Response

to the Commission's Green Paper on the reform of the Common Fisheries Policy

ClientEarth
Justice for the Planet

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CONTENTS

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1. Introduction

1.1. Background

1.1.1. The failings of the CFP and the need for reform

The Common Fisheries Policy (CFP) aims to:

- protect and conserve living aquatic resources;
- limit the environmental impact of fishing;
- provide for sustainable exploitation;
- apply a precautionary approach;
- implement an ecosystem based approach; and
- be consistent with other Community policies, including in relation to the environment[1].

However, so far, the CFP has failed to achieve these goals. As mentioned in the Commission's Green Paper on the reform of the Common Fisheries Policy itself, 88% of EU fish stocks are overfished (compared to a global average of 25%), around 30% of assessed stocks in the EU are outside safe biological limits, and 93% North Sea cod are fished before they can breed[2]. At the same time, large parts of the EU fleets are not profitable (and/or highly subsidised).

Thus, the CFP is generally acknowledged to have failed to achieve its objective of the sustainable exploitation of marine resources. Some of the main reasons for this lie in the systemic failure of a piecemeal system of rules and regulations that has a short-term outlook, encourages illegal and unsustainable behaviour, and has no effective enforcement mechanisms. The Green Paper itself identifies five main structural failings: fleet overcapacity, imprecise policy objectives resulting in insufficient guidance, a short-term focus in decision-making, insufficient industry responsibility and poor compliance.

[1] See Article 2, Council Regulation 2371/2002/EC on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (the 'Basic Regulation').
[2] See section 3, p. 7, para 4 of the Green Paper.

At the same time, the CFP is a part of a much wider, complex, and often unwieldy web of international, EU and national legal regimes in relation to the fisheries and the marine environment, which are often not being effectively applied in relation to EU fisheries.

In its Green Paper on the reform of the Common Fisheries Policy (CFP), the Commission suggests that

'*a whole-scale and fundamental reform of the Common Fisheries Policy (CFP) and remobilisation of the fisheries sector can bring about the dramatic change that is needed to reverse the current situation. This must not be yet another piecemeal, incremental reform but a sea change cutting to the core reasons behind the vicious circle in which Europe's fisheries have been trapped in recent decades'.*

ClientEarth agrees with this analysis. This ClientEarth response to the Green Paper is complementary (and meant to be read in conjunction with) the joint ClientEarth/Marine Conservation Society (MCS) response already submitted by ClientEarth and MCS[3]. In their joint response MCS and ClientEarth propose a new holistic ecosystems-based approach to fisheries managements (which they refer to as the 'Fishing Credits System') and they identify three core objectives for a reformed CFP:

- **effectively using an ecosystems based approach**;
- **applying the precautionary principle in practice**;
- **achieving consistency with other EU (and international) policies, in particular in relation to the environment**.

The MCS/ClientEarth joint response deals with all three core objectives, in particular the first two. This current response aims to address the third goal in more detail than was possible in the framework of the joint response.

1.1.2. The gap in fisheries management measures relating to environmental protection

Thus, the analysis in section 2 below will show that it is a clear requirement of international and EU law that EU fisheries management must integrate environmental laws and policy into its operation and must comply with existing EU (and international) laws on the environment, in particular as regards the conservation of marine biodiversity and ecosystems, but also in relation to the need to apply an ecosystems approach and the precautionary principle (thereby closely reflecting the core objectives for a reformed CFP identified by ClientEarth and MCS in their joint response).

Legally, there is no doubt about this (see Section 2 below). If the CFP, and indeed any fishing activities regulated under the CFP (or under national laws in relation to territorial waters), do not comply with these EU (and international) requirements, then the CFP and/or those fishing activities are technically in breach of EU (and international) law.

Even though this is so clearly the case, under the current CFP it is often not possible for fishers, Member States or the EU itself to comply with such legal requirements in practice, simply because no adequate fisheries management measures are available either under the CFP or under any other EU law requirements.

[3] See http://ec.europa.eu/fisheries/reform/docs/clientearth_en.pdf).

In the joint ClientEarth/MCS response, one of the reasons identified for this is the '*artificial separation between fisheries and other marine conservation*[4]. The reason for this artificial separation arises out of the way the EC Treaty (until the entry into force of the Lisbon Treaty) has dealt with fisheries. Because, until now, the management of fisheries has been subject to exclusive EU competence, it has not been possible for Member States (and to an extent the EU itself) to comply with their marine protection obligations under EU and international law outside Member State territorial waters (and sometimes even outside the 0-6 nm zone) because Member States have not been allowed to implement or enforce their own fisheries management measures.

At the same time, although the current CFP contains language expressing a general aspiration to comply with environmental laws and principles (see Section 2 below), the actual measures that the CFP intends to be used for conservation are limited to **fish stock conservation** only[5]. The CPF contains no specific language which would allow **fisheries management measures** for the **conservation of the marine environment and biodiversity in general**, rather than in relation to the conservation of fish stocks. The only real exception that there has been so far relates to appropriate assessments under the Habitats Directive, which fishers are obliged to carry out according to EU case law[6], and which are specific measures required under EU law and can therefore satisfy the requirement that all fisheries management measures need to be carried out subject to EU law (not national) requirements (i.e. complying with the condition of EU competence in relation to fisheries management and conservation).

