

Shared enforcement of the common fisheries policy and accountability gaps. Fishing in troubled waters?

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7. Fishing in troubled waters? Shared enforcement of the Common Fisheries Policy and accountability gaps

Federica Cacciatore and Mariolina Eliantonio

1. INTRODUCTION

Given their range and the number of persons they involve, marine fisheries have always been one of the main concerns for the European Union (EU). Twenty-three out of its 28 Member States (MS) have a coastline, and almost half of its population lives in maritime regions.¹ Moreover, the world's largest merchant fleet is that of the EU.² The manifold risks of unsustainable fish stock exploitation and environmental damage have called for political action,³ and the very nature of such policy, whose main activities and interventions happen beyond national borders, directly concerns the EU, which has applied a sea-basin strategy, in which actions are taken on a geographical neighbourhood basis.

During the 1970s, more and more specific rules about fisheries have been adopted by the EU. A first step towards the creation of a Common Fisheries Policy (CFP) was taken in 1983, with the approval of the first fish management scheme. Since then, the CFP has been further developed and amended. Drawing from the EEC Treaty provision about EU competence on agriculture, under the Common Agricultural Policy 'agricultural products' were understood to include all those involving 'the products of the soil, of stock farming and of fisheries and products of first-stage pro-

¹ European Commission, 'Maritime Affairs: Facts and Figures' <http://ec.europa.eu/maritimeaffairs/documentation/facts_and_figures/index_en.htm> accessed 29 July 2016.

² European Commission, *Maritime Affairs and Fisheries* (Publications Office of the European Union 2014).

³ See, among others: A Berg, *Implementing and Enforcing European Fisheries Law* (Brill Nijhoff 1999).

cessing directly related to these products'.⁴ Nonetheless, growing criticisms about CFP's low rate of effectiveness arose,⁵ especially with regard to the role of MS in implementing and enforcing EU rules.⁶ The CFP has long been accused of 'being unable to provide sustainable fisheries or actually in itself being an obstacle to it'.⁷ For this reason, the idea of CFP reform started to gain ground in the late 1990s, and in 2001 a *Green Paper on the future of the Common Fisheries Policy*⁸ was published, setting out the Commission's proposals for reform of the CFP.

The Green Paper proposed the introduction of a decentralized enforcement system, from one mostly managed at EU level (by the Commission, the Council and the European Parliament) to one according more powers to the MS,⁹ by envisaging that power should be delegated to the lowest competent level of governance. Regulation 2371/2002¹⁰ subsequently reformed the CFP, by introducing stronger and better-defined control and enforcement powers on the part of the MS.¹¹

⁴ Treaty of Rome 1957, art 38(1).

⁵ C Johnson, 'Fisheries Enforcement in European Community Waters Since 2002 – Developments in Non-Flag Enforcement' (2008) 28 *ESTU* 249; D Symes, 'Reform of the European Union's Common Fisheries Policy: Making Fisheries Management Work' (2009) 100 *Fisheries Research* 100.

⁶ T Gray and J Hatchard, 'The 2002 Reform of the Common Fisheries Policy's System of Governance – Rhetoric or Reality?' (2003) 27 *Marine Policy* 545; J DaRocha, S Cerviño and S Villasante, 'The Common Fisheries Policy: An Enforcement Problem' (2012) 36 *Marine Policy* 1309.

⁷ T Hegland and J Raakjær, 'Recovery Plans and the Balancing of Fishing Capacity and Fishing Possibilities: Path Dependence in the Common Fisheries Policy' in S Gezelius and J Raakjær (eds), *Making Fisheries Management Work: Implementation of Policies for Sustainable Fishing* (Springer 2008) 131.

⁸ European Commission, 'Green Paper on the future of the common fisheries policy', COM (2001) 135 final.

⁹ S Eliassen, T Hegland and J Raakjær, 'Decentralising: The Implementation of Regionalization and Co-Management under the Post-2013 Common Fisheries Policy' (2015) 62 *Marine Policy* 224.

¹⁰ Council Regulation (EC) 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (2002) OJ L358/59.

¹¹ Pursuant to the policy reform which occurred in 2009, now Commission officials have the powers to:

carry out verifications and inspections on fishing vessels as well as on the premises of businesses and other bodies with activities relating to the common fisheries policy and shall have access to all information and documents needed to exercise their responsibilities, to the same extent and under the same conditions as officials of the Member State in which the verification and inspection take place (art 97(1) of Regulation 1224/2009).

The establishment of a dedicated EU body, the Community Fisheries Control Agency (CFCA), in 2005, was presented as the missing piece in the 2002 CFP reforms, since there was a need for a ‘technical and administrative Community body’ to organize the coordination and cooperation which MS needed in order to make CFP enforcement effective from their side.¹² According to Regulation 768/2005,¹³ the Agency’s main mission is indeed to ‘coordinate control and inspection by Member States relating to the control and inspection obligations of the Community’.¹⁴ Furthermore, CFCA is also to assist MS in their reporting and sanctioning activities and, more generally, ‘to assist Member States to fulfil their tasks and obligations under the rules of the common fisheries policy’.¹⁵

The CFCA began operations in 2007, when its first work programme was adopted. Its powers were further strengthened in 2009, with Regulation 1224/2009¹⁶ amending that of 2005, and in particular introducing Article 17a. Specifically, as will be explained in more depth below, this provision granted CFCA – later renamed EFCA (European Fisheries Control Agency) – autonomous inspection powers in certain very specific circumstances, thereby setting up a cooperative enforcement mechanism with national authorities, which remain competent to sanction those infringements identified by EFCA.

Another major revision to the CFP was made between 2012 and 2013, by means of an agreement between the Council and the EP, with the aim of making inspection and sanctioning mechanisms more effective and more balanced between the MS.¹⁷ Among the most important reform steps is the introduction of a governance shift towards regions.¹⁸ Efforts were once again intended to amend and improve the low performance of the

Nonetheless, their role falls outside the shared enforcement mechanisms which are of interest for this book.

¹² Council Regulation (EC) 768/2005 establishing a Community Fisheries Control Agency and amending Regulation (EEC) 2847/93 establishing a control system applicable to the common fisheries policy (2005) OJ L128/1, Recital 6.

¹³ Reg 768/2005, art 23(2)(b).

¹⁴ *Ibid.*, art 3(a).

¹⁵ *Ibid.*, art 3(d).

¹⁶ Council Regulation (EC) 1224/2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy [2009] OJ L343/1.

¹⁷ Council Regulation (EC) 1379/2013 on the common organisation of the markets in fishery and aquaculture products [2013] OJ L354/1. See also J Wakefield, *Reforming the Common Fisheries Policy* (Edward Elgar Publishing 2016) 51ff.

¹⁸ M Salomon, T Markus and M Dross, ‘Masterstroke or Paper Tiger – The Reform of the EU’s Common Fisheries Policy’ (2014) 47 *Marine Policy* 76.

MS as regards the control and sanctioning activities. The new CFP came into force on 1 January 2014.

EFCA's enforcement activity and, in particular, the shared enforcement system set up for the control of the CFP, has not been subject to any academic analysis thus far. In order to examine political and judicial accountability arising in the system of shared enforcement and in particular in the enforcement tasks of EFCA and the national authorities, the chapter will focus on the case studies of the Italian and UK legal systems.

