

Legal Toolkit
for
Challenging the Unlawful Management of Natura 2000
Marine Protected Areas



October 2020

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Table of Contents

1. INTRODUCTION	3
2. FACTUAL BACKGROUND	4
Facts about the marine site	4
Facts about activities on the site	6
Facts about the legal, policy and governance landscape	8
3. LEGAL BACKGROUND	11
Introduction	12
Legal Overview of EU MPAs	12
The protected habitats and species	13
Management obligations	14
Frequently Asked Questions – General	15
Frequently Asked Questions – Article 6(1) Habitats Directive	18
Frequently Asked Questions – Article 6(2) Habitats Directive	20
Frequently Asked Questions – Article 6(3) Habitats Directive	23
Frequently Asked Questions – Article 6(4) Habitats Directive	32
Frequently Asked Questions – MPAs and the Common Fisheries Policy	34
4. LEGAL TOOLS FOR INTERVENTION	41
Access to environmental information	41
Making a Request for Environmental information	41
Advocacy with the competent authority	43
Correspondence with the Competent Authority	44
Reports and Position Papers	45
Public consultations and official working groups	45
Pre-litigation procedure	46
Instructing lawyers	46
Assessing time limits and legal standing	47
Legal costs	47
Litigation at the national level	48
Overview of Litigation Procedure	48
Emergency orders	48
Legal Interventions at the EU level	49
5. Bibliography and Reference Materials	50
Annex I: MPA Case Studies	51
1. Marine Conservation Society: Shrimp Fishing in the Wash, UK	51
Annex II: Site Integrity Briefings	54

1. INTRODUCTION

A Marine Protected Area (MPA) is a conservation tool for the ocean, designed to provide spatial protection for marine ecosystems, including specific marine habitats and species. When properly implemented, MPAs can be a highly effective method for protecting vulnerable marine ecosystems, halting biodiversity loss, enabling the recovery of fish stocks, and contributing to human wellbeing.

Unfortunately, the majority of MPAs in European waters exist as “paper parks” – EU countries officially designate areas for conservation but then neglect to properly manage them in practice. For example, although around 12% of European waters are designated as MPAs, only 1.8% of those waters have conservation measures in the form of management plans to protect the species and/or habitats in the site.¹ Member States also continue to allow destructive human activities in or around protected sites that severely undermine their conservation objectives.

This should not be the case. EU conservation law – namely the Birds and Habitats Directives – imposes legal duties on EU Member State to proactively manage, conserve and restore their MPAs. If Member States fully complied with these duties, there would be a dramatic improvement in conservation outcomes for our marine environment. EU marine protected sites would be able to recover their biodiversity, function and productivity.

This toolkit aims to address this problem of non-compliance by empowering NGOs and local campaigners to take action, both civically and legally, to challenge the unlawful management of MPAs by Member States and their public authorities. As well as providing factual and legal information, the toolkit aims to provide practical guidance through the inclusion of case studies set out in **Annex I**.

The focus of the toolkit is on fishing activities due to the pressing challenges that they pose to marine habitats and species. Member States continue to authorise destructive fishing practices in MPAs, acting on the assumption that these types of activities are generally permissible in MPAs. As a result, 59% of northern Europe’s MPAs are commercially trawled, where average trawling intensity is 40% higher than in non-protected areas.² The toolkit aims to set the record straight in this regard, showing that EU conservation law prohibits fishing practices in MPAs where there is a likelihood of the site’s biodiversity being damaged.

The toolkit should also prove useful for those seeking to address other human pressures on MPAs, such as from unsustainable aquaculture or from other activities such as tourism, resource exploitation, or coastal developments when they are poorly regulated.

Finally, this toolkit addresses MPAs that are designated as part of the Natura 2000 network under either the Habitats Directive or the Birds Directive. It is not designed to provide guidance where an MPA has been designated under the Marine Strategy Framework Directive or under national law only, although certain sections may still be of interest.

¹ WWF, *Protecting our Ocean: Europe’s Challenges to Meet the 2020 Deadlines* (2019)
<https://www.wwf.de/fileadmin/fm-wwf/Publikationen-PDF/WWF-Protecting-Our-Ocean.pdf>

² Dureuil et al. 2019. Elevated trawling inside protected areas undermines conservation outcomes in global fishing hot spot. *Science* 21: 1403-1407.

2. FACTUAL BACKGROUND

KEY POINTS

- The starting point for campaigners seeking to challenge the management of MPAs is to establish a robust factual basis for doing so. This section provides information on how to gather relevant facts about:
 - (i) the marine site and its ecological features;
 - (ii) the damaging activities occurring on the site; and
 - (iii) the local policies, laws and governance structures relating to the site
- To find out about where the MPA concerned is designated as a Natura 2000 site, check the Natura 2000 viewer website: <https://natura2000.eea.europa.eu/>
- On this website, you will also be able to access the 'Standard Data Form' for the relevant Natura 2000 site. This is an essential document, providing important information for your advocacy.
- One of the most important preliminary facts to establish is the identity of the 'competent authority' i.e. the authority responsible for regulating the activities concerned. To challenge unlawful MPA management, it will be necessary to engage with this authority. This section provides information on how to identify this authority.
- While it is helpful to have scientific information about the impact of the damaging activities on the site, remember that the onus is on the competent authority to obtain this information, by carrying out assessments if necessary.

