Article 11 of the EU Common Fisheries Policy
1 Executive Summary

1. Previous laws regulating fishing in Union waters have been unclear on the process to be followed when a Member State implements European environmental laws that impose restrictions on fishing in marine protected areas, creating an area of uncertainty and, arguably, misinterpretation, as well as a failure to comply with and apply EU environmental law to fishing activities.

2. The new reformed Common Fisheries Policy (CFP)\(^1\) aims to reduce confusion by providing for a specific process, in Article 11, to directly address this.

3. Nonetheless, a Member State’s power, and its duty, to implement environmental measures are not new, and existed prior to the reformed CFP. For many years, Member States have been, and still are, obligated to implement their environmental conservation obligations under the Habitats Directive,\(^2\) the Birds Directive\(^3\) and the Marine Strategy Framework Directive\(^4\) in their sovereign waters with respect to any activities that might be potentially damaging to the interests protected by those laws.\(^5\)

4. Article 11 now provides more clarity for Member States and specifies the procedural steps to follow in order to adopt conservation measures within EU marine protected areas so far as they relate to Article 6 of the Habitats Directive, Article 4 of the Birds Directive and Article 13(4) of the Marine Strategy Framework Directive. It follows that measures introduced under Article 11 are for environmental purposes and the article is about implementation of existing EU environmental law. The objective of Article 11 is therefore wholly concerned with environmental conservation, not fisheries conservation (i.e. the conservation of fish stocks).

5. This means that all measures passed pursuant to Article 11 need to be sufficiently environmentally robust to effectively implement a Member States’ EU environmental law obligations. A Member State’s environmental obligations that must be complied with when passing measured under Article 11 include the need to: ensure that fishing activities are environmentally sustainable;\(^6\) apply the precautionary approach;\(^7\) meet the objectives of the relevant EU environmental legislation (for example Article 6 of the Habitats Directive);\(^8\) and

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\(^6\) Article 2(1).

\(^7\) Article 2(2).

\(^8\) Article 11(1).
be at least as stringent as measures under Union law (for example apply the precautionary principle and the integration principle).  


7. In relation to the procedural elements of Article 11, this article re-confirms that Member States have the power to adopt, in the waters under their sovereignty or jurisdiction, conservation measures that are necessary to comply with the legal provisions regulating European marine protected areas, provided that no other Member State’s fishing vessel is affected. Where a Member State’s proposed conservation measure under Article 11 might affect a fishery in which another Member State has a direct management interest, the European Commission is empowered to adopt such a measure - upon request of the Member State initiating the process - by means of a delegated act. Other affected Member States can be involved via a ‘joint recommendation’ if they so wish.

8. If Member States decide not to make joint recommendations, then after the time limit for making joint recommendations (six months) has expired, the European Commission can pass a relevant delegated act.

9. If Member States choose to invoke the joint recommendation process but a joint recommendation is not agreed within the stipulated timeframe, or if an agreed joint recommendation is deemed not to be compatible with the objectives of the CFP, the relevant EU environmental law it is implementing or is not as stringent as measures under EU law, then the European Commission is able to make its own proposal ‘in accordance with the Treaty’. Were the European Commission to pass a proposal through the ordinary legislative procedure in such circumstances, this has the potential to cause an unacceptable delay to much needed conservation measures and to potentially undermine EU law.

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9 Article 11(1).
10 Article 11(1).
11 Article 11(2); refer to article 46 and ClientEarth briefings on delegated acts under the CFP for more detail and information on the delegated legislative procedure.
12 Article 11(3).
RECOMMENDATIONS

In response to the issues and questions raised in this briefing about the correct legal procedures and processes applicable under Article 11, including in relation to timing, we make a number of recommendations:

- **The Directorate General for the Environment at the European Commission (DG Environment), rather than the Directorate-General for Maritime Affairs and Fisheries (DG Mare), should always lead any of the processes provided for in Article 11 (whether delegated acts, emergency measures or new proposed legislation).**

- **All conservation measures passed pursuant to Article 11, whatever their nature, must comply with and implement relevant EU environmental law, as well as being compatible with the objectives of the CFP.** This must be the case whether Member States implement conservation measures protecting their marine protected areas themselves (i.e. where the measure does not affect fishing vessels of other Member States), or the European Commission passes the conservation measure by means of a delegated act (i.e. where another Member State has a direct management interest in the fishery to be affected), and whether the European Commission passes an emergency measure or proposes new legislation. **It is the European Commission's duty to ensure that this is the case.**

- **Any measures introduced under Article 13(5) of the Marine Strategy Framework Directive that will affect a marine protected areas established under Article 13(4), must be covered by Article 11.** This is because measures introduced under Article 13(5) are the type of marine spatial protection measures implicitly covered in Article 13(4).

- **The European Commission should clarify the time limits for Member States and the European Commission to carry out various of the procedural steps required under Article 11, as well as the meaning of certain terms or concepts, including, for example, when exactly time periods start and expire - and what would constitute 'sufficient information', a 'complete request' or the nature of 'measures' referred to in Article 11(4) and (5).**

- **There is scope for confusion between measures 'affecting vessels of other Member States’ in Article 11(1) and measures affecting fisheries ‘subject to a direct management interest’ of other Member States in Article 11(2). Guidance from the European Commission would be helpful to explain the difference between these two phrases and to ensure that there are no unintended gaps or loopholes that result because two different phrases have been used.**

- **The European Commission should produce guidance to ensure that a consistent approach to facilitation of co-operation amongst Member States in agreeing joint recommendations is applied to each negotiation.**

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13 Article 11(1).
The European Commission should utilise its power to take urgent measures under Article 11(4) and (5) whenever the processes under Article 11(1) – (3) are too slow and endanger the conservation objectives for the relevant marine protected areas.

