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ClientEarth report on sustainability in the European Maritime and Fisheries Fund

Background

The European Maritime and Fisheries Fund (EMFF) is the new funding instrument for the fisheries and aquaculture sectors in the EU. This was the last of the three regulations forming the Common Fisheries Policy (CFP) Reform Package to be finalised, after being formally adopted by the European Parliament on 16 April 2014 and approved by the Council of Ministers on 6 May 2014.

The EMFF constitutes an essential element of the CFP reform, complementing the regulatory framework set down in the rest of the legislation by laying down the rules and conditions for receiving EU financial aid for fisheries and aquaculture from 2014-2020. Financial public aid is meant to support both Member States and economic operators in implementing the reformed CFP and achieving its objectives.

In our technical briefing of October 2013,¹ we stressed some of the important elements that needed to be maintained or introduced in the EMFF during the legislative process in order to ensure the financial instruments would effectively support the implementation of the CFP.

As MEPs considered the draft EMFF during its first reading in the European Parliament in October 2013, our key recommendations were as follows:

- Aid should be conditional on 'good behaviour'. Only those operators and Member States who comply with the rules of the CFP and of EU environmental law should receive aid under the EMFF. This 'conditionality' should not be limited or restricted in any way - either in scope (e.g. how 'serious' the non-compliance is judged to be) or timing (before, during or after receiving aid).
- No environmentally or economically perverse subsidies in the fisheries sector should be supported. Direct subsidies for fleet renewal, eliminated ten years ago due to the damage they caused, should not be re-introduced. Other direct subsidies, for instance for permanent or temporary cessation of fishing activities, would similarly undermine the economic and environmental sustainability of fisheries. Instead, subsidies should only support measures that contribute to a more economically viable (self sufficient) and environmentally sustainable fisheries sector.
- The EMFF should only finance aquaculture activities that meet EU environmental standards and that ensure that EU aquaculture will be sustainable over time.
- Increased total public financing for data collection and fisheries control should be secured in the EMFF. If the new CFP is to be successful, more funding is vitally needed to support data collection (including for essential assessments and monitoring of the state of marine ecosystems) and fisheries control measures. Minimum quantities of aid should be set for this purpose.

¹ Please see our briefing of October 2013 on the EMFF on our website: www.clientearth.org/reports/20131011-biodiversity-recommendations-for-EMFF-proposal-vote-october-2013.pdf

- The EMFF should include provisions that increase the transparency of decisions and access to information. Opportunities for public participation should be increased, including scope for public oversight of national and EU-level decision-making under the EMFF.

After the final negotiations between the two legislators of the EU decision-making process - the European Parliament and the Council of Ministers (the EU co-legislators) - the compromise text finally adopted departs in many ways from the recommendations above.

In this summary briefing, we will analyse these departures, as they appear in the final text of the EMFF Regulation, and we will identify the key challenges the EMFF poses with respect to supporting and delivering the core sustainability objectives of the CFP. In many ways the EU co-legislators have weakened the initial text proposed by the European Commission (the European Commission's proposal), or have failed to introduce the necessary changes so desperately needed to have robust financial support for the CFP.

We will also suggest in our conclusions how Member States can take advantage of the positive aspects of the EMFF and mitigate its negative aspects. Based on the options provided by the EMFF, Member States will either contribute to moving forward to achieve the objectives of the reformed CFP, or use this considerable source of public funding to resist the changes necessary to move towards economically and environmentally sustainable fishing and aquaculture sectors.

Key issues in the final version EMFF:

1. Aid is not sufficiently conditional on 'good behaviour'

Only those operators and Member States who comply with the rules of the CFP and of EU environmental law should receive aid under the EMFF. This is called 'conditionality'.

The EMFF only includes very limited, insufficient provisions for ensuring that aid does not go to individuals or Member States who do not comply with the rules in the CFP. Similarly, it contains very limited provisions to prevent the granting of aid in circumstances where environmental rules have been broken.

