

July 2018

The post-2020 European Maritime and Fisheries Fund: how to ensure that EU financial aid serves the objectives of the Common Fisheries Policy?

1 Background

The European Maritime and Fisheries Fund (EMFF) is the financial instrument for the fisheries and aquaculture sectors in the European Union (EU), which will be in place until the end of 2020. It entered into force in May 2014 as the last of the three regulations forming the Common Fisheries Policy (CFP) Reform Package, which included in particular the CFP Basic Regulation¹ with the main policy objectives and fisheries management tools.

The EMFF constitutes an essential element of the CFP reform, complementing the regulatory framework set down in the rest of the legislation by laying down the rules and conditions for receiving EU financial aid for fisheries and aquaculture from 2014-2020. Financial public aid is meant to support Member States, economic operators and other actors, such as NGOs, in implementing the reformed CFP and achieving its objectives.

As part of the financial instruments of the EU, which are designed to cover a period of 7 years under the multi-annual financial framework (MFF), the EMFF will be revised and a new financial instrument will need to be in place from 1 January 2021 (the post-2020 EMFF Regulation).

In this briefing, ClientEarth will identify what should be the priorities of the post-2020 EMFF Regulation. ClientEarth has identified some key guiding principles around which the future fund should be developed. Each of these guiding principles will result in eligible measures, ineligible measures or recommendations for requirements or activities that should be included in the post-2020 EMFF Regulation. Finally, ClientEarth will include reflections on management rules that would also lead to a more efficient, effective and targeted distribution of funding.

ClientEarth will refer to the proposal of the Commission for the post-2020 EMFF (the post-2020 EMFF Proposal)², which has been published on 12 June 2018, and our recommendations will address what is missing, what should be strengthened or what should not be weakened by the co-legislators. This briefing will also include general recommendations to be taken into account throughout the legislative process.

¹ 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, OJ L354, 28.12.2013, p.22. (CFP Basic Regulation).

² Proposal for a Regulation of the European Parliament and of the Council on the European Maritime and Fisheries Fund and repealing Regulation (EU) No508/2014, COM 2018/0210 (COD) (post-2020 EMFF Proposal).

2 The post-2020 EMFF serving the objectives of the CFP

The post-2020 EMFF will be the only financial instrument specifically dedicated to support the implementation of the CFP. As such, its purpose should be to support the implementation of the CFP and the achievement of the CFP objectives.

One way to make sure that the right measures are being financed under the post-2020 EMFF is to avoid supporting aid that has an environmental or economic perverse effect. Over the last 30 years, EU funds in the fisheries sector have mostly been used to finance measures that have proven to be inefficient both for the objectives of the CFP itself, as well as in purely economic terms³. The post-2020 EMFF should constitute structural aid that only supports measures that contribute to a more economically viable (self-sufficient) and environmentally sustainable fisheries sector.

Direct subsidy schemes, such as aid for permanent cessation or temporary cessation of fishing activities, have been used in the past with no regard to the objectives of capacity reduction or the sustainability of fishing resources and have exacerbated the imbalance between available fishing resources and fishing capacity of the EU fleet⁴. Recognising that direct subsidy schemes do not contribute to better economic or environmental viability of the fisheries sector, in 2014, the EMFF Regulation⁵ introduced stricter conditions for the use of direct subsidies, as well as a phasing out of permanent cessation schemes from 31 December 2017 onwards⁶.

ClientEarth believes that public financial resources should be used to create added value for society as a whole, rather than financing the exit of vessels from the sector or activities aiming at maintaining actors artificially in the sector, which brings very little added value to fisheries and the marine environment. This can be realised by financing activities that benefit fishers or coastal regions, while at the same time achieving environmental sustainability of EU fisheries, in particular through protecting and restoring fish stocks and their ecosystems.

In order to achieve a more environmentally and economically viable fisheries sector, ClientEarth is also strongly opposed to aid for the renewal of the fishing fleet or for young fishers, aid that increases the ability of the vessel to catch fish or its fishing capacity and aid that artificially maintains economic operators in the sector. Instead, the post-2020 EMFF Regulation should provide aid that helps achieve concrete CFP objectives, such as supporting the implementation of the landing obligation, increasing the selectivity of fishing gears, improving data collection and having a better fisheries control system.

3 <http://fishsubsidy.org/EU/schemes>; Court of Auditors, Special Report No 3/93 concerning the implementation of the measures for the restructuring, modernization and adaptation of the capacities of fishing fleets in the Community, OJ C 2 . 04.1.1994, p.1; Special Report No 12/2011 "Have EU measures contributed to adapting the capacity of the fishing fleets to available fishing opportunities?" 12/12/2011.

4 The Court of Auditors provided some examples of projects funded by the EMFF that might have contributed to increasing fishing ability. "One of the modernisation projects audited in the United Kingdom concerned a project to replace the normal propeller by a nozzle propulsion system, resulting in an increase of the vessel's speed. The skipper informed the auditors that the speed increase had resulted in higher fish catches." (Court of Auditors, Special report No 12/2011, p. 27); Encarnacion Cordón Lagares and Felix García Ordaz, Fisheries structural policy in the European Union: A critical analysis of a subsidised sector, Ocean & Coastal Management 102 (2014), p.203 and p.208

5 Regulation (EU) No 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund and repealing Council Regulations (EC) No 2328/2003, (EC) No 861/2006, (EC) No 1198/2006 and (EC) No 791/2007 and Regulation (EU) No 1255/2011 of the European Parliament and of the Council, OJ L149, 20.5.2014, p.1. (EMFF Regulation).