Facts about the marine site

Is the relevant marine site a Natura 2000 site? What is the process for fully identifying a site, including its official name, site code and map? It is essential to find out whether the marine site in question is a Natura 2000 site. If it is not a Natura 2000 site, then many of the conservation obligations under EU law addressed in this toolkit do not apply.

The easiest way to find out if a site is part of the Natura 2000 network is to access the European Environment Agency's dedicated website: <https://natura2000.eea.europa.eu/>. You can search for a site by reference to the site name or the site code. You can also search for the site by navigating on the interactive map. Click on the 'My Location' button in the top-left of the viewer to zoom in to sites close to your location.

Once you have identified the relevant site, click on the 'Standard Data Form' link, which should appear in a pop-up window on the viewer. When you have reached the standard data form webpage, take a record of the site code, the site name and whether the site is designated under the Habitats Directive or the Birds Directive. This information should be visible at the top of the page.

Natura 2000 Network Viewer European Environment Agency DISCLAIMER - 2019 status of the network

Rechercher une adresse ou un li

Search by site

Par Attribut Résultats

Zoom tous Vider

Entités sélectionnées: 3 Tout exporter au format CSV

SITECODE: FR5400469
SITENAME: Pertuis Charentais

SITECODE: FR7200811
SITENAME: Panache de la Gironde et plateau rocheux d
Cordouan (Système Pertuis Gironde)

SITECODE: FR5412026
SITENAME: Pertuis charentais - Rochebonne

(1 de 2)

Habitats Directive Sites (pSCI, SCI or SAC)

Pertuis Charentais (SiteCode: FR5400469)
Area: 456 027,02 ha
Dataset year: 2019

Standard Data Form Google Earth

Site view URL

Zoom sur

Database release: End2019 --- 12/06/2020

SDF



NATURA 2000 - STANDARD DATA FORM

For Special Protection Areas (SPA),
Proposed Sites for Community Importance (pSCI),
Sites of Community Importance (SCI) and
for Special Areas of Conservation (SAC)

SITE

FR5400469

SITENAME

Pertuis Charentais

TABLE OF CONTENTS

- 1. SITE IDENTIFICATION
- 2. SITE LOCATION
- 3. ECOLOGICAL INFORMATION
- 4. SITE DESCRIPTION
- 5. SITE PROTECTION STATUS
- 6. SITE MANAGEMENT
- 7. MAP OF THE SITE

Print Standard Data Form

1. SITE IDENTIFICATION

1.1 Type

B

1.2 Site code

FR5400469

1.3 Site name

Pertuis Charentais

1.4 First Compilation date

1995-11

If the site does not appear in the Natura 2000 viewer, then it may not be a Natura 2000 site. In that case, it is recommended to seek clarification from the relevant authority responsible for managing the site.

What habitats and/or species are protected in the site? Marine Natura 2000 sites are designated for the protection of specific habitats and/or habitats of species contained within them. It is important to identify these relevant species and/or habitats because any challenge to the management of the site needs to refer to the adverse conservation consequences for these protected species and/or habitats. This information should be available in section 3 (ecological information) of the Standard Data Form for the site concerned. Section 3.1 lists the habitat types under Annex I of the Habitats Directive for which the site has been designated to protect, while Section 3.2 lists the species under Annex II of the Habitats Directive for whose habitat the site has been designated to protect.

What are the conservation objectives of the site? The management of a marine site must aim to achieve the conservation objectives that have been established for the particular site. These conservation objectives may be detailed in Section 6.3 (conservation measures) or in Section 4 (site description) of the Standard Data Form. If the site's conservation objectives are not clear from the standard data form, they may be available on the website of the public authority responsible for managing the site. If necessary, contact the relevant authority to seek clarification.

Who is the competent authority? The competent authority is the public body or authority responsible for managing the Natura 2000 site or for regulating activities that may affect the site. It is necessary to identify the competent authority, as this is the entity whose decision-making is to be challenged. The identity of the competent authority may depend on the type of activity being challenged and the legal obligation that is allegedly being breached. For example, the body responsible for managing the site (as detailed in section 6.1 of the Standard Data Form) may have legal obligations to ensure that the site is adequately conserved, while a fishing licensing authority may be legally responsible for ensuring that the granting of a fishing licence does not lead to destructive fishing happening in the site. Depending on the case, there may be more than one authority whose decision-making should be challenged.

Facts about activities on the site

Has the competent authority identified the activities concerned? Civic engagement or legal interventions for the protection of MPAs will often involve objecting to human activities, either proposed or underway, that are environmentally damaging to the protected site. Fishing is the most prominent example in Natura 2000 marine sites, but other activities could include aquaculture, windfarm development, shipping, unsustainable tourism or activities related to oil and gas exploitation. In order to successfully challenge those activities, it is necessary to obtain as much relevant information about them as possible, first from the competent authority (or in the management plan if it exists or on the competent authority's website) and then by other means if the authority does not provide the information.

