

Technical Measures and sensitive species and habitats

Key points and recommendations

- One of the Common Fisheries Policy ('CFP')'s key objectives is coherence with Union environmental legislation, which includes the Habitats¹ and Birds Directives² (the "Nature Directives") and the Marine Strategy Framework Directive (the 'MSFD').³ The Technical Conservation Measures Framework ('TCMF') should have an essential role in ensuring this coherence, particularly as the European Commission's TCMF Proposal⁴ contains a number of provisions relating to sensitive species and habitats. As a result, any conflict in the TCMF Proposal must be addressed in the final regulation adopted through co-decision. This briefing assesses the Commission's proposal in terms of coherence with Union environmental legislation and makes recommendations where amendments and clarifications are necessary.
- In order to ensure coherence with the Nature Directives and the MSFD, the protections in the TCMF Regulation that is adopted through co-decision must as a minimum apply to the same marine habitats and marine species, including mammals, seabirds and reptiles, as these directives. The wording of relevant provisions must be consistent, particularly with the Habitats Directive requirement to maintain at, or restore to, favourable conservation status. The objectives in the TCMF Proposal present a potential conflict here and their wording must be amended accordingly.
- Provisions relating to bycatch of marine species, including mammals, seabirds and reptiles, must be coherent with the requirements in the Nature Directives and international agreements. To ensure this, targets relating to bycatch levels must be consistent with levels set out in these directives, where such levels exist. The TCMF Regulation needs to be clearer about when Member States should adopt mitigation measures and baseline mitigation measures should comprehensively cover the areas and gears where bycatch is likely to occur.

1 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora

2 Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds

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)

4 Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the conservation of fishery resources and the protection of marine ecosystems through technical measures, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:134:FIN>

- To strengthen the protection for sensitive species and habitats, the processes referred to in the TCMF Proposal for establishing measures in relation to these species and habitats must be made clearer, particularly if coherence with the Nature Directives and MSFD is to be ensured.
- The environmental impact of fishing on seabed habitats must be minimised and where possible eliminated, and to this end the relationship between the targets in the TCMF Proposal and any levels set out in the MSFD must be clarified.

1 Background

The CFP Basic Regulation explicitly states as one of its objectives that the CFP shall "*be coherent with Union environmental legislation, in particular with the objective of achieving good environmental status by 2020 as set out in Article 1(1) of [the Marine Strategy Framework Directive], as well as with other Union policies.*"⁵ The Habitats⁶ and Birds Directives⁷ (the 'Nature Directives') are key pieces of Union legislation with which such coherence must be ensured. This is evidenced in Article 11 of the CFP Basic Regulation, which sets out the process for adopting conservation measures necessary for compliance with obligations under these directives, as well as the Marine Strategy Framework Directive (the 'MSFD').⁸ The need for coherence with Union environmental legislation means that the European institutions, in proposing and adopting new laws within the framework of the CFP, must ensure that the laws will be in line with the requirements of these directives. Legislation relating to technical measures is a key example of where such coherence is essential.

Technical measures are rules for where, when and how fishing may take place and are fundamental for regulating the impact of fishing on stocks and the wider marine ecosystem. In March 2016 the European Commission proposed a new framework for a regulation on the conservation of fishery resources and the protection of marine ecosystems through technical measures⁹ (we refer to this proposal as the 'Technical Conservation Measures Framework Proposal', or 'TCMF Proposal'). The final TCMF regulation that is adopted through co-decision (hereinafter referred to as the 'TCMF Regulation') will have an essential role to play in European fisheries management, particularly in the implementation of the CFP and the achievement of its objectives, including coherence with Union environmental legislation.

Proposing and adopting new legislation in a way that ensures coherence with the Nature Directives and the MSFD poses a number of challenges. For example, specific wording and the level of protection must be consistent. This is essential to avoid a watering down of the requirements of these directives and a threat to the achievement of their objectives. In light of the general evidence of declining marine biodiversity, it is unacceptable to weaken the protections afforded by the legal framework. Further, the fact that the European Commission's 'fitness check' of the Nature Directives found that they "*remain relevant and fit for purpose*"¹⁰ means that any amendments via the 'backdoor' would be contrary to the stated intention to focus on improving implementation and enforcement rather than reopening and changing the directives.

⁵ Regulation 1380/2013 on the Common Fisheries Policy, Article 2(5)(j)

⁶ n.1

⁷ n.2

⁸ n.3

⁹ n.4

¹⁰ Commissioner Vella statement: https://ec.europa.eu/commission/2014-2019/vella/announcements/my-statement-orientation-debate-next-steps-fitness-check-birds-and-habitats-directives_en

The Commission's TCMF Proposal contains a number of provisions that relate to sensitive species and habitats and we expect that such provisions will be retained in one form or another in the TCMF Regulation. While sensitive species and habitats are not exclusively those covered by the Nature Directives and the MSFD, as shown in the definitions in Article 6 of the TCMF Proposal, many such species and habitats are listed under these directives. This provides potential for the approach in the TCMF and these directives to conflict. Such conflict must be avoided. In this briefing we will consider the ways in which coherence between the TCMF Regulation and the Nature Directives and the MSFD can be ensured, assessing the issues in the proposal that must be addressed in the co-decision process and the final regulation.

Recommendations:

- The sensitive species and habitat provisions of the TCMF Regulation must be coherent with the Habitats and Birds Directives and the MSFD, as this is a key objective of the CFP Basic Regulation, so any potential conflict contained within the TCMF Proposal must be addressed in the co-decision process and the final regulation.

2 Ensuring coherence with the Birds, Habitats and Marine Strategy Framework Directives

2.1 Consistent lists of species and habitats

The Habitats and Birds Directives clearly indicate which species and habitats are protected by their provisions.¹¹ To be coherent with these directives, any new legislation, in this case the TCMF Regulation must, as a minimum, apply to the same marine habitats and species, including marine mammals, seabirds and marine reptiles.

What must be avoided is any attempt to seek to amend the lists or scope of species and habitats to be protected, thereby weakening the protection afforded by the directives, and in this regard the TCMF Proposal is on the right track. It cross-refers to the Nature Directives (and therefore the species and habitats that they cover) in a number of its provisions, including the Article 3(2)(b) bycatch target (see below) and in the definitions of 'sensitive habitat' and 'sensitive species' in Articles 6(6) and 6(7). Such cross-references explicitly link the TCMF Proposal and the directives and ensure consistency between the species and habitats protected under each. These cross-references are one relatively clear and simple way of recognising the need to ensure coherence and must be maintained.

Recommendation

- To ensure coherence with the Nature Directives and MSFD, the final TCMF Regulation must as a minimum apply to the same marine species and habitats, and in this respect the cross-references to the lists of species and habitats in the directives should be retained.

¹¹ For certain provisions the directives reference clear lists, in their respective Annexes, of the species and habitats; for other provisions reference is to specific categories meeting certain criteria

2.2 Consistent wording

When new legislation is introduced that cross-refers to the requirements of the Nature Directives and the MSFD, the relevant provisions must not undermine the wording of these directives. For instance, if new legislation is drafted in such a way that the language does not exactly replicate that of the Nature Directives and MSFD, perhaps introducing new terminology, the result will be legal uncertainty and potential conflict. Any such conflicts must be removed at the earliest opportunity during the co-decision process, and certainly in the TCMF Regulation.

