

# Taking the Pulse of Environmental and Fisheries Law: The Common Fisheries Policy, the Habitats Directive, and Brexit

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## ABSTRACT

There has long been a tension between environmental regulation and the European Common Fisheries Policy (CFP), which has been addressed over time through progressive reform of the CFP. It is now recognised that Member States may comply with their obligations under EU nature conservation law by taking unilateral non-discriminatory measures within their territorial seas to protect the marine environment from threats posed by fishing. Nevertheless, fundamental uncertainties remain when it comes to the application of these obligations to offshore waters. This article explores the options available to coastal states in this context and the weaknesses of the procedures introduced to the reformed CFP in 2013. It is argued that compliance with nature conservation law in the context of fisheries is not discretionary and that in the absence of measures agreed at the EU level, Member States must comply with their obligations under the Habitats Directive in their capacity as a flag state. Finally, the article addresses the implications of Brexit for the protection of European Marine Sites in UK waters, suggesting that Brexit offers opportunities to strengthen the protection of marine ecosystems by making future access arrangements for foreign fishing vessels conditional upon compliance with nature conservation laws.

**KEYWORDS:** Common Fisheries Policy, Habitats Directive, Birds Directive, European Marine Site, Fisheries Management, Nature Conservation, Brexit

## 1. INTRODUCTION

There has long been an intrinsic tension between environmental regulation and the European Common Fisheries Policy (CFP). For many years, there was a presumption (in fact, if not in law) that the flagship piece of EU environmental legislation, the Habitats Directive,<sup>1</sup> did not automatically apply to fisheries. This was partly as a consequence of an overlap in different European competences; competence for

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1 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitats Directive) [1992] OJ L 206/7.

environmental matters is shared between the EU<sup>2</sup> and Member States, while the ‘conservation of marine biological resources’ is the exclusive competence of the EU.<sup>3</sup> In practice, this clash of competences made it far harder for Member States to fulfil the requirements of the Habitats Directive in relation to fisheries than for other industries. The core problem for legislators was that it was questionable whether Member States’ domestic environmental legislation could be imposed on other Member States’ fishing vessels, since those vessels were usually managed under the CFP;<sup>4</sup> any domestic environmental regulation, which purported to apply to other Member States’ vessels, could result in a challenge before the Court of Justice of the European Union (CJEU), not a welcoming prospect for a Member State’s environment department. As a result, it became established practice that somehow fisheries were ‘exempt’ from the Directive. However, the Habitats Directive contains no such exemption, and finally, over the last 15 years, it has started to take effect on fisheries. These developments are, in part, not only a consequence of the jurisprudence of the CJEU but also as a result of CFP reform itself, both discussed further. Nevertheless, fundamental tensions and uncertainties remain, particularly when it comes to the application of the Habitats Directive to offshore waters.

This article will address the implementation of Article 6 of the Habitats Directive to fisheries in the context of managing protected areas. It will explain how the Directive has come to be applied to inshore waters within six nautical miles, and it will then assess whether the revised management approach for inshore waters can be adapted for offshore waters and what challenges may arise in this context. The article argues that the possibility of cooperative measures for the management of fisheries impacts on EMS in offshore waters as outlined in the reformed CFP does not necessarily exhaust the application of the Habitats Directive to fisheries. It will be argued that failure to agree on cooperative measures under Article 11 of the CFP Basic Regulation<sup>5</sup> does not excuse Member States from carrying out an individual assessment of the impacts of fishing activities by their vessels in and around EMS and taking appropriate action. The article will finally reflect on the Brexit negotiations and their impact on the management of sites that are currently designated as protected areas in UK waters.

## 2. THE HABITATS DIRECTIVE AND FISHERIES LEGAL PRACTICE

The Habitats Directive requires, inter alia, Member States to identify certain protected areas across the EU according to habitat type.<sup>6</sup> Sites are proposed by Member States to the Commission, which then considers the application and, if satisfactory,

2 Consolidated Treaty on the Functioning of the EU (TFEU), art 4(1)(e).

3 *ibid*, art 3(1)(d). See also Case 804/79, *Commission v United Kingdom* [1981] ECR 1045.

4 See Daniel Owen, *Interaction between the EU Common Fisheries Policy and the Habitats and Birds Directives* (Institute for European Environmental Policy 2004).

5 See Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC (2013 CFP Basic Regulation) [2013] OJ L 354/22.

6 Habitats Directive (n 1) arts 3–5 and Annexes I and II.

adopts the proposed site as a site of community importance (SCI).<sup>7</sup> Finally, it is up to the Member State to formally designate the site as a Special Area of Conservation (SAC) and take appropriate protective measures.<sup>8</sup> Whilst the Directive makes clear that it applies to both ‘terrestrial [and] aquatic areas’,<sup>9</sup> the precise extent of its application remained ambiguous until it was confirmed by both domestic courts<sup>10</sup> and the CJEU<sup>11</sup> that the Directive is to be applied to the territorial sea, the exclusive economic zone (EEZ) and the continental shelf of Member States. If a Member State fails to live up to its obligations, either by not designating enough habitat<sup>12</sup> or by failing to implement management measures,<sup>13</sup> the European Commission can (and does) infract Member States, which can ultimately result in substantial fines through the CJEU.<sup>14</sup> This is to avoid a race to the bottom with one Member State obtaining a competitive advantage by failing to protect its environment. A similar mechanism applies to the identification of Special Protection Areas (SPAs) for the protection of habitats of wild birds under the Birds Directive.<sup>15</sup> Indeed, the Habitats Directive expressly extends its obligations relating to the avoidance of adverse effects on designated sites to those sites that have been classified under the Birds Directive.<sup>16</sup> Both SACs and SPAs contribute to what is known as Natura 2000, a ‘coherent European ecological network.’<sup>17</sup> In light of this close interrelationship, for the purposes of this article, references to the protection of sites designated under the Habitats Directive should be understood as including those sites designated under the Birds Directive. When they are located in the marine environment, such sites are known as a European Marine Site or an EMS.<sup>18</sup>

The Habitats Directive was adopted in May 1992, at the time when the Basic Regulation of the CFP was in the process of being revised and reformed for the first time. Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture lays down the basic rules of the

7 *ibid*, art 4(2). See also art 5 that allows the Commission to propose additional sites for approval by the Council.

8 *ibid*, art 4(4).

9 *ibid*, art 1(b).

10 *R v Secretary of State for Trade and Industry, ex p Greenpeace Ltd (No 2)* [2000] 2 CMLR 94 (QBD).

11 Case C-6/04, *Commission v United Kingdom* [2005] ECR I-9017.

12 Case C-141/14, *Commission v Bulgaria* ECLI:EU:C:2016:8.

13 European Commission, ‘Environment: Hungary and Romania asked to ensure protection of their wildlife habitats *Press Release*’ (IP/12/539 31 May 2012), <[http://ec.europa.eu/environment/legal/law/press\\_en.htm](http://ec.europa.eu/environment/legal/law/press_en.htm)> accessed 19 November 2018.

14 See European Commission, ‘Environment: Fresh warning to Greece over Nature Protection Shortcomings’ (IP/10/310, 18 March 2010), <[http://europa.eu/rapid/press-release\\_IP-10-310\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-10-310_en.htm?locale=en)> accessed 19 November 2018.

15 Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, replacing Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (Birds Directive) [2010] OJ L 20/7.

16 Habitats Directive (n 1) art 7. While this provision refers to the 1979 Birds Directive, it should now be understood as referring to the 2009 Birds Directive.

17 *ibid* art 3(1).

18 This is a term that derives from the UK Habitats Regulations; see eg (in relation to England and Wales), The Conservation of Habitats and Species Regulations 2017 SI 2017/1012, reg 8(3). The term not only refers to SACs and SPAs but also sites that have been proposed as candidate SACs or have been listed as SCI but not yet been formally designated.