6 Article 33 and Article 34 of the EMFF Regulation.

2.1 Eligible measures

In order to support the objectives of the CFP, ClientEarth recommends that the measures described below should be eligible for funding under the post-2020 EMFF Regulation.

The post-2020 EMFF Regulation should:

- Include similar eligible activities linked to the protection and restoration of marine biodiversity and ecosystems as those included in the current EMFF Regulation, such as innovation linked to the conservation of marine biological resources;
- Ring-fence 25% of the budget for each Member State to dedicate to activities linked to the protection and restoration of marine biodiversity and ecosystems;
- Include eligible activities linked to the increase of selectivity, the reduction of unwanted catches and the promotion of low impact fishing;
- Increase the total public financial allocation for data collection and control;
- Ensure a proper ring-fencing of the budgetary allocation for data collection and control measures with at least 25% of the budgetary resources allocated to these two activities;
- Finance initiatives relating to monitoring and control means, including electronic monitoring and reporting tools for small-scale fishing vessels;
- Not finance any operating costs, such as insurance (including for specific mutual funds), overheads, fuel or basic equipment of the fishing vessels that make it merely operational or even navigational;
- Not finance the same operation for the same beneficiary more than once during the programming period 2021-2027;
- Not finance any permanent or temporary cessation of fishing activities.

2.1.1 Protection and restoration of marine biodiversity and ecosystems

The post-2020 EMFF Regulation will continue to be very important for supporting the protection and restoration of marine biodiversity and ecosystems. The CFP Basic Regulation⁷ requires the implementation of the ecosystem-based approach to fisheries management in order to minimise the impact of fishing on the marine ecosystem and avoid the degradation of the marine environment. In addition, the legislation also requires coherence with other Union environmental legislation⁸.

In its list of eligible measures, the EMFF Regulation includes several actions that can be financed to protect and restore marine biodiversity and ecosystems⁹. The current EMFF Regulation also allows for specific eligible measures for innovation purposes linked to the conservation of marine biological resources. ClientEarth strongly supports keeping all of these measures eligible for funding under the post-2020 EMFF Regulation.

⁷ Article 2(3) of the CFP Basic Regulation.

⁸ Article 2(5) (j)) of the CFP Basic Regulation.

⁹ Article 40 of the EMFF Regulation.

Unfortunately, the post-2020 EMFF Proposal has considerably reduced the list of eligible measures and the conditions for receiving financial support, leaving it to the Member States to define eligibility measures and conditions¹⁰. However, eligibility measures and conditions for granting financial support are essential to make sure that EU financial aid does not disrupt progress towards achieving the objectives of the CFP. Further, delegating decisions on conditions to Member States means that there will not be a level playing field for fishers across the EU.

Therefore, the post-2020 EMFF Regulation should include at least the list of eligible measures of the current EMFF Regulation. In particular, it is concerning that the post-2020 EMFF Proposal does not mention measures linked to innovation. Innovation in fisheries needs to be linked with technical improvement as well as scientific expertise and follow-up to make sure that the innovation developed does not have a negative impact on stocks or the wider marine environment. These activities are very expensive, time-consuming, and will therefore need financial aid under the post-2020 EMFF Regulation.

ClientEarth would like to see an expansion of the list of eligible measures and inclusion of other possible activities to be financed under the post-2020 EMFF Regulation; for example, collaboration between fishers, national authorities and other stakeholders involved, such as NGOs, for the monitoring and assessment of fisheries technical and conservation measures as well as the development of innovative technical and conservation measures.

Whereas ClientEarth understands that the list of eligible measures in the post-2020 EMFF Proposal is an indicative list and that the Commission does not want to have predefined measures or eligibility rules at EU level¹¹, listing some important activities that can be financed under the post-2020 EMFF Regulation will give an incentive to Member States to make use of the funding for these activities. In addition, having conditions for eligibility is an essential requirement to make sure that the post-2020 EMFF Regulation only finances activities that are in line with the CFP.¹²

Activities linked to the conservation and restoration of the marine environment and ecosystems benefit fishers, fish stocks and broader society¹³ and should therefore be prioritised. This means that part of the financial resources of the post-2020 EMFF Regulation should be primarily dedicated to those activities under the ring-fencing of budget resources. ClientEarth suggests that Member States invest at least 25% of their available resources in the protection and restoration of marine biodiversity and ecosystems.

2.1.2 Increase selectivity, avoid unwanted catch and promote low impact fishing

The post-2020 EMFF Regulation can play a key role in financing gears or on-board equipment that are more selective and can help develop new techniques, or finance equipment to avoid unwanted catches in fishing activities. The post-2020 EMFF Regulation should, for example, continue to support research in order to develop more selective and environmentally friendly gears to minimise the negative impact of fishing on the ecosystem. More selective fishing gears and

¹⁰ Article 22 of the post-2020 EMFF Proposal.

¹¹ Explanatory memorandum to the post-2020 EMFF Proposal, p.7.

¹² For further details, see Section 6 of this briefing.

¹³ Sumaila UR, Khan A, Dyck A, Watson R, Munro G, Tyedmers P and Pauly D (2010) A bottom up re-estimation of global fisheries subsidies. *Journal of Bioeconomics* 12:201–22

fishing techniques could also facilitate compliance with the landing obligation, one of the requirements introduced by the reformed CFP to incentivise fishing that is more selective.

