

Chapter 9

Muddying the Waters of the Landing Obligation: How Multi-level Governance Structures Can Obscure Policy Implementation



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Abstract The 2013 reform of the European Common Fisheries Policy (CFP) included an increased drive for regionalisation of the policy implementation and the introduction of the Landing Obligation (LO). The process of implementing the LO takes place at multiple levels of governance within the EU. We use the case of the implementation of the LO in the Netherlands, where policymakers and the fishing industry cooperate towards a workable policy implementation. In this paper, we argue that the EU's complex and unconsolidated implementation structure hampers a fair and clear implementation process. Three main causes can be distinguished: first, a lack of a shared understanding of the goal of the Landing Obligation within and between the different governance levels that are involved in the implementation process. Second, no meaningful discussions are taking place between concurrent resource users, resource managers and supporters of the LO regarding the need and usefulness of the measure, as there is no arena in the governance system for them to meet. With the introduction of the Regional Advisory Councils in the 2002 CFP reform, a platform for discussion between fishers and NGOs was created, but this platform has only an advisory role and does not include the Member States. Third, the relationship between different decision-making bodies is unclear, as is the manner in which stakeholder input will be included in decision-making about

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implementing the LO. The result of this implementation process has been a diluted policy where the goal, its execution and its effectiveness remain unclear.

Keywords Common Fisheries Policy · Landing obligation · Multi-level governance · Regionalisation · Subsidiarity

9.1 Introduction

Since its inception in the 1980s, the EU Common Fisheries Policy (CFP) has been reformed more or less every 10 years (1992, 2002, 2013). The latest reform of the CFP came into force in 2014 (European Commission 2013). A Green Paper presented the analysis on which the reform was based (European Commission 2009). That paper described five main structural failures of the CFP: a deep-rooted problem of fleet overcapacity, imprecise policy objectives resulting in insufficient guidance for decisions and implementation, a decision-making system that encourages a short-term focus, a framework that does not give sufficient responsibility to the industry and a lack of political will to ensure compliance and thus poor compliance by the industry. Among the proposals to reform the CFP mentioned at the time (European Commission 2011a) were the introduction of a discard ban; the application of maximum sustainable yield as a leading principle for the management of fish stocks; regionalisation, addressing social issues such as labour conditions, employment and wages; and the introduction of transferable fishing concessions (European Commission 2011b).

Starting from these justifications for reform, the last reform of the CFP introduced two major changes: the introduction of the Landing Obligation and the regionalisation of CFP implementation. Article 15 includes the obligation for European fisheries to land all discards of commercial species for which catch restrictions apply. The term ‘discards’ refers to catches that are discarded either because they consist of unwanted catch, or catch that cannot be landed due to rules of catch composition and minimum landing size, lack of quota or catches that have (relatively) low or no economic value (Mytilineou et al. 2018; Zeller et al. 2018). Article 18 of the CFP describes the regional cooperation on conservation measures (European Commission 2013). Throughout the Regulation, the process of regionalisation is mentioned as an important instrument in CFP implementation.

In this chapter we will examine how a new policy instrument (i.e. the Landing Obligation, LO) and a new governance setting (regionalisation) are working in practice, using the case of Dutch fisheries. The LO is introduced in a complex process that takes place at multiple levels in the EU governance system: (1) the general policy has been described in the reformed CFP in Article 15; (2) the details have to be filled in at the regional level in multi-annual plans or discard plans by groups of Member States (such as the ‘Scheveningen group’ for the North Sea); (3) for each Member State, the implementation process is discussed with

stakeholders (De Vos et al. 2016), and research projects are performed by national research institutes to provide the necessary information (van Hoof and Kraus 2017). These national processes then feed into the regional process, and (4) the regional discard plans consequently have to be presented to the European Commission and the Council of Fisheries Ministers for approval (Borges and Penas-Lado, [this volume](#); Rihan et al., [this volume](#)). The regional groups are advised by the Advisory Councils, representing stakeholders, and attended by members of the fishing industry and NGO representatives.

To analyse this process, we use the case of the introduction of the LO in Dutch fisheries. We use the perspective of multi-level governance to analyse institutional changes and the outcomes of the process. The inputs for this study were obtained from literature analyses, interviews with relevant policymakers, industry representatives, fishers and NGO representatives, by observing and analysing meetings between the fishing sector and the government and by attending meetings of the Dutch Landing Obligation steering group.