CFP, but makes little mention of the broader environmental impacts of fishing, beyond a brief acknowledgement in Article 2 of the need to take into account the implications of fishing for the marine ecosystem.<sup>19</sup> Certainly, no attempt is made to coordinate the obligations under the CFP with the Habitats Directive or the earlier Birds Directive. Indeed, the relationship between nature conservation and fisheries remained the subject of great uncertainty for over a decade, and it is only in recent years that any serious effort has been made to reconcile these two aspects of EU law, both through the emerging jurisprudence of the CJEU and also through reforms to the CFP Basic Regulation.

The application of the Habitats Directive to commercial fisheries in Europe was first explicitly recognised in 2004 with the *Waddenzee* ruling, which held that Dutch mechanical cockle pickers in the Waddenzee SAC were subject to the provisions of the Directive.<sup>20</sup> The case raised the question as to whether the fishery at issue qualified as a ‘plan or project’ for the purposes of Article 6(3) of the Habitats Directive, which states:

*Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.*

The *Waddenzee* ruling held that the licensed Dutch cockle pickers qualified as a ‘project’, adopting a broad interpretation of the term,<sup>21</sup> and, therefore, the Dutch government was required to undertake an ‘appropriate assessment’ before a licence could be granted, as the activity would be likely to have a ‘significant effect’ on the site.<sup>22</sup> This understanding of Article 6(3) of the Habitats Directive clearly has the potential to capture a range of fishing activity, whenever it is licensed to take place within, or near, an EMS. The significance of this finding is that a Member State is proscribed from authorising any activity that is found to adversely affect the integrity of the site, unless it can be demonstrated that there are ‘imperative reasons of overriding public interest’ (IROPI) and compensatory measures are taken to ensure that the overall coherence of the Natura 2000 network is protected.<sup>23</sup> In reality, the IROPI

19 Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture [1992] OJ L 389/1.

20 Case C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (Waddenzee)* [2004] ECR I-07405.

21 *ibid* [25]–[27].

22 In interpreting the question of when the threshold for an appropriate assessment was met, the Court invoked the precautionary principle, finding that ‘in case of doubt as to the absence of significant effects such an assessment must be carried out’; *ibid* [44].

23 See Habitats Directive (n 1) art 6(4).

exemption is unlikely to apply in the case of fishing for a number of reasons. It is almost impossible to conclude that fishing by private commercial companies is an imperative public interest and the exemption is really aimed at significant infrastructure works, such as port developments.<sup>24</sup> Moreover, the Article 6 process will only restrict those fishing methods likely to cause harm: the option remains, therefore, for fishing businesses to switch to more benign fishing gears. Finally, even if IROPI did exist, then there would need to be a series of ‘compensatory measures’ under Article 6(4) to redress the harm caused by the permitted activity. Fisheries administrators and fishing businesses have never undertaken this sort of activity, and it is difficult to see how the business models of either the fisheries administration or fishing operators would absorb the cost.

In the UK, the Department for the Environment, Food and Rural Affairs (DEFRA) tried to distinguish the application of the Habitats Directive to fishing by saying:

There is a common law public right to fish in England and Wales. Activities undertaken by this right are not authorised by any competent authority [...]. Our view is that these common rights activities are not plans or projects under Article 6 (3) [of the Habitats Directive] unless they require further authorisation from a competent authority.<sup>25</sup>

The view was that since there was no licensing authority, there was no plan or project. This argument was successfully challenged by environmental NGOs who contended that the fishing vessel licence was granted by a licensing body (or ‘competent authority’ in the wording of the Directive).<sup>26</sup> In any event, Article 6(2) required management of a protected area,<sup>27</sup> and the CJEU has confirmed that this provision ‘establishes a general obligation to take appropriate protective steps to avoid deterioration of habitats and disturbance of species’ and ‘the option of exempting generally certain activities, in accordance with the rules in force, from the need for an assessment of the implications for the site concerned does not comply with that provision’.<sup>28</sup>

After some years, DEFRA accepted this position and adopted a ‘revised approach’ to fisheries management in England, which led to DEFRA and the local management bodies, the Inshore Fisheries and Conservation Authorities (IFCAs), adopting a risk-based approach and phasing out the activities most likely to damage the site—a process that perhaps avoided strict compliance with Article 6(3) but instead properly

24 See the discussion in European Commission, *Guidance Document on Article 6(4) of the Habitats Directive 92/43/EEC: Clarification of Concepts of: Alternative Solutions, Imperative Reasons of Overriding Public Interests, Compensatory Measures, Overall Coherence, Opinion of the Commission* (January 2007) 7–9.

25 DEFRA correspondence reported by David Symes and Suzanne Boyes, *Review of Fisheries Management Regimes and Relevant Legislation in UK waters* (Institute of Estuarine and Coastal Studies: University of Hull 2005) 55.

26 Habitats Directive (n 1) art 6(3).

27 Jean-Luc Solandt, Thomas Appleby and Miles Hoskin, ‘Up Frenchman’s Creek: A Case Study on Managing Commercial Fishing in an English Special Area of Conservation and its Implications’ (2013) 25 *ELM*133.

28 Case C-241/08, *Commission v France* [2010] ECR I-01697, [31].

applied Article 6(2) and represented a pragmatic solution to the issue.<sup>29</sup> A similar approach has been taken in Scotland, with Scottish Natural Heritage providing advice under Regulation 33 of the Conservation (Natural Habitats) Regulations 1994 in order to identify ‘any operations which may cause deterioration of natural habitats or the habitats of species, or disturbance of species, for which the site has been designated’, and the Scottish Ministers adopting measures under the Inshore Fishing (Scotland) Act 1984<sup>30</sup> to address the identified risks.<sup>31</sup> The Scottish Government has also recognised that any plans to open a new fishery in or adjacent to an EMS may require an appropriate assessment.<sup>32</sup>

The most recent example of the latter concerns the decision by the Scottish Government to authorise a scientific trial of electrofishing for razor clams in certain inshore waters.<sup>33</sup> Marine Scotland, as the regulatory body responsible for sea fishing, identified 11 possible trial sites around the country for which authorisation could be sought,<sup>34</sup> but it accepted that an appropriate assessment would be necessary before it could authorise any fishing in two of the proposed trial sites, namely the Sound of Barra and Luce Bay, because of the existence of EMS in these areas.<sup>35</sup> Furthermore, the boundaries of some trial sites were modified in order to avoid impacts on other protected features, with the removal of areas falling within the Sound of Arisaig SAC from one of the proposed trial sites.<sup>36</sup> At the same time, this example demonstrates that the existence of an EMS does not necessarily prevent fishing, but only particular fishing methods that may impact upon the protected features of a site. Thus, several of the electrofishing trial sites are taking place within EMS, but it has been deemed that the fishing activity is unlikely to undermine the conservation objectives of these

29 Robert Clark and others, ‘Dialectics of Nature: The Emergence of Policy on the Management of Commercial Fisheries in English European Marine Sites’ (2017) 78 *Marine Policy* 11.

30 This legislation permits the adoption of prohibitions or restrictions in specified areas for inter alia marine environmental purposes; see Inshore Fishing (Scotland) Act 1984, s 1 read with s 2A. The legislation applies to waters adjacent to Scotland that are within six nautical miles from baselines from which the territorial sea is measured.

31 See eg Inshore Fishing (Prohibition of Fishing and Fishing Methods) (Scotland) Order 2015 SSI 2015/435. For an explanation of the change in policy and a discussion of what measures to apply to protect the EMS in Scottish inshore waters, see Scottish Government, *Consultation on the Management of Inshore Special Areas of Conservation and Marine Protected Areas: Overview* (2014).

32 See eg the *Simple Guide to Opening a Fishery* produced by Marine Scotland in collaboration with other public agencies, which notes that an appropriate assessment may be needed for some new fisheries; available at <[http://www.ifgs.org.uk/rifg\\_nec/rifg\\_nec\\_meetings/](http://www.ifgs.org.uk/rifg_nec/rifg_nec_meetings/)> accessed 23 November 2018. This guidance has had the practical effect of preventing some proposed fisheries going ahead, such as a proposed drift net fishery in the Moray Firth, which would appear to have been prevented from proceeding owing to potential impacts on the dolphin population, protected by the Moray Firth SAC; see Minutes of the North and East Coast Regional Inshore Fisheries Group, 25 November 2016, available at <[http://www.ifgs.org.uk/rifg\\_nec/rifg\\_nec\\_meetings/2016/](http://www.ifgs.org.uk/rifg_nec/rifg_nec_meetings/2016/)> accessed 19 November 2018.

