



HAL
open science

How to improve the link between the Common Fisheries Policy and the Nature Restoration Law proposal?

Betty Queffelec

► To cite this version:

Betty Queffelec. How to improve the link between the Common Fisheries Policy and the Nature Restoration Law proposal?. UBO, UMR AMURE, IUEM Technopôle Brest-Iroise, rue Dumont d'Urville, 29280 Plouzané; The Greens-EFA Group in the European Parliament. 2023. hal-04226963

HAL Id: hal-04226963

<https://hal.science/hal-04226963>

Submitted on 3 Oct 2023

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

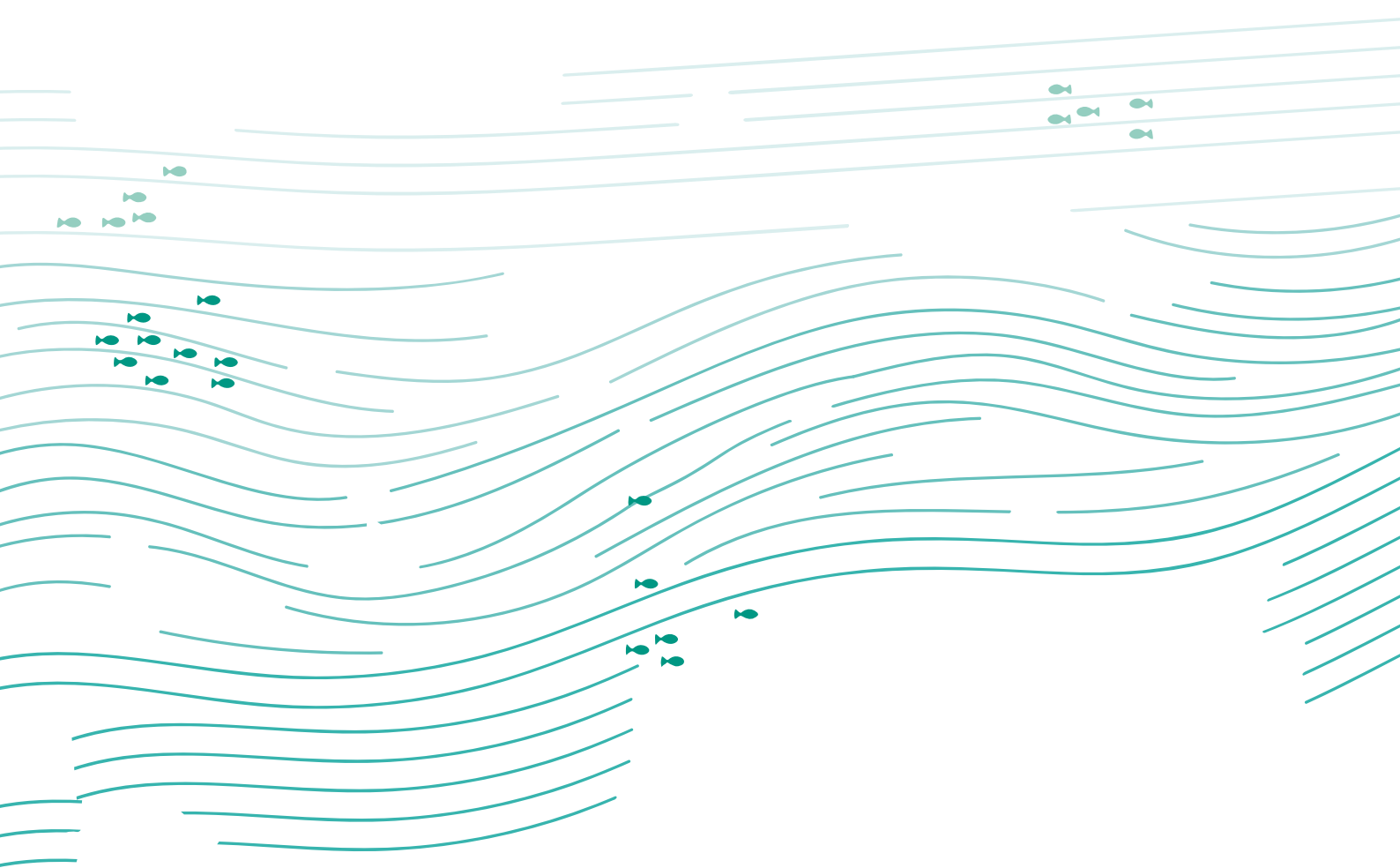
L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

HOW TO IMPROVE THE LINK BETWEEN THE COMMON FISHERIES POLICY AND THE NATURE RESTORATION LAW PROPOSAL?



Betty Queffelec
UMR-AMURE – IUEM, Université de Bretagne Occidentale





How to improve the link between the Common Fisheries Policy
and the Nature Restoration Law proposal?

Written by Betty Queffelec, UMR-AMURE – IUEM – UBO
7 July 2023

With the financial support of the Greens-EFA Group
in the European Parliament

Photo: Posidonia seagrass meadows in the Mediteranean
[istock.com/Damocean](https://www.istock.com/Damocean)

SUMMARY

This note explores how greater coherence between the Common Fisheries Policy (CFP) and the Nature Restoration Law (NRL) proposal can be achieved. It first addresses the issue of the legal basis. We conclude that the NRL has a mainly environmental purpose and that even though fisheries are mentioned, they only constitute an incidental purpose. Therefore the legal basis of the NRL is the sole article 192 TFEU. This note goes on to explore links between the CFP and the environmental legislation. It shows that despite substantial integration of environmental concerns into the CFP, links between legislations remain difficult. Indeed, the principle of equal access to EU waters limits the ability of Member States to adopt environmental measures restricting fishing activity in the waters under their sovereignty or jurisdiction, hence the need for a specific procedure to ensure coherence between these legislations. In the CFP Regulation, this is established by article 11 and based on regional cooperation. It provides for the adoption by all interested Member States of a joint recommendation and empowers the Commission to adopt the measures through a delegated act. But the procedure remains underused. Accordingly, while the EU is in the process of adopting a new environmental legislation, the NRL, this note explores how this procedure can be improved to ensure greater coherence between the NRL and the CFP. It concludes that two main elements can be strengthened. An additional article dedicated to this link should be added to the NRL. The most suitable option appears to be to allow the initiating Member State to submit a recommendation even without the unanimous agreement of the other Member States having a direct management interest. In this case, the provision has to make clear which part of the initial art. 11 CFP procedure applies and the specific NRL elements to be included in the procedure. In addition, in order to avoid perverse effects, the NRL could indicate that the Commission will give particular attention to mitigating any negative effects of displacing the fishing activity to other sensitive areas. Governance issues also need to be addressed. Greater involvement of scientific bodies and stakeholders would appear to be key to avoiding deadlocks in the process. Finally, it is crucial to strike a better balance of the environmental obligations placed on interested Member States for discussing joint recommendations. Explicitly introducing flag State obligations and reporting on them could be a useful course of action.

ACRONYMS

CFP Common Fisheries Policy

CJEU Court of Justice of the European Union

ECA European Court of Auditors

EEA European Environment Agency

EEZ Exclusive Economic Zone

MSFD Marine Strategy Framework Directive

MPA Marine Protected Area

NRL Nature Restoration Law

STECF Scientific, Technical and Economic Committee for Fisheries

TFEU Treaty on the Functioning of the European Union

WFD Water Framework Directive

Among its common policies, the EU has developed the Common Fisheries Policy. To ensure its implementation, a set of measures based on the Treaty on the Functioning of the European Union (TFEU), in particular article 43(2), has also been adopted. Its overall framework is laid down by Regulation No. 1380/2013 on the Common Fisheries Policy (hereafter the CFP Regulation). Its scope includes the conservation of marine biological resources, the management of fisheries and fleets, measures relating to markets and financial measures in support of the implementation of the CFP for fresh water biological resources, aquaculture, and the processing and marketing of fisheries and aquaculture products¹.

Coherence with environmental legislation has been addressed by the CFP since the 2002 CFP Regulation², and was reinforced with the 2013 CFP Regulation³. It includes precautionary and ecosystem-based approaches. Many types of conservation measures, listed in article 7, contribute directly to environmental objectives, for instance limitations or prohibitions on the use of certain fishing gears, and on fishing activities, in certain areas or periods; requirements for fishing vessels to cease operating in a defined area for a defined minimum period in order to protect temporary aggregations of endangered species, spawning fish, fish below minimum conservation reference size, and other vulnerable marine resources; specific measures to minimise the negative impact of fishing activities on marine biodiversity and marine ecosystems, including measures to avoid and reduce, as far as possible, unwanted catches. And all conservation measures aimed at achieving maximum sustainable yields for commercial stocks also indirectly contribute to environmental objectives.