The question that needs to be answered is not whether it is true that fisheries rules (and management) need to integrate (and comply with) environmental law, but rather how this is to be reflected in the relevant legal and practical fisheries management frameworks, particularly given issues surrounding shared and exclusive competence of the EU and Member States in relation to fisheries and environmental policies, and the changes brought about by the Lisbon Treaty, both in relation to those competences and in relation to the relevant EU law-making procedures.

In this context, please also refer to sections 3.3.2 and 4.1 of the joint ClientEarth/MCS response.

1.1.3. About this response

To explore these issues and propose a potential approach for resolution, this response will:

- set out the EU's and the EU Member States' legal duties that exist in relation to the integration of EU fisheries and other EU and international laws regarding the marine environment - this will include, for example, the Convention on Biodiversity[7] (CBD) and the Convention on the Law of the Sea (LOSC)[8] (amongst others) at the international level, and the Treaty itself, as well as the Marine Strategy Framework

[4] See section 3.3.2, para 7 and preceding paragraphs.
[5] see Chapter II of Regulation 2371/2002 on the conservation and sustainable exploitation of fisheries under the Common Fisheries Policy ('the Basic Regulation').
[6] See *Waddenzee* case in footnote 31.
[7] Convention on Biodiversity 1992, see http://www.cbd.int/convention/convention.shtml;
[8] United Nations Convention on the Law of the Sea 1982, see http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

Directive[9] (MSFD), the EIA[10] and SEA[11] Directives and the Habitats[12] and Birds[13] Directives at EU level (see entire Section 2 below);
- set out the reformed legal structure in relation to fisheries under the Lisbon Treaty (as relevant and appropriate) (see Section 3 below); and
- propose ways in which the legal framework of a reformed CFP could meet the EU's and Member States' integration requirements (See Section 4 below);
- set out very briefly some of the basic conditions that need to be met by EU fisheries outside EU waters (See Section 5 below).

1.2 About ClientEarth

ClientEarth is a non-profit environmental law, science and policy group working in the EU and beyond. ClientEarth uses advocacy, lobbying, litigation and research in its efforts to protect the environment and acts for people and the planet. Through its use of the legal system, allied with current scientific knowledge, it has achieved a pedigree of success in its work in other environmental areas, in particular in relation to climate change and energy policy, which it is hoping to emulate in relation to fisheries and marine issues.

2. The integration principle

2.1. International law

The EU and/or its Member States are signatories to a series of international conventions which either contain obligations (express or by implication), or call for, the integration of fisheries management with environmental, conservation (and general coastal management) rules. This includes in particular the following duties under the LOSC:

- only to **exploit natural resources in accordance with environmental protection and conservation** duties (Article 193, LOSC);
- to take account of ecological/ environmental considerations (Article 61(3) and 61(4), LOSC);
- to prevent the impact of fishing activities on marine biodiversity outside their jurisdiction[14]; and
- to prevent over-exploitation of living marine resource (Article 61, LOSC).

Other international instruments and agreements also contain integration requirements/messages. The Convention on Biodiversity, for example establishes in Article 6(b) that

'[e]ach Contracting Party shall, in accordance with its particular conditions and capabilities: ... b integrate, as far as possible and as appropriate, the conservation and sustainable use

[9] Directive 2008/56/EC establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) (OJ L 164, 25.6.2008, p. 19).
[10] Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment; (OJ L 175, 5.7.1985, p. 40).
[11] Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (OJ L 197, 21.7.2001, p. 30).
[12] Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22/07/1992, p. 7).
[13] Directive 79/409/EEC on the conservation of wild birds (OJ L 103, 25.4.1979, p.1).
[14] See for example Articles 62(4), Articles 116–120 and 145, LOSC.

of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies."

Similarly, Article 10 (a), CBD requires that

'[e]ach Contracting Party shall, as far as possible and as appropriate: (a) integrate consideration of the conservation and sustainable use of biological resources into national decision-making".[15]

Other examples providing for integration requirements and references include:

- Chapter 17, Agenda 21[16];
- the OSPAR Convention[17];
- the Helsinki Convention[18];
- the SPA and Biodiversity Protocol of Barcelona Convention[19];
- the EU's 6th EAP[20]);
- the Johannesburg Plan of Implementation[21] (under the World Summit on Sustainable Development).

The integration principle in international law is also supported by the requirement to apply the precautionary principle and to take an ecosystems-based approach in relation to fisheries management and marine conservation[22].

[15] Decision II/10 paragraph 2, 3 and Annex I (ii), (iii), (iv) and Annex II paragraph 4 (a) also contain references to integration.

[16] See for example paras 17.1, 17.5, 17.6, 17.21 and 17.22.