Has the competent authority considered whether the activities are likely to have a significant effect on the site? For all projects or plans that pose any risk of affecting a Natura 2000 marine site, the competent authority must carry out a 'screening' procedure to determine whether it is "likely to have a significant effect" on the site (click [here](#) for more about the legal meaning of this phrase). If so, then the competent authority must undertake a full "appropriate assessment" in relation to those effects. Knowing whether the competent authority has properly screened activities for 'likely significant effects' can be essential to determining whether there has been a breach of legal obligations.

Has the competent authority carried out any assessments on these activities? Where the activity concerned is a project or plan likely to have a significant effect on the site, the competent authority is required to carry out an “appropriate assessment” (click [here](#) for more information on this requirement). If an assessment has been carried out, it is important to obtain a copy of the assessment because this should provide information about the impacts of the activities on the site.

If an assessment has not been carried out for the activities affecting the site, the relevant competent authority should be asked to explain its reasons for not carrying out the assessment. If the authority has failed to carry out an appropriate assessment even though the project or plan is likely to have a significant effect on the marine site, it could form the basis of a strong legal challenge.

If an assessment has been carried out but you believe it to be flawed or incomplete, the competent authority can be challenged to complete a new assessment. This can be the case if you believe that the assessment has not adequately addressed all the possible impacts of the relevant plan/project on the site or that it has not addressed the cumulative impacts from all of the plans/projects taking place inside or close to the site. In this regard, it may be appropriate to gather scientific evidence (see section below) and/or consult an independent scientific expert to advise as to the appropriateness of the assessment that has been carried out.

What is the justification for the activities? It is important to know whether the competent authority has provided a justification for the activity because this may ultimately determine whether the activity can lawfully proceed for “imperative reasons of overriding public interest” even though it adversely affects the marine site (click [here](#) for more information on this requirement). If a justification has been provided, make sure to ask the authority to provide evidence in support of its position, including whether it has considered alternative solutions.

Are the activities licensed? If so, when was the licence granted / is it due to be renewed? Many activities in the marine environment, including fishing, generally cannot be undertaken without first obtaining a licence from the authority responsible for regulating the activity in the question. Where the activity is a licensed activity, efforts should be made to obtain a copy of the licence, as this may provide relevant information about the nature and scope of the activities. If the licence is due to be renewed in the near future, it may be possible to challenge the renewal of the licence if the authority has not carried out a proper “appropriate assessment” of the activities permitted under the licence.

Is there scientific evidence about the potential impacts of the activity on the site?

Activities which have impacts on marine sites may be unlawful if they give rise to significant adverse environmental impacts. In order to advance a strong case, it is helpful to obtain as much information as possible about the environmental impacts of the activities, especially on the habitats and species for which the site has been designated. If possible, any factual arguments about the impacts of an activity on a site should be supported by scientific evidence. This may be relevant in order to rebut contentions by the competent authority that the activity concerned does not have adverse environmental effects (although it is worth remembering that the onus is on the competent authority – not the campaigner – to show that the activity does not have adverse effects).

It can therefore be helpful to gather scientific information relating to:

- (i) the current ecological state of the site (including the habitats and species that contribute to the ecological integrity of the site);

- (ii) the ecological impacts of the activity, especially on the habitats and species for which the site is protected;
- (iii) the conservation baseline of the site (this is the state of the site if it were fully restored to its initial ecological state prior to human interference); and
- (iv) whether the site is being properly assessed and monitored to ensure that the environmental needs of the protected species and habitats are being addressed.

Some information about the ecological status of the site should be contained in the site's Natura 2000 Standard Data Form and in any Appropriate Assessments that have been carried out in relation to the site. The website of the public authority responsible for managing the site may also have relevant information.

The ecological requirements needed to maintain site integrity can be ascertained from scientific reports relating to the habitat types and species for which the site is designated, even if such reports do not specifically address the site in question. For example, there is an extensive body of scientific literature cataloguing the adverse ecological impacts of bottom-trawling on protected habitat types such as sandbanks (H1110) and reefs (H1170).

See **Annex II** of this toolkit for an overview of the site integrity requirements for commonly protected marine habitat types, together with an inventory of scientific literature.

It can also help to identify the ecological requirements of the 'typical species' associated with the natural habitat that is protected within the MPA. For example, if the site is designated as a sandbank habitat type (H1110), the European Commission's Interpretation Manual of EU Habitats confirms that fish are part of the sandbank ecosystem as a typical species.³ As explained in the [Legal FAQs](#) below, the concept of site integrity requires Member States to ensure that the conservation status of these typical species is "favourable".

If scientific evidence is unavailable or if the current evidence is inadequate or outdated, it can be beneficial to instruct a scientist to prepare a report addressing by reference to the specific features of the marine site and the impacts of any activities taking place or proposed for the site. Any such report can then be relied upon in civic or legal engagement in relation to the site. Of course, even if it is not feasible to obtain such a report, it is up to the competent authority to show that an activity will not have negative impacts. Therefore it is still possible to require the competent authority to take appropriate steps and assessments to protect the MPA even where you do not have access to scientific evidence.