33 The Razor Clams (Prohibition of Fishing and Landing) (Scotland) Order 2017, SSI 2017/419.

34 See map: <<http://marine.gov.scot/maps/1636>> accessed 20 November 2018.

35 See correspondence between Marine Scotland the Scottish Natural Heritage, particularly the letter from Greig Chalmers of Marine Scotland to David Donnan of Scottish Natural Heritage of 16 November 2017, [13]; available at <<http://www.gov.scot/Topics/marine/Sea-Fisheries/management/razors/trialcorrespondence>> accessed 19 November 2018.

36 *ibid* [9].

sites, which are largely concerned<sup>37</sup> with the protection of marine mammals<sup>37</sup> or seabirds.<sup>38</sup>

This ‘revised approach’, observable in both England and Scotland, was possible because it was only adopted inside the six nautical mile limit, including internal waters within the territorial sea baselines, an area within the exclusive control of the relevant UK authorities, where only UK vessels may fish.<sup>39</sup> Beyond that area, the application of the Habitats Directive is still very problematic because of the presence of vessels from multiple nations and the questions of competence that arise. These issues will be explored in the following sections.

### 3. APPLICATION OF THE HABITATS DIRECTIVE BEYOND THE SIX NAUTICAL MILE LIMIT

#### 3.1 The Challenges of Extending Nature Conservation Protection beyond Six Nautical Miles

Whilst the *Waddenzee* judgment made an important clarification concerning the application of the Habitats Directive to fisheries, it addressed a relatively easy scenario, involving the annual licensing of Dutch nationals involved in the cockle fishery in in-shore waters by the Dutch government. Thus, the rights and interests of other Member States in relation to fisheries conservation and management were not considered by the Court. Indeed, the judgment does not mention the CFP, and it certainly does not grapple with the challenging issues that arise concerning competence and the competing rights and interests of the EU and its Member States. Such challenges are less easy to avoid the further one moves away from land. Yet, this has become an urgent issue as Member States have, despite a slow start, begun to identify and designate EMS in their offshore waters.<sup>40</sup>

Before trying to untangle the broader relationship between the Habitats Directive and the CFP, it is worth reminding ourselves of the basic, albeit complicated, position in relation to fisheries conservation and management in the EU. In general, powers to manage fisheries are largely conferred on the EU, which has exclusive competence to regulate ‘the conservation of marine biological resources under the common fisheries policy’.<sup>41</sup> This competence does not cover all aspects of fisheries, however, and competence over other fisheries matters are shared between the EU and the Member States.<sup>42</sup> Furthermore, competence for the protection of the

37 For example, the Inner Hebrides and the Minches SCI, listed for the protection of the harbour porpoise.

38 For example, Sound of Harris pSPA, Colle and Tيرة pSPA, North Colonsay and Western Cliffs SPA, Sound of Gigha pSPA, and the Outer Firth of Forth and St Andrews Bay Complex pSPA. For a discussion, see the correspondence in (n 35).

39 See 2013 CFP Basic Regulation (n 5) art 5(2) and Annex I.

40 The first designations of offshore SACs were made by Germany in 2004. For a discussion of the challenges and milestones in the expansion of protection under the Habitats Directive to offshore waters, see eg Richard Caddell, ‘The Maritime Dimensions of the Habitats Directive: Past Challenges and Future Opportunities’ in Gregory Jones QC (ed), *The Habitats Directive: A Developer’s Obstacle Course?* (Hart 2012) 183–207.

41 TFEU (n 2) art 3(1)(d).

42 *ibid* art 4(2)(d).

environment is also shared.<sup>43</sup> The precise division between these different competences is both complex and contested, in part not only because of the challenges of drawing a clear line between the shared competence and the exclusive competence in the context of fisheries management but also because of the potential overlap between fisheries measures and environmental measures.<sup>44</sup> The situation is further complicated by the way in which the competences apply in practice. First, shared competence can usually only be exercised by a Member State ‘to the extent that the Union has not exercised its competence’,<sup>45</sup> which means that the EU can essentially exclude action by a Member State in an area of shared competence should it adopt exclusive measures. One caveat to this situation relates to the environment, where ‘[t]he protective measures adopted pursuant to Article 192 [of the TFEU] shall not prevent any Member State from maintaining or introducing more stringent protective measures.’<sup>46</sup> Secondly, in the context of fisheries management, the EU has tended to delegate powers back to Member States, even in relation to issues where it has exclusive competence.<sup>47</sup> It follows that it is not possible to consider the question of competence in the abstract, and it must be analysed in relation to the precise regulatory framework and any measures that have actually been adopted by the EU. As we see further, the ability of Member States to adopt measures to protect an EMS may vary, depending upon the location of the site and the nature of the site itself.

### 3.2 The Protection of European Marine Sites within 12 Nautical Miles

The first, and perhaps easier, scenario, concerns waters between six and twelve nautical miles, where Member States have some powers under the CFP to restrict access to fisheries by vessels from other Member States, provided that they allow in vessels from other Member States which have traditionally fished in those waters.<sup>48</sup> Even where a vessel from another Member State has a right to access fisheries in the belt of waters between six and twelve nautical miles from the coast, the coastal state is permitted to regulate those foreign vessels. To this end, Article 20(1) of the CFP Basic Regulation permits Member States to adopt:

non-discriminatory measures for the conservation and management of fish stocks and the maintenance and improvement of the conservation status of marine ecosystems within 12 nautical miles provided that the Union has not adopted measures addressing conservation and management specifically for that area or specifically addressing the problem identified by the Member State concerned.<sup>49</sup>

43 *ibid* art 4(2)(e).

44 See eg Owen (n 4); Hendrik Schoukens and Harm Dotinga, ‘Natura 2000 and Fisheries’ in Charles-Hubert Born and others (eds), *The Habitats Directive in its EU Environmental Law Context: European Nature’s Best Hope?* (Routledge 2015) 387; Till Markus, *European Fisheries Law: From Promotion to Management* (Europa Law Publishing 2009) 51–58.

45 TFEU (n 2) art 2(2).

46 *ibid* art 193.

47 See generally Robin Churchill and Daniel Owen, *The EC Common Fisheries Policy* (OUP 2010) 130.

48 Annex I of the 2013 CFP Basic Regulation (n 5) provides a list of such historic rights.

49 *ibid* art 20(1).



This power expressly covers the conservation of marine ecosystems, which is not defined in the Regulation, but it would clearly cover the protection of most features protected by an EMS, and it may even be much broader, allowing protection, for example, of domestic marine protected areas (MPAs). There are limits on this power, however. The last part of Article 20(1) of the CFP Basic Regulation makes clear that this is a residual power that may be used by a Member State only if the EU institutions have not adopted measures. Moreover, measures adopted by the coastal state under this provision must be ‘non-discriminatory’,<sup>50</sup> but this does imply that they may be applied to all vessels fishing in the area, whether or not they fly the flag of the coastal state or another Member State. The purpose of such a non-discrimination requirement is presumably to ensure that all vessels are operating under similar conditions in order to ensure a level-playing field. The following paragraphs of Article 20 confirm that such measures may be applied to the vessels of other Member States, provided that certain procedural obligations are carried out. Thus, Article 20(2) says that ‘such measures shall be adopted only after consulting the Commission, the relevant Member States and the relevant Advisory Councils on a draft of the measures, which shall be accompanied by an explanatory memorandum that demonstrates, *inter alia*, that those measures are non-discriminatory’.<sup>51</sup> This memorandum should presumably also explain how the proposed measures seek to promote the conservation and management of fish stocks or the maintenance and improvement of the conservation status of marine ecosystems. The procedure further provides that the Member State may set a deadline for responses by the relevant actors, and it imposes a minimum requirement of two months for the consultation.<sup>52</sup>

Whilst the power under Article 20 of the CFP Basic Regulation has been carried over from the previous version of the Regulation (adopted in 2002), there is one critical difference: under Regulation 2371/2002, the ability of a Member State to take conservation measures required the approval of the Commission.<sup>53</sup> It is on the basis of this previously applicable procedure that the 2005 request of the UK to extend a domestic ban on pair trawling for bass within 12 nautical miles of the south-west coast of England to other EU vessels was refused by the Commission.<sup>54</sup> The language of the CFP Basic Regulation has been modified through the 2013 amendments so that the Commission may now only ‘request that the Member State concerned amends or repeals the relevant measure’.<sup>55</sup> This reform, thus, does away with what had been described as the ‘onerous’ consultation procedure<sup>56</sup> under the old Article 9 of the 2002 Regulation, and the 2013 CFP Basic Regulation would

50 *ibid.*

51 *ibid* art 20(2).

