

**Legal Study on the Relationship between Certain Aspects of the Common
Fisheries Policy Basic Regulation and Key Provisions of the Nature
Restoration Regulation**

**Including an Evaluation of Existing Options on Improving the Joint
Recommendation Procedure and Proposal of Additional Options.**

An Opinion Prepared for ClientEarth

By

**Richard Barnes, Professor Of International Law, University Of Lincoln
/Adjunct Professor Of Law University Of Tromsø**

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Executive Summary

The Nature Restoration Regulation (NRL) will expand the EU environmental acquis, generating new obligations for Member States to protect marine ecosystems, beyond those already recognized under the Birds & Habitats and Marine Strategies Framework Directives, to meet timebound restoration targets through effective measures included in national restoration plans. To the extent that marine restoration measures constitute “*conservation measures*” affecting fishing interests of other Member States, their adoption will be guided by the “joint recommendations” procedure of Article 11 of the Basic Regulation of the Common Fisheries Policy (CFP). There is scope for the NRL to inform the operation of the joint recommendation process, although care is required to ensure that the NRL does not amend the provisions of the CFP, given their different legal bases. This report answers six questions concerning problems with the joint recommendation process, and the steps that can be taken to mitigate or avoid these as they might apply under the proposed NRL (*See Section 1 and Paras 25-30*).

The Joint Recommendation process, which aims to protect marine protected areas (MPAs) from fishing, has been criticized for being slow, limited in its coverage, and favouring commercial fishing interests over nature conservation requirements. There are also ambiguities and gaps in the process that hold up reaching agreement on Joint Recommendations including, specifically, a failure to ensure early engagement of key stakeholders in the process. The process has discretionary elements, and it does not provide clarity about who within Member States should be involved in the process. Member States with a direct interest in fishing are given a de facto veto, which can hinder the process. There is a lack of stakeholder engagement and scientific advice, insufficient investment in resources, and no specific deadline or definition of ‘sufficient information’ for the compilation of initial information. This has deterred Member States from using the process. The absence of consequences for failing to adopt a Joint Recommendation makes it difficult to hold States to account for failing to adopt Joint Recommendations. Infraction proceedings have not been brought against Member States for failure to adopt Joint Recommendations. The European Court of Auditors report on the process has been influential in calling for amendments to EU law/practice in this area. (*See Paras 17-21, 23-24, and Annex Para 15*)

The problems inherent in the Joint Recommendation process will negatively impact on the NRL as presently structured because the NRL relies upon the CFP mechanisms for the implementation of restoration/conservation. There is further concern that the Joint Recommendation process could be used to water down restoration measures since they occur outside the more exacting structure of the NRL. The CFP empowers but does not oblige Member States to adopt Joint Recommendation. However, this is separate to Member States' obligation (and not discretion) to comply with environmental legislation. When compliance with environmental legislation necessitates the adoption of Joint Recommendations, it would be unconvincing for Member States to argue that the adoption of a JR is discretionary. A lack of clarity on the interrelationship between these provisions undermines wider EU environmental law targets. (*See Paras 20.a and 45*)

The following recommendations are provided to ensure the NRL is not undermined by the Joint Recommendation process:

First, a strong teleological argument can be made that widely accepted principles of EU environmental law (ecosystem-based approach, the principles of shared responsibility, sincere cooperation and effectiveness) dictate how the Joint Recommendation should be implemented. This argument could be applied *mutatis mutandis* to the NRL. Such an argument could also inform litigation concerning the Joint Recommendation process. (See *Para 47*)

Second, the NRL should be drafted in a way that shapes how the NRL operates vis a vis the CFP. This includes: (i) specifying what actions or events trigger the initiation of the Joint Recommendation process; (ii) including a timeframe of 12 months following the adoption of the NRL for the communication of ‘sufficient information’ on the required restoration measures; (iii) specifying what measures are adopted under national restoration plans; (iv) specifying what happens as a default to the failure to adopt (suitable) Joint Recommendations, including specific action by the Commission to adopt measures in accordance with the CFP. In the event of potential opposition to changes to the substantive provisions of the draft NRL, proposals for new recitals could be added. (See *Paras 33-44*)

Third, in keeping with its duties under Article 11(6) CFP, the Commission should play an active role in facilitating and timekeeping the Joint Recommendation process, including by setting clear expectations from the Member States and stakeholders, asking Member States for a roadmap and periodic updates, providing good offices or even acting as a mediator. The Commission could set an annual agenda, and use emergency measures under the CFP to provide protection to designated sites. It could also initiate an infringement procedure against Member States at the European Court of Justice . There is also scope for complaints to be brought against the Commission via the European Ombudsman or ECJ for not acting in accordance with its various responsibilities. (See *Para 47*)

Full resolution of the problems in the Joint Recommendation process would require amendment of the CFP. This could be done through targeted amendments of Article 11. The Commission has indicated a willingness to do this if there is insufficient progress on the marine action plan part of the Biodiversity Strategy 2030 by the time of its mid-term review in 2024. However, this would be a slow process, and risks opening up (and weakening) existing conservation measures in the CFP. The NRL cannot be used to amend the CFP because of the different legal basis, and it is unlikely that this would be changed. (See *Para 52*)

Finally, it is worth noting that both the EU and its Member States are bound by wider commitments under international environmental law. This includes an ecosystem-based approach, the precautionary approach, and the duty to protect the marine environment (including commitments under OSPAR). The European Parliament has expressed a desire to support a principle of non-regression that requires States to refrain from acts that undermine existing levels of environmental protection. These approaches reinforce the argument that the CFP should not be used to undermine or operate out with the scope of environmental commitments. (See *Paras 46 and 41*)

Methodology

The report was carried out as a desk-based research project.

Main Report

Section 1: INTRODUCTION

1. EU Member States are under a series of duties to take conservation measures to protect the environment. This includes commitments to establish protected areas under the Habitats Directive¹ and Birds Directive.² Such sites comprise the Natura2000 network. Member States are also under obligations under the Marine Strategy Framework Directive (MSFD) to ensure the good environmental status of European sea areas.³ These Directives establish frameworks for action, as well as setting out specific conservation requirements. If specific measures of conservation are needed that relate to fisheries, then such measures must be taken under the CFP. The procedures for adopting conservation measures, particularly under the Joint Recommendation process of Article 11, are underutilized with the result that conservation of marine areas is undermined. The proposed Nature Regulation Law (NRL) has the scope to enhance the conservation of habitats. However, the current draft indicates that conservation measures relating to fisheries will also be taken under the CFP. As such there is a risk that measures to restore marine habitats under the NRL will be undermined in a similar way by the CFP process.
2. This report assesses the basis and effect of the conservation process under the CFP, evaluates suggestions for reform and analyses what steps may be taken to ensure that the NRL can avoid similar problems with the Joint Recommendation process. The following research questions are addressed:
 - a. Please provide your opinion on the proposed amendments to the NRL. Do you have any suggestions for improving them? **See Paras 33-44.**
 - b. In your opinion, how far is it possible to incorporate wording in the NRL to strengthen or provide alternatives to the joint recommendation procedure without actually amending Art 11 CFP? **See Para 33.**
 - c. Would it be possible to include in the NRL deadlines relating to the joint recommendation procedure for restoration measures so that they can be agreed and/or submitted within the timeframe for finalizing national restoration plans? **See Para 34.**
 - d. Do you have any other suggestions about how to ensure that the legal uncertainties and poor implementation of the joint recommendation procedure in the context of the NRL is not used as a pretext for watering down the restoration plans and restoration measures required to achieve the NRL objectives? **See Para 45. See also Comments in Paras 27-29**
 - e. Would it be possible to use the NRL to amend Art 11 CFP? Would this require including Article 43(2) TFEU as a legal basis for the NRL? What risks would you foresee in advocating

¹ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, pp. 7–50.

² Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (Codified version), OJ L 20, 26.1.2010, pp. 7–25.

³ Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) (Text with EEA relevance), OJ L 164, 25.6.2008, pp. 19–40.

for an approach that calls for an amendment of the CFP through the NRL? **See Paras 33 and 52**

- f. Leaving aside the specific context of the NRL, what is your opinion on amending the CFP in order to address the shortcomings inherent in the joint recommendation procedure? In particular, do you see any possibility to advocate for the amendment only of the provisions relating to the joint recommendation procedure without opening up the entire CFP for revision and possible amendment? **See Paras 48-52.**
3. Section 2 provides an outline and assessment of the CFP process. An analysis of proposed Section proposed reforms or guidance to the CFP process is included in an Annex, with the main lessons from this being integrated into Section 3. Section 3 outlines the Nature Regulation Law, and considers the options for framing conservation procedures in such a way as to avoid similar pitfalls to the implementation of fisheries conservation measures pursuant to the MSFD and Habitats and Birds Directives.

Section 2: Outline and Assessment of the CFP Conservation Procedures

4. **Common Fisheries Policy.** The CFP forms part of the exclusive competence of the EU. Article 43(2) TFEU provides the legislative basis for the adoption of fisheries laws. The CFP requires that fishing and aquaculture activities are environmentally sustainable in the long-term (Art 2(1)). Conservation measures may be taken under Article 11 and Article 20. Article 11 was introduced in part, to strengthen regionalisation in decision-making within the CFP. Whilst the CFP sits apart from environmental policy, it is intended to be pursued in a way that is compatible and integrated with environmental policies. Environmental policies are a shared competence and the legislative basis for action is Article 192(1) TFEU.
5. Measures taken under the CFP must be compatible with Article 2 of the CFP, which requires:
 - a. that fishing and aquaculture activities are environmentally sustainable in the long-term and are managed in a way that is consistent with the objectives of achieving economic, social and employment benefits, and of contributing to the availability of food supplies (Art 2(1));
 - b. the application of the precautionary approach (Art 2(2)), and to maintain stocks at maximum sustainable yield;
 - c. ecosystem-based approach to fisheries management so as to ensure that negative impacts of fishing activities on the marine ecosystem are minimised, and shall endeavour to ensure that aquaculture and fisheries activities avoid the degradation of the marine environment.
6. **Article 11 Process.** Article 11 sets out the procedural steps Member States are to follow in adopting conservation measures that meet their obligations under EU environmental law. Such measures are applicable to waters under their sovereignty or jurisdiction, ie the 12nm territorial sea and exclusive economic zone. (As noted below, Article 20 CFP is applicable to the 12nm zone.) More specifically, Article 11 refers to:
 - a. *The Habitats Directive.* This Directive requires Member States to take ‘necessary conservation measures’ to meet the ecological needs of certain habitats’ (Art 6(1) and to ‘take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which

the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.’ (Art 6(2); Special Areas of Conservation).