Even though the landing obligation will enter into force in all EU sea regions by 1 January 2019, the fishing sector will still need support to implement it effectively and to improve their selectivity. Avoiding unwanted catches, and in particular undersized fish, is one of the key factors to help ensure healthy fish stocks in EU waters, as required by the CFP Basic Regulation¹⁴.

Similarly, the CFP Basic Regulation requires moving towards an ecosystem-based approach to fisheries management by ensuring that negative impacts of fishing activities on the marine ecosystem are minimised¹⁵. In line with this objective, the post-2020 EMFF Regulation should finance activities and research aiming at reducing the impact of fishing on the marine environment by promoting low impact fishing gears and techniques.

2.1.3 Enhanced data collection, control and fully documented fisheries

Data collection, control and compliance are necessary for the achievement of the reformed CFP's objectives. Despite the increase in data collection and control activities covered under the reformed CFP, the level of financing for data collection and fisheries control was not adjusted in the current EMFF Regulation. Furthermore, while the amount of EU public funding available for data collection and fisheries control has increased in the current EMFF regulation compared to the past, the national contribution has decreased. As a result, the total public funding (EU and national) available for data collection and fisheries control has stayed roughly the same. This is reflected in the scarce implementation of the Fisheries Control Regulation as highlighted in our 2017 report¹⁶.

The current EMFF Regulation contains provisions which allow for flexibility between the amounts of funding allocated for data collection and the amounts allocated to fisheries control measures (Article 13(8) and Article 94(d)(e)). Because of this flexibility, Member States have been able to decide the overall amounts of aid dedicated to financing either data collection or fisheries control measures. This flexibility reduces the certainty of funding for each of the measures. However, data collection is required so that the health of fish stocks and their degree of exploitation can be assessed as well as the impact of fishing on the environment, and fisheries control measures are necessary to ensure compliance with the rules of the reformed CFP and to fulfil Member States' enforcement obligations. The post-2020 EMFF Regulation should ensure enough dedicated investment in both areas in order to achieve the objectives of the CFP.

Furthermore, the post-2020 EMFF Regulation should increase the total public financial allocation for data collection and control to create financial incentives for Member States to comply with the increased data collection and control activities under the reformed CFP. The post-2020 EMFF Regulation should also ensure a proper ring-fencing of the budgetary allocation for data collection and control measures with at least 25% of the budgetary resources allocated to these two activities

¹⁴ Article 2(2) and Article 2(5) a) of the CFP Basic Regulation.

¹⁵ Article 2(3) of the CFP Basic Regulation.

¹⁶ ClientEarth, "Slipping through the net - The control and enforcement of fisheries in France, Ireland, the Netherlands, Poland, Spain and the UK (England)," published in September 2017, Available at <https://www.documents.clientearth.org/library/download-info/slipping-through-the-net-the-control-and-enforcement-of-fisheries-in-france-ireland-the-netherlands-poland-spain-and-the-uk-england/>.

that are key to the proper implementation of the CFP and are good subsidies for the fisheries sector¹⁷. Funding allocated to data collection, control and compliance must not be reallocated to other funding areas.

ClientEarth is also closely following the revision process of the Fisheries Control Regulation¹⁸. In order to strengthen the control throughout the fisheries sector, decision-makers want to extend the monitoring and reporting requirements for small-scale fisheries (SSF) and make data exchange entirely electronically based. ClientEarth supports this position and adequate funding must be available for this purpose. The post-2020 EMFF Regulation should make substantial financial aid available to SSF to comply with monitoring requirements including to equip their vessels with electronic monitoring and reporting tools.

2.2 Ineligible measures

2.2.1 Funding for operating costs

EU financial aid in fisheries should provide structural support to the sector. A long-term perspective is needed to have an economically viable and profitable fisheries sector and restoring and maintaining healthy fish stocks plays a key role in achieving this objective.

Financing operating costs such as insurance (including for mutual funds), overheads, fuel or basic equipment of the fishing vessels that make it merely operational or even navigational (such as ropes, mandatory security or safety requirements and maintenance services) serve to artificially maintain vessels or fishers in the sector. This is because it reduces the costs of fishing and thus fishers can profit from an otherwise unprofitable (or less profitable) activity. This can negatively influence the sustainability of the fishery resources by incentivising fishers to fish more, as expenses are kept artificially low by the subsidies for their operating costs. It also undermines the goal of creating an economically viable fisheries sector that is resilient and profitable without depending on subsidies.

The post-2020 EMFF Proposal does not put any restrictions on subsidising operating costs¹⁹. Operating costs should be explicitly mentioned in the list of ineligible measures to avoid some Member States receiving EU funding for those costs. In addition, to stimulate the economic viability of the sector and to limit the dependency on subsidies, any financial support granted under the post-2020 EMFF Regulation should only be granted once during the programming period. This condition should also be clearly stated in the post-2020 EMFF Regulation.

17 Sumaila UR, Khan A, Dyck A, Watson R, Munro G, Tyedmers P and Pauly D (2010) A bottom up re-estimation of global fisheries subsidies. *Journal of Bioeconomics* 12:201–22; Encarnacion Cordón Lagares and Felix García Ordaz, Fisheries structural policy in the European Union: A critical analysis of a subsidised sector, *Ocean & Coastal Management* 102 (2014), p.201.