In any future revision of the CFP, either in the next reform or before, the European Commission should be empowered to act by delegated or implementing act in circumstances where:

- environmental law clearly requires a conservation measure that affects fishing activities; and
- a joint recommendation has not been agreed (or the European Commission deems it incompatible with relevant EU law requirements); or the European Commission has exhausted its ability to take urgent measures and no other measure has been passed by delegated act in the meantime including when there are ongoing infringement procedures.

This is necessary to enable the European Commission to pass permanent conservation measures and prevent unacceptable delays while measures are passed via the ordinary legislative procedure (potentially leaving Member States in breach of EU environmental laws and in danger of infringement proceedings), as well as any potential of such future legislation to undermine EU law and the EU legislative process itself.
2 Introduction

10. Previous laws regulating fishing in Union waters have been unclear on the process to be followed when a Member State implements European environmental laws that impose restrictions on fishing in marine protected areas. This has created an area of uncertainty and, arguably, misinterpretation, as well as a failure to comply with and apply EU environmental law to fishing activities.

11. Under the framework for fisheries management created by the reformed Common Fisheries Policy (CFP), a new procedure is established – in Article 11 – for how Member States may take measures for the control of fishing activities, in order to implement conservation measures within marine protected areas designated under the Birds and Habitats Directives and the Marine Strategy Framework Directive.

12. This briefing considers the scope of the new measures incorporated into Article 11 of the CFP and what this means for Member States and the European Commission when new conservation measures that relate to marine protected areas are implemented.

13. Recommendations are proposed for how Article 11 must be interpreted and implemented in order to ensure compliance with EU law. This briefing also highlights procedural elements of Article 11 that are unclear or confusing and suggests areas where the European Commission should establish guidance to provide clarity as well as recommendations for where further legislative reform is required.

14. Of most importance, this briefing highlights that measures introduced under Article 11 are primarily for the purposes of environmental conservation. For this reason, DG Environment must be the lead authority responsible for measures introduced under Article 11. DG Environment, possessing the required expertise, will then be responsible for ensuring that the conservation measures introduced integrate the fundamental principles of EU environmental law - including for example the precautionary principle - and are sufficiently robust to effectively implement Member State’s specific EU environmental law obligations. If Member States try to introduce weak conservation measures that do not comply with their environmental obligations, including in particular those referred to in Article 11, they will be breaching EU law and where relevant, such measures cannot be enacted by the European Commission.

3 Article 11 in context: a new power or obligation?

15. A Member State’s power and indeed its duty to implement conservation measures in the marine environment are not new, and existed prior to the new CFP Article 11. Member States have for some years been obligated to implement environmental conservation obligations under the Marine Strategy Framework Directive, Habitats Directive and Birds

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Directive in their sovereign waters with respect to any activities that might be potentially damaging to the interests protected by those laws.

16. For example, the Waddenzee case\(^{15}\) established that the granting of fishing licences within a special protected area is a plan or project within Article 6(3) of the Habitats Directive and the issuing of annual cockle fishing licences must therefore be subject to the relevant tests in Article 6 of the Habitats Directive. The courts have also confirmed that the Habitats and Birds Directives apply out to Member States’ Exclusive Economic Zones.\(^{16}\)

17. In practice, this obligation was often not accepted by Member States or even if it was accepted, Member States were unclear on the correct legal process under which they should implement such obligations.\(^{17}\) As a result, very few conservation measures affecting fisheries have been introduced in the marine environment under the Birds and Habitats Directives. This is slowly changing and there has been significant progress in some Member States to implement, for example, conservation measures under Article 6 of the Habitats Directive that will have an impact on fisheries operating in or near protected sites.\(^{18}\)

18. The previous CFP Regulation\(^{19}\) (now repealed) included provisions for Member States to implement measures for the 'conservation and management of fisheries resources and to minimise the effect of fishing on the conservation of marine ecosystems' within 12 nautical miles from a Member State's coast\(^{20}\) (an equivalent provision is now included in Article 20 of the reformed CFP). We do not know to what extent the old Article 9 was used for either fisheries conservation measures, or for purposes of environmental protection but in any case, EU environmental protection obligations, for example those included in Article 6 of the Habitats Directive, go much further than 'minimising the effect of fishing' and are about much more than conserving fisheries resources. It is interesting to note that the new Article 20 of the CFP in some respects goes further than its predecessor. It covers conservation and management of 'fish stocks' (rather than 'fisheries resources'), as well as any non-discriminatory measures for the 'maintenance or improvement of the conservation status of marine ecosystems'. This wording shows much more clearly the legislators' intention to enable Member States to take environmental measures under Article 20.

19. However, the fundamental difference between the new and the old CFP is that previously there were no explicit linkages between the CFP and marine protected areas conservation measures that are required by the Birds Directive, Habitats Directive and the Marine Strategy Framework Directive. The new CFP attempts to make the necessary linkages to ensure that


\(^{16}\) The first judicial consideration of this issue was advanced in 2000. The UK courts confirmed that on a purposive construction, the Habitats Directive must extend beyond territorial waters, see R (on the application of Greenpeace) v Secretary of State for Trade and Industry (No.2) [2000] 2 CMLR 94 (QBD) at para 117. The European Court of Justice further confirmed this position in 2005 in C-6/04 Commission v UK [2005] ECR 1-9017.

\(^{17}\) For a more detailed discussion on the legal uncertainty relating to the manner in which a Member State can restrict the activities of fishing vessels for the primary purpose of compliance with existing EU environmental obligations under the Birds and Habitats Directive, see Institute for European Environmental Policy Briefing by Daniel Owens, 'Interaction Between the EU Common Fisheries Policy and the Habitats and Birds Directives' (April 2004).