This choice is motivated by, first of all, the importance of the fisheries policy area for the two MS. Of the 23 MS with a coastline, Italy and the UK are among those with the longest coastlines and with the highest percentage of inhabitants living in marine regions and working in the fisheries sector.¹⁹ Secondly, Italy and the UK represent two different models for both their traditional political systems²⁰ and their legal and administrative cultures and traditions, which are expected to influence the accountability set-up. Thirdly, as regards the CFP and national attitudes towards, more generally, decision-making at the EU level in sectors where domestic stakeholders' interests are traditionally strong and cohesive, as in the fisheries sector,²¹ national authorities' willingness to foster their local stakeholders' (i.e., fishermen's) interests is quite clear. This is particularly so for the UK, where the lively public debate around the opportunity to exit or not to exit the EU, preceding the referendum of 23 June 2016 that led to the 'leave' option, has greatly involved the issue of fisheries²² both at the political and institutional level.

¹⁹ In particular, in 2015 both Italy and the UK were among the seven MS with the highest number of vessels, among the four with the highest gross tonnage and among the first four MS for the employment of engine power in Kw. Furthermore, Italy ranks second and the UK fifth for employment in the fisheries sector (European Commission, *Facts and figures on the Common Fisheries Policy. Basic statistical data: 2016 edition* (Publications Office of the European Union 2016) 13), available at <http://ec.europa.eu/fisheries/documentation/publications/pcf_en.pdf> accessed 28 July 2016.

²⁰ Whereas Italy has traditionally been a typical consensus model of democracy, with balanced powers between the executive and the legislative and a multi-party system of political representation, the UK is a classic example of a majoritarian ('Westminster') democracy. See for this categorization, A Lijphart, *Patterns of Democracy. Government Forms and Performance in Thirty-six Countries* (Yale University Press 1999).

²¹ J Suárez de Vivero, J Mateos and D del Corral, 'The Paradox of Public Participation in Fisheries Governance. The Rising Number of Actors and the Devolution Process' (2008) 32 *Marine Policy* 319.

²² See for example the brochures published by some supporters of the 'leave' option, like *Better off out* available at <<http://www.betteroffout.net/wp-content/>

This chapter proceeds as follows. The enforcement powers of EFCA and the competent national Italian and UK authorities will be analysed in Section 2. Section 3 will offer an examination of how the system of political and judicial accountability over CFP enforcement activities is organized, both as regards EFCA and the Italian and UK authorities, on the one hand, and across the two levels, on the other. In Section 4 some conclusions on the possible accountability gaps will be provided together with some recommendations on how these gaps could be filled.

2. EFCA AND THE COMPETENT NATIONAL AUTHORITIES: POWERS AND RELATIONSHIP

While originally endowed only with coordination powers, with the enactment of Regulation 1224/2009 and the establishment of an integrated control system for the implementation of the CFP, EFCA was granted also direct investigation powers on vessels. The Agency, however, remains to date devoid of any sanctioning or monitoring power. In order to examine the powers that EFCA shared with the national authorities, the analysis will first focus on the powers to design the general enforcement policy and to implement it, and then it will be split into two phases of the enforcement cycle, i.e., inspection and sanctioning.

2.1 Formulation and Development of General Enforcement Policies by EFCA

Unlike other EEAs, especially agencies like ESMA, EFCA has only limited enforcement powers. Being first and foremost a coordinating agency, EFCA is in general not responsible for the design of CFP's enforcement policies as regards sanctioning, but it is required to set up general criteria for monitoring and inspection by the MS. Indeed, '[f]isheries control and inspection activities undertaken by the Member States should be carried out in accordance with common criteria, priorities, benchmarks and procedures regarding control and inspection activities on the basis of [joint deployment plans]'.²³ EFCA's coordinating role in the develop-

uploads/2016/01/A5-1-Designed-v1-booklet-Fisheries-Campaign_Layout-1.pdf> and the EFDD Group in the European Parliament at <http://www.efddgroup.eu/images/publications/Stolen_Seas.pdf>, and by some supporters of the 'remain' option, like the Green Party available at <<http://www.swgreenerin.org.uk/wp-content/uploads/2016/04/EU-and-Fisheries-Briefing.pdf>>.

²³ Reg 768/2005, Recital 13.

ment of CFP thus entails that control and inspection activities are to be carried out by MS on the basis of general criteria established at EU level. Joint Deployment Plans (JDPs) are the main tool through which control and inspection criteria are set up. They are taken to implement a Specific Control and Inspection Programme (SCIP), as envisaged by Regulation 2371/2002, which is adopted by the Commission in agreement with the MS. JDPs provide general criteria and reference indicators for the three main phases of the control and inspection activities to be conducted by the MS: planning, implementation and assessment.

In the formulation of EU enforcement (i.e., control) policies, EFCA's role is also to provide expertise to the Commission for the control aspects while formulating or reviewing fisheries regulations,²⁴ whose enforcement remains, as will be further argued, the direct responsibility of MS.

Furthermore, of interest for the purposes of this chapter is the Multiannual Work Programme that EFCA periodically publishes and updates, where its 'overall objectives, mandate, tasks, performance indicators and the priorities for each action'²⁵ are set out. Among these, in its annual update EFCA provides for the general objectives and key indicators regarding control and inspections as well as the general achievements for the next year.²⁶

2.2 Inspection Powers of EFCA and the National Competent Authorities

As for many EU policies, the enforcement activities related to the CFP are mostly the responsibility of the MS which have a duty, under EU law, to set up adequate administrative and technical structures, as well as providing sufficient financial, human and technical resources, to ensure that the aims of the relevant EU policy are achieved.²⁷

In particular, according to Article 74 of Regulation 1224/2009, national competent authorities (NCAs) may carry out inspections 'at sea, in ports, during transport, on processing premises and during the marketing of the fisheries products'. These inspections may relate, among others, to

²⁴ EFCA, 'EFCA's Multiannual work programme 2016–2020 and Annual work programme 2016' available at <<http://www.efca.europa.eu/sites/default/files/Multiannual%20Work%20Programme%202016-2020%20and%20Annual%20Work%20Programme%202016.pdf>> accessed 7 August 2016.

²⁵ Reg 768/2005, art 17.

²⁶ E.g., for the current year, EFCA's first objective is to promote 'effectiveness and efficiency of control operations' and deliverables related to this objective are itemized (EFCA (n 24) 32).

²⁷ For the CFP, see Reg 1224/2009, art 5(3).

the catch itself, the documentation related to it, and the gear used. The national officials may examine all relevant areas, decks and rooms, and they may also question persons deemed to have information on the matter that is the subject of the inspection. The inspection is concluded with the drawing up of an inspection report. Under specific circumstances, national officials may also carry out inspections outside the waters of their MS.²⁸

Inspections may also be carried out by 'Union inspectors', pursuant to Article 79 of Regulation 1224/2009. Officials of a MS or of the Commission or the EFCA may be acting as 'Union inspectors'.²⁹ Inspections by the Agency were specifically made possible through the insertion of Article 17a into the text of EFCA's founding Regulation by Article 120(6) of Regulation 1224/2009.

