

North Sea Advisory Council



NSAC Advice Ref 5-1516

Reflections and recommendations on the consultation procedure by Member States regarding Article 11 of the CFP (Regulation (EU) No 1380/2013)

The NSAC adopted this paper at its Executive Committee meeting in Den Haag on 27 September 2016. Aware that the North Sea (Scheveningen) Group has established a technical expert group (**Fish-ENVI technical group**) '*to ensure continuous cooperation at a regional level in formulating joint recommendations set out in Article 11 and in Article 18 paragraph 3 of the fisheries basic regulation concerning obligations under Union environmental legislation*' (Terms of Reference of Fish-ENVI, 10 July 2014), and that these ToRs specify the role of **Ad-hoc groups by initiating Member State**, the NSAC presents this paper to the **High Level Group** to inform the procedure for consulting the Advisory Council by the initiating Member State.

1. Introduction

- 1.1 Article 11 of the 2013 CFP basic regulation empowers Member States to adopt conservation measures contributing to an ecologically coherent network of MPAs, in order to meet their obligations under Article 13(4) of Directive 2008/56/EC [Marine Strategy Framework Directive], Article 4 of Directive 2009/147/ED [Birds Directive] and Article 6 of Directive 92/43/EEC [Habitats Directive].
- 1.2 The previous CFP was unclear on the procedure to be followed when a Member State proposed fisheries management measures in a marine area for the purpose of implementing EU environmental legislation in their sovereign waters. Article 11 of the new CFP addresses this deficit by defining the process.
- 1.3 A number of 'initiating Member States' (iMS) have opened discussions under the Article 11 procedure, including the UK, Belgium, Netherlands, Germany and Denmark,



although only one delegated act (for ten reef sites in Danish waters) has so far been adopted by the Commission.

- 1.4 Article 18 of the CFP addresses the issue of regional cooperation in agreeing conservation measures. Member States with a 'direct management interest' in the fishery to be affected by the proposed measures may agree to submit joint recommendations and, if they do so, must cooperate in formulating these. In addition, Art 18(2) states that these Member States must also consult the 'relevant Advisory Councils'.
- 1.5 However, Article 18 gives no guidance on the specific consultation requirements with ACs. In practice, consultation is variously informal or formal, in writing or face-to-face, although none of these approaches is specified in Article 18.
- 1.6 Given this lack of prescription, in practice the NSAC has been experiencing a lack of uniformity in the approach taken by different Member States. Generally, the NSAC is invited to engage in 'informal consultation' followed by 'formal consultation', by which time all the Member States involved may be largely in agreement. Informal consultation generally appears to have the purpose of ascertaining initial views from NSAC stakeholders. In contrast, formal consultation generally serves to invite feedback on a near-final agreement among the Member States involved. However, such a distinction has not always been made clear and there is a lack of consistency in when and how ACs are consulted.
- 1.7 The NSAC has two main concerns over the range of consultation procedures conducted to date by Member States:

(1) The distinction between informal and formal consultation, and when this should trigger engagement with the AC, has not always been made clear by the iMS, thereby compromising the NSAC's preparedness and opportunity to give formal advice. For example, the NSAC was, on one occasion, invited to engage in an 'informal consultation' when in fact it was the NSAC's only opportunity to contribute advice, with no formal consultation subsequently offered.

(2) Article 11 sets out standardised timescales for submitting and approving joint recommendations for the measures to which the article relates. However, because the Member States' approach so far appears to have been to engage in informal discussions before triggering the formal Article 11 process, and because Article 18 gives no guidance on the methods of consultation, the steps taken with the NSAC to develop joint recommendations vary. In fact, deadlines for the NSAC's response(s) are typically set at the iMS's discretion. As a result, the NSAC has sometimes found itself expected to respond to a consultation procedure, whether formal or informal, in a timescale too short to take account of the time constraints of the NSAC's own internal procedures for approving advice.