\(^{18}\) See for example the UK revised approach to fisheries: http://www.marinemanagement.org.uk/protecting/conservation/ems_fisheries.htm

\(^{19}\) Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries under the Common Fisheries Policy.

the appropriate environmental tests under the relevant EU nature conservation laws are applied in the marine environment and in particular, to fisheries. Additionally, Article 9 of the old CFP was limited to measures within 12 nautical miles, while Article 11 of the new CFP applies in the exclusive economic/fisheries zones of Member States.

20. The new procedures in Article 11 of the CFP have been introduced because of the uncertainty and misinterpretation that previously existed, and they aim to streamline the process of implementing already existing EU environmental laws in the marine environment. This should assist Member States in complying with their existing environmental obligations under EU environmental law. It also seeks to ensure that environmental protection is effectively integrated into the CFP (i.e. complying with the integration principle, which is discussed in more detail below).

4 Scope of Article 11: Conservation of marine protected areas

21. Although the heading of Article 11 may appear to imply that this provision relates to all conservation measures necessary for compliance with any obligations under EU environmental legislation, this is not actually the case. Article 11(1) limits the article's remit so that it will only apply to conservation measures necessary for the purpose of complying with obligations regarding the types of marine protected areas referred to in Article 13(4) of the Marine Strategy Framework Directive, special protected areas (SPAs) classified under Article 4 of the Birds Directive and special areas of conservation (SACs) designated under Article 6 of the Habitats Directive (together SPAs and SACs make up the Natura 2000 network).

4.1 Article 13(4) of the Marine Strategy Framework Directive

22. Under Article 13(4) of the Marine Strategy Framework Directive, Member States must establish 'spatial protection measures, contributing to coherent and representative networks of marine protected areas' as part of their broader obligation to establish a programme of measures that are required to achieve or maintain good environmental status in their marine waters.

23. Such marine protected areas could include SACs under the Habitats Directive, SPAs under the Birds Directive and other marine protected areas established under a Member States’ domestic legislation (for example the Marine and Coastal Access Act 2009 for England and Wales) or regional agreements to which Member States or the European Union are party (for example OSPAR\(^{22}\)), provided that they contribute to a Member State's coherent and representative network of marine protected areas.

24. Therefore, conservation measures that fall within the ambit of Article 13(4) of the Marine Strategy Framework Directive, i.e. 'spatial protection measures, contributing to coherent and

\(^{21}\) Recital (25) of the CFP. Also confirmed by a Workshop hosted by DG Environment and DG Mare on 3-4 April 2014, ‘Marine environment and fisheries - applying the new CFP and environment policy together’.

\(^{22}\) The Convention for the Protection of the Marine Environment of the North-East Atlantic.
representative networks of marine protected areas' - will need to go through the specified Article 11 process.

25. It is curious that Article 13(5) of the Marine Strategy Framework Directive is not included within the ambit of Article 11, even though Article 13(5) deals with the adoption of measures regulating human activities likely to have a significant impact on the marine environment, particularly in the areas established under Article 13(4). Article 4 of the Birds Directive and Article 6 of the Habitats Directive both concern the management of sites (see below), which is the main reason why they are referred to in Article 11 of the new CFP.

26. Article 11 would become meaningless with regard to marine protected areas falling within Article 13(4) if the measures envisaged were not to include site management measures. Therefore, it must be assumed that the failure of Article 11(1) to refer to Article 13(5) is based on the assumption that where Article 13(5) measures affect any marine protected areas established under Article 13(4), they will be covered by Article 11 in any case because they are the type of marine spatial protection measures implicitly covered in Article 13(4).

RECOMMENDATION

- Any measures introduced under Article 13(5) of the Marine Strategy Framework Directive that will affect a marine protected areas established under Article 13(4), must be covered by Article 11 because they are the type of marine spatial protection measures implicitly covered in Article 13(4).

4.2 Article 4 of the Birds Directive

27. Article 4 of the Birds Directive requires special conservation measures concerning the habitat for European wild birds and regularly occurring migratory species. In particular, Member States must classify SPAs for the conservation of the bird species mentioned in Annex I of that Directive in order to ensure their survival and reproduction in their area of distribution. Similar measures must also be taken for regularly occurring migratory species. Further, Article 4(4) of the Birds Directive requires Member States, in respect of SPAs, to 'take appropriate steps to avoid pollution or deterioration of habitats or any disturbance affecting birds in so far as these would be significant having regard to the objectives' of Article 4.

28. By virtue of Article 7 of the Habitats Directive, the obligations contained in Articles 6(2), (3) and (4) of that Directive (see below) are also applicable to SPAs established under the Birds Directive.
4.3 Article 6 of the Habitats Directive

29. Article 6 of the Habitats Directive requires the establishment of appropriate conservation measures for SACs and also sets out the procedural management requirements for the Natura 2000 network (which includes both SACs and SPAs).

30. Article 6(1) requires Member States to establish 'necessary conservation measures' and 'appropriate statutory, administrative or contractual measures' for SACs, which correspond to the ecological requirements of the relevant protected habitats or species present on the site.

31. Article 6(2) has an emphasis on preventative measures and requires Member States to 'take appropriate steps to avoid [...] the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated'. Following on from the preventative measures laid out in Article 6(2), Article 6(3) of the Habitats Directive sets out a series of procedural and substantive safeguards governing plans and projects likely to have a significant effect on a Natura 2000 site.

32. For completeness, Article 6(4) provides a derogation to the procedural safeguards if, in the absence of alternative solutions, a plan or project must be carried out for reasons of overriding public interest (and in relation to priority species or habitats then such public interest is restricted to human health or public safety).

5 The procedures established under Article 11

33. Article 11 establishes (mainly) new procedures for how Member States may take measures to comply with their existing EU environmental law obligations in respect of the relevant obligations relating to the Natura 2000 network, and also 'spatial protection measures' established under Article 13(4) of the Marine Strategy Framework Directive.