Facts about the legal, policy and governance landscape

How is the relevant EU legislation implemented into the national laws and policies governing the site? Is there a transposition gap? As part of any legal challenge to the management of Natura 2000 sites before a national court, it is necessary to identify how the relevant EU legislation, particularly the Habitats Directive, has been transposed into national law. While legal arguments challenging the activities should be based on EU legislation and CJEU jurisprudence, they may also need to refer to the national law that gives effect to it. It is also important to assess whether there are gaps in how the EU legislation has been transposed into national law i.e. have all the relevant obligations in the EU legislation been clearly and precisely stated in the national law? Any gap in the transposition of these

³ European Commission, *Interpretation Manual of European Union Habitats* (2013) https://ec.europa.eu/environment/nature/legislation/habitatsdirective/docs/Int_Manual_EU28.pdf p.8

obligations may be open to challenge. (See **Annex I** of this toolkit, for a case study on how the Swedish Society for Nature Conservation has successfully advocated for the European Commission has taken an infringement action against Sweden for failing to properly transpose Article 6(2) of the Habitats Directive into national law.)

Is there a government policy affecting the conservation of the site? There may exist a government policy affecting the conservation of the site, which could include a policy relating to the type of activity that is being challenged or to the management of the site more generally. For example, there may be a policy providing guidance to the competent authorities on how to establish conservation measures for the site or when to carry out an appropriate assessment or a policy setting out what type of fishing activities can be allowed in MPAs. If this policy is undermining the conservation of the Natura 2000 site, then it may be open to legal challenge. Accordingly, it is important to obtain as much relevant information about the policy as possible, including the justification for the policy and whether it is supported by sound scientific evidence.

What are the local laws relating to the marine site? Aside from the laws transposing the EU legislation, there may exist other national or local laws affecting the management of the marine site. If those laws are undermining the effectiveness of the EU legal obligations, then they could potentially be subject to a legal challenge.

What is the governance structure of the decision-making body and who are the participating stakeholders? It is important to identify the governance structure in any body or committee making decisions affecting the marine site. Being able to pinpoint the key decision-makers will facilitate any efforts to engage in civic advocacy challenging the management of the site. If other stakeholders, such as fishers, local business associations, marine researchers, or other environmental groups participate in the decision-making process, there may also be advocacy opportunities in respect of those stakeholders.

Has the competent authority held public consultations or other types of stakeholder involvement in relation to the policy or activities? Are there any upcoming consultations? Steps should be taken to find out whether there are any upcoming public consultations regarding the activities or policy in questions, as any such consultation presents an opportunity to object to those activities or policies. Where there is no consultation process in place, then it may be possible to legally challenge the relevant authority to hold a public consultation in accordance with its legal obligations under the Habitats Directive and other EU laws relating to access to environmental justice and decision making.

Is there any other advocacy related to the activities in the site? There may be other groups engaged in advocacy related to the site. If the aims of these groups are aligned with your own, it may be effective to work together on any advocacy campaigns. Where several groups can present a united front with clear messages, this can better influence key decision-makers. However, where there are advocacy groups with opposing aims, such as commercial fishing representatives, it may be necessary to formulate legal arguments countering their assertions, for instance that the activity does not require an appropriate assessment, that the activity would not cause a deterioration to the protected habitat or that economic considerations should be taken into account, etc. The legal arguments to counter these claims are addressed in [Legal FAQs](#) below.

What is the time limit for bringing a legal claim before the local court? If the aim is to bring a legal case before the national court challenging the decision of the competent authority, it is critical to ascertain the time limit for bringing a claim. Such claims are usually brought by way of administrative law procedures, where the time limits tend to be short. Any claim challenging the decision will usually

need to be brought promptly, within a matter of months or even weeks after the decision has been made. Different time limits may apply depending on the local legal system, and on what is being challenged (whether it is a general policy, a management plan, the lack of management, an authorisation approving a particular activity etc.), so it is important to precisely understand what decision is being challenged and when that decision was made.

3. LEGAL BACKGROUND

KEY POINTS

- Under the Habitats Directive, **EU countries have enforceable legal duties to adequately manage their EU MPAs**. This includes:
 - **Introducing conservation measures**, such as management plans;
 - **Preventing the deterioration of the habitats and disturbance of the species** for which the site has been designated;
 - **Carrying out ‘appropriate assessments’** to understand the impacts of any proposed projects or plans likely to have a significant effect on the site. Subject to limited exceptions, such a project or plan can only be authorised if it can be shown that the integrity of the site will not be adversely affected.
- The test for ‘likely significant effect’ that triggers an appropriate assessment is a low threshold. An appropriate assessment of a project or plan is required whenever there is a doubt about the effects of a plan or project.
- **Fishing activities must be assessed** to find out whether they will adversely affect the site. Our view is that fishing is a ‘project’ or ‘plan’ for the purpose of the Habitats Directive.
- **The obligation to a manage site can arise even before it has been officially designated as an MPA**. Once the site has been adopted by the European Commission as a ‘Site of Community Importance’, certain management obligations will apply.
- It is the **responsibility of the competent authority** – not campaigners or NGOs – **to show that the activity in question is not harming the MPA**
- **Competent authorities must consider the cumulative impacts of different activities** on the site. The impacts of a proposed project or plan must be assessed not in isolation but in combination with the impacts of other projects or plans
- **For offshore MPAs** located beyond the 12 nautical mile zone, **there is a separate procedure available under the EU’s Common Fisheries Policy** for introducing conservation measures that would affect fishing interests.