While national or Commission officials may carry out inspections in EU waters, and on EU fishing vessels outside EU waters, EFCA's officials acting as Union inspectors may only carry out inspections in international waters.

Union inspectors in general may be assigned for the implementation of the specific control and inspection programmes and for international fisheries control programmes, where the EU is under an obligation to provide for controls (art 79(3) Regulation 1224/2009). These inspectors are to be granted access to all areas on board EU fishing vessels and any other vessels carrying out fishing activities, to public premises or places and means of transport; and to all information and documents which are needed to fulfil their tasks, in particular the fishing logbook, landing declarations, catch certificates, the transshipment declaration, sales notes and other relevant documents (art 79(4) Regulation 1224/2009). They have therefore direct enforcement powers over economic operators.

Detailed rules on the inspection powers and obligations of both national and Union inspectors have been set up in Implementing Regulation 404/2011. Of interest for the purposes of this chapter is Article 122, pursuant to which:

[I]n the accomplishment of their tasks Union inspectors shall comply with the law of the European Union and, as far as applicable, the national law of the MS where the inspection takes place or, where the inspection is carried out outside EU waters, of the flag MS of the inspected fishing vessel and relevant international rules.

If an infringement of the CFP has been discovered during an inspection carried out by a national official with respect to a fishing vessel located

²⁸ *Ibid.*, art 80.

²⁹ *Ibid.*, art 4(7).

inside the waters of the MS to which the official belongs, the latter must indicate the infringement in the report and forward it to the competent authority (art 82 Regulation 1224/2009). If instead the infringement was detected with respect to a vessel located outside the waters of the inspecting MS, the official must submit the report to the coastal MS in whose waters the inspection was carried out or, in case of an inspection outside EU waters, to the flag MS of the fishing vessel concerned.

Union inspectors are equally under a duty to draw up inspection reports and in the case where an infringement is detected in the course of an inspection, they must submit the report to the competent authorities of the coastal MS or, where the inspection was carried out outside EU waters, to competent authorities of the flag State of the inspected fishing vessel and to EFCA (art 123 of Implementing Regulation 404/2011).

2.3 Sanctioning Powers of the National Competent Authorities

After the notification of an infringement of the CFP has been discovered through an inspection, MS are under an obligation to ensure that action (of a criminal or administrative nature) is undertaken vis-à-vis the infringer.³⁰

For the purposes of this chapter, it is important to note that sanctioning powers are only granted to the national authorities, with EU officials (including those of EFCA) having only inspection powers. According to Article 87 of Regulation 1224/2009, it is the MS responsibility to undertake all appropriate measures in respect of any infringement that a Union inspector has discovered in the waters under their sovereignty or jurisdiction, or on a fishing vessel flying their flag. This provision should be read in conjunction with Article 77, pursuant to which inspection reports drawn up by Union inspectors constitute admissible evidence in administrative or judicial proceedings of any MS. For establishing facts such reports are to be treated as equivalent to inspection reports of the MS.

2.4 Intermezzo: Identification of the ‘Shared Enforcement’ Systems

The analysis carried out above identified essentially two mechanisms of shared enforcement involving the EFCA. The shared nature of the mechanisms lies:

³⁰ Ibid., arts 85 and 89.

- (1) in the formulation and development of the general control and inspection policies, in which, on the one hand, the EU, through EFCA, sets up the common criteria, priorities, benchmarks and procedures and, on the other hand, the MS have the duty to implement them; and
- (2) in the cooperation between EFCA, on the one hand, which has been granted the power to carry out inspections on EU vessels in international waters, and the competent authorities of the MS, on the other hand, which are in charge of undertaking actions of an administrative and criminal law nature vis-à-vis the infringers.

These processes are typical instances of ‘composite procedures’, namely decision-making processes entailing the input of administrative actors from different jurisdictions, and in which the final decision, issued by a MS or an EU authority, is based on procedures involving the more or less formalized input of the various participating authorities.³¹

In the case of EFCA in the first shared mechanism, the development of general enforcement policies, the various inputs can be categorized into:

- (1) the development of SCIPs by the Commission in agreement with the MS;
- (2) the common criteria and priorities for controls and inspections under the CFP set up by EFCA through the JDPs;
- (3) the control and inspection policies developed by the NCAs, based on the common EU principles;
- (4) the inspection carried out by the NCAs.

In the second shared mechanism, i.e., the inspection activities carried out under the CFP, the inputs can be categorized into:

- (1) the inspection action carried out by an EFCA official acting as Union inspector in international waters;
- (2) the inspection report drawn up by the same EFCA official;
- (3) the enforcement measure taken by the NCAs.

In the first instance, the legislative set-up provides that the establishment of the general enforcement policies under the CFP, as regards control and inspection activities, is up to EFCA, and that MS develop and put into

³¹ H Hofmann, G Rowe and A Türk, *Administrative Law and Policy of the European Union* (Oxford University Press 2011) 406.

practice those policies, by means of their competent authorities acting in accordance with their national institutional framework.

In the second mechanism, the legislative set-up provides that inspection activities are regulated both by EU law and the law of the MS where the inspection takes place or, where the inspection is carried out outside EU waters, of the flag MS of the inspected fishing vessel and relevant international rules. Moreover, inspection reports drawn up by EFCA officials acting as Union inspectors constitute admissible evidence in administrative or judicial proceedings of any MS and they must be treated as equivalent to domestic inspection reports. In order to complete the picture of the system of shared enforcement set up by Regulation 1224/2009, it is necessary to identify the competent national authorities and the relevant enforcement measures that can be taken.

Having identified the shared enforcement mechanisms involving EFCA, the analysis will now turn to the identification of the NCAs and their inspection and sanctioning powers.

2.5 The Powers of the National Competent Authorities

In the Italian legal system, the competent authority designated for the application of Regulation 1224/2009 is the Ministry of Agriculture, Food and Forestry, and in particular its Fisheries Directorate (*Ministero delle politiche agricole, alimentari e forestali – Direzione generale della pesca marittima e dell'acquacoltura*).³²

For the inspection and sanctioning activities, the Ministry makes use of the central and local maritime authorities; the Ministry of Defence, with the Coastguard, the Navy and the *Carabinieri*; the Ministry of Interior, with the national police; the Ministry of Finance, with the finance police; and the Ministry of Social Affairs for veterinary activities.³³ At the local level, control and inspection activities are carried out by the national harbour authorities (*Comando generale delle capitanerie di porto*, through

³² D.P.C.M. 27/02/2013 n. 105, *Regolamento recante organizzazione del Ministero delle politiche agricole alimentari e forestali, a norma dell'articolo 2, comma 10-ter, del decreto-legge 6 luglio 2012, n. 95, convertito, con modificazioni, dalla legge 7 agosto 2012, n. 135*, art 3(b).

