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The control and enforcement of fisheries in England

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During the production of this legal briefing we contacted the MMO and selected IFCA's. This is a legal briefing examining how European laws are understood and adhered to in English fisheries, and is not intended to be a comprehensive examination of the operations of all enforcement authorities.

Executive summary and recommendations

EU legislation, specifically the Control and IUU Regulations, creates a framework for the enforcement of the rules of the Common Fisheries Policy (CFP), and combating illegal, unreported and unregulated (IUU) fishing. This EU legislation is directly legally binding in Member States, meaning the English government, and specifically the English fisheries authorities, must abide by it. Nevertheless, the EU legislation lacks detail in various respects, and as such, the exact nature of how it is implemented is decided through national legislation, non-legal codes and guidance documents, and regulatory culture and common practice. In the case of fisheries enforcement, national arrangements for criminal justice also have an important influence. In this report we identify a number of areas where full compliance with EU fisheries enforcement law is not currently being achieved, due to flaws in these instruments and practices.

IUU fishing can have a profound environmental impact, and habitats and species protected by EU environmental legislation may be damaged by illegal fishing activities. The relationship between fisheries enforcement and EU environmental law is therefore also an area of importance too. It is also possible for fishing activities which are legal under the requirements of the CFP to cause breaches of EU environmental laws, for example where as a result of a fishing related activity, environmental harm is caused to a protected site where harm should be prevented. The final section of this report will discuss this issue, and how English law should be changed to remedy it.

The Control Regulation and the IUU Regulation place a number of obligations on Member State governments. These include obligations in respect of carrying out surveillance of fishing activities and conducting inspections as necessary to prevent non-compliance with the CFP; and, where breaches of the CFP are discovered, imposing penalties on the infringing parties. The regulations specify which characteristics these penalties must have, such as being effective, proportionate, and dissuasive. They make a distinction between infringements and serious infringements and require that in respect of serious infringements, a system of penalty points be applied which could ultimately result in the suspension or revocation of fishing licences.

In England, responsibility for fisheries enforcement is divided between the Marine Management Organisation (MMO), with a national role, and Inshore Fisheries and Conservation Authorities (IFCAs), with regional responsibilities, under the oversight of the Department for Environment, Food and Rural Affairs (Defra). The Marine and Coastal Access Act 2009 is the main piece of legislation setting out the MMO and IFCAs' powers and duties in respect of fisheries enforcement and environmental conservation. However, the legal framework is very complex, and a number of other pieces of legislation also play an important role. For example, the Sea Fish Conservation Act 1967, as amended, is the legal basis under which various activities which would breach the rules of the CFP are formally categorised as offences under English law, and the Sea Fishing (Penalty Notices) (England) Order 2011 establishes a system of administrative penalties which can be used in respect of fisheries infringements.

In addition to these specific pieces of fisheries legislation, other 'cross-cutting' legal instruments such as the Legislative and Regulatory Reform Act 2006, and the Regulation of Investigatory Powers Act 2000, set out general rules for the conduct of enforcement activities by public authorities, which have a significant impact on how the fisheries enforcement obligations contained in EU law are carried out in England.

A variety of other non-legal documents also exist and play a role in governing how EU fisheries enforcement obligations are carried out in England. Central among these are the Compliance and Enforcement Strategy of the MMO, and Enforcement Frameworks created by IFCA's. These documents in their turn make references to other non-legal instruments concerning such topics as regulatory best practice (for example, the Regulator's Code¹ and the Hampton Principles)², and guidance for prosecutors (for example, the Code of Practice for Crown Prosecutors). For cases that are prosecuted, the Magistrates Court Sentencing Guidelines are a further important, non-legal source of rules and guidance.

In addition to reviewing the 'documentary' framework for fisheries enforcement in England, ClientEarth also undertook some research into what is happening 'in practice' in order to inform this report. Firstly, in seeking to obtain information about the number and type of fisheries infringements occurring in England, we discovered that transparency and ready access to information on this issue is currently lacking. Although the MMO currently manages a national register of infringements by recording information on the UK Fisheries Monitoring, Control and Surveillance System (MCSS system), it is not publicly available. From recent conversations with IFCA's, we can conclude that this register is not complete (as required by EU law). Since these authorities have said that they do not have full access to the MCSS system, they are not obliged to put their data in it and cannot enter prosecutions in the system as well.

A freedom of information request did reveal some important information; that the overall number of fisheries prosecutions in England in recent years is low, and furthermore that even where prosecutions are brought, fines appear to be set at a low rate. Our research revealed some concerning practices and attitudes with respect to the monitoring, surveillance and inspection of fisheries activities which allow potential infringements to be identified in the first place. From the complex landscape of legislation and non-legal guidance, the dominant themes actually guiding enforcement practice appear to favour a cautious approach, which prioritises avoidance of regulatory burden to business over the robust fulfilment of EU law obligations to detect fisheries infringements.

Overall, as a result of our analysis of the legal and guidance materials described above, in combination with indications given by our research into what is happening 'on the ground' regarding fisheries enforcement, we have identified a number of areas of concern. In each of these cases, we believe that current practice in England represents a breach of EU legislation. These areas of concern can be summarised as follows:

1. Too much emphasis is currently placed on reduction of regulatory burden at the expense of a rigorous approach to inspection. This imbalance is reflected in the MMO Compliance and Enforcement Strategy, and in day-to-day practice of IFCA's. In addition, the effect of legislation aimed at controlling the use of covert surveillance by public authorities has also been to restrain proactive inspection activities. This is preventing fulfilment of the overall objective of the Control Regulation, to undertake surveillance and inspection as necessary to ensure compliance with the rules of the CFP.
2. Current practice includes the use of 'soft' measures such as verbal and written warnings over prosecution, including in cases where breaches of the law are identified. Furthermore,

¹ The Regulators' Compliance Code was replaced by the Regulators' Code, which came into statutory effect on 6 April 2014. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300126/14-705-regulators-code.pdf.

² Philip Hampton, 'Reducing administrative burdens: effective inspection and enforcement' (HM Treasury Report) (March 2005). Available at: http://news.bbc.co.uk/1/hi/shared/bsp/hi/pdfs/bud05hampton_150305_640.pdf [accessed 28 September 2016].

the level of penalties imposed even where there is prosecution, is low. Regularly, no penalties are applied at all. This practice represents a breach of the Control and IUU Regulations, which together require that penalties for serious infringements must be effective, proportionate and dissuasive.

3. Although England is currently maintaining a national register of infringements, it appears that it is not complete as our research indicates that infringements dealt with by IFCA's are not always included. Furthermore, it is not possible to access it via public sources. Not keeping the national register up-to-date is a breach of Article 93 of the Control Regulation. Not to make such a register publicly accessible breaches Article 3(k) of the CFP Basic Regulation, which requires handling of fisheries data to be transparent, and Articles 4 and 5 of the Aarhus Convention (and its implementing EU Regulation), which require public access (including active dissemination) of environmental information. The relevant definition of environmental information is broad, and would capture data on fisheries infringements because of the potential for IUU fishing to have impacts on marine waters and biodiversity.
4. English rules currently specify that the system under which points are added to fishing licences as a sanction for serious infringements will only be invoked where the infringement in question has resulted in a successful criminal prosecution. This is a breach of Article 92 of the Control Regulation, which does not restrict the application of the required system in this way. The limitations imposed by English rules are worrying, especially in light of the UK referendum on leaving the EU ("Brexit") and the UK Government's plan to do so. In fact, it has been said that, after Brexit, the UK will have to observe and implement a strong and complex enforcement and fisheries management system to ensure compliance and protect marine biodiversity,³ therefore most of our recommendations will still be relevant when the UK is no longer bound by the EU control framework.
5. There is currently nothing within the English legal system that allows prosecution for environmental damage caused to a European Marine Site designated under the Birds or Habitats Directives (unless a specific local byelaw has been enacted to restrict certain fishing activities and prevent damage). As a result, the UK is failing to implement its obligation, under those pieces of legislation, to prevent damage to or deterioration of these protected sites. Furthermore, where damage is caused to one of these sites by an IUU fishing activity prosecuted under fisheries legislation, there is a perception that the environmental damage caused (as opposed, for example, to the economic benefit gained), is not a relevant consideration in sentencing. In fact, this is contrary to Article 90(4) of the Control Regulation which specifically foresees the taking into account of environmental damage. This is also particularly relevant for prosecution since it is an element considered by the MMO when determining the public interest required for taking judicial action.⁴

Based on the analysis presented in this report, we make a number of recommendations for actions which the UK government should take in order to achieve full compliance with EU law and, through this, a more effective system to combat IUU fishing.

³ Oliver Bennet, 'Brexit: What Next For Fisheries' (House of Commons 2016) p.11-12.

⁴ Marine Management Organisation, 'Marine Management Organisation Compliance and Enforcement Strategy' (11 June 2014). Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/317543/compliance_enforcement.pdf [accessed 10 August 2016]

Recommendations

England's approach to surveillance and inspection must be improved to make it more proactive and redress the balance towards more robust enforcement and away from too much focus on burdens to industry. This requires interpretation of the Hampton Principles, the Regulator's Code and the Legislative and Regulatory Reform Act 2006 in the light of EU law obligations, and not the other way around. For the UK to be in compliance with EU fisheries control laws, England's fisheries control and governance provisions should reaffirm that inspections are justified by the overarching need to detect non-compliance, not only on a case-by-case basis in response to specific suspicions.

On the subject of surveillance, additional guidance and training should be provided to the staff of fisheries enforcement authorities to enable them to better understand the scope of the Regulation of Investigatory Powers Act 2000 (RIPA), and how they may discharge their surveillance and inspection obligations within its bounds. Most specifically, when they do and do not need to apply for authorisation under that act, and how authorisation should be obtained where relevant. If RIPA makes it impossible for enforcement authorities to comply effectively with their monitoring and enforcement duties under EU law, then further legislation should be enacted to provide an alternative legal basis for covert surveillance in a fisheries context.

A more robust approach towards the use of formal prosecution should be put in place, as opposed to soft measures such as oral and written warnings even where breaches of the law are identified and supported by evidence. This will require amendments to be made to the MMO and IFCA Enforcement Strategy and Frameworks respectively,⁵ and a change in regulatory culture. In applying the public interest test in the Code for Crown Prosecutors, prosecuting authorities should give more weight to the severity of illegal fishing, in recognition of the fact that illegal fishing causes damage to fishery resources and the marine environment, and thereby the communities and economies that depend on them.