The Habitats Directive clearly states that "*measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest*". The requirement to maintain at, or restore to, favourable conservation status is central to the Habitats Directive regime and must not be weakened in any successive legislation. Therefore, to ensure coherence is maintained, the following provisions of the TCMF Proposal must be amended by the co-legislators.

2.2.1 Article 3 objectives and a 'threat to the conservation status'

One important element of the TCMF Proposal is that it provides a framework of common objectives and, where possible, quantitative targets. General and specific objectives are contained in Article 3 of the TCMF Proposal. The overarching objective, in Article 3(1), is that the technical measures "*shall contribute to the objectives of the CFP set out in Article 2 of [the CFP Basic Regulation] and in particular paragraphs 2, 3 and 5(a) and (j) of that Article*". Again, this makes it clear that technical measures are tools to support the CFP and, in particular, the objective of coherence with Union environmental legislation.

In light of this, ClientEarth is concerned that, at present, the wording of the objectives in Article 3(2)(b) and (c) of the TCMF Proposal appears inconsistent with the wording of the Habitats Directive. These objectives state:

2. *In addition, technical measures shall in particular [...]*

*(b) ensure that bycatches of marine species listed under Directives 92/43/EEC and 2009/147/EC and other sensitive species that result from fishing are minimised and where possible eliminated **such that they do not represent a threat to the conservation status of these species*** [emphasis added];

*(c) ensure that the environmental impacts of fishing on marine habitats are minimised and where possible eliminated **such that they do not represent a threat to the conservation status of those habitats*** [emphasis added].

With regards to Article 3(2)(b) we support the objective of minimising and where possible eliminating bycatches of marine species listed under the Habitats and Birds Directives, although we assess the use of the term bycatch in more detail below. The explicit reference to the Nature Directives in this objective is an appropriate reflection of the need for consistency and must be retained. However, the wording "*such that they do not represent a threat to the conservation status of these species*" jeopardises such consistency, as discussed below.

The relationship between Article 3(2)(c) of the TCMF Proposal and the Habitats Directive is not clear. This objective is not explicitly linked to only the habitats covered by the Habitats Directive and must therefore be interpreted as applying to all marine habitats. However, for those marine habitats that are covered by the Habitats Directive, the minimisation and elimination of environmental impacts of fishing on such habitats is essential if the requirement to maintain at, or restore to, favourable conservation status is to be met. The wording of this objective in the TCMF Proposal must therefore be consistent with the Habitat Directive's wording.

Unfortunately, the qualifier to each of these objectives, highlighted above, of "*such that they do not represent a threat to the conservation status of these species*" has the potential to conflict with the Habitats Directive requirement to maintain at, or restore to, favourable conservation status.¹² Further to this, it has been acknowledged by the Commission that the Birds Directive, though preceding the Habitats Directive, is also underpinned by the concept of maintaining at, or restoring to, favourable conservation status.¹³ To require only that bycatch levels and environmental impacts of fishing activities do not represent **a threat to conservation status** does not set the test at the right level. This seems to require only that there is no change to conservation status. Not only does this lack ambition but, in line with the Nature Directives, conservation status must be improved, especially where it is not yet favourable.

Further, the burden of proof associated with this wording in the TCMF Proposal is also likely to raise difficulties through a lack of certainty – what would be classed as 'a threat' and how is this to be demonstrated? Will there be inaction in terms of minimising bycatch or environmental impacts if this cannot be demonstrated? Indeed, to show that something is a threat to the conservation status could imply that damage or degradation has already been observed to occur. This would conflict with the emphasis on proactive and precautionary action embedded in the Nature Directives. And how does the reference to conservation status apply to the species and habitats not covered by the Nature Directives? These issues cause an extra layer of uncertainty in relation to Article 3(2)(c) of the TCMF Proposal that can only be addressed by removing the qualifier "*such that they do not represent a threat to the conservation status of these species/those habitats*".

We strongly support the apparent purpose behind these two objectives, i.e. the minimisation and, where possible, elimination of bycatch of sensitive species (though for specific species this may not go far enough – see discussion below) and of the environmental impacts of fishing. As detailed below, these are in line with the requirements not only of the Nature Directives and MSFD but of international agreements such as ASCOBANS, which relates to the conservation of small cetaceans.¹⁴ These elements should be retained. However we recommend that the qualifier "*such that they do not represent a threat to the conservation status of those species/habitats*" is removed from the proposal, for the reasons outlined above. Deleting this stipulation not only removes potentially conflicting wording and the possibility of undermining and weakening the requirements of the Habitats Directive, but would also have the effect of strengthening the objectives themselves.

¹² Article 2(2) Habitats Directive

¹³ See European Commission guidance "Guide to Sustainable Hunting under the Birds Directive" which, in relation to favourable conservation status, states, at footnote 36 on page 23, "[a]lthough the term is not explicitly mentioned in Directive 79/409/EEC [the Wild Birds Directive] the principles underpinning it are equally applicable in relation to the objectives of this Directive". Footnote 37 then goes on to refer to favourable conservation status assuming population viability, which "lies at the heart of the requirement laid down in Article 2 of the Directive, which contains the general obligation of population maintenance. Viable populations are integral to demonstrating a secure conservation status."

http://ec.europa.eu/environment/nature/conservation/wildbirds/hunting/docs/hunting_guide_en.pdf

¹⁴ AGREEMENT ON THE CONSERVATION OF SMALL CETACEANS OF THE BALTIC, NORTH EAST ATLANTIC, IRISH AND NORTH SEAS, <http://www.ascobans.org/en/documents/agreement-text>

We note that the same wording is reproduced in Article 25 of the proposal, which provides for the introduction of nature conservation measures through regionalisation. Currently this states that "[j]oint recommendations submitted by Member States in accordance with Article 19 to allow for the use of nature conservation measures to protect sensitive species and habitats may in particular... specify restrictions on the construction and operation of specified gears or introduce a total prohibition on the use of certain fishing gears within a region where such gears represent **a threat to the conservation status of species** referred to in Articles 11 and 12 or to the habitats referred to in Article 13 or other sensitive habitats referred to in Article 13 or other sensitive habitats outside NATURA 2000 sites [emphasis added]". Given the ambiguities and potential conflict inherent in a reference to 'a threat to the conservation status' outlined above we recommend that this wording is amended to align more closely with the relevant provisions in the Habitats Directive: "specify restrictions on the construction and operation of specified gears or introduce a total prohibition on the use of certain fishing gears within a region where **there is a risk such gears could have an adverse impact on** species referred to in Articles 11 and 12 or the habitats referred to in Article 13 or other sensitive habitats referred to in Article 13 or other sensitive habitats outside NATURA 2000 sites".

Recommendations

- The objectives to minimise and, where possible, eliminate bycatch of sensitive species and the environmental impacts of fishing must be retained.
- The qualifier for these objectives of "*such that they do not represent a threat to the conservation status*" should be removed as this presents a potential conflict with the Habitats Directive objective to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

2.3 Coherence of objectives and targets in new legislation

In line with the principles discussed above, where new legislation introduces objectives and targets, it must be ensured that these objectives and targets do not conflict with the requirements of the Nature Directives and the MSFD. Below we assess areas of the TCMF Proposal where there is a risk of such conflict and make recommendations for how this can be addressed to ensure coherence of the proposal with the directives.