In Sect. 9.2, within the context of European fisheries management and its governance setting, the principle of subsidiarity and multi-level governance will be introduced. In Sect. 9.3, a short history of the evolution of the Landing Obligation is presented, in relation to both society's call to reduce fish discards and the policy process leading to the inclusion of the LO into the CFP. In Sect. 9.4, we investigate how the LO is being operationalised in Dutch fisheries within the context of regional North Sea cooperation. In Sect. 9.5, we reflect on the implementation of the LO and aspects of multi-level governance, and Sect. 9.6 presents the conclusions.

9.2 Fisheries Management, Subsidiarity and Multi-level Governance

Fisheries management in the EU is one of only five areas in which the Commission has sole competence (Hawkins 2005; van Hoof 2010b). This implies that policy proposals are developed by the European Commission, and the sole responsibility of the Council of Fisheries Ministers (hereby referred to as 'Fisheries Council') is to approve or reject the proposal. Since the Lisbon Treaty in 2007, this responsibility has been shared between the Fisheries Council and the European Parliament (Symes 2012).

This setting stems from the principle of subsidiarity: according to Spicker (1991), 'subsidiarity' is based on a view of society in which responsibilities are conditioned by the closeness of people's relationships. Intervention at higher levels of society shall be seen as subsidiary to the obligations of smaller social units. Applied more narrowly in the context of the EU, subsidiarity refers to a functional division of administrative responsibilities, although sometimes the principle is referred back to its wider usage where it implies an emphasis on decentralisation and diversity

(Spicker 1991). Kickert (2003) defines subsidiarity as the principle under which the state shall interfere only if the autonomous lower parts seriously fail to fulfil their tasks. In EU fisheries management, subsidiarity is defined in the European Treaty as fisheries management being the sole competence of the EU (CFP) (Raakjear et al. 2010; van Hoof 2010a). Hence, for the CFP, the principle of subsidiarity implies that the EU formulates the general principles of the CFP and is responsible for its general outline, while the Member States are responsible for the implementation of the general policies (Frost and Andersen 2006). Consequently under the CFP the Commission can only command the management level but does not control implementation (Sissenwine and Symes 2007).

With the 2013 reform of the CFP (EU 2013) and the introduction of Article 18, the institutional setting has changed slightly by introducing the regional level into the CFP implementation. Article 18 includes the provision that for some of the conservation objectives (such as the LO), Member States affected by these measures may present recommendations to the European Commission on how to achieve the objectives. In the development of their proposal, the Member States are required to consult the relevant Advisory Council. However, little authority is formally transferred to the regional level and the stakeholders, as the Commission is not accountable for how it handles the inputs from the regional Member States, which themselves are not accountable for how they handle the inputs from the Advisory Councils (Eliassen et al. 2015:227).

The rather complex institutional setting of European Fisheries management consists of the Council of Ministers, the European Commission (EC) and the European Parliament (EP) at the supranational EU level and the Member States at the national level. Therefore fisheries management is shaped to a large extent during a continuous process of draft legislation being prepared by the European Commission, legislative acts being jointly decided by the Council of the European Union and the European Parliament acting together through the co-decision procedure and adopted legislative acts being implemented by the EU Member States (Hegland et al. 2012). One problem with the regionalisation of the CFP, however, is that the European Treaties (which govern the policy-making conduct of EU) do not recognise regions as part of the executive process (Symes 2012).

European fisheries policies are prepared in a way that resembles neither traditional international politics nor policy-making by nation-states. The process takes place in a complex nested setting in which Member States, the European Council of Ministers, the European Commission and the European Parliament play a distinct role. With the concept of multi-level governance, it is possible to capture the shifting locus of governance from the traditional state level to subnational and supranational levels. More specifically, multi-level governance points to sharing policy-making competencies in a complex system of negotiation. The many actors involved in the discussion are located at several levels of nested governmental institutions (supranational, regional, national and local) as well as private actors (i.e. NGOs, producers, consumers, citizens, scientists) (van Tatenhove 2003). Using the perspective of multi-level governance for the analysis of a complex system shows how the EU is

clearly still a treaty-based polity and its Member States keep the ultimate authority to approve all decisions (Smith 2004). Nevertheless, responsibility for implementing the CFP still belongs to the Member States.