52 *ibid.*

53 See Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (2002 CFP Basic Regulation) [2002] OJ L 358/59, Article 9(2), cross-referencing Article 8(3), which provides that ‘the Commission shall confirm, cancel or amend the measure within 15 working days of the date of notification’.

54 Commission Decision of 26 February 2005 (Document 2005/322/EC). For a discussion of the aftermath of this decision and the related (domestic) legal proceedings, see Jason Lowther, ‘Dolphin Bycatch: The Greenpeace Challenge’ (2006) 18 ELM 51.

55 2013 CFP Basic Regulation (n 5) art 20(4). Emphasis added.

56 Owen (n 4) 15.

grant much greater discretion for the Member State to act to protect an EMS within 12 nautical miles. This change would appear to be inspired in part by a proposal from the European Parliament, which was directly involved in the detailed drafting of the CFP for the first time during the preparation of the 2013 CFP Basic Regulation following reforms introduced by the Lisbon Treaty,<sup>57</sup> calling for the strengthening of Member States' powers in this regard.<sup>58</sup> It is not that this power is completely unfettered, as the conditions in Article 20(1) relating to non-discrimination do have to be met. Now, however, if the Commission wishes to challenge measures proposed by a Member State, it must take the matter to the CJEU, which is the ultimate arbiter of whether a Member State has complied with the requirements of Article 20(1). The 2013 amendment of the Basic CFP Regulation, thus, extends the power of Member States to unilaterally adopt measures to protect an EMS. The most significant limitation is that this power only extends to the edge of their territorial sea, ie up to the maritime boundary with a neighbouring state or a maximum of 12 nautical miles. Beyond the territorial sea, we have to look to other provisions of the Basic CFP Regulation to see what measures can be taken.

### 3.3 The Protection of European Marine Sites within the Exclusive Economic Zone

Beyond 12 nautical miles, matters become more complex, as the principle of equal access applies so that any fishing vessel flying the flag of one Member State may fish in the EEZ of any other Member State.<sup>59</sup> Moreover, in this zone, the EU has been far less willing to give up its competence over fisheries, even where questions of nature conservation are also at stake. This is illustrated by a 2007 Guidance Document, in which the European Commission took the view that 'in cases where a Member State considers that fishing activity has to be regulated in order to protect a Natura 2000 site, . . . it is for the Community to finally take fisheries measures'.<sup>60</sup> With equal access to Member States' waters, fisheries should be an obvious industry to benefit from harmonised regulation, and they would also have the added advantage that a fecund marine environment directly benefits the commercial fishery. The creation of European level regulation theoretically means that even where there is equal access by differing Member States' vessels, regulations should bind all Member States and

57 See further on this point Jill Wakefield, *Reforming the Commons Fisheries Policy* (Edward Elgar 2016) 68: 'the influence of the European Parliament is marked by a repositioning of the policy from one that was purely exploitative, in which the protection of the environment was an objective of the policy that had to be weighed against the competing social and economic objectives, to one which is designed to embed the protection of the environment in the decision-making process'.

58 See the justification for amendment 135 proposed by the European Parliament, available in Committee on Fisheries of the European Parliament, 'Report on a proposal for a regulation of the European Parliament and of the Council on the Common Fisheries Policy' (COM(2011)0425 – C7-0198/2011 – 2011/0195(COD)), Document A7-0008/2013.

59 2013 CFP Basic Regulation (n 5) art 5(1).

60 European Commission, *Guidelines for the Establishment of the Natura 2000 Network in the Marine Environment: Application of the Habitats and Birds Directives* (2007) 109. See also European Commission, *Fisheries Measures for Marine Natura 2000 Sites: A consistent approach to requests for fisheries management measures under the Common Fisheries Policy* (2008) 3, which says that were a site is located beyond 12 nautical miles, 'the proposed measures fall under the scope of the Common Fisheries Policy, for which the Community has exclusive competence'.

there should not be a question of seeking anti-competitive protection for a domestic industry through feigned environmental action.<sup>61</sup> Yet, the EU has been slow to take measures to protect Natura 2000 sites from fishing activity. Moreover, given the claim of exclusive competence by the EU, the normal mechanisms for infraction proceedings by the European Commission do not easily apply, and it has been left to the European Parliament to perform the policeman function.<sup>62</sup>

In this context, some authors have taken the view that the Commissioners have overstated their claim in relation to exclusive competence. For example, Leijen has persuasively argued that:

... [T]he exclusive competence within the CFP is limited to conservation of marine biological resources. Following the wording of the Treaty the exclusive competence does not extend to the conservation of habitats. It could therefore be argued that in the area of marine habitats conservation, the EU has to share competence with the Member States, be it within the framework of fisheries excluding the conservation of marine biological resources, or within the framework of environment, as the Union in fact did when enacting the Habitats and Birds Directives ...<sup>63</sup>

This position casts doubts on the claims to exclusive competence by the Commission. Indeed, the CJEU has never directly ruled that such conservation measures are part of the exclusive competence, and the Court has demonstrated increasing awareness of the dangers of 'competence creep'; since the judgment in *Germany v European Parliament (Tobacco Advertising I)*,<sup>64</sup> the CJEU has increasingly supported requirements for the EU institutions to operate within the range of powers expressly conferred by the European Treaties.<sup>65</sup>

These arguments about competence now have to take into account the 2013 reforms to the CFP Basic Regulation, which have modified the legal framework through more direct recognition of the interaction between the CFP and the nature conservation directives. Article 11 of the 2013 CFP Basic Regulation, thus, establishes an additional mechanism to ensure compliance with the Habitats and Birds Directives (and also the Marine Strategy Framework Directive), although as we shall see further, the new provision is not without its own limitations. The relevant text of Article 11(1) provides:

Member States are empowered to adopt conservation measures not affecting fishing vessels of other Member States that are applicable to waters under their

61 Lowther (n 54).

62 Client Earth, 'European Parliament rejects rubberstamping flawed fisheries management in North Sea protected areas' (2018). <<https://www.clientearth.org/european-parliament-reject-flawed-fisheries-management-north-sea/>> accessed 19 November 2018.

63 Jaap Leijen, 'The Habitats and Birds Directives versus the Common Fisheries Policy: A Paradox' (2011) 27 *Utrecht J of Intl and European L* 19, 33.

64 Case C-376/98, *Germany v European Parliament and the Council of the European Union (Tobacco Advertising I)* [2000] ECR I-08419.

65 Michael Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts' (2008) 45 *CML Rev* 617–703.

sovereignty or jurisdiction and that are necessary for the purpose of complying with their obligations under . . . Article 6 of Directive 92/43/EEC.

This can be fairly interpreted to mean ‘Member states are empowered to adopt conservation measures affecting their own fishing vessels in waters under their sovereignty or jurisdiction’.