18 Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the Common Fisheries Policy, amending Regulations (EC) No 847/96, (EC) No 2371/2002, (EC) No 811/2004, (EC) No 768/2005, (EC) No 2115/2005, (EC)

19 Article 13 of the post-2020 EMFF Proposal.

2.2.2 Aid for permanent and temporary cessation

Aid for permanent cessation is a use of funding that is potentially neither effective nor in line with the CFP's objectives. The European Court of Auditors identified this type of measure as one of the most controversial direct subsidies in 1994 and 2011²⁰.

The intended purpose of aid for permanent cessation is to support the exit of vessels from the sector, which in turn could address issues of overcapacity and overfishing. However, there is a risk of re-investment of the money received back into the sector, in conflict with this purpose. The Court underlined in its reports that subsidies for permanent cessation such as scrapping schemes could, paradoxically, have the effect of encouraging fishers to stay in business²¹. The reason for this is that, in practice, it is very difficult to control how these premiums are spent. A fisher receiving a scrapping premium can reinvest it in a new fishing vessel or in the modernisation of other fishing vessels they own, which would lead to an overall increase of the fishing capacity, despite one vessel (often less efficient at catching fish to begin with) having been scrapped. In addition, it makes more sense to use money to finance positive and proactive actions for the sector rather than actions aimed at destroying fishing vessels that need to exit the sector anyway.

It is extremely unfortunate to see that the post-2020 EMFF Proposal includes these subsidies again despite the phasing-out agreed by the EU legislators in 2014²². Compared with past funds, the current EMFF Regulation contains stricter conditions for the use of funds to support permanent cessation, but crucially it also contains a phasing out of these types of subsidies from 31 December 2017 onwards. The legislators introduced the phase-out because they recognised the limitations and challenges of this type of approach, including the difficulty of verifying that all of these conditions are respected. The post-2020 EMFF Regulation should not reintroduce this type of subsidy - this would be a step backwards.

Although temporary cessation is often described as aid linked to conservation measures, in the past, these schemes have been poorly targeted for the purposes of conservation and there is evidence of damaging environmental and economic effects²³. In addition, temporary cessation contributes to maintaining fishing effort by artificially increasing profitability in the short-term. As early as 1994, the Court of Auditors found that temporary cessation aid had been granted for periods where fishers would not have been fishing in any case²⁴. Considering that fishing is a seasonal activity, it should also be considered that fishers usually fish for different species around the year and that it is part of their normal activity to stop fishing for particular species at certain times of the year. It would be more appropriate to use the post-2020 EMFF Regulation to support more sustainable fishing by financing more selective fishing or investing in recovery areas rather than continue compensating fishers in a situation where fish stocks are close to depletion.

20 Court of Auditors, Special Report No 3/93 concerning the implementation of the measures for the restructuring, modernization and adaptation of the capacities of fishing fleets in the Community, OJ C 2 , 04.1.1994, p. 46; Special Report No 12/2011 "Have EU measures contributed to adapting the capacity of the fishing fleets to available fishing opportunities?" 12/12/2011, points 28 and 29.

21 Ibid.

22 Article 17 of the post-2020 EMFF Proposal.

23 Court of Auditors, Special Report No 3/93 concerning the implementation of the measures for the restructuring, modernization and adaptation of the capacities of fishing fleets in the Community, OJ C 2 , 04.1.1994, p. 48; Special Report No 12/2011 "Have EU measures contributed to adapting the capacity of the fishing fleets to available fishing opportunities?" 12/12/2011, point 76.

24 Court of Auditors, Special Report No 3/93 concerning the implementation of the measures for the restructuring, modernization and adaptation of the capacities of fishing fleets in the Community, OJ C 2 , 04.1.1994, p. 48; Regulation (EC) No 1198/2006 and Council Regulation (EC) No 861/2006 and Council Regulation No XXX/2011 on integrated maritime policy (COM(2013)0245 – C7-0108/2013 – 2011/0380(COD)), PE 494.539v03-00 A7-0282/2013 Fund repealing Council.

3 Coherence with international commitments

Most global fisheries subsidies, in particular the capacity-enhancing kind, are detrimental to the sustainability of fisheries²⁵. By distorting the true costs of fishing, subsidies can encourage overcapacity and overfishing, because fishing might seem more lucrative than it is in reality²⁶.

The international community has made several commitments to address the harmful effect of subsidies on the fisheries sector. The United Nations Sustainable Development Goals (UN SDGs), agreed in 2016²⁷, include a dedicated goal to the Oceans (UN SDG 14), namely to conserve and sustainably use the oceans, seas and marine resources. One of the targets set to achieve this goal is the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and overfishing and the elimination of subsidies that contribute to IUU fishing by 2020 at the latest; importantly, there is also a clear restriction on introducing new subsidies²⁸.

The European Union has agreed to contribute to the achievement of the UN SDGs, including SDG14, and should be faithful to its commitment when deciding its internal policy²⁹. The Commission has confirmed this position both in the explanatory memorandum and in the recitals of its proposal³⁰. However, this commitment should be reflected in the concrete measures eligible for financing in the post-2020 EMFF Regulation. This means not subsidising the construction, acquisition or the modernisation of fishing vessels, including through engine replacements³¹.

Moreover, since the Doha Ministerial Conference in 2001, at the World Trade Organization (WTO), the EU has been negotiating for a prohibition on using subsidies that contribute to overfishing and overcapacity³². At the 2017 Buenos Aires Ministerial Conference, WTO members agreed to adopt an agreement on fisheries subsidies at the 2019 Ministerial Conference³³ and the EU continues to defend the position that harmful fisheries subsidies should be banned³⁴. The EU should be coherent with this position in the post-2020 EMFF Regulation.