- b. *The Birds Directive*. This Directive requires Member States to take special conservation measures for species concerning their habitat in order to ensure their survival and reproduction in their area of distribution (Art 4(1); Special Protection Areas). Member States should also take ‘appropriate steps to avoid pollution or deterioration of habitats or any disturbance affecting birds’ protected within Special Protection Areas (Art 4(4)).
 - c. *Marine Strategy Framework Directive*. As part of a wider programme of measures, Article 13(4) of the MSFD requires Member States to adopt ‘spatial protection measures, contributing to coherent and representative networks of marine protected areas, adequately covering the diversity of the constituent ecosystems, such as special areas of conservation pursuant to the Habitats Directive, special protection areas pursuant to the Birds Directive, and marine protected areas as agreed by the Community or Member States concerned in the framework of international or regional agreements to which they are parties’.
7. **On the consideration of restoration measures taken under the NRL as “conservation measures” in the meaning of Article 11(2) of the CFP Basic Regulation:** The Article 11 process does not refer to other environmental measures, including the proposed NRL. This raises the question of whether the Joint Recommendations can be adopted to give effect to the restoration measures under the NRL. Amending the CFP to explicitly include reference to the NRL would resolve such questions. However, this raises the prospect of reforming the CFP, which would be a potentially long and contentious process. The adoption of restoration measures by Member States could also be framed as part of commitments under the Habitats Directive or MSFD (Article 13 programme of measures). This could provide a means of ensuring that Article 11/18 process is appropriate. There appears to be no objections to the use of the Article 11 process to advance restoration measures in respect of fisheries, so this is unlikely to be an issue in practice.
8. Under Article 11, there are three options for implementing conservation measures. *First*, if the proposed measures do not affect fishing vessels of other Member States, then the Member State with sovereignty or jurisdiction over the waters is unilaterally empowered to unilaterally adopt conservation measures (Article 11(1)). *Second*, where the proposed conservation measures would affect a fishery in which another Member State has a direct management interest, the relevant Member States shall work together to submit a joint recommendation to the Commission, who may then adopt measures by way of delegated acts (Article 11(2)). The joint recommendation is prepared in accordance with procedures set out under Article 11(3). The initiating Member State provides the Commission and the other Member States having a direct management interest in the fishery with a fisheries management plan. This plan includes relevant information on the measures required, including their rationale, scientific evidence in support and details on their practical implementation and enforcement. On the basis of this plan, the initiating Member State and the other interested Member States may submit a joint recommendation to the Commission, through the regional process set out in Art 18, within six months from the provision of sufficient information. After assessing whether the proposed measures are necessary in accordance with the EU environmental legislation, the Commission is empowered to adopt a delegated act to give effect to the measures. *Third*, the Commission may take measures in cases of urgency. These are limited to measures that, in the absence of a joint recommendation, would jeopardise the objectives associated with the conservation measures the Member State is required to for the protected area (Art 11(4)). Such emergency measures are limited to 12 months, although may be extended a further 12 months if the conditions requiring their adoption still continue (Art 11(5)).

9. The Commission is under a duty to facilitate cooperation between the Member State concerned and the other Member States having a direct management interest in the fishery in the process of implementation and enforcement of the measures adopted above (Art 11(6)).
10. *Regional Cooperation under Article 18.* Article 18 sets out the process for regional cooperation in the adoption of conservation measures applicable under Article 11. The Commission shall not adopt any such delegated or implementing acts before the expiry of the deadline for submission of joint recommendations by the Member States. Article 18 places a series of duties on Member States formulating a joint recommendation. First, Member States having a direct management interest in fisheries subject to conservation measures shall *cooperate* with one another in formulating joint recommendations. Second, there is a duty on Member States to consult the relevant Advisory Councils in formulating the joint recommendation. Third, joint recommendations on conservation measures to be adopted are to be based on the best available scientific advice and fulfil all four of the following requirements:
- a. they must be compatible with the objectives set out in Article 2;
 - b. they must be compatible with the scope and objectives of the relevant conservation measure;
 - c. they must be compatible with the scope and meet the objectives and quantifiable targets set out in a relevant multiannual plan effectively; and
 - d. they must be at least as stringent as measures under Union law.
11. *Practice under Article 11.* To date seven delegated regulations related to Article 11 have been adopted. These regulations are limited to the Baltic Sea, where 7 sites are protected, and the North Sea, where 12 sites are protected:
- Commission Delegated Regulation (EU) 2015/1778 (repealed), which prohibited fishing activities in seven areas of the Baltic Sea and three sites in the Kattegat with mobile bottom contacting gear in reef zones and the prohibition of all fishing activities in bubbling reef zones;⁴
 - Commission Delegated Regulation (EU) 2017/117, which repealed Delegated Regulation (EU) 2015/1778, and prohibited fishing with bottom contact gear in restricted areas of the Baltic Sea;⁵
 - Commission Delegated Regulation (EU) 2017/118, which prohibited fishing mobile bottom contacting gear and fishing in areas of the Kattegat and Bratten;⁶
 - Commission Delegated Regulation (EU) 2017/1180, which amended the scope of Delegated Regulation (EU) 2017/118 in respect of the size and shape of the protected areas;⁷

⁴ Commission Delegated Regulation (EU) 2015/1778 of 25 June 2015 establishing fisheries conservation measures to protect reef zones in waters under the sovereignty of Denmark in the Baltic Sea and Kattegat, OJ L 259, 6.10.2015, p. 5.

⁵ Commission Delegated Regulation (EU) 2017/117 of 5 September 2016 establishing fisheries conservation measures for the protection of the marine environment in the Baltic Sea and repealing Delegated Regulation (EU) 2015/1778, OJ L 19, 25.1.2017, p. 1.

⁶ Commission Delegated Regulation (EU) 2017/118 of 5 September 2016 establishing fisheries conservation measures for the protection of the marine environment in the North Sea, OJ L 19, 25.1.2017, p. 19.

⁷ Commission Delegated Regulation (EU) 2017/1180 of 24 February 2017 amending Delegated Regulation (EU) 2017/118 establishing fisheries conservation measures for the protection of the marine environment in the North Sea, OJ L 171, 4.7.2017, p. 1.

- Commission Delegated Regulation (EU) 2017/1181, which amended Delegated Regulation (EU) 2017/117;⁸
- Commission Delegated Regulation (EU) 2023/340, which amended Delegated Regulation (EU) 2017/118;⁹ and
- Commission Delegated Regulation (EU) 2022/952, which further amended Delegated Regulation (EU) 2017/118.¹⁰

The Commission Staff Working Document on the State of Play of the CFP indicates that there are 10 delegated acts pending under Article 11.¹¹

12. The Commission is bound to report on the exercise of its delegated powers under Article 46 (2) of the CFP. Two reports have been provided since the adopted of the revised CFP: 2018 and 2023. They are matters of procedure and do not provide any assessment of the effectiveness of the delegated acts.¹²
13. In 2018, the Commission published guidance on Article 11 of the CFP Regulation on adopting conservation measures for Natura 2000 sites and for the purposes of the Marine Strategy Framework Directive.¹³ The guidance was intended to facilitate the work of Member States and includes good practices for consideration. As a staff working document, it can be periodically updated to reflect best practices.
14. **Article 20 process.** Article 20 permits Member States to adopt conservation measures within their territorial sea. Such measures must be non-discriminatory – so apply to all fishing vessels. If the measures are liable to affect fishing vessels of other Member States, then such measures only take effect after the Commission, the relevant Member States and the relevant Advisory Councils are consulted on a draft of the measures. The draft measures shall be accompanied by an explanatory memorandum that demonstrates, inter alia, that those measures are non-discriminatory. The consulting Member State may set a reasonable deadline, but this may not be shorter than two months.
15. Article 20 differs from Article 11 procedures in that other interested parties are only to be consulted. Under Article 11, the initiating Member State must secure the agreement whereas

⁸ Commission Delegated Regulation (EU) 2017/1181 of 2 March 2017 amending Delegated - Regulation (EU) 2017/117 establishing fisheries conservation measures for the protection of the marine environment in the Baltic Sea and repealing Delegated Regulation (EU) 2015/1778, OJ L 171, 4.7.2017, p. 30.

⁹ Commission Delegated Regulation (EU) 2023/340 of 8 December 2022 amending Delegated Regulation (EU) 2017/118 as regards conservation measures in Sylter Aussenriff, Borkum-Riffgrund, Doggerbank and Östliche Deutsche Bucht, and in Klaverbank, Friese Front and Centrale Oestergronden, OJ L 48, 16.2.2023, p. 1.

¹⁰ Commission Delegated Regulation (EU) 2022/952 of 9 February 2022 amending Delegated Regulation (EU) 2017/118 establishing fisheries conservation measures for the protection of the marine environment in the North Sea, OJ L 165, 21.6.2022, p. 1-22.

¹¹ Commission Staff Working Document (2023). Common Fisheries Policy - State of play. Accompanying the document Communication from the Commission to the European Parliament and the Council. The common fisheries policy today and tomorrow: a Fisheries Pact towards sustainable, science-based, innovative and inclusive fisheries management. SWD(2023) 103 final, at p 79.

¹² Report from the Commission to the Council and the European Parliament in respect of the delegation of powers referred to in Article 11(2), Article 15(2), (3), (6), (7) and Article 45(4) of Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, COM(2023)170 final, 27.03.2023; COM(2018) 79 final.

¹³ Commission staff working document on the establishment of conservation measures under the Common Fisheries Policy for Natura 2000 sites and for Marine Strategy Framework Directive purposes staff working document (2018)288.

Article 11 requires agreement of the Commission and other Member States interested in the management of the fishery.