The preparation of NSAC advice generally requires the appointment of a small drafting group, followed by circulating the draft to a working group, in this case the NSAC Spatial Planning Working Group, for their comment. This is then followed by revision of the draft, in most cases (i.e. unless there is a timely Executive Committee meeting scheduled in the calendar), and by the Executive Committee's approval of the advice by written procedure. This process can take up to ten weeks, with eight weeks being the minimum period applicable to ensure NSAC members have had the opportunity to review and comment on the documents presented, feedback their views and agree a consensus position. These timescales are particularly relevant in relation to Article 11, with the views held by NSAC members in relation to conservation measures often varying. For the NSAC to be able to provide a written response to the consultation, as explicitly provided for in Article 18, these time periods should be accommodated, where possible.

1.8 . However, the NSAC also observes that in practice the overall time taken for Member States to agree and submit a joint recommendation to the Commission is often significantly longer than stipulated in Article 11. As outlined above, there appear to be lengthy informal discussions before the formal process begins. This ultimately results in delayed protective measures for Natura 2000 sites, to the potential detriment of delivering an ecologically coherent European network of effectively managed sites. We would not wish for the procedure, and therefore protection, to be delayed further and expect that the consultation procedures can be accommodated within the existing planned timescales.

1.9 The NSAC appreciates that the Member States are also learning to implement a relatively new and untested process under Articles 11 and 18, and that under these circumstances some variation in approach is inevitable. However, in the interests of promoting a uniform and transparent, best practice approach to stakeholder engagement, the NSAC makes the following recommendations to the High Level Scheveningen Group and the Commission on the Article 11 consultation procedure.

2.0 Recommendations

2.1 The iMS should, at the outset, inform the NSAC of the indicative projected timeline for drafting and consulting on their proposed fisheries management measures, factoring in the NSAC's own response time capability (see below), and specifying which interactions with the AC are intended as, respectively, informal and formal stages in the consultation procedure.

2.2 The NSAC supports the approach of one or more initial informal consultations by the iMS, in order that the latter can take account of any stakeholder knowledge, concerns or other issues that might assist the iMS in formulating its proposed joint recommendation.

2.3 This initial, informal consultation should be conducted in a face-to-face meeting with interested stakeholders of the NSAC. For this purpose, the iMS should invite the NSAC



Secretariat to schedule such a consultation on the agenda of the Spatial Planning Working Group.

- 2.4 Subsequent to the meeting, the NSAC should be allowed ten weeks, and a minimum of eight weeks, to provide the Executive Committee's adopted written response (see 1.7(2), above) to the iMS.
- 2.5 As demonstrated by some Member States, once the proposal is well advanced but not concluded, the iMS should invite further feedback from NSAC representatives (typically one each from the industry and from the 'other interests' group) by their participation as observers in at least one Ad Hoc (Scheveningen) Group meeting, involving also Member States with a direct management interest, scientists, and observers from the Commission (both DG Mare and DG Envi).
- 2.6 Once the joint recommendation is near final, the NSAC should be formally consulted in a face-to-face meeting with the iMS, and final written feedback invited, as in 2.3 and 2.4 (above), again accommodating the timescales outlined above.
- 2.7 Whilst there is no guarantee that consensus advice can be produced by the NSAC in relation to these measures, the above procedure should at least provide the flexibility to make a response more possible. However, we recommend that the timescales we have outlined are incorporated within the iMSs' existing planned timescales in order to avoid extending the process for agreeing a joint recommendation further, which would result in further delays to the adoption of conservation measures.
- 2.8 Whereas these recommendations address consultation on the formulation of joint recommendations as set out in Articles 11 and 18, we consider that they should also be taken into account in the implementation of Article 20 (Member State measures within the 12 nautical mile zone) where the conservation and management measures to be adopted by a Member State are liable to affect fishing vessels of other Member States. The NSAC highlights that, under Article 20(2) the measures can only be adopted after consulting the relevant Advisory Councils (as well as the Commission and relevant Member States) on a draft of the measures, which must be accompanied by an explanatory memorandum demonstrating, inter alia, that the measures are non-discriminatory. Article 20(2) also contains a clear minimum timescale, stating that '[f]or the purpose of such consultation, the consulting Member State may set a reasonable deadline which shall, however, not be shorter than two months'.