On one hand, this provision is broader in its geographical application than Article 20, considered earlier, as it allows a Member State to adopt measures ‘applicable to waters under their sovereignty or jurisdiction’, which is a veiled reference to the territorial sea (sovereignty)<sup>66</sup> and the EEZ (jurisdiction).<sup>67</sup> This would appear to be a climbdown for the Commission, which, as noted earlier, had previously taken the view that any measures adopted in the EEZ were the exclusive competence of the EU. On the basis of Article 11(1), a coastal state may take unilateral measures in relation to its own vessels for the purposes of complying with its obligations under the Habitats Directive throughout its waters, as it is indeed required to as a matter of law.<sup>68</sup> On the other hand, Article 11(1) does not permit such regulations to be unilaterally applied to other Member States’ vessels.<sup>69</sup> Instead, there is a notification process ‘initiated’ under Article 11(2) to 11(5), which aims at a political settlement between the interested Member States, with the Commission performing a residual role in the case where no agreement is forthcoming.<sup>70</sup> On the face of it, this permits a process aimed at resolving the question of regulating other Member States’ vessels fishing in a Member State’s waters. Yet, there is a danger that in reality it makes regulating fishing in Natura 2000 sites a discretionary process for the following reasons. First, it is up to the Member State whether it ‘considers’ there is a need for measures. Secondly, the initiating Member State and the other Member States having a direct management interest ‘may’ submit a joint recommendation, but they are not obliged to do so. Thirdly, the Commission is ‘empowered’ to adopt management measures, and in the absence of agreement, it ‘may’ submit a proposal, but it is under no obligation in this respect. Finally, even once the procedure is complete, the Parliament or Council may object to a measure, thereby invalidating it.<sup>71</sup> There is none of the mandatory language present in the Habitats Directive, and it potentially leaves a gap in the protection of an EMS where the political will is missing or there is significant resistance from interested Member States. In practice, the procedure has only been

66 See United Nations Convention on the Law of the Sea (UNCLOS), 1834 UNTS 3 (1982), art 2.

67 See *ibid* art 56.

68 See discussion above at nn 6–18.

69 The only exception is where there is ‘evidence of a serious threat to the conservation of marine biological resources or to the marine ecosystem relating to fishing activities in waters falling under the sovereignty or jurisdiction of a Member State that require immediate action’, in which case, a Member State may, following a similar consultation procedure to the one applicable to Article 20, take emergency measures for up to three months; 2013 CFP Basic Regulation (n 5) art 13. The Commission also has emergency powers, which may be adopted at the request of a Member State or *proprio motu*; *ibid* art 12. Emergency measures adopted by the Commission are applicable for a period of up to six months, with the option of extending them for a further six months.

70 For best practice in developing joint recommendations, see European Commission, *Commission Staff Working Document on the Establishment of Conservation Measures under the Common Fisheries Policy for Natura 2000 sites and for Marine Strategy Framework Directive purposes*, Document SWD(2018)288 final.

71 2013 CFP Basic Regulation (n 5) art 46(3).

used on a handful of occasions since the entry into force of the 2013 CFP Basic Regulation, with six joint recommendations being received.<sup>72</sup> This has resulted in two regulations adopted by the Commission, which protect 13 EMS in the North Sea<sup>73</sup> and 7 EMS in the Baltic Sea.<sup>74</sup> In other areas, progress has been frustrated by a lack of agreement. The Scottish Government has identified a number of EMS where it believes that additional protection measures are needed, and it has developed proposals to this end, starting in 2013, but it would appear that no consensus is yet forthcoming.<sup>75</sup> Furthermore, the UK environmental NGO, the Blue Marine Foundation, have recently lodged a complaint to the European Commission regarding experimental electric pulse trawling permitted under an EU exemption in EMS in the North Sea.<sup>76</sup> It is clear that a significant number of offshore EMS are not currently protected from fishing pressures. This analysis, thus, still leaves the question of whether any further mechanisms exist for the adoption of conservation measures to protect an EMS from fisheries impacts.

#### 4. ALTERNATIVE MECHANISMS FOR THE APPLICATION OF THE HABITATS DIRECTIVE TO EUROPEAN MARINE SITES

The above analysis approaches the problem of managing an EMS from the perspective of coastal states, as this is the approach taken by Articles 11 and 20 of the CFP Basic Regulation. In relation to offshore waters, beyond the territorial sea, it has been seen that the coastal state has only limited powers, and so this approach, in the absence of action at the EU level, could lead to significant gaps in the protection of an EMS. In order to try and address this situation, this section will consider whether the issue can also be approached from the perspective of flag states.

All sea-going vessels are required to fly the flag of a single state, which, as the so-called flag state, exercises jurisdiction and control over that vessel, wherever it is in the world.<sup>77</sup> The principle of flag state jurisdiction is fundamental to the regulation of the oceans, as it ensures that ships are subject to the legislative and enforcement powers of a state at all times. Indeed, a flag state has an obligation to ‘effectively exercise its jurisdiction and control in administrative, technical and social matters over

72 See <[https://ec.europa.eu/fisheries/cfp/fishing\\_rules\\_en](https://ec.europa.eu/fisheries/cfp/fishing_rules_en)> accessed 19 November 2018.

73 See Commission Delegated Regulation (EU) 2017/1180 of 24 February 2017 amending Delegated Regulation (EU) 2017/118 establishing fisheries conservation measures for the protection of the marine environment in the North Sea [2017] OJ L 171/1.

74 See Commission Delegated Regulation (EU) 2017/1181 of 2 March 2017 amending Delegated Regulation (EU) 2017/117 establishing fisheries conservation measures for the protection of the marine environment in the Baltic Sea and repealing Delegated Regulation (EU) 2015/1778 [2017] OJ L 171/30.

75 The latest version of the proposals were published in September 2017 and the Scottish Government has said that it is ‘now consulting other member states and the advisory councils to ascertain whether the proposals have sufficient information to become joint recommendations’; <<https://www2.gov.scot/Topics/marine/marine-environment/mpanetwork/SACmanagement/offshoreseptember2017>> accessed 21 November 2018.

76 Ben Webster, ‘Dutch Devastate Marine Life with Electric Shock Fishing’ *The Times* (2018) <<https://www.thetimes.co.uk/article/dutch-devastate-marine-life-with-electric-shock-fishing-x9hpqc6hv>> accessed 13 December 2018.

77 UNCLOS (n 66) art 94. See Richard Barnes, ‘Flag States’ in Donald Rothwell and others (eds), *Oxford Handbook on the Law of the Sea* (OUP 2015) 304, describing flag state jurisdiction as ‘one of the principal ways of maintaining legal order over activities at sea . . .’.

ships flying its flag'.<sup>78</sup> This is also the case when it comes to protecting the marine environment. For example, the 1992 Convention on Biological Diversity requires contracting parties to conserve biological diversity not only in waters within their national jurisdiction, but they are also under a duty to regulate any 'processes and activities, regardless of where their effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction'.<sup>79</sup> This includes the regulation of vessels flying the flag of a contracting party. Indeed, in the context of fishing, the International Tribunal for the Law of the Sea has recently emphasised that 'the primary responsibility of the coastal State [in relation to] fishing conducted within its exclusive economic zone does not release other States from their obligations in this regard',<sup>80</sup> and it went on to highlight the continuing responsibility of the flag state in relation to, *inter alia*, the protection and preservation of the marine environment.<sup>81</sup>

The application of these international law principles is more complicated in the case of the EU, where Member States have agreed to pool sovereignty and to collectively regulate fish stocks within their waters. The EU itself is a party to UNCLOS, and it bears the obligations in relation to fisheries conservation.<sup>82</sup> Nevertheless, there is no reason to believe that EU law has completely removed the ability of a Member State, as the flag state, to exercise its inherent jurisdiction over its vessels, provided that it does so in a matter that is compatible with EU law. This would appear to be recognised by the EU itself in its declaration under UNCLOS, which provides that 'in respect of measures relating to the exercise of jurisdiction over vessels, flagging and registration of vessels and the enforcement of penal and administrative sanctions, competence rests with the Member States whilst respecting Community law'.<sup>83</sup> In this respect, Article 19 of the CFP Basic Regulation also expressly recognises that 'a Member State may adopt measures for the conservation of fish stocks in Union waters provided that those measures . . . apply solely to fishing vessels flying the flag of that Member State . . ., are compatible with the objectives set out in Article 2, . . . [and] they are at least as stringent as measures under Union law'.<sup>84</sup> It follows that, for instance, Dutch-flagged vessels operating within the UK EEZ are still operating within the jurisdiction of the Dutch government (for fishing vessel licensing). In recognition of the fact that such measures only affect the vessels of the State adopting them, there is no requirement of consultation under Article 19, only an obligation to inform other Member States<sup>85</sup> and to make appropriate information publicly

78 UNCLOS (n 66) art 94(1).

79 Convention on Biological Diversity (CBD), 1760 UNTS 79 (1992), art 4.

80 *Request for an advisory opinion submitted by the sub-regional fisheries Commission submitted to the Tribunal-Advisory Opinion (Fishery Advisory Opinion)* [2015] ITLOS 21, [108].