2.3.1 Minimisation and elimination of bycatch

As discussed above, in general we support the objective in Article 3(2)(b) of ensuring that bycatches of marine species are minimised and where possible eliminated, whether these species are listed under the Habitats Directive or otherwise. However, it is possible that for those species listed under Annex IV(a) of the Directive, focusing only on minimisation and possible elimination is not strong enough to ensure coherence. This is because the Nature Directives can be understood to set a higher standard, dependent on the interpretation of the word 'deliberate' and whether bycatch can be said to fall within the category of 'deliberate capture'. To ensure coherence of the TCMF Proposal with the requirements of the Nature Directives, the word 'deliberate' must be used and interpreted in the same way as it has previously been used in relation to these directives.

Article 12 of the Habitats Directive prohibits "*all forms of deliberate capture or killing of specimens of [Annex IV] species in the wild*".¹⁵ This requirement is echoed in both Articles 11 and 12 of the TCMF Proposal, as discussed below. These articles differentiate between deliberate catching and bycatch, therefore it can be inferred that bycatch of such species is considered incidental rather than deliberate in the context of technical measures. Article 12(4) of the Habitats Directive itself envisages the possibility of incidental capture or killing of Annex IV(a) species (which include, for example, cetaceans), and places obligations on Member States in relation to these situations.¹⁶ However, while the text of the Habitats Directive does not address whether bycatch should be considered incidental, the case law of the Court of Justice of the European Union ('CJEU') provides further guidance.

The CJEU has stated that "*it must be proven that the author of the act intended the capture or killing of a specimen belonging to a protected animal species or, at the very least, accepted the possibility of such capture or killing*".¹⁷ The Commission has since produced guidance stating "*not only a person who fully intends to capture or kill a specimen of an animal commits an offence: an offence is also committed by a person who might not intend to capture or kill a specimen but is sufficiently informed and aware of the consequences his action will most likely have and nevertheless performs the action, leading to the capturing or killing of specimens (e.g. as an unwanted but accepted side-effect), with reckless disregard of the known prohibitions (conditional intent)*".¹⁸ In the context of bycatch, this makes it a case by case analysis focusing on the fisherman's awareness of whether using certain gear in certain places would likely result in capture or death of the protected species.

Article 5 of the Birds Directive also prohibits deliberate killing or capture by any method of species of birds referred to in Article 1 of the directive i.e. "*all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies*".¹⁹ Whilst there have not been specific cases on the interpretation of 'deliberate' in the context of the Birds Directive, this provision is clearly similar to the requirements set out in Article 12 of the Habitats Directive. We see no reason why the CJEU's interpretation of the word 'deliberate' in the Habitats Directive cases would not, therefore, apply equally to the Birds Directive.

One difference is that in the Birds Directive there is no separate or specific provision covering 'incidental' killing, only a provision on 'deliberate' capture and killing. Could this suggest that all bycatch should be seen under the Birds Directive as 'deliberate'? While clearly not addressed in the Birds Directive itself, the Commission's 2012 action plan for reducing incidental catches of seabirds in fishing gears,²⁰ which "*depends on parts of the EU environmental acquis, in particular the Birds and Habitats Directives and the Marine Strategy Framework Directive*", could provide a broader view. Whilst this plan, in the form of a Commission Communication, has no legal force, it does use the terms 'incidental catch' and 'bycatch' interchangeably, suggesting that the Commission's starting point is that bycatch, in this case of seabirds, is incidental rather than deliberate. So it seems likely that bycatch as an 'incidental' catch is the starting position in

¹⁵ Article 16 of the Habitats Directive provides for Member States to derogate from this provision where "there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range"

¹⁶ Article 12(4) states: "Member States shall establish a system to monitor the incidental capture and killing of the animal species listed in Annex IV (a). In the light of the information gathered, Member States shall take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned"

¹⁷ Case C-221/04 Commission v Spain [2006] ECR I-04515 para 71

¹⁸ Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC p.36

http://ec.europa.eu/environment/nature/conservation/species/guidance/pdf/guidance_en.pdf

¹⁹ This is subject to exceptions and derogations set out in Articles 7 to 9 of the Birds Directive

²⁰ Communication from the Commission to the European Parliament and the Council and the Council "Action Plan for reducing incidental catches of seabirds in fishing gears", <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0665&from=EN>

relation to the Birds Directive. However, if the CJEU's interpretation of 'deliberate' in the Habitats Directive cases is applied to the capture of wild birds (including seabirds) covered by the Birds Directive, as we argue it should, bycatch must be prohibited if it fits the Court's interpretation and can properly be said to be deliberate.

What does this mean then in the context of the TCMF Regulation? If bycatch of Annex IV(a) species can be deemed deliberate and thus is prohibited in line with Article 12 of the Habitats Directive, the TCMF objective to minimise and, where possible, eliminate such bycatch will not be strong enough as it clearly allows for the capture and killing of some individuals. The same applies to the bycatch of species covered by the Birds Directives, specifically seabirds in this context, which according to Article 5 of the Birds Directive should not be killed or captured. Therefore, we assume that the Commission's starting position underlying in the TCMF Proposal is that bycatch is incidental, but, as set out above, actually bycatch situations need to be assessed on a case by case basis to determine if they are 'incidental' or 'deliberate'. We recommend that the Commission issues guidance to accompany the technical measures which makes clear that the question of whether bycatch is incidental or deliberate is to be determined on a case-by-case basis and that the outcome must be in line with the CJEU's interpretation in Habitats Directive cases.

Recommendation:

- In deciding whether bycatch is deliberate or incidental, the interpretation used by the CJEU in Habitats Directive cases must be used. Where bycatch is of Annex IV(a) Habitats Directive species or species covered by the Birds Directive, then any bycatch that can be deemed deliberate must be completely prohibited.
- The Commission should issue guidance to accompany the technical measures which makes clear that the question of whether bycatch is incidental or deliberate is to be determined on a case-by-case basis and that the outcome must be in line with the CJEU's interpretation in Habitats Directive cases.

2.3.2 Reference to 'levels'

Any cross-reference in new legislation to levels set out in the Nature Directives and MSFD must be worded in a way that is consistent with the requirements of these Directives and avoids weakening them, particularly by introducing ambiguity that could lead to difficulties with interpretation and implementation. In turn, this prevents a risk to the coherence with Union environmental legislation that is clearly required by the CFP. Central to this is a clear explanation of what is meant by 'levels' throughout the proposal and the implications of these references.

Below we analyse the references to 'levels' in the TCMF Proposal Article 4 targets and explore the lack of clarity surrounding these references. We highlight how the proposal puts in jeopardy both the effectiveness of the targets (and the ability to measure progress against them) and coherence with the requirements of the Nature Directives and MSFD and recommend that these references in the proposal are amended by the co-legislators.

Bycatch levels

Article 4(1)(b) of the Commission's TCMF Proposal states:

"1. *Technical measures shall aim to achieve the following targets: [...]*

(b) ensure that bycatches of marine mammals, marine reptiles, seabirds and other non-commercially exploited species do not exceed the levels provided for in Union legislation and international agreements."

Whilst we support its focus on limiting bycatch, it is unclear why Article 4(1)(b) refers to bycatch **levels** in Union legislation and international agreements. It is understandable that a quantitative approach would be desirable for the purposes of measuring progress, but in relation to this target, such levels do not appear to exist. Recital 9 of the TCMF Proposal gives an indication of the 'Union legislation' envisaged by this reference, as well as the other Article 4 targets. It states that *"targets relating to the levels of unwanted catches; to the level of bycatches of sensitive species and to the extent of seabed habitats adversely affected by fishing; should be established that reflect the objectives of the CFP, Union environmental legislation (in particular Council Directive 92/43 and Directive 2000/60/EC of the European Parliament and of the Council) and international best practice"*.