16. **Member State emergency measures.** Where there is a serious threat to the conservation of marine biological resources or to the marine ecosystem relating to fishing activities in its waters, a Member State may adopt emergency measures to alleviate the threat (Article 13). Such measures must be compatible with CFP Article 2, and they are limited to a maximum duration of 3 months. Where such measures affect the vessels of other Member States, they may only be adopted following consultation with the Commission, affected Member States and Advisory Councils on the draft measures. A consultation period of not less than one month may be set. The Commission may order the amendment or repeal of the emergency measures if they do not comply with the conditions for their use.
17. *Problems with Article 11 process.* In general, the process has not worked effectively to enable measures to be taken in protected areas. Several criticisms of the process have been made. First, the process has been slow to bring into effect and only covers certain areas in the North Sea and the Baltic Sea.¹⁴ This has led the Court of Auditors to conclude that the procedure 'is not able to ensure timely protection from fishing for a large number of Natura 2000 MPAs.'¹⁵ The report of the European Court of Auditors has been quite influential, and is generally cited as a reason for the amendments to EU law/practice in this area. The EEA has observed that 'commercial fisheries interests were favoured over nature conservation requirements.'¹⁶ The Article 11 process occupies a grey area between fisheries management and environment obligations, but it fails to clearly demarcate the specific legal relationships between the two areas, resting instead on general exhortations to foster coherence, coordination, consistency and integration between the different policy areas.¹⁷ The fishing industry takes the position that environmental protection must integrate but not overrule fisheries policy.¹⁸
18. Four types of challenge with respect to the process can be identified. First, in practice, Article 11 provides states with a direct interest in fishing with a de facto veto over the joint recommendations by simply refusing to agree to a proposal or simply not engaging in the process. At root there is a critical flaw in the process that will be difficult to overcome without legal reform. Whilst steps can be made to work around this through guidance, in the absence of specific legal changes or resort to infraction proceedings, the effectiveness of the Article 11 process will depend upon political good will or pressure.
19. Second, as the Commission itself recognises, Member States need to 'renew their commitment to increase the efficiency, speed and level of ambition of regionalised work, especially with regard to the implementation of environmental legislation under Article 11 of the CFP.'¹⁹ There has been insufficient investment in resources for the work of regional groups, which has resulted in a lack of stakeholder engagement and scientific advice underpinning regional cooperation.

¹⁴ COM(2019) 274 final, para 2.4.2.

¹⁵ European Court of Auditors. (2020). *Marine Environment: EU protection is wide but not deep*. Special Report 26/2020, para 43.

¹⁶ EEA: Marine messages II, Box 3.2, 2020.

¹⁷ See e.g. Recital 9, 39 and 40 MFSD.

¹⁸ Europeche, *The future Common Fisheries Policy must correct failed policies and adapt to new challenges* (EP2(22)50, 10 June 2022). Available at <https://europeche.chil.me/attachment/4fae0709-1744-4ea7-8025-6321810497f5>

¹⁹ Communication from the Commission to the European Parliament and the Council on The common fisheries policy today and tomorrow: a Fisheries and Oceans Pact towards sustainable, science-based, innovative and inclusive fisheries management, COM(2023) 103 final, 21.2.2023

20. Third, a series of specific ambiguities or gaps in the process hold up reaching agreement on Joint Recommendations, or simply deter States from using it:

- a. The text of Article 11(1) does not make clear the extent to which Member States are required to adopt conservation measures. Rather than using the mandatory 'shall', it provides that Member States are 'empowered' to act. This indicates a capacity to act, rather than a duty. However, the provision continues to provide that such a power is exercised in respect of conservation measures 'necessary' to give effect to commitments under EU environmental law. It is not clear if this means they should exercise their power when necessary – or that when exercising the power such measures must only be those necessary to give effect to environmental commitments. Appleby and Harrison interpret this as a discretionary power.²⁰ Similarly, conservation measures impacting on other Member States with an interest in the management of the fishery is discretionary rather than obligatory: Article 11(2) refers to such measures being 'considered necessary'. This textual ambiguity is symptomatic of the ambiguous relationship between the CFP and environmental laws. Taking a literal reading of Article 11 in isolation, it seems clear that although Member States are under a duty to comply with their environmental commitments, this does not result in a duty to submit a joint recommendation.²¹ Article 11(3) provides only that Member States 'may submit' a recommendation. **While Article 11(2) and (3) does not oblige, but only empowers, Member States to adopt a Joint Recommendation, this is separate to Member States' obligation (and not discretion) to comply with environmental legislation. When compliance with environmental legislation necessitates the adoption of JR, it would be unconvincing for Member States to argue that the adoption of a JR is discretionary and hence a power that could or should not be exercised.** This argument applies to the NRL (See para 29 below).
- b. There is no timescale or deadline for the compilation of the initial information to be prepared by the initiating Member State. This situation may differ from the NRL, where deadlines for the submission of information are being considered as amendments to the draft (See para 36 below).
- c. There is no definition of what constitutes 'sufficient information' for the purpose of this document.
- d. It is common for the initiating Member State to only engage interested fishing states once they have developed a proposal. This may generate resistance from interested fishing states about a lack of timely engagement in plans. It may also limit the opportunity for other States or regional bodies to engage in the process, given the limited 6-month window for the development of Joint Recommendations.
- e. There is no clarity about who within Member States should be involved in this process – i.e. fisheries or environment agencies. This is important because the process is influenced by who and how it is led within different Member States. Sometimes the process is led by fisheries agencies and sometimes nature conservation agencies. Different agencies will have different ideas about what constitutes relevant/sufficient measures. Similarly, there is no definition of what the reference to direct management interest entails beyond identifying interested States. For example, it does not entail engagement with specific environmental or fisheries agencies within interested Member States.
- f. Article 11 only deals with external procedures. Member States will need to secure internal approval for conservation measures impacting upon vital fishing interests. National approval of the draft Joint Recommendation can be delayed by domestic legal or political

²⁰ Appleby T. and Harrison J. (2019). 'Taking the Pulse of Environmental and Fisheries Law: The Common Fisheries Policy, the Habitats Directive, and Brexit'. *Journal of Environmental Law*, 31(3):443-464

²¹ See also CFP Art 6(3).

procedures (eg change of Government or ministers, or securing Parliamentary approval).²²

- g. There is a general duty to cooperate in formulating Joint Recommendations (Art 18(2)). However, a duty to cooperate does not entail a duty to secure an outcome. Notably, Article CFP 6(3) states that Member States ‘may cooperate’ to give effect to their conservation commitments (including ‘specific measures to minimise the negative impact of fishing activities on marine biodiversity and marine ecosystems’) under Articles 11, 15, and 18. However, there are no specified consequences for a failure to cooperate under the CFP. This situation may differ in respect of the NRL, since Article 12(3) NRL specifically requires restoration plans, where applicable, to include conservation measures intended to be adopted in CFP Joint Recommendations. Thus, the NRL strengthens Member State commitments to deliver conservation measures through its planning provisions.
- h. There is a lack of structure in the consultation/decision-making process, and specifically, the process for consultations happening separate to the decision-making process.²³ Not only are there tensions between fishing and environmental groups, but there are tensions between different sectors of the fishing industry (eg pulse fishing was supported in Netherland, but protested by the French). The structure of and culture in Advisory Councils may make it difficult for them to engage.²⁴
- i. There is duty on the Commission to facilitate cooperation – but the meaning of this is not specified (Art 11(6) and Art 18(2)).
- j. The European Parliament or Council may revoke the power to adopt delegated acts at any time and so bring the process to an end.

21. Fourth, Article 11 does not set out any consequences for failing to adopt a Joint Recommendation. As noted, it is not a strict legal duty, and in any event failure to agree a Joint Recommendation may be difficult to attribute to individual States. In principle, individual Member States are responsible for complying with their environmental obligations, and they are susceptible to infraction proceedings being brought by the Commission for such failure unless such a failure falls within the scope of any exceptions. The MFSD provides exceptions for a failure to achieve good environmental status, including when attributable to ‘action or inaction for which the Member State concerned is not responsible’.²⁵ This is likely to preclude infraction proceedings against host Member States for a failure to secure restrictions on fisheries in order to ensure GES of a protected area. However, when a Member State is unable to achieve GES, it ‘shall take appropriate ad-hoc measures aiming to continue pursuing the environmental targets, to prevent further deterioration in the status of the marine waters...’

22. *Exceptions/derogations.* The Habitats Directive provides for derogations from requirements to protect species of flora and fauna, provided there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the species at favourable conservation status, if the derogation is: in the interest of protecting species; needed to prevent serious harm to, inter alia, fisheries; to protect public health or safety, or for any other reasons of overriding public interest, including social or economic concerns.²⁶ There is no specific exception related to acts beyond the control of the Member State, so Member States may not rely upon acts taken by other Member States to avoid responsibility for a failure to meet their obligations. These derogations indicate

²² This occurred in 2017 during the Dogger Bank process, where changes of government and opposition in Parliament held up Dutch approval of the draft Joint Recommendation.

²³ See comments by NSAC: North Sea Advisory Council. (2020). NSAC Advice on lessons learned from the Dogger Bank Process. NCAS Advice 09-1920, at p. 7.

²⁴ European Commission, *CFP Regionalisation*. Final Report (2018) 57.

²⁵ MFSD Art 14(1)(a).

²⁶ Habitats Directive Art 16.

that the duties in the Directive are not absolute. The Birds Directive provides for derogations to protective measures in, inter alia, the interests of public health and safety. It is unlikely this would cover failures to secure protections under the CFP process. Article 14 of the MSFD sets out a series of exceptions for Member States for a failure to achieve good environmental status in its waters. These include: (a) action or inaction for which the Member State concerned is not responsible; (b) natural causes; (c) force majeure; (d) actions taken for reasons of overriding public interest which outweigh the negative impact on the environment, including any transboundary impact; (e) natural conditions which do not allow timely improvement in the status of the marine waters concerned. The Member State concerned remains bound to take ad hoc measures to continue pursuit of environmental targets, and prevent deterioration in the status of the waters. This does not permit measures unilaterally affecting the vessels of other States beyond 12nm.