The level of fines sought by prosecutors and handed down by magistrates upon conviction need to be made more stringent in order to ensure that the sanctions levied against illegal fishers for serious infringements reflect EU legal requirements to be effective, dissuasive and proportionate. This may require amendments being made to the MMO and IFCA Enforcement Strategy and Frameworks, respectively, to make it clearer which considerations EU law requires to be taken into account when setting sanctions, and raising the awareness of magistrates as to the gravity and consequences of IUU fishing. It may also require new sentencing guidelines to be provided to magistrates for application in fisheries offence cases; or, at the least, guidance on how to apply the Magistrates Court Sentencing Guidelines correctly in the specific case of EU fisheries offences. Such guidance should make it clear that mitigating factors must not be applied to fisheries fines to such an extent that they are stripped of their dissuasive effect. It should also make clear that environmental damage and threat to fishery resources must be considered in every infringement case, that the value of the catch obtained must also be considered, and importantly, that fines must effectively deprive the perpetrator of all economic benefit.

⁵ DEFRA, 'Her Majesty's Government and the Marine Management Organisation Framework Document' 2012 (Amended July 2013). Available at: <http://archive.defra.gov.uk/environment/marine/documents/legislation/mmo-framework.pdf> [accessed 10 August 2016]; DEFRA, 'Guidance to Inshore Fisheries and Conservation Authorities on the establishment of a common enforcement framework' (February 2011). Available at: <http://www.association-ifca.org.uk/Upload/About/2011-ifca-guide-common%20enforcement%20framework.pdf> [accessed 10 August 2016]; Marine Management Organisation, 'Marine Management Organisation Compliance and Enforcement Strategy' (11 June 2014). Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/317543/compliance_enforcement.pdf [accessed 10 August 2016]

The UK must put in place a publicly accessible register of all infringements of the rules of the CFP committed by vessels flying their flag or by their nationals, including the sanctions they incurred and the number of points assigned, in order not to be in breach of the Control Regulation and the Aarhus Convention.⁶ Ideally, the information should be freely available on a routinely updated website, rather than only on specific request.

Current English guidance on the application of a points system in cases where serious infringements are committed breaches EU law. It restricts the application of the points system only to instances where a criminal conviction for a serious infringement is secured: EU law does not restrict it to these circumstances. The guidance must be amended to correct this position.

The Environmental Damage Regulations⁷ should be amended to remove the exemption they contain which prevents rules on liability for prevention and remediation of damage to EU protected habitats and species from applying where it arises from commercial fishing activities. Currently, this exemption places the English Regulations in breach of the EU Environmental Liability Directive.⁸

Finally, in the context of Brexit, the UK Government will have to prioritise and strengthen its national enforcement system to ensure the fisheries control framework it develops to replace EU regulations is effective. Although it has been recently announced that the UK will pledge £20 million over the next four years to support the implementation, management, surveillance and enforcement of around four million square kilometres of new Marine Protected Areas,⁹ investment is also needed to bringing the UK's existing enforcement system in compliance with the Control Regulation. This will be critical for developing a stronger future fisheries' regulatory framework in all UK waters, built on the stable foundations given by EU fisheries law.

⁶ UNECE Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters 2001 (the 'Aarhus Convention').

⁷ The Environmental Damage (Prevention and Remediation) Regulations 2015.

⁸ Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143/56.

⁹ <https://www.gov.uk/government/news/uk-set-to-protect-four-million-square-kilometres-of-ocean> [accessed 22 September 2016].

Introduction

Control and enforcement are crucial aspects of any legal framework, and enforcement of the rules governing fishing activities, aimed at securing plentiful stocks and a healthy marine environment, is no different. The main source of laws governing the conduct of fisheries in English waters is the EU Common Fisheries Policy (CFP).¹⁰ A further set of laws, contained in the Control Regulation,¹¹ establishes what actions Member States must take to ensure the CFP is complied with. While the CFP and the Control Regulation are mainly aimed at controlling the activities of EU fishing vessels, and vessels fishing in EU waters, a further piece of legislation complements this framework by targeting imported fishery products. The Illegal, Unreported and Unregulated (IUU) Fishing Regulation¹² aims to ensure that products from outside the EU are also caught in accordance with whatever rules are applicable in their respective jurisdictions. The IUU Regulation also supports the CFP and Control Regulation in other ways, adding additional rules on what constitutes IUU fishing, and how such activities must be sanctioned.

The EU regulations described above are directly applicable in the UK, meaning they are legally binding without the need for additional implementing measures to be created in domestic law. They therefore impose direct obligations on Member States, and in some cases, on members of the fishing industry such as masters of fishing vessels. However, the manner in which these rules are applied in practice depends on the national legal context. As is regularly the case with EU law, some of the requirements in the EU fisheries regulations lack detail, creating a framework that, while nonetheless legally binding, leaves some aspects to be completed by Member States, and a certain degree of flexibility for its implementation. Provisions in national legislation set up the structures and the precise procedures needed to implement the EU obligations, and supplement them in various ways. In addition, because ensuring compliance with fisheries rules involves the application of sanctions, and criminal investigation and prosecution procedures, the national system of criminal justice plays an important role. **All of this may influence how effectively the EU legislation is being implemented, and whether its objectives are being achieved.**

There is a further important aspect. EU environmental laws that aim to protect marine ecosystems or species (for example, by creating designated protected areas) are closely intertwined with fishing activities and the rules governing them. The habitats and species protected by these laws may be damaged by illegal fishing activities – which by their nature do not respect fisheries or environmental rules. In addition, fishing-related activities could be legal under the requirements of the CFP and its associated legislation, but may be illegal under the requirements of EU environmental laws. This is particularly easy to imagine in situations where harm is caused to a protected site or species as a result of fishing activity.

EU environmental laws that are contained within directives, such as the Birds and Habitats Directives, are not directly applicable to Member States, although they are binding. To be implemented, directives must be transposed into domestic legislation at national and local level. For this reason, it is essential that domestic fisheries legislation ensures effective implementation of the EU environmental laws, so that appropriate domestic rules are in place to

¹⁰ Regulation (EU) 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 [2013] OJ L354/22 (the 'CFP Basic Regulation').

¹¹ Regulation 1224/2009/EC of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy [2009] OJ L343/1 (the 'Control Regulation').

¹² Regulation 1005/2008/EC of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, [2008] OJ L286/1 (the 'IUU Regulation').

ensure that the objectives of all EU laws are met. Of particular relevance to fishing activities is the need for effective national rules in place that prevent and deter environmental harm being caused in protected sites.

This report will examine aspects of the English legal framework relating to the implementation of EU law on fisheries controls and marine environmental protection, and question whether the implementation of EU legislation, through national law and practice, is sufficient to secure compliance with the CFP and EU environmental law in English waters. The report also relates to the future challenges posed by Brexit concerning the protection of the marine environment and the sustainable use of its resources.

1 English fisheries enforcement

In England, responsibility for implementing the rules of EU fisheries legislation as referred to above, and ensuring compliance with fisheries law, is divided between the Marine Management Organisation (MMO), with a national role, and Inshore Fisheries and Conservation Authorities (IFCAs) which have regional responsibilities. The MMO and the IFCAs were created by the **Marine and Coastal Access Act 2009 (the Marine Act)**. The Marine Act sets out their major areas of responsibility, and their powers, including in respect of enforcement. For example, both the MMO and IFCAs are empowered under the Marine Act to carry out inspections of vessels and premises, to conduct searches, to require the production of documents, to conduct seizures, including seizures of catches and fishing gear, to use reasonable force in exercising these powers, and to bring criminal prosecutions. The MMO also has powers to grant, revoke and suspend fishing licences.

While the Marine Act provides the basic foundation for both the MMO's and IFCAs' enforcement roles, there are, in addition, a number of other pieces of legislation and non-legal guidance, codes and principles that detail how the MMO and the IFCAs should approach their tasks. This collection of instruments also contains the detailed rules and procedures through which the obligations set out in the Control and IUU Regulations are to be put into practice in the national context. It is important to note that some of these instruments are legislative, either legally binding Acts of Parliament or Statutory Orders; while other documents are not legally binding, but rather are policies provided to assist with putting the legal obligations into practice. Some of these policies are set by the Department for Environment, Food and Rural Affairs (Defra), while others are put together by the MMO and IFCAs themselves to structure and guide their own activities. A selection of the key documents is described in further detail in the following paragraphs. Overall, the picture is of a complex regulatory landscape, with numerous sources determining or guiding how the authorities may act.

Firstly, there are different pieces of legislation that make various activities criminal offences under English law. For example, the **Sea Fish (Conservation) Act 1967** makes it an offence to land undersized fish, to fish without a valid licence, or to fish in a closed area, during a closed season or using a prohibited method.¹³ The **Sea Fishing (Illegal, Unreported and Unregulated Fishing) Order 2009** makes it an offence (*inter alia*) to use falsified documents, or engage in fishing of a stock which is subject to a moratorium.¹⁴ The Marine Act itself makes it an offence to

¹³ Sea Fish (Conservation) Act 1967 ss.1, 4 and 6.

¹⁴ Sea Fishing (Illegal, Unreported and Unregulated) Order 2009 s.9.

contravene a byelaw put in place by the MMO or an IFCA in order to ensure the sustainable use of fishery resources.¹⁵ In effect, these provisions are the means by which the activities that constitute illegal fishing under EU law are incorporated into the English legal system, and they provide the basis on which enforcement action is taken.

In the past, such legislation provided for maximum penalty levels that could have been imposed for the various offences on conviction in a Magistrates Court; between £5,000 and £50,000. However, the **Legal Aid, Sentencing and Punishment of Offenders Act 2012** removed these caps, so that now fines are not limited following conviction by either a Magistrates Court or a Crown Court. Magistrates will determine sentences with reference to the **Magistrates Court Sentencing Guidelines**. These provide a framework for how to assess the correct fine level, starting with an assessment of the seriousness of the offence, which should consider the culpability of the defendant and the amount of harm caused. Within the scope of the Sentencing Guidelines, a wide range of factors that constitute either aggravating or mitigating circumstances can be considered. Some examples include: any history of offending, whether the act was motivated by economic gain, the financial circumstances of the defendant, the level of cooperation with authorities, entering a guilty plea, lack of understanding of the regulations, and how deliberate or reckless the offence was.¹⁶

In addition to the legislation creating criminal offences, another piece of legislation provides for a system of financial penalties that adds to the enforcement framework. The **Sea Fishing (Penalty Notices) (England) Order 2011** provides that where an MMO or IFCA enforcement officer has reason to believe an offence has been committed, he/she may issue the offender with a penalty notice for an amount up to £10,000. This is known as a Financial Administrative Penalty (FAP). A FAP must be paid within a period of 28 days, and if payment is made in this time no criminal proceedings for the same offence may then be brought. The MMO has issued a guidance document on FAPs dated 30 August 2012, which sets out further details on when FAPs will, and will not, be used, and how the level of the penalty should be determined.

One further important document, which plays a role in governing how the MMO and IFCA's must exercise their enforcement powers as far as criminal prosecutions are concerned, is the **Code for Crown Prosecutors**. The Code for Crown Prosecutors is not a legal document, but it is issued by the Director of Public Prosecutions under the Prosecution of Offences Act 1985 and there is a strong convention for prosecuting authorities to follow it. It sets out guidance for how to make a decision on whether to seek a criminal prosecution in any particular case, and specifically requires two tests to be met. Firstly, there should be sufficient evidence to provide a realistic prospect of conviction, and secondly, prosecution must be in the public interest.