³³ D.Lgs. 09/01/2012 n. 4, *Misure per il riassetto della normativa in materia di pesca e acquacoltura, a norma dell'articolo 28 della legge 4 giugno 2010, n. 96*, Gazz. Uff. 01/02/2012 n. 26, art 22(3). See also European Parliament, Directorate-General for Internal Policies, *The CFP-Infringement Procedures and Imposed Sanctions Throughout the EU. Note* (2014), 21 <[http://www.europarl.europa.eu/RegData/etudes/note/join/2014/514003/IPOL-PECH_NT\(2014\)514003_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2014/514003/IPOL-PECH_NT(2014)514003_EN.pdf)> accessed 21 August 2016.

the territorial partition into maritime districts – *Compartimenti marittimi*) under the authority of the Ministry of Agriculture.³⁴

The sanctions envisaged by the Italian legal system are of both a criminal and an administrative law nature, hence the competent courts will be the ordinary criminal courts or the administrative courts, according to the nature of the sanction.³⁵

In the UK, enforcement is divided between four authorities, one for each of the four constituent countries. For the purposes of this chapter, the focus will lie on the activities carried out by the English and Scottish authorities.³⁶ In England, the Marine Management Organization (MMO) is entrusted with the enforcement of the CFP. MMO, which is an executive body of the Department for Environment, Food and Rural Affairs, inspects fishing vessels at sea and in port³⁷ and it may take action in line with the MMO's Compliance and Enforcement Strategy.³⁸ Inspections are carried out by the Royal Navy Fishery Protection Squadron (RNFPS) in English waters on behalf of the MMO. MMO may also impose sanctions for the violation of the CFP. These sanctions may be, in the UK legal system, both of a criminal or of an administrative law nature.³⁹

In Scotland, it is Marine Scotland, a directorate of the Scottish Parliament, which is entrusted with the enforcement of the CFP.⁴⁰ Inspections are carried out by Marine Scotland and in particular by Marine Scotland Compliance, an arm of Marine Scotland dedicated to these functions. Administrative penalties are also applied in Scotland by Marine Scotland.⁴¹ Marine Scotland Compliance may also report infringers to the Crown Office and the Procurator Fiscal Service, i.e., Scotland's

³⁴ D.Lgs. 4/2012, art 13(2).

³⁵ *Ibid.*, art 7-21.

³⁶ In Northern Ireland the competent authority is the Department of Agriculture and Rural Development (DARD); in Wales, it is the Welsh Government. With respect to inspections, both authorities are supported by the Royal Navy Fishery Protection Squadron (RNFPS) in their respective waters (see European Parliament (n 33) 22).

³⁷ Marine and Coastal Access Act 2009, Pt 8. See also <<https://www.gov.uk/government/publications/fishing-vessel-inspections>>.

³⁸ Marine Management Organisation, 'Compliance and Enforcement Strategy' (11 June 2014) <<https://www.gov.uk/government/publications/compliance-and-enforcement-strategy>> accessed 29 July 2016.

³⁹ Marine and Coastal Access Act 2009, s 294; The Sea Fishing (Penalty Notices) (England) Order 2011 and Marine Management Organisation, 'Fishing offences: fines and payment' (11 June 2014) <<https://www.gov.uk/government/publications/fishing-offences-financial-administrative-penalties>>.

⁴⁰ European Parliament (n 33) 22.

⁴¹ Marine (Scotland) Act 2010, Pt 7.

prosecution service, which indicates that criminal sanctions may also be imposed on infringers.

3. POLITICAL AND JUDICIAL ACCOUNTABILITY IN THE SHARED ENFORCEMENT OF THE CFP

The two mechanisms of shared enforcement in the CFP mentioned above could potentially raise concern about whether and how the underlying mechanisms of political accountability ensure that the controllers account for their decisions.⁴²

In order to shed some light on how and to what extent mechanisms of shared enforcement are followed and thus legitimized by mechanisms of political accountability, in this section it will be identified which body (EFCA or NCAs) is accountable before what other body for which shared enforcement activities, and any possible gaps will be highlighted. For this purpose, mechanisms of political accountability will be analysed following Bovens' three stages of information, discussion and rectification.⁴³

3.1 Accountability at the Information and Discussion Stages

In the two shared enforcement mechanisms identified above, EFCA and the NCAs are held politically accountable before different representative bodies. Both for the development of general control and inspection policies and for the inspections made by Union inspectors in international waters, EFCA has a duty to report on such activities to the EU bodies, whereas the NCAs are accountable for their own enforcement tasks before the national relevant bodies.

3.1.1 The EU level

With respect to the reporting obligations, and as regards both shared enforcement mechanisms, according to Regulation 768/2005, EFCA's Administrative Board is to adopt the annual general report on the Agency's overall activity and to forward it to the EP, the Council, the Commission, the Court of Auditors (see Chapter 12) and the MS. Since the report is not subject to any review clause, but the Agency is only subject to an evaluation clause concerning the Multiannual Work Programme (see Section 2.1

⁴² P Craig, *EU Administrative Law* (OUP 2012) 160; M Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2005) 13 *ELJ* 447.

⁴³ Bovens, *ibid.*; see also Chapter 1.

supra),⁴⁴ the five-year assessment appears to be more of a ‘merely procedural obligation’⁴⁵ than a concrete tool to render account of what has been done.

Furthermore, there is no discussion stage, provided no hearings before the EP are envisaged.⁴⁶

Nonetheless, the annual report for 2015 appears to provide information to a different degree of detail depending upon the shared enforcement powers at stake. With regard to the set-up of general enforcement criteria, the report is more detailed,⁴⁷ while as regards the participation of Agency staff as Union inspectors in international waters, the data reported only referred to the number of international missions (three) in which members of EFCA’s staff acted as Union inspectors.⁴⁸ No information about the inspections’ outcomes is available in the report.

As regards the power to develop general enforcement policies, EFCA also has further specific reporting obligations towards the EP, although they appear to be more of a ‘communication’ obligation since no consequence is envisaged if EFCA fails to provide such information. The first obligation stems from Article 14 of EFCA’s founding Regulation, and it entails ‘an annual assessment of the effectiveness of each [JDP]’, together with an empirical assessment about the possibility that fishing activities are not compliant with applicable control measures. Such annual assessment must be communicated to the EP – although no hearings, as previously said, are formally provided for regarding CFP’s functioning⁴⁹ – the Commission and MS. Moreover, upon the EP’s request, according to Article 36(10) of Regulation 768/2005, EFCA’s Executive Director is to provide ‘all information necessary for the smooth application of the discharge procedure for the financial year in question, as laid down in Article 146(3) of the Financial Regulation’.⁵⁰

As for specific financial reporting, in order for the Executive Director to have its annual budget granted by the Commission (see below, Section 3.2.1), each year she/he must draw up a draft statement of estimates of EFCA’s

⁴⁴ M Scholten, *The Political Accountability of EU and US Independent Regulatory Agencies* (Brill Nijhoff 2014) 421.

⁴⁵ *Ibid.*, 115.

⁴⁶ *Ibid.*, 131.

⁴⁷ EFCA (n 24) 13–19.

⁴⁸ *Ibid.*, 26.

⁴⁹ Although they happen *de facto* (see Scholten (n 44) 467).