The EU co-legislators have clearly weakened the European Commission's original proposal in relation to **conditionality of aid to economic operators or individuals** in the following ways:

- The EMFF restricts conditionality so that it only applies to 'serious infringements' of the CFP (as defined in EU legislation), meaning that if an operator commits an infringement not classified as 'serious', they would still be able to receive and/or keep aid under the EMFF (Article 10(1.c)). Infringement defined as not serious could also have negative impacts on sustainability of fisheries therefore we should not be

investing public funding in operators, operations or Member States that breach CFP obligations.

- The need to prove that an operator has committed 'fraud' instead of 'irregularities' in relation to suspected inconsistencies with the financing rules under the EMFF or its predecessor the European Fisheries Fund (EFF)² (Article 10(3)) is likely to prove extremely disabling. Not only will there need to be criminal proceedings - a process that takes a lot of time, money and evidence, which makes it less likely to happen - but it will also require the adoption of a conviction by a criminal court. This requires a final decision by a court and most cases never get this far. Once more this prolongs the process and unnecessarily restricts the ability of relevant national authorities or the Commission to take preventive steps with the aim of protecting Union and national public funding from misuse.
- The period during which operators must continue to abide by the conditions for receiving aid is limited in scope and does not apply for cases of fraud (Article 10(3)). This means that once an operator has received aid, they could commit a fraud and be able to apply again for aid under the EMFF after a given period of time identified by the Commission (Article 10(3) and (4)). However, if a fraud has been committed in the previous funding period and is identified after the operator has already received aid under the EMFF there is no possibility foreseen to recover the amounts granted.
- Article 99(2) stipulates that the amount of financial correction ("financial sanction") applied where the conditions of aid have been breached shall depend on the perceived level of importance of the aid to the economic activity of the operator. This weakens the impact of sanctions and undermines the effectiveness of this measure. There can be a big discrepancy between the economic importance of the aid received under the EMFF and the gains obtained from the illegal activity; the latter could be much higher than the former with the result that the sanction is tiny compared to the profit.

The EMFF has weakened the **conditionality of aid to Member States** in the following ways:

- There is a serious gap in the conditionality applied to Member States since the two most effective sanctions in relation to conditionality, namely the suspension of payments to Member States and financial sanctions on Member States, can only apply in cases of 'serious infringements' of the CFP. Member States could potentially not comply with the CFP and still receive financial aid under the EMFF as long as these cases of non-compliance are considered 'not serious' (Articles 101 and 105). Infringements that are not defined as serious by the EU co-legislator could still be serious enough to affect the sustainability of fisheries.
- The system for enforcing conditionality is further restricted because the concept of serious infringement is already enshrined in EU legislation (Article 90 of the Fisheries Control Regulation and Article 10(1)(c) of the EMFF) and therefore very limited discretionary power is left to the Commission in the elaboration of delegated acts.

² Council Regulation (EC) No 1198/2006 of 27 July 2006 on the European Fisheries Fund, OJ L223, 15.08.2006, p. 1.

The EMFF did not introduce robust **conditionality of aid** on Member States or economic operators or individuals **concerning EU environmental obligations**:

- There is some conditionality of aid in the EMFF with regard to EU environmental legislation (Article 3 and 4 of Directive on the protection of the environment through criminal law³) for economic operators involved in aquaculture activities. However, economic operators involved in fisheries activities are not subject to these conditions, despite the fact that aspects of EU environmental law are highly relevant to fishing activities and the achievement of the CFP's objectives (Article 10(1)(d)). This is hardly justified in the light of the effects that fishing activities have on the environment.
- There is no direct reference to specific EU environmental obligations but rather to the Directive on the protection of the environment through criminal law⁴ that requires Member States to translate the non-respect of environmental obligations into criminal offences in their national justice systems. This means that non-compliance with EU environmental obligations must first be established in a criminal court proceeding. The establishment of a criminal conviction requires higher standard of proof, rigorous and lengthy procedures which makes this requirement unreasonable especially in the light of the precautionary principle which should apply in EU environmental law. The adoption of preventive measures should be encouraged. The EMFF already foresees preventive measures such as interruption or suspension of payments however the requirements explained above will make them very difficult to apply.

2. Damaging subsidies have been reintroduced.

Direct subsidies in the form of direct cash payments for the construction of fishing vessels were not reintroduced. However, other, similarly damaging, subsidies (such as for permanent or temporary cessation or engine replacement) have been reintroduced. These are summarised below.