34. Article 11 sets out three possible scenarios. The first deals with Member State conservation measures where the measures in question do not affect other Member States’ fishing vessels (Article 11(1)); the second with European Commission delegated acts (or proposals for EU legislation) based on national proposals and (possibly) joint recommendations with other Member States (Article 11(2)-(3)). This process will be invoked where another Member State’s fishing interest is affected. The third scenario deals with cases of urgency (Article 11(4)-(5)). Because of the importance of each one, the text and a short discussion of each of these provisions will follow, before Parts 6-8 explores questions arising out of all three.
5.1 Member State conservation measures where no fishing vessel of another Member State is affected

Article 11 (1)

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

35. As is evident from the text of Article 11(1), this article specifies that Member States may themselves adopt conservation measures where these do not affect the fishing vessels of other Member States and where they are necessary to comply with the specified marine protected areas provisions in the Habitats Directive, the Birds Directive and the Marine Strategy Framework Directive. The only further requirements are that the conservation measures must be compatible with the objectives set out in Article 2 of the CFP, meet the objectives of the relevant Union legislation that they intend to implement, and be at least as stringent as measures under Union law (discussed further in Part 6 below).

36. In theory at least, it is therefore a straightforward and unchanged process for Member States to adopt conservation measures (now under the reformed CFP) so as to comply with Article 13(4) of the Marine Strategy Framework Directive, Article 4 of the Birds Directive or Article 6 of the Habitats Directive, except that there is a restriction that provides that no other Member State’s fishing vessel may be affected by those measures.

5.2 Conservation measures that affect a fishery in relation to which other Member States have a direct management interest

5.2.1 Delegated Acts

Article 11(2)

Where a Member State (“the initiating Member State”) considers that measures need to be adopted for the purpose of complying with the obligations referred to in paragraph 1 and other Member States have a direct management interest in the fishery to be affected by such measures, the Commission shall be empowered to adopt such measures, upon request, by means of delegated acts in accordance with Article 46. For this purpose, Article 18(1) to (4) and (6) shall apply mutatis mutandis.
37. If another Member State has a ‘direct management interest in the fishery to be affected’ by a conservation measure, then under Article 11(2), upon request, the European Commission is empowered to adopt such measures by means of delegated acts.

38. A ‘Member State having a direct management interest’ is defined in Article 3(22) of the CFP as:

’a Member State which has an interest consisting of either fishing opportunities or a fishery taking place in the exclusive economic zone of the Member State concerned, or, in the Mediterranean Sea, a traditional fishery on the high sea.’

39. In the situation where there is ‘a Member State having a direct management interest in the fishery to be affected’ by a proposed conservation measure, Article 11(2) empowers the European Commission, upon request, to adopt the relevant marine spatial conservation measures by means of delegated acts.

40. Article 11(2) states that ‘for this purpose, Articles 18(1) to (4) and 18(6) of the CFP shall apply mutatis mutandis’ (emphasis added). The relevant sections of Article 18 set out the regional cooperation between Member States that is required in such circumstances.

5.2.2 Process for passing conservation measures subject to joint recommendations

Article 11(3)

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

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

41. Firstly, when proposing a conservation measure that could affect other Member States’ direct management interests in the fishery, the initiating Member State must provide the

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23 The literal translation of mutatis mutandis means ‘things being changed that have to be changed’ and according to the online Oxford Dictionary the term is used when comparing two or more cases or situations and means ‘making necessary alterations while not affecting the main point at issue’.
European Commission and the potentially affected Member States with ‘relevant’ information on the measures. Relevant information includes the rationale of measures, scientific evidence in support and details on practical implementation and enforcement, but could, presumably, also cover other information. There is no indication as to the time frame for providing such information once a request is made.

42. The European Commission must adopt the measure within three months from receipt of a complete request by way of delegated act, taking into account any available scientific advice. What is left open is when exactly a request will be considered to be complete (see also next paragraph).

43. Article 11(3) provides the initiating and the potentially affected Member State with the possibility (not the duty) of submitting to the European Commission a joint recommendation (as referred to in Article 18(1)) for achieving the objectives of the relevant conservation measures. This has to be done within six months of the provision of ‘sufficient information’ by the initiating Member State. Presumably, if a joint recommendation is received, this could constitute a ‘complete request’, although this is not actually specified.

44. As stated above, the initiating and the potentially affected Member States are under no obligation to submit a joint recommendation to the European Commission. The wording in paragraph 2 of Article 11(3) - ‘if not all Member States succeed in agreeing’ (emphasis added) - predicates that there has been an attempt between Member States to agree a joint recommendation.

45. It is therefore reasonable to conclude that provided the initiating Member State has submitted relevant information on the measures required to the European Commission and other Member States with a direct management interest in the fishery, and if those Member States decide not to make joint recommendations and/or there has been no commencement of collaborative work between Member States, then after the time limit for making joint recommendations (six months) has expired, the European Commission can pass a relevant delegated act (if this is regarded as a ‘complete request’ from the initiating Member State). How this process will apply in practice is unclear.

46. In circumstances where Member States propose conservation measures that will affect the fishing interests of other Member States, but do not commence negotiations to agree joint recommendations, no clarity is provided as to what would constitute a ‘complete request’, and when the three-month period in which the European Commission can pass a delegated act should commence.

24 Article 11(3).
25 Article 11(3).
26 Article 11(2).
27 Articles 11(2) and 11(3).
Due to these remaining uncertainties, it is crucial that the following questions are explored, and clarification is provided by decision makers:

- What is a 'complete request'?
- When does the three-month period start and expire?
- Would the Member State request for a measure and submission of 'relevant information' be seen as the starting point of the three-month period? This would mean that - provided that there has been no attempt by Member States to collaboratively agree joint recommendations - the European Commission could act as soon as the six-month time limit for joint recommendations has expired.
- Alternatively, if Member States do commence negotiations to agree joint recommendations, would the three-month period commence when a joint recommendation is submitted to the European Commission?