Moreover, the MMO's Compliance and Enforcement Strategy mentions two elements for determining the public interest in order to prosecute an offender. The first is the impact of the offence on the environment (in general), on the marine environment and on protected species. In this sense, while the MMO is required to take this first element into consideration for determining the public interest required for prosecution, it is not always clear whether the courts later consider the environmental harm caused by the infringement when imposing the correspondent sanctions.

¹⁵ Marine and Coastal Access Act 2009, s.163.

¹⁶ See Sentencing Guidelines Council – Magistrates Court Sentencing Guidelines and 'Costing the Earth: Guidance for Sentencers' (Magistrates Association, 2009).

The second element is the previous enforcement record of the offender. Although according to the MMO's Compliance and Enforcement Strategy, this record has to be taken into account when determining the public interest for prosecuting, we have concluded that the national register of infringements is neither updated nor complete, leading to questions about whether enforcement records actually are, or even can be, taken into consideration by the authorities.

The system of applying points to licences is implemented in English law by means of a guidance document: **Guidance for the Application of a Points System for Serious Infringements**.¹⁷ The MMO is the authority responsible for this system, and the Guidance sets out when the system will be invoked, and how many points will be applied for different activities. It states that an infringement will only be considered to be a serious infringement if criminal proceedings have been brought in respect of it, and if the natural or legal persons responsible for the infringement have been convicted of an offence. Criminal conviction therefore determines whether or not points will be applied.

The point system for masters of fishing vessels foreseen in Article 92(6) of the Control Regulation has been implemented into UK law through the Sea Fishing (Points for Masters of Fishing Boats) Regulations No 3345 of 2014. It basically applies to masters the same point system as the one already applicable to fishing licences holders and states that penalty points will be applied only if a master is convicted in court of a serious infringement.

In order to provide information about how the MMO will approach its enforcement role, it has published a **Compliance and Enforcement Strategy**. This document sets out the overall approach that the MMO plans to take to achieving compliance, and the general principles it will follow. In its introduction, the Compliance and Enforcement Strategy highlights why enforcement is such an important part of fisheries management; it lists as one of its aims to ensure that no party engaged in a regulated activity gains an unfair market advantage by breaking the rules, and that honest and law-abiding persons and industry are not disadvantaged by being compliant. It also notes that the MMO will aim to place a minimum burden on the regulated stakeholders through its enforcement activity. The exercise of balancing the need to ensure compliance with the desire to avoid overburdening the industry is evident throughout the document.

The Compliance and Enforcement Strategy explains that in conducting its activities the MMO will work in accordance with the **Hampton Principles**, as set out in the **Regulators' Compliance Code** and the **Legislative and Regulatory Reform Act 2006**. The Hampton Principles are a non-legal set of principles arising from a review commissioned by government and led by a businessman in 2005 with the objective of creating a programme to reduce the burdens imposed on businesses by regulation. The Legislative and Regulatory Reform Act 2006, which was created in response to the findings of the Hampton review, requires that regulatory activities are carried out in a way that is transparent, consistent, accountable and proportionate,¹⁸ and that they *"should be targeted only at cases in which action is needed"*.¹⁹ The Regulators Compliance Code is not a legal document, but it is drawn up under section 23 of the Legislative and Regulatory Reform Act, which says regulators must have regard to it. It outlines how regulators must take a risk-based, evidence-based approach, and emphasises that regulators should avoid imposing unnecessary burdens on the regulated.

¹⁷ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/314545/points.pdf [accessed 28 September 2016].

¹⁸ Legislative and Regulatory Reform Act 2006, s.21(2)(b).

¹⁹ *Ibid.*, s.21(2)(b).

However, since 6 April 2014, the Regulator's Compliance Code has been replaced by the Regulator's Code.²⁰ The Regulator's Code is a shorter document and no longer expressly refers to the Hampton Principles. However, the need for regulators to take a risk-based approach to regulatory activities is one of the six key principles contained in the updated code which remains part of the government's initiative to reduce the impact of regulation on business.

Therefore, the MMO Compliance and Enforcement Strategy is constructed around a risk-based approach, and sets out specifically that the MMO will ensure that any compliance or investigative action it takes is proportionate to a specific identified risk. It applies the requirement in the Legislative and Regulatory Reform Act that regulation should target only cases where action is needed in the following terms: "*activities that would place a burden on the regulated parties (such as monitoring, inspection, investigation and compliance actions) [will be] targeted to a specific identifiable need (therefore, for example, limiting random inspections to specific identified compliance requirements).*"

With regard to penalties, the Compliance and Enforcement Strategy explains that the MMO will use "*appropriate and proportionate*" actions to achieve compliance. An escalating series of enforcement tools is set out. This begins with the issuing of oral advice "*simply informing the regulated person what needs to be done or changed to be compliant*". The next step in the series is an advisory letter, which may be sent "*where it is believed that breaches of the law may have been committed*" in order to "*remind the regulated person of the need to obey the law*". Next, an official written warning will be used where "*there is evidence an offence has been committed but it is not appropriate to commence formal prosecution proceedings*". Following this, the MMO may implement a FAP (as described above). Finally it may commence prosecution (applying the Code for Crown Prosecutors).

In addition, the Strategy explains that it is also possible for the MMO to use out of court disposals. There is a general national framework for the use of these in place of prosecutions (for numerous offences including fisheries offences). For example, under this framework, simple cautions can be used for any offence where there is sufficient evidence for a conviction but it is considered that it is not in the public interest to prosecute.²¹ Such out of court disposals generally require an admission of liability, and that there would have been enough evidence to justify pursuing a prosecution.

Concerning IFCAs, a **best practice guidance document** (issued by Defra)²² plays a similar role to that of the Compliance and Enforcement Strategy of the MMO. Individual IFCAs are required to put in place their own **enforcement frameworks**, which are based around this guidance. In summary, the approach embodied in these documents is very similar to the MMO Strategy as described above. They apply the same 'principles of good regulation' with, once again, a primary focus on actions being proportionate and targeted. It is stated that '*blanket inspections regardless of level of risk are unacceptable*'. Again, a sanctioning approach based around the escalation of penalties is invoked. There are certain suggested considerations for IFCAs to include in their enforcement strategy for when considering whether or not to prosecute, including the level of premeditation of the activity, and the level of damage caused.

²⁰ <https://www.gov.uk/government/publications/regulators-code> [accessed 28 September 2016].

²¹ See quick reference guide on justice.gov.uk. They are a non-statutory system. Available at <https://www.justice.gov.uk/downloads/oecd/quick-http://www.yjlc.uk/wp-content/uploads/2016/02/MoJ-Quick-reference-guides-out-of-court-disposals-2013.pdf> [accessed 28 September 2016].

²² See footnote 5, DEFRA, 'Guidance to Inshore Fisheries and Conservation Authorities on the establishment of a common enforcement framework' (February 2011).

One further instrument of significance in this context is the Regulation of Investigatory Powers Act 2000 (RIPA). This is a statute that puts rules in place governing the conduct of covert surveillance likely to result in the obtaining of private information about a person. Covert surveillance for this purpose includes monitoring, observing or listening to persons' movements, conversations, activities and communications, when this is carried out in a way calculated to ensure the observed person(s) is (are) unaware. It also covers the use of covert human intelligence sources. Essentially, it requires that under a number of circumstances, such activities can only lawfully be carried out with specific authorisation from the correct public authority, which may (depending on the exact nature of the surveillance activity, and how intrusive it is) be a Defra official, a police chief constable, or the Secretary of State. Authorisations will be granted according to a detailed set of rules, where it is considered necessary on grounds, for example, such as protecting public health, the interests of public safety, or for the purposes of preventing or detecting crime. The consequences of not following RIPA properly and carrying out unauthorised surveillance activities that should have been authorised, include that the evidence gathered may not be admissible in legal proceedings and that the investigating authority will have acted unlawfully.²³

RIPA is a complex piece of legislation and the question of when an activity may, or may not, count as covert surveillance under its definitions, and therefore trigger its authorisation processes, will not always be straightforward. A critical question is whether the activity is likely to lead to the collection of 'private information' about a person. Private information is widely defined, and may include information relating to any aspect of a person's private or personal relationships with others, including family and professional or business relationships.²⁴ It can include information deriving from activities monitored in public places. Although many of the activities that the MMO and IFCA's need to carry out to in the normal course of their monitoring and control activities, e.g. taking photos of illegal catches or illegal activities at the time they are observed, would probably not fall within RIPA's scope, it is possible that they might, if they result in the obtaining of private information according to this wide definition. Certainly, as will be seen in section 4, there appears to be a perception within IFCA's that RIPA may be invoked by the kind of evidence gathering activities that may be needed in some particular cases to establish breaches of fisheries law.

2 What is happening in practice

The preceding section describes the legal and non-legal documents on which English fisheries enforcement is based. In order to gain further insight into how enforcement activities are unfolding 'on the ground', ClientEarth has conducted research, including freedom of information act requests, and had numerous discussions with stakeholders and government officials, including some IFCA enforcement staff. The following section describes the results of this research. The aim was not to obtain a comprehensive picture of English fisheries infringements, but to gain a snapshot of how the EU and domestic rules are in reality being translated into actions in a sample of specific cases.

²³ See section 27 of RIPA, plus section 78 of the Police and Criminal Evidence Act 1984.

²⁴ See section 26(10) of RIPA, which states that private information includes any information relating to a person's private or family life, and Covert Surveillance and Property Interference, Revised Code of Practice, Home Office 2014.

It is firstly important to address the question about whether England is currently maintaining a national register of fisheries infringements, as required by the Control Regulation.²⁵ Such a register is not accessible via a standard internet search, and the MMO confirmed this to be the case in its response to our freedom of information act request, stating that this register exists but is not publicly available.

We understand from conversations with IFCA staff that IFCAs do not always report the infringements they detect to the centralised system for inclusion in the national register. Therefore, it can be concluded that this register is not comprehensively maintained. This itself represents a breach of the Control Regulation.

The Southern IFCA's Enforcement Strategy and Framework refers to a UK 'Monitoring Control and Surveillance System' (MCSS),²⁶ which is described as being a '*system that collects fisheries effort data nationally to inform management and enforcement actions*'. Accordingly, the Sussex IFCA and the Kent and Essex IFCA also mention this system in their annual reports.²⁷

According to the MMO's response to our freedom of information request, this system is maintained and managed by the MMO, and it is used daily to record all enforcement activity. In addition, the MMO declared that the system is also used by the IFCAs for reporting purposes.