81 *ibid* [111], making a reference to art 192 of the UNCLOS, which provides that 'states have the duty to protect and preserve the marine environment'.

82 See the declaration of the European Communities (as it was) under art 5(1) of Annex IX to UNCLOS, <[http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm#European%20Community%20Declaration%20made%20upon%20formal%20confirmation](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#European%20Community%20Declaration%20made%20upon%20formal%20confirmation)> accessed 19 November 2018.

83 *ibid*.

84 2013 CFP Basic Regulation (n 5) art 19(1).

85 For the purposes of enforcement; see *ibid* art 19(2).

available.<sup>86</sup> It must be noted that Article 19 only relates to measures ‘for the conservation of fish stocks’, meaning that its scope is particularly narrow. Yet, it is clear that this does not exhaust the flag state jurisdiction of EU Member States over vessels, and it can be argued that flag states may also have such a power for the purposes of environmental protection, by virtue of their shared competence in this regard. This argument builds upon the position adopted by Leijen that the EU does not have exclusive competence over all aspects of fishing and that in some matters, the Member States retain a shared competence.<sup>87</sup> It is with this in mind that the obligations of the Habitats Directive must be interpreted.

Returning to the obligations under Article 6 of the Habitats Directive, it is noticeable that they are drafted without any reference to the location of SACs (or SPAs) that must be protected. Thus, paragraph 2 provides that ‘Member States shall take appropriate steps to avoid, in the [SACs], the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the sites have been designated’, whereas paragraph 3 refers to ‘any plan or project . . . likely to have a significant effect [on a SAC]’. In the vast majority of cases, the Member State will be regulating activities within its own territory or under its own jurisdiction, but the text of Article 6 would appear to be drafted broadly enough to capture any activities that may affect Natura 2000 sites, regardless of their location. This may not only cover both transboundary impacts but also the regulation of fishing by vessels that are licensed to fish in the waters of another Member State. This interpretation of Article 6 may be bold, but it is arguably in line with the teleological approach seen in previous case law in which the Directive has been interpreted in a way to contribute to its core objective, namely the conservation of natural habitats and of wild flora and fauna.<sup>88</sup> Moreover, it must be also remembered that Natura 2000 sites are not sites of national importance, but as part of the designation process, they are agreed by the Commission to be sites of Community importance.<sup>89</sup> From this perspective, it would be strange if some Member States had the burden of protecting them, but other Member States did not.

The obvious counter-argument is that the final text of the 2013 CFP Basic Regulation only makes mention of coastal states taking measures to satisfy their obligations under the Habitats Directive and flag states are not mentioned at all.<sup>90</sup> Drawing upon the interpretative principle of *expressio unius est exclusio alterius*, it could, thus, be argued that the Regulation reserves the power to take measures to protect SACs and SPAs to coastal states alone, albeit only in relation to their own

86 *ibid* art 19(3).

87 See discussion at (n 63).

88 See eg Opinion of the Advocate General in *Commission v United Kingdom* (n 3) [132]; *Waddenzee* (n 20) [44]. More generally on the use of teleological or purposive interpretation in EU law, see Luis Miguel Poiares Pessoa Maduro, ‘Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism’ (2007) 1 EJLS 137–52.

89 Habitats Directive (n 1) art 4(2).

90 Contrast the original proposal by the Commission in European Commission, *Proposal for a Regulation of the European Parliament and the Council on the Common Fisheries Policy*, Document COM/2011/0425 final – 2011/0195 (COD), art 12(1), which provides that ‘fishing activities shall be conducted by Member States in such a way so as to alleviate the impact from fishing activities in . . . special areas of conservation’.

vessels, and flag states may not take such measures unless they have been agreed as a result of the process outlined in Article 11(2)–(5). This argument assumes that Article 11 delegates a limited power back to Member States. However, a careful reading of Article 11(1) casts some doubt on this argument. Indeed, the language of Article 11(1) is interesting because it would appear to be descriptive rather than normative. To be precise, Article 11(1) says that ‘member state *are* empowered’ to take measures, which could be read as simply confirming what powers Member States already have, rather than conferring new powers on them, something which is usually done using prescriptive language, such as is found in Article 11(2) in which ‘the Commission *shall be* empowered to adopt . . . measures’. In other words, Article 11(1) does not delegate powers back to Member States, but rather it recognises that Member States are already empowered to take measures to satisfy their obligations under the Habitats Directive. This reading of Article 11(1) supports the view previously advanced by scholars such as Leijen, which recognises that Member States may take protective measures for an EMS in their coastal waters using their shared environmental or fisheries competence.<sup>91</sup> As argued earlier, this shared competence also includes the power of flag states to take unilateral measures in relation to their vessels, wherever they are in the world.

If this argument is correct, then there is no reason why we cannot interpret the obligations under Article 6 of the Habitats Directive to require flag states to regulate the activity of their vessels wherever they are located and a Member State in whose waters an EMS is located could demand, through litigation if necessary, that other Member States whose vessels were fishing in the vicinity of that EMS carried out an appropriate assessment and took relevant conservation measures. Requiring individual flag states to carry out their own appropriate assessment and take necessary protective measures would help to secure the protection of an EMS in situations where a settlement under Article 11(2)–(5) of the CFP Basic Regulation is not forthcoming. Obviously, this approach has some inherent disadvantages, as it would require multiple appropriate assessments by each and every flag state, with the potential for different conservation and management measures to be adopted. However, such diversity is implicit in the very notion of flag state jurisdiction, as recognised in both the CFP and international law.<sup>92</sup> Moreover, even the threat of having to carry out an appropriate assessment for its vessels may persuade Member States to cooperate in the development of a joint recommendation under Article 11 of the CFP Basic Regulation. In practice, the Article 11(2)–(5) route is more satisfactory since it ensures not only an equivalent measure of protection by all vessels, which is better from both the perspective of ecosystem protection, but also enforcement. Yet, given that Article 11 is largely permissive, exclusive reliance on this procedure provides Member States with an opportunity to avoid their obligations under the Habitats Directive by stalling or blocking any initiative. This potentially leaves a glaring gap in

91 See n (63).

92 2013 CFP Basic Regulation (n 5) art 19(1). As a matter of international law, the flag state is often required to comply with international minimum standards, but it is free to adopt stricter unilateral measures for its own vessels; see UNCLOS (n 66) arts 94(4), 211(2).



the protection of an EMS, which would defeat the object and purpose of the Habitats Directive. The interpretation that is suggested here—requiring flag states to take steps to protect an EMS from activities by their vessels, even if they are fishing in the waters of another Member State—avoids this unwelcome prospect by offering a choice to Member States: they can meet their obligations under the Habitats Directive collectively through the procedure set out in Article 11 of the CFP Basic Regulation, but if they do not, they will still have to take individual action directly under the Habitats Directive.

### 5. THE IMPACT OF BREXIT

Progress on integrating fisheries and environmental policy has been slow, and it is important that the current direction of travel is maintained: the development of active management measures for all EMS created under the Habitats and Birds Directives. It is of utmost importance that the UK's decision to invoke Article 50 and begin negotiations to leave the EU does not upset these hard won gains. Any post-Brexit arrangement on fisheries access agreed between the UK and the EU should not undermine this position.