5.2.3 The difference between conservation measures affecting fishing vessels of other Member States and those affecting a fishery in which another Member State has a direct management interest

47. There is some ambiguity as to why the phrase 'a Member State having a direct management interest in the fishery to be affected' in Article 11(2) was not also used in Article 11(1), which instead refers to conservation measures 'not affecting fishing vessels of other Member States'. It is possible that the use of the two phrases is just an anomaly in the drafting and that 'not affecting fishing vessels of other Member States' was intended by the legislators to be interpreted to mean the same thing as a 'Member State having a direct management interest in the fishery to be affected'.

48. On the other hand, a literal interpretation would conclude that Article 11(1) covers cases where conservation measures are purely national in effect. Such measures are not allowed to affect fishing vessels from other Member States, whether or not a direct management interest in any fishery of any other Member State is affected. The use of different wording like this is very confusing. It is not clear whether a conservation measure in a marine protected area that could affect a 'fishing vessels of other Member States' would always also be captured by the situation where 'other Member States have a direct management interest in the fishery to be affected'.

49. Article 11(2) in turn, always applies where a proposed measure would affect the fishing interests of other Member States.

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28 ClientEarth and Marine Conservation Society meeting with Fotios Papoulious of DG Environment on 13 January 2014 suggest that DG Environment support such an interpretation.
RECOMMENDATION

- Because of the scope for confusion in this respect, guidance from the European Commission would be helpful to explain the difference between the two phrases - 'not affecting fishing vessels of other Member States' and 'a Member State having a direct management interest in the fishery to be affected' - and to ensure that there are no unintended gaps or loopholes that result because two different phrases have been used.

5.2.4 Joint recommendation not agreed amongst Member States or not compatible with requirements of Article 11(1)

50. If a joint recommendation is deemed not to be compatible with the requirements of Article 11(1) (i.e. it does not meet the objectives of the CFP or of the relevant EU environmental law requirements), or where not all Member States succeed in agreeing a joint recommendation within six months (that is, if a joint recommendation procedure has been instigated under Article 11(3)), then there is one last fall-back procedure: the European Commission may submit a proposal in accordance with the Treaty (see 2nd paragraph of Article 11(3)). According to the European Commission, this means a legislative proposal under the ordinary legislative procedure, though it is not obvious why this was not stated expressly if that is the case.29

51. Indeed, given the purpose of Article 11, this is a very surprising conclusion. The purpose of Article 11 is to assist Member States to comply with their existing obligations under EU environmental law.30 Relying on an entire new round of full-blown legislative process to achieve this appears not to make any sense. Not only could this cause unacceptable and potentially fatal (for the conservation interests in question) delay, but it might undermine EU law. Further clarification from the European Commission would be helpful, and in any future reform, it would be advisable to revise this provision and provide for a more practical process in which the European Commission can pass conservation measures that Member States consider are necessary for managing the relevant marine protected areas more quickly and easily, if the joint recommendation process fails or breaches legal requirements.

29 Article 11(3).
30 Recital (25). Also confirmed by a Workshop hosted by DG Environment and DG Mare on 3-4 April 2014, 'Marine environment and fisheries - applying the new CFP and environment policy together'. 
RECOMMENDATION

- In any future revision of the CFP, either in the next reform or before, the European Commission should be empowered to act by delegated or implementing act in circumstances where:
  - environmental law clearly requires a conservation measure that affects fishing activities (of more than one Member State); and
  - a joint recommendation has not been agreed (or the European Commission deems it incompatible with relevant EU law requirements); or
  - the European Commission has exhausted its ability to take urgent measures and no other measure has been passed by delegated act in the meantime.

5.3 European Commission acts in cases of urgency

Article 11(4)

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

Article 11(5)

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

52. In cases of urgency and in the absence of a joint recommendation, the European Commission has a duty to adopt relevant conservation measures. 31 Although the text does not state so expressly, presumably this will be by a Commission Decision, as provision is made for a Commission Decision in urgent situations under Article 12, and it is the most suitable measure in this context.

53. However, it is also be possible that the relevant measure may be passed by delegated act, if the word ‘measure’ in Article 11(4) is interpreted as referring back to the delegated acts mentioned in Article 11(2). If this is not the case though – and it would mean that other non-Article 11(2) scenarios were not covered – then no sufficient delegation of power is provided for by this provision (and under Article 46).

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31 Article 11(4).
54. Article 11(4) measures can only apply for a maximum period of 12 months, extendable for another 12 months where conditions so justify.\(^{32}\)

55. This scenario will be invoked, for example, if - by not implementing the proposed conservation measures - the objectives of the Habitats, Birds or Marine Strategy Framework Directives and the initiating Member State’s intentions, would be placed in jeopardy.

56. Again, in such situations it must be DG Environment that has autonomy over this process since it proposed the adoption of the relevant conservation laws across the EU, and it is mandated to ensure their implementation and therefore possesses the relevant expertise.

57. Further, and although Article 18(1) does not permit the European Commission to adopt any measure before the expiry of the deadline for submission of joint recommendations, Article 11(4) is arguably a derogation whereby the European Commission is not bound to wait for the expiry of the six month timeframe stipulated in Article 11(3).

58. Therefore, it would presumably be possible - in urgent situations - for DG Environment to adopt temporary conservation measures by way of Commission Decisions as soon as it receives notice from the initiating Member State of the conservation measure required under Article 11(3).

59. This way it would be possible to prevent any damage occurring to the site in the interim period while the European Commission waits for the expiry of the six-month time limit for joint recommendations and until a permanent conservation measure is either passed by delegated act, or where necessary (i.e. the joint recommendation procedure has been initiated and a joint recommendation is not agreed or not deemed to be compatible with the requirements in Article 11(1)), under the ordinary legislative procedure.