As the 2020 deadline under SDG 14 is fast approaching, it is essential that the post-2020 EMFF Regulation is coherent with international commitments of the EU and therefore does not provide any funding that could contribute to overfishing and overcapacity. The post-2020 EMFF Proposal includes a general rule in its section on ineligible operations that "*operations that increase the fishing capacity of a fishing vessel or support the acquisition of equipment that increases the ability of a fishing vessel to find fish*"³⁵ are not eligible under the post-2020 EMFF. However, at the same time, the post-2020 EMFF Proposal includes a derogation for this general rule, which says that

25 World Bank Group, "The Sunken Billions Revisited: Progress and Challenges in Global Marine Fisheries," 2017, executive summary and page 23.

26 World Bank Group, "The Sunken Billions Revisited: Progress and Challenges in Global Marine Fisheries," 2017, page 58; Colin W. Clark, Gordon R. Munro and Ussif Rashid Sumaila, "Subsidies, Buybacks, and Sustainable Fisheries" (2005) 50 Journal of Environmental Economic and Management 1, 47.

27 <https://www.un.org/sustainabledevelopment/development-agenda/>

28 UNGA Res 70/1 (25 September 2015) UN Doc A/RES/70/1, see target 14.6.

29 World Trade Organization, TN/RL/GEN/181/Rev.1.

30 Recital (12) of the post-2020 EMFF Proposal and explanatory memorandum to the post-2020 EMFF Proposal, p.8-9.

31 Article 16 of the post-2020 EMFF Proposal.

32 World Trade Organization, "The Doha Declaration explained," Available at: https://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm#fisheries_subsidies.

33 World Trade Organization, Ministerial Decision of 13 December 2017 at the Ministerial Conference, Eleventh Session, Buenos Aires, p. 10-13 December 2017.

34 See footnote 29.

35 Article 13 (a) of the post-2020 EMFF Proposal.

both the acquisition of fishing vessels and the replacement or modernisation of engines can be financed for small-scale coastal fishing vessels under certain conditions³⁶. This is clearly contrary to the commitments agreed to by the EU at international level. In addition, limiting this derogation to small-scale fishing is not actually a real limitation, since SSF represents "75% of all fishing vessels registered in the Union and nearly half of all employment of the fishery sector" as stated in the recitals of the post-2020 EMFF Proposal³⁷.

The post-2020 EMFF Regulation should not finance:

- Any renewal of the fleet including in outermost regions;
- The acquisition of fishing vessels for new fishers;
- Modernisation of fishing vessels through engine replacement or other capacity enhancing changes.

3.1.1 Renewal of the fleet

Funding the renewal of the fleet, whether through the construction of fishing vessels or the acquisition of fishing vessels for new fishers, is a capacity-enhancing subsidy that is clearly against the international commitments of the EU.

The construction of fishing vessels has been eliminated from EU funding since 2004³⁸. As mentioned above, it is internationally recognised that capacity-enhancing subsidies are not beneficial for the fisheries sector from both an environmental and economic point of view. The EU fleet still needs to overcome its problems regarding overcapacity³⁹ and financing new capacity will only exacerbate these problems - this has been recognised since 2004. Re-introducing vessel renewal in the EU, including in outermost regions, would be a major step back from the current efforts to reduce overcapacity in the EU fishing fleet. This is mainly due to the 'technological creep' phenomenon, because as a result of modernising the fleet with the newest technology, fishing vessels will become more efficient and will therefore be able to catch more fish while using less time and resources⁴⁰.

In 2017, the European Parliament adopted an own-initiative report suggesting the reintroduction of aid for the renewal of the fleet in outermost regions⁴¹. The post-2020 EMFF should not reintroduce harmful subsidies, including in outermost regions, since these subsidies have been recognised as harmful at international level for all sea regions and all types of fisheries sectors (from large-scale to artisanal fleets).

In the same vein, subsidising new fishers to enter the sector, even if only in the small-scale sector, artificially inflates the short-term profitability of such a venture and could lead to an unsustainable increase in fishing pressure. Furthermore, it creates a culture of dependency rather than of

³⁶ Article 16 of the post-2020 EMFF Proposal.

³⁷ Recital (28) of the post-2020 EMFF Proposal.

³⁸ Article 13 of Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy and Article 11 of the Council Regulation (EC) No 2792/1999 laying down the detailed rules and arrangements regarding Community structural assistance in the fisheries sector.

³⁹ Article 22 of the CFP Basic Regulation.

⁴⁰ J. Fitzpatrick, 'Technology and Fisheries Legislation', in FAO (1996). Precautionary approach to fisheries Part 2, FAO Fisheries Technical Paper 350/2, pp.191-199.

⁴¹ 2016/2016(INI) Management of the fishing fleets in the outermost regions, Rapporteur Ulrike Rodust.

entrepreneurship, innovation and self-sufficiency. It appears to represent an incentive to enter the sector when in fact, if the sector is vibrant, this should not be necessary. The fishing industry is unlikely to be in a good shape if the stocks are not in a good shape. Moreover, incentivising new fishers to enter the sector risks further depletion of stocks.