[17] See for example Article 2(1)(a):), *'The Contracting Parties shall, in accordance with the provisions of the Convention, take all possible steps to prevent and eliminate pollution and shall take the necessary measures to protect the maritime area against the adverse effects of human activities so as to safeguard human health and to conserve marine ecosystems and, when practicable, restore marine areas which have been adversely affected.*

[18] See for example Article 3(1): '*The Contracting Parties shall individually or jointly take all appropriate legislative, administrative or other relevant measures to prevent and eliminate pollution in order to promote the ecological restoration of the Baltic Sea Area and the preservation of its ecological balance'.*

[19] See for example Article 3(1)(a): *'Each Party shall take the necessary measures to: (a) protect, preserve and manage in a sustainable and environmentally sound way areas of particular natural or cultural value, notably by the establishment of specially protected areas'.*

[20]See for example Recital 35 of the Preamble: '*On the basis of an assessment of the state of the environment, taking account of the regular information provided by the European Environment Agency, a review of progress and an assessment of the need to change orientation should be made at the mid-term point of the Programme.'*

[21] See for example para 30(b) and(e): '*(b) Oceans, seas, islands and coastal areas form an integrated and essential component of the Earth's ecosystem (...) Ensuring the sustainable development of the oceans requires effective coordination and cooperation, including at the global and regional levels, between relevant bodies, and actions at all levels to: (b) Promote the implementation of chapter 17 of Agenda 21, which provides the programme of action for achieving the sustainable development of oceans, coastal areas and seas (...); (e) Promote integrated, multidisciplinary and multisectoral coastal and ocean management at the national level and encourage and assist coastal States in developing ocean policies and mechanisms on integrated coastal management'.*

[22] See for example: **precautionary principle**: Principle 15, of the Rio Declaration, the FAO Code of Conduct for Responsible Fisheries (CCRF) – non-binding; and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNIA) – binding – which share this statement: '*States should apply the precautionary approach widely to conservation, management and exploitation of living aquatic resources in order to protect them and preserve the aquatic environment. The absence of adequate scientific information should not be used as a reason for postponing or failing to take conservation and management measures.*' **Ecosystems approach**: UNGA Resolution 62/177, CBD, COP Decision II/8 (para 1), Decision II/10 (Annex I(v) and Annex II, para 2a)), Decision IV/5 (Annex section B.1) and Decision V/6 (the ecosystem approach is the primary framework for action under the CBD Convention), the Johannesburg Plan of Implementation under the WSSD, para 30 (d), 32(c), 44(e) and 70(b).

These principles are underpinned not only by provisions giving coastal states **rights** of **exploitation, conservation and management** of (living) natural resources[23]; but crucially also giving them the following duties, rights and powers:

- **jurisdiction** in relation to the **protection and preservation of the marine environment**, for example in their exclusive economic zones (EEZs)[24];
- **duties** to comply with **fisheries conservation and management measures** in other states'[25];

and, most importantly:

- **duties** to **preserve** and **protect** the marine environment[26].

Therefore, it is important to recognise that in addition to international law rights to the exploitation of natural resources, there are also concurrent international law duties to conserve and protect the marine environment, and that, more than that, there is a need and a duty to integrate fisheries management and environmental protection requirements in order to achieve the sustainable exploitation of resources and the required degree of conservation and protection of the marine environment.

2.2. EU law

The principle of integration is also reflected in the law of the European Union. It is a general principle of EU law, according to the Treaty and case law, and, in theory at least, it is already part of EU fisheries policy.

2.2.1. The EU Treaty

The principle that environmental protection requirements must be integrated into all EU policies and activities – i.e. the integration principle - is established in Article 37 of the Charter of Fundamental Rights of the European Union and in Articles 7 and 11 of the Treaty on the Functioning of the European Union (TFEU). Crucially, it is regarded as a binding principle of EU law[27].

In this context '*environmental protection requirements*' means measures needed to ensure a high level of environmental protection, in compliance with Article 37 of the Charter of Fundamental Rights (see above) and with Article 191(2), TFEU. They include the objectives, principles and conditions for action set out in Article 191, such as the precautionary, preventive[28] and polluter pays principles. In addition, it is accepted that any reference to EU Treaty law also includes EU secondary environmental legislation, such as the Habitats Directive (92/43/EEC).

Article 11, TFEU makes it very clear that all other EU policies and activities need to integrate the environmental protection requirements of the Treaty. Fisheries policy is not excluded. Indeed rules under the Common Agricultural Policy (which includes the CFP - see Article

[23] See for example Articles 21 (d) and 56(1)(a), LOSC.
[24] See for example Article 56(1)(b)(iii), LOSC.
[25] See for example Article 62(4), LOSC.
[26] See for example Article 192, LOSC.
[27] See *Greece v Council* -Case 62/88, at para 20.
[28] See also cases C-157/96 and C-180/96, para. 64.

38(1), TFEU) oblige farmers to comply with EU environmental legislation (e.g. in the form of 'cross-compliance' requirements) and meet high environmental standards (e.g. in the form of 'cross-compliance' requirements, agri-environment schemes, and 'good farming practice'). There is no reason why fisheries should be treated any differently.

In addition, an ecosystems based approach is fast becoming more and more crucial to the protection of EU biodiversity in general (including marine biodiversity) – as witnessed by the ongoing TEEB ('The Economics of Ecosystems and Biodiversity') studies and reports currently being carried out at EU level. Of course, the ecosystems based approach is also at the heart of the new marine management framework set out in the Marine Strategy Framework Directive (see also section 2.2.3 below).