However, based on conversations held during the 2016 summer with Southern IFCA and Devon and Severn IFCA, we found that IFCAs' access to MCSS is quite limited. In fact, the system is not available to IFCAs to register prosecutions and IFCAs are not obliged to enter their data into it. In this context and despite Southern IFCA's Enforcement Strategy and Framework referring to the MCSS, this does not appear to be intended for the recording of their infringements, and therefore, as far as we understand, has not led to infringement information from IFCAs being collected or passed on as required by the Control Regulation.

2.1 MMO

We addressed two 'freedom of information act requests', in different years, to the MMO asking for the data they hold on fisheries offences, covering descriptions of the type of offence in each case, and what penalty was enforced in respect of it. The data we received also included enforcement cases where no further action was taken, or where an alternative course of action (such as verbal or written warnings) was taken instead of prosecution. Again, it is not clear whether the data was gathered from the national register of infringements required by the Control Regulation.

The data supplied to us by the MMO show that in 2012 a total of 40 prosecutions were brought in English waters. Of these, 36 resulted in Magistrates Court proceedings, one case was heard in Lewes Crown Court, one case dropped and 2 FAPs were issued as an alternative to court proceedings (counted as 'prosecutions' in the MMO figures). The data do not indicate that penalty points were issued in any of the cases, and because our request asked broadly about penalties (rather than specifically about fines for example), we presume this means that points were not applied. This finding is corroborated by the five years report of the UK on the implementation of the Control Regulation. In this report, UK competent authorities reported that

²⁵ Article 93 of the Control Regulation.

²⁶ <http://www.southern-ifca.gov.uk/sitedata/files/EnforcementFramework.pdf>.

²⁷ Sussex IFCA, 'Annual Report 2013/14' (2014) and Kent and Essex IFCA, 'Annual Report 2014/15' (2015).

for the period 2010-2014, penalty points were awarded in only one occasion, by Marine Scotland, to licence holders.²⁸

All court proceedings resulted in a guilty verdict. The fines issued varied between a minimum of £300, based on the value of the catch obtained (with £2,550 costs); and the largest, for an amount of £5,000. The Plymouth Magistrates Court issued both the smallest and the largest fine. The smaller fine was issued for exceeding herring quota restrictions while the largest fine was issued for a gear offence (otter twine thickness greater than 4mm). The largest financial burden imposed in any of these cases (i.e. including both fine and court costs) was for an amount of £14,120 and Plymouth Magistrates Court again issued this. This prosecution included a fine based on the value of the catch, plus £10,000 in costs.²⁹

According to the MMO's data, 14 of the guilty verdicts in 2012 resulted in no fines and no costs being awarded. It is unclear from the information received the reasons for this. Removing the cases where no fines or costs were awarded so as not to skew the data, on average, of the guilty verdicts reached in 2012, the average court fine was for an amount of £1,249.30 and average court costs were for an amount of £1,488.80. The largest FAP issued in 2012 was for £5,000. Including the cases where no fines or costs were awarded, the average fine on a guilty verdict was £776, with the costs averaging £925.

In 2013, the information shows that there were only 12 prosecutions. Of these, 10 guilty verdicts were awarded by the Magistrates Courts, one case was adjourned and one FAP was offered (again, counted amongst the prosecutions for the purposes of the MMO's figures, and again, no indication that points were applied). All the court proceedings took place in the Magistrates Courts and the largest fine issued was £4,000. This fine was issued by North Tyneside Magistrates Court and was for an offence relating to a failure to record catch correctly. The minimum fine issued by the courts in 2013 was £500, from Torbay Magistrates Court, for an offence relating to 'illegal fishing within mackerel box'. There were 3 guilty verdicts that do not appear from the information received to have resulted in any fines or court costs.

Once again removing the cases where no fines or costs were awarded despite a guilty verdict, the average fine issued for an illegal fishing activity in 2013 was £1,641 with £303 awarded in court costs. Including the cases with no fines or costs awarded, the average fine for 2013 was £1,313 with £242 awarded in court costs. The FAP issued by the MMO in 2013 was again for the sum of £5,000 and concerned an offence relating to towed gear mesh size failure.

Between the years 2014-2016 the MMO has carried out 1541 compliance checks at sea and 3203 inspections of vessels in port. The results, in terms of enforcement actions taken by such authority are explained below:

- In 2014, the data indicates that there were 22 prosecutions. Of these, 21 guilty verdicts were awarded by the Magistrates Courts and 8 FAPs were issued.
- In 2015, there were 53 prosecutions with 9 guilty verdicts and 14 FAPs were issued. The largest fine issued that year by a Magistrates Court was of £1333.

²⁸ See:

<https://www.asktheeu.org/en/request/3715/response/13265/attach/4/20170505%20150259%20UK%20Control%20Regulation%205%20Year%20Report%20Annex%2037%20UK%20submission.pdf>.

²⁹ The amounts described in this section may also have included a 'victim surcharge' – which is an amount the Court is required to add at a rate of 10% of the value of the fine awarded, up to a maximum amount of £120. The money is paid into a victim support fund.

- In 2016, the MMO has to date brought 8 prosecutions from which the Courts awarded 2 guilty verdicts imposing fines of £500 in each and 4 FAPs were issued.³⁰

2.2 IFCA's

Based on the information declared in annual reports, anecdotal evidence and discussions with IFCA enforcement officers, IFCA's primary concerns in relation to enforcement are compliance with the Hampton Principles. Particular weight is given to the statement in the Hampton Principles that, 'no inspection shall take place without a reason'. While the Regulator's Compliance Code (which set out the Hampton Principles) has now been superseded by the shorter Regulator's Code, the Hampton Principles still seem to remain a key component of IFCA's enforcement strategy. A key reason for this may be because the now in force Regulator's Code still has as its core the requirement for a risk-based approach to enforcement.

This means that in many districts, IFCA's will only monitor and inspect fishing vessels on an 'intelligent lead basis', i.e. where information is brought to the IFCA indicating a particular issue of concern, which is used to trigger further investigation. As a result, there are very few IFCA patrol boats operating in the inshore fisheries conservation districts, and aside from what IFCA officers are told by local fishers and stakeholders, there is very little knowledge about rates of compliance in each district.

In the past, it has been reported to us that IFCA officers were concerned about the application of the provisions of the Regulation of Investigatory Powers Act 2000 (RIPA). As discussed in section 3 above, RIPA requires that certain covert surveillance activities and the use of covert human intelligence sources can only be lawfully undertaken with specific, case-by-case authorisation. Even though currently these concerns seem to be less prevalent since RIPA has been in force for a longer time, one area of confusion over when RIPA will apply still remains relevant, particularly when it is unclear whether people are living on the vessel. The overall result is that IFCA officers perceive they must take a very cautious approach to their enforcement activities in order not to fall foul of this legislation. This may mean, again, that too little proactive investigative work is undertaken, for misplaced fear of breaching RIPA. A further consequence over lack of clarity on RIPA's application could however also be that evidence of infringing activity is collected, but without the correct authorisation under RIPA, with the result that the evidence is inadmissible in legal proceedings. Hence, in order to ensure full understanding of this piece of legislation and its scope of application, further guidance and training should be provided to the staff of fisheries enforcement authorities, including IFCA's.

It is important to acknowledge that low rates of inspection are not prevalent in all IFCA districts. For example, we have been provided with data from the Southern IFCA which shows that in 2012-13 a total of 280 compliance checks at sea were made and a total of 251 compliance checks in port were made. Further, in 2013-14, 232 compliance checks at sea were made and 179 compliance checks at port were made. In 2014-2015, 153 compliance checks at sea were made and 292 compliance checks at port were made. This therefore portrays a very different picture with a high number of inspections being undertaken in the Southern District. In addition, for the period 2014-2015, the North Western IFCA reported 96 compliance checks at sea and 1078 compliance checks in port, which reveals also an intensive enforcement activity in that district, especially concerning compliance once catches have been landed.

³⁰ This information was received in October 2016.

With respect to recent cases, the Eastern IFCA annual report states that during the period 2014-2015, there were no court prosecutions, one written warning, and no FAPs issued. While this low level of enforcement activity could suggest that almost all fishers in the Eastern district are compliant with local byelaws, the rate of actual compliance is unknown.

The Devon and Severn IFCA issued a total of ten penalties for breaches of local fishing byelaws in 2012 and 2013. Of these, seven penalties were imposed as FAPs in amounts between £250 and £1000. Of the three that resulted in prosecutions in court, presumably because the infringements were more serious and hence a criminal conviction was deemed to be most appropriate, the fines issued by the local magistrates varied between £300 (with £548 awarded in costs) and £1,950 (with £1,530 awarded in court costs). For each prosecution brought before the court, the defendant entered a guilty plea. Furthermore, during the years 2014 and 2015, the Devon and Severn IFCA issued 6 FAPs, 10 written warnings and brought 12 prosecutions. To date in 2016 it has issued 2 FAPs, 11 written warnings and 5 prosecutions.

Southern IFCA issued one FAP in 2013 and 3 FAPs in 2014, bringing in the same year 27 prosecutions before the court. In addition, 43 verbal warnings and 5 written warnings were issued.³¹ The previous year, nine court prosecutions were successful and three written warnings and 36 verbal warnings were issued. During the period 2015-2016 Southern IFCA offered 5 FAPs, issued 50 verbal warnings and 8 written warnings, and brought 21 prosecutions.

In Cornwall, in February 2014, Martyn Rogers and Amy R Trawlers Ltd were convicted - following successful prosecution by the Cornwall IFCA - for offences related to scallop fishing in breach of the Scallop Dredging (Limited Fishing Time) Byelaw. In addition, a number of undersized scallops were found on board. Mr Rogers was fined a total of £5,000 and ordered to pay £4,500 costs; Amy R Trawlers Ltd was fined a total of £3,000 and ordered to pay £2,482.80 costs. That year, 4 prosecutions were brought before the court and 6 FAPs were issued.

The Northumberland IFCA issued in 2014: 9 FAPS, 20 verbal warnings, 6 written warnings and only 1 prosecution. That same year, the Kent and Essex IFCA issued 2 FAPs, 18 verbal warnings, 4 written warnings and also 1 prosecution.

The North Eastern IFCA issued in 2014, 4 FAPs, 20 verbal warnings, 2 written warnings and 3 court prosecutions. Also in 2014, the North Western IFCA issued 1 FAP, 71 verbal warnings, 8 written warnings and 3 prosecutions.

The Sussex IFCA does not report any information on enforcement in its annual report for the period 2014-2015 and the Isles of Scilly IFCA has not published its annual reports for the periods of 2013-2014 or 2014-2015.

Again, as noted above, we understand that these IFCA cases are not generally reported to the MMO or Defra for inclusion in their records, or the national register of infringements. In the case of serious infringements, IFCA's are also required to inform the MMO of decisions concerning the application of points,³² and although the MMO's data shows that no points have been applied, the lack of a national reporting registration system for infringements suggests that in the face of a serious infringement, the UK would be in breach of this reporting obligation. This situation, in turn, creates uncertainty about compliance and transparency, ultimately preventing the public

³¹ Southern IFCA, 'Annual Report 2014-2015' (2015).