3.1.2 Funding for modernisation of fishing vessels

In order to avoid exacerbating the problem of overcapacity, any investment that increases the ability of the vessel to catch fish should not be eligible for funding. This would ensure coherence with the CFP objectives of having fishing activities that are environmentally sustainable in the long term. In addition, where possible, fishers should continue to adapt their fishing behaviour to reduce costs instead of continue receiving subsidies. This flexibility will also make the industry more resilient to external shocks, such as increases in fuel costs.

Funding energy efficiency measures, including engine replacement and climate change mitigation, has the risk of supporting measures that result in increased technical ability to catch fish. The European Court of Auditors confirmed in its 2011 special report that investments on board aimed at increasing energy efficiency can increase fishing capacity⁴². Aid that increases the ability of a vessel to catch fish or its fishing capacity has proven to be counterproductive for the sustainability of the sector as it creates, or contributes to increasing, the imbalance between the fishing resources and fishing capacity. This is not to say that vessels cannot make these changes themselves, if the management regime allows it, just that this should not be supported by public funds.

The post-2020 EMFF Proposal allows for the replacement or modernisation of engines for small-scale coastal fishing vessels⁴³. Considering that the replacement or modernisation of engines is very likely to increase fishing capacity, this should not be eligible under the post-2020 EMFF Regulation. In addition, the Commission has itself recognised this risk in its post-2020 EMFF Proposal and has included three conditions under which support may be granted. However, these conditions are unsatisfactory and difficult to control⁴⁴. Of even greater concern is the fact that the Commission leaves it up to the Member States to "*define the precise eligibility rules for those investments*"⁴⁵ because of the new architecture which does not include prescriptive measures⁴⁶.

4 Conditionality of EU financial aid

In 2014, the EMFF Regulation introduced the 'conditionality' principle, which means that financial support under the EMFF is conditional upon compliance by Member States and by operators with the rules of the CFP and of EU environmental law⁴⁷. Conditionality is a fundamental mechanism to ensure that EU public aid is only available for and granted to those operators and Member States who respect and comply with CFP obligations. In terms of operators, this means that the application for aid submitted by an operator who does not respect CFP rules is not admissible under the EMFF.

42 Court of Auditors, Special Report No 12/2011, "Have EU measures contributed to adapting the capacity of the fishing fleets to available fishing opportunities?" 12/12/2011, paragraphs 43-47.

43 Article 16 (1) (b) of the post-2020 EMFF Proposal.

44 Court of Auditors, Special Report No 8/2017, "EU fisheries controls: more efforts needed" 30/05/2017, paragraphs 16-23.

45 Recital (22) of the post-2020 EMFF Proposal.

46 See also Section 6 hereinafter.

47 Regulation (EU) No 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund, Articles 10, 99, 101 and 105.

Unfortunately, the post-2020 EMFF Proposal does not address some of the deficiencies of the conditionality rules provided in the current EMFF Regulation and therefore ClientEarth suggests including the points mentioned below in the post-2020 EMFF Regulation.

The post-2020 EMFF Regulation should include that:

- Conditionality applies not only to 'serious infringements' of the CFP (as defined in EU legislation), but also to other infringements that have negative impacts on the sustainability of fisheries;
- Conditionality is extended to apply to operators and Member States in case of violation of obligations under the Birds and Habitats Directive and the MSFD.

The current EMFF Regulation includes insufficient provisions for ensuring that aid does not go to individuals and Member States who do not comply with the rules in the CFP. Similarly, it contains some limited provisions to prevent the granting of aid in circumstances where environmental rules have been broken. ClientEarth considers that the post-2020 EMFF Proposal's inclusion of the same conditionality requirements as in the EMFF Regulation⁴⁸ is the bare minimum.

ClientEarth considers that conditionality for the post-2020 EMFF should be further strengthened. Firstly, the post-2020 EMFF Proposal provides that an application is inadmissible if the beneficiary concerned has committed any 'serious infringement' of the rules of the CFP, but this is not sufficient. Other infringements that have negative impacts on the sustainability of fisheries should be added to the list. For example, infringements that are related to fishers trying to get around the control system, such as turning off Automatic Identification System (AIS) transmitters, and infringements related to failure to fulfil obligations to mitigate against the accidental catches of sensitive species. Those operators who are contributing to committing offences should also not be able to benefit from public money.

There should be a direct reference to specific EU environmental obligations relevant to the CFP in the post-2020 EMFF Regulation. This would include any infringement committed by an operator, for example, under the national laws implementing the Birds⁴⁹ and Habitats⁵⁰ Directives, as well as the Marine Strategy Framework Directive⁵¹ (MSFD). These infringements should cover activities such as breaching rules around fishing activities in protected areas. Conditionality should also apply in respect to Member States both at the stage of releasing funding⁵² and when distributing funding from the post-2020 EMFF, if they are in violation of these Directives and the Commission is aware of it.

48 Article 12, Article 33, Article 34, Article 35 and Article 36 of the post-2020 EMFF Proposal.

49 Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, OJ L20, 26.01.2010, p.9.

50 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L206, 22.07.1992, p.7.

51 Directive 2008/56/EC of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), OJ L164, 25.06.2008, p.19.

52 Article 11 and Annex III of the CPR Proposal.

5 Transparency of EU financial aid

Both Member States and the European Union need to respect the general EU financial principles, which include the principle of transparency⁵³. Transparency in the EMFF Regulation ensures that citizens are able to access information about spending of EU funds, but also has the potential benefits of attracting beneficiaries and enabling a best practice approach. Transparency requirements should be maintained for the post-2020 EMFF Regulation and, in certain circumstances, strengthened to enable adequate monitoring and public oversight of the implementation of the post-2020 EMFF Regulation. ClientEarth also believes that transparency of the decision-making process in relation to the adoption of implementing rules and delegated acts should be improved.