23. Infraction proceedings have not been brought against any Member States for a failure to implement their environmental obligations due to a failure to adopt conservation measures through fisheries regulations under Article 11 of the CFP. This is indicative of the difficulty in establishing precise causes of action in this field, where the language of the operative provisions are framed on hortatory or general terms.
24. According to the European Court of Auditors, the main reason Member States gave for not using Article 11 of the CFP was that the process, based on joint recommendations was complicated and it could:
 - a. result in weaker final restrictions than those initially put forward by the Member State making the proposal, and
 - b. require lengthy discussion during which the area would remain open to vessels of other Member States and further damage to sensitive habitats could continue.²⁷

These risks and delays undermine the duty of Member States to give effect to their environmental commitments under the MSFD and Habitats and Birds Directives with regards to the areas where other Member States have a direct interest in fisheries management.

Section 3: Nature Restoration Law

25. On 22 June 2022, the European Commission proposed the 'Nature Restoration Law'.²⁸ The proposal is a key element of the EU Biodiversity Strategy, which calls for binding targets to restore degraded ecosystems.²⁹ In light of the continuing decline of European habitats, the Commission considered that more decisive action was needed to achieve the EU climate and biodiversity objectives for 2030 and for 2050, as well as to ensure the resilience of food systems.³⁰
26. The Nature Restoration Law will complement existing EU environmental law, including the Birds and Habitats Directives, Water Framework Directive, Marine Strategy Framework Directive and Invasive Alien Species Regulation. It is also intended to work with the CFP, and specifically to ensure coherence and complementarity. As a regulation, it will be directly applicable, and Member States will not need to transpose it into national law. This will result in consistency of action across the EU.

²⁷ European Court of Auditors, above (n 15), para 42.

²⁸ Proposal for a Regulation of the European Parliament and of the Council on nature restoration, COM(2022) 304 final.

²⁹ EU Biodiversity Strategy for 2030, COM(2020) 380 final.

³⁰ Proposal on nature restoration, above (n 7), p 2.

27. Unlike the Birds and Habitats Directives, it will establish specific requirements to also restore habitats outside Nature 2000 sites. It will establish specific deadlines for action. The NRL will apply to territory of Member States (including the territorial sea), and the outer limits of areas where Member States exercise sovereign rights under the UNCLOS.³¹
28. The aim of the Nature Restoration Law is to ‘contribute to the continuous, long-term and sustained recovery of biodiverse and resilient nature across the EU’s land and sea areas through the restoration of ecosystems’, as well as achieving EU climate objectives, and meeting other international commitments.³² According to the Commission’s proposal, Member States are required to put in place a system of restoration measures that will cover 20% of EU land and sea areas by 2030, and for all ecosystems in need of restoration by 2050. Specific restoration targets and duties for terrestrial habitat types are provided in Article 4 (and Annex I, pending development) of the NRL, with specific targets and measures for marine ecosystems provided for in Article 5 (and Annex II, pending development). The detail of habitat features and types to be restored will be set out in annexes. Article 5 of the NRL is a critical provision because it commits Member States to taking measures to meet restoration targets. As noted in para 30 below, this includes a commitment to conservation measures to be adopted under the CFP. The effect of this provision is to shore up the powers under Article 11 of the CFP to adopt conservation measures by linking the clear duty to establish measures under the NRL with the power and necessity requirements of the CFP. The effect of this will be to require Member States to make use of their powers under the CFP. Non-compliance with restoration obligations outside of Natura 2000 sites is justified only in cases of force majeure, unavoidable habitat changes caused by climate change, or when due to projects of overriding public interest and for which no less damaging alternatives are available.³³ In Natura 2000 sites, non-compliance is justified only in cases of force majeure, unavoidable habitat changes caused by climate change, and plans/projects authorised under Article 6(4) of the Habitats Directive.
29. Member States are required to prepare national restoration plans that contain measures needed to meet restoration targets and areas of coverage.³⁴ These should take account of measures established under other EU environmental laws, including the CFP. The plans shall cover a period up to 2050 and include, inter alia, statements of the quantification of areas covered, measures planned, or in place, to achieve restoration targets, measures to ensure non-deterioration of areas in good condition, timescales for the foregoing, and monitoring provisions.³⁵ It is expected that any possible loss of income suffered by groups, such as fishers, may be covered under EU (Maritime Fisheries and Aquaculture Fund) and other sources of funding. Moreover, the Commission’s impact assessment of the NRL shows that the restoration of ecosystems is cost-effective (the benefits far outweigh the costs), so there will be longer term benefits from restoration measures.³⁶
30. Specific to fisheries, the **NRL requires that national restoration plans shall, where applicable, include the conservation measures that a Member State intends to adopt under the common fisheries policy, including conservation measures in joint recommendations that a Member State intends to initiate in accordance with the procedure set out in Regulation (EU) No**

³¹ NRL, Art 2.

³² NRL, Art 1.

³³ NRL, Art 5(8).

³⁴ NRL, Art 11.

³⁵ NRL, Art 12.

³⁶ See COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT Accompanying the proposal for a Regulation of the European Parliament and of the Council on nature restoration, Part 1/12, SWD(2022) 167 final, p. 79.

1380/2013, and any relevant information on those measures. On the one hand this is problematic, since it channels restoration measures through the CFP, thereby generating similar problems as faced under existing conservation frameworks. On the other hand, it would appear to require a longer term and more proactive approach to determining conservation measures required via the CFP. This may enable discussions and consultation to occur, at least informally, at a much earlier stage than may be the case for more ad hoc measures under existing EU environmental law. Given that the restoration plan, including restoration measures potentially affecting fisheries, will be assessed by the Commission, means that there is a form of oversight of measures planned (NRL Article 14). **Whilst the Commission does not approve plans, Member States shall take the Commission's observations into account, and if the Member State concerned does not address an observation from the Commission or a substantial part thereof, that Member State shall provide its reasons (Article 12(2)(o)). If the Commission makes such recommendations relating to conservation measures and these are included in restoration plans, then this will make it difficult for other Member States to ignore or 'challenge' these under Article 11 CFP procedures.** Similarly, due to evaluating potential insufficiency of the measures adopted at an early stage, it would be expected that the Commission adopt urgent measures pending the conclusion of a joint recommendation.

31. *Relationship with the CFP.* Where nature restoration measures require controls on fishing, then such measures will be pursued through the CFP. The proposal specifically refers to the requirement under the CFP to implement the ecosystem-based approach, to ensure negative impacts of fishing activities on the marine ecosystem are minimised, and to ensure that aquaculture and fisheries activities avoid the degradation of the marine environment. This reiterates the standard approach to the integration of fisheries and environmental measures, without subjecting the CFP to specific requirements under EU environmental law.
32. The draft NRL specifically highlights the availability of mechanisms under Article 11 of the CFP.³⁷ As such it is not expected that the NRL will provide different procedures for controlling the impact of fishing activities on protected areas/restoration sites. **The main impact will be to add a higher degree of precision to the protective measures that will be in place in protected sites/restoration sites. If the targets and associated restoration measures set out under the NRL have a higher degree of specificity (which is the case with the Commission's proposal), this may have implications for the CFP. For example, where it is demonstrated that certain activities such as fishing need to be controlled to meet restoration targets, then it may be more difficult for States to debate the necessity of specific controls on fishing.** It may also make it more difficult for Member States to claim they are in compliance with their environmental commitments, and in the event of litigation on non-compliance through a failure to adopt JR establish breach of EU law.
33. *Amendments to the draft NRL.* **A key challenge in advancing the proposals to amend the draft NRL is to design draft proposals that are limited to shaping how the NRL operates vis a vis the CFP, rather than proposals that seek to directly or indirectly amend the operation of the CFP (especially the JR process) through the NRL.** The different legal bases for action for the CFP and the environment under the EU treaties mean that specific routes for review or amendments to legislation have to be followed. As such any amendments to the draft NRL must focus on what can be done under the terms of the NRL. Proposals for amendments to the draft NRL should not seek to change directly the terms of the CFP. **Legitimate proposals for amendments may include: (1) Specifying what actions or events under the NRL would trigger the initiation of the JR process; (2) Specifying what implications the non-adoption of a JR has for the NRL.** For example, this

³⁷ Recital 39 of the CFP Regulation.

could be to trigger a recommendation to review restoration plans or conservation measures under Article 5 NRL; (3) making it clear that restoration targets and obligations under Article 5, included in national restoration plans, shall include specific measures to be adopted under the CFP and through Joint Recommendations. The inclusion of commitments in national restoration plans will mean they are subject to assessment by the Commission, periodic review, and annual reporting. This will enhance the transparency and accountability of Member States for their actions.

34. The NRL can include deadlines or triggers for the initiation of CFP procedures. The CFP contains procedural timeframes for the preparation and submission of a Joint Recommendation, and for review of this by the Commission. It does not specify any deadline or time frame for the initiation of a JR process. As such there is no clear evidence that this is a matter falling within the scope of the CFP. Indeed, given that the source of any decision to adopt conservation measures flows from the requirements of EU environmental laws, it is reasonable to assume that such EU environmental laws can impose trigger points for the operation of the CFP procedures on the adoption of conservation rules. The creation of a duty or timeframe for the initiation of conservation measures flows from the duty incumbent upon Member States to give effect to their environmental responsibilities under specific EU environmental legislation.
35. **Proposed NRL amendments aiming at aligning the JR process with marine restoration measures under the NRL:** In the draft report of ENVI Committee's Rapporteur Cesar Luena,³⁸ there are three relevant amendments on the CFP. A fourth proposal put forward by ENVI Committee MEPs is also relevant. Regardless of the ultimate success of these proposals, there is value in advocating for them since they expose the weaknesses in the CFP and seek to address them in the context of the NRL. They also demonstrate the tensions in the discrete legal bases for action in fisheries and environmental matters, which may impede holistic solutions. I agree with the client that the most effective way of addressing defects in the CFP Joint Recommendation process would be to seek targeted reforms of Article 11/18.
36. **Proposal 1** (AM98 of draft report) - Article 11(2)(a)(new) provides: '[For the restoration measures required under Article 5, Member States shall communicate the information in Article 11\(2\) and any information relevant and sufficient for the purpose of Article 11\(3\) Regulation \(EU\) No 1380/2013 to Member States having a direct management interest in the fishery to be affected by such measures by THE first day of the month following 12 months after the date of entry into force of this Regulation.](#)'
37. Two Comments: **(1)** The above proposal would trigger the operation of Article 11(3) of the CFP. This is an important and necessary amendment. Since there is no provision on the use of Joint Recommendations for nature restoration measures in the CFP, there needs to be a trigger for this in the NRL. The above proposal would require Member States to provide sufficient information to other Member States with fisheries management interests concerning the need for 'conservation measures' which would in turn initiate the 6-month period for the submission of a Joint Recommendation. The proposal appears to proceed on the basis that the provision of Article 5 measures will trigger the JR process. This would occur 12 months after entry into force, and so align the potential delivery of a Joint Recommendation with the submission of a domestic nature restoration plan in month 24 following the entry into force of the NRL. It should be noted that there is a risk of the Joint Recommendation not being agreed, and so resulting in a gap in restoration measures under the NRL and fisheries management rules. There is a need for clarification about when steps taken under the NRL will trigger Joint Recommendations under the