Introduction

Any challenge to the management of Natura 2000 marine sites should be based on persuasive legal arguments, supported by references to the applicable EU legislation and case law of the Court of Justice of the European Union (CJEU).

In this section, we provide an overview of the relevant EU legal obligations governing the management of EU Marine Protected Areas. The focus is on the Habitats Directive,⁴ which is the primary source of these obligations. However, we address other EU legislation, such as the Birds Directive,⁵ the Marine Strategy Framework Directive,⁶ and the Common Fisheries Policy Basic Regulation,⁷ to the extent that they impact on the management of activities in EU MPAs.

We first provide a brief legal overview of the Habitats Directive. This is followed by a more extensive 'Frequently Asked Questions' designed to illustrate how the legal obligations operate in practice. We have also included short summaries of several key cases, which should help to give a flavour of nature conservation litigation. We recommend taking local legal advice before embarking on any legal challenge. It is also important to be mindful that bringing a legal challenge could carry financial and/or reputational risks.

Users of this toolkit should bear in mind that each Member State has implemented its own national laws to give legal effect to EU Directives in that Member State. However, it is still important to refer to the Habitats Directive and CJEU jurisprudence when making legal arguments to local decision-makers or when bringing cases before national courts. This is because EU law has primacy over national laws, so EU law and CJEU case law set the interpretation that Member States and national courts have to follow. It has also been held that the Habitats Directive has 'direct effect', meaning that an individual complainant is entitled to directly rely on its provision before a national court.⁸

Legal Overview of EU MPAs

EU MPAs are part of an EU-wide network of protected areas established under the EU Habitats Directive. This network, also known as the Natura 2000 network, is comprised of Special Areas of Conservation (**SAC**) designated by Member States under the Habitats Directive and Special Protection Areas (**SPA**) designated under the Birds Directive. Both terrestrial and marine sites can be designated as protected areas. For marine sites, this includes territorial waters and also the exclusive economic zone (EEZ) and the continental shelf.⁹

The aim of the Natura 2000 network is to ensure the long-term survival of Europe's most threatened species and habitats. Measures taken under the Habitats Directive are designed to "maintain or restore, at favourable conservation status" natural habitats and species of wild fauna and flora of Community interest.¹⁰ This overarching objective informs the interpretation of the legal obligations imposed on Member States.

⁴ Directive 92/43/EEC

⁵ Directive 2009/147/EC (codified version)

⁶ Directive 2008/56/EC

⁷ Regulation (EU) 1380/2013

⁸ *Waddenzee* (C-127/02)

⁹ *Commission v UK* (C-6/04)

¹⁰ Habitats Directive, art 2(2)

The protected habitats and species

Under Annex I, the Habitats Directive expressly protects nine marine environment habitat types:

92/43 Habitats Directive. Annex I	
<i>Open sea and tidal areas natural habitats types of community interest whose conservation requires the designation of special areas of conservation (SAC's)</i>	
1110	Sandbanks which are slightly covered by sea water all the time
1120 *	Posidonia beds (<i>Posidonium oceanicae</i>)
1130	Estuaries
1140	Mudflats and sandflats not covered by seawater at low tide
1150 *	Coastal lagoons
1160	Large shallow inlets and bays
1170	Reefs
1180	Submarine structures made by leaking gases
8330	Submerged or partially submerged sea caves

Source: European Commission

More detailed technical descriptions of these habitat types are set out in EU-28 Habitats Interpretation Manual.¹¹

In addition to the habitats listed in Annex I, the habitats of certain marine species are also required to be protected through the designation of marine sites. The species whose conservation requires the designation of protected sites are listed in Annex II of the Habitats Directive.¹² 7 marine mammal species,¹³ 19 fish species¹⁴ and 2 sea turtle species¹⁵ are listed for protection.¹⁶ They include the grey and monk seals,¹⁷ the harbour porpoise,¹⁸ the common bottlenose dolphin,¹⁹ the loggerhead turtle,²⁰ certain species of fish and molluscs as well as various marine plant species.