The Habitats Directive

Directive 92/43 - the Habitats Directive - is specifically highlighted. However, this appears something of an anomaly as the directive does not contain reference to permitted levels of bycatch. As explained above, what the Habitats Directive does do is provide for 'strict protection' of specific species, for instance all cetaceans, which are particularly vulnerable to bycatch. If bycatch of these species is deemed as deliberate capture then, as discussed above, the result would be that such bycatch must be completely prohibited, with any level above zero being unacceptable. However, in the event that such bycatch is interpreted as falling within incidental capture, the requirement in Article 12(4) of the Habitats Directive is for this incidental capture and killing not to have a **significant impact** on the species. No level for 'significant impact' is set, therefore this would have to be considered on a species-by-species basis. This provision also sets out a requirement to monitor the incidental capture and killing of the animal species in Annex IV(a). Whether prohibited or subject to a requirement not to have a significant impact on species subject to 'strict protection', in neither case can it be said that there are the type of 'levels' that Article 4(1)(b) seems to envisage.

The Birds Directive

Similar questions arise in relation to the Birds Directive. While not specifically referred to in Recital 9, the Birds Directive clearly falls under the category of Union legislation and an explicit reference to seabirds within this target makes the applicability of the directive clear. Similarly to Article 12 of the Habitats Directive, Article 5 of the Birds Directive also provides a system of strict protection, prohibiting deliberate capture or killing of the species it covers (i.e. all wild birds).²¹ Again there is no reference to **levels** of bycatch. However, were seabird bycatch to be deemed deliberate, using the interpretation given in the Habitats Directive cases outlined above, then the prohibition of capture and killing precludes any bycatch level above zero. Again, this is difficult to

²¹ As above, this is subject to exceptions and derogations

reconcile with the idea of permitted levels of bycatch. Is there anything else that could indicate potential bycatch levels for species covered by the Birds Directive? The Commission's 2012 action plan for reducing incidental catches of seabirds in fishing gears,²² which, as discussed above, depends in part on the Birds Directive, has as its stated objective "*to minimise and, where possible, eliminate the incidental catches of seabirds*". Whilst, as a communication, this is not 'Union legislation', it gives some indication of the Commission's intentions in relation to seabird bycatch. Again, while there is a clear intention to minimise such bycatch, this plan also does not envisage specific levels.

The language in the TCMF Proposal thus appears to have no meaning.

In relation to Annex IV(a) species, it would be more appropriate for the target to be zero bycatch, with a requirement for appropriate mitigation actions where this target is exceeded. The same argument can be made for species covered by the Birds Directive, in this case seabirds.

However, the Article 4(1)(b) objective applies more widely than just to the sensitive species covered by Annex IV(a) of the Habitats Directive and Article 5 of the Birds Directive. A number of the species covered by the objective may not require the 'strict protection' set out in these provisions, but for these species, the reference to 'levels' of bycatch set elsewhere is even less clear.

So, setting levels of bycatch appears incompatible with the approach taken by, and the requirements of, the Nature Directives.

MSFD

With regards to the MSFD, Member States "*shall establish and implement coordinated monitoring programmes for the ongoing assessment of the environmental status of their marine waters on the basis of the indicative lists of elements set out in Annex III and the list set out in Annex V, and by reference to the environmental targets established pursuant to Article 10*". Article 10 MSFD states that "*Member States shall, in respect of each marine region or subregion, establish a comprehensive set of environmental targets and associated indicators for their marine waters so as to guide progress towards achieving good environmental status in the marine environment, taking into account the indicative lists of pressures and impacts set out in Table 2 of Annex III, and of characteristics set out in Annex IV*".²³ One such pressure and impact is "*selective extraction of species, including incidental non-target catches (e.g. by commercial and recreational fishing)*". However, there is not an explicit requirement for this to involve the setting of levels and the directive itself, as well as the 2010 Commission Decision on criteria and methodological standards on good environmental status of marine waters²⁴, does not currently provide specific bycatch levels (which one would expect to be based on the outcome of any monitoring, once that has been undertaken).

22 Communication from the Commission to the European Parliament and the Council and the Council "Action Plan for reducing incidental catches of seabirds in fishing gears" <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0665&from=EN>

23 MSFD Article 11 - Annex III Table 1 contains characteristics relevant to the issue of bycatch, including a description of the population dynamics, natural and actual range of species of marine mammals, reptiles and seabirds

24 COMMISSION DECISION of 1 September 2010 on criteria and methodological standards on good environmental status of marine waters <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:232:0014:0024:EN:PDF>

It should be noted that, at the time of publication, the Annex to the European Commission's proposed GES decision²⁵ includes criteria for determining GES for species groups of birds, mammals, reptiles, fish and cephalopods. The Commission's proposal is to allow Member States to establish the threshold values for the mortality rate from incidental by-catch per species through regional or subregional cooperation under criteria D1C1. Could this qualify as "*levels provided for in Union legislation*" referred to in the target? Such threshold values have the potential to conflict with the requirements in the Nature Directives, depending on whether bycatch is seen as deliberate or incidental and whether there is 'significant impact' on the species (in the case of those covered by Article 12(4) of the Habitats Directive). They also do not appear to be in line with the TCMF Proposal's own objective of minimising and, where possible, eliminating bycatch. If the proposed GES decision is adopted, the Commission must address this apparent conflict, clarifying what it means in referring to bycatch levels and how this can be said to be in line with the requirements of existing Union legislation.

Other Union environmental legislation

What about other Union environmental legislation? Regulation 812/2004²⁶ lays down measures concerning incidental catches of cetaceans but does not set out specific bycatch levels.²⁷ Certain requirements under this regulation are incorporated into Part D of the Annexes in the TCMF Proposal. It appears that the Commission intended to develop new measures based on that regulation, including defining "*measurable objectives laying down the maximum levels of incidental catches for different cetacean species*".²⁸ If such objectives were established, the reference to bycatch levels, at least for cetaceans, would become clearer. However, it is not clear if such levels are still to be developed and by whom. So, at present, in relation to this specific piece of Union legislation, a reference to levels is not appropriate. Recital 9 of the TCMF Proposal refers to Directive 2000/60/EC - the Water Framework Directive - but this cannot be said to be applicable to the issue of bycatch.²⁹ For these reasons, it would be useful for the Commission to clarify the intent of this target and make clear to which levels in which Union legislation it is referring. This should then be reflected by the co-legislators in the final TCMF Regulation so that progress against the target can be more easily measured and coherence with Union environmental legislation ensured.