³⁸ European Parliament, Committee on the Environment, Public Health, and Food Safety, [Draft Report on the proposal for a regulation of the European Parliament and of the Council on nature restoration](#) (COM(2022)0304 – C9-0208/2022 – 2022/0195(COD)) (5.12.2022)

CFP. This is because NRL Article 12(3) also refers to the initiation of the JR process, and this would be at a point *after* the submission of restoration plans in month 24 (according to the text proposed by the Commission). It also needs to be pointed out that restoration measures under the NRL will evolve (following assessment and annual review, in line with NRL Articles 14 and 15) and so there will be future opportunities to initiate JR measures under the CFP as plans and measures develop. The point when the initial JR is to be triggered needs clarification (ie adoption of Article 5 restoration measures or adoption of restoration plan). **(2)** The words ‘referred to’ should be inserted before ‘in Article 11(2)’ since Article 11(2) merely sets out the reference points for such information, rather than contain such information per se.

38. **Proposal 2** (AM129): Article 12(3): ‘The national restoration plans shall, where applicable, include the conservation measures submitted under the common fisheries policy, including conservation measures in joint recommendations that a Member State intends to initiate in accordance with the procedure set out in Regulation (EU) No 1380/2013, and any relevant information on those measures.’
39. Two Comments. **(1)** Proposal 2 seeks to replace the phrase ‘that a Member State intends to initiate’ with ‘submitted.’ This is important as it reinforces the Proposal 1 above. The wording of the amendment would have been improved if the word ‘adopted’ was used, to demonstrate that such measures have been implemented, rather than proposed. As noted above, the current text of the NRL does not make it clear when a Joint Recommendation may be initiated. If the NRL is to work with the CFP, then this mechanism needs to be clearly provided in the text of the NRL because it is unlikely the CFP will be amended. The language in the current text proposed by the Commission simply refers to intentions to make use of the CFP Joint Recommendation process,³⁹ which may lead to legal uncertainty as to the actual measures to be adopted. Amendment 129 provides that the restoration plan will include both adopted conservation measures and those already submitted. This is to be preferred since it at least clarifies that submitted conservation measures must be in the restoration plan (even if not approved by the Commission). **(2)** Proposal 2 should follow part of the language of the EP Amendment: ‘The national restoration plans shall, where applicable, include the conservation measures *submitted* under the common fisheries policy, including conservation measures in joint recommendations that a Member State *intends to initiate* in accordance with the procedure set out in Regulation (EU) No 1380/2013, and any relevant information in those measures.’ This text confirms the existence of the 12/18 month trigger point for Joint Recommendation process, as well as making it clear that there will be future opportunities for use of this depending on the content of the domestic restoration plan as it develops.
40. **Proposal 3** (AM130): Article 12(a): Where no joint recommendations have been submitted within six months of the provision of sufficient information as provided for in Article 11(3) of Regulation (EU) No 1380/2013, the Member States having a direct management interest shall be deemed, pursuant to their shared responsibility and Article 4(3) of the Treaty on the Functioning of the European Union, to have agreed to the measures proposed by the initiating Member State for the purposes of agreeing joint recommendations under Article 11(3) of Regulation (EU) No 1380/2013. The initiating Member State shall directly submit its proposed Joint Recommendations for restoration purpose to the Commission for adoption under Article 11(3) of Regulation (EU) No 1380/2013.’
41. Comments: **(1)** The second paragraph of the proposed amendment to NRL Art 12(3) (namely AM130) deems the restoration measures proposed by the initiating Member State to be agreed if

³⁹ Ibid, p 85.

the six-month time limit expires without the submission of a Joint Recommendation. This amendment would significantly alter the process for submission of Joint Recommendations. It would provide the initiating Member State with a powerful lever to compel States with a direct management interest to cooperate to reach an agreement since the default position would be the acceptance of unilaterally determined measures. **(2)** The Amendment refers to the idea of shared responsibility. Whilst I agree that a good argument can be made to frame commitments under EU environmental law as shared responsibilities, I think this is unlikely to be accepted given it significantly changes the CFP. Although the idea of a shared responsibility is noted in a DG opinion⁴⁰ – it is not yet a position set out explicitly in environmental legislation, nor is it a term used in the CFP Directives, nor has it been confirmed by the ECJ. As such this could be regarded as a significant legislative change to other environmental laws. This reference is best left to the Recitals where it remains an interpretative point of reference, and less likely to generate strong political objections. It also undermines the priority afforded to cooperation in the CFP process. **(3)** Failure to agree is not equivalent to tacit approval, and it could generate conflict between Member States. If this amendment was adopted, it would solve potential problems in the draft NRL by allowing the de facto veto of other Member States to impede the adopt of necessary restoration measures under the NRL. **(4) If the Joint Recommendation process is not completed, then it remains open to the Commission to make an observation on a Member State’s draft restoration plan that addresses such a gap in conservation measures. This could indicate the need to agree such measures, as well as the reasons for this. Member States would be bound to take account of this in the final restoration plan. (5) A revision to the AM130 (or another amendment) could be made that requires Member States to provide reasons for why a Joint Recommendation was not agreed.⁴¹ This in turn could facilitate assessments and action by the Commission in terms of observations on either restoration plans or emergency measures. This would be consistent with the Commission’s duties and powers under CFP Article 11(3) and (6).**

42. **Proposal 4** – Article 15(4)(new) (included in the European Parliament’s Environmental Committee’s MEPs amendment proposals AM 1975, 1976): ‘For areas falling within the scope of Article 12(3), the Commission shall, within 6 months after the adoption of the final restoration plan under Article 14(6), adopt restoration measures constituting ‘conservation measures’ under Part III of Regulation (EU) No 1380/2013 and pursuant to articles 11(4) or 11(5) of Regulation (EU) No 1380/2013 in the following circumstances: (1) In the absence of the Joint Recommendations submitted in line with Article 12(3); or (2) In the absence of Joint Recommendations sufficient to comply with the targets and obligations set out in Article 5, [in line with the national restoration plan].’

43. **Comments. (1) There is value in strengthening the role of the Commission to safeguard conservation needs in the absence of a Joint Recommendation. This is particularly so given the ambiguity inherent in CFP Joint Recommendation process. (2)** The approach in the current text of Article 15 is to develop constructive dialogue – this is to ensure that the Commission does not overstep its remit and usurp the present responsibility on Member States to address restoration issue or to correct issues in their plans. Accordingly, in Article 15(3), the Commission *may require Member States to revise restoration plans* if they are insufficient to meet targets and obligations

⁴⁰ See Nollkaemper, A., d’Aspremont, J., Ahlborn, C., Boutin, B., Nedeski, N. and Plakokefalos, I (collaboration of Jacobs, D.). (2020). ‘Guiding Principles on Shared Responsibility in International Law’. *European Journal of International Law*, 31(1): 15–72.

⁴¹ **Alternative amendment:** 12 (x) ‘Where no joint recommendations have been submitted within six months of the provision of sufficient information as provided for in Article 11(3) of Regulation (EU) No 1380/2013, Member States shall inform the Commission of the reasons for this. The Commission may/shall address this issue in its observations on the draft national restoration plan, or through measures pursuant to Article 11(3) of Regulation (EU) No 1380/2013.’

set out in Article 4-10. It would be more consistent with the tenor of Art 15 to have the Commission direct Member States to initiate new or revised Joint Recommendation in the event that there is a failure to agree a Joint Recommendation, or a finding that it is insufficient. **(3)** Proposal 4 as drafted would be a significant change to the CFP, and effectively position the Commission as default regulator for environmental matters. **(4)** It should be noted that there are already options in the CFP for interim or emergency measures to be adopted by the Commission of Member States to use in situations where a Joint Recommendation is not agreed. A suitably framed amendment to the Commission's proposal of the NRL could be used to drive the CFP Joint Recommendation process.⁴² This would be consistent with the aims of the NRL (and the accepted requirement to implement the CFP consistently with other EU laws and policies). The purpose of the NRL is to 'enable the EU to act *with urgency* and to start restoring ecosystems based on binding targets and obligations that can already be measured and monitored. This will ensure that *Member States can start restoration work without delay.*'⁴³ Article 1(2) sets out the aim of the NRL to establish a framework within which Member States shall put in place, *without delay*, effective and area-based restoration measures ... [for] all ecosystems in need of restoration'. Enabling the Commission to safeguard measures would be consistent with the shared responsibilities to improve habitats.

44. *Four Additional points on other proposed amendments in the draft ENVI Committee Report.* These relate to the draft NRL's Recitals, and indicate a less contentious way of shaping the operation of the NRL through by including interpretative context **(1)** Proposed Amendment 13⁴⁴ of Recital is to be welcomed since this confirms that in general, the CFP is to implement the ecosystem-based approach to fisheries management so as to ensure that negative impacts of fishing activities on the marine ecosystem are minimised. This reinforces the linkage between the two regimes, despite the lack of reference in the CFP to the proposal NRL. **(2)** The proposed Amendment 14⁴⁵ of Recital 39 is welcomed.⁴⁶ It makes clear that the unilateral conservation measures and those undertaken in a Joint Recommendation are to be assessed against the CFP *and* the NRL. **(3)**

⁴² 'For areas falling within the scope of Article 12(3), and in the Commission may, within 6 months after the adoption of the final restoration plan under Article 14(6), request Member States take steps to secure the adoption of Joint Recommendations in pursuant to Regulation (EU) No 1380/2013 in the following circumstances: (1) In the absence of the Joint Recommendations submitted in line with Article 12(3); or (2) In the absence of Joint Recommendations sufficient to comply with the targets and obligations set out in Article 5, [in line with the national restoration plan]. Pending the adoption of a Joint Recommendation, the Commission shall adopt measures in accordance with article 11(3) and 11(5) of Regulation (EU) No 1380/2013'

⁴³ NRL Proposal above (n 28), p 4..