¹¹ European Commission, *Interpretation Manual of European Union Habitats* (2013)

https://ec.europa.eu/environment/nature/legislation/habitatsdirective/docs/Int_Manual_EU28.pdf

¹² See the consolidated version of the Habitats Directive: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:01992L0043-20130701>

¹³ Common bottlenose dolphin (*Tursiops truncatus*); harbour porpoise (*Phocoena phocoena*); grey seal (*Halichoerus grypus*); harbour seal (*Phoca vitulina*); Mediterranean monk seal (*Monachus monachus*), Baltic ringed seal (*Phoca hispida bottnica*); Saimaa ringed seal (*Phoca hispida saimensis*)

¹⁴ <https://ec.europa.eu/environment/nature/natura2000/marine/docs/Marine%20brochure%20WEB.pdf>.

Examples include: Sea lamprey (*Petromyzon marinus*); European river lamprey (*Lampetra fluviatilis*); Adriatic sturgeon (*Acipenser naccarii*); European sea sturgeon (*Acipenser sturio*); allis shad (*Alosa alosa*); twait shad (*Alosa fallax*); Spanish toothcarp (*Aphanius iberus*); Mediterranean killifish (*Aphanius fasciatus*); Valencia toothcarp (*Valencia hispanica*); Canestrini's goby (*Pomatoschistus Canestrinii*); Corfu toothcarp (*Valencia letourneuxi*); houting (*Coregonus oxyrinchus*); Pontic shad (*Alosa immaculate*); Black Sea shad (*Alosa tanaica*)

¹⁵ loggerhead turtle (*Caretta caretta*) and the green sea turtle (*Chelonia mydas*)

¹⁶ European Commission, *The EU Nature Directives: protecting Europe's marine biodiversity* (Brochure, 2019) <https://ec.europa.eu/environment/nature/natura2000/marine/docs/Marine%20brochure%20WEB.pdf>

¹⁷ *Halichoerus grypus*, *Monachus monachus*

¹⁸ *Phocoena phocoena*

¹⁹ *Tursiops truncatus*

²⁰ *Caretta caretta*

Habitats and species that are especially vulnerable, and so require a greater level of legal protection, are marked by an asterisk in those Annexes as "priority" habitats or species. Priority habitats are those which are in danger of disappearance in the European territory,²¹ while priority species are those which are endangered in the European territory.²² In the marine environment, the priority habitats are *Posidonia* seagrass beds and coastal lagoons, while the priority species are the Mediterranean monk seal (*Monachus monachus*), the Saimaa ringed seal (*Phoca hispida saimensis*), the loggerhead turtle (*Caretta caretta*) and the green sea turtle (*Chelonia mydas*). There is a greater requirement to designate sites hosting priority species and habitats as SACs and there are additional safeguards in respect of permitting activities in MPAs that host priority habitats or species.

Under the Birds Directive, an area should be designated as a Special Protection Area if it (i) features a vulnerable bird species listed in Annex I of the Directive or (ii) constitutes a breeding, moulting or wintering area or a staging post along migration routes for regularly occurring migratory birds.²³

Management obligations

These protected areas are not intended to be strict nature reserves where all human activity is prohibited. Nevertheless, Article 6 of the Habitats Directive does place obligations on Member States to conserve these sites at favourable conservation status and to prevent their deterioration. In particular, Member States must:

- Under Article 6(1), ensure that 'necessary conservation measures' are established within protected areas;
- Under Article 6(2), proactively prevent the deterioration of natural habitats and habitats of species as well as disturbance of the species for which the area has been designated ; and
- Under Article 6(3), carry out an "appropriate assessment" for any plan or project likely to have a significant effect on a protected area. A plan or project can only be authorised when the relevant public authority has ascertained that it will not adversely affect the integrity of the site concerned.
- In exceptional circumstances, a plan or project may still be permitted to proceed in spite of a negative assessment. Under Article 6(4), such a project or plan may still proceed provided there are no alternative solutions and the plan or project is considered to be justified for imperative reasons of overriding public interest. In such cases, the Member State must take appropriate compensatory measures to ensure that the overall coherence of the Natura 2000 network is protected. As considered further below, it is highly unlikely that a particular fishing activity would satisfy these Article 6(4) conditions.

The nature of the obligations set out in Articles 6(2) and 6(3), which address the impacts of specific activities, means that they can usually be invoked as a means to challenge destructive fishing in MPAs. Article 6(1) may also be relied upon in circumstances where the conservation measures for the site concerned are inadequate or non-existent.²⁴

Another fundamental aspect of the Habitats Directive is that it requires Member States to address the cumulative impacts on an MPA from different human activities. This means that Member States need

²¹ Habitats Directive, art 1(d).

²² Habitats Directive, art 1(h).

²³ Birds Directive, arts 4(1) and 4(2).

²⁴ While the obligations under Articles 6(2), 6(3) and 6(4) apply to both SAC and SPAs, the obligations under Article 6(1) apply only to SACs. However, there are analogous provisions in Articles 3 and 4 of the Birds Directive that apply to SPAs.

to assess the impacts of activities not in isolation but in combination with any other activities that give rise to a cumulative impact on the site. Accordingly, in the context of fishing activities, an appropriate assessment would be required where:

- several licensed fishing activities in combination may be a threat to a marine Natura 2000 site, even if one individual fishing activity might not pose such a risk; or
- a non-fishing marine plan or project is being considered for authorisation which in combination with fishing may be a threat to a marine Natura 2000 site.