2.2.2. EU fisheries policy

In addition to the general legal requirements under EU law for integrating fisheries management with EU environmental law, the CFP itself requires this too (at least in theory). Articles 1 and 2 of the Basic Regulation incorporate environmental protection requirements into the CFP, including in particular the precautionary principle and the ecosystem based approach, as well as requirements in relation to conservation and the limitation of the environmental impact of fishing in marine ecosystems. It should be noted that complying with these principles is expressed in broad terms and is not restricted only to compliance with the fairly limited environmental protection measures provided for in Chapter II of the CFP Regulation itself. In fact, Article 2.2.d stipulates consistence with other Community policies, including environmental policies, as a principle of good governance.

Moreover, the Commission Action Plan to integrate environmental protection requirements into the Common Fisheries Policy[29] recognizes that the CFP is based on the environmental objectives of Article 174 of the EC Treaty (now Article 191, TFEU), in particular the principles of precaution, prevention, rectification at source, the polluter pays principle and the progressive implementation of an eco-system based approach. It also states that the CFP should also address Biodiversity Action Plan measures for Fisheries.

In addition, the Commission Communication on the role of the CFP in implementing an ecosystem approach to marine management[30] stresses the integration principle when arguing for the need to implement an ecosystem approach through the CFP and takes a cross-sectoral approach, referring for example to the Integrated Maritime Policy, the Marine Strategy Framework Directive and the Habitats Directive.

Also, the principle of the application of EU environmental legislation to fisheries has already been accepted in the *Waddenzee* case[31], where the European Court of Justice established that fishing is subject to the provisions of the Habitats Directive (for further information, we attach a legal briefing sent by the Marine Conservation Society to UK competent authorities in relation to this).

[29] COM (2002) 186 final.
[30] (COM (2008) 187 final).
[31] Case C-127/02.

2.2.3. The Marine Strategy Framework Directive

It is the goal of the MSFD to preserve and restore the marine environment '*with the ultimate aim of maintaining biodiversity and providing diverse and dynamic oceans and seas which are clean, healthy and productive*[32].'

To achieve these goals, the MSFD sets up a framework based on the precautionary principle (and the principles of preventive action, rectification at source and the polluter pays principle)[33] and on an ecosystem based approach[34] in order to achieve what it describes as '*good environmental status*'. In this context, coherence with other Community policies is seen as crucial, and the integration of environmental considerations and concerns (and of requirements of international agreements) into all relevant policy areas, including the CFP (mentioned expressly) is a fundamental goal[35]. This includes provisions under the MSFD (reflecting requirements of the LOSC) that fishing activities under a Member State's jurisdiction or control do not cause damage outside that Member States' jurisdiction[36].

It is already clear from the above that the MSFD intends to integrate environmental requirements into the CFP, but this is made even clearer in the MSFD's preamble, which states that the '*Common Fisheries Policy, including in the future reform, should take into account the environmental impacts of fishing and the objectives of this Directive*[37]*'.* The MSFD also says that

'[m]easures regulating fisheries management ***can'*** [note: not **must**] '*be taken in the context of the Common Fisheries Policy, as set out in Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy,* ***based on scientific advice with a view to supporting the achievement of the objectives addressed by this Directive****,* ***including*** *the* ***full closure*** *to fisheries of certain areas,* ***to enable the integrity, structure and functioning of ecosystems to be maintained or restored*** *and, where appropriate, in order to safeguard, inter alia, spawning, nursery and feeding grounds*[38]*.'* (emphasis added)

There are two important points worth noting in this paragraph:

- Where it is necessary to impose fisheries management measures to ensure compliance with the MSFD, these measures do not necessarily **have to be** taken in the context of the CFP (note the use of the word '**can'**).
- Where fisheries measures are taken in the context of the CFP, they are to be based on scientific advice aimed at helping to achieve the MSFD's objectives to maintain and restore ecosystems and to safeguard spawning, nursery and feeding grounds.

In order to achieve these ambitious objectives, the MSFD imposes duties on Member States (all by 15 July 2012) to:

[32] See Preamble, para 3.
[33] See preamble, para 27 and 44.
[34] See Article 1(3) and Preamble, para 8 and 44.
[35] See Article 1(4) and Preamble, para 3, 9, 17, 27 and 45.
[36] See MSFD Article 13(5), 13(8) and Preamble, para 17.
[37] See Preamble, para 40.
[38] Preamble, para 39.

- assess the current status of marine waters[39];
- determine 'good environmental status' for the relevant waters[40];
- set environmental targets and indicators[41];
- establish monitoring programmes[42].

In addition, Member States have to determine programmes of measures (by 2013) in order to reach or maintain 'good environmental status' by 2020[43]. In order to determine 'good environmental status' and the relevant targets and programmes of measures, an ecosystem based approach will be taken which will necessarily encompass the consideration of many fish/fisheries-related factors, including not only a direct assessment of fish stocks themselves (which are required to be within safe biological limits[44]), but also of their importance in the context of the entire ecosystem they are part of (e.g. place in food chain and other ecological considerations[45])and of the impact on the marine environment of fishing activities[46]. In addition, several of the types of programmes of measures described in Annex VI will also include fisheries management measures[47].

The reason for setting out these duties in so much detail here is that the reformed CFP will need to consider them very carefully, as they will directly affect and determine fisheries management measures by imposing specific management targets and conditions and, in fact, management measures, which must be met by Member States, and which will, at least partly, fill the current gap in relation to appropriate fisheries conservation management measures that was identified in section 1.1.2 above.