Within the realm of the LO, we can distinguish three layers of policy-making, policy operationalisation and implementation, i.e. the European level, the Member State level and, in between, the newly created regional level of Member States who discuss regional implementation of the LO. Using the case of Dutch fisheries, we will look at how the LO came about and how it is being implemented across this institutional setting, both from the perspective of the societal call to address discarding of fish and the policy process of incorporating the LO into the CFP.

9.3 A Short History of the EU Landing Obligation

In 2007, the EC published a document about the policy to reduce unwanted bycatches and eliminate discards in European fisheries (European Commission 2007). It suggested a gradual elimination of discards by changing fishers' behaviour and technologies, followed by a discard ban, thus placing the discard problem on the European fisheries managers' agenda (Borges 2015).

In 2008, a British vessel was captured on camera discarding tonnes of fish. This sparked widespread societal awareness of the discard problem. Discarding was perceived by people as morally reprehensible, leading to a waste of marine resources and contributing to fish mortality (Self 2015). This societal call to action, coupled with the slow rate of implementation of discard reduction, substantially increased political pressure on the EU to reconsider the discard policy and to promptly address the discard problem (Borges 2015). Following this development, the EC started reviewing the CFP by publishing the Green Paper proposal on the CFP reform (Commission of the Europe an Communities 2009) and launching a public consultation to discuss the proposed reforms (European Commission 2016). The proposal stated that 'the future CFP should ensure that discarding no longer takes place' (Johnsen and Eliassen 2011).

The debate on banning discards took great momentum when British chef Hugh Fearnley-Whittingstall launched his 'Hugh's Fish Fight' public campaign against fisheries discards (Fish Fight 2014; Borges 2015). The campaign gained a large support across Europe from celebrities, major retailers and the public in general; it also received substantial funding and support of a number of environmental NGOs (Fish Fight 2014). Just before the start of the 'Hugh's Fish Fight' campaign, the new EC had been installed, and the new Commissioner for Maritime Affairs and Fisheries, in the process of reforming the CFP, adopted the idea of an LO (Schwägerl 2013). Involved in the fisheries decision-making process for the first time (European Commission 2016), the European Parliament responded to the expectations of the European public by 'holding the line and fighting hard in the negotiations... for a radical overhaul of EU fisheries policies' (Schwägerl 2013:1–2).

As a result, the previously dismissed ‘discard ban’ was included in the 2013 reform of the CFP as the ‘Landing Obligation’. The introduction to the CFP 2013 explains some of the aims of this LO. Consideration 26 states: ‘[...] Unwanted catches and discards constitute a substantial waste and negatively affect the sustainable exploitation of marine biological resources and marine ecosystems and the financial viability of fisheries. [...]’ (European Commission 2013:24–25). This we perceive as a ‘best use perspective’, as the simplest explanation of the obligation to land in this perspective: one must land unwanted bycatches, therefore making ‘best use’ of these catches. In addition to the best use perspective, consideration 29 states: ‘[...] In the management of the landing obligation, it is necessary that Member States do their utmost to reduce unwanted catches. To this end, improvements of selective fishing techniques to avoid and reduce, as far as possible, unwanted catches must have high priority. [...]’ (European Commission 2013). This we perceive as a ‘selectivity perspective’. In this perspective, landing discards is a tool to create an incentive for fishers to improve their species and size selectivity, as landing unwanted bycatch would be a burden for them.

It must be noted that the intended effect of the Landing Obligation differs between the two perspectives. In the ‘best use’ perspective, catches are perceived to be landed and to be used; in the latter, the ‘selectivity perspective’, the burden of landing fish is used to stimulate selectivity, through which a decrease in the amount of discarded fish is established. The relation between these two intended effects and/or the hierarchy of these intents is not clear, as consideration 29 gives the selectivity perspective ‘high priority’: improvements of selective fishing techniques to avoid and reduce, as far as possible, unwanted catches must have high priority (European Commission 2013). As for the ‘best use’ consideration, the CFP states that the discards landed are not allowed to be used for direct human consumption. Article 15 Section 11 states that for the species subject to the Landing Obligation as specified in paragraph 1, the use of catches of species below the minimum conservation reference size (MCRS) shall be restricted to purposes other than direct human consumption, including fish meal, fish oil, pet food, food additives, pharmaceuticals and cosmetics. Although the intention of Article 15 Section 11 is clear, as the regulation limits the use of discards to prevent the development of a market for undersized or over-quota fish because this could lead to an incentive to catch undersized or over-quota fish, it does prevent a large proportion of discards from being used for human consumption.