³² Commission Implementing Regulation 404/2011/EC laying down detailed rules for the implementation of Council Regulation (EC) No 1224/2009 establishing a Community control system for ensuring compliance with the rules of the Common Fisheries Policy, Article 127.

from assessing the effectiveness of the measures taken by the authorities to combat infringements relating to sea fishing.

2.3 Information from public services

Some further examples of what is happening in practice can be found by searching the information available on the MMO and IFCA's websites, as well as in local press. The first two contain news stories relating to successful prosecutions. Information collected this way is clearly not comprehensive, but represents selected (well publicised) examples:

- In August 2015 the North Tyneside Magistrates Court ordered two fishers to pay a total of £1,825, including legal costs for landing 21 lobsters below the minimum landing size in breach of Regulation (EC) 850/1998 and therefore exceeding the maximum permitted daily number of 1 lobster per day, according to Northumberland IFCA Byelaw 13. The prosecution stressed the seriousness of the offence in relation to the importance of conserving lobster stocks in the district, both for the benefit of the marine environment but also for the fisheries operating in the district.³³
- In June 2014 a skipper was ordered to pay £11,565 in fines and costs for offences relating to the use of an illegal net, and obstructing an investigation by the MMO. £5,000 of the amount here related to a fine, and the balance to legal and investigation costs.³⁴
- For offences relating to the use of illegal fishing gear, a vessel owner was ordered to pay just over £25,000 in July 2014. This included a penalty of £20,000 based on the value of the catch, plus costs.³⁵
- In July 2014, the Devon and Severn IFCA prosecuted a fisherman for illegal use of fixed nets, in breach of a byelaw. The total penalty imposed was £2,620 of which £1,000 was costs, and £120 was victim surcharge.³⁶
- As a result of a joint MMO and IFCA investigation, in October 2014 a vessel owner and master were ordered to pay respectively £5,620 (of which £3,000 fine, £2,500 costs and £120 victim surcharge) and £6,620 (of which £4,000 fine, £2,500 costs and £120 victim surcharge), for illegally fishing for scallops in Lyme Bay.³⁷

During the year 2016, some cases seem to have overcome the previous years' trend, with higher fines and novel prosecutions, but there is no clarity about whether they will remain as the general rule or the exception:

- Based on recent conversations with the Southern IFCA and the Devon and Severn IFCA, there has been a successful prosecution under the Proceeds of Crime Act 2002 (POCA) in a Magistrates Court this year. This was achieved with the collaboration of Dorset Police and may have been the first prosecution focusing on proceeds of illegal fishing activities. However, the IFCA's believe that it is unlikely that this type of prosecution becomes common in the near future due to its resource-intensive nature and the need to engage POCA's officers in the process.

³³ <http://www.nifca.gov.uk/wp-content/uploads/2015/09/Foster-and-Willis-2015.pdf> [accessed 22 September 2016].

³⁴ <https://www.gov.uk/government/news/skipper-fined-for-fisheries-offences> [accessed 22 September 2016].

³⁵ <https://www.gov.uk/government/news/use-of-net-attachments-cost-master-and-owner-25000> [accessed 22 September 2016].

³⁶ http://www.northdevongazette.co.uk/news/fisherman_fined_after_illegal_netting_near_bucks_mills_1_3708261 [accessed 28 September 2016].

³⁷ <https://www.gov.uk/government/news/vessel-owner-and-master-guilty-of-illegal-fishing-in-lyme-bay> [accessed 22 September 2016].

- In September 2016, Weymouth Magistrates Court sentenced a vessel owner and a vessel master to fines of £2,445 and costs of £2,541.50, with a victim surcharge of £120 for the first and to a total fine and costs of £10,213 for the second, for the offence of exceeding the under 10 metres monthly catch limit in Area VIIe for sole (287.86 kgs in excess), and failing to accurately record the area of capture for sole in the vessel's logbook.³⁸
- In June 2016, Bournemouth Magistrates Court gave a Criminal Behaviour Order (CBO) to a fisherman who pleaded guilty to several fisheries and Poole Harbour Commissioners (PHC) byelaw offences including: denying access of IFCA's officers to the vessel, acting aggressively towards them and retaining an auxiliary hydraulic pump located on board his vessel that was contrary to the Southern IFCA Poole Harbour Dredge Permit byelaw (which was also seized by the IFCA's officers). The CBO will be in force from 2016 and for the next 3 years the offender must not enter or be found on land or sea within Poole Harbour. Additionally, the offender was ordered to pay £700 and received a 3-year conditional discharge for all charges which means that if he is found guilty and convicted of any offence within the next 3 years he will be sentenced for that offence and also for the offence he pleaded guilty to in this case.³⁹

Once again, as there is no easily accessible central database of prosecutions, no publicly accessible national infringements register, it is difficult to crosscheck these publicised cases with the information received from the authorities, or to judge how representative a picture they constitute.

3 Discussion and recommendations

Our review of the domestic framework for fisheries enforcement in England, together with the insights gained from the information on recent activities provided by IFCAs and the MMO, gives rise to concerns that England is not in compliance with the control and enforcement requirements of EU fisheries law. This situation arises in part from the content of some of the legal and non-legal documents through which the EU obligations are implemented, and in part from the regulatory attitude and culture within the government authorities concerned.

In addition, there is a growing concern regarding the effects of Brexit in the fisheries enforcement sector, because of the likely replacement of the CFP by a national fisheries management policy.⁴⁰ It has been suggested that the UK keep some of the main features of the CFP, such as the quota system and the ban on discards.⁴¹ In light of the Norwegian experience, it has been said that the UK will need a complex and strong management system with *“control and enforcement measures at port and at sea to ensure compliance [and also] measures to protect marine habitats and biodiversity”*.⁴² Nevertheless these drastic changes in national fisheries regulation could lead to even less effective control⁴³ if the British government does not prioritise the injection of resources for the adaptation and improvement of the current

³⁸ <https://www.gov.uk/government/news/father-and-son-fined-10213-for-fisheries-offences-in-case-brought-by-mmo> [accessed 22 September 2016].

³⁹ <http://www.southern-ifca.gov.uk/news> [accessed 22 September 2016].

⁴⁰ Institute for European Environmental Policy, 'The Potential Policy and Environmental Consequences for the UK of a Departure from the European Union' (2016), p.89.

⁴¹ See footnote 3, Bennet, p.11.

⁴² See footnote 3, Bennet, p.12.

⁴³ See footnote 38, IEEP, p.92.

enforcement system, in order to face the challenges posed by the establishment of a new regulatory framework, outside the CFP.

In this context, the strengthening of the national enforcement system will be even more important in order to properly control fishing activities in UK waters. This would include enforcing international and possibly bilateral agreements as well as national regulations to combat IUU fishing.⁴⁴ Hence, improving the UK's compliance with the Control Regulation now must be a priority since it does not only enhance its current performance but also strengthens its national enforcement scheme, especially at a time where Defra's⁴⁵ and the MMO's budget has been substantially cut.⁴⁶

The following paragraphs discuss five areas where we believe problems exist, and where action or further investigation is therefore needed to ensure EU law is not breached and the UK's system of enforcement is more robust and effective.

3.1 Approach to detection is insufficient

As explained above, the MMO Strategy and IFCA enforcement frameworks are built around a series of 'better regulation' documents: the Hampton Principles, the Legislative and Regulatory Reform Act 2006, and the Regulators Code. The dominant theme in these connected documents is the reduction of the regulatory burden placed on businesses. The UK Parliament publications website describes the Hampton Principles as "*an ambitious programme to reduce the burdens on business created by regulatory systems... urg[ing] regulators to become more risk-based in their inspection and information requirements...*"⁴⁷

There is clearly merit in making sure regulated businesses are not unnecessarily burdened, and in making sure that finite regulatory resources are used efficiently. As such, the taking of a risk-based approach to detection of fisheries non-compliance is reasonable and in fact is required by the Control Regulation itself.⁴⁸ However, this approach will cease to be legitimate if its practical effect is to create a regulatory culture in which action is not taken often enough to achieve the ultimate aim of the law. Based on our discussions with some IFCAs, it appears that the message to which most weight is given in this context is the statement, in the Hampton Principles, that '*no inspection should take place without a reason*', and that this is interpreted to mean that inspection must in every case be justified by a specific pre-existing cause for concern: a so-called 'intelligent lead'.

This is borne out by the MMO Compliance and Enforcement Strategy in its interpretation of the Legislative and Regulatory Reform Act, through the statement that "*activities... in particular those that would place a 'burden' on a regulated person (such as monitoring, inspection, investigation and compliance actions) are targeted to a specific identifiable need (therefore, for example, limiting random inspections to specific identified compliance requirements)*"

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ According to the MMO's Annual Report 2014/15, its budget was reduced from £32.0 million in the period 2010/11 to £28.1 million in the period 2013/14. Marine Management Organisation, 'Annual Report and Accounts 2014/15' (2015). Also, in recent conversations with Southern IFCA and Devon and Severn IFCA, they recognise that the budget cuts are most likely to impact enforcement staff numbers which could, in turn, affect the balance of current staffing in other work areas such as evidence. In addition, they declare that after the revised approach was introduced, IFCAs' budget has not really been adapted to balance the amount of work generated by the IFCA staff against the number and extension of the existent marine protected areas in each district.

⁴⁷ <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmspeak/1069/106911.htm>.

⁴⁸ See footnote 30, Commission Implementing Regulation 404/2011/EC, Article 98.

(emphasis added). Arguably - from the observation of the evidence gathered - this interpretation is quite restrictive.

Contributing another facet to this picture is the existence of the Regulation of Investigatory Powers Act 2000 (RIPA). As discussed above, this requires that certain activities, which would constitute covert surveillance under that Act, may only be conducted with official authorisation in each case. In fact, it is likely that many of the surveillance activities that might need to be conducted for fisheries enforcement purposes would not trigger RIPA – for example, Home Office guidance states that the Act will not apply to ‘general observation’ activities.⁴⁹ However – balancing this with the application of the Act where widely defined ‘private information’ on the object of surveillance may be collected as part of the evidence, and the complexity of the RIPA rules in general, it is perhaps unsurprising that it generates a degree of confusion and consequent caution.

Ultimately, the overall obligation placed on Member States by the Control Regulation is to carry out the necessary inspection activities in order to prevent activities that are not in compliance with the CFP, subject to a risk-based approach.⁵⁰ An indication of what is envisaged by a risk-based approach can be gained from the definition of risk management in the Control Regulation itself.⁵¹ It refers to: “*the systematic identification of risks and the implementation of all measures necessary for limiting the occurrence of these risks. This includes activities such as collecting data and information, analysing and assessing risks, preparing and taking action and regular monitoring and review of the process and its outcomes....*” As such, where the Control Regulation requires that Member States undertake inspection activities on the basis of risk management, what is envisaged is a broad-based and proactive methodology, rather than a narrow approach that is based solely on individual reasons for concern.