Although the paragraph in the Preamble mentioned above states that the CFP itself can deal with the required fisheries management measures in this regard, none of the operative provisions of the MSFD repeat this, and neither Article 13, nor Annex VI (on programmes of measures) contain a provision for fisheries management measures to be taken under the CFP rather than under the MSFD, where, as just described, such measures are required under the MSFD to attain 'good environmental status'.

Therefore, it is very clear that the reformed CFP will need to ensure that fisheries management measures are introduced that ensure compliance with the requirements of the MSFD in relation to achieving 'good environmental status'. There is no choice and no discretion in this regard. The only question will be one of organisation and management: Will the required measures be taken in the context of the CFP (and if so, will this satisfy the requirements of the MSFD?) or as part of programmes of measures under the MSFD itself?

[39] Article 5(2)(a)(i) and Article 8 and Annex III.
[40] Article 5(2)(a)(ii) and Article 9 and Annex I and III.
[41] Article 5(2)(a)(iii) and Article 10 and Annex III and IV.
[42] Article 5(2)(a)(iv) and Article 11 and Annex III and V..
[43] See Article 1, 5(2)(b) and Article 13 and Annex VI, and Preamble, para 27 and 29.
[44] Annex I, para 3.
[45] Annex I, para 1, 4, 5, 9 and 10.
[46] Annex II, table 2, under 'physical damage' – abrasion and selective extraction, and under 'biological disturbance' – selective extraction of species, including incidental non-target catches (e.g. by commercial and recreational fishing); 'other physical disturbance' – marine litter.
[47] E.g., input controls (para 1), output controls (para 2), spatial and temporal distribution controls (para 3), management coordination measures (para 4), economic incentives (para 6) (and communication, stakeholder involvement and raising public awareness (para 8)).

3. Legal structure under the Lisbon Treaty

Parts 3.3.2 and 4.1 of the joint ClientEarth/MCS response already mention some of the changes brought about by the Lisbon Treaty and their possible effect on the legal framework required in relation to a reformed CFP. Section 1.1.2 explains some of the underlying issues raised of Part 3.3.2 of the joint response in more detail. Part 4.2 sets out the potential basic legal framework for a reformed CFP and we will not duplicate or repeat what is proposed in part 4.2 here. However, for the sake of completeness, we would refer the Commission to both of these sections of the joint ClientEarth/MCS response, but at the same time we would also make some additional and complementary observations:

3.1. Exclusive and shared competence

The TFEU has clarified (in Article 2) the meaning of exclusive and shared competence. In areas of exclusive EU competence, Member States can only legislate and adopt legally binding acts if they are empowered to do so by the Union or for the implementation of Union acts. In relation to shared competence, Member States can exercise their competence to the extent that the Union has not exercised its competence.

This means that in both areas of competence it is possible for a Member State to legislate as long as it is empowered (expressly in the case of exclusive competence, or implicitly in relation to shared competence) to do so.

3.2 Legislative procedures

As referred to in part 4.1 of the joint ClientEarth/MCS proposal, the TFEU establishes two different legislative procedures in relation to fisheries management. The ordinary legislative procedure applies to the general pursuit of the objectives of the CFP[48], but there is no involvement of the European Parliament in relation to the fixing and allocation of fishing opportunities[49], where the legislative procedure involves a proposal by the Commission, which is subject to qualified majority vote in the Council, but with the Council only being able to change the proposal by a unanimous vote (see part 4.1 of the joint ClientEarth/MCS proposal for more detail). The ordinary legislative procedure also generally applies to environmental measures (with certain exceptions) under Article 192(2), TFEU.

Crucially, the distinction between the two legislative procedures is not drawn on the same lines as the distinction between shared and exclusive competence between the EU and the Member State. Thus, the basic legislative procedure in relation to fisheries is now the ordinary legislative procedure, both in relation to laws subject to shared and exclusive competence (i.e. for fisheries management and conservation). Only in relation to the allocation of fishing opportunities is a different legislative procedure used. At the same time, even though the ordinary legislative procedure may be used both in relation to fisheries conservation measures and other fisheries management measures, fisheries conservation measures are subject to exclusive EU competence and are therefore generally dealt with by way of regulation, as regulations are directly applicable by Member States in relation to all their terms[50] (differently from directives which set up the objectives to be achieved, but leave Member States the competence to chose how to implement them).

[48] See Article 43(2), TFEU.
[49] See Article 43(3), TFEU.
[50] See Article 288, TFEU.

Other management measures (subject to shared competence) on the other hand would not need to be dealt with by regulation, but could be regulated by way of directive (which is binding as to the result to be achieved, but leaves the choice and form of methods to Member States[51]). Particularly in view of the fact that the reformed CFP is likely to involve much stronger regionalisation, and much stronger integration with other areas of EU policy (including in relation to the environment), which may also be subject to shared competence and generally dealt with by directives, this may be seen by some as a potential advantage of the new rules under the Lisbon Treaty.

Annual fishing opportunity allocations would presumably be seen as relating to the conservation of marine biological resources under the CFP (and therefore subject to exclusive competence) and be dealt with by way of regulation.