Besides the fundamental difference in perception of the core objective of the LO (best use versus selectivity), some of the discards are a direct result of previous CFP legislation. Measures such as total allowable catch (TAC) or minimum landing sizes forbid landing and hence selling over-quota catches (Copes 1986; Poos et al. 2010) and small fish (Harley et al. 2000; Rochet and Trenkel 2005). The natural result is discarding of these catches (Mytilineou et al. 2018; Zeller et al. 2018). Hence, the LO conflicts with certain provisions within current legislation, which lead fishers to discard fish that they are not allowed to keep on board (Sardà et al. 2015). To remove the legal and practical impediments to the LO and ensure a legally sound and

consistent basis for the introduction of the LO, the EC proposed in 2014 to adjust eight EU fisheries laws/regulations that were not yet adapted to the Landing Obligation (Popescu 2015; Borges and Penas-Lado, [this volume](#)).

Exemplary of this is the debate on the so-called ‘Omnibus regulation’ proposal, initiated at the beginning of 2014. This debate resulted in Regulation (EU) 2015/812 of the European Parliament and of the Council of May 20, 2015 that amended several Council and Parliament regulations¹ which became in fact a technical road map for the implementation of the LO. That document reflected a period of additional discussions, meetings and hearings at the EU level on the core objectives and paths of implementation, separating the involved institutions into different ‘camps’. Some members of the European Parliament, together with the European Commission, signalled a desire to put this legal adjustment in place as soon as possible without undermining the main provisions of the initial CFP. Some other members of the European Parliament, together with the Council, put forward a number of changes in the proposal (Naver 2014).

The ‘Omnibus regulation’ is one area where the discourse of the LO reflects differences in opinions on the ‘how’ and ‘when’ of the Landing Obligation. Article 15 of the CFP does include provisions allowing some flexibility under the LO. Paragraph 4 of the reformed CFP (Art. 15 §4; (European Commission 2013) specifies exemptions for prohibited species, species having high survival rates after being discarded, and the so-called *de minimis* exemption (further elaborated in §5 (c)). The latter implies that 5% of the catch can be discarded, considering that it is very difficult to improve the selectivity of a gear or when using selective fishing gear, handling of unwanted catches on board leads to ‘disproportionate costs’. Interspecies flexibility is allowed to a maximum of 9% (§8) and year-to-year flexibility is allowed up to 10% (§9). However, flexibilities provided in Article 15 are associated with great uncertainty, particularly about how the provisions will be implemented in practice: the wording leaves room for subjective interpretation, e.g. ‘scientific evidence demonstrating high survival rates’ (Batsleer 2016).

Paragraph 5 (Art. 15 §5) notes that details of the implementation of the Landing Obligation must be specified in multi-annual plans (§8–9), in the context of the Landing Obligation (also called ‘discard plans’). These details include the high survival² exemptions and the *de minimis* exemptions. Between October 2014 and beginning of 2018, the Commission adopted 15 of these documents in preparation of the Landing Obligation. Exemptions must be specified according to the type of

¹Council Regulations (EC) No 850/98, (EC) No 2187/2005, (EC) No 1967/2006, (EC) No 1098/2007, (EC) No 254/2002, (EC) No 2347/2002 and (EC) No 1224/2009, and Regulations (EU) No 1379/2013 and (EU) No 1380/2013 of the European Parliament and of the Council, as regards the landing obligation, and repealing Council Regulation (EC) No 1434/98 (European Commission 2015).

²Fishers should be allowed to continue discarding species which, according to the best available scientific advice, have a high survival rate when released into the sea (European Commission, considerations (27):25; Chaps. 2, 3 and 4).

fishing (small pelagic, large pelagic or demersal), the species of fish, the specific type of fishing gear and the fishing ground and may apply only for a limited amount of time. This results in highly detailed plans.

9.4 The Implementation of the Landing Obligation in Dutch Fisheries

Based on the Landing Obligation proposed by the European Council and agreed in the Council of June 2012, the Dutch ministry started preparing for the Landing Obligation in autumn 2012. A large part of the Dutch fleet fishes in a mixed demersal fishery that involves substantial amounts of discards (Catchpole et al. 2008). Reduction of discards was therefore seen as a major challenge. The topics that the government wished to address were thus the economic impact of the Landing Obligation for the fishing sector and its implications for control and surveillance, and for the scientific monitoring of catches.