The whole objective of an enforcement framework will not be achieved without a sufficiently robust approach to identifying non-compliance in the first place. In order to make sure EU law is fully complied with, we recommend:

Relevant documents (Compliance and Enforcement Strategy etc.) be amended to make it clear that Hampton Principles and the Legislative and Regulatory Reform Act are subordinate to the requirements of EU law, and must be applied carefully within the overall clear framework of making sure EU fisheries law is complied with.

The stipulation in the Hampton Principles that “[n]o inspections should take place without a reason” must be correctly interpreted. The ‘reason’ therein must refer to the authorities’ general obligation to detect fisheries infringements, rather than a specific ‘intelligent lead’.

That more guidance and training be provided to IFCAs regarding RIPA, clarifying precisely what limits to their monitoring and surveillance activities are created by this legislation, and how their objectives can be achieved within its framework, including through the seeking and obtaining of authorisations where this is necessary. This could include examples/case studies of scenarios both where RIPA authorisation is NOT necessary, because for example an activity constitutes general observation, or would not fall within the definition of ‘covert’, and examples of where authorisation should be sought, plus identifying clearly the correct sources of authorisation. If it becomes apparent, through this process, that RIPA is too stringent to allow fisheries surveillance to be conducted effectively to secure compliance with EU law, further legislation should be enacted to provide an alternative legal basis for covert surveillance in a fisheries context.

3.2 Number of prosecutions is low and level of fines insufficient

As noted in the discussion in the preceding section, the number of prosecutions for fisheries offences is quite low. In 2009 there were 64 prosecutions with 64 guilty verdicts obtained in local Magistrates Courts. In 2010 there were 49 prosecutions with 44 guilty verdicts and in 2011 there were 39 prosecutions resulting in 27 guilty verdicts. In 2013 there were only 12 prosecutions, in 2014 there were 49 prosecutions, in 2015, 53, and in 2016 there have been only 8 prosecutions. At EU level, according to the North Sea Joint Deployment Plan 2015, the UK - compared to other Member States - holds the highest percentage of inspections at sea with suspected infringements,⁵² yet considering the past years' statistics, the number of prosecutions is still low. In fact that year the MMO brought 53 prosecutions: 9 guilty verdicts were awarded, and the largest fine imposed that year was of £1,333.

There may of course be a number of reasons for this. It might indicate that there are very few, and declining, instances of non-compliance. However, it is also logical that if authorities are not proactive in their surveillance and inspection activities, as discussed under the previous heading, this will influence the number of instances of non-compliance that are discovered and can therefore be prosecuted. In addition, the system of applying sanctions according to an escalating scale, as described in the MMO Strategy and IFCA enforcement frameworks, with 'soft' measures or out of court settlements being invoked as a preliminary or alternative step to prosecution, will also reduce the number of cases that reach this stage.

While a proportionate and escalating response may be reasonable in many respects, there is once again a question of whether these actions are in fact sufficient to achieve the overall objective of the regulation; to deter and prevent breaches of the law. The language used in the MMO Compliance and Enforcement Strategy makes it clear that informal measures, including oral advice, advisory letters and written warnings, are expected to be used in cases where a breach of the law has been identified, and where evidence is available, to serve such purposes as "reminding" the offender of the need to obey the law. It must also be questioned whether, as well as not complying with the Control Regulation, such a light-touch approach is adequate, or fair to law-abiding members of the industry.

A further possibility is that informal measures are used because it is decided that the Code for Crown Prosecutors tests – sufficiency of evidence and public interest – are not met. Regarding sufficiency of evidence, a more rigorous approach to detection and inspection might assist (as discussed under the previous heading). Where more resources are needed to do this, they must be provided (noting that the Control Regulation requires authorities to be provided with adequate resources).⁵³ Regarding the public interest, prosecuting authorities should give more weight to the severity of illegal fishing, recognising fully the damage to fishery resources and the marine environment, and thereby the communities and economies that depend on them, that it may create.

Where prosecutions are brought and are successful, another issue concerns the level of fines. According to the information provided in response to our access to information request, the average level of fine issued by local courts is low. In most cases, the fines were between a few hundred and a few thousand pounds. In several cases the court costs as a result of the prosecution are larger than the fine the defendant is given. Even in cases of persistent

⁵² European Fisheries Control Agency, 'Annual Report 2015' (2015) p.94.

⁵³ See footnote 11, the Control Regulation Article 5(3).

offending, fines seem to be relatively low (for example, in the Martyn Rogers/Amy R Trawlers case, the same operator, being fined repeatedly over a period of 14 years, never saw the fines increase despite the clear history of non-compliance). In some cases, a conviction actually results in no fine being imposed at all. Whether a prosecution is sought, or whether a FAP is imposed, does not seem to make a lot of difference to the size of the penalty.

The Control and IUU Regulations very clearly demand that penalties for serious fisheries infringements must be effective, dissuasive and proportionate.⁵⁴ Regardless of the severity of the offence, the Control Regulation requires that sanctions effectively deprive the perpetrator of economic benefit, and discourage further offences. Although these rules leave much discretion to national authorities in setting the precise framework for size of sanction, the ultimate result that must be achieved is very clear. Member States must, in fixing sanctions for serious infringements, take into account the value of prejudice to fishery resources and to the marine environment. They shall 'as appropriate' calculate sanctions based on the value of the fishery products obtained by committing the infringements.

The question arises as to why fines are generally set at a low level, what factors are leading to these decisions, and whether everything that is required to be considered by EU law is in fact being considered. In the past, maximum penalty levels have existed for a range of fishery offences, but this is not the limiting factor: the fines tend to be set in any case well below the maximum permitted level. The application of the magistrates sentencing guidelines could be part of the problem. As previously outlined, these guide sentencing according to a number of aggravating and mitigating factors, including the defendant's financial circumstances, whether guilt was admitted, and whether there was lack of awareness of a particular regulation. Although factors such as whether the infringement was motivated by financial gain, and whether damage has been caused, may also be considered, it is possible that the mitigating factors are being given disproportionate weight. If this means that the penalties are not effective and dissuasive, then compliance with EU law will not be achieved. At the same time, such a framework is unlikely to face the challenges related to fisheries control as a result of Brexit.

As outlined in section 4, the information we have received from the MMO indicates that in at least some cases, and to some extent, fines are being based on the value of the catches obtained. The information from publicly available news reports also, in some cases, indicates that the value of the catch is the basis for the fine. However, information on this is not complete, which makes it difficult to assess whether the EU requirement that sanctions deprive the perpetrator of its benefits is being met.

In addition, the EU legislation is also clear that other factors must be taken into account when sanctions are applied in cases of serious infringements, as well as the issues of dissuasiveness and deprivation of benefit, namely, the amount of any prejudice to marine resources and to the marine environment concerned. In theory, the magistrates' sentencing guidelines would allow consideration of environmental damage, but it appears, from our discussions with IFCAs, that the issue of environmental damage is something that is not currently considered by magistrates. Some of the cases reported on MMO and IFCA websites comment on the sensitivity of the local marine environment, and its vulnerability to damage by the infringing activity (for example, in the 'Lyme Bay' case it was commented that the area is vulnerable to scallop dredging). However, it is again difficult to tell whether this has had any influence on the sentence imposed.

⁵⁴ See footnote 11, the Control Regulation, Articles 89-90; see footnote 12, the IUU Regulation, Article 44.

We recommend improvements are made in the following areas:

The English authorities' practice with respect to commencing criminal prosecutions for infringements of fisheries law, and to the use of 'soft' measures even where breaches are identified, should be reviewed. A more robust approach should be incorporated into the MMO's Compliance and Enforcement Strategy, and IFCA enforcement frameworks. This should include extra guidance on the use of the public interest test in this context, giving adequate recognition to the consequences of illegal fishing for the environment, communities and compliant businesses.

Further sentencing guidelines should be developed for the use of magistrates. These should make it clear that environmental damage and prejudice to fishery resources must be considered in every serious infringement case, and that the value of the catch obtained must also be considered, with the fine effectively depriving the perpetrator of all economic benefit. It should also be made clear that mitigating factors should not be allowed to operate to such an extent as to undermine the effectiveness and dissuasiveness of a sanction.

3.3 Information on fisheries infringements is not transparent

The maintenance of a national register of fisheries infringements is a clear requirement of the Control Regulation. As pointed out in section 4, this register is being maintained by the MMO, although from our conversations with IFCA's we have concluded that it is not complete. This situation should be rectified immediately to avoid a continuing breach of EU law.

Article 93 of the Control Regulation, which establishes the national register requirement, does not itself provide that the register should be publicly accessible. However other legal provisions give strong grounds for arguing that there should be public accessibility, including proactive publication, as well as provision of information on request. Firstly, Article 3 of the CFP Basic Regulation establishes transparency of data handling (subject to existing legal requirements on confidentiality) as one of the key governing principles of that legislation, so the starting point for registers of data on CFP infringements should be a high level of transparency. For instance, Spain has understood the register obligation as one of public nature. Moreover, with the purpose of implementing Article 93 of the Control Regulation within national legislation, it has created a national register of serious infringements, made publicly available,⁵⁵ which aims to improve all coordination efforts between Member States in their combat against breaches relating to sea fishing.

Furthermore, the provisions of the Aarhus Convention⁵⁶ are relevant in this context. The Aarhus Convention sets up rules applicable to all EU Member States, including the UK, in respect of access to 'environmental information'. Environmental information in this context is information which refers to "[f]actors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the

⁵⁵ Article 2(1) Real Decreto 114/2013, de 15 de febrero, por el que se crea y regula el registro nacional de infracciones graves a la política pesquera común, se establecen las normas de aplicación del sistema de puntos y se actualizan los importes de las sanciones previstas en la Ley 3/2001, de 26 de marzo, de Pesca Marítima del Estado.

⁵⁶ See footnote 6. The Aarhus Convention is implemented into EU law, in respect of access to environmental information as considered here, by the provisions of Directive 2003/4/EC on public access to environmental information and repealing Council Directive 90/313/EEC.

scope of subparagraph (a) above [includes the state of water and biodiversity], and cost-benefit and other economic analyses and assumptions used in environmental decision-making.⁵⁷ The Convention, and its implementing EU legislation, requires that access is given to environmental information upon request, but also that public authorities that hold environmental information organise it with a view to its active and systematic dissemination to the public. Member States are obliged to make sure that environmental information progressively becomes available to the public through electronic means.⁵⁸ Article 5(2)(b) of the Convention actually gives the example of publicly accessible registers as a method for public authorities to use to make environmental information 'effectively accessible'.