**RECOMMENDATIONS**

- Clarify that the type of measure to be used in any Article 11(4) and (5) process will be a Commission Decision.
- The European Commission should utilise its power to take urgent measures whenever the processes under Articles 11(1) – (3) are too slow and endanger the conservation objectives for the relevant marine protected areas.

\(^{32}\) Article 11(5).
6 The purpose of conservation measures under Article 11 and the appropriate Directorate-General in the European Commission

60. The following paragraphs explore in more detail the purpose of conservation measures under Article 11(1) and Article 11 more generally and the implications this has for the processes and procedures introduced by Article 11.

61. As mentioned above, Article 11(1) requires conservation measures adopted under Article 11 to comply with Article 2 of the CFP. Article 2 sets out the general and specific objectives of the CFP. The general objectives are listed first, in Article 2(1) – (4). They include, in particular, the following environmental protection standards:

- ensuring 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;33
- explicit application of the precautionary approach;34
- implementation of an ecosystem-based approach to fisheries management.35

62. A high standard of environmental protection is therefore reflected in the general objectives of the CFP and as the first listed objective, environmental sustainability should be interpreted as having the most significance.36 This is especially so given the fundamental requirement of environmental sustainability for the long-term survival of commercial fisheries. Further, implementation of an ecosystem-based approach is crucial to the effective interaction between the Marine Strategy Framework Directive and the CFP.

63. Set out beneath these overarching objectives of the CFP are a number of specific objectives which - amongst others - include:

- the promotion of ‘the development of sustainable Union aquaculture activities to contribute to food supplies and security and employment’;37
- to ‘contribute to a fair standard of living for those who depend on fishing activities bearing in mind coastal fisheries and socio-economic aspects’;38
- the promotion of ‘coastal fishing activities, taking into account socio-economic aspects’;39 and
- coherence ‘with the Union environmental legislation, in particular with the objective of achieving a good environmental status by 2020 as set out in Article 1(1) of Directive 20087/56/EC, as well as with other Union policies’.40

33 Article 2(1).
34 Article 2(2).
35 Article 2(3).
36 Refer to ClientEarth briefing on prioritising the environmental pillar in a reformed CFP for further analysis: http://www.clientearth.org/reports/technical-briefing-prioritising-environmental-objective-common-fisheries-reform.pdf
37 Article 2(5)(e).
38 Article 2(5)(f).
39 Article 2(5)(i).
40 Article (2)(5)(j).
64. Clearly, these specific objectives cover a range of interests, and inherent within them is the possibility for mutual incompatibility. It is possible that a proposed conservation measure could potentially be incompatible with the promotion of coastal fishing activities and have an impact on the standard of living of those who depend on coastal fisheries, but be entirely compatible with, and indeed essential for, achieving coherence with Union environmental legislation. This could arise, for example, where a Member State adopts fishing restrictions in an inshore SAC under Article 6(3) of the Habitats Directive.

65. Another example of the tensions that could arise in balancing the objectives included in Article 2 of the CFP would be the refusal of an aquaculture project on the basis that the proposed project may have an adverse effect on the integrity of an SAC and therefore would not be permitted in accordance with the requirements of Article 6 of the Habitats Directive.

66. Importantly, the specific objective requiring coherence with ‘Union environmental legislation’ and the attainment of good environmental status under the Marine Strategy Framework Directive is a re-iteration of the fundamental EU legal principles established in Articles 7 and 11 of the Treaty on the Functioning of the European Union, as explained in the following paragraphs.

67. Article 11 of the Treaty legally obliges the EU to ensure that environmental protection is effectively integrated into all EU policies (known as the integration principle). Article 11 of the Treaty states:

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

68. The reference to ‘environmental protection requirements’ in Article 11 of the Treaty refers to the environmental chapter of the Treaty, particularly the environmental policy objectives of Article 191 of the Treaty but also secondary environmental law (i.e. the Birds Directive, Habitats Directive and Marine Strategy Framework Directive) and policy more generally. In implementing this obligation, the European Court of Justice has confirmed that merely ‘taking account’ of environmental protection will be insufficient and that the integration principle is a binding principle of EU law.\(^{41}\) The integration principle therefore applies to all EU policies and activities including energy and fisheries.

69. It follows that, to comply with Article 11 of the Treaty, the CFP must integrate a range of environmental protection requirements contained in the EU Treaties, in secondary environmental legislation and policies. In particular, it must incorporate Article 191 of the Treaty so that the CFP contributes to “preserving, protecting and improving the quality of the environment,”\(^ {42}\) and must “…aim at a high level of protection…”\(^ {43}\) for the environment.

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\(^{41}\) Hellenic Republic v Council of the European Communities, Case C - 62/88, Para 20; See also: R v Minister of Agriculture - Case C - 157/96 at paragraphs 63-64.

\(^{42}\) Article 191(1) Treaty on the Functioning of the European Union, as amended by the Lisbon Treaty.

\(^{43}\) Article 191(2) Treaty on the Functioning of the European Union, as amended by the Lisbon Treaty and Article 3(3) The Treaty on European Union.
Implementation of the CFP must also apply the precautionary principle and the principle that preventive action should be taken.\(^{44}\)

70. In addition, Article 7 of the Treaty establishes that the EU is obliged to ‘ensure consistency between its policies and activities’ and therefore implementation of the reformed CFP must also be consistent with other EU policy areas, including environmental policies and legislation.

71. Integration of environmental protection and the requirements to ensure policy consistency must be prioritised above any specific objectives listed in Article 2(5) of the CFP - such as the promotion of coastal fisheries or the promotion of sustainable aquaculture - since these are fundamental and overarching principles of EU environmental law.\(^{46}\) In the fisheries context, this recognition in law of the need effectively to integrate environmental considerations is logical given the unavoidable link between healthy marine ecosystems and fisheries’ social and economic success in the long-term.\(^{46}\)

72. In this context it should be noted that general EU environmental legal principles (for example the precautionary principle and the principle that preventative action should be taken) will take precedence over any perceived incompatibilities with the specific objectives of the CFP (which include for example the promotion of coastal fisheries). In any case, environmental sustainability, the application of the precautionary approach and implementation of the ecosystem-based approach are all primary objectives both of the CFP and of the Marine Strategy Framework Directive\(^{47}\).