The Dutch government launched a LO working group (*werkgroep Aanlandplicht*). Scientists, NGOs and industry representatives were invited to attend monthly meetings, together with civil servants from the Ministry and the control agency. The Ministry deemed it necessary to cooperate with the industry and aimed to garner industry support for necessary measures. In reality the opposite occurred; the LO triggered an immense negative response in the Dutch fishing fleet and resulted in the industry representatives refusing the offer to participate in the working group (Pastoors et al. 2014).

Internationally, other fishing sectors (EAPO, Européche and Cogeca) opposed the plans and developed their ‘alternative proposal’ with a focus on stock sustainability.³ Over the course of 2013, resistance grew in the Netherlands with one of the two fisheries organisations in the Netherlands, the *Vissersbond*, launching a campaign entitled ‘Landing Obligation NO’ with a manifesto.⁴ The actual content of the Landing Obligation document was as yet unknown because the European Parliament was still preparing its opinion regarding the Commission’s CFP proposal. This hindered the Dutch government’s communication regarding the expected impact. The fisheries representatives and the government did meet to discuss the draft policy, however. In the summer of 2013, it was decided that brainstorming sessions would be organised with the fishers, scientists and policy officers to discuss possible ideas for research towards improved selectivity. However, during the first brainstorming session (in Urk on August 31, 2013), the fishers expressed marked pessimism (Kraan and Verweij *in press*) because they saw no

³<http://nsrac.org/wp-content/uploads/2013/01/Paper-5.1-EAPO-Alternative-proposal-discards-approach-by-EU-Industry.pdf>

⁴<https://www.goeree-overflakkee.nl/document.php?m=46&fileid=14793&f=84374857b90e60c39d03f7a7aef57228&attachment=0&c=22055>

ecological and economic benefits resulting from the LO and they feared economic loss. This precluded a constructive or productive discussion about the LO.

From an ecological perspective, the fishers argued that a large part of the discarded catch could survive the discarding process. As such, they expected that by having to land the entire catch under the LO, mortality of the stocks would only increase, reducing potential future yield. In addition, they feared cascading effects in the ecosystem to arise as many other (scavenging) species, i.e. birds and benthic fauna, feed off discards.

From an economic point of view, undersized fish are not allowed to be sold for human consumption. In this context, fishers will obtain a low price for such fish, lower than the cost of the additional workload of having to handle, sort and store the unwanted catches on board. In addition, capacity problems in the fish hold as well as choke species⁵ may cause an early cessation of fishing activities resulting in a loss of potential catches and yield. Both the ecological and economic impacts were still poorly understood when the Landing Obligation came into force. This lack of understanding was met with suspicion and fear for the future by the industry. In turn, this uncertainty led to an attitude towards the LO that was likely to undermine compliance (Batsleer 2016).

Besides the Dutch fishers’ fear of how the LO would affect the ecosystem, they also feared the market-driven consequences of landing undersized fish (Trapman and Kraan 2015:28). In the 1980s and 1990s, there had been a major black market for undersized sole, and the fishing sector had fought hard to ban this practice. Many fishers feared that the LO would bring this practice back. To prevent a black market from developing, the government had summoned to destroy undersized fish immediately at the auction by pouring red dye over the fish.

As a result of the fishers’ resistance to brainstorming about how to cope with a potential LO, future sessions were cancelled and replaced with sessions where the Minister explained to the fishers the LO and listened to their concerns. These meetings, one held in Scheveningen and one in Urk, have been characterised by Pastoors et al. (2014) as ‘parallel monologues’ with three ‘talking lines’ (Table 9.1).

Table 9.1 Parallel lines of reasoning between fishers and the Dutch government

	Fishers	Minister
1	The Landing Obligation is impossible to implement	The Landing Obligation is a fact
2	We want a principled discussion about the goals and measures of the LO	We will not have a principled discussion about the goals and measures of the LO
3	Emphasising impossibilities, concerns and dilemmas	Seeking room to manoeuvre in the implementation of the Landing Obligation

Source: Pastoors et al. (2014)

⁵Choke species are species for which quota are so restrictive that quota will be fully exploited at an early stage in the year, resulting, in a mixed fisheries, that the fishery has to be completely stopped, although for other species there may well still be sufficient quota.