⁵⁰ As reported, for example, in the last report for 2015, where the EP, while granting the Executive Director a discharge in respect of the implementation of EFCA’s budget, called on it to publish the CVs and declarations of interests of members of the Advisory Board, ‘in order to contribute to bigger transparency’ (EFCA (n 24) 89). The same applies, for example, to EMA.

revenues and expenditures for the financial year to come, on the basis of which the Administrative Board must produce a further draft statement of estimates, to be forwarded to the Commission. The latter, in turn, must forward it to the EP and the Council (the ‘budgetary authority’) which will finally authorize the appropriations for the subsidy to the Agency. The final budget must be adopted by the Administrative Board and will become final only after final adoption of the general budget of the European Union.⁵¹

EFCA’s reporting obligations as regards both political and financial issues are directly related to its lack of full *independence* – both institutional and financial – from its EU principles, although its founding Regulation states that it should be granted ‘legal, financial and administrative autonomy’, while ‘*maintaining close links*’ with the MS and other EU institutions.⁵² The Regulation also states that, in order to fulfil such ‘functional autonomy’, EFCA ‘should be granted’ budgetary independence.⁵³ Nonetheless, EFCA’s budget partially consists of a contribution from the Commission envisaged in the general budget of the EU,⁵⁴ granted by the Commission to the Agency through a complex procedure of approval (subject to an *ex ante* reporting activity by the Executive Director, as illustrated below, see Section 3.2.1). Of the overall budget, EFCA is directly responsible for the allocation of specific quotas to the activities related to the shared enforcement with MS of the CFP.

Moreover, EFCA’s annual report is also subject to the European Court of Auditors’ review, pursuant to the provisions of Article 287 TFEU, according to Article 23(2)(b) of the Agency’s founding Regulation.

As regards, specifically, its relationship with the Commission, no specific accountability relationship is envisaged between them. In this regard, Regulation 768/2005 sets out that the Commission *should* be represented on the Administrative Board (together with the MS),⁵⁵ which is indeed composed of representatives of the MS and six members from the Commission⁵⁶ and has the duty to adopt the CFP’s general enforcement principles. The ongoing relationship between EFCA and the Commission, accordingly, is somewhat based on ‘cooperation’,⁵⁷ as well as for other agencies like EASA and EMA.

⁵¹ The 2015 contribution to EFCA’s budget from the total subsidy of the EU was an amount of € 9217000 (EFCA (n 24) 73).

⁵² Council Regulation (EC) 768/2005, Recital 27. Emphasis added.

⁵³ *Ibid.*, Recital 37.

⁵⁴ *Ibid.*, art 35.

⁵⁵ *Ibid.*, Recital 29.

⁵⁶ *Ibid.*, art 24.

⁵⁷ *Ibid.*, art 17c(1).

3.1.2 The national level

The UK Pursuant to Schedule 1, Paragraph 26, of the Marine and Coastal Access Act 2009, the MMO is required to present to the Secretary of State an annual report and accounts related to its activity. The Secretary of State must then lay a copy before each House of Parliament. The MMO is held accountable to Ministers and is responsible to the Secretary of State for Environment, Food and Rural Affairs.⁵⁸

The MMO has no financial reporting obligations before the Parliament, since its enforcement activities fall into the non-financial schedule of delegations. Nonetheless, it is financially dependent on the Secretary of State, before whom the former is accountable at a rectification stage (see below, Section 3.2.2).

In Scotland, the Scottish Ministers are asked to keep under review the activities carried out pursuant to the Marine (Scotland) Act. In particular, they have to report about ‘the effects’ and ‘the effectiveness of the policies’ adopted to achieve the objectives in the marine plan – which is the main tool by which the Scottish Ministers set up and develop their marine and fisheries policies. For this purpose, the Scottish Ministers must prepare ‘from time to time’⁵⁹ a report, after the publication of which they may decide whether or not to amend or replace the marine plan to which it refers. Further reports must be produced no later than five years after the previous report. Overall, the Scottish Ministers are held accountable before the Scottish Parliament for the activities carried out under the Act, including the enforcement of the CFP. They must therefore lay before Parliament a report ‘before the end of each relevant period’,⁶⁰ according to what is envisaged in each marine plan.

Italy According to Article 13(2) of Legislative Decree 4/2012, the Italian authority in charge of taking a decision at the local level, after an infringement has been ascertained under the CFP, is the *Comando generale delle Capitanerie di porto*, through the daily activity of the authorities mentioned in Section 2.5 above. The authority has to produce a report on its sanctioning activity and forward it to the *Capo del compartimento marittimo* (head of the maritime district). No reports to the National

⁵⁸ See Marine Management Organization (2016) p. 8, where it is stated that, in order to fulfil its role in the most appropriate way, the framework for its activities is The Marine Policy Statement, which sits ‘alongside important European legislation, such as [...] the Common Fisheries Policy [...]’.

⁵⁹ Marine (Scotland) Act 2010, s 16(3).

⁶⁰ *Ibid.*, s 103.

Parliament are foreseen. As regards *Direzione generale della pesca marittima e acquacoltura*'s enforcement tasks under the CFP, it is not envisaged that there will be a report to the National Parliament either. Article 15 of D.Lgs. 4/2012 establishes a National Register of Infringements, for which the *Corpo delle Capitanerie di porto* is responsible. Any final decision taken by the *Capo del compartimento marittimo* as regards sanctions under the CFP is to be forwarded to the *Direzione generale della pesca marittima*,⁶¹ and every resulting change to an inspected vessel's individual status has to be promptly reported in the National Register of Infringements.⁶²

In none of the two national cases a discussion stage is foreseen within the accountability relationship between the NCAs and their representative bodies.

3.2 Accountability at the Rectification Stage

EFCA's and the NCAs' lack of full independence regarding their role in the shared enforcement mechanisms also implies different levels of accountability at a rectification stage, either through the financial lever or by having their powers reduced by their representative bodies. Especially as for the national cases, it may also happen through reappointment provisions that render their members directly accountable for their decisions.

3.2.1 The EU level

As regards personal arrangements at a rectification stage, for the members of the Administrative Board, as mentioned above, pursuant to Article 24 of Regulation 768/2005, no provisions on the dismissal of members of the Administrative Board have been made.⁶³ Indeed, Article 28 of Regulation 768/2005 also envisages personal independence for the members of the Administrative Board,⁶⁴ in order to avoid any conflict of interest that may prejudice their independent role.

⁶¹ D.M. 29/02/2012, Procedimento di assegnazione dei punti alla licenza di pesca, arts 2–5.

⁶² *Ibid.*, art 9.

⁶³ See also Scholten (n 44) 97.

⁶⁴ Pursuant to its founding Regulation (Regulation 2371/2002), EFCA's institutional bodies are the Administrative Board, the Executive Director and the Advisory Board. The Administrative Board's main tasks are (art 23): to appoint and dismiss the Executive Director; adopt the Agency's annual and multiannual programmes and adopt the Agency's final budget and establish its rules of procedure. The Executive Director is to 'give effect to the principles of the common fisheries policy' (art 29). The Advisory Board's main task (art 31) is to advise the Executive Director at her/his request in the performance of her/his duties.

As regards specifically the Executive Director, who must ‘give effect to the principles of the common fisheries policy’,⁶⁵ pursuant to Article 29(1) she/he ‘shall neither seek nor take instructions from any government or any other body’, even though she/he ‘shall be responsible for his/her activities to the Administrative Board’ (art 29(4)).

Her/his term of office is five years as from her/his appointment, and it can be renewed once on the proposal of the Commission, to be approved by two-thirds of the members of the Administrative Board. The latter, by the same majority, may also dismiss the Executive Director, at the request of the Commission or of one-third of its members.