(i) Aid to young fishers

As regards aid to young fishers (Article 31), the EU co-legislators missed the opportunity to depart from a system of economically perverse subsidies that lead people to enter a sector by financing the acquisition of their first fishing vessel despite the overcapacity already present in many fisheries. This artificially inflates the short-term profitability of such a venture, could lead to an unsustainable increase in fishing pressure, and creates a culture of dependency rather than of entrepreneurship, innovation and self sufficiency.

³ Directive 2008/99 of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, OJL 328, 06.12.2008.

⁴ Directive 2008/99 of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, OJL 328, 06.12.2008.

(ii) Temporary cessation

It is regrettable that the possibility of financial aid for temporary cessation has been reintroduced by the EU co-legislators (Article 33) despite the European Commission's decision to not propose it due to the evidence of its damaging environmental and economic effects.⁵

Some of the conditions for temporary cessation in the EMFF have been strengthened compared to the EFF, and some have been weakened. The main changes are summarised below.

- A closer link to conservation measures is required than in the past. This is a positive improvement as the idea behind temporary cessation measures was to give support to fishers and owners of fishing vessels that are unable to fish due to exceptional conservation reasons (Article 31(1)).
- The maximum time temporary cessation aid can be received has been limited to 6 months over the whole funding period (2014-2020; Article 33(2)).
- Cumulative spending limits per Member State for temporary cessation, permanent cessation and engine replacement have been introduced (Article 25(5)).
- The provision that recurrent seasonal suspension of fishing should not be financed has been lost. Under Article 24(3) of the EFF⁶, it was clear that temporary cessation was not meant to cover the breaks in fishing activities which are a recognized as a normal part of the fishing season.⁷
- Allowing aid for the non-renewal of fishing partnership agreements or protocols (Article 33(1)(b)) for reasons that are not linked to conservation is inconsistent with the aim of temporary cessation.

(iii) Permanent Cessation (“Scrapping”)

It is also regrettable that **permanent cessation** can be financed under the EMFF (Article 34), again despite the European Commission not including this in its proposals. The European Court of Auditors identified this type of measure as one of the most controversial direct subsidies in 1994 and 2011.⁸ Furthermore, it is unclear how (and indeed whether) the concerns highlighted in the 2011 Special Report on Overcapacity of the Court of Auditors Court⁹ have been taken into account in the EMFF.

⁵ Court of Auditors, Special Report No 3/93 concerning the implementation of the measures for the restructuring, modernization and adaptation of the capacities of fishing fleets in the Community, OJ C 2 , 04.1.1994, p. 48; Special Report No 12/2011 “Have EU measures contributed to adapting the capacity of the fishing fleets to available fishing opportunities?” 12/12/2011, point 76.

⁶ Council Regulation (EC) No 1198/2006 of 27 July 2006 on the European Fisheries Fund, OJ L223, 15.08.2006, p. 1.

⁷ EFF Vademecum p.12.

⁸ Court of Auditors, Special Report No 3/93 concerning the implementation of the measures for the restructuring, modernization and adaptation of the capacities of fishing fleets in the Community, OJ C 2 , 04.1.1994, p. 46; Special Report No 12/2011 “Have EU measures contributed to adapting the capacity of the fishing fleets to available fishing opportunities?” 12/12/2011, points 28 and 29.

⁹ European Court of Auditors, Special Report No 12/2011 “Have EU measures contributed to adapting the capacity of fishing fleets to available fishing opportunities?”

There are several additional major shortcomings in this article, such as:

- The EMFF allows for the possibility for fishers or owners of a fishing vessel that has been de-commissioned to re-enter into fishing activities within a relatively short period after having received aid for permanent cessation of fishing activities (2 years for fishers (Article 34(3)) and 5 years for the owners to register a new fishing vessel (Article 34(5))). Clearly 'permanent' does not mean 'permanent' at all, but 'temporary'.
- The EMFF imposes very unclear conditions for permanent cessation where vessels are to be retrofitted for other (non-fishing) purposes, and for traditional wooden vessel used to enhance maritime heritage through land-based activities (Article 34(6)), with no delegation of power to the European Commission to provide essential clarification of what types of measures should actually be financed.
- Although Article 34(4) has been perceived as allowing a phase out of this type of harmful subsidy by 31 December 2017, the financing mechanism is constructed in such a way that Member States plan their spending (budgetary commitments) by that date but the actual payments (budgetary spending) will take place until 31 December 2020, i.e. the entire funding period.