IUU fishing activities, because of their very significant potential for impacting on the marine environment and biodiversity (i.e. the 'state of water and biodiversity' as referred to in the definition above), would fall within the scope of the Aarhus rules. As such, we recommend that to ensure compliance with EU and international law, the national register of fisheries infringements is made publicly available. Ideally, this would be through a centralised web-based portal. It should be noted that although Article 113 of the Control Regulation puts in place rules regarding the protection of professional and commercial secrecy, this should not prevent the Aarhus framework on access to environmental information from applying. The Aarhus Convention and implementing EU legislation contain provisions for exceptions to the availability of information on grounds such as commercial confidentiality, and these will be the relevant applicable rules on commercial and professional secrecy and confidentiality to which Article 113 applies. However, it also states that these exceptions may be waived in the public interest, which it is in the case of illegal and criminal activities.

It is also important to point out that much of the information gathered on IFCA's comes from their annual reports and although Defra has published a guidance document on Annual Planning (2011)⁵⁹ that orientates them on the main sections required in a report, it does not provide any further detail for their content. Consequently, it is observed that IFCA's present their annual reports' information in many different ways and with varying level of detail, which does not allow for a full and systematic review of the data and scrutiny of the performance of each authority according to their respective enforcement strategies. In addition, we have observed that some of the IFCA's have not published their annual reports on their websites.⁶⁰

The possibility for public scrutiny of non-compliant businesses and individuals has the potential to promote a culture of compliance. Currently, although selected information is available (either proactively on websites or on request), it gives an incomplete picture. It is therefore very hard for observers to judge the state of compliance and the potential environmental impact IUU fishing may have, or to understand the decision-making processes of enforcing authorities and judicial authorities in selecting enforcement measures and setting sanctions. We recommend that the national infringements register be made publicly available and completed to assist in rectifying this, and further guidance is given by Defra to IFCA's to detail their annual reports accordingly.

⁵⁷ Article 2(3) of the Aarhus Convention, and Article 2(1) of Directive 2003/4/EC.

⁵⁸ Article 7(1) of Directive 2003/4/EC.

⁵⁹ Guidance document for Inshore Fisheries and Conservation Authorities on Annual Planning (2011). Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/182347/2011-ifca-guide-memp.pdf [accessed 6 September 2016].

⁶⁰ This is the case of Isles of Scilly IFCA which has not published its annual reports on the periods 2013-2014 and 2014-2015.

3.4 Failure to categorise acts as “serious infringements”

The Control Regulation requires that in addition to a system of administrative and/or criminal sanctions, Member States employ a system of imposing points on fishing licence holders and masters where a serious infringement is committed. The English system for the implementation of this aspect of the Control Regulation is set out in a non-statutory guidance document entitled ‘Guidance for the application of a points system for serious infringements’.⁶¹ This document explains that in England, points will be applied only where a licence holder or a master is convicted in court of a serious infringement.

EU law does not restrict the application of the points system only to serious infringements that result in a criminal conviction; rather it requires that this be invoked when serious infringements arise. The English approach is therefore restricting the operation of this system in breach of EU law, and undermining its deterrent effect. The infrequency of prosecutions and convictions as discussed in the preceding sections therefore has even wider consequences than may at first appear, leading to improper implementation (i.e. breach) of the Control Regulation.⁶²

In the examples discussed above, the MMO data appears to show no points having been applied, despite the fact that some of these activities would appear to have been serious infringements (e.g. exceeding quota restrictions). Notwithstanding this, even under the current English regime which restricts application of the points system to criminal convictions, where there are criminal prosecutions, we can see no evidence of that the points system is in fact being applied.

We recommend that the conditionality of the points system on the existence of a criminal conviction should be removed, in order to bring England into line with EU legal obligations.

4 Connection with environmental conservation: fisheries and protected areas

From the point of view of environmental conservation, fisheries enforcement is of great importance. As noted in the introduction, fishing activities have great potential for causing environmental damage. This threat is controlled partly through rules in fisheries legislation like the CFP, Control and IUU Regulations, and partly through environmental legislation; especially legal frameworks that create protected sites in the marine zone. Illegal fishers are unlikely to respect environmental rules, and their breaches of fisheries rules (e.g. fishing beyond their quotas, with prohibited gear or in closed seasons) also cause damage to the marine environment. The following section takes a brief look at the key laws governing marine protected areas in English waters and responsibility for their enforcement.

As with responsibility for the management of fisheries, responsibility for environmental conservation in English waters is divided between the MMO and the IFCA under the Marine

⁶¹ See footnote 17. Marine Management Organisation, ‘Guidance for the application of a points system for serious infringements’ (May 2013).

⁶² Although the Sea Fishing (Points for Masters of Fishing Boats) Regulations 2014 implements a points system for vessel masters, it does not address any of the problems identified in this report in respect to how the points based system currently operates for fishing vessel licences.

Act. These organisations, under the supervision of Defra, have the role of integrating the management of fisheries with marine conservation objectives established under EU and domestic law, and relating particularly to marine protected areas.

The main relevant pieces of EU law in this context are the Birds and Habitats Directives⁶³ and the Marine Strategy Framework Directive.⁶⁴ As EU Directives, these are binding on Member States and must be fully incorporated into the provisions of national legislation. The Directives allow discretion to the UK Government as to how the requirements contained within the EU conservation laws will fit within the UK domestic legal framework. If, however, the UK Government does not correctly transpose the directives – that is, they do not incorporate sufficient legal provisions that allow the objectives and requirements of the directives to be achieved – then this is a breach of EU law.

In England, the Birds and Habitats Directives are implemented through the Habitats and Species Regulations (2010) (Habitats Regulations) and in the offshore marine area through the Offshore Marine Conservation (Natural Habitats) Regulations (2007). The Wildlife and Countryside Act 1981 also contains relevant environmental conservation provisions. The Marine Strategy Framework Directive is implemented through the Marine Act.

Under the Habitats Directive, obligations are placed on the UK Government to establish a network of protected areas, the marine components of which are referred to as European Marine Sites in domestic legislation. Generally, European Marine Sites are meant to enable selected habitats and species to achieve or maintain favourable conservation status.⁶⁵ In order to practically achieve this, Article 6 of the Habitats Directive sets out the provisions governing the conservation and management of European Marine Sites. Firstly, obligations are placed on the government to ensure that 'necessary conservation measures' are established within protected sites.⁶⁶ Secondly, the government must take appropriate steps to prevent deterioration or disturbance.⁶⁷ Finally, all human activities 'likely to have a significant effect' on the site must be subject to an appropriate assessment before being allowed to proceed. Following that appropriate assessment, unless it can be shown beyond a reasonable doubt⁶⁸ that the proposed activity will not 'adversely affect the integrity of the site' (i.e. the favourable conservation status of the protected feature and its associated biodiversity),⁶⁹ such activities cannot be permitted by a competent authority (i.e. in relation to fishing activities in England, must not be permitted by the MMO or by the IFCA).⁷⁰

The Marine Strategy Framework Directive also creates an obligation to establish coherent and representative networks of marine protected areas, which will include European Marine Sites, as well as additional areas. In England the additional marine protected areas are known as Marine Conservation Zones (MCZs), and the rules for their designation and management are set out in

⁶³ Directive 2009/137/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2010] OJ L207/7 (the 'Birds Directive'); Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7 (the 'Habitats Directive').

⁶⁴ 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 (the 'Marine Strategy Framework Directive') [2008] OJ L164/19.

⁶⁵ Article 2(2) Habitats Directive.

⁶⁶ Article 6(1) Habitats Directive.

⁶⁷ Article 6(2) Habitats Directive.

⁶⁸ See paras 56-59 of the judgment of the European Court of Justice in Case C-127/02 (the 'Waddenzee' case), which confirms that there must be no reasonable scientific doubt that a plan or project will not have an adverse effect on the integrity of the site, before it can be approved.

⁶⁹ For further information, refer to ClientEarth briefing on the meaning of 'site integrity': <http://www.clientearth.org/reports/natura-2000-site-integrity-briefing.pdf>.

⁷⁰ Article 6(3) Habitats Directive.

Part 5 of the Marine Act. The fundamental grounds for designating an area as an MCZ are to conserve marine flora, fauna, habitats, or features of geological or geomorphological interest.

The MMO's role includes the management of potentially damaging fishing activities in European Marine Sites.⁷¹ IFCA's also have environmental conservation objectives in this respect within their districts.⁷² The UK's approach to the management of European Marine Sites in English waters was revised in 2012, and work is ongoing to bring management more into line with the Birds and Habitats Directives' requirements.

Defra has provided guidance in connection with the revised approach to the effect that IFCA's⁷³ are expected to be the lead regulatory authorities implementing measures for the management of commercial fisheries in English inshore waters in respect of EU conservation objectives (except in cases where the Environment Agency is primarily responsible for regulating the fishery).⁷⁴ For sites between 6-12 nautical miles (nm) or sites that straddle the 0-6 and 6-12 nm boundary, and out to 12 nm (Exclusive Economic Zone) the MMO is the lead regulatory authority, and it also has a coordination role.

So far under the revised approach, the MMO has enacted a total of 4 byelaws to restrict the use of the most damaging fishing gear in or near the sensitive features of 25 European Marine Sites. On the other hand, IFCA's have enacted a range of 11 to 13 new byelaws for the same purposes. While the IFCA website states that 13 new byelaws⁷⁵ have been enacted, through a review of each individual IFCA website we found that only 11 byelaws are currently published.

The MMO again has responsibilities for ensuring that MCZs meet their conservation objectives.⁷⁶ IFCA's are also required under the Marine Act to manage MCZs and to ensure that MCZs meet their conservation objectives.⁷⁷ This includes enacting local byelaws,⁷⁸ as well as taking enforcement action against breaches of local byelaws⁷⁹ and prosecution measures for damage to MCZs.⁸⁰ Any person who contravenes a byelaw that has been enacted by the MMO or IFCA's to protect an MCZ is guilty of an offence and liable on summary conviction to a fine.

In addition, and importantly regardless of whether a byelaw has been enacted, any person who intentionally or recklessly causes damage to a protected feature of an MCZ, where that act may significantly hinder the conservation objective of the MCZ, is guilty of an offence and liable on summary conviction to a fine.⁸¹

⁷¹ Sections 9 - 11 and 125 Marine Act.

⁷² Section 153(2)(a)-(b) and section 153(4) Marine Act.

⁷³ While the Marine Act does not place an express duty on IFCA's to manage European Marine Sites, taking their duties listed together under the Act, it seems self evident that their conservation duties extend beyond MCZs to, for example, European Marine Sites (see in particular ss.153(2)(a), 153(2)(b) and 154 of the Marine Act). This is confirmed in section 158(6) Marine Act which provides that no consent (where it would otherwise be required) is needed for byelaws that protect sites of special scientific interest, national nature reserves, Ramsar sites, European Marine Sites or MCZs. The Habitats and Species Regulations (2010) (Habitats Regulations) also confirm that a 'relevant authority' under those Regulations - which implement the Birds and Habitats Directives into domestic law - includes IFCA's (s.6 Habitats Regulations). It therefore follows that the power bestowed on IFCA's under section 155 of the Marine Act to enact byelaws for the purposes of carrying out their duties (which includes ensuring sustainable management of exploitation of sea fisheries resources and protection of MCZs) empowers IFCA's to make byelaws to protect European Marine Sites.