International agreements

If these 'levels' do not exist in Union legislation, do they exist in international agreements? ASCOBANS³⁰, for example, applies to small cetaceans. These small cetaceans which, as referred to above, are also subject to strict protection under the Habitats Directive, fall within the 'marine mammals' category included in the Article 4 TCMF Proposal targets. The ultimate aim of ASCOBANS is to reduce bycatch of these species to zero, thereby eliminating such bycatch.³¹ Prior to that the emphasis is on minimisation of bycatch. Whilst 'interim target levels' have been recommended under ASCOBANS, it has been argued they should be viewed as a "*stepping*

25 ANNEX to the Commission Decision laying down criteria and methodological standards on good environmental status of marine waters and specifications and standardised methods for monitoring and assessment, and repealing Decision 2010/477/EU, https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2016-5301702_en

26 COUNCIL REGULATION (EC) No 812/2004 of 26.4.2004 laying down measures concerning incidental catches of cetaceans in fisheries and amending Regulation (EC) No 88/98

27 This regulation includes measures relating to the monitoring of cetacean bycatch and the mandatory use of active acoustic deterrent devices in certain fisheries

28 Summaries of EU Legislation: Protecting whales, dolphins and porpoises, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A166024>

29 Note it is also unclear which Article 4 target this is referring to

30 AGREEMENT ON THE CONSERVATION OF SMALL CETACEANS OF THE BALTIC, NORTH EAST ATLANTIC, IRISH AND NORTH SEAS

31 ASCOBANS Resolution 3.3, http://www.ascobans.org/sites/default/files/document/Inf03_MOP3_2000-3_IncidentalTake.pdf

*stone on the way to achieving zero bycatch*³² and in light of this a reference to not exceeding the levels in ASCOBANS does not seem appropriate. The target that would be more in line with ASCOBANS', and indeed the Habitats Directive's, objectives is the minimisation of bycatch to zero. Such a target should highlight the need for appropriate mitigation measures to be put in place where the target is currently not being met (a point also made in relation to the Union environmental legislation above). Is this, in fact, the intention of the target in referring to international agreements? It is possible that, in wording the target this way and referring to international agreements, the Commission's eventual aim is to reduce bycatch to zero, as in ASCOBANS.

ASCOBANS is not the only international agreement, though we are not aware of reference to 'levels' in other international agreements. It is perhaps significant that Recital 9 refers instead to target levels being established to reflect 'international best practice'. This has the potential to be wider than 'international agreements'. Again, clarification from the Commission on the agreements and levels this is meant to refer to would be useful in interpreting this target and in analysing the need for amendment through the co-decision process.

Whilst we appreciate that the idea may be to keep this target flexible, it is still necessary that progress can be measured against the target for results-based management to work. It is unclear from the present wording how these two aspects can be reconciled, creating legal uncertainty and an apparent lack of coherence with both Union legislation and international agreements. How can progress be measured in the absence of quantitative levels? The potential conflicts must be addressed and the target made clearer at the earliest opportunity and reflected in the final TCMF Regulation. This should ensure it is workable and the reference to 'levels' is coherent with the relevant Union environmental legislation and international agreements.

Recommendations:

- As the Article 4(1)(b) target in the TCMF Proposal requires that 'levels' of bycatch do not exceed those in Union legislation, the Commission should provide greater clarity on what levels are being referred to. This is essential if coherence is to be ensured with this legislation, and if results are to be measurable against the target.
- Similarly, the Commission should clarify which levels in international agreements it envisages this target to relate to. The wording of the target must not undermine the objectives of such agreements.

Levels needed to achieve good environmental status

Article 4(1)(c) of the TCMF Proposal states that technical measures shall aim to "*ensure that the environmental impacts of fishing activities on seabed habitats do not exceed the levels needed to achieve good environmental status for each habitat type assessed in the framework of Directive 2008/56/EC in each marine region or subregion in relation to both habitat quality and the spatial extent over which the required levels need to be achieved*".

³² Towards an EU Action Plan on Cetacean Bycatch submitted to the ASCOBANS Advisory Committee by WDC, August 2015, http://www.ascobans.org/sites/default/files/document/AC22_Inf_4.1.e_EuropeanCetaceanBycatch.pdf p.7

This target relates to the MSFD objective of achieving good environmental status ('GES') by 2020, in line with the CFP objective of coherence with Union environmental legislation.³³ This directive sets out 11 qualitative descriptors which describe what the environment will look like when good environmental status is achieved. These include biodiversity (Descriptor 1) and seafloor integrity (Descriptor 6), which are of particular relevance to this target for seabed habitats. However, at the time of writing, the directive does not include quantitative levels, as Article 4(1)(c) appears to suggest. This means that it would not be possible to assess results in relation to the target. However, it is our understanding that the Commission drafted this target with a view to upcoming changes in the definition of GES.

At the time of publication, the Annex to the Commission's proposed GES Decision³⁴ includes criteria for determining GES for 'benthic habitats' i.e. seabed habitats. The Commission's proposal is to allow Member States to define a 'maximum allowable extent' of habitat loss under criteria D6C4 and D6C5. Putting aside for the moment any concerns about sanctioning a proportion of damage to be inflicted on habitats, for the purposes of this briefing we have concerns about a potential conflict between the wording of the Article 4(1)(c) target and the new criteria in the GES Decision, should this be adopted.

Currently, DC64 in the Annex to the proposed GES Decision states that "*the extent of the loss of the habitat type, **resulting from anthropogenic pressures**, does not exceed a specified proportion of the natural extent of the habitat type in the assessment area. Member States shall establish the maximum allowable extent of habitat loss as a proportion of the total natural extent of the habitat type, through cooperation at Union level*" [emphasis added]. The proposed DC65 states that "*the extent of **adverse effects from anthropogenic pressures** on the condition of the habitat type, including alteration to its biotic and abiotic structure and its functions... does not exceed a specified proportion of the natural extent of the habitat type in the assessment area*" [emphasis added]. Therefore, under the proposed GES Decision, Member States are to establish threshold values for adverse effects on the condition of each habitat type and the maximum allowable extent of those adverse effects as a proportion of the total natural extent of the habitat type. However, as one might expect in legislation on technical measures for fisheries, the target in Article 4(1)(c) of the TCMF Proposal focuses only on one specific anthropogenic pressure - fishing activities.

What does this mean for the Article 4(1)(c) target and its coherence with the MSFD? It is understandable that the TCMF Proposal focuses on fishing activities. However, it is difficult to envisage how the level of environmental impact of fishing activities on seabed habitats will be measured and quantified against the levels of environmental impact of **all** anthropogenic pressures that would be applicable should the proposed GES Decision be adopted. Consequently, there is a lack of clarity over how progress in relation to the Article 4(1)(c) target can be monitored. Under the GES Decision it will be for the Member State proposing the proportion of the habitat loss/adverse effects to monitor whether these proportions are adhered to. How the anthropogenic pressure of fishing will fit into this monitoring process and what levels will be applicable is therefore unclear. If the proposed GES Decision is adopted this lack of clarity must be addressed if conflict is to be avoided and coherence between the TCMF and MSFD is to be ensured. If it is not adopted, the reference to MSFD levels in this target will not be applicable and this also must be addressed in the co-decision process.

³³ Article 2(5)(j) CFP Basic Regulation

³⁴ ANNEX to the Commission Decision laying down criteria and methodological standards on good environmental status of marine waters and specifications and standardised methods for monitoring and assessment, and repealing Decision 2010/477/EU, https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2016-5301702_en

Recommendation

- As the target in Article 4(1)(c) of the TCMF Proposal relies on the adoption of levels in the Commission's proposed GES decision, it must be made clearer how the level of environmental impact of fishing activities can be measured against the levels of environmental impact of all anthropogenic pressures.