The post-2020 EMFF Regulation should:

- Maintain the transparency standards for Member States and beneficiaries that are in the CPR Proposal;
- Include a general obligation to publish all relevant documents related to its implementation;
- Include obligations for the annual performance reports of Member States to be routinely published on the website of the European Commission;
- Include an obligation for Member States and the European Commission to publish reports on best practices on their respective websites;
- Require Member States to publish information on the implementation of the EMFF in both the original language and in one of the working languages of the European Commission.

The Common Provisions Regulation proposal⁵⁴ (CPR Proposal), which is the overarching legislation for all EU structural funds, will apply to the post-2020 EMFF Regulation and it includes transparency provisions. These include the obligation of Member States to properly inform potential beneficiaries about funding possibilities; with a fair and widely advertised selection process, known, fair and non-discriminatory selection criteria and a process that ensures that all beneficiaries are subject to the same implementing rules and reporting requirements. It also requires Member States to inform Union citizens, in line with the transparency principle⁵⁵, where and for what purpose the European Union spends certain funds⁵⁶.

Transparency requirements also apply to beneficiaries of EU funds who must acknowledge the fact that they have been recipients of EU financial support in accordance with the relevant provision of the CPR Proposal⁵⁷.

53 Chapter 8 of Title II of Regulation (EU, EURATOM) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, EURATOM) No 1605/2002, OJ L298, 26.10.2012, p.26.

54 Chapter III of Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument, COM(2018) 375 final (CPR Proposal).

55 Recital (16) of Regulation (EU, EURATOM) No 966/2012 and Chapter 8 of Regulation (EU, EURATOM) No 966/2012.

56 Article 44 of the CPR Proposal.

57 Article 57 of the EMFF Proposal and Article 45 of the CPR Proposal.

All these transparency requirements should be maintained throughout the decision-making process leading to the adoption of the post-2020 CPR Regulation and the post-2020 EMFF Regulation.

After following the implementation of the CFP for several years, ClientEarth has seen first-hand the lack of transparency in the decision-making process when it comes to the adoption of associated delegated or implementing acts. The post-2020 EMFF Regulation should foresee the publication of all relevant documents relating to its implementation (proposals, amendments, reports, interpretations, etc.) on the website of the European Commission.

The post-2020 EMFF Proposal requires Member States to report annually to the European Commission on the implementation of the post-2020 EMFF Regulation. This reporting obligation of Member States towards the European Commission enhances transparency. Annual performance reports of the Member States on the implementation of the post-2020 EMFF Regulation should be routinely published on the website of the European Commission in line with the obligations set out in the Aarhus Regulation in terms of transparency and participation of civil society in the decision-making process⁵⁸.

The post-2020 EMFF Regulation should include an obligation for the European Commission to collect examples of best practices of operations funded and should publish these on its own website in order to facilitate and incentivise further best practices. Member States should also be required to publish information on best practices at national level.

Information published at Member State level should be available in at least one of the working languages of the European Commission, as well as the original language, in order to facilitate transparency for all EU citizens.

6 Improvements to the Regulatory Framework and Management of the EMFF

Taking into account lessons learned from the implementation of the EMFF Regulation, the requirements of the new EU multi-annual financial framework (referred to as MFF)⁵⁹ as well as having analysed the post-2020 EMFF Proposal, ClientEarth has identified a series of deficiencies of the regulatory and management framework that it will address in this section.

58 Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L264, 25.09.2006, p.13.

59 Press release of the European Commission on the EU budget for the 2021-2027 period in which the Commission indicated that the EU budget should be efficient, modern, simple and flexible, available at: http://europa.eu/rapid/press-release_IP-18-3570_en.htm.

The post-2020 EMFF Regulation should:

- Include an exhaustive list of eligible operations with clear conditions;
- Allow for budget flexibility for data collection and control purposes;
- Focus on SMEs in the fisheries sector with very limited access to funding for large enterprises;
- Not finance inland fishing;
- Finance only aquaculture activities that have a low impact on the environment;
- Not finance the construction or modernisation of ports, landing sites or auction halls.

6.1 Assessment of the general structure of the post-2020 EMFF Proposal

The post-2020 EMFF Proposal is structured in such a way as to limit the prescriptiveness of the Regulation to the maximum extent. In particular, the Commission introduced the basic principle that *"it is up to Member States to draw up their programme indicating therein the most appropriate means for achieving the priorities of the EMFF"*⁶⁰. ClientEarth understands the need for simplification and believes the CFP must strike a balance between environmental, social and economic objectives. This requires a constant fine tuning and balancing between the situation of the stocks and the interests of the sector. Since funding can have an important impact on how the CFP is implemented, it is crucial that it is used only for those activities that will bring real added value to the marine environment, the fisheries sector and society as a whole. To achieve this objective, necessary safeguards need to be clearly laid down in the post-2020 EMFF.

The Commission does acknowledge that investment and compensations for the fishing fleet should be *"strictly conditional upon their consistency with the conservation objectives of the CFP"*⁶¹. However, the conditions included in the post-2020 EMFF Proposal are not sufficient. Furthermore, because Member States will be in charge of setting eligibility criteria, there is a risk of undermining the principle of a level playing field in terms of the distribution of aid at EU level.