3.2.2 The national level

The UK MMO’s financial accountability before the Secretary of State is directly translated into obligations at a rectification stage. According to Schedule 1, Paragraphs 32–35 of the Marine and Coastal Access Act 2009, the Secretary of State may make payments by way of grants to the MMO, on the conditions which she/he determines. The MMO may also borrow money from the Secretary of State, by way of a loan, which may not exceed a total amount of £20 million – unless the Secretary of State amends that provision – or from other persons, only if the Secretary of State consents.

Other obligations at this stage are also foreseen at the personal level. The MMO is governed by a Chair and Board. No member may hold office for more than ten years, whether or not continuous. The Secretary of State has the power to suspend or terminate the appointment of any member (be it the Chair, the deputy chair or an ordinary member) in some specific cases, among which is being ‘unable or unfit to discharge the functions of the appointment for any other reason’,⁶⁶ therefore allegedly also those functions linked to enforcement activities. The Secretary of State also has the discretion to decide upon the MMO’s members’ remuneration and allowances.⁶⁷

More generally, the Secretary of State may require the MMO to provide any information regarding the carrying out, or proposed carrying out, of the MMO’s functions, or the MMO’s responsibilities in general.⁶⁸

Also Marine Scotland’s support functions, including finance and other facilities, generally depend on the Scottish Government’s estimations, since

⁶⁵ Reg 768/2005, art 29(2).

⁶⁶ Marine and Coastal Access Act 2009, Sch 1, para 9(1).

⁶⁷ *Ibid.*, para 11.

⁶⁸ *Ibid.*, para 28(1).

they are delivered by the Scottish Government's corporate services,⁶⁹ so Marine Scotland's financial budget, the biggest part of which is allocated for the compliance activities, may be reduced by the Government.

Also Marine Scotland's members are personally accountable at a rectification stage. It is led by a Director and is divided into five distinct operational/policy Divisions. Among these divisions is Marine Scotland Compliance, whereas the management of its overall operations is overseen by a Marine Scotland Board.⁷⁰ Since December 2010, the former Scottish Executive Departments have been replaced by a number of Directorates, with the aim to lead, present and develop ministerial policies.⁷¹ Given that the Scottish Government Directorates are responsible for progressing its five 'core strategic objectives' ('Wealthier and Fairer Scotland, Healthier Scotland, Safer and Stronger Scotland, Smarter Scotland and Greener Scotland'), their heads are highly dependent on national politics and their actions are directly linked to the executive's political viewpoint.

Italy Overall, the number and nature of tasks with which the *Direzione centrale della pesca marittima e acquacoltura* is currently endowed, are the responsibility of the Italian Council of Ministers, which may decide to increase or decrease the former's role within the CFP based on further evaluations of the policy's outcomes and on political inputs in that regard.⁷²

Moreover, since the competent authority for the shared enforcement mechanisms under the CFP is dependent upon a Ministerial DG, therefore ultimately an expression of the Italian Government itself, its budget is fully based on the financial provisions which the Government makes and allocates among the Ministries through the Annual Financial Law. The same applies to the other national authorities involved in the enforcement of the CFP. With regard to the Coastguard, it is functionally and organizationally dependent upon various ministries (the Ministry of

⁶⁹ Marine Scotland, 'A Review of Marine Scotland' (February 2016) <www.gov.scot/Resource/0049/00497928.pdf> accessed 21 August 2016.

⁷⁰ Ibid.

⁷¹ Scottish Government, 'Reporting on 100 Days: Moving Scotland forward' <<http://www.gov.scot/Publications/2007/08/23162100/1>> accessed 21 August 2016.

⁷² The *Direzione centrale della pesca e acquacoltura* within the Ministry was established in 2010 through a Decree of the President of the Council of Ministers (DPCM 27/02/2013 n. 105, *Regolamento recante organizzazione del Ministero delle politiche agricole alimentari e forestali, a norma dell'articolo 2, comma 10-ter, del decreto-legge 6 luglio 2012, n. 95, convertito, con modificazioni, dalla legge 7 agosto 2012, n. 135*), which may not be reviewed or repealed by a Ministerial decree without the whole Government's approval.

Infrastructures and Transport, the Ministry of Environment, the Ministry of Agriculture and others).⁷³

At a personal level, the chief structures of the *Direzione nazionale della pesca e acquacoltura*, also concerning their shared enforcement tasks under the CFP, are subject to the principles for the appointment of high officials of the public administration, who are accountable to their direct superiors for what they do while exercising their functions and cannot be dismissed unless they have severely damaged the administration they are representing. The rather recent changes in the functioning of the public administration have introduced a system of performance measurement and accounting,⁷⁴ according to which managers and officials are to be assessed based on their performance. Therefore, they are personally accountable for their enforcement activities to the head of the relevant executive body, and they do not, in any way, account to any EU representative body for such functions.

3.3 Interim Conclusions: Political Accountability in the Shared Enforcement Mechanisms between EFCA and the NCAs

On the basis of the analysis of the EFCA's and the NCAs' carried out above, it can be concluded that political accountability is ensured at the different levels of Government involved, as far as the two mechanisms of shared enforcement of the CFP are concerned. The possible shortcomings deriving from a somewhat 'weak' information stage (i.e., the lack of a proper review clause in the relationship between EFCA and the EP) are compensated for by an effective financial accountability set-up both at an information and at a rectification stage, which ensures that the budget discharge procedure is subject to strict control on the part of the EP. Furthermore, NCAs are directly accountable to their representative bodies as regards their own enforcement powers.

⁷³ Guardia Costiera, 'Organizzazione: Organigramma' <<http://www.guardiacostiera.gov.it/organizzazione/Pages/organigramma.aspx>> accessed 21 August 2016.

⁷⁴ The most recent being represented by D.P.R. 09/05/2016 n. 105, *Regolamento di disciplina delle funzioni del Dipartimento della funzione pubblica della Presidenza del Consiglio dei ministri in materia di misurazione e valutazione della performance delle pubbliche amministrazioni*, GU 17/06/2016, n. 140.

3.4 Judicial Accountability in the Shared Enforcement of the CFP

In the case of an investigation carried out by a Union inspector and a sanction imposed by a national authority, a dissociation may be observed between the authority gathering information and the authority taking a final decision on the basis of that information.⁷⁵ Similarly, in the case of enforcement policies formulated by EFCA and actual enforcement measures taken at the national level, there are different levels of governance involved in the enforcement process. However, while the system of decision-making established for the implementation of EU policies is increasingly becoming 'integrated', the system of judicial accountability is still linked in a two-level system, with separate national and EU levels. This strict separation implies that the judicial level responsible for a claim corresponds to the administrative level that has carried out the act or action which is being challenged.

For the shared enforcement system which is of relevance to this chapter, the duality of jurisdiction implies that EFCA's enforcement policies, its inspection activity and its final inspection report, as well as the lack of investigation, would fall within the jurisdiction of the EU's courts, while the decision to impose sanctions, the decision not to prosecute an infringer as well as inaction in the sanctioning process, in addition to all national enforcement actions taken on the basis of EFCA's policies, would fall within the jurisdiction of the national courts.