3 Coherent adoption of conservation measures

3.1 Mitigation of bycatch

Section 3 of the TCMF Proposal specifically focuses on the protection of sensitive species and habitats, making the need for coherence with the Nature Directives and MSFD particularly clear. This section includes provisions on bycatch of prohibited fish and shellfish species (Article 11) and on bycatches of marine mammals, seabirds and marine reptiles (Article 12). As discussed above, in both articles a clear distinction is made between deliberate catching and bycatch, indicating that the TCMF Proposal inherently considers bycatch to be incidental. The provisions start with a prohibition on deliberate catching, retention on board, transshipment or landing of specific species, namely those fish or shellfish species referred to in Annex IV of the Habitats Directive (Article 11 TCMF Proposal) and marine mammals, seabirds and marine reptiles referred to in Annexes II and IV of the Habitats Directive and species of seabirds covered by the Birds Directive (Article 12 TCMF Proposal). Such a requirement is consistent with the requirements of the Habitats Directive, in particular the Article 12 'strict protection' requirements, and the strict protection afforded by Article 5 of the Birds Directive. Annex 11 of the TCMF Proposal seeks to extend this protection further, applying the prohibition, and also the bycatch requirements, to species listed in Annex I of the TCMF Proposal. This appears to be an attempt to enshrine the lists of prohibited species contained in each year's TAC and quota regulation into one longer-term regulation. The idea, as suggested by Recital 15, is to introduce a general prohibition on fishing for these species.

Article 12 of the TCMF Proposal also introduces the concept of bycatch mitigation measures and it is questionable whether this goes far enough. Notably, Article 12(4) of the TCMF Proposal states that "*on the basis of the best available scientific advice a Member State may put in place for vessels flying its flag, mitigation measures or restrictions on the use of certain gears*" and that such measures "*shall minimise and where possible eliminate*" the catches of the species covered by the relevant annexes of the Habitats Directives and by the Birds Directive. This is in line with the TCMF Proposal's objectives as well as international agreements such as ASCOBANS, outlined above. Where bycatch is incidental rather than 'deliberate', a focus on mitigation is also in line with the requirements of the Habitats Directive, specifically Article 12. This states that "*Member States shall establish a system to monitor the incidental capture and killing of the animal species listed in Annex IV (a). In the light of the information gathered, Member States shall take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned*". The mitigation of bycatch is therefore a priority under the Habitats Directive.³⁵

³⁵ Whilst not legislation, the EU Seabird Bycatch Action Plan also details mitigation measures for the incidental bycatch of seabirds

As the conservation measures envisaged in Article 12 of the TCMF Proposal are to apply only to vessels flying that Member State's flag, the process envisaged for this is Article 19 of the CFP Basic Regulation. However, this lacks clarity as Article 19 refers only to measures for the conservation of fish stocks and therefore it is unclear how this will apply to measures intended to protect marine mammals, seabirds and reptiles. As a result, the Commission should provide clarification on the reference to Article 19 so that the process for the adoption of mitigation measures, in line with requirements in Union legislation³⁶ and those of international agreements, is not hindered.

However, it is also unclear when the Member State would be expected to put in place such mitigation measures as, even on the basis of the best available scientific advice, the provision states only that they 'may' do so. It is interesting that the recital that relates to this provision, Recital 16, states Member States "***should put in place mitigation measures***" [emphasis added] for these species. Clearly 'should' is stronger than 'may'. Whilst recitals are not legally binding, they do indicate the intention of the legislation so such a clear conflict is problematic. With regards to Article 12(4), is it to be inferred that Member States will put in place mitigation measures if scientific advice supports this, unless there are appropriate reasons for doing otherwise? What justification can there be for not adopting these measures where such scientific advice exists, particularly given that one of the principles of good governance in the CFP is the establishment of measures in accordance with the best available scientific advice?³⁷ In addition, to introduce such measures would result in stronger coherence with the requirements of the Nature Directives and MSFD, as well as international agreements. To ensure such coherence, the Commission should provide clarification as to the intention behind this article and when the adoption of mitigation measures or restrictions on the use of certain gears is envisaged. The final TCMF Regulation should contain wording to better reflect the need for each Member State to put in place such mitigation measures, in line with international agreements and the strict protection requirements of the Nature Directives, including mitigation requirements in the Habitats Directive.

This provision must also be seen in the context of Article 25 of the TCMF Proposal. This falls within the regionalisation chapter of the proposal, allowing for the establishment of technical measures at regional level. Article 25 relates to the situation where joint recommendations are submitted by Member States to allow for the use of nature conservation measures to protect sensitive species and habitats.³⁸ Within these joint recommendations the Member States may '*specify the use of additional mitigation measures to those referred to in Part D of Annexes V to X to minimise the bycatches of species referred to in Article 12*'. Whilst we support mitigation measures to minimise and where possible eliminate bycatch of sensitive species, there must be strong baseline mitigation measures already in place in the annexes if this provision is to be coherent with the Nature Directives. At present some bycatch mitigation measures in the regional annexes do not apply to all areas, for example there are no measures to mitigate seabird bycatch in relation to the North Sea. In addition, the measures contained in the annexes appear very limited, only applying to specific gears. We refer above to the Commission's 2012 action plan for reducing incidental catches of seabirds in fishing gears and highlight that, in relation to seabirds, the measures envisaged in this plan must be reflected in full in the final

36 Specifically Article 12(4) of the Habitats Directive, which states that "Member States shall establish a system to monitor the incidental capture and killing of the animal species listed in Annex IV (a). In the light of the information gathered, Member States shall take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned". Whilst not legislation, the EU Seabird Bycatch Action Plan also details mitigation measures for the incidental bycatch of seabirds

37 Article 3(c) CFP Basic Regulation

38 For more information see the ClientEarth briefing "Technical Measures and the Procedural Jigsaw", <http://www.documents.clientearth.org/wp-content/uploads/library/2016-11-16-technical-measures-and-the-procedural-jigsaw-ce-en.pdf> p7-8

TCMF Regulation. To ensure that bycatch for sensitive species, including seabirds, is indeed minimised and, where possible, eliminated, the co-legislators must ensure that all gear types likely to result in bycatch are addressed in these annexes.

In the absence of a strong starting point in the Annexes, the wording of Article 25, allowing Member States to introduce nature conservation measures through regionalisation, is not sufficiently strong to ensure that mitigation will occur. At present this Article states that "*joint recommendations submitted by Member States in accordance with Article 19 to allow for the use of nature conservation measures to protect sensitive species and habitats may in particular... specify the use of additional mitigation measures to those referred to in Part D of Annexes V to X to minimise the bycatches of the species referred to in Article 12*". If comprehensive mitigation measures were incorporated in the annexes then this wording might be appropriate as it reflects the need for Member States to keep taking action to minimise bycatch. However, if, as is currently the case, the baseline mitigation measures in the annexes do not apply to all relevant areas and gears, the wording that would be necessary to address these gaps and meet the requirements of both Union legislation, including the Habitats Directive, and international agreements, is that the Member States 'shall' specify these additional mitigation measures.

Recommendation

- To ensure coherence with the Nature Directives the TCMF Proposal should be clearer about the process for Member State adoption of mitigation measures and restrictions on gears.
- The baseline mitigation measures set out in the annexes to the TCMF Proposal must apply to all areas and address all gear types likely to incur bycatch.
- Should the baseline mitigation measures not apply to all areas and all gear types likely to incur bycatch, then the wording of Article 25 is not strong enough and should be amended so that Member States 'shall' introduce additional mitigation measures.