Moreover, several regulations, part of the CFP, aim to protect the marine environment, such as Council Regulation (EC) No. 734/2008 of 15 July 2008 on the protection of vulnerable marine ecosystems in the high seas⁴.

EU environmental legislation also protects marine biodiversity and ecosystems directly and indirectly. It includes the Birds and Habitats Directives and the Marine Strategy Framework Directive⁵. The NRL proposal aims to complete this set of legislation.

However, implementation of the CFP Regulation and environmental legislation reveals there is still a lack of coherence between them. In this regard, one of the main issues concerns the general rules on access to waters (article 5 of the CFP Regulation).

Article 11 of the CFP Regulation sets out the procedure to achieve CFP coherence with these environmental legislations. However, it has been little implemented (see annex 1). In February

1 Art. 1 Regulation No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC

2 Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, (OJ L 358, 31.12.2002, p. 59–80).

3 Four CFP Regulations have followed one another. They were adopted in 1983, 1992, 2002, 2013.

4 Regulation (EU) 2016/2336 of the European Parliament and of the Council of 14 December 2016 establishing specific conditions for fishing for deep-sea stocks in the north-east Atlantic and provisions for fishing in international waters of the north-east Atlantic and repealing Council Regulation (EC) No 2347/2002.

5 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.1992, p. 7).

2023, the Commission published a Communication taking stock of implementation of the CFP and presenting its future prospects, entitled “the common fisheries policy today and tomorrow: a Fisheries and Oceans Pact towards sustainable, science-based, innovative and inclusive fisheries management”. It gives a mixed assessment of the implementation of article 11 of the CFP Regulation:

“Work on conservation measures under Article 11 of the CFP Regulation, necessary to ensuring compliance with the obligations stemming from the EU environmental legislation and the Technical Measures Regulation, started to accelerate only as of 2021. It has progressed at a very uneven pace in the different sea basins. As outlined in the marine action plan, Member States need to renew their commitment to increase the efficiency, speed and level of ambition of regionalised work, especially with regard to the implementation of environmental legislation under Article 11 of the CFP. For this purpose, Member States should address the lack of sufficient resources for the work in regional groups, further increase stakeholder involvement, and strengthen the scientific base.”⁶

In view of the adoption of the NRL, and based on the experience of previous environmental legislation, this note aims to explore how greater coherence between the CFP and the NRL can be achieved. It first addresses the issue of the legal basis (1). It then goes on to explore the development of environmental integration in the CFP (2), and the need for a specific procedure to ensure coherence between the CFP and the environmental legislations (3). Finally, it explores ways to improve this procedure to ensure coherence between the NRL and the CFP (4).

1. THE CFP AND THE NRL: DIFFERENT LEGAL BASES

Some of the objectives of the CFP and environmental legislation are shared. Indeed, restoration of marine ecosystems can have an impact on the conservation of marine resources and the environmental aspects of the CFP have progressively been extended. But their legal bases are different. If the NRL were to establish a linking procedure with the CFP, this would affect fisheries. Is this possible without a legal basis in the CFP? Determining the legal basis is important since it determines whether a legal text can be adopted (competence issue) and the procedure for its adoption.

In the proposal, the NRL is based on the environmental competence, which is a shared competence between the EU and the Member States (Art. 4.2, Art. 191 and 192.1 TFEU). As stated by the Commission:

“The legal basis for this proposal is Article 192(1) of the Treaty on the Functioning of the European Union that sets out how Article 191 of the Treaty should be implemented. Article 191 of the Treaty provides the objectives of EU environmental policy:

- preserving, protecting and improving the quality of the environment;
- protecting human health;
- utilising natural resources prudently and rationally;

⁶ Communication from the Commission to the European Parliament and the Council, The common fisheries policy today and tomorrow: a Fisheries and Oceans Pact towards sustainable, science-based, innovative and inclusive fisheries management, 21 February 2023, COM(2023) 103 final, p. 10 – 11.

– promoting measures at international level to deal with regional or worldwide environmental problems, in particular to combat climate change”⁷.

The ordinary legislative procedure applies.

The CFP regulation is based on a dedicated EU common policy, the Common Fisheries Policy (Art. 38 and 43 TFEU). The ordinary legislative procedure also applies, except for some matters: “The Council, on a proposal from the Commission, shall adopt measures on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities” (Art. 43.3). As linking the NRL to the CFP Regulation is not covered by these specific topics, here too, the ordinary legislative procedure applies.

Another point worth examining is whether the CFP is an exclusive or a shared EU competence.

The CFP: an exclusive and shared EU competence

Both apply to the CFP. Article 3.1 of the CFP regulation states that “The Union shall have exclusive competence in the following areas: (...) d) the conservation of marine biological resources under the common fisheries policy;” while article 4.2 states that “Shared competence between the Union and the Member States applies in the following principal areas: (...) d) agriculture and fisheries, excluding the conservation of marine biological resources”. Indeed, the scope of the CFP is broader than the conservation of marine biological resources alone.

The scope of the CFP is laid down in Article 1.1 of the CFP Regulation:

“The Common Fisheries Policy (CFP) shall cover:

(a) the conservation of marine biological resources and the management of fisheries and fleets exploiting such resources;

(b) in relation to measures on markets and financial measures in support of the implementation of the CFP: fresh water biological resources, aquaculture, and the processing and marketing of fisheries and aquaculture products”.

Accordingly, depending on the topic, the competence of the EU in relation to marine fisheries is either exclusive or shared with Member States. Regarding the case at hand, the link between the CFP Regulation and the NRL would most likely come under the conservation of marine biological resources, which is an exclusive competence of the EU. The question is: does it have an impact on the choice of the legal basis of the NRL?

Regarding the choice of the legal basis of the NRL

The Court of Justice of the European Union (CJEU) has laid down the criteria for choosing the legal basis of a Union act.

It “must be based on objective factors which are amenable to judicial review and include in particular the aim and content of the measure (...). If examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or

⁷ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on nature restoration, COM(2022)304.

component, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component (...). Exceptionally, if on the other hand it is established that the act simultaneously pursues a number of objectives or has several components that are inextricably linked, without one being secondary and indirect in relation to the other, such an act will have to be founded on the various corresponding legal bases"⁸.

Moreover, it is settled case-law that recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other⁹. Moreover, a dual legal basis is an exception, possible only where two equivalent objectives or components are inextricably linked. Here, in both cases, the ordinary legislative procedure applies. However, conservation of marine biological resources comes under the exclusive competence of the EU while the environment is a shared competence.

There is a precedent for choosing the appropriate legal basis for an EU environmental and fisheries regulation. The Council supported by several Member States challenged the Commission before the CJEU regarding the nature of the EU's competence in negotiations for the development of marine protected areas (MPAs) in the Antarctic under the Canberra Convention¹⁰. The court ruled in favour of shared competence as the establishment of MPAs goes beyond the fisheries issue.

"It follows from the foregoing that, contrary to the Commission's submissions, fisheries constitute only an incidental purpose of the reflection paper and the envisaged measures. As protection of the environment is the main purpose and component of that paper and those measures, it must be held that the contested decisions do not fall within the exclusive competence of the European Union laid down in Article 3(1)(d) TFEU, but within the competence under Article 4(2)(e) TFEU regarding protection of the environment that it shares, in principle, with the Member States"¹¹.

To conclude, the NRL has a mainly environmental purpose and fisheries only constitute an incidental purpose. Its legal basis is therefore article 192(1) TFEU alone, even if incidentally it impacts fisheries.

2. STRONG ENVIRONMENTAL INTEGRATION IN THE CFP

From a legal point of view, the gap between the objectives of the CFP and environmental legislation is limited. Several elements provide an explanation of this.

8 CJEU, 10 January 2006, n° C-94/03, Commission of the European Communities v Council of the European Union, §34-36.

9 CJEU, 6 November 2008, n° C-155/07, European Parliament v. Council of the European Union, §37.

10 Cudennec A. et. al., Chronique maritime, Revue de l'Union européenne, 2019, p. 300.

11 CJEU, 20 November 2018, Joined Cases n° C-626/15 and C-659/16, European Commission v. Council of the European Union §100.

Environmental integration is a treaty obligation

Environmental integration is provided for in Art. 11 of the TFEU:

“Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development”.