⁴⁴ 'Where the protection of coastal and marine habitats requires that fishing or aquaculture activities are regulated, the common fisheries policy applies. Regulation (EU) No 1380/2013 of the European Parliament and of the Council provides, in particular, that the common fisheries policy is to implement the ecosystem-based approach to fisheries management so as to ensure that negative impacts of fishing activities on the marine ecosystem are minimised. That Regulation also provides that that policy is to endeavour to ensure that aquaculture and fisheries activities avoid the degradation of the marine environment.'

⁴⁵ 'In order to achieve the objective of continuous, long-term and sustained recovery of biodiverse and resilient nature, Member States should make full use of the possibilities provided under the common fisheries policy. Within the scope of the exclusive competence of the Union with regard to conservation of marine biological resources, Member States have the possibility to take non-discriminatory measures for the conservation and management of fish stocks and the maintenance or improvement of the conservation status of marine ecosystems within the limit of 12 nautical miles. In addition, Member States that have a direct management interest have the possibility to agree to submit joint recommendations for conservation measures necessary for compliance with obligations under Union law on the environment. Such measures will be assessed and adopted according to the rules and procedures provided for under the common fisheries policy and this Regulation.'

⁴⁶ Above (n 38) pp 17- 18.

Similarly, Amendment 15 proposing a new Recital is welcomed since it clearly states the CFP is to be coherent with environmental legislation.⁴⁷ This is consistent with the general requirement that the CFP be carried out consistently with EU environmental law (see eg CFP Recitals, 3, 11, 13, 39 and 48). This supports the position that the CFP Joint Recommendation process should not be used so as to undermine EU policies, and the MFSD in particular. **(4)** As a general point securing interpretative statements in the Recitals may be easier to secure than in the main text since they do not directly determine legal obligations. However, in the event of litigation, this may play an important role. Strategically, it may be worth trying to secure a statement in a recital that makes it clear that Member States have a shared responsibility to implement the environmental commitments to restore habitats. This could be worded as follows: 'Restoration measures within and beyond Natura 2000 site are intended to improve the condition of protected habitats across the Union. This constitutes a shared responsibility among Member States to maintain or restore, at favourable conservation status, species and habitats of Community interest across their natural range. This is to be effected in accordance with the duty of sincere cooperation under the Treaty.'

45. There is a concern that the JR process can be used to water down conservation measures. The CFP does not contain any specific restrictions on the negotiated content of the JR. However, the Commission may review such measures and make proposals for appropriate measures through ordinary legislative procedures (Art 11(3)). Notably the SWD on Conservation Measures does not set out any guidance for how the Commission is to exercise this discretion. Following the adoption of the NRL, the terms of the SWD should be updated to reflect new practices, as well as clarify existing ambiguities. This should specifically set out guidance for how the Commission exercises its facilitative role and discretion to adopt proposal on conservation measures.
46. Member States of the EU remain bound by wider international environmental law. This includes the Part XII of the 1982 Convention on the Law of the Sea (especially Article 194(5) on protecting necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life), measures to protect the marine environment under OSPAR, and the application of eco-system based approaches to fisheries management.⁴⁸ Although not clearly established as a principle of international law, the principle of non-regression is an emerging concept that could be used to argue that Member States should refrain from acts that undermine existing levels of environmental protection.⁴⁹ In the lead up to Rio+20, the European Parliament called for 'call[ed] for the recognition of the principle of non-regression in the context of environmental protection as well as fundamental rights.'⁵⁰ Such an argument presently would be more of policy/moral argument than a legal argument since the principle is not clearly established in either EU law or general international law.
47. *The following Recommendations on strengthening the Commissions role in the Joint Recommendation process are drawn from an analysis in Annex.* The Commission should provide much needed procedural structure and certainty to the process, and the guidance could be

⁴⁷ 'Regulation (EU) No 1380/2013 provides that the common fisheries policy is to be coherent with the Union environmental legislation, in particular with the objective of achieving a good environmental status in the marine environment by 2020 as set out in Article 1(1) of Directive 2008/56/EC of the European Parliament and of the Council, as well as with other Union policies'

⁴⁸ See FAO Code of Conduct for responsible Fisheries (FAO, 1995); See further Molenaar, E.J. (2002) 'Ecosystem-Based Fisheries Management, Commercial Fisheries, Marine Mammals and the 2001 Reykjavik Declaration in the Context of International Law'. *International Journal of Marine and Coastal Law*, 17:561.

⁴⁹ Mitchell, A. and Munro, J. (2023). 'An International Law Principle of Non-Regressions from Environmental protections'. *International & Comparative Law Quarterly*, 72(1): 35-71.

⁵⁰ European Parliament resolution of 29 September 2011 on developing a common EU position ahead of the United Nations Conference on Sustainable Development (Rio+20) 2013/C 56 E/14

incorporated into an updated version of the Commission Staff Working Document Guidance on CFP Conservation Measures. First, there is scope to clarify the nature of the obligations within and around the Joint Recommendation process. **A strong argument can be made, based upon a teleological approach that the ecosystem-based approach, long-term-environmental sustainability, and which contributes to the protection of the marine environment,⁵¹ combined with the principles of shared responsibility and sincere cooperation and effectiveness, dictates how the Joint Recommendation process needs to be implemented. This argument could be applied mutatis mutandis to the NRL, although is perhaps stronger given the more precise measures that are expected to be taken under that law. Such an argument could inform litigation arising out of the Joint Recommendation process.** Second, the Commission should take an active role as facilitator and timekeeper of the process. Alternatively, it could ask Member States to provide a roadmap for the Joint Recommendation process and to provide periodic updates on this. If required, the Commission could provide its good offices to facilitate discussions, or even act as a mediator in the event of stalemate during the negotiations. It could initiate meetings, ask Member States to provide formal updates of the implementation process in their designated MPAs, and set a clear annual agenda for this process. This would be similar to the process for the delegated acts on the discard plans. Third, the Commission should set a clear annual agenda for Article 11 procedures, similar to the one for discard plans, including dates for the submission of Joint Recommendations, STECF evaluation, and publication of the evaluation by the Commission. Fourth, the Commission should use its power to take emergency measures in Natura 2000 sites that have been designated but have no management measures in place. This power exists in the CFP and could be used more proactively. Its exercise would be consistent with the precautionary principle. Fifth, if the circumstances justify it, the Commission could initiate infringement proceedings against Member States at the European Court of Justice for not implementing measures included in the management plans of their designated MPAs. This could generate jurisprudence on Article 11 and allow the ECJ to clarify Member State responsibilities. This would be consistent with the exclusive competence of the EU in respect of fisheries measures. This includes powers in respect of conservation measures under the CFP. Finally, complaints could be brought against the Commission. This could include a Member State bringing an action for a failure to adopt measures of urgency or to facilitate a Joint Statement or bringing a complaint before the European Ombudsman for a failure for maladministration on its environmental targets. Such a complaint could concern a failure to facilitate cooperation or to adopt emergency measures in accordance with wider EU. In general, infringement proceedings should be a last resort because they take time and are best suited to clear breaches of EU law, or systemic failings, and this may be difficult to establish in practice concerning a failure to take limited, time-bound urgent measures under CFP Article 11(3).

Section 5: Proposal of Additional Options to Reform the CFP

48. *Legislative reform of the CFP and Article 11 process.* I agree with the client that the most effective way of addressing defects in the CFP Joint Recommendation process would be to seek targeted reforms of Article 11/18. However, this would not be an easy or quick process. Given that the CFP Joint Recommendation process does expressly provide for conservation measures to be proposed or adopted in respect of the NRL, this might be used as a justification to introduce a targeted reform of the CFP. Although not strictly a legal point, advocacy of targeted reform would help keep maintain awareness of the limitations of Article 11. Interestingly, the Commission has noted that if there is insufficient progress on the marine action plan part of the Biodiversity Strategy

⁵¹ See CFP Recitals 4, 11, 13 and 39.

2030, by the time of its mid-term review in 2024, then it will consider further action, including legislative action.⁵²

49. The previous reform of the CFP was initiated by a Commission Green paper in 2009 and completed in 2013. A potential time frame of four years, with additional periods of scoping and policy preparation would mean changes are unlikely to occur before and contribute to 2030 Biodiversity targets. The process of developing a Green Paper and devoting considerable amounts of time to a relatively small technical issue, like inclusion of the NRL as a reference point in Article 11, is unlikely to secure support from the EU. Reform of the CFP is not likely to proceed unless there is significant and sustained pressure for reform across a wider range of policy areas than the Joint Recommendation process, not least until it can clearly be shown that the governance of the process is wholly unworkable. Whilst the outcome of the process remains modest, it at least shows that it can work. The CFP has been amended five times since 2013: the first to include Mayotte as a region of the EU within the scope of Article 349 and 355 TFEU;⁵³ the second to remove technical inconsistencies arising from landing obligations;⁵⁴ the third to extend the transition period for multi-annual plans;⁵⁵ the fourth as a result of the Technical Measures Regulation;⁵⁶ and a final time to extend the access to waters regime for a further 10 years.⁵⁷ In each case the measures were necessary to ensure the effective function of core CFP mechanisms.
50. Reform of the CFP could better align EU laws with general international law. General international law situates the conservation and management of marine living resources within a broader framework of duties to protect and conserve the marine environment. In its *Fisheries Advisory Opinion* (2015) the ITLOS stated that the reference to the 'marine environment' in Article 192 included the conservation of the living resources of the sea and other marine life.⁵⁸ Article 192 of UNCLOS entails a 'positive obligation to take active measures to protect and preserve the marine environment'⁵⁹. This obligation applies not only within states own maritime zones, but also to areas within the jurisdiction of other States.⁶⁰ This has two implications. One it supports the argument that EU Member States have a shared responsibility to ensure habitats (and conservation measures upon fisheries) are protected. A failure to agree conservation measures

⁵² Commission, above (n 19), p. 12.