Therefore, it would be possible to be in a situation where three basic instruments were needed to provide for all aspects of fisheries conservation and management, as well as annual regulations allocating fishing opportunities:

- a regulation subject to ordinary legislative procedure on fisheries management measures which affect the conservation of marine biological resources under the CFP (i.e. fish stock conservation;
- a directive subject to ordinary legislative procedure on fisheries management measures which do not affect fish stock conservation, but could include general biodiversity conservation measures;
- a regulation on the basic system for allocating fishing opportunities (if this is held to be a fish stock conservation measure- otherwise it also be a different legislative instrument) subject to special legislative procedures;
- regulations on the annual setting of fishing opportunities.

Of course, comitology procedures could also be possible in some instances. All of this has the potential for a particularly complicated and confusing legal structure in relation to fisheries, necessitating too many different legislative instruments depending on the legislative procedure required and the nature of the competence involved. Such a situation would obviously not be in the interest of the EU, its Member States or of any of the stakeholders involved in or connected to fishing. Moreover, it would not be in conformity with the EU's better regulation objectives.

4 What is needed for the CFP Reform?

4.1 Integration

As shown in section 2 above, there is no doubt that EU and international legal requirements regarding the protection of the marine environment apply to fisheries management and need to be integrated into the CFP.

As also already mentioned above (in sections 1.1.2 and 2.2.3), the question is therefore not whether it is necessary to make fisheries comply with environmental requirements, but rather how this is to be achieved in terms of the required legal and management framework without allowing for the same loopholes that have existed so far.

[51] Ibid.

4.2 Legal instruments

As seen in section 3.2 above, subsequent to the Lisbon Treaty, this question about the relevant legal and practical management framework is complicated mainly by the fact that there is a mixture of shared and exclusive competence in relation to fisheries management (and different legislative procedures).

As already seen above, it is necessary for the reformed CFP to integrate fisheries and environmental rules and to eliminate artificial distinctions between fisheries and biodiversity conservation measures. Regional (or other relevant) fisheries management bodies would need to be able to deal with fish stock conservation and biodiversity conservation at the same time (as well as other fisheries management measures). It would simply not make sense to split the basic legislation into a directive and a regulation simply because of the different competences of the EU and Member States in relation to fish stock conservation and biodiversity conservation/other fisheries management measures (as set out in the first two bullet points in section 3.2 above). The new rules should provide one holistic fisheries management system, including all types of conservation (fish stock and general biodiversity) and other fisheries management measures.

In addition, directives may not be appropriate in relation to fisheries, as they often (but not always) set minimum standards. EU environmental laws, for example, are generally passed as directives which impose minimum standards for environmental protection, but more stringent national measures can be applied[52]. In relation to fisheries, the Treaty does not provide for the possibility of more stringent measures, and minimum standards would be inappropriate given how ambitious the goals of a reformed CFP need to be in order to fulfil its objectives (see section 1.1.1 above).

Therefore, to avoid this hugely complex situation, it is worth considering whether it would be possible to simplify the legislative approach (including in relation to environmental requirements) and continue to use regulations only for fisheries management and conservation, at least in relation to the basic rules. As already seen (section 3.1 above), it is possible for Member States to legislate in both areas of competence as long as they are empowered to do so. It is therefore possible for a regulation to require Member States to take further measures in order to fully comply with the regulation in question[53].

Where appropriate, provision could also be made for subisidiary legislation, for example to set up regional management bodies and to allow national and regional fisheries management and enforcement rules (as is already the case, for example in relation to the establishment of the Regional Advisory Councils[54]).

Therefore, it should be considered whether the following legislative structure could be employed:

- The first basic regulation would set out the reformed CFP's entire new management system except in relation to the allocation of fishing opportunities. This regulation would cover fish stock and general environmental conservation measures. In relation to fish stock conservation, any powers to be given to regional organisations or Member States would have to be very carefully and expressly delegated to satisfy

[52] See Article 193, TFEU).
[53] See also for example *Commission v UK – Tachographs* – Case 128/78.
[54] Decision 2004/585/£C establishing Regional Advisory Councils under the Common Fisheries Policy.

the requirements of Article 2(1), TFEU regarding exclusive competence. In the areas of shared competence (environmental policy and fisheries management in general), the general management system could also be set up in the regulation, but details could be dealt with by subsidiary legislation. Because of the nature of regulations, management and enforcement structures would need to be carefully delegated.

- The second basic regulation would set up the general system for allocating fishing opportunities. This would be supported by annual regulations allocating fishing opportunities pursuant to the system set up in the second basic regulation. In this regard, we would refer the Commission to Part 4.1 of the joint ClientEarth/MCS response.

If this approach is followed, it will however, be crucially important that clear provisions should be included in each regulation to ensure proper and effective enforcement of the relevant rules by the EU and at national level. In addition, it will be important that the regulations and the processes, rules and procedures they introduce, should be transparent and should provide for rights of public access to information, public participation and access to justice as required by the 1998 Aarhus Convention[55].

4.3 Legal base

Closely connected to the question of legislative procedures is the issue of the legal basis for the relevant legal instruments. A reformed CFP will have Article 43, TFEU as its legal base. However, because of the need for fisheries management measures that are able to address and comply with environmental law requirements (see section 4.1 above) and because of the crucial and core importance of environmental considerations in the reformed CFP, it may be necessary to consider the possibility of a joint legal base (to refer to Article 191, TFEU, as well as Article 43, TFEU) for the new basic CFP instruments.