3.4.1 The EU level

As mentioned above, the strict separation of jurisdiction between the national and the EU level implies that EFCA's contribution to a decision-making process will be subject to the sole jurisdiction of the EU's courts. In particular, EFCA's enforcement policies as well as its investigation activity and final investigation report could be challenged directly in an action for annulment under Article 263 TFEU, or indirectly through a preliminary question of validity under Article 267 TFEU, while EFCA's failure to carry out an inspection or issue a JDP could be the subject matter of an action for failure to act under Article 265 TFEU.

The direct and indirect challenge to EFCA's actions Pursuant to Article 263 TFEU, the EU courts may review the legality of acts 'other than recommendations and opinions'. Under the case law developed before the

⁷⁵ H Hofmann and M Tidghi, 'Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks' (2014) 20 *European Public Law* 154.

Lisbon Treaty (and concerning the predecessor of Article 263 TFEU, i.e., Article 230 EC), the scope of reviewability of EU measures was extended to ‘all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects’.⁷⁶ Specifically concerning acts of agencies, Article 263 TFEU provides that these can be reviewed if they are ‘intended to produce legal effects vis-à-vis third parties’.

As far as private parties are concerned, this requirement essentially entails proving that ‘the measure is binding on, and capable of affecting the interests of the applicant by bringing a distinct change in his legal position’.⁷⁷ With regard to preparatory measures in the decision-making process, they are generally considered as non-reviewable. The authority for this statement is contained in the *IBM* case in which the CJEU held that a measure is reviewable only if it is ‘definitively laying down the position of the Commission or the Council in the conclusion of that procedure, and not a provisional measure intended to pave the way for a final decision’.⁷⁸

This limitation entails that EFCA’s enforcement policies will not be considered a reviewable act before the EU courts because they are not capable of affecting an individual’s legal sphere. The same can be concluded with regard to inspection reports, which have also been considered as non-reviewable in annulment actions before the EU courts. For example, in a case concerning an inspection report drawn up in the context of competition law, the report was not considered a reviewable act.⁷⁹ In this context, the Court of First Instance made a statement which can be analogically applied to the inspection reports drawn up by EFCA: ‘The investigation procedure referred to [. . .] is not aimed at terminating an infringement or declaring that an act is unlawful, but has the sole object of enabling the Commission to gather the necessary information to check the actual existence and scope of a given factual and legal situation.’⁸⁰

On this basis, it can be argued that EFCA enforcement policies, as well as its investigation activity and the investigation report, will not constitute reviewable acts for the purposes of an action for annulment, because the EU courts will consider that they are not capable of affecting an individual’s legal sphere but constitute a mere statement of objectives or a mere information-gathering activity.

This conclusion, however, does not mean that EFCA’s enforcement

⁷⁶ Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263, para 42.

⁷⁷ Case 60/81 *IBM v Commission* [1981] ECR 2639, para 9.

⁷⁸ *Ibid.*, para 10.

⁷⁹ Case T-9/97 *Elf Atochem SA v Commission* [1997] ECR 1997.

⁸⁰ *Ibid.*, para 22. See for similar considerations concerning an OLAF report, Case T-309/03, *Camós Grau v Commission* [2006] ECR II-01173 paras 48–58.

policies or an inspection report will, under no circumstances, come under the EU courts' scrutiny. In the system of remedies created by Treaties, EU measures can, in principle, be challenged not only directly through an action for annulment provided under Article 263 TFEU but also indirectly, i.e., through a question of validity, by bringing an action against a national measure and in the national proceedings challenging the validity of the underlying EU measure. According to the case law of the CJEU, the range of measures which can be challenged indirectly through a question of validity is wider than those which are amenable to judicial review in direct actions since it is held to include 'all acts of the institutions without exception'.⁸¹ This implies, for the purposes of this analysis, that EFCA enforcement policies as well as its inspection activities and inspection reports could be challenged indirectly through a preliminary question of validity in national proceedings against a sanction imposed on an infringer by the NCAs or another enforcement act carried out by a NCA.⁸²

Having established that indirect challenges of EFCA enforcement policies, inspection activities and inspection reports are, in principle, admissible, a much more thorny issue concerns the question of the standard according to which the inspection activity or the inspection report would be specifically reviewed by the EU courts.

The question arises because of the formulation of Article 122 of Implementing Regulation 404/2011, pursuant to which, in the accomplishment of their tasks, Union inspectors must comply with the law of the EU and, as far as applicable, the national law of the MS where the inspection takes place or, where the inspection is carried out outside EU waters, of the flag MS of the inspected fishing vessel and relevant international rules. This provision therefore suggests that EFCA inspection activities and inspection reports are reviewable not only against EU primary and secondary law, as well as general principles of EU law concerning, for example, the right of defence, the right to protection of business secrets and so on, but also against the (written or unwritten) principles of administrative procedural law applicable in the flag MS.

This provision seems, however, to clash with the strict separation of jurisdiction between the national and EU levels. While EU courts would be capable of reviewing EFCA inspection activity and inspection report against EU law, it is not clear to what extent the EU courts could exercise

⁸¹ Case C-322/88 *Grimaldi v Fonds des maladies professionnelles* [1989] ECR 4407, para 8; Case T-193/04 *Tillack v Commission* [2006] ECR II-3995, para 80.

⁸² Although this does not seem to have ever occurred, according to a search with the keyword 'EFCA' in the Curia database.

any review on the basis of the law of the MS. Possible guidance could be seen in an analogical reading of the *Fiorucci* case.⁸³ In this case, EU law⁸⁴ granted the competence to the Office for Harmonization in the Internal Market (OHIM) to declare a Community trademark invalid where the use of such trademark is, inter alia, prohibited by another earlier right provided in national legislation. The applicant had challenged the decision of OHIM's Board of Appeal, arguing that it was based on a misinterpretation and misapplication of certain provisions of Italian law concerning intellectual property. The General Court went on to interpret and apply these provisions and concluded that the Board of Appeal had committed an error of law in its interpretation of Italian law.⁸⁵ On appeal to the EU Court of Justice, it was confirmed that, when reference is made to national law by EU law, the EU courts are competent to use that national law and review the actions of EU bodies against that law.⁸⁶

This case law seems therefore to suggest that EFCA inspection activities and inspection reports will be fully reviewed by the EU courts against national, EU and international standards.

The action for failure to act as a means of challenging the lack of action by EFCA Pursuant to Article 265 TFEU, the EU courts may review failures to address to the applicant any act other than a recommendation or an opinion. Despite this broad formulation, however, the EU courts have held that failures to act can only be challenged when an EU institution is

⁸³ Case C-263/09 P, *Edwin v OHIM* [2011] ECR I-05853.

⁸⁴ Council Regulation (EC) 40/1994 of 20 December 1993 on the Community trade mark [1994] OJ L11.

⁸⁵ Case T-165/06, *Fiorucci v OHIM* [2009] ECR II-01375.

⁸⁶ Case C-263/09 P, *Edwin v OHIM* [2011] ECR I-05853. 'In the present case, the rule which the appellant claims has been infringed is a rule of national law made applicable to the dispute by the reference made in a provision of European Union law' (para 47).