Environmental integration is especially well-developed as regards aquatic environments

For aquatic environments, environmental integration is organised around a good status objective by two framework directives: the Water Framework Directive¹² (WFD) (2000) and the Marine Strategy Framework Directive (MSFD) (2008). The WFD aims to achieve good ecological and chemical status of surface water “at the latest 15 years after the date of entry into force of this Directive” i.e. 2015. Its scope encompasses mainly freshwater but coastal waters are also included¹³. The MSFD “establishes a framework within which Member States shall take the necessary measures to achieve or maintain good environmental status in the marine environment by the year 2020 at the latest” (Art. 1.1). Both framework directives specify in detail how Member States should define good status. Both of them follow an iterative logic of progressive improvement through planned multi-year cycles. The MSFD is conceived as an environmental pillar of the EU’s integrated maritime policy.

“After the MSFD’s adoption, the General Affairs Council stated that cross-cutting policy tools were of utmost importance to enhance sustainable economic development, environmental monitoring, safety, security and law enforcement on Europe’s oceans, seas and coastal regions. They acknowledged the MSFD, with the ecosystem-based approach to manage human activities, as a basis to develop more successfully and sustainably all maritime activities (2973rd General Affairs Council meeting, Brussels, 16 November 2009)”¹⁴.

Moreover, as mentioned by the Commission, “one of the main changes made to the CFP in 2002 was to make a greater commitment to integrate environmental concerns into fisheries management”.¹⁵ This should facilitate links between the CFP and the environmental legislation.

12 Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, 22.12.2000, p. 1–73)

13 Under the WFD, « “Coastal water” means surface water on the landward side of a line, every point of which is at a distance of one nautical mile on the seaward side from the nearest point of the baseline from which the breadth of territorial waters is measured, extending where appropriate up to the outer limit of transitional waters » (Art. 2.7 of the WFD).

14 REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the implementation of the Marine Strategy Framework Directive (Directive 2008/56/EC)

15 COMMISSION STAFF WORKING DOCUMENT Common Fisheries Policy - State of play Accompanying the document COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL The common fisheries policy today and tomorrow: a Fisheries Pact towards sustainable, science-based, innovative and inclusive fisheries management (SWD/2023/103 final), 108p.

Environmental integration is particularly well-developed under the CFP

The most recent CFP Regulation, adopted in 2013, shows a clear desire to integrate environmental law. This is made clear by its objectives:

“ 1. The CFP shall ensure that fishing and aquaculture activities are environmentally sustainable in the long-term and are managed in a way that is consistent with the objectives of achieving economic, social and employment benefits, and of contributing to the availability of food supplies.

2. The CFP shall apply the precautionary approach to fisheries management, and shall aim to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the maximum sustainable yield.

In order to reach the objective of progressively restoring and maintaining populations of fish stocks above biomass levels capable of producing maximum sustainable yield, the maximum sustainable yield exploitation rate shall be achieved by 2015 where possible and, on a progressive, incremental basis at the latest by 2020 for all stocks.

3. The CFP shall implement the ecosystem-based approach to fisheries management so as to ensure that negative impacts of fishing activities on the marine ecosystem are minimised, and shall endeavour to ensure that aquaculture and fisheries activities avoid the degradation of the marine environment.

4. The CFP shall contribute to the collection of scientific data.

5. The CFP shall, in particular: (...) (j) be coherent with the Union environmental legislation, in particular with the objective of achieving a good environmental status by 2020 as set out in Article 1(1) of Directive 2008/56/EC, as well as with other Union policies”.

Moreover, several regulations, part of the CFP, aim to protect the marine environment, especially Council Regulation (EC) No. 734/2008 of 15 July 2008 on the protection of vulnerable marine ecosystems in the high seas from the adverse impacts of bottom fishing gears, Regulation 2016/2336 establishing specific conditions for fishing for deep-sea stocks in the north-east Atlantic and provisions for fishing in international waters of the north-east Atlantic¹⁶ and Regulation 2019/1241 on the conservation of fisheries resources and the protection of marine ecosystems through technical measures (hereafter the Technical Measures Regulation)¹⁷.

16 Regulation (EU) 2016/2336 of the European Parliament and of the Council of 14 December 2016 establishing specific conditions for fishing for deep-sea stocks in the north-east Atlantic and provisions for fishing in international waters of the north-east Atlantic and repealing Council Regulation (EC) No 2347/2002

17 Regulation (EU) 2019/1241 of the European Parliament and of the Council of 20 June 2019 on the conservation of fisheries resources and the protection of marine ecosystems through technical measures, amending Council Regulations (EC) No 1967/2006, (EC) No 1224/2009 and Regulations (EU) No 1380/2013, (EU) 2016/1139, (EU) 2018/973, (EU) 2019/472 and (EU) 2019/1022 of the European Parliament and of the Council, and repealing Council Regulations (EC) No 894/97, (EC) No 850/98, (EC) No 2549/2000, (EC) No 254/2002, (EC) No 812/2004 and (EC) No 2187/2005 ; Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ L 20, 26.1.2010, p. 7) ; Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (OJ L 164, 25.6.2008, p. 19)

To conclude, the MSFD therefore plays a central role at sea in integrating environmental legislation and the CFP largely integrates environmental objectives. In such a context, environmental legislation should be easily integrated into the CFP. A specific procedure is available to link these legislations but remains little used. How this can be explained?

3. WHY IS A SPECIFIC PROCEDURE TO LINK THE CFP AND ENVIRONMENTAL LEGISLATION NEEDED?

A major issue in linking the CFP and the environmental legislation lies in the principle of equal access to EU waters which limits the ability of Member States to adopt environmental measures covering their marine waters (a). Hence, the CFP regulation establishes a specific procedure to address this difficulty (b).

A. The CFP principle of equal access to EU waters

The principle of equal access to EU waters stems from article 5 of the CFP Regulation. In principle, Union fishing vessels have equal access to waters and resources in all Union waters. This means that fishing vessels flying the flag of a Member State and registered in the Union can access and fish within the waters under the sovereignty or jurisdiction of the Member States (except the overseas countries and territories detailed in annex II of the TFEU).

There are exceptions to this principle. Member States are authorised to restrict fishing to their own fishing vessels in their territorial seas, i.e. the waters up to 12 nautical miles from baselines under their sovereignty or jurisdiction. This exception is different in the outermost regions¹⁸: in the waters up to 100 nautical miles from the baselines, Member States are authorised to restrict fishing to vessels registered in the ports of those territories.

There are also exceptions to these exceptions, to take into account Union vessels that traditionally fish in waters not covered by the principle of equal access to EU waters. Annex 1 of the CFP Regulation fixes for each Member State the geographical zones within the coastal bands of other Member States where fishing activities can be pursued, the species concerned and sometimes restrictions (e.g. fishing period). As regards the Union's outermost regions, the 100 nautical miles' exception does not apply to Union vessels that traditionally fish in those waters either, but no annex sets this out. Article 5 of the CFP Regulation simply states "in so far as those vessels do not exceed the fishing effort traditionally exerted".

Within 12 nautical miles, the procedure that Member States have to follow to adopt conservation and management measures affecting fishing vessels of other Member States mainly consists of consultations (Art. 20 CFP Regulation).

"2. Where conservation and management measures to be adopted by a Member State are liable to affect fishing vessels of other Member States, such measures shall be adopted only after consulting the Commission, the relevant Member States and the relevant Advisory Councils on a draft of the measures, which shall be accompanied by an explanatory memorandum that demonstrates, inter alia, that those measures are non-discriminatory. For the purpose of such consultation, the consulting Member

18 Regions referred to in article 349 of the Treaty.

State may set a reasonable deadline, which shall, however, not be shorter than two months”.

Accordingly, measures that Member States can adopt to implement environmental legislation, especially restricting fishing activities in marine protected areas, including Natura 2000 sites, are limited where the CFP principle of equal access to EU waters applies, i.e. in their Economic Exclusive Zone and, to a lesser extent, when Union vessels traditionally fish in their territorial sea as mentioned in annex 1 (for the outermost region, within 100 nautical miles). Hence, a specific procedure has been laid down in article 11 of the CFP Regulation to allow full implementation of environmental legislation in all EU marine waters.

B. Article 11 of the CFP Regulation: a dedicated provision to ensure the adoption of conservation measures necessary for compliance with obligations under Union environmental legislation

Article 11 of the CFP Regulation is a dedicated provision to ensure the adoption of conservation measures necessary for compliance with obligations under Union environmental legislation. It is part of the broader framework of regionalisation introduced by the CFP Regulation in 2013. Consequently, it should be read in conjunction with article 18 providing for the procedure for regional cooperation on conservation measures.

The procedure

In their EEZ, Member States can restrict the activity of their own fishing vessels in order to comply with their environmental obligations.

“Art. 11 1. Member States are empowered to adopt conservation measures not affecting fishing vessels of other Member States that are applicable to waters under their sovereignty or jurisdiction and that are necessary for the purpose of complying with their obligations under Article 13(4) of Directive 2008/56/EC, Article 4 of Directive 2009/147/EC or Article 6 of Directive 92/43/EEC, provided that those measures are compatible with the objectives set out in Article 2 of this Regulation, meet the objectives of the relevant Union legislation that they intend to implement, and are at least as stringent as measures under Union law”.