The European Commission has also produced its own [Guidance Document](#) on the provisions of Article 6 of the Habitats Directive. Although not legally binding, it is a useful document to consult when looking for additional information or seeking clarification on the application of the Habitats Directive.²⁵

Frequently Asked Questions – General

What is the process for designating an EU MPA?

Article 4 of the Habitats Directive sets out the process for designating sites as SACs. This process, which is based on relevant scientific information and the ecological criteria set out in Annex III of the Directive, has three main stages:

- a) Member States must assess the presence in their territory of the habitats and species given protection by the Directive and then submit a list of proposed Sites of Community Importance (pSCIs) to the Commission.
- b) The Commission assesses the quality of the pSCIs and, in agreement with the Member States, adopts a list of Sites of Community Importance (SCIs).
- c) Member States must then designate the SCIs as Special Areas of Conservation (SACs) as soon as possible and within six years at most. The six-year period starts running from the date of the Commission Decision that adopts the list of SCIs.

For SPAs, the European Commission has a more limited role in the designation of sites. Article 4 of the Birds Directive, Member States are required to classify “the most suitable territories in number and size as special protection areas” for the conservation of the bird species listed in Annex I of the Birds Directive as well as for any regulatory occurring bird species not listed in Annex I. For these regularly occurring migratory birds, Member States must also bear in mind their need for spatial protection as regards their breeding, moulting and wintering areas and staging posts along their migration routes. When classifying SPAs, Member States are also required to pay particular attention to the protection of wetlands and particularly to wetlands of international importance (for example, wetlands listed under the Ramsar Convention on Wetlands 1971).

When does the obligation to manage a site arise?

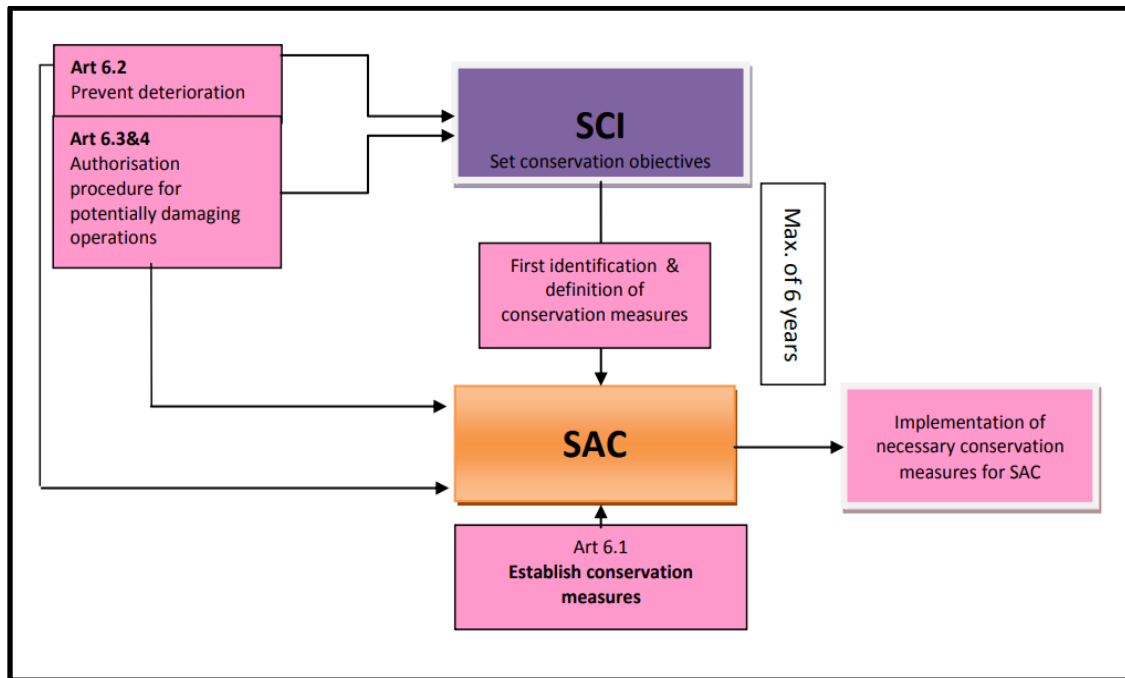
The obligations under articles 6(2), 6(3) and 6(4) of the Habitats Directive apply as soon as the Commission adopts the site as an SCI.²⁶ The obligation to implement conservation measures under

²⁵ European Commission, *Managing Natura 2000 sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC* C(2018) 7621 final
https://ec.europa.eu/environment/nature/natura2000/management/docs/art6/Provisions_Art_.nov_2018_endocx.pdf (‘Commission Guidance’).

²⁶ Habitats Directive, art 4(5).

Article 6(1) applies as soon as the Member State has designated the SCI as an SAC or once the 6-year time limit for designating the SCI as an SAC has expired.²⁷

The graph below provides a visual illustration of when these obligations arise for SCIs and SACs.