The two perspectives inherent in the Landing Obligation (best use and selectivity) have caused confusion during implementation of LO in the Netherlands. From the discussions it became clear that fishers and policy officers had fundamentally opposing perceptions of what the ecological consequences of the Landing Obligation would be (see Kraan and Verweij [in press](#)). This disconnect did not become obvious as the Minister refused to have a principled discussion. The ‘best use’ perspective conflicts strongly with the perception of the fishers; they think that the Landing Obligation will conversely result in massive ‘waste’, as the discards (hardly reduced) cannot be used and will have to be destroyed on land (Kraan and Verweij [in press](#)). This undermines their willingness to cooperate and think constructively about how to implement the measure.

The third talking line, however, provided a bridge between fishers and government. The government created a research agenda based on all of the (perceived) impossibilities, concerns and dilemmas the fishers mentioned and provided funding in 2013 to implement research based on proposals from the fishing sector. The Minister emphasised from the start that she would seek ‘room to manoeuvre’ for the fleet. During 2014 and 2015, meetings were organised between the Ministry, fishers and researchers to discuss research directions and findings. Research was directed at developing what was labelled as ‘best practices’ by gaining a better understanding of amounts of discards of different fisheries, possible gear innovations, the survival of discarded fish (and ways to improve survival), camera monitoring on board and processing and valorisation of discards.

It became clear from interviews with fishers that they thought it was impossible to prepare for the LO because of the long preparation trajectory, while the final details about the measure itself still remained uncertain. When asked in 2014/2015 about possibilities to fish more selectively by the choices they make on where and when to fish, fishers expressed uncertainty and indicated that they could not envision how the (draft) rules would influence their behaviour (Trapman and Kraan 2015). Again, their fundamental resistance to the LO was linked to their (lack of) willingness and ability to think constructively about how to live with it.

In light of deeply entrenched resistance of most Dutch fishers to the Landing Obligation, the Dutch therefore prepared for it by cooperating between fisheries representatives, policy officers and scientists to search for the best way to implement the new rules. The participants involved in the process built up interactional expertise (Stange 2017) as they were frequently and directly in contact with each other. Fisheries representatives combined their knowledge of the fleet and fishing practices with the knowledge of the political arena and science and thereby thought constructively about what was technically feasible, scientifically researchable and politically achievable. A small group of fishers did participate in the cooperative research projects⁶ and thus also got some of these insights as well; however, most of the individual fishers were left out of these developments and their resistance to the LO remained high.

⁶See <http://cvo-visserij.nl/projecten-2/best-practices/> for some of these projects.

This development illustrated the need to improve communication with and within the fishing community, since all discussions and negotiations at the national level had to be explained and brought to acceptance in the fleet by the fisheries representatives. The attempts to improve communication were not fully successful, resulting in the 2016 establishment of a fisher protest movement called ‘EMK’ (*Eendracht Maakt Kracht*; Unity Creates Strength). EMK opposed the LO as well as other measures impacting the fishers, such as the development of windmill parks in the North Sea and the establishment of marine protected areas. EMK has organised annual demonstrations since 2016: in Rotterdam (August 2016; an armada of 50 vessels sailed on the Maas to the city centre, in conjunction with ‘World Harbour Day’), in Brussels (May 2017; EMK delivered a petition to the European Parliament) and in Amsterdam (June 2018; an armada of 15 vessels and other fishers who came by bus to deliver a petition to a member of the European Parliament).⁷ The EMK fishers aim for repeal of the LO. The fishing industry as a whole (consisting of different organisations and groups using different avenues) has also tried to bring its opinion on the LO to different arenas at different levels. The demonstrations of the EMK group were aimed at the Dutch general public and Dutch EP members; but the Dutch parliament was also mobilised from time to time, resulting in a motion to the Minister in December 2015 to go to Brussels to ask for a delay in the implementation of the Landing Obligation.