But if a Member State needs to apply these conservation measures to other Union fishing vessels, it cannot use its national legislation. It needs to undertake a procedure whereby the Commission is empowered to adopt a delegated act incorporating the conservation measures.

“2. Where a Member State (“the initiating Member State”) considers that measures need to be adopted for the purpose of complying with the obligations referred to in paragraph 1 and other Member States have a direct management interest in the fishery to be affected by such measures, the Commission shall be empowered to adopt such measures, upon request, by means of delegated acts in accordance with Article 46. For this purpose, Article 18(1) to (4) and (6) shall apply mutatis mutandis”.

In this provision, Union environmental legislation is restricted to conservation measures “that are necessary for the purpose of complying with their obligations under Article 13(4) of Directive 2008/56/EC [i.e. (...)] “spatial protection measures, contributing to coherent and representative

networks of marine protected areas (...) such as special areas of conservation pursuant to the Habitats Directive, special protection areas pursuant to the Birds Directive, and marine protected areas as agreed by the Community or Member States concerned in the framework of international or regional agreements to which they are parties.”], Article 4 of Directive 2009/147/EC or Article 6 of Directive 92/43/EEC”.

Two remarks need to be made. First, the list is restrictive. It only concerns parts of the MSFD, Birds and Habitats Directives. Second, the Commission acts only upon a request of the initiating Member State. Indeed, the conservation measures in question must be previously defined in a joint recommendation.

“3. The initiating Member State shall provide the Commission and the other Member States having a direct management interest with relevant information on the measures required, including their rationale, scientific evidence in support and details on their practical implementation and enforcement. The initiating Member State and the other Member States having a direct management interest **may submit** a joint recommendation, as referred to in Article 18(1), within six months from the provision of sufficient information. The Commission **shall adopt** the measures, taking into account any available scientific advice, within three months from receipt of a complete request”.

It should be noted that Member States’ regional groups are set up for negotiating joint recommendations:

“multiple Member States collaborate on conservation measures for their fisheries within Member States regional groups. Seven such groups are in place: BaltFish; the North-Western Waters Group; the Scheveningen Group; the South-Western Waters Group; PescaMed; ADRIATICA; and SudEstMed”¹⁹.

Moreover, in line with article 18 of the CFP Regulation dedicated to regionalisation (i.e. regional cooperation on conservation measures), “Members States have to consult the Advisory Councils established under the CFP”²⁰. Article 26 of the CFP Regulation regarding the consultation of scientific bodies also requires the Commission to consult appropriate scientific bodies and where appropriate, the Scientific, Technical and Economic Committee for Fisheries (STECF) makes a relevant scientific assessment. Its evaluation needs to be validated in its plenary session²¹.

“Finally, the draft delegated acts based on the empowerments included in the CFP Regulation have all been submitted to the Expert Group for Fisheries and Aquaculture that was set up to ensure appropriate expert consultation for the preparation of delegated acts. The European Parliament and the European Fisheries Control Agency are invited to the meetings of this Expert Group as observers. The

19 Report from the Commission to the Council and the European Parliament in respect of the delegation of powers referred to in Article 11(2), Article 15(2), (3), (6), (7) and Article 45(4) of Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy (COM/2023/170)

20 COMMISSION STAFF WORKING DOCUMENT on the establishment of conservation measures under the Common Fisheries Policy for Natura 2000 sites and for Marine Strategy Framework Directive purposes (SWD(2018) 288 final), p.3.

21 Ibid. p.6; See for instance SCIENTIFIC, TECHNICAL AND ECONOMIC COMMITTEE FOR FISHERIES – 66th PLENARY REPORT (PLEN-21-01), p. 69 and following Evaluations of BALTFISH and SWW Joint recommendations to prevent cetacean by-catches and evaluation of joint recommendations on Kattegat <https://stecf.jrc.ec.europa.eu/documents/43805/2850498/STECF-PLEN+21-01.pdf/874bc98a-5c5a-46a5-a3e5-e9711285b193>

documents relevant to these consultations were submitted simultaneously to the European Parliament and to the Council in line with the Common Understanding on delegated acts. After adoption, the delegated acts were all notified to the European Parliament and to the Council. To date, the European Parliament has objected to one delegated act adopted by the Commission under the CFP Regulation concerning the protection of the marine environment in the North Sea²². It did so within 2 months, in line with Article 46(5) of the CFP Regulation. This proposal has therefore not entered into force. For some other delegated acts, the European Parliament has requested to extend the deadline for 2 more months²³.

To summarise, the procedure consists of 5 steps:

1. The initiating Member State defines the measures required and explains their rationale, the scientific evidence in support of them and details of their practical implementation and enforcement;
2. It provides this information to the Commission and the other Member States having a direct management interest;
3. Start of negotiations with all the Member States concerned to present a joint recommendation;
4. Within 6 months of step 2, the Member States may submit a joint recommendation;
5. The Commission has 3 months to adopt the measures.

What happens if at step 4 the Member States have failed to agree, if the negotiations are not concluded within the six-month period or if the joint recommendation does not meet the requirements?

"If not all Member States succeed in agreeing on a joint recommendation to be submitted to the Commission in accordance with the first subparagraph within the deadline set therein, or if the joint recommendation is deemed not to be compatible with the requirements referred to in paragraph 1, the Commission may submit a proposal in accordance with the Treaty".

The Commission can make a proposal but is not obliged to do so. It should be noted that the Commission can only make a proposal if a Member State has initiated the process. Moreover, the 6-month period starts with "the provision of sufficient information" which leaves room

22 Commission Delegated Regulation (EU) .../... of 2 March 2018 amending Delegated Regulation (EU) 2017/118 establishing fisheries conservation measures for the protection of the marine environment in the North Sea (C(2018)01194).

European Parliament resolution of 14 June 2018 on the Commission delegated regulation of 2 March 2018 amending Delegated Regulation (EU) 2017/118 establishing fisheries conservation measures for the protection of the marine environment in the North Sea (C(2018)01194 – 2018/2614(DEA)) reproduced annex II.

23 Report from the Commission to the Council and the European Parliament in respect of the delegation of powers referred to in Article 11(2), Article 15(2), (3), (6), (7) and Article 45(4) of Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, op. cit.

for interpretation²⁴. If the Commission makes a proposal, it is not a delegated act. In this case, “conservation measures may be adopted through the ordinary legislative procedure”²⁵.

What if there is an urgent need to act?

“4. By way of derogation from paragraph 3, in the absence of a joint recommendation referred to in paragraph 3, in cases of urgency, the Commission shall adopt the measures. The measures to be adopted in a case of urgency shall be limited to those in the absence of which the achievement of the objectives associated with the establishment of the conservation measures in accordance with the Directives referred to in paragraph 1 and the Member State’s intentions, is in jeopardy.

5. The measures referred to in paragraph 4 shall apply for a maximum period of 12 months which may be extended for a maximum period of 12 months where the conditions provided for in that paragraph continue to exist.”

By way of derogation, the Commission “shall” adopt the measures. This is therefore an obligation for the Commission. But, it applies for a limited period, up to a maximum of 24 months. Moreover, urgency needs to be qualified.

The Commission states that use of this instrument is strictly conditional. It has been used twice only since adoption of the 2013 CFP Regulation²⁶ and in both cases, the act was based on article 12(1) of the CFP Regulation dedicated to Commission measures in case of a serious threat to marine biological resources²⁷. It should be noted that the conditions appear to be stricter within article 12(1) than under article 11. Under the previous 2002 CFP regulation, the CJEU examined the statement of reasons in order to adopt an urgent act²⁸.

24 Kingma, I., Walker, P. 2021. Was Article 11 of the CFP doomed to fail? Report produced by Ocean Future Collective for Oceana, Amsterdam, The Netherlands, 53 pp., <https://zenodo.org/record/5503739>

25 Commission Staff Working Document on the establishment of conservation measures under the Common Fisheries Policy for Natura 2000 sites and for Marine Strategy Framework Directive purposes (SWD (2018) 288 final), p.2.

26 COMMISSION STAFF WORKING DOCUMENT Common Fisheries Policy – State of play Accompanying the document COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL The common fisheries policy today and tomorrow: a Fisheries Pact towards sustainable, science-based, innovative and inclusive fisheries management (SWD/2023/103 final).

Commission Implementing Regulation (EU) 2015/111 of 26 January 2015 establishing measures to alleviate a serious threat to the conservation of the sea bass (*Dicentrarchus labrax*) stock in the Celtic Sea, Channel, Irish Sea and southern North Sea.