⁷⁴ Revised Approach to the Management of Commercial Fisheries in European Marine Sites - Overarching Policy and Delivery Document (2013): https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/345970/REVISED_APPROACH_Policy_and_Delivery.pdf [accessed 28 September 2016].

⁷⁵ <http://www.association-ifca.org.uk/marine-protected-areas/european-marine-sites-ems> [accessed 16 September 2016].

⁷⁶ Section 125 Marine Act.

⁷⁷ Section 154 Marine Act.

⁷⁸ Section 155 Marine Act.

⁷⁹ Section 163 Marine Act.

⁸⁰ See section 140 of the Marine Act for offences of damaging protected features of MCZs.

⁸¹ Section 140 Marine Act.

In determining the amount of any fine to be imposed for an offence of intentional or reckless damage to an MCZ (and where there is no byelaw in place) the court must in particular have regard to any likely financial benefit of the offence.⁸² Also of note is that the Marine Act allows any person who has been charged with intentional or reckless damage to an MCZ (and where there is no byelaw in place) a defence if that act was done in the course of, or in connection to, sea fishing and the damage to the protected feature could not reasonably have been avoided.⁸³ While the Secretary of State may restrict the application of this offence,⁸⁴ its availability suggests that it is imperative that byelaws are enacted to protect MCZs to avoid offenders abusing this defence.

Similarly, MMOs and IFCA's also have responsibility to ensure that the legal protection afforded to European Marine Sites as referred to above is implemented and adhered to. Under England's domestic legislation, similar to the enforcement of MCZ byelaws, any person who contravenes a byelaw that has been enacted by the MMO or the IFCA's to protect a European Marine Site is guilty of an offence and liable on summary conviction to a fine.⁸⁵

A further piece of legislation with importance for the protection of habitats and species is the Environmental Liability Directive (the ELD).⁸⁶ According to this legislation, in certain circumstances the operator of a commercial activity (which would include fishing), is obliged to avoid causing damage to sites or species protected under the Habitats and Birds Directives, and is liable to pay to remediate such damage if it is caused. The competent public authorities are empowered to require either preventive or remediation measures to be taken. In England, the ELD is implemented through the Environmental Damage (Prevention and Remediation) Regulations 2015. However, the Regulations contain an exemption, stating that damage caused in the course of commercial sea fishing will not be applicable under the Regulations if all legislation relating to that fishing was complied with.⁸⁷ This makes the Regulations incompatible with EU law, as will be further discussed below.

4.1 Problems concerning environmental damage to protected sites

In 2012 in the Eastern IFCA's district, environmental damage was caused as a result of reckless 'prop washing' (vessel-based hydraulic suction dredging) in the Wash European Marine Site. The activity of 'prop washing' was not prohibited at the time by a local byelaw and as a result, the IFCA was unable to prosecute the offenders. The only option that was understood to be available to the IFCA was to close the fishery to enable restoration of the damage caused. The fishers who engaged in the highly damaging activity in this case therefore suffered no prosecution or fine.

As noted above, as concerns MCZs, whether or not a byelaw is in place, an offence exists of deliberately or recklessly causing damage to one of its protected features. However, if there is no byelaw in place to protect a European Marine Site, and environmental damage is caused to

⁸² Section 140(5) Marine Act.

⁸³ Section 141(4) Marine Act.

⁸⁴ Section 141(5) Marine Act.

⁸⁵ See Section 38 of the Habitats Regulations, which gives the MMO power to make byelaws to protect European Marine Sites under Section 129 of the Marine Act, and is therefore also captured by Section 139 of the Marine Act - Offence of Contravening Byelaws. See also Section 163 of the Marine Act, which makes contravention of an IFCA byelaw passed to protect MCZs or to manage inshore fisheries (and by analysis of an IFCA's duties taken together, to protect European Marine Sites) an offence.

⁸⁶ *Ibid* 9.

⁸⁷ *Ibid* 8, s8 (3)(g). Although this recently enacted Regulation revoked the Environmental Damage (Prevention and Remediation) Regulations 2009, extending the territory for the MMO to exercise its enforcement powers, regrettably lost a valuable opportunity to make an amendment to the exemptions.

it, then a concerning gap in the domestic legislation arises whereby there is no apparent ability for the MMO, IFCA or other governmental authority to prosecute the perpetrator. As it currently stands, if environmental damage was caused to a European Marine Site in the circumstances where there was no law in place preventing such action, then there is nothing within the English legal system that allows prosecution for environmental damage caused to a European Marine Site. In the 2012 Eastern IFCA 'prop washing' case – without a byelaw banning or regulating the activity (which some argue when used responsibly is not damaging to the protected site) the IFCA was unable to effectively deter reckless use of the practice through prosecution. Even when the closure might have been understood as the only possible solution to avoid further damage, the economic benefit derived from the offence was not taken away from the offender, which raises some questions about the nature of such measure, which can be considered to be a measure for reparation but not quite adequate to achieve a deterrent effect. This is a failure of the UK Government to effectively transpose and achieve the objectives of the Habitats Directive.

Given that the MMO and IFCA have been delegated responsibility under English law to implement EU environmental law requirements (see above) including to “*take appropriate steps to prevent deterioration or disturbance of the natural habitats and habitats of species for which the site has been designated to protect*”, then there must be a regime in place that acts as a deterrent to individuals who might cause environmental harm. The inability of IFCA and the MMO to hold individuals to account for damage cause to European Marine Sites is a significant flaw in the English domestic system that must be rectified.

A partial solution could be found in the form of the Environmental Damage Regulations. However, some problems arise. Most obviously, the exemption currently preventing these Regulations from applying to commercial fishing activities renders them inapplicable in this context. We believe this exemption places the English Regulations in breach of the EU legislation. Although the latter does allow for a ‘permit defence’ to be incorporated into national transpositions (this operates to remove liability for damage caused by an activity that was conducted in compliance with specific listed legal permits), a blanket removal of an entire sector from the legislation’s coverage on the basis that it complies generally with other legislation, is beyond the scope of such a defence, as would be the formulation of a permit defence that is not listed in the Environmental Liability Directive itself. Again, this is a breach of EU law. A further problem with the ELD/Environmental Damage Regulations is that they will only invoke fault-based liability on fishing activities, i.e., liability will only exist in circumstances where the operator has acted negligently, and this may be difficult to establish.

A second issue concerns the problem seen already above, regarding consideration of environmental damage in setting penalties. Our research indicates that local magistrates are not applying sufficiently dissuasive fines that take into account environmental damage. This is reflected in the statistics that were provided by the Devon and Severn IFCA, which show that the fines administered by magistrates are, as a general rule, relatively low. We have already discussed in section 4 that a breach of EU fisheries law (specifically, the Control Regulation) arises where sanctions for serious infringements are not proportionate, effective and dissuasive, and where environmental damage caused by a fisheries activity is not considered in the sanctioning process in cases of serious infringement. However, another issue that may arise is a breach of EU environmental law, where a fisheries activity causes damage to protected areas, habitats and species.

Moreover, based on conversations recently held with the Southern IFCA and the Devon and Severn IFCA, the impression of the prosecutors is that magistrates tend to focus on the specific

breach, for instance, verifying whether there has been a transgression of a permit or condition. Consequently, they generally leave environmental damage outside the scope of analysis for determining and imposing a sanction. However, the victim impact statement could be a suitable opportunity for communicating the effects of the offence in the environment to the court. As set out earlier, under the Marine Act, where a person has caused damage to a protected feature of an MCZ, the court must in particular have regard to any financial benefit that has accrued as a result of the offence. This does not, however, preclude the Court from also having regard to the degree and type of environmental damage caused. It is important to note that where environmental damage has been caused in breach of a fishing byelaw (i.e. an illegal fishing activity), the perception that enforcers cannot take into account the environmental damage caused is actually contrary to the EU law.⁸⁸

We make the following recommendations for bringing English law in this area into line with the overarching EU framework:

An urgent amendment should be passed under the Habitats Regulations so that the offence of damaging protected features of MCZs under the Marine Act would also apply to damage to protected features of European Marine Sites. It is important to note that the defence relating to an action occurring in connection with sea fishing would not be permissible under Article 6 of the Habitats Directive and so could not apply. Regarding MCZs, we recommend that byelaws are enacted as soon as possible with respect to fishing activities which may present a threat to these sites, in order that this same defence cannot be abused.

Where fishing regulations have been breached and as a consequence, environmental damage has been caused to European Marine Sites, prosecuting authorities should seek to impose higher fines, taking into consideration the degree of environmental damage caused as well as other relevant considerations such as the financial benefit that may have arisen through the offence.

The Environmental Liability Regulations should be amended to remove the clause exempting commercial fisheries. Although these rules will still be restricted in their scope to instances where a fisher acted negligently, which, as noted, may be difficult to prove, they should still be capable of responding in some instances. The MMO and IFCA must be designated as competent authorities for the purposes of this legislation. Even in the Brexit scenario, we believe these changes -and learnt lessons- would strengthen the national enforcement system, in order to face the many challenges posed by an eventual new monitoring control and enforcement framework for fisheries.

⁸⁸ See footnote 11, the Control Regulation, Article 90(4); see footnote 12, the IUU Regulation, Article 13(2).

5 Conclusion

This report has examined the legal framework surrounding fisheries enforcement and the issue of combating IUU fishing in England. It identifies that a number of barriers to effective implementation of the relevant EU law in England currently exist. We have set out the failures of English law and regulatory practice in allowing for sufficient surveillance and inspection, noting that emphasis on the reduction of regulatory burden is infringing on necessary proactive inspection activities, and we argue that this must be addressed in order to have an effective approach to enforcement. Guidance and training need to be provided to the staff of the enforcement authorities to enable them to better understand the extent of their duties. Approaches to prosecution, sentencing, and the application of licence points as a further sanction for infringements, need to be reviewed urgently.

Although England is currently maintaining a national register of infringements, it is not updated reliably enough to be useful and in compliance with EU requirements. In addition, it was confirmed to us that this register cannot be accessed by the public and even the IFCA's are experiencing difficulties to access it, therefore it can be concluded that public access also needs to be addressed in order to meet the requirements under EU law and the Aarhus Convention.

IUU fishing is a serious issue, threatening marine ecosystems, biodiversity important to the citizens of the EU, and the future of sustainable and economically viable fisheries. It is not acceptable for compliant members of the fishing community to have livelihoods undermined by ineffective fisheries enforcement. For these reasons there are strong EU laws in place to monitor, prevent and penalise this activity. English law is not currently in line with these requirements, and action therefore needs to be taken to rectify this, not only for the current times but also to shape and strengthen the national enforcement systems in order to face future challenges posed by Brexit with regard to the protection of marine environment and the fight against overfishing.

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