Parallel to this development, the Ministry had to (re-)negotiate at the regional level with the other North Sea Member States in the ‘Scheveningen’ group. In that process, Member States present their ideas for policy measures in the discard plans at the Scheveningen group meeting, the Scheveningen group drafts a joint recommendation for the annual discard plans. These are then sent to the STECF⁷ for evaluation, who then advises the EC (see Rihan et al., [this volume](#)). The EC then sends it as a Delegated Act to the European Parliament, which then also has to agree before the plans can be finally accepted. This is a lengthy process, in which (highly) technical matters and politics get mixed (see also Stockhausen, [this volume](#)). In this process, the Ministry balances the expectations regarding the other Member States and ‘room to manoeuvre’ of the fishing fleet in consultation with the fisheries representatives (fisheries representative June 6, 2018). This results in some policy proposals from the Dutch fleet representatives being filtered out at national level and no longer discussed at the regional level.

9.5 The Muddy Waters of Multi-level Governance

Starting from the very beginning of the CFP reform process, considerable disparity in the views articulated by different European institutions and EU Member States was observed regarding the LO and its implications (Self 2015). The position taken

⁷The Scientific, Technical and Economic Committee on Fisheries of the European Commission, the highest Scientific Advisory body for fisheries of the EU

by the European Parliament, representing the interests of European citizens, was very much influenced by public discontent with the fishing practices of discarding with discards seen as unacceptable behaviour (Frangoudes et al. 2015). The ‘Hugh’s Fish Fight’ campaign played an important role in portraying the image of waste, and the image of mature cod being discarded in British small-scale fisheries was instrumental. The European Parliament adopted the LO with the aim of changing current fishing practices. However, they had failed to consider all of the factors driving discarding (Borges 2015). The driving factors behind the discarding of North Sea cod (i.e. lack of quota) are completely different than those behind the discarding of undersized plaice (i.e. CFP regulation; minimum landing size) in a fishery such as the Dutch mixed fisheries.

In contrast, the Council of Ministers has been much more reluctant to embrace changes in the CFP (Schwägerl 2013). Among the national governments, there are differing interpretations of the LO (Viðarsson et al. 2015; Borges et al. 2016) which results in a situation in which ‘[a]t the level of the Member States, the rules of the game seemed not yet to be fixed, and open for change’ (de Vos et al. 2016).

The general public, fuelled by ‘Hugh’s Fish Fight’ and its commercial and NGO supporters, regards discarding as a waste of living resources (Heath et al. 2014; Borges 2015). During the public consultation process preceding the introduction of the LO, environmental NGOs strongly supported the principles of a discard ban. To them, discarding is a wasteful practice that damages marine life and is consequently an unsustainable practice (Villasante et al. 2016a, b).

The LO has been met with strong resistance by the European fishing industry. The fishers’ response to the new CFP reform and the LO was initially influenced by their exclusion from the decision-making process that preceded introduction of the Regulation (De Vos et al. 2016). The fishers therefore perceive the introduction of the LO as a top-down process (SOCIOEC 2013; Frangoudes et al. 2015; De Vos et al. 2016; Fitzpatrick et al., *this volume*). Moreover, they do not generally comprehend the LO’s relevance, its biological meaningfulness nor its overall objective (Hedley et al. 2015). They also emphasise that there are different reasons for discarding, including some that result from the very rules of the same CFP (Kraan et al. 2015; Borges and Penas-Lado, *this volume*). This has resulted in a lack of legitimacy and acceptance not only among Dutch fishers but among most European fishers, weakening their willingness to comply with the LO requirements.

The reform of the CFP met with three major shifts in the governance set-up: co-decision, regionalisation and the LO. The co-decision procedure for the first time provided a strong voice to the European Parliament in policy development.

Parallel to the implementation of the Marine Strategy Framework Directive, using a regional seas approach in which in drawing up marine strategies for the waters within each marine region, Member States are required to cooperate closely (van Hoof and van Tatenhove 2009; van Hoof et al. 2012; Van Leeuwen et al. 2012). And, due to the 2013 reform, the CFP now has a regional component. This regional approach creates a new layer in the institutional setting of fisheries policy between the European institutions and Member States.

Finally, the LO is a Policy, yet it carries many characteristics of a Directive. In the CFP, the wider goal of the LO is formulated, but the operationalisation of the policy into concrete measures is developed over time. This will allow for adaptation of the LO to local and regional circumstances and practices.

In principle these three developments added to a multi-level governance structure, contributing to improved subsidiarity; in theory it emphasises decentralisation and diversity resulting in policy implementation that is as close to fishing practices as possible (Spicker 1991). However, in practice, bottom-up proposals from stakeholders to improve policy do not make it up the chain of multi-level governance due to political considerations (i.e. assessing that the proposals will probably not get support from the other Member States). Also, as a consequence of this new institutional setting, it becomes clear that there is no one single overarching discourse steering the operationalisation of the LO. At different levels and across institutions, the main driver and hence the main objective of the LO ('best use' perspective or 'selectivity' perspective) are interpreted differently.