As regards the examination, in the context of an appeal, of the findings made by the General Court with regard to that national law, the Court of Justice has jurisdiction to determine, first of all, whether the General Court, on the basis of the documents and other evidence submitted to it, distorted the wording of the national provisions at issue or of the national case-law relating to them, or of the academic writings concerning them; second, whether the General Court, as regards those particulars, made findings that were manifestly inconsistent with their content; and, lastly, whether the General Court, in examining all the particulars, attributed to one of them, for the purpose of establishing the content of the national law at issue, a significance which is not appropriate in the light of the other particulars, where that is manifestly apparent from the documentation in the case file. (para 53).

under a clear obligation to act.⁸⁷ Considering that the applicable provisions and specifically Article 79 of Regulation 1224/2009 do not seem to ground any obligation for Union inspectors to carry out inspections or for EFCA to draft JDPs, it seems very unlikely that an action for failure to act, brought for example by a vessel's master who has been subject to an inspection (and who claims that its competitor should equally be inspected), would be successful. This is because of the discretion granted to the Union inspectors as to how to enforce the CFP.

Finally, it should be pointed out that failures to act by an EU institution or body cannot be the subject matter of a preliminary question of validity.⁸⁸

In conclusion, it can be argued that, with regard to the lack of inspection by EFCA or the failure by EFCA to draft a JDP, an evident gap of judicial accountability presents itself, because this inaction can be challenged neither directly before the EU courts, nor indirectly through a preliminary question of validity.

Action for damages as an additional or supplementary remedy to direct and indirect challenges of EFCA's inspection activities Article 268 TFEU grants the EU courts jurisdiction in disputes which concern compensation for damages under the conditions set out in Article 340(2) TFEU. On the basis of this provision, therefore, it might be possible for an applicant to request compensation for damages incurred as a consequence of the possible illegality of EFCA's inspection activities and inspection report. In this context, it must be pointed out that EFCA's inspection report could certainly be considered as an 'act' for the purposes of an action for damages. Indeed, the court has considered a report by OLAF terminating an anti-fraud investigation as an act capable of giving rise to EU liability, despite the non-reviewability of that very report in an annulment action.⁸⁹

While therefore an applicant fulfilling the liability requirements provided by EU law could bring an action for the damages incurred as a consequence of an inspection report by EFCA, this avenue is not open in the case of a lack of investigation, as actions for failure to act can only be brought where an institution has infringed a legal obligation to act.⁹⁰

⁸⁷ Case T-95/96 *Gestevisión Telecinco v Commission* [1998] ECR II-3407, para 71; Case T-127/98 *UPS Europe v Commission* [1999] ECR II-2633, para 34.

⁸⁸ Case C-68/95 *T. Port GmbH & Co. KG v Bundesanstalt für Landwirtschaft und Ernährung* [1996] ECR I-833, para 53.

⁸⁹ Case T-309/03 *Camós Grau v Commission* [2006] ECR II-01173, paras 75–81.

⁹⁰ Case T-196/99 *Area Cova SA and others v. Council and Commission* [2001] ECR II-3597.

3.4.2 The national level

The division of jurisdiction between the national and the EU courts implies, as discussed above, that decisions imposing sanctions on the basis of an EFCA investigation report, decisions not to prosecute an infringer as well as inaction in the sanctioning process, fall within the jurisdiction of the national courts.

Italy In the Italian legal system some of the sanctions imposed are of a criminal law nature, ranging from monetary sanctions, to imprisonment, seizure of catch and revocation of licence.⁹¹ When these sanctions are imposed, they will follow the usual criminal law path in the Italian legal system, as far as imposition of penalties, closure of criminal proceedings, duty of motivation and so on are concerned. Appeal against these sanctions lies in accordance with the Italian criminal procedural system.

Where instead the sanctions are of an administrative law nature,⁹² these will be imposed by the *Capo del compartimento marittimo*⁹³ and they will follow the normal decision-making procedure for administrative sanctions in the Italian legal system, with a challenge against them being open before the Regional Administrative Courts.

The UK In England, sanctions are imposed by the Marine Management Organization. These sanctions may be, in the UK legal system, criminal or administrative in nature.⁹⁴ Financial penalties are considered as administrative in nature. Payment of the penalty will discharge the possibility of the MMO prosecuting the offence. However, if a financial administrative penalty is not paid within the required timescale (28 days), the matter will proceed to the competent court. MMO can also impose other sanctions such as the seizure of catch, the variations of a licence or its revocation. In cases where MMO decides to prosecute the case, the rules of English criminal procedure will apply to the case and the case will be heard in the first instance by a Magistrates' Court.

In Scotland, Marine Scotland imposes administrative penalties.⁹⁵ Marine Scotland Compliance may also report infringers to the Crown

⁹¹ D.Lgs. 4/2012, GU 01/02/2012 n. 26, arts 7–9.

⁹² *Ibid.*, arts 10–12.

⁹³ *Ibid.*, art 13.

⁹⁴ Marine and Coastal Access Act 2009, s 294; The Sea Fishing (Penalty Notices) (England) Order 2011, and Marine Management Organisation, 'Fishing offences: Penalties and inspections' (2014) <<https://www.gov.uk/government/publications/fishing-offences-financial-administrative-penalties>>.

⁹⁵ Marine (Scotland) Act 2010, Pt 7.

Office and the Procurator Fiscal Service, i.e., Scotland's prosecution service, which indicates that criminal sanctions may also be imposed on infringers. In these cases, the case will follow the normal trajectory of criminal proceedings in Scotland.

3.4.3 Interim conclusions: judicial accountability in the shared enforcement mechanisms between EFCA and the national authorities

The analysis carried out above shows that EFCA's activities in the process of shared enforcement of the CFP cannot be reviewable in direct actions before the EU courts, due to the lack of direct legal effect which EFCA's enforcement policies or inspection report would need to produce to be reviewable. However, this gap in judicial accountability could be regarded as being compensated for by the possibility to review these acts indirectly through a preliminary question of validity under Article 267 TFEU. Furthermore, actions for damages against EFCA's activities can be brought before the EU courts. There is also a gap in judicial accountability with regard to EFCA's omissions (i.e., to draft a JDP or to carry out an inspection), as in such cases neither a direct action for failure to act nor a preliminary question of validity is open to the applicant, due to the lack of an obligation on the part of EFCA to carry out those very activities.

4. CONCLUSIONS

EFCA has been granted mostly coordinating powers, with the majority of enforcement activities concerning the Common Fisheries Policy remaining the responsibility of the MS. The two enforcement powers which EFCA shares with the national enforcement authorities are the possibility to set up the Joint Deployment Plans containing general criteria for the implementation of enforcement policies by the MS and to carry out inspections in international waters. All other enforcement powers (i.e., monitoring and sanctions) and inspections in most cases are exercised by the MS.

The analysis of the legal accountability framework for the shared enforcement activities of EFCA has revealed that there are some gaps in judicial accountability, in that direct actions against EFCA activities will not readily be heard by EU courts. The gap can be considered as compensated for by the possibility to challenge these activities before national courts through a preliminary question of validity. Another gap is the lack of judicial accountability for EFCA's failures to act. In turn, this

shortcoming can perhaps be compensated for through a full and complete system of political accountability, which does not seem to present any gap, because the strict financial accountability set-up compensates for a weaker system of institutional accountability.