3.2 Measures and processes for the protection of sensitive habitats

3.2.1 Scope of habitat protection

Article 13 of the TCMF Proposal focuses on habitats, specifically protection for sensitive habitats including vulnerable marine ecosystems. The connection with the Nature Directives and the MSFD is less explicitly made here than in the other Section 3 provisions. However, Article 13(1) focuses on existing sensitive marine areas set out in Annex II to the TCMF Proposal. Those areas in Annex II Part A are all within Natura 2000 areas designated under the Nature Directives. The majority of areas in Annex II Part B maintain existing restrictions in larger areas³⁹, within which Natura 2000 sites are present. Article 25 of the TCMF Proposal provides further context. It states that joint recommendations submitted by Member States to allow for the use of nature conservation measures to protect sensitive species and habitats may "*specify measures to minimise the impacts of fishing gears on the habitats referred to in Article 13 or other sensitive habitats outside NATURA 2000 sites*". From this one can infer that the intention of Article 13 is to apply to habitats covered by the Nature Directives and coherence with these Directives must be ensured.

³⁹ Madeira and Canaries, Azores

Areas designated under the MSFD must also be within the scope of Article 13. This is supported by the reference in Article 13 to Article 11 of the CFP Basic Regulation, which relates to marine protected areas designated under both the MSFD and the Nature Directives. Likewise, this is indicated by Article 13(4) of the TCMF Proposal which states that measures adopted under Article 13 shall aim at achieving the target in Article 4(1)(c), i.e. ensure that the environmental impacts of fishing on seabed habitats do not exceed the levels needed to achieve good environmental status (an MSFD-related target).

However, to be fully comprehensive, Article 13 should apply to all sensitive habitats, no matter whether listed as such under these directives or other legislation and agreements. This is in line with the definition of sensitive habitats contained in Article 6 of the proposal, which states that "*sensitive habitats, in particular, include habitat types listed in Annex I and habitats of species listed in Annex II of Directive 92/43/EEC, habitats of species listed in Annex I of Directive 2009/147/EC, habitats whose protection is necessary to achieve good environmental status under Directive 2008/56/EC and vulnerable marine ecosystems as defined by Art. 2(b) of Council Regulation 734/2008*". While only explicitly referring to the Nature Directives, MSFD, and the Council Regulation on protecting vulnerable marine ecosystems,⁴⁰ this list is not exhaustive and suggests that there can be other sensitive habitats. This is also supported through the areas listed in Annex II, which in some instances extend beyond the Natura 2000 sites.⁴¹ We therefore recommend that Article 13 is explicit that measures to minimise gear impact on all sensitive habitats are envisaged under this Article. Should this change be made, it will not be sufficient for Article 13 to refer only to the process provided under Article 11. In fact, what will be needed is an additional reference to Article 18 of the CFP Basic Regulation so that potential limitations (due to the restricted scope of Article 11 of the CFP Basic Regulation) on the introduction of conservation measures are addressed.⁴²

A relatively simple way for Article 13 of the TCMF Proposal to address the need for protection of sensitive habitats both within and outside Natura 2000 and MSFD areas, as well as regionalisation processes under both Article 11 and Article 18 of the CFP Basic Regulation more broadly, is the introduction of a further paragraph. First of all, as Article 13(3) refers to the procedure in Article 11 of the CFP Basic Regulation (though see section 3.2.2 regarding the lack of clarity on this), wording should be incorporated into this paragraph so that it is clear it is applicable where the sensitive habitats occur within sites designated under the Nature Directives and MSFD. We recommend that a new paragraph 13(4) is then inserted which contains words to the effect that where the conservation measures referred to in Article 13(3) are introduced for the protection of habitats outside the sites referred to in that article, Member States must use the procedure set out in Article 18 of the CFP Basic Regulation, in line with Article 25 of the TCMF Proposal. Finally, to be comprehensive, the existing Article 13(4) should become 13(5) and incorporate reference to the measures in paragraph 4.

As discussed above in relation to the bycatch of sensitive species, there is a level of discretion as to the particular conservation measures to be put in place for sensitive habitats. Article 25 of the TCMF Proposal states that joint recommendations "*may... specify measures to minimise the impacts of fishing gears on the habitats referred to in Article 13 or other sensitive habitats outside NATURA 2000 sites*". We have already suggested that Article 13 should apply to all sensitive habitats, not just those in Natura 2000 sites and on this basis recommend that the

40 COUNCIL REGULATION (EC) No 734/2008 of 15 July 2008 on the protection of vulnerable marine ecosystems in the high seas from the adverse impacts of bottom fishing gears

41 Madeira and Canaries, Azores

42 For further discussion of the differences between Article 11 and Article 18 see the ClientEarth briefing "Technical Measures and the procedural jigsaw"

wording is changed to "*minimise the impacts of fishing gears on sensitive habitats referred to in Article 13, both within and outside NATURA 2000 sites*". The same recommendation applies to the reference in Article 25 to specifying "*restrictions on the construction and operation of specified gears or introduce a total prohibition on the use of certain fishing gears within a region where such gears represent a threat to the conservation status of species referred to in Articles 11 and 12 or to the habitats referred to in Article 13 or other sensitive habitats outside NATURA 2000 sites*". We have addressed concerns about the use of the term "*threat to the conservation status of species*" in this provision⁴³ but in line with the discussion above, this provision's wording should also be changed to "*other sensitive habitats referred to in Article 13, both within and outside NATURA 2000 sites*" (on the basis of our evaluation that Article 13 is to apply to all sensitive habitats).

We also question whether stating that joint recommendations "*may*" specify measures to minimise the impacts of fishing gears on sensitive habitats goes far enough in meeting the objectives of both the CFP and the TCMF Proposal. Article 2(3) of the CFP Basic Regulation states "*the CFP shall implement the ecosystem-based approach to fisheries management so as to ensure that negative impacts of fishing activities on the marine ecosystem are minimised*". The objective at Article 3(2)(c) is to "*ensure that the environmental impacts of fishing on marine habitats are minimised and where possible eliminated such that they do not represent a threat to the conservation status of those habitats*" (see discussion of this objective in section 2.2.1). There is no differentiation here between habitats in Natura 2000 sites or otherwise. Given the strong wording of these objectives and the need for fisheries management to follow both an ecosystem-based and precautionary approach to fisheries management, it would be more appropriate to require these measures to be specified in joint recommendations, therefore replacing the word 'may' with 'shall'. However, provision will need to be made for the fact that joint recommendations are only required for conservation measures outside the Member State's 12 nautical mile zone.⁴⁴ Whilst still being in line with a regional approach, not being prescriptive as to specific measures required, this is more in line with the high level of protection envisaged in Union legislation and in the objectives of the CFP itself.

Similarly, Member States only "*may*" specify restrictions on the construction and operation of specified gears or introduce a total prohibition on the use of certain fishing gears where these represent a threat to the conservation status of species (again, see alternative wording recommended above) and habitats covered in Articles 11 to 13 of the TCMF Proposal. To be in line with the objectives of the CFP and the TCMF Proposal itself, as well as the Nature Directives and MSFD, we recommend that this wording is changed to "shall", meaning that Member States are required in their joint recommendations to specify these measures (although there must be recognition that joint recommendations are only necessary for conservation measures outside the 12 nautical mile zone, as above). We make further recommendations regarding the wording in Article 25 in sections 3.1 and 3.3 of this briefing.