Investigations into the effects of Brexit could be lengthy as it raises challenging questions of access and quotas,<sup>93</sup> but there are three key issues that are relevant in the current context: the status of Natura 2000 sites; the status of European fisheries management and whether EU vessels continue to operate in UK waters post Brexit. In principle, these three issues are relatively straightforward.

It is important to recognise that the UK played a leading role in negotiating the Habitats Directive as the UK Government made clear at the time:

The Government welcomed it as a step forward for nature conservation in the Community. The Directive was an opportunity for the [European Community] to give legal force at Community level to the requirements of the Bern Convention on the Conservation of European Wildlife and Natural Habitats.<sup>94</sup>

As a UK sanctioned directive and one which has its basis in international law, the main requirements of the Habitats Directive will be difficult to unpick. Recent fitness checks by the European Commission<sup>95</sup> and DEFRA<sup>96</sup> both concluded that the Directive generally worked well. Moreover, the corpus of international law has shifted further in favour of developing representative networks of MPAs,<sup>97</sup> and such

93 These questions have been explored by, *inter alia*, the House of Lords European Union Committee, *Brexit: Fisheries*, 8<sup>th</sup> Report of Session 2016–17, HL Paper 78 (2016). See also Thomas Appleby and James Harrison, 'Brexit and the Future of Scottish Fisheries: Key Legal Issues in a Changing Regulatory Landscape' (2017) 25 J Water L 124–32.

94 HM Government, 'Implementation of the Council Directive 92/43 on the Conservation of Nature Habitats and of Wild Fauna and Flora: Consultation Paper' [1993] JPL B13–149.

95 European Commission, *Fitness Check of the Birds and Habitats Directives* (2016).

96 DEFRA, *Progress on Implementation of the Habitats Directive Implementation Review* (2013).

97 Joint Nature Conservation Committee, *Contributing to a Marine Protected Area Network* (2017).

arrangements are envisaged under the Convention on Biological Diversity,<sup>98</sup> the OSPAR Convention<sup>99</sup> and the Bern Convention.<sup>100</sup> The latter is particularly pertinent, as the Habitats Directive was originally designed to give effect to the Bern Convention<sup>101</sup> and all Natura 2000 sites are part of the Emerald network of protected areas adopted under the Bern Convention.<sup>102</sup> Thus, whilst the precise obligations found in the Habitats Directive may be vulnerable to future changes, it is clear that there needs to be some protection for international recognised species and habitats found in UK waters and failure to do so would be a violation of international law. Indeed, the position of the UK government would seem to suggest that existing EU environmental law will remain in place, at least in the short-term.<sup>103</sup> As such, there is no obvious reason why Brexit should affect the principles of the Directive. It may, however, impact on its mechanics.

One aspect that causes serious concern is that the European Commission has in the past played a significant role in supporting implementation of the Directive through infraction proceedings.<sup>104</sup> Depending on the eventual Brexit settlement, the Commission may no longer be able to take that role in the future. In the past, this has been supplemented by access to justice in the UK courts via judicial review.<sup>105</sup> Recent changes in funding of such cases have led to concerns over the availability of

- 98 CBD (n 78) art 8(a). The concept of protected areas is also reflected in the Aichi Biodiversity Targets, which were adopted by the Conference of the Parties to the Convention on Biological Diversity as part of the Strategic Plan for Biodiversity 2011–2020; see Decision X/2 of the Conference of the Parties to the Convention on Biological Diversity (2010), Annex, Aichi Target 11: 'By 2020, at least 17 per cent of terrestrial and inland water, and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscapes and seascapes'.
- 99 See Convention for the Protection of the Marine Environment of the North East Atlantic, 2354 UNTS 67 (1992), Annex V, art 3(1)(b)(ii). See also Guidelines for the Identification and Selection of Marine Protected Areas in the OSPAR Maritime Area (OSPAR Agreement: 2003–17).
- 100 Convention on the Conservation of European Wildlife and Habitats, 1284 UNTS 209 (1979), art 4. See also Recommendation No 16 (1989) of the standing committee on areas of special conservation interest and Resolution No 3 (1996) concerning the setting up of a pan-European Ecological Network.
- 101 See Gregory Jones QC, 'The Bern Convention and the origins of the Habitats Directive' in Gregory Jones QC (ed), *The Habitats Directive: A Developer's Obstacle Course?* (Hart 2012) 1–22.
- 102 See <<https://www.coe.int/en/web/bern-convention/emerald-network>> accessed 19 November 2018.
- 103 See Statement from HM Government, Chequers, 6 July 2018: 'In keeping with our commitments to uphold international standards, the UK and the EU would also agree to maintain high regulatory standards for the environment ...'; <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/723460/CHEQUERS\\_STATEMENT\\_-\\_FINAL.PDF](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/723460/CHEQUERS_STATEMENT_-_FINAL.PDF)> accessed 10 July 2018. See also European Union (Withdrawal) Act 2018, in which all existing EU legislation is incorporated into UK law as retained EU law. The Act does not, however, provide any long-term protection against changes in EU law.
- 104 See eg European Commission Press Release, Environmental Impact Assessment: Commission refers POLAND to the Court of Justice of the EU over inadequate assessment of exploratory mining drillings, Brussels, 28 April 2016, Document IP/16/1454; European Commission Press Release, Water: Commission refers GERMANY to the Court of Justice of the EU over water pollution caused by nitrates, Brussels, 28 April 2016, Document IP/16/1453.
- 105 A recent high-profile example is *R (on the application of Client Earth (No 3)) v Secretary of State for Environment, Food and Rural Affairs* [2018] EWHC 315 (Admin).

access to environmental justice.<sup>106</sup> The remedy is also not equally effective in all UK jurisdictions; Scotland, for instance, has a poor track record for successful judicial review claims.<sup>107</sup> A recent UK government consultation suggests that new institutional arrangements may be established to oversee the development and implementation of environmental law following Brexit. To this end, the European Withdrawal Act 2018 requires the Secretary of State to bring forward legislation enshrining key environmental principles and providing for 'the establishment of a public authority with functions for taking, in circumstances provided for by or under the Bill, proportionate enforcement action (including legal proceedings if necessary) where the authority considers that a Minister of the Crown is not complying with environmental law (as it is defined in the Bill)'.<sup>108</sup> Similar provisions are included in the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill passed by the Scottish Parliament.<sup>109</sup> The precise scope and powers of any new bodies are not clear at the time of writing, nor is the definition of environmental law that will be used, but it will presumably include nature conservation, and it is hoped that it will ensure the continuing effectiveness of the Habitats and Birds Directives.<sup>110</sup> The UK government has also promised an Environmental Principles and Governance Bill, which could include measures for fisheries in UK waters, but its text is still awaited at the time of writing.<sup>111</sup>

As far as fisheries is concerned, the large number of transboundary and straddling stocks in the North Sea and wider North-East Atlantic means that there will continue to be some form of shared management, as this is a requirement under international law.<sup>112</sup> Such an agreement need not contain the depth of regulation contained in the CFP, and unless Member States' vessels continued to operate in UK waters, enacting measures to protect UK EMS would be a matter for the UK fishery administrations directly against their own vessels—so a process similar to the 'revised approach' discussed in this article could (at least in theory) be easily carried out. Matters become more complicated (at least in law) if the UK continues to allow EU vessels into its waters, and this is a real possibility. Before the UK joined the EU, it had already recognised historic access rights to nearshore waters under the London Fisheries

106 Particular concerns have been raised about the revisions to the costs protection regime; see eg discussion in House of Lords Secondary Legislation Scrutiny Committee, *25 Report of Session 2016-17*, HL Paper 114 (23 February 2017).

107 See Alan Page 'The Judicial Review Caseload: An Anglo-Scottish Comparison' (2015) 4 *Judicial Rev* 337–52.

108 European Union Withdrawal Act 2018, s 16(1).

109 UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, clause 26A. Royal assent for this bill has, however, been held up by a legal challenge under s 33 of the Scotland Act 1998.