Commission Implementing Regulation (EU) 2019/1248 of 22 July 2019 establishing measures to alleviate a serious threat to the conservation of the eastern Baltic cod (*Gadus morhua*) stock.

27 « On duly justified imperative grounds of urgency relating to a serious threat to the conservation of marine biological resources or to the marine ecosystem based on evidence, the Commission, at the reasoned request of a Member State or on its own initiative, may, in order to alleviate that threat, adopt immediately applicable implementing acts applicable for a maximum period of six months in accordance with the procedure referred to in Article 47(3) »

28 CJEU, 17 March 2011, Case n° C-221/09 AJD Tuna Ltd v Direttur tal-Agricoltura u s-Sajd and Avukat Generali, §62.

What are the weaknesses of this procedure?

- (Step 1) Member States are not obliged to initiate the procedure, unless it is considered that due to the binding nature of the environmental obligations at stake the procedure is mandatory for the initiating Member State.
- (Step 3) From a long-term perspective, environmental protection benefits everyone and has a positive effect on marine resources. But, from a short-term perspective, the interests of the initiating Member State and those of the other Member States that have a direct management interest in the fishery and will be affected by the conservation measures, differ. Indeed, the burden of the conservation obligation falls on the initiating Member State. The other Member States are invited to voluntarily waive their rights to enable the initiating State to achieve its objectives.
- (Step 4) If a Member State initiates the procedure, but the negotiations fail, the Commission is not obliged to submit a proposal.

4. HOW CAN THE PROCEDURE FOR LINKING THE CFP TO THE NRL BE IMPROVED?

In order to analyse how to improve the procedure for linking the CFP to the NRL, we will examine which links exist in previous environmental legislation (a) and then, analyse the link established in the NRL proposal (b), before finally exploring the proposed amendments (c).

A. Previous environmental legislation

The WFD establishes a procedure to ensure coherence between legislations from an environmental point of view.

Article 12 Issues which cannot be dealt with at Member State level

1. Where a Member State identifies an issue which has an impact on the management of its water but cannot be resolved by that Member State, it **may** report the issue to the Commission and any other Member State concerned and may make recommendations for the resolution of it.

2. The Commission **shall** respond to any report or recommendations from Member States within a period of six months.

The MSFD also establishes a procedure which is more binding than that of the WFD:

"Article 15 Recommendations for Community action

1. Where a Member State identifies an issue which has an impact on the environmental status of its marine waters and which cannot be tackled by measures adopted at national level, or which is linked to another Community policy or international agreement, it **shall** inform the Commission accordingly and provide a justification to substantiate its view.

The Commission **shall** respond within a period of six months.

2. Where action by Community institutions is needed, Member States **shall** make appropriate recommendations to the Commission and the Council for measures

regarding the issues referred to in paragraph 1. Unless otherwise specified in relevant Community legislation, the Commission shall respond to any such recommendation within a period of six months and, as appropriate, reflect the recommendations when presenting related proposals to the European Parliament and to the Council."

Why do the procedures for ensuring consistency with environmental legislation not work well?

The Member States interviewed by the European Court of Auditors (ECA) point out the length, complexity and randomness of the procedure. Scientific evidence of the measure's efficacy is hard to produce. Only six delegated acts have been adopted by the Commission under Article 11 of the CFP Regulation and only in the Baltic and North Seas²⁹. Nor has Article 15 of the MSFD been successful.

An example is given by the ECA:

"In 2014, to meet its commitments under the BHDs and MSFD, Portugal banned bottom trawling by its vessels in a large part of its EEZ and continental shelf (...). In July 2015, Portugal asked the Commission to address the NEAFC to extend the ban to other EU and non-EU vessels, under Article 15 of the MSFD. In 2016, the Commission requested Portugal to provide further scientific studies, which the Portuguese authorities told us they did not consider necessary. As a result, Portuguese vessels are not authorised to bottom trawl in that area, while, at the time of our audit, other Member States' vessels continued to do so."³⁰

B. What is proposed in the NRL proposal?

The Commission's NRL proposal does not include a specific linking article, but recitals 38 and 39 refer to the link between the NRL and the CFP.

"(38) Where the protection coastal and marine habitats requires that fishing or aquaculture activities are regulated, the common fisheries policy applies. Regulation (EU) No 1380/2013 of the European Parliament and of the Council provides, in particular, that the common fisheries policy is to implement the ecosystem-based approach to fisheries management so as to ensure that negative impacts of fishing activities on the marine ecosystem are minimised. That Regulation also provides that that policy is to endeavour to ensure that aquaculture and fisheries activities avoid the degradation of the marine environment.

(39) In order to achieve the objective of continuous, long-term and sustained recovery of biodiverse and resilient nature, **Member States should make full use of the possibilities provided under the common fisheries policy.** Within the scope of the exclusive competence of the Union with regard to conservation of marine biological resources, Member States have the possibility to take non-discriminatory measures for the conservation and management of fish stocks and the maintenance or improvement of the conservation status of marine ecosystems within the limit of 12 nautical miles. In addition, Member States that have a direct management interest

29 European Court of Auditors, « Special Report Marine environment: EU protection is wide but not deep », 2020, 74p., p. 27s.; AEE, Rapport n° 17/2019, Marine messages II, Navigating the course towards clean, healthy and productive seas through implementation of an ecosystem-based approach, 2020, 77p., p.31.

30 Ibid. p. 30.

have the possibility to agree to submit joint recommendations for conservation measures necessary for compliance with obligations under Union law on the environment. Such measures will be assessed and adopted according to the rules and procedures provided for under the common fisheries policy.”

The recitals states that “Member States should make full use of the possibilities provided under the Common Fisheries Policy”. This is a reminder that Member States have ways to implement their environmental obligations. If they do not use them fully, the Commission may initiate an infringement action. In July 2020, the Commission sent letters of formal notice to France, Sweden and Spain urging them to reduce the by-catch of dolphins and porpoises. It used this argument:

“The Commission is asking France, Spain and Sweden to implement the measures required under the Habitats Directive (Council Directive 92/43/EEC) and Common Fisheries Policy to avoid unsustainable by-catches of dolphin and porpoise species by fishing vessels. (...) France, Spain and Sweden have not taken sufficient action to monitor by-catches in their waters and by their fleets, nor made full use of the possibilities that the Common Fisheries Policy provides to comply with their obligation under the Habitats Directive and protect these species.”³¹

It should be noted that the recitals in the NRL proposal provide a brief summary of the CFP mechanism. Historical fishing rights recognised within CFP Regulation should be explicitly mentioned for a more complete picture.

Moreover, integrating the link between the CFP and the NRL into a specific article of the proposal would be clearer. In addition, a specific article would provide a legal basis to activate article 11 in a new context. Indeed, the article 11 link procedure mentions a limited list of provisions within environmental legislations that allow it to be triggered and, naturally, the NRL is not among them. But it can be extended to other legislations without modifying the CFP Regulation. Adopted in 2019, the CFP Technical Measures Regulation includes an article 12 on “protection for sensitive habitats including vulnerable marine ecosystems”. It empowers the Commission to adopt delegated acts pursuant to the procedure laid down in article 11 of the CFP Regulation, to amend its own Annex II or to protect sensitive habitats:

“2. Where the best available scientific advice recommends an amendment of the list of areas set out in Annex II, the Commission is empowered to adopt delegated acts in accordance with Article 29 of this Regulation and pursuant to the procedure laid down in Article 11(2) and (3) of Regulation (EU) No 1380/2013, to amend Annex II accordingly. When adopting such amendments, the Commission shall give particular attention to the mitigation of negative effects of the displacement of fishing activity to other sensitive areas.

3. Where the habitats referred to in paragraph 1 or other sensitive habitats, including vulnerable marine ecosystems, occur in waters under the sovereignty or jurisdiction of a Member State, that Member State may establish closed areas or other conservation measures to protect such habitats, pursuant to the procedure laid down in Article 11 of Regulation (EU) No 1380/2013. Such measures shall be compatible with the objectives of Article 2 of Regulation (EU) No 1380/2013 and be at least as stringent as measures under Union law”.

31 EC July 2020 infringements package: key decisions https://ec.europa.eu/commission/presscorner/detail/en/inf_20_1212

A specific article on the link between the NRL and the CFP would therefore be preferable to a mere mention in its recitals.

C. What do the amendments propose to improve the NRL proposal regarding its link with the CFP?

Several amendments have been tabled to improve the link between the NRL and the CFP. They propose a specific article dedicated to this issue.

The amendments focus on unblocking step 4 of the procedure, when the initiating Member State and the other Member States having a direct management interest cannot submit a joint recommendation. A deadline is set to submit a joint recommendation and a mechanism is established to unblock the process.