For example, it is extremely important to support innovation under the post-2020 EMFF Proposal, in particular innovation in selectivity of gears or fishing techniques. However, for innovation to be reliable and to be able to contribute to real selectivity improvements needs, support for innovation should be complemented by scientific assessment that checks the impacts of proposed innovation measures on both the targeted fish stocks and the wider ecosystem it affects. The post-2020 EMFF Proposal does not include any conditions for the development of innovation, thereby risking that fishing methods that seem more innovative might be financed without a proper scientific assessment, which could in turn lead to greater detrimental impacts on the marine environment.

⁶⁰ Explanatory Memorandum to the post-2020 EMFF Proposal, p.7.

⁶¹ Ibid.

The lack of a list of eligible operations and clear conditions for granting financial support in the post-2020 EMFF Proposal creates the risk that financial aid goes to measures that are counterproductive to reaching the objectives of the CFP.

6.2 Budget flexibility for control and data collection

The shared management section under the EMFF Regulation has substantial funds available for monitoring, control and data collection⁶². However, to date, these funds have been significantly underused by Member States and there is a lack of flexibility to reallocate these funds to activities financed under direct management. In 2017, for example, part of the funding dedicated to control has been redirected to Integrated Maritime Policy activities even though funding is badly needed for fisheries control activities⁶³. For the post-2020 EMFF, correcting this problem would mean, for example, that control funds under shared management that have not been spent by Member States should be reallocated to the European Fisheries Control Agency or other control measures financed under direct management that are in need of funding.

6.3 More efficient and targeted funding

In line with the MFF objectives to ensure a more efficient use of EU funding, the post-2020 EMFF should focus on certain beneficiaries and activities.

6.3.1 More targeted beneficiaries

The EU should continue and increase preferential support for small and medium-sized enterprises (SMEs) in the fisheries sector, which historically have had difficulty in accessing funding and represent nearly 75% of the EU fleet in the catching sector. The post-2020 EMFF should identify SMEs in accordance with the EU definition of SMEs⁶⁴.

The post-2020 EMFF should direct its funding towards supporting those SMEs where there may be a lack of personnel and technical expertise.

To have a more efficient use of funding, large enterprises, as opposed to small and medium enterprises, should in principle no longer be eligible for financial aid. However, large enterprises may make use of funding under the post-2020 EMFF for the development of more selective gears or fishing techniques to avoid unwanted catches, including juveniles, better monitor and control the landing obligation through the installation of REM/CCTV on board, or to increase the accuracy and reliability of fully documented fisheries.

62 Regulation (EU) No 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund, see Articles 76(2)(a), 76(2)(b), 76(2)(h), 76(2)(k) and 77.

63 Commission delegated Regulation (EU) 2017/1787 of 12 June 2017 amending Regulation (EU) No 508/2014 of the European Parliament and of the Council as regards the distribution of funds under direct management among objectives of the Integrated Maritime Policy and the Common Fisheries Policy, O J.L.256, 4.10.2017, p.1.

64 Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ L124, 20.5.2003, p.36.

6.3.2 More targeted activities

The EMFF regulation includes a large range of activities that can be financed. This approach needs to be modified to satisfy the requirements of the MFF to be more targeted in terms of financing. ClientEarth believes that support for certain activities should no longer be financed or should be financed under other EU structural funds.

One of the activities that should no longer be financed is aid to inland fishing activities. These activities do not support the achievement of the CFP's objectives, because they are not covered by the CFP Basic Regulation⁶⁵. Should inland fishing enterprises need support, this could be covered by the European Regional Development Fund, which has funding available to support SMEs.

Moreover, ClientEarth recommends that aquaculture activities should only be eligible for financial support if they are proven to have a low impact on the environment. Under the EMFF Regulation, a very wide range of aquaculture activities can be financed without any condition to ensure that they are environmentally sustainable. As a result, there is the potential for environmentally harmful activities to be supported. For the sake of ensuring efficient use of limited EU funding, this sector should only be financed under the post-2020 EMFF Regulation if they are assessed as having a low impact on the environment, such as the recirculating aquaculture system or natural extensive aquaculture systems.

Finally, the post-2020 EMFF Proposal considers that the construction of new fishing ports, new landing sites or new auction halls is ineligible for funding. We strongly support this provision and would encourage decision-makers to also consider ineligible the modernisation of existing ports, landing sites and auction halls. We consider that these infrastructure investments should instead be covered under the European Regional Development Fund.

7 Conclusion

This first assessment of the post-2020 EMFF Proposal shows that changes and improvements need to take place during the upcoming decision-making process to make sure that from 2021 onwards EU financial aid in fisheries will serve the objectives of the CFP.

In particular, the upcoming financial framework needs to be coherent with the commitments of phasing out certain harmful subsidies, which were agreed upon in the EMFF Regulation and at international level. If the post-2020 EMFF does not take these commitments into account, EU financial aid in fisheries will continue to be unsustainable from an economic and environmental perspective.

In order to be able to serve the objectives of the CFP, the post-2020 EMFF should become a stronger regulatory framework with clear guidance concerning what activities are eligible and under which conditions. The post-2020 EMFF should also take into account the increased financial needs in terms of control and data collection, in particular in view of the revision of the Fisheries Control Regulation and the increased monitoring requirements.

⁶⁵ Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy.

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ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

ClientEarth is funded by the generous support of philanthropic foundations, institutional donors and engaged individuals.

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