(iv) Engine replacement

Engine replacement has been maintained in the EMFF although it is the most critical measure in relation to the increase of a vessel's fishing capacity (the ability of vessels to catch fish) and therefore of overcapacity in fishing fleets. That a fishing vessel should belong to a fleet segment that is in balance with the available fishing opportunities is not enough of a safeguard to prevent overcapacity because with technological advancements the capacity of the fishing vessel is still likely to increase. For this reason, engine replacement is the type of aid we believe is most likely to contribute to creating an imbalance between the fleet capacity and the fishing opportunities.

(v) Financing operating costs

Financing operating costs such as insurance, overheads, or basic equipment of the fishing vessels that make the vessel merely operational or even navigational (such as ropes, mandatory security or safety requirements, maintenance services) serve to artificially maintain vessels or fishers in the sector. This undermines the creation of an economically viable fisheries sector that does not depend on subsidies.

Despite these serious considerations the EU co-legislators decided to:

- Finance insurance schemes (Article 35).
- Allow financing in circumstances that are not clearly defined at EU level, which creates possible inequality or discrimination in application between operators in the different Member States of the EU (Article 35 (6)).

(vi) Overall limitation on spending for permanent and temporary cessation and engine replacement

The EMFF does introduce one positive change in relation to the damaging types of subsidies discussed above: a cap at Member State level on financial aid for permanent and temporary cessation and engine replacement (Article 25(3)). We hope this will limit the uptake of these harmful types of measures, since they have the potential to have a very negative impact on the environmental sustainability (and therefore the economic sustainability) of the fisheries sector.

3. Financing for aquaculture has not been restricted to practices that can demonstrate their environmental sustainability.

In spite of the European Parliament's vote to introduce provisions to limit financial aid for aquaculture to aid for sustainable aquaculture activities only, the final text agreed by EU co-legislators removed conditions for 'sustainability' with reference to subsidies for aquaculture development in the European Union (Chapter II, and throughout). This could lead to increasing environmental degradation or destruction throughout the EU as a result of unsustainable aquaculture activities.

Specifically, it is therefore regrettable that:

- Sustainability requirements for all aquaculture activities have not been clearly stated.
- Large enterprises can ask for financial aid under the EMFF (Article 46) whereas they could not under the EFF.
- There are no safeguards concerning overproduction due to excessive public funding pumped into the sector.
- Support for aquaculture products other than for human consumption is allowable (Article 46) whereas it was not under the EFF.
- Provisions have been introduced allowing Union financial support for aquaculture activities in marine protected areas in certain circumstances (Article 46(5)).

4. The level of financing for data collection and fisheries control has remained at the same level, despite the increase in data collection and control activities under the reformed CFP.

The amount of EU public funding available for data collection and fisheries control has increased but the national contribution has decreased with the result that the total public funding (EU and national) available for data collection and fisheries control has stayed roughly the same. Additional flexibility between the amounts allocated for data collection and the amounts allocated to fisheries control measures has been introduced (Article 13 (8) and Article 94 (3) (d) and (e)). As a result of this new flexibility, Member States can decide the overall amounts of aid dedicated to financing either data collection or fisheries control

measures (Article 13 (8)). This flexibility further reduces the certainty of funding for one or the other measure and is very worrying since these two types of measures are not interchangeable, and both are required for the effective implementation of the CFP. Data collection is required so that the health of fish stocks and their degree of exploitation can be assessed, as well as the impact of fishing on the environment. Fisheries control measures are necessary to ensure compliance with the rules of the reformed CFP, and to fulfil Member States' enforcement obligations.