110 See, however, the current consultation by the UK government on arrangements to promote compliance with environmental law with the anticipation of an Environmental Governance and Principles Bill in Autumn 2018; DEFRA, *Environmental Principles and Governance after the United Kingdom Leaves the European Union: Consultation on Environmental Principles and Accountability for the Environment (May 2018)*. See also the *Report by the Roundtable on Environment and Climate Change on Environmental Governance in Scotland on the UK's Withdrawal from the EU*, 1 June 2018; <<https://www.gov.scot/Publications/2018/06/2221>> accessed 19 November 2018.

111 DEFRA, *Environmental Principles and Governance after EU Exit* (2018). <<https://consult.defra.gov.uk/eu/environmental-principles-and-governance/>> accessed 13 December 2018.

112 UNCLOS (n 66) art 63(1).

Convention of 1964<sup>113</sup> and so the precedent for continued access predates the UK's membership of the EU. The UK has given notice of its withdrawal from the London Convention, which will take effect either on 3 July 2019 or on the date on which the UK ceases to be a Member State of the EU, whichever is later.<sup>114</sup> As a result, the historical rights enjoyed by other EU Member States will be terminated, and they will have no legal right to fish within UK waters after this period in the absence of some other arrangement.<sup>115</sup> Nevertheless, EU access to UK waters is likely to continue by agreement at least during any transition arrangements,<sup>116</sup> unless there is a 'no deal' Brexit, but even then the draft Fisheries Bill<sup>117</sup> includes provision for access by foreign vessels. Indeed, UNCLOS encourages granting access to foreign vessels if the coastal state is not able to catch all of the total allowable catch within its EEZ.<sup>118</sup> Aside from giving access to surplus quota, it is also common in the North-East Atlantic to see states engaging in quota swaps for other reasons.<sup>119</sup> At the same time, any foreign vessels fishing in the UK EEZ following Brexit would in principle have to comply with national rules relating to both fisheries and the protection of the marine environment. This obligation is explicit in UNCLOS, which provides that 'nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with other terms and conditions established in the law and regulations of the coastal State'<sup>120</sup> and the list of example measures includes the regulation of areas of fishing.<sup>121</sup> This would include the power to dictate no-take zones or restricting the use of particular fishing gear within an EMS or other MPA. The application of coastal state's environmental law to foreign-flagged vessels in its

113 London Fisheries Convention Fisheries Convention, London. 9 March/10 April 1964.

114 For the text of the declaration, see <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/625470/15\\_Fisheries\\_Convention\\_1964\\_status.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/625470/15_Fisheries_Convention_1964_status.pdf)> accessed 19 November 2018.

115 Some Member States (eg Belgium) have insisted that they have historical rights that have their legal basis outside of the regime established by the London Convention and so they won't be affected by the UK's withdrawal from that treaty. However, it can also be argued that the London Convention automatically extinguished any inconsistent fishing rights and that any fishing undertaken since the entry into force of the London Convention has been done on the basis of that treaty (or on a legal basis permitted under that treaty) or subsequent EU law. For a discussion of this issue, see Valentin Schatz, 'Brexit and Fisheries Access – some reflections on the UK's denunciation of the 1964 London Fisheries Convention', EJIL Talk!, (18 July 2017).

116 See Draft Agreement on the withdrawal of the UK of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Agency, 14 November 2018, arts 127 and 130, <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/756374/14\\_November\\_Draft\\_Agreement\\_on\\_the\\_Withdrawal\\_of\\_the\\_United\\_Kingdom\\_of\\_Great\\_Britain\\_and\\_Northern\\_Ireland\\_from\\_the\\_European\\_Union.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/756374/14_November_Draft_Agreement_on_the_Withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union.pdf)> accessed 21 November 2018.

117 Clause 12, Fisheries Bill.

118 UNCLOS (n 66) art 62. For further discussion of access and quota allocation after Brexit, see Appleby and Harrison (n 93) 127–29.

119 Such arrangements are often the result of the annual coastal state consultations on shared fish stocks. See eg the arrangements between the EU and the Faroe Islands on access to fish for mackerel, blue whiting and spring spawning herring in one another's waters in Agreed Record of Fisheries Consultations between the Faroe Islands and the European Union for 2018, Torshavn, 8 December 2017, [3.2], [4.4], and [5.4].

120 UNCLOS (n 66) art 62(4).

121 *ibid* art 62(4)(c).

EEZ was also confirmed in a recent opinion by the International Tribunal on the Law of the Sea:

The Tribunal is of the view that article 62, paragraph 4, of the [United Nations] Convention [on the Law of the Sea] imposes an obligation on States to ensure that their nationals engaged in fishing activities within the exclusive economic zone of a coastal State comply with the conservation measures and with the other terms and conditions established in its laws and regulations.<sup>122</sup>

Moreover, the coastal state has enforcement jurisdiction over foreign vessels so that it may inspect and detain any vessel that it suspects has violated its laws and regulations.<sup>123</sup>

It follows that the UK will be in a stronger position to protect any SACs and SPAs within its waters following Brexit, and it may even be under an obligation to do so under the Bern Convention. Any protective measures should be adopted on a non-discriminatory basis so that they apply to both UK vessels and any foreign vessels (EU or otherwise) that are permitted to fish within UK waters in order to ensure effective protection of EMS. Violation of these rules by foreign vessels should also be strictly enforced, using the powers that are clearly granted to coastal states under UNCLOS. Enforcing such measures may be a challenge, particularly in remoter offshore areas, but it is possible for a coastal state to require that foreign vessels operate vessel-monitoring systems at all times whilst they are in the EEZ,<sup>124</sup> which may facilitate policing of protected areas. Evidential presumptions of various forms may also be employed in order to promote easier enforcement of nature conservation legislation.<sup>125</sup>

## 6. CONCLUSION

This article has addressed the complex relationship between nature conservation law and fisheries law. The clash of competences between the EU and Member States over the implementation of the Habitats Directive should not be used as an excuse to make mandatory conservation measures discretionary. It is clear that under both international law and EU law, Member States are legally required to protect all EMS

122 *Fishery Advisory Opinion* (n 70) [116].

123 UNCLOS, art 73. There are some conditions attached to enforcement. For a discussion, see James Harrison, 'Safeguards against Excessive Enforcement Measures in the Exclusive Economic Zone - Law and Practice' in Henrik Ringbom (ed), *Jurisdiction over Ships* (Brill 2015) 217–49.

124 See eg Camille Goodman, 'Striking the Right Balance? Applying the Jurisprudence of International Tribunals to Coastal State Innovations in Fisheries Governance' (2017) 84 *Marine Policy* 293, 294; Thomas Appleby and others, 'Sea of possibilities: Old and New uses of Remote Sensing Data for the Enforcement of the Ascension Island Marine Protected Area' (2018) *Marine Policy*, forthcoming (<<https://doi.org/10.1016/j.marpol.2018.06.012>> accessed 23 November 2018).

125 See eg The Conservation of Offshore Marine Habitats and Species Regulations 2017 SI 2017/1013, reg 71, which provides that 'a person who, for the purpose of committing an offence under Part 3, is [at a place where, or on a ship or aircraft on which and in a place where, the offence under Part 3 could have been committed] and in possession of anything capable of being used for committing the offence, is guilty of an offence and punishable in the same manner as for that offence.' For an alternative use of presumption in a fisheries context, see *Inshore Fishing (Scotland) Act 1984*, s 4A.

from harmful activities, including fishing. The UK has succeeded in managing English and Scottish inshore waters successfully according to the 'revised approach'. It merely remains for the UK and other Member States to ensure that similar protective measures are enforced in offshore waters. The article has argued that the new procedure in Article 11 of the CFP Regulation is a step in the right direction, but it needs to be reinforced with a direct obligation for flag states to take measures applicable to vessels flying their flag in relation potential impacts on any EMS, wherever it is located. Although Brexit undoubtedly complicates the political landscape, international law, the Habitats Directive and EU law will continue to apply to UK waters. Unless and until those regulations are changed, they should be properly enforced.