⁵³ Council Regulation (EU) No 1385/2013 of 17 December 2013 amending Council Regulations (EC) No 850/98 and (EC) No 1224/2009, and Regulations (EC) No 1069/2009, (EU) No 1379/2013 and (EU) No 1380/2013 of the European Parliament and of the Council, following the amendment of the status of Mayotte with regard to the European Union.

⁵⁴ Regulation (EU) 2015/812 of the European Parliament and of the Council of 20 May 2015 amending Council Regulations (EC) No 850/98, (EC) No 2187/2005, (EC) No 1967/2006, (EC) No 1098/2007, (EC) No 254/2002, (EC) No 2347/2002 and (EC) No 1224/2009, and Regulations (EU) No 1379/2013 and (EU) No 1380/2013 of the European Parliament and of the Council, as regards the landing obligation, and repealing Council Regulation (EC) No 1434/98

⁵⁵ Regulation (EU) 2017/2092 of the European Parliament and of the Council of 15 November 2017 amending Regulation (EU) No 1380/2013 on the common fisheries policy.

⁵⁶ Regulation (EU) 2019/1241 of the European Parliament and of the Council of 20 June 2019 on the conservation of fisheries resources and the protection of marine ecosystems through technical measures, amending Council Regulations (EC) No 1967/2006, (EC) No 1224/2009 and Regulations (EU) No 1380/2013, (EU) 2016/1139, (EU) 2018/973, (EU) 2019/472 and (EU) 2019/1022 of the European Parliament and of the Council, and repealing Council Regulations (EC) No 894/97, (EC) No 850/98, (EC) No 2549/2000, (EC) No 254/2002, (EC) No 812/2004 and (EC) No 2187/2005.

⁵⁷ Regulation (EU) 2022/2495 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 1380/2013 as regards restrictions to the access to Union waters

⁵⁸ *Fisheries Advisory Opinion*, paras 120 and 216.

⁵⁹ *South China Sea* (Philippines v. China) (2016), paras 941–2.

⁶⁰ *South China Sea case*, paras 927 and 940.

could place States in breach of their environmental commitments. Second, that the division of environmental and fisheries matters in EU law, which situates fisheries outside of environmental commitments runs counter to the approach of general international law.

51. The approach to the regulation of conservation measures under EU law, which requires Member States to achieve certain conservation objectives, locates the competence to adopt conservation measures for fisheries under the CFP. This subjects environmental commitments to the risk of fragmenting the protection of the marine environment and fisheries management. Placing the competence to adopt conservation measures in the hands of the Commission, or making it subject to the agreement of Member States with a direct management interest in the fishery, may deny Member States the power to give effect to their wider international commitments under the law of the sea.
52. *Can the NRL be used to amend Art 11 CFP?* It is not possible to use the NRL to amend the CFP. Aside from a clear lack of intention to do this, the different legal basis of the proposed NRL means that it is not capable of amending the CFP. An amendment of the CFP, assuming this was desired, would have to proceed under the relevant legislative procedure (ie Article 43(2) TFEU). The CFP and EU Environmental Law have discrete legal bases in the EU Treaties. The Commission has been consistent in maintaining this distinction in developing each area of law. I am not aware of any examples of environmental measure being adopted other than on the basis of Article 192 (or its predecessors). It has been suggested that the legislative basis of the NRL could be adapted to include Article 43(2) TFEU. This would be unprecedented in the field of fisheries law. There is one precedent for proposing legislation on a twin legal basis: Directive (EU) 2018/2001.⁶¹ Including Article 43(2) would potentially give the European Parliament Fisheries Committee having additional leverage over environmental policies. Although not on the same point, there is jurisprudence indicating the robust approach to ensuring that policies proceed on the correct legal basis.⁶²

⁶¹ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency, COM/2022/222final

⁶² See e.g. Council decision on the allocation of fishing opportunities in EU waters (cases C-103/12 and C-165/12) and a regulation on a long-term plan for cod stocks (cases C-124/13 and C-125/13).

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Annex: Evaluation of Existing Options on Improving the Joint Recommendation Procedure

1. **Improving the Joint Recommendation Procedure.** The existing literature in the Joint Recommendation process is somewhat limited. Recommendations for improving the process have been advanced by Oceana,⁶³ a North Sea Advisory Council advice paper,⁶⁴ through various Client Earth briefing reports, and a paper by Appleby and Harrison (2019).
2. *Oceana Report 2021.* This report proposed three sets of recommendations to improve the effectiveness of Article 11 procedures. These focus on: 1) clarity of process and timelines; 2) arbitration and conflict resolution; and 3) transparency and accountability.
3. The 2021 report makes eight recommendations to clarify Article 11 Procedure and Timelines.
 - a. The Commission should take an active role as facilitator and timekeeper of the process. It could initiate meetings, ask Member States to provide formal updates of the implementation process in their designated MPAs, and set a clear annual agenda for this process. This would be similar to the one for the delegated acts on the discard plans.
 - b. The Commission and Member States to seek legal guidance on clarifying the division of responsibility between fisheries and environment departments, specifically in cases where fisheries interest can be overruled when they prevent reaching environmental objectives.
 - c. The Commission could initiate infringement procedures against Member States that have failed to implement fisheries measures in MPAs
 - d. The Commission should set a clear annual agenda for Article 11 procedures, similar to the one for discard plans, including dates for the submission of Joint Recommendations, STECF evaluation, and publication of the evaluation by the Commission
 - e. The Commission should use its power to take emergency measures in Natura 2000 sites that have been designated but have no management measures in place based on the precautionary approach.
 - f. The Commission and/or Member States may use other legislative and policy processes to strengthen the implementation capabilities and add hard deadlines for MPAs that have already been designated, for example through the review of the Technical Measures Regulation or the revision of the Multiannual Plan.
 - g. Member States to ensure that civil servants from both fisheries and environment departments are actively involved in both the drafting and the negotiation process.
 - h. The Commission and Member States incorporate elements of the Staff Working Document into a Delegated Act, so that they form a proper binding set of guidelines for the Article 11 process.
4. Comment: (1) These recommendations refrain from making specific recommendations to reform the CFP process. They focus on improving process/guidance within the law – so can be implemented without significant delay cost or debate. On point (a), there is particular value in fleshing out the meaning of the facilitative responsibility of the Commission to provide much needed procedural structure and certainty. This could be included in a revised SWD on Conservation Measures. There is the potential for more creativity in the role of the Commission. For example, it could consider the use of good offices or mediation to help overcome disagreements. This may take time, so may require a reconsideration of time frames for the

⁶³ Kingma, I. and Walker, P. (2021). *Was Article 11 of the CFP doomed to fail? Report produced by Ocean Future Collective for Oceana.* Amsterdam, 53 pp.

⁶⁴ North Sea Advisory Council. (2020). *NSAC Advice on lessons learned from the Dogger Bank Process.* NCAS Advice 09-1920

development of JRs when negotiations breakdown. (2) On point (c), taking infringement procedures against States that have failed to adopt conservation measures under the CFP raises difficulties since the Commission has the power to take such measures under Art 11(4). Whilst a case could concern a failure to implement measures set out in delegated legislation, this does not address the problem of a breakdown in process leading to the adoption of such measures through CFP Art 11. (3) On point (e), the use of the emergency process in Article 11(4) could be helpful. However, it depends upon Member States initiating some proposals for conservation measures. In the absence of these, the Commission may lack a sufficient evidence basis to take interim, remedial measures. This makes the practical prospects of litigation somewhat uncertain. legal action (4) It is recommended that elements of the Staff Working Document are incorporated into a delegated act. In principle this could be done in response to a Joint Recommendation process – although at that stage it would be too late to influence the JS process. It is not clear that delegated acts can be adopted in respect of JS in an ad hoc manner; the text of Article 18 indicates these are responsive forms of legislation.⁶⁵

5. The 2021 report makes six Recommendations to utilise dispute resolution mechanisms to break down impasse.
 - a. The Commission could initiate a procedure against Member States at the European Court of Justice for not implementing their designated MPAs, in order to create jurisprudence on Article 11. Alternatively, a civil society group could take the Commission to court for not delivering on its environmental targets.
 - b. The Commission and/or Member States to carry out a risk assessment on the basic document produced to indicate which elements are likely to need additional work to prevent delays later in the process.
 - c. Member States should agree formally which information can be used and which scientific authorities can be consulted when there is disagreement on the severity of fisheries measures needed
 - d. The Commission and Member States could strengthen the scientific underpinning by including a scientific check at an early stage of the Joint Recommendation process (shortly after the basic document is presented by the initiating Member State), to review if the proposal meets the environmental objectives and then suggest improvements and clarifications.
 - e. The European Commission can request STECF to initiate Expert Groups (EGs) to deal with specific topics, which then report to the plenary meeting for STECF to formulate advice. These EGs work independently and allow the possibility to involve participants with a specific expertise.
 - f. Alternatively, Member States could formulate special requests to ICES in early stages of negotiations or on draft Joint Recommendations and use the resulting information to prepare the final Joint Statement.

6. *Comment: (1)* On point (a), see above comment on litigation. An action against the Commission might be useful given the competence to implement fisheries conservation measures is within the exclusive competence of the Commission. Such action could concern a failure to facilitate cooperation or to adopt emergency measures. In practice, such an action would be costly, slow and uncertain as to outcome, given the ambiguity inherent in this area of law. *(2)* On point (c), guidance and structure for the use of scientific evidence would improve the process because a lack of clarity here can be used to stall/block agreement on the basic need for conservation measures. This could include guidance on how ICES or other experts are used to provide evidence to underpin conservation proposals.

⁶⁵ See also CFP Recital 67.

7. The 2021 report makes three Recommendations to improve Transparency and Accountability.
 - a. The Commission and Member States to agree on formal guidelines for the organisation of Regional Groups and ratify these guidelines within a delegated act. These should include the obligation to publish agendas and notes of meetings as well as meeting documents. The meetings should be open to the participation of stakeholders and observers and there should be a formal decision-making process and arbitration in case of diverging opinions.
 - b. The Commission to request Member States to publish a proposed timeline and update this timeline throughout the process, for the route towards a Joint Recommendation to be shared with relevant stakeholders and available online.
 - c. The Commission and Member States should provide written responses to the STECF evaluation which clarifies what (if anything) they have done address any concerns flagged by the scientists.