73. Further, Article 11(1) also requires that the relevant conservation measures are ‘at least as stringent as measures under EU law’ – an additional explicit acknowledgment of the fundamental EU legal principles that demand that environmental protection is effectively integrated into all EU policies and activities,\(^{48}\) that all EU policies are consistent with one another\(^{49}\) and that the attainment of EU policy and objectives are not jeopardised, including environmental policy objectives.\(^{50}\)

74. In this way, conservation measures that are necessary to comply with European laws governing marine protected areas must not be restricted in practice by the reference in Article 11(1) to compatibility with the objectives set out in Article 2 of the CFP. Environmental sustainability and general EU environmental legal principles - for example the precautionary principle and the principle that preventative action should be taken - will take precedence over a perceived incompatibility with any of the specific objectives.

\(^{44}\) Article 191(2) Treaty on the Functioning of the European Union, as amended by the Lisbon Treaty.

\(^{45}\) For further analysis refer to ClientEarth briefing on integration in the CFP: http://www.clientearth.org/reports/technical-briefing-integration-common-fisheries-reform.pdf.


\(^{47}\) Article 1(3) of the Marine Strategy Framework Directive.

\(^{48}\) Article 11 of the Treaty on the Functioning of the European Union, as amended by the Treaty of Lisbon.

\(^{49}\) Article 7 of the Treaty on the Functioning of the European Union, as amended by the Treaty of Lisbon.

\(^{50}\) Article 4(3) Treaty on the European Union
75. All of this makes it very clear that the fundamental objective of Article 11 is environmental in nature - and this is supported by the title of Article 11 itself ('Conservation measures necessary for compliance with obligations under Union environmental legislation' - emphasis added) More precisely, it is compliance with conservation requirements in relation to marine protected areas under the Marine Strategy Framework, Habitats and Birds Directives, which must take priority over any potentially competing fisheries interests. Conversely, all of this also makes it very clear that the purpose of Article 11 is not one related to fisheries conservation.

76. It follows that any measures, be they delegated acts, urgent Commission measures or newly proposed legislation, must do everything to ensure that Member States comply with their obligations under those three Directives and cannot sacrifice these environmental objectives to other potentially competing interests or objectives.

77. It also follows that the new procedures introduced and the measures passed under Article 11 should be supervised and managed by environmental rather than fisheries authorities, both at Member State level and, possibly more importantly, at EU level in the European Commission. The European Commission Directorate-General (DG) responsible for implementation and application of fisheries legislation generally is DG Mare. DG Environment is the Directorate-General responsible for ensuring the correct application and implementation of environmental law, including the Habitats Directive, Birds Directive and Marine Strategy Framework Directive, which are at the heart of Article 11, as already explained.51

**RECOMMENDATIONS**

- **All conservation measures passed pursuant to Article 11, whatever their nature, must comply with and implement relevant EU environmental law.** This must be the case whether Member States implement conservation measures protecting their marine protected areas themselves (i.e. where the measures do not affect fishing vessels of other Member States), or the European Commission passes the conservation measure by means of a delegated act (i.e. where another Member State has a direct management interest in the fishery to be affected): and whether the European Commission passes an emergency measure or proposes new legislation.52

- **It is essential that DG Environment, which is in charge of the proper implementation of the Marine Strategy Framework Directive, Habitats Directive and Birds Directive, take responsibility for implementation of the new process outlined in Article 11.**

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52 Article 11(1).
7 Regionalisation and joint recommendations

78. As stated above, Article 11(2) requires the relevant regionalisation procedures under Articles 18(1)–(4) and (6) to be used for the adoption of delegated acts under Article 11.

79. This means that if Member States decide to go down the joint recommendations route (see above), they must cooperate with one another in formulating the joint recommendations.\textsuperscript{53} Further, the Member States must consult with the relevant Advisory Councils,\textsuperscript{54} and the European Commission must facilitate such cooperation between Member States, including, where necessary, ensuring that a scientific contribution is obtained from the relevant scientific bodies. Further detail on the extent or the type of facilitation that will be provided by the European Commission is not clarified within the article.

80. It is also important for Member States to note that after the submission of a joint recommendation, the European Commission will review the joint recommendation and take into account 'any available scientific advice'.\textsuperscript{55} While it is not further specified, it therefore seems possible for the European Commission, following receipt of a joint recommendation, to make changes to a proposed measure on the basis of scientific advice.

81. In addition to this, the European Commission will only adopt joint recommendations that are compatible with the originally proposed conservation measure\textsuperscript{56} and are compatible with the requirements referred to in Article 11(1).\textsuperscript{57} This means that a joint recommendation must:

- ensure that fishing activities are environmentally sustainable;\textsuperscript{58}
- apply the precautionary approach;\textsuperscript{59}
- meet the objectives of the relevant EU environmental legislation that they intend to implement;\textsuperscript{60} and
- be at least as stringent as measures under Union law\textsuperscript{61} and therefore, for example, the recommendation must comply with Article 6 of the Habitats Directive.

**RECOMMENDATIONS**

- The European Commission should produce guidance to ensure that a consistent approach to facilitation of co-operation amongst Member States when working to agree joint recommendations is applied to each negotiation.
- The European Commission must ensure that any measures, including joint recommendations, passed under the processes provided for in Article 11 meet the environmental objectives of the relevant EU conservation legislation and environmental requirements.