3.2.2 Lack of clarity regarding process

Even if clarity is provided on the sensitive habitats to which Article 13 is meant to apply, it is very difficult to assess whether this article as drafted will ensure coherence with the requirements of

⁴³ See section 2.2.1

⁴⁴ Article 20 CFP Basic Regulation applies within 12 nautical miles: "A Member State may 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 12 nautical miles of its baselines provided that the Union has not adopted measures addressing conservation and management specifically for the area or specifically addressing the problem identified by the Member State concerned"

the Nature Directives and MSFD. This is because there are a number of other aspects of the provision that lack clarity. These largely centre around the use of the process in Article 11 of the CFP Basic Regulation. Article 11, as referred to above, provides for the adoption of conservation measures necessary for compliance with obligations under Article 13(4) MSFD, Article 4 of the Birds Directive and Article 6 of the Habitats Directive. In formalising a process for all Member States with a direct management interest to agree conservation measures for Natura 2000 and MSFD sites, Article 11 has a hugely important role to play in ensuring coherence with the Nature Directives and MSFD. Consequently, any reference to the use of Article 11 in subsequent legislation must be clear and consistent with its processes.

On this basis we have a number of concerns about the wording of Article 13 in the TCMF Proposal. Article 11 of the CFP Basic Regulation provides for either Member States to adopt measures themselves (where these do not affect fishing vessels of other Member States) or, where a number of Member States have a direct management interest in the fishery to be affected, for these Member States to submit a joint recommendation to the Commission proposing conservation measures. The Commission will adopt these measures through a delegated act as long as they meet the criteria set out in Article 11(1). However, the wording of Article 13(2) of the TCMF Proposal does not at present clearly reflect this process. It envisages the use of the procedure in Articles 11(2) and (3), i.e. the joint recommendation process, but refers to the Commission adopting amendments to the list of areas in Annex II of the TCMF Proposal "*where the best available scientific advice recommends an amendment*". This suggests that a joint recommendation will not be necessary to trigger an amendment to Annex II. If this was the Commission's intention, how does this fit in with the requirements of Article 11? Or is the intention of Article 13(2) in fact that Member States are able to make joint recommendations under Article 11 of the CFP Basic Regulation to amend the list of areas in Annex II but *only* where best available scientific advice recommends an amendment (representing a more restrictive approach)? This must be clarified.

Further difficulty arises from the fact that Article 13(3) of the proposal clearly envisages a situation where Member States establish closed areas or other conservation measures "*pursuant to the procedure laid down in Article 11 of [the CFP Basic Regulation]*" where sensitive habitats occur in waters under their sovereignty or jurisdiction. As discussed above, Article 11 contains two procedures for two different circumstances, depending on whether other Member State fishing vessels are affected. The procedure to be used where no other Member State fishing vessels are affected - set out in Article 11(1) - does not require a joint recommendation. What is not clear is whether Article 13(3) of the TCMF Proposal envisages the use of Article 11(1), although the use of the phrase "*that Member State is empowered to establish*" would suggest this. If not, and the more complicated procedure in Article 11(2)-(3) is envisaged, the relationship between Articles 13(2) and 13(3) becomes even less clear. Again, the process envisaged must be clarified.

Such clarification is essential before the processes set out in the technical measures can be assessed in terms of whether they provide (or do not provide) the protection of sensitive habitats necessary to ensure coherence with the requirements of the Nature Directives and MSFD. Further, the current wording casts doubt on the role of regionalisation and how the action the Commission takes in relation to the protection of sensitive habitats feeds into that of the Member States, and vice versa. These concerns must be addressed by the Commission, which must provide clarification regarding the intention behind this article and then by amendments to the wording of the article through the co-decision process.

Recommendations

- To be fully comprehensive, Article 13 of the TCMF Proposal must apply to all sensitive habitats.
- If, as we recommend, Article 13 of the TCMF Proposal is to apply to all sensitive habitats, an additional paragraph should be added to confirm that for conservation measures outside Natura 2000 and MSFD sites the process set out in Article 18 of the CFP Basic Regulation is to be used.
- The processes for adopting measures envisaged in Articles 13(2) and 13(3) of the TCMF Proposal must be clarified by the Commission and then the wording of these provisions amended through the co-decision process.

3.3 Nature conservation measures at regional level

Above we recommend that joint recommendations submitted by Member States in accordance with Article 19 to allow for the use of nature conservation measures to protect sensitive species and habitats should require that these joint recommendations i) specify the use of additional mitigation measures to those referred to in the annexes (unless the annexes are made more comprehensive and cover all areas and gears where bycatch is likely to occur); ii) specify measures to minimise the impacts of fishing gear on sensitive habitats and iii) specify restrictions on the construction and operation of specified gears or introduce a total prohibition on the use of certain gears where these are likely to have a negative impact on sensitive species or habitats. Further to this, we also recommend that the possibility of developing lists of sensitive species and habitats most at risk from fishing activities within the relevant region based on best available scientific advice be made a requirement under Article 25. As a result, instead of saying what measures the joint recommendations "may" include, this article should be changed so it shows what they 'shall' include. This will ensure coherence with the Nature Directives, MSFD and international agreements considered in this briefing.

However, we also recommend an addition to the nature conservation measures envisaged in Article 25. Above, we considered the importance of introducing mitigation measures for the protection of sensitive species and habitats. However, to ensure that the objectives of the CFP, TCMF Proposal, Nature Directives and MSFD are being met, the success of these mitigation measures will need to be measured, in particular at Member State level. The need for such measurement has not been appropriately reflected in the TCMF Proposal and we recommend that it is addressed in Article 25. This can be done by introducing wording to the effect that Member States "*shall specify monitoring measures to assess and evaluate the effectiveness of mitigation measures introduced under Article 12 and Article 25 of this regulation*".

Recommendations

- To ensure full coherence with the requirements of the Nature Directives and MSFD and the CFP objectives, Article 25 of the TCMF Proposal should require that all the measures specified in that article are set out in joint recommendations that allow for the use of nature conservation measures to protect sensitive species and habitats.
- Article 25 should also incorporate a requirement for Member States to set out monitoring measures in the joint recommendations that assess and evaluate the effectiveness of mitigation measures introduced under Article 12 and Article 25 of the proposal.

4 Conclusion

The above analysis shows that there are a number of situations where the TCMF Proposal has the potential to conflict with the wording and the requirements of the Habitats, Birds and Marine Strategy Framework Directives, as well as certain international agreements, thereby weakening the protection afforded to sensitive species and habitats and not meeting the CFP objective to ensure coherence with Union environmental legislation.

The TCMF framework must avoid using different tests, refer appropriately to relevant concepts, contain coherent bycatch requirements and targets and set out processes for adopting conservation measures that will ensure coherence with the requirements of the directives. As can be seen from the analysis in this briefing, ClientEarth has a number of concerns in this regard. However, there are ways in which the areas of potential conflict should be addressed to ensure coherence with Union environmental legislation.

It is essential that the Commission provides clarification on the points suggested in this briefing, and the legislative process addresses at the earliest opportunity all areas where there may be conflict with the Nature Directives and the MSFD. These clarifications and subsequent amendments are necessary so that the final TCMF Regulation contains strong provisions on sensitive species and habitats that provide a high level of protection and ensure coherence with these directives.

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