5 The external dimension

There is a clear ethical obligation and an ecological imperative that EU fishers should comply with all relevant and appropriate CFP and environmental requirements when fishing outside EU waters. This is confirmed by several specific international and EU law requirements described in section 4.1 above (e.g. in the MSFD) that require Member States and fishers subject to their control and jurisdiction to comply with relevant environmental and (fisheries management) requirements even outside area of jurisdiction of the Member State[56].

6 Conclusion

6.1 Integration

It is abundantly clear that the CFP and the fishing activities it regulates are subject to and need to comply and be integrated with all relevant EU and international environmental law requirements, particularly as regards the MSFD, but also the Habitats Directive and others.

[55]Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998.

[56] See Article 13(5), 13(8) and Preamble, para 17, MSFD; Article 4(b), CBD.

Express provisions need to be included in the reformed CFP to ensure that the current situation does not continue, which prevents fishers, Member States and the EU itself from complying with their legal obligations in this regard, purely because no provision is made for fisheries management measures that are aimed at biodiversity conservation, rather than fish stock conservation. Fisheries management measures in future must allow for measures which are necessary to protect marine biodiversity in general and which comply with all relevant environmental legislation.

6.2 Legislative procedures

The complex situation in relation to legislative procedures and shared and exclusive competence could be dealt with most easily by continuing to use regulations (and subsidiary legislation) in relation to fisheries, even though the use of directives would now be possible in certain circumstances.

As shown above, directives will often not be appropriate legal tools in relation to fisheries management. Regulations could be used even in relation to issues subject to shared competence, as regulations can make provision for further measures. In addition, the use of regulations would enable a holistic management approach ensuring the integration of environmental requirements and consisting of fewer basic instruments. The need for different legal instruments would merely arise out of the necessity for different legislative procedures under Article 43(2) and (3) (see section 4.1 of the joint ClientEarth/MCS response). This would contribute to the simplification of the CFP and would be in accordance with principles of better regulation.

6.3 The need for transparency and robust compliance and enforcement rules

Any rule or system of rules is only as good as its implementation and enforcement. Experience shows that the reformed CFP, whatever its rules will be, will stand or fall with the quality of compliance and the strength of its potential enforcement mechanisms. Therefore, it is absolutely crucial that as well as ensuring that fisheries and environmental management and rules are integrated, there must be robust compliance and enforcement rules, which guarantee Member States and/or potential regional management organisations the necessary monitoring and enforcement powers. This is also particularly important if, as suggested above, the regulatory system is to be kept simpler by using regulations rather than directives (as regulations may otherwise be more difficult to enforce by Member States and/or regional management organisations – the necessary powers will need to be formulated very carefully and precisely).

In this context, the joint CFP reform proposal submitted by ClientEarth and MCS sets out the basic structure for just such a system with a strong emphasis on good compliance through:

- strong incentives for compliance and for sustainable fishing techniques (leading to good compliance) through fishing credits system and financial aid rules (amongst other tools);
- intense monitoring and surveillance;
- increased incentive for industry stewardship;
- wide stakeholder involvement and public transparency;
- improved traceability through the supply chain;

and robust enforcement, through a variety of strong sanctions (including through an extension of rules already envisaged in the new Control Regulation[57]), e.g.:

- penalty points;
- deduction of credits (under proposed credits allocation system);
- cancellation of public aid;
- licence revocation;
- cross-compliance requirements in relation to CFP and environmental law rules.

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[57] COM (2008) 721 final).

Annex I

MARINE CONSERVATION SOCIETY

LEGAL BRIEFING NOTE IN RESPECT OF COMMERCIAL FISHING ACTIVITIES AFFECTING NATURA 2000 SITES.

The operative provision

Article 6 (3) of the Habitats Directive[58] states:

> *Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.*

In short, this means that any plan or project likely to have a significant effect on a Natura 2000 site should be the subject of an appropriate assessment, a form of environmental impact assessment. To understand whether this Article applies to the issue of fishing vessel licences their relevant operative provisions need to be properly understood.

Is commercial fishing a 'plan or a project'?

The terms 'plan' and 'project' and not defined in the Habitats Directive.

However there is good guidance issued by the European Commission,[59] which sets out that the terms should be broadly interpreted:

> Article 1(2) of Directive 85/337/EEC provides that 'project' means:
>
> > *'the execution of construction works or of other installations or schemes — other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources.*'

[58] Directive 92/43/EEC
[59] http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf accessed 13th July 2008

> As can be seen, this is a very broad definition, which is not limited to physical construction. For example, a significant intensification of agriculture which threatens to damage or destroy the semi-natural character of a site may be covered.

This broad interpretation of the term is based on established EU law and the ECJ decision in *Kraaijeveld* case C-72/95.

Similarly, the term 'plan' has been given a very broad interpretation. The Commission guidance makes a distinction between statutory plans such as plans drawn up for land-use planning and mere policy statement, but goes on to stress:

> An example [of a policy statement] might be a general plan for sustainable development across a Member State's territory or a region. It does not seem appropriate to treat these as 'plans' for the purpose of Article 6(3), particularly if any initiatives deriving from such policy statements must pass through the intermediary of a land-use or sectoral plan. However, where the link between the content of such an initiative and likely significant effects on a Natura 2000 site is very clear and direct, Article 6(3) should be applied.