From the 'best use' perspective, the perspective adhered to by the general public and the main driver of the anti-discards campaign, human consumption of bycatch fish is stimulated. From this perspective, it is hard to understand why the unwanted bycatches, and hence former discards, cannot be made available for consumption. Parallel to this perspective is the fishers' opinion that when unwanted bycatches are discarded, they still fulfil a role in the marine ecosystem, yet once landed, they are subtracted from the ecosystem. If, after landing, the catches are then destroyed, this seems to contrast with a 'best use' perspective.

From the 'selectivity' perspective, fishers find it hard to see ways of increasing selectivity. As a result, we see today that across Europe exemptions are increasingly sought under the *de minimis* regulation, 'high survival' exemption (Rihan et al., [this volume](#)) and the Omnibus regulation, to find ways to exclude certain fish species from the LO. A new discourse seems to present itself in which, at national levels, efforts are being made to prove that species have a high survival rate after being caught and discarded.

Hence, instead of developing a clear understanding of the aim of the LO, its operationalisation and implementation at the most relevant level of the multi-governance structure of fisheries policy in the EU, it appears that the current governance setting of the CFP is obscuring the discussion, with different interpretations of the aims at different levels of governance and different perceptions of the principles behind the LO and of the consequences when implemented.

9.6 Conclusions

The introduction of the LO and regionalisation of the CFP have reshaped the multi-level setting of fisheries policy-making in Europe. However, when looking at implementation and operationalisation of the LO, one can wonder whether these

changes actually have resulted in a more open, transparent and participatory manner of policy-making. Has it shifted from the subsidiary level to the lowest possible institutional level?

The debate on the objective of the LO between the ‘best use’ and ‘selectivity’ perspectives, resulting in different interpretations at different levels, obscures the debate. It highlights the lack of a shared goal of the LO within and between the different governance levels that are involved in the implementation process.

As we have seen in the case of the Netherlands, this partly stems from the lack of discussion between opposing resource users and supporters of the Landing Obligation about the need and usefulness of the measure because there is no arena in the governance system where they meet. In addition, in the new institutional setting, two things are unclear: the relation between different decision-making bodies and the way in which stakeholders’ input will be incorporated in decision-making regarding the implementation of the Landing Obligation. The multi-level setting of fisheries policy in Europe has made the debate more opaque instead of more transparent and open. The result of this implementation process has been a diluted policy whose goal, execution and effectiveness are all equally muddy.

The multi-level governance setting could have been instrumental using the subsidiarity principle of having discussions and decisions made at the most relevant policy and institutional level. The regional level is added to the Member States and the European institutions of the Council, Parliament and Commission. The effectiveness of the setting would have benefitted greatly from clearly defined roles for industry and other stakeholders at each level of governance. Participation requires a clear platform; and clearly defining and communicating policy goals are essential to the process.

Besides this lack of a principled discussion about the motivation and objective of the LO, implementation also appears to be muddled. Testing for high survival rates of discarded fish is in fact not so much implementing the LO but trying to escape from the LO. This can be traced to the inconsistency in interpretation of the objectives of the LO, a lack of thorough debate linking objectives with fishing practice (i.e. what is more wasteful – discarding fish back into the ecosystem with an unclear fate or landing them and thus clearly choosing for fish mortality?) and from the lack of reflection in an earlier stage on the driving forces behind the discards.

Surely, the fishing industry does see benefits of reducing unwanted catches, but does not see any justification for having to land all catches of quota-managed species. Indeed the ‘force’ of the LO has resulted in improved selectivity in sub-sections of the fishing industry, which otherwise might not had been accomplished. However, the final goal of a total ban on discards is far from being attained. Perhaps the major change that is needed to reduce discards requires a transition to a whole new system of fisheries, including different fishing practices, different fish consumption patterns and different fisheries management. Implementing rigorous mitigation measures, such as the LO, should be supported by a common understanding of the context in which the problem occurs and how best to address it. If not, it may lead to unexpected and unwanted consequences and undermine acceptance and compliance. At times, it is clear that a complex multi-level governance structure may only muddy the waters instead of resolving the debate.

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