Regarding the deadline, certain elements need be taken into account. First, it should be noted that a Member State can decide not to initiate the process, even if it has to comply with environmental obligations, whereas it should be compelled to do so if the conditions so require.

Second, as mentioned above, the time limit is calculated from when the initiating Member State provides the Commission and the other Member States having a direct management interest with “relevant information on the measures required, including their rationale, scientific evidence in support and details on their practical implementation and enforcement”. There is room for interpretation here which could be clarified. It should be noted that, regarding the NRL, an amendment plans to calculate the deadline between submission of the final restoration plan and submission of the joint recommendation by all Member States concerned. However, the initiating Member State will still decide whether or not to initiate the process depending on the environmental issues at stake.

Third, as mentioned by Kingma et al., scientific recommendations are asked for at too late a stage in the implementation of article 11 procedure and the stakeholders are insufficiently associated with it³². **This “relevant information” could be provided to the STECF and possibly other scientific bodies (e.g. ICES) at an early stage for recommendations.** Two benefits would flow from this. The Member States’ discussion to achieve a joint recommendation would be better informed from a scientific point of view and, if the situation appears urgent, the Commission could act more quickly on a sound scientific basis. Moreover, **for more transparency and involvement of the stakeholders, this “relevant information” could be made public for consultation. Greater involvement of the relevant advisory councils also appears essential (articles 43 and following of the CFP Regulation).**

Regarding the mechanism to unblock the process when no joint recommendation is submitted there are the following, different options:

- a new delegation of power:

32 Drouineau H., Moullec F., Gascuel D. et al., « Food for thought from French scientists for a revised EU Common Fisheries Policy to protect marine ecosystems and enhance fisheries performance », Marine Policy, 148, février 2023, p. 105460; Kingma, I., Walker, P., Was Article 11 of the CFP doomed to fail? Report produced by Ocean Future Collective for Oceana, op. cit.

This is the WFD and MSFD model. It seems possible from a technical point of view. However, in practice, there are very few implementations. Portugal tried to implement it to limit fishing activities in its MPA. But the process failed (see above).

- urgent measures:

First, urgent measures are limited in time (12-month period and a maximum extension of 12 months). Second, their material scope is also limited: “The measures to be adopted in a case of urgency shall be limited to those in the absence of which the achievement of the objectives associated with the establishment of the conservation measures in accordance with the Directives referred to in paragraph 1 and the Member State’s intentions, is in jeopardy. » (Art. 11.4). **Accordingly, urgent measures cannot be used structurally to replace the joint recommendations. But they can usefully complement the process if the failure to submit a joint recommendation results in jeopardising environmental objectives.**

- adoption of the joint recommendation if no objection within x weeks/months after the initial proposal by the initiating Member State

This solution seems simple but fragile. Any Member State having a direct management interest can easily block the process.

- the initiating Member State can submit a recommendation even without the unanimous agreement of the other Member States having a direct management interest

This solution seems technically possible. To some extent, it goes against the regionalisation approach put in place under the 2013 CFP Regulation. There is a risk that Member States could hesitate to initiate the process in order to avoid the other Member States having a direct management interest being able to act in the same way against the interest of their own fishing vessels (domino effect). Poor implementation of article 20.2 of the CFP Regulation, which provides for a simpler procedure within 12 nautical miles, suggests this³³.

However, to some extent, this solution is not so far removed from the article 11 procedure itself:

“If not all Member States succeed in agreeing on a joint recommendation to be submitted to the Commission in accordance with the first subparagraph within the deadline set therein, or if the joint recommendation is deemed not to be compatible with the requirements referred to in paragraph 1, the Commission may submit a proposal in accordance with the Treaty.”

Indeed, under the article 11 procedure, should the Commission, decide to submit a proposal, such a proposal would probably be based on the draft measures proposed by the initiating Member State. Although it should be noted that to our knowledge, the Commission has never made a proposal to this effect within this framework, this appears to be a suitable solution to unblock the process. But if the initiating Member States are allowed to submit the recommendation, precautions must be taken in defining the procedure in a specific NRL article.

First, an article mentioning the article 11 procedure of the CFP Regulation, but modifying its elements for the NRL, should define which part of Article 11 is applicable. Like article 11.2 itself referring to article 18: “For this purpose, Article 18(1) to (4) and (6) shall apply mutatis mutandis”.

33 Ibid.

Second, in the proposed solution, the initiating Member State submits a recommendation. The article **should mention whether this recommendation is the initially proposed recommendation**, made available with other relevant information at the very beginning of the process, or whether the initiating Member State can change it, to take into account discussions that have taken place during negotiations.

Moreover, when receiving such a recommendation, the Commission's room for manoeuvre should be described. **Is the Commission obliged to adopt the recommended measures? In which cases, can it refuse them?** At the very least, the Commission should be able to refuse them if the recommendation is not deemed compatible with the requirements of article 11.1, i.e. "necessary for the purpose of complying with their obligations under Article 13(4) of Directive 2008/56/EC, Article 4 of Directive 2009/147/EC or Article 6 of Directive 92/43/EEC, provided that those measures are compatible with the objectives set out in Article 2 of this Regulation, meet the objectives of the relevant Union legislation that they intend to implement, and are at least as stringent as measures under Union law" as mentioned in article 11.3 of the CFP Regulation.

Finally, **what kind of act should the Commission issue? A proposal (ordinary legislative procedure) or a delegated act?**

Additional considerations to improve the process:

First, the burden of environmental objectives should be better shared between the initiating Member State and the other Member States having a direct management interest. This would improve the ability of Member States to achieve ambitious joint recommendations. Indeed, even if flag states and the initiating Member State coordinate, they do not have a clear obligation reach far-reaching agreements³⁴. This has been shown in practice. Echoing the findings of the European Environment Agency (EEA), the ECA mentions, "We note that the EEA reported in 2020 that the Article 11 procedure often had the consequence that commercial fisheries interests were favoured over nature conservation requirements". More balanced environmental obligations between the flag State and the coastal State could contribute to improving the situation. To this end, **a provision in the NRL could refer to flag state obligations. At the very least, when implementing restoration measures adopted in the framework of the NRL in EU waters, Member States, as flag states, should report these measures to the Commission. This should clearly form part of their environmental obligations.**

Second, often excluding fishing activity from one space means increasing it in other spaces. The involvement of stakeholders, scientific modelling and analysis of the global impact of the measures are needed to limit this perverse effect. Like the Technical Measures Regulation (article 12.2), the NRL could mention that **"When adopting such delegated act, the Commission shall give particular attention to the mitigation of negative effects of the displacement of fishing activity to other sensitive areas"**.

34 Art. 6.4 general provisions of Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, op. cit : « Member States shall coordinate with one another before adopting national measures pursuant to Article 20(2) »

CONCLUSION

Some elements can be highlighted to ensure real coherence between the CFP and the NRL. First, the legal basis of the NRL is article 192 TFEU. Indeed, the NRL has a mainly environmental purpose. Even though fisheries are mentioned, they only constitute an incidental purpose. Second, the context is important to improve coherence between legislations. It appears that despite substantial integration of environmental concerns into the CFP, links between the legislations remain difficult.

The CFP principle of equal access to EU waters limits the ability of Member States to adopt environmental measures restricting fishing activities in waters under their sovereignty or jurisdiction, hence the need for a specific procedure to ensure coherence between these legislations. In the CFP Regulation, this is established by article 11 and based on regional cooperation. This article provides for the adoption by all interested Member States of a joint recommendation and empowers the Commission to adopt the measures through a delegated act. But the procedure remains underused. The analysis has identified some deadlocks. Technical improvements are important but not sufficient. Improvement in governance is also essential.

From a technical point of view, a new article dedicated to this link should be added to the NRL. It can be an adaptation of article 11 of the CFP Regulation. A suitable option appears to be to allow the initiating Member State to submit a recommendation even without the unanimous agreement of the other Member States having a direct management interest. In this case, the provision has to make clear which part of the initial art. 11 CFP procedure applies and the specific NRL elements to be included in the procedure. Moreover, in order to avoid perverse effects, the NRL could mention that the Commission will give particular attention to mitigating the negative effects of displacing the fishing activity to other sensitive areas. As regards governance issues, first, greater involvement of scientific bodies and stakeholders seems to be key to avoiding deadlocks in the process. Second, it is crucial to strike a better balance of the environmental obligations placed on interested Member States for discussing joint recommendations. Explicitly introducing flag State obligations and a duty to report on them could be a useful course of action.