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\textsuperscript{53} Article 18(2).
\textsuperscript{55} Article 11(3).
\textsuperscript{56} Article 18(3).
\textsuperscript{57} Articles 11(1) and 11(3).
\textsuperscript{58} Article 2(1).
\textsuperscript{59} Article 2(2).
\textsuperscript{60} Article 11(1).
\textsuperscript{61} Article 11(1).
8 Implementation and enforcement

82. Once the European Commission has formally adopted conservation measures under any of the procedures outlined above, the European Commission has an additional responsibility to facilitate co-operation between the Member States to achieve implementation and enforcement of the adopted conservation measures. Due to the environmental nature of such measures, it again must be DG Environment which takes responsibility for ensuring effective implementation and enforcement of the adopted conservation measures.

9 Conclusions with regard to the interpretation of Article 11

83. Article 11 is about the procedural steps to follow in order to adopt conservation measures within EU marine protected areas so far as they relate to Article 6 of the Habitats Directive, Article 4 of the Birds Directive and Article 13(4) of the Marine Strategy Framework Directive. It follows that measures introduced under Article 11 are for environmental purposes and the Article is about implementation of existing EU conservation laws. DG Environment is responsible for ensuring that Member States apply EU environmental law correctly. It is therefore essential that DG Environment take responsibility for the process set out in Article 11 (and potentially also other environmental articles of the CFP, such as Article 20).

84. Article 11(1) specifies a mechanism for a Member State to adopt conservation measures so as to comply with Article 13(4) of the Marine Strategy Framework Directive, Article 4 of the Birds Directive or Article 6 of the Habitats Directive provided that no other Member State’s fishing vessel is affected. In effect, this obligation remains unchanged as from the situation that existed prior to the reformed CFP, although there is now an expressly stated process (see below). Measures proposed by Member States under Article 11(1) must be sufficiently environmentally robust to effectively implement a Member States’ EU environmental law obligations (such as the precautionary principle and the principle that preventative action must be taken).

85. The key change created by Article 11 of the CFP is that now there is an explicit process for the adoption of enduring conservation measures under the relevant marine protected area provisions of the Habitats, Birds and Marine Strategy Framework Directives under the new CFP in circumstances where other Member States have a direct management interest in the fishery to be affected by the conservation measure. This new process is based primarily on the European Commission adopting delegated acts.

86. It is important to note that while a new process has been established, there has been no change in the environmental laws with which Article 11 is interacting. Therefore, as is always the case for implementation of EU nature conservation laws, it must be DG Environment within the European Commission that is given responsibility to oversee the new processes in Article 11.

62 Article 11(6).
87. Member States are under no obligation to submit a joint recommendation to the European Commission for achieving the objectives of the relevant conservation measures. However, if Member States do decide to initiate the joint recommendation procedure, then a delegated act will be adopted on the basis of the joint recommendations made. Where relevant, Member States will need to work in cooperation with one another under the regionalisation provisions of the CFP to achieve this.

88. Further, when negotiating joint recommendations, each Member State must have a clear understanding of the environmental stringency that is expressly incorporated through Article 11 into the CFP in respect of Member State’s compliance with EU environmental law marine protected areas measures. In this respect, the European Commission will only adopt joint recommendations that are compatible with the originally proposed conservation measure and are compatible with the requirements referred to in Article 11(1). This means that a joint recommendation must ensure that fishing activities are environmentally sustainable; apply the precautionary approach; meet the objectives of the relevant EU environmental legislation that they intend to implement (for example Article 6 of the Habitats Directive); and be at least as stringent as measures under Union law (for example apply the precautionary principle and the integration principle).

89. In addition, it seems possible for the European Commission, following receipt of a joint recommendation, to make changes to a proposed measure on the basis of scientific advice.

90. If Member States decide not to make joint recommendations, then after the time limit for making joint recommendations (six months) has expired, the European Commission can pass a relevant delegated act.

91. If a joint recommendation is not agreed within the stipulated timeframe, or an agreed joint recommendation is deemed not to be compatible with the objectives of the CFP or of the relevant EU environmental law it is implementing or is not as stringent as measures under EU law, then the European Commission is able to make its own proposal ‘in accordance with the Treaty’. Were the European Commission to pass a proposal through the ordinary legislative procedure in such circumstances, this has the potential to cause an unacceptable delay to much needed conservation measures and to potentially undermine EU law and procedures. Any future review of this provision should consider empowering the European Commission to use delegated or implementing acts in these circumstances.

92. Finally, in urgent circumstances and in the absence of a joint recommendation, the European Commission must adopt the necessary conservation measures on a temporary basis. This provides some reassurance that urgent conservation measures will be enacted by the European Commission. While not specified, it is assumed this will be enacted by way of Commission Decision and urgent conservation measures can be adopted by the European Commission.

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63 Article 18(3).
64 Articles 11(1) and 11(3).
65 Article 2(1).
66 Article 2(2).
67 Article 11(1).
68 Article 11(1).
Commission at any time after the European Commission receives notice from the initiating Member State of the conservation measures required. Again, this must be carried out by DG Environment which has the relevant expertise and responsibility for ensuring that EU nature conservation laws are being complied with.

93. In some respects, Article 11 of the reformed CFP is successful in clearing up the uncertainty and misinterpretation that previously existed in respect of a Member State’s duty to implement conservation measures in the marine environment, despite the effect that this may have on fishing vessels. Article 11 now provides more clarity for Member States and reconfirms that Member States are empowered to adopt conservation measures to comply with their legal obligations relating to marine protected areas under EU legislation.

94. Further, the regionalisation process that Member States must now adhere to when agreeing joint recommendations is a sensible approach under the new and more regionalised framework of the CFP. However, in other respects there are remaining uncertainties and some danger that this Article will undermine European environmental conservation laws and fundamental principles of EU law in general. Such uncertainties must be dealt with urgently; and in particular, confirmation is needed from the European Commission that DG Environment will be the primary Directorate responsible for implementation of the new Article 11 of the CFP.
ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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