It is regrettable that the EMFF:

- Barely increases the total public financial allocation for data collection and control; the EU allocation has increased while the required contribution from Member States has decreased (Article 13(3) and (4) and Article 94 (3) (d) and (e)).
- Fails to oblige Member States to bring the national financial counterpart (higher co-financing rate for the Member States), in order to provide a real increase of available funding, and fails to allow the flexibility that would allow Member States to contribute more if they wanted to do so under the EMFF (Article 94 (3) (d) and (e)).
- Does not ensure a proper ring-fencing of the budgetary allocation for data collection and control measures (Article 13 (8)).

5. There is insufficient transparency

Increased transparency of decision-making, access to information, and improved participation by stakeholders are all necessary to enable adequate monitoring and public oversight of the implementation of the EMFF.

Specifically, the EMFF does not:

- Align the provision for publishing the names of natural persons who are beneficiaries under the EMFF with the provisions in the Common Agricultural Policy.¹⁰ These provisions foresee a general rule of publishing the names of natural persons receiving funding and a derogation in cases where the aid granted is relatively low. This approach favours transparency and takes also into account the concerns relating to data protection raised by the European Court of Justice in the *Schecke* case.¹¹ It strikes the right balance between protecting personal data and the public right of information with regard to public spending. The EMFF on the other hand adopted a completely different approach that will lead to major gaps in the transparency relating to public funding.
- Increase the transparency of decision-making processes in relation to the EMFF, including the adoption of associated delegated acts or implementing acts.

¹⁰ Article 111 and article 112 of Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008, OJ L347, 20.12.2013, p.549.

¹¹ Judgment of the Court (Grand Chamber) of 9 November 2010, *Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v Land Hessen*, Joined cases C-92/09 and C-93/09.

Conclusions and Recommendations

The EMFF sets a framework for financial aid to support the fishing and aquaculture sectors in achieving the objectives of, the CFP. Member States have the power to decide how the EMFF will be implemented at national level. They can, therefore, decide to utilise the positive provisions in the EMFF, and limit the uptake of the negative ones.

The creation of regional groups of Member States working together to implement other aspects of the CFP (e.g. discard plans, multiannual management plans) provides a new opportunity for Member States to work together to improve the sustainability (and profitability) of fishing and aquaculture activities in their region. In line with this spirit of cooperation and collaboration, Member States could jointly agree not to use economically or environmentally damaging provisions, which would ensure a level-playing field for all operators in that region. If Member States make the right choices they can still ensure that the allocation of financial aid under the EMFF truly supports the implementation of the new CFP.

For the EMFF to support the objectives of the CFP, we recommend the following:

1. Conditionality of aid on ‘good behaviour’ should be further enhanced at national level by introducing additional conditions for receiving and keeping aid. A broader, more comprehensive approach to conditionality should be discussed among Member States at regional level, to ensure stronger adherence to the rules of the CFP (and environmental rules too) across their fleets while at the same maintaining a level playing field among competing economic operators in that region.

2. Environmentally or economically harmful subsidies in the fisheries sector should not be applied. The EMFF allows for the use of these harmful subsidies. However, it does not require them, and they may in fact impede the achievement of the objectives of the CFP. Member States should make the choice in the implementation of the EMFF at national level not to grant these types of subsidies. National implementation documents (i.e. operational programmes) should instead concentrate on financing only those fisheries measures that would support fishers in implementing the landing obligation, increasing environmental sustainability, cooperating with scientists, and adding value to the fish caught.

3. Financing for aquaculture should be restricted to practices that can demonstrate their environmental sustainability. Member States can and should decide at national level to only finance sustainable aquaculture according to good environmental practices.

4. The level of funding for data collection and fisheries control measures should be increased at national level. Although the minimum level of public funding from the EU for data collection and fisheries control measures has barely increased in the EMFF, nothing prevents Member States from developing funding programs at national level. Member States should complement the funding available under the EMFF with additional national funding

schemes to support their obligations under the Data Collection Framework and fisheries control regulations.

5. Transparency should be increased in the EMFF. Although the measures for transparency stipulated in the EMFF are inadequate, Member States should work towards increasing the transparency of their decision-making processes and public access to information at national level and regional level. Participation of stakeholders should be improved to enable better monitoring and public oversight of decision-making, implementation and use of public funds through the EMFF.

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ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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