ANNEXES

ANNEX I: COMMISSION DELEGATED REGULATIONS ADOPTING RELEVANT JOINT RECOMMENDATIONS

Commission Delegated Regulations adopting joint recommendations under the article 11 of the CFP Regulation

- Commission Delegated Regulation (EU) 2023/340 of 8 December 2022 amending Delegated Regulation (EU) 2017/118 as regards conservation measures in Sylter Aussenriff, Borkum-Riffgrund, Doggerbank and Östliche Deutsche Bucht, and in Klaverbank, Friese Front and Centrale Oestergronden (OJ L 48, 16.2.2023, p. 1) http://data.europa.eu/eli/reg_del/2023/340/oj
- Commission Delegated Regulation (EU) 2022/952 of 9 February 2022 amending Delegated Regulation (EU) 2017/118 establishing fisheries conservation measures for the protection of the marine environment in the North Sea (OJ L 165, 21.6.2022, p. 1-22) http://data.europa.eu/eli/reg_del/2022/952/oj

Some other relevant Commission Delegated Regulations adopting joint recommendations under article 18 of the CFP Regulation about regionalisation (including under Technical Measures Regulation)

- Commission Delegated Regulation (EU) 2022/1357 of 25 May 2022 amending Regulation (EU) 2019/1241 of the European Parliament and of the Council as regards king scallops (*Pecten maximus*) in the English Channel, (OJ L 205, 5.8.2022, p. 4–6), http://data.europa.eu/eli/reg_del/2022/1357/oj/eng
- Commission Delegated Regulation (EU) 2022/826 of 23 March 2022 correcting and amending Regulation (EU) 2019/1241 of the European Parliament and of the Council as regards exemptions from the plaice box, (OJ L 147, 30.5.2022, p. 22–24) http://data.europa.eu/eli/reg_del/2022/826/oj/eng
- Commission Delegated Regulation (EU) 2022/303 of 15 December 2021 amending Regulation (EU) 2019/1241 as regards measures to reduce incidental catches of the resident population of the Baltic Proper harbour porpoise (*Phocoena phocoena*) in the Baltic Sea, (OJ L 46, 25.2.2022, p. 67–80) http://data.europa.eu/eli/reg_del/2022/826/oj/eng
- Commission Delegated Regulation (EU) 2022/200 of 2 December 2021 amending Regulation (EU) 2019/1241 of the European Parliament and of the Council as regards certain technical measures on mesh sizes and the overall maximum length for certain beam trawls in the North Sea, (OJ L 33, 15.2.2022, p. 4–6) http://data.europa.eu/eli/reg_del/2022/200/oj/eng
- Commission Delegated Regulation (EU) 2022/199 of 2 December 2021 amending Regulation (EU) 2019/1241 of the European Parliament and of the Council as regards the use

of excluder devices in the North Sea fishery for Norway pout, (OJ L 33, 15.2.2022, p. 1–3) http://data.europa.eu/eli/reg_del/2022/199/oj/eng

- Commission Delegated Regulation (EU) 2021/2324 of 23 August 2021 amending Regulation (EU) 2019/1241 of the European Parliament and of the Council as regards technical measures for certain demersal and pelagic fisheries in the Celtic Sea, the Irish Sea and the West of Scotland, (OJ L 465, 29.12.2021, p. 1–7) http://data.europa.eu/eli/reg_del/2021/2324/oj/eng
- Commission Delegated Regulation (EU) 2021/1160 of 12 May 2021 amending Regulation (EU) 2019/1241 of the European Parliament and of the Council as regards the sprat box and the plaice box in the North Sea, (OJ L 250, 15.7.2021, p. 4–6) http://data.europa.eu/eli/reg_del/2021/1160/oj/eng
- Commission Delegated Regulation (EU) 2020/2013 of 21 August 2020 amending Regulation (EU) 2019/1241 of the European Parliament and of the Council as regards technical measures for certain demersal and pelagic fisheries in the North Sea and in the South Western Waters, (OJ L 415, 10.12.2020, p. 3–9) http://data.europa.eu/eli/reg_del/2020/2013/oj/eng
- Commission Delegated Regulation (EU) 2019/2201 of 1 October 2019 supplementing Regulation (EU) 2019/1241 of the European Parliament and of the Council with detailed rules for the implementation of real-time closures for Northern prawn fisheries in the Skagerrak », (OJ L 332, 23.12.2019, p. 3–11) http://data.europa.eu/eli/reg_del/2019/2201/oj/eng
- Modified by Commission Delegated Regulation (EU) 2021/1473 of 30 June 2021 correcting Delegated Regulation (EU) 2019/2201 as regards certain rules for the implementation of real-time closures for Northern prawn fisheries in the Skagerrak (OJ L 325, 15.9.2021, p. 1–5) http://data.europa.eu/eli/reg_del/2021/1473/oj
- Commission Delegated Regulation (EU) 2018/47 of 30 October 2017 authorising the use of alternative T90 trawls in Baltic Sea fisheries, by way of derogation from Council Regulation (EC) No 2187/2005, (OJ L 7, 12.1.2018, p. 21–22) http://data.europa.eu/eli/reg_del/2018/47/oj/eng

For more details, see:

Report from the Commission to the Council and the European Parliament in respect of the delegation of powers referred to in Article 11(2), Article 15(2), (3), (6), (7) and Article 45(4) of Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy (COM/2023/170)

Commission Staff Working Document, Common Fisheries Policy - State of play Accompanying the document Communication from the Commission to the European Parliament and the Council, The common fisheries policy today and tomorrow: a Fisheries Pact towards sustainable, science-based, innovative and inclusive fisheries management (SWD/2023/103 final)

Report from the Commission to the Council and the European Parliament in respect of the delegation of powers referred to in Article 11(2), Article 15(2), (3), (6), (7) and Article 45(4) of Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy (COM/2018/079)

ANNEX II: EUROPEAN PARLIAMENT RESOLUTION OF 14 JUNE 2018 ON THE COMMISSION DELEGATED REGULATION OF 2 MARCH 2018 AMENDING DELEGATED REGULATION (EU) 2017/118 ESTABLISHING FISHERIES CONSERVATION MEASURES FOR THE PROTECTION OF THE MARINE ENVIRONMENT IN THE NORTH SEA

(C(2018)01194 – 2018/2614(DEA))

The European Parliament,

- having regard to the Commission delegated regulation (C(2018)01194),
- having regard to Article 290 of the Treaty on the Functioning of the European Union,
- having regard to Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC³⁵, and in particular Articles 11(2) and 46(5) thereof,
- having regard to Commission Delegated Regulation (EU) 2017/118 of 5 September 2016 establishing fisheries conservation measures for the protection of the marine environment in the North Sea³⁶,
- having regard to the motion for a resolution by the Committee on Fisheries,
- having regard to Rule 105(3) of its Rules of Procedure,

A. whereas Member States are required to achieve good environmental status for marine waters by 2020, in line with Article 1(1) of Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for Community action in the field of marine environmental policy (Marine Strategy Framework Directive)³⁷, while Article 2(5)(j) of Regulation (EU) No 1380/2013 requires the common fisheries policy to contribute to this goal;

B. whereas the Scientific, Technical and Economic Committee for Fisheries (STECF), in the conclusions to its relevant scientific advice³⁸, voiced a number of concerns as regards the effectiveness of the proposed measures for protected species and habitats and seafloor integrity; whereas those concerns have not been fully reflected in the recitals to the delegated regulation under review;

35 OJ L 354, 28.12.2013, p. 22.

36 OJ L 19, 25.1.2017, p. 10.

37 OJ L 164, 25.6.2008, p. 19.

38 Scientific, Technical and Economic Committee for Fisheries (STECF) (2017), 54th Plenary Meeting Report (PLEN-17-01).

C. whereas the STECF also noted in its scientific advice that the figures relating to the fishing activity in question on which the proposed measures are based are from 2010-2012 and could therefore be outdated;

D. whereas the unquantified number of vessels that would be covered by the partially temporary exemptions under Articles 3b, 3c and 3e of Commission Delegated Regulation (EU) 2017/118, as amended by the delegated regulation under review, could well have an impact on the effectiveness of the proposed measures;

E. whereas the definition of 'alternative seabed-impacting fishing gear' set out in point 2 of Article 2 of Commission Delegated Regulation (EU) 2017/118, as amended by the delegated regulation under review, needs to be further specified; whereas if it covers electric pulse fishing such a definition would be in contradiction with the mandate for negotiations adopted by Parliament on 16 January 2018³⁹ in the ordinary legislative procedure for the adoption of a regulation of the European Parliament and of the Council on the conservation of fishery resources and the protection of marine ecosystems through technical measures⁴⁰;

F. whereas the impact of the proposed 'alternative seabed-impacting fishing gear' could still be significantly higher than that of other, partially prohibited gear (Danish and Scottish seines);

G. whereas the review and reporting clause of the proposed delegated act does not apply to the newly proposed zones and their management, thus rendering impossible a transparent evaluation of the effectiveness of the measures, especially on newly tested alternative seabed-impacting gear;

1. Objects to the Commission delegated regulation;

2. Instructs its President to forward this resolution to the Commission and to notify it that the delegated regulation cannot enter into force;

3. Calls on the Commission to submit a new delegated act which takes account of the concerns set out above;

4. Instructs its President to forward this resolution to the Council and to the governments and parliaments of the Member States.