8. **Comment: (1)** It is not clear that a delegated act can be adopted to convert guidance into binding legal procedure. However, there is no reason why the Commission should not use the SWD Guidelines to structure its duty to facilitate cooperation in the development of a Joint Recommendation. **(2)** The requirements to ensure transparency through procedural rules would be consistent with the Aarhus Convention.⁶⁶ Such information is not merely about fisheries management, but impacts upon conservation of marine environments, so clearly falls within the scope of the Aarhus Convention.

9. *NSAC Recommendations.* In 2020, NSAC commissioned a review of lessons arising from problems that arose in the development of a Joint Recommendation for the Dogger Bank SAC.⁶⁷ The capacity of ACs to contribute to JR consultations is limited by its internal capacity and skills. Effective contributions will depend on resources and support from Member States, or through ACs aligning themselves with external partners to supplement capacity.⁶⁸ There needs to be clear ‘rules of engagement’ for the process, including defined roles, terms of reference for the process, budget, and access to scientific evidence.⁶⁹ The SWD on Conservation Measures 2018 should be updated to accommodate a series for specific recommendations: the SWD should be explicit about what elements of the ‘good practice’ will meet the requirements of sufficient information for the purpose of CFP Art 11(3); inclusion of scope for a request for advice from the Commission on whether sufficient information exists; clarification of what ‘any available science advice’ means in Art 11(3) in respect of the Commission decision to adopt measures; guidance that the AC and other stakeholder can provide Member States with scientific evidence; guidance for engaging with stakeholders in the informal stages of planning the proposal; guidance that consultation with ACs should take place prior to the start of the 6-month period in Art 11(3); guidance on securing contributions from both DG Mare and DG Environment on the Article 11 process both prior to the JS development period and during the JS development period;

10. *Comment:* These recommendations echo those of Oceana, and are designed to improve the clarity and structure of the consultation and development process leading to a JR. As such they work within existing legislative structures and could be readily adopted through revisions to the SWD on Conservation Measures 2018.

⁶⁶ See Aarhus Convention, Arts 3(1) and 5(2).

⁶⁷ North Sea Advisory Council. (2020). *NSAC Advice on lessons learned from the Dogger Bank Process*. NCAS Advice 09-1920.

⁶⁸ *Ibid*, 15.

⁶⁹ *Ibid*, pp. 15-6.

11. *Appleby and Harrison* propose a more radical approach.⁷⁰ They suggest that flag States can take steps to regulate their vessels under Article 19 of the CFP and should do so to ensure that they comply with any protective measures established for protected sites. This approach depends upon a broad reading of Article 6 of the Habitats Directive to require Member States to take appropriate steps to avoid the deterioration of habitats any Natura 2000 are, and not just those within their territory or jurisdiction. There is some support for this position, with an opinion of the NADEG group stating that obligations under Article 6(1) and 6(2) of the Habitats Directive are not limited to further imposes hosting the site, but are a shared responsibility of Member States fishing in the site.⁷¹ This is reinforced by the existence of shared obligations to protect species and habitats under related instruments (ie the Bern Convention), which specific call for cooperation of States.⁷² Further the principle of sincere cooperation requires that Member States take all the measures necessary to guarantee the application and effectiveness of Community law, and further imposes on the Member States and the Community institutions mutual duties of sincere cooperation.⁷³ It also depends upon reading Article 19 of the CFP widely so as to accommodate the taking of conservation measures generally and not merely for the conservation of fish stocks. The argument remains to be tested. The argument depends upon a strong teleological interpretation of several provisions of EU law, and it runs counter to a literal reading of the text. It also depends upon flag States being willing to impose unilateral controls on their vessels – and this should be questioned given that such states may have resisted the imposition of conservation measures through the Joint Recommendation process. In general, this approach may be undesirable in the long term since effective conservation and fisheries management depends upon cooperative and coordinated approaches. **A strong argument can be made, based upon a teleological approach that refers to the ecosystem-based approach, long-term-environmental sustainability, and which contributes to the protection of the marine environment,⁷⁴ combined with the principles of sincere cooperation and effectiveness dictates how the Joint Recommendation process needs to be implemented. This argument could be applied mutatis mutanda to the NRL. Such an argument is perhaps stronger in respect of the NRL given the more precise measures that are expected to be taken under that law.**

12. *Additional Points.* Article 50 of the Control Regulation provides for control of fishing restricted areas adopted by the EU Council, but not for all marine protected areas defined by Member States under Natura 2000 network of the Habitat Directive. This means that not all marine protected areas were covered by the Control Regulation, limiting the scope for protective measures to be adopted thereunder. In 2018, the Commission proposed extending the definition of fisheries restricted areas to cover any protected area established by Member States, which would empower them to control fishing activities in those areas.⁷⁵ This would simplify the process

⁷⁰ Appleby and Harrison (n 20), pp 458-60.

⁷¹ DG Environment Expert group on the birds and habitats directives ("NADEG") Doc NADEG 19-11-06-2.

'It has been considered by the Commission services that the obligations under Article 6(1) and (2) of Habitats Directive would not be limited only to the Member State hosting a site (terrestrial or marine) but would be a shared responsibility among the Member States that have fishing rights in the concerned sites. This interpretation is based on the wording of the aforementioned provisions and the supra-national objective of Natura 2000, which is to maintain or restore, at favourable conservation status, species and habitats of Community interest across their natural range, as well as by the duty of sincere cooperation under the Treaty.'

⁷² See Art 1(1) of the Convention on the Conservation of European Wildlife and Natural Habitats, Bern, 19 September 1979, in force 1 June 1982, CETS No. 104 (Bern Convention).

⁷³ Case C-2/88 *Imm. Zwartveld and Others* [1990] ECR I-3365, para 17.

⁷⁴ See CFP Recitals 4, 11, 13 and 39.

⁷⁵ COM(2018) 368 final. Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Regulation (EC) No 1224/2009, and amending Council Regulations (EC) No 768/2005, (EC) No 1967/2006, (EC) No 1005/2008, and Regulation (EU) No 2016/1139 of the European Parliament and of the Council as regards fisheries control.

currently required under Article 11. This was generally supported by NGOs and Advisory Councils.⁷⁶ The proposal is still proceeding through the EU legislative process. Whilst this would not enable the regulation of environmental impacts of fishing in such areas, it would strengthen the capacity of Member States to control vessel activities in such areas

13. In general, the Commission needs to exert a stronger leadership role in the development of Joint Recommendations. Whilst the content of the process rightly remains in the hands of Member States and regional bodies, as part of the policy of regionalisation, this does not mean that the Commission can or should not be involved. There is a clear legal duty on the Commission to facilitate the discussions between coastal State and interested States under Article 11(6) and 18(2). The CFP does not indicate how the Commission should exercise this function. Notably, ClientEarth has advised that this role should be conducted by DG Environment because DG Environment has the 'relevant expertise and responsibility for ensuring that these laws [ie the MSFD and Habitats and Birds Directives] are complied with'. Accordingly, DG Environment 'has the primary responsibility for overseeing the processes described in Article 11.'⁷⁷ Given that this area of law straddles fisheries and environmental matters, it is advisable to ensure that both DG Mare and DG Environment are involved. This can and should be clarified in the SWD on Conservation measures.
14. The regionalisation of the CFP through Article 18 has been hampered by a lack of commitment by Member States to making the process work.⁷⁸ In part this may be the result of the awkward division of competence across fisheries/environmental matters. Whilst regionalisation enables Member States to develop fisheries and conservation measures to suit local needs, ultimately the decision to adopt such measures is outside of the hands of individual Member States (either subject to de facto veto by other States or control by the Commission/EU Parliament). This may deter Member States from investing time and resources in matters that may not ultimately meet their needs. The CFP is part of the EU's exclusive competence, so, in principle, having the Commission step in to mandate conservation measures in the event of Member State failures would not be inconsistent with the division of competences, as long as such measures were framed as fisheries management measures. Care would need to be taken here to ensure that such steps do not open up difficult debates about the division of competences between Member States and the EU.
15. A key concern expressed with respect to the Joint Recommendation process is the need for early engagement with stakeholders.⁷⁹ Early engagement can give different groups a stake in the process and help frame the scope of discussions from the outset. This may improve levels of engagement, as well as vest such groups with a desire to see the process through. As such Member States should engage with interested groups at the point when they first consider the need for conservation measures. This could be done by notifying a list of interested parties that they are considering a proposal and gather information for the purpose of Article 11(3).
16. Concerns have been raised about the capacity and resource of Advisory Councils to engage in the process. Beyond developing more detailed guidance on the process, there is scope to consider the

⁷⁶ Ibid, 62.

⁷⁷ ClientEarth, 'Simply' Article 11 of the Common Fisheries Policy (September 2014). Available at <https://www.nwwac.org/fileupload/Papers%20and%20Presentations/2014/Simply%20Art%2011%20of%20the%20CFP.pdf>

⁷⁸ Salomon, M., Markus, T. and Dross, M. (2014). 'Masterstroke or paper tiger – The reform of the EU's Common Fisheries Policy'. *Marine Policy*, 47:76-84.

⁷⁹ See e.g. views of Oceana, Client Earth and NSAC.

provisions of training or other capacity building measures to support more effective engagement in the process.

17. Structural funds under the EMFAF are available to support the implementation of the CFP – including measures to protect the marine environment. Arguably these can be used to compensate for short-term losses due to reduced catches as a result of conservation measures initiated under EU environmental law. This would include to support measures adjusting fishing effort or methods in protected areas. Clarity on the use of such funds could help address concerns and potential resistance from fisheries groups to Joint Recommendations.
18. If fisheries and other interest groups are unable to reach agreement, then mechanisms are needed to reach compromise or resolution. There is no explicit legal basis for formally brokering the resolution of a stalemate. However, this should fall within the scope of the Commissions duty to facilitate the Joint Recommendation process. See para 24 of the main report above.