In *Commission v France* case 256/98 the Advocate General stated in his opinion that a broad interpretation of the term 'plan' should be used, based on the outcome of the activity:

> *the adoption of a narrow interpretation of the term 'plan' would be contrary to both the wording of Article 6(3) ('[any] plan or project'), and the conservation objectives which the designation of SACs seeks to pursue. As the possible future development of a site depends primarily on the assessment, it seems to me that the obligation ratione materiae to carry out a site assessment must therefore cover all development activities with the exception of those which are unlikely to have any significant effect, either individually or in combination with other development activities, on the site's conservation objectives. This is consistent with the principle of Community law that exceptions to the general rule (here, development activities which do not require a site assessment) are to be interpreted restrictively.*[60]

This opinion was adopted by the ECJ in its judgment.[61]

Because of the broad terminology, without specific reference to the fishing sector, there is a danger that those engaged in fisheries management may have assumed that in some way the Habitats Directive did not apply to plans or projects proposed and implemented for the commercial fishing sector, despite the designation of many marine sites. This matter came to a head in *Waddenzee* case C127/02 where the ECJ found:

> *mechanical cockle fishing which has been carried on for many years but for which a licence is granted annually for a limited period, with each licence entailing a new*

[60] Opinion of the Advocate General *Commission v French Republic* Case C-256/98 at 32
[61] *Commission v French Republic* Case C-256/98 at 38

> *assessment both of the possibility of carrying on that activity and of the site where it may be carried on, falls within the concept of 'plan' or 'project' within the meaning of Article 6(3) of the Habitats Directive.*[62]

This confirmed that fishing could be a plan or project, but there is still a reluctance among fisheries managers to fully implement appropriate assessments across all UK & NI fisheries. The facts of the *Waddenzee* case have led to an erroneous interpretation which distinguished it from much UK & NI fisheries management. There is a reference in the case to the Waddenzee fishery being an annually licensed fishery. This has led to an assumption within fisheries management that the majority of commercial fisheries in the UK and NI are not 'plans or projects' as they are not, apparently, annually licensed. If this is the justification for not considering fisheries management measures as 'plans or projects' it is our view this is incorrect for two reasons.

Fishery Management

Firstly. it is true that the *Waddenzee* ruling considered an annually licensed fishery and found that to be within the definition of 'plan or project' but it does not automatically follow that a fishery which is not licensed on that basis is not a 'plan or project'. Indeed the ECJ was considering whether the annual licensing was an obstacle to its being a 'plan or project' and not part of their defining characteristics:

> *The fact that the activity has been carried on periodically for several years on the site concerned and that a licence has to be obtained for it every year, each new issuance of which requires an assessment both of the possibility of carrying on that activity and of the site where it may be carried on, does not in itself constitute an obstacle to considering it, at the time of each application, as a distinct plan or project within the meaning of the Habitats Directive.*[63]

The result is that, in our view, commercial fishery management itself falls within the broad definition of 'plan or project' as the link between the content of commercial fishery management and the effects of fishing activities on Natura 2000 sites are very clear and direct. As a result commercial fishery management itself should undergo an appropriate assessment, before allowing fishing activities likely to have a significant effect on Natura 2000 sites to continue.

Fishing Vessel Licences

In the past there has been discussion as to whether it is the vessel, which is authorised rather than fishing activity. This has led to arguments that the activity is authorised under the ancient and unwritten public right to fish, while it is the vessel which is licenced. As a result there is no plan or project for the purposes of the Directive.

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[62] *Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Voge v Staatssecretaris van Landbouw, Natuurbeheer en Visserij,* C -127/02 at 29

[63] ibid at 28

> There is common law public right to fish in England and Wales. Activities undertaken under this common law are not authorised by any competent authority, our view is that these common right activities are not plans and projects in terms of Article 6(3) unless they require further authorisation from a competent authority.[64]

These argument are not substantiated in statute. The Sea Fisheries (Conservation) Act 1967 under which vessel licences are granted, states at s4 that it is the activity and not the vessel which is being licensed:

> *The Minister may by order provide:*
>
> *(a) that in any specified area within the relevant British fishery limits fishing* [our emphasis] *by fishing boats ……. is prohibited unless authorised by a licence granted by one of the Ministers.*

This wording is mirrored in the Sea Fish Licensing Order 1992, which states at s3(1):

> *Subject to [*some exceptions*], fishing* [our emphasis] *anywhere by fishing boats which are registered in the United Kingdom or are British Owned is hereby prohibited unless authorised by a licence ….*

Licenses are issued biennially rather than annually, but otherwise it is difficult to see any substantive difference between UK & NI licences and those of the Waddenzee. In short it is our view that these licences authorise a 'plan or project' and should therefore be subject to the provisions of Article 6 (3) of the Habitats Directive.

The effects of Article 6 (3)

Now that it has been established that licences and broader fisheries management are plans and projects under the Directive, rapid measures need to be taken to conform with the Directive. These will include appropriate assessment of all fisheries likely to have a significant effect on Natura 2000 sites and, where necessary, closure of the area to the fishery.

[64] DEFRA Letter regarding plans and projects – Article 6 (3) of the Habitats Directive to the Association of Sea Fisheries Committees 24th September 2004 referred to in Symes, D. & Boyes, S. (2005) *Review of Management Regimes and Relevant Legislation in UK Waters* University of Hull