39 Texts adopted, [P8_TA\(2018\)0003](#).

40 Legislative procedure [2016/0074\(COD\)](#).

BIBLIOGRAPHY

EU acts

Regulations

Regulation (EU) 2019/1241 of the European Parliament and of the Council of 20 June 2019 on the conservation of fisheries resources and the protection of marine ecosystems through technical measures, amending Council Regulations (EC) No 1967/2006, (EC) No 1224/2009 and Regulations (EU) No 1380/2013, (EU) 2016/1139, (EU) 2018/973, (EU) 2019/472 and (EU) 2019/1022 of the European Parliament and of the Council, and repealing Council Regulations (EC) No 894/97, (EC) No 850/98, (EC) No 2549/2000, (EC) No 254/2002, (EC) No 812/2004 and (EC) No 2187/2005

Regulation (EU) 2016/2336 of the European Parliament and of the Council of 14 December 2016 establishing specific conditions for fishing for deep-sea stocks in the north-east Atlantic and provisions for fishing in international waters of the north-east Atlantic and repealing Council Regulation (EC) No 2347/2002

Regulation No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC

Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, (OJ L 358, 31.12.2002, p. 59–80).

Directives

Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ L 20, 26.1.2010, p. 7)

Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (OJ L 164, 25.6.2008, p. 19)

Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, 22.12.2000, p. 1–73)

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.1992, p. 7)

Commission Implementing Regulation

Commission Implementing Regulation (EU) 2019/1248 of 22 July 2019 establishing measures to alleviate a serious threat to the conservation of the eastern Baltic cod (*Gadus morhua*) stock.

Commission Implementing Regulation (EU) 2015/111 of 26 January 2015 establishing measures to alleviate a serious threat to the conservation of the sea bass (*Dicentrarchus labrax*) stock in the Celtic Sea, Channel, Irish Sea and southern North Sea.

To note, Commission Delegated Regulations adopting relevant joint recommendations are gathered Annex 1 of this document.

Communication from the Commission

Communication from the Commission to the European Parliament and the Council, The common fisheries policy today and tomorrow: a Fisheries and Oceans Pact towards sustainable, science-based, innovative and inclusive fisheries management, 21 February 2023, COM(2023) 103 final

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU Action Plan: Protecting and restoring marine ecosystems for sustainable and resilient fisheries, COM(2023)102 final

Proposal for a Regulation of the European Parliament and of the Council on nature restoration, COM(2022)304

Case Law

CJEU, 20 November 2018, Joined Cases n C-626/15 and C-659/16, European Commission v. Council of the European Union.

CJEU, 17 March 2011, Case n° C-221/09 AJD Tuna Ltd v Direttur tal-Agricoltura u s-Sajd and Avukat Generali.

CJEU, 6 November 2008, n C-155/07, European Parliament v. Council of the European Union.

CJEU, 10 January 2006, n C-94/03, Commission of the European Communities v Council of the European Union.

Other

EC July 2020 infringements package: key decisions https://ec.europa.eu/commission/presscorner/detail/en/inf_20_1212

European Parliament resolution of 14 June 2018 on the Commission delegated regulation of 2 March 2018 amending Delegated Regulation (EU) 2017/118 establishing fisheries conservation measures for the protection of the marine environment in the North Sea (C(2018)01194 – 2018/2614(DEA))

Reports

Official Reports

Report from the Commission to the Council and the European Parliament in respect of the delegation of powers referred to in Article 11(2), Article 15(2), (3), (6), (7) and Article 45(4) of Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy (COM/2023/170)

Commission Staff Working Document, Common Fisheries Policy - State of play Accompanying the document Communication from the Commission to the European Parliament and the Council, The common fisheries policy today and tomorrow: a Fisheries Pact towards sustainable, science-based, innovative and inclusive fisheries management (SWD/2023/103 final)

Scientific, Technical and economic committee for fisheries – 66th Plenary Report (PLEN-21-01), Evaluations of BALTFISH and SWW Joint recommendations to prevent cetacean by-catches and evaluation of joint recommendations on Kattegat <https://stecf.jrc.ec.europa.eu/documents/43805/2850498/STECF-PLEN+21-01.pdf/874bc98a-5c5a-46a5-a3e5-e9711285b193>

Scientific, Technical and economic committee for fisheries. Evaluation of maximum catch limits and closure areas in the Western Mediterranean (STECF22-01), 2021.

Report from the Commission to the European Parliament and the Council, Implementation of the Technical Measures Regulation (Article 31 of Regulation (EU) 2019/1241) COM(2021)583 final

Commission Staff Working Document, Accompanying the document Report from the Commission to the European Parliament and the Council, Implementation of the Technical Measures Regulation (Article 31 of Regulation (EU) 2019/1241) SWD/2021/268 final (Especially Appendix III: summary table of joint recommendations received)

European Court of Auditors, « Special Report Marine environment: EU protection is wide but not deep », 2020, 74p.

European Environment Agency, Report n° 17/2019, Marine messages II, Navigating the course towards clean, healthy and productive seas through implementation of an ecosystem-based approach, 2020, 77p.

Report from the Commission to the European Parliament and the Council, on the implementation of the Marine Strategy Framework Directive (Directive 2008/56/EC), 25 June 2020, COM(2020) 259 final

Commission Staff Working Document on the establishment of conservation measures under the Common Fisheries Policy for Natura 2000 sites and for Marine Strategy Framework Directive purposes (SWD(2018) 288 final)

Report from the Commission to the Council and the European Parliament in respect of the delegation of powers referred to in Article 11(2), Article 15(2), (3), (6), (7) and Article 45(4) of Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy (COM/2018/079)

NGO Reports and documents

Kingma I., Walker P., Was Article 11 of the CFP doomed to fail? Report produced by Ocean Future Collective for Oceana, 2021, 53 p. <https://zenodo.org/record/5503739>

Schacht K. et al., 5-year review (2014-2019) of the EU Common Fisheries Policy, Deutsche Umwelthilfe, 2019, https://www.duh.de/fileadmin/user_upload/download/Projektinformation/Naturschutz/Fischereipolitik/GFP_Fischereipolitik_Broschure_komplett_lange_Version_GB_16_12_19.pdf

Seminar Sea at Risk « Fisheries measures in offshore MPAs: how Art 11 CFP works », 2017, https://www.youtube.com/watch?v=cUb_JQodFUk

MPAs-Europe « Frequently Asked Questions – MPAs and the Common Fisheries Policy » <https://www.mpas-europe.org/toolkit/frequently-asked-questions-mpas-and-the-common-fisheries-policy>

ClientEarth, 'Simply' Article 11 of the Common Fisheries Policy, 2014.

Scientific articles

Claudet, C. Loiseau, M. Sostres, M. Zupan, Underprotected marine protected areas in a global biodiversity hotspot, *One Earth* 2 (2020) 380 –384.

Cudennec A. et. al., *Chronique maritime, Revue de l'Union européenne*, 2019, p. 300.

Curtil O. La politique commune de la pêche à l'épreuve des exigences de la protection environnementale, in *L'UE et la mer 60 ans après les Traités de Rome*, Cudennec, A. and Gueguen-Hallouët G. (Dir.), Paris : Pedone, 2019, 401p., pp. 117-126.

Drouineau H., Moullec F., Gascuel D. et al., « Food for thought from French scientists for a revised EU Common Fisheries Policy to protect marine ecosystems and enhance fisheries performance », *Marine Policy*, 148 (2023) p. 105460.

Fock H.O., *Natura 2000 and the european common fisheries policy*, *Marine Policy* 35 (2011) 181–188.

Raicevich, P. Battaglia, T. Fortibuoni, T. Romeo, O. Giovanardi, F. Andaloro, Critical inconsistencies in early implementations of the marine strategy framework directive and common fisheries policy objectives hamper policy synergies in fostering the sustainable exploitation of mediterranean fisheries resources, *Front. Mar. Sci.* 4 (2017) <https://www.frontiersin.org/articles/10.3389/fmars.2017.00316>.

Rätz H.-J., Dörner H., Scott R., Barbas T., Complementary roles of European and national institutions under the Common Fisheries Policy and the Marine Strategy Framework Directive, *Marine Policy* 34 (2010) 1028 –1035.



THE GREENS/EFA
in the European Parliament