Source: European Commission

Even before a site has been designated as an SCI by the Commission, Member States have legal obligations regarding pSCIs. In accordance with CJEU case law, they are required to:

- I. deny authorisation to interventions which incur the risk of seriously compromising the ecological characteristics of those sites;²⁸ and
- II. take protective measures appropriate for the purpose of safeguarding that ecological interest of the proposed SCIs.²⁹

Management obligations arise under the Birds Directive as soon as the relevant Member State has classified the site as a Special Protection Area.

What is the precautionary principle and how is it relevant?

The precautionary principle is a fundamental principle of environmental policy in the EU, designed to ensure that the environment is safeguarded in the face of scientific uncertainty. The principle is enshrined under Article 191(2) of the Treaty on the Functioning of the European Union (TFEU), which provides that EU policy on the environment shall aim at a high level of protection based on the precautionary principle. It is an integral aspect of the Habitats Directive, informing how decision-makers should act when faced with environmental risks to protected sites.

In essence, the precautionary principle means that action can be taken to protect against risks to the environment, even in the absence of conclusive scientific evidence as to the existence, or extent, of

²⁷ *Commission v Spain* (C-090/10).

²⁸ *Bund Naturschutz* (C-244/05) para 47.

²⁹ *Draggagi* (C-117/03) para 29.

those risks. In such cases, protective measures are justified without having to wait until the reality and seriousness of those risks become fully apparent.³⁰

The precautionary principle is generally relevant to two distinct stages of risk management analysis:

- i. the political decision of whether or not to act when a potential risk has been identified; and
- ii. where the decision is made to act, the kind of protective measures that should be taken.³¹

The first stage – deciding whether to act – occurs when decision-makers become aware of a risk to health or the environment that may have potentially significant consequences. Once they become aware of the risk, decision-makers should obtain a scientific assessment. Accordingly, Article 6(3) of the Habitats Directive establishes a procedure whereby the competent authority is required to carry out an “appropriate assessment” where there is a potential ecological risk to the integrity of a marine site as a result of a proposed plan or project. Following the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned.³² In layman terms, if there is any doubt (i.e. scientific uncertainty) about whether the activity will have a significant effect on the site, an appropriate assessment should be carried out in order to fully identify the risks.³³

Where an appropriate assessment is carried out, the competent authority must again apply the precautionary principle in deciding whether the plan or project should be authorised. The competent authority can only authorise such an activity if they have made certain that it will not adversely affect the integrity of that site. That is the case when no reasonable scientific doubt remains as to the absence of such effects.³⁴

What is the proportionality principle and how is it relevant? Can Competent authorities rely on socio-economic considerations to justify destructive fishing in MPAs?

The proportionality principle requires that action taken under EU law does not go beyond what is suitable and necessary to achieve its objectives.³⁵ This principle applies to actions taken by EU institutional actors and Member States. An action or measure is considered proportionate only when it is both appropriate and necessary and not disproportionate to the objective pursued.³⁶ As with the precautionary principle, the proportionality principle is integrated into the Habitats Directive.

In practice, we have seen that competent authorities try to invoke the proportionality principle to justify allowing harmful fishing in an MPA, arguing that any curtailment of such an activity would have an unacceptably high economic cost and is therefore not proportionate (this argument also ignores the economic benefits of MPAs).

However, economic considerations may only be relied upon by competent authorities to allow a damaging activity in the exceptional circumstances set out under Article 6(4) of the Directive (i.e. where there are ‘imperative reasons of overriding public – see our FAQ below’).³⁷ In our view, fishing

³⁰ *Pfizer Animal Health SA v Council of the European Union* (T-13/99) para 139

³¹ European Commission, *Communication on the Precautionary Principle* (COM (2000) 1).

³² *Waddenzee* (C-127/02) para 44.

³³ *Waddenzee* (C-127/02) para 44.

³⁴ *Waddenzee* (C-127/02) paras 56-59.

³⁵ Treaty on the European Union, art 5(4).

³⁶ See, for example, *Germany v Parliament and Council* (C-233/94).

³⁷ This provision essentially gives effect to the proportionality principle, providing a ‘proportionate’ exemption to the requirement under Article 6(3) of the Habitats Directive that projects or plans can only be authorised

is unlikely to fall into this Article 6(4) category. You should therefore strenuously push back against the competent authority where is seeking to rely on economic considerations or the proportionality principle as a legal justification for allowing environmentally damaging fishing activity in an EU MPA.

If you need further support on this issue, Seas At Risk or ClientEarth would be happy to discuss it in more detail.

Frequently Asked Questions – Article 6(1) Habitats Directive

Legal Text: Article 6(1) HD

“For special areas of conservation, Member States shall establish the **necessary conservation measures** involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which **correspond to the ecological requirements** of the natural habitat types in Annex I and the species in Annex II present on the site.”

What forms of ‘necessary conservation measures’ are required?

Article 6(1) requires Member States to establish a conservation programme for each of their SACs (but not SPAs). Member States must introduce and enforce positive and pro-active conservation measures aimed at achieving the general objective of the Directive i.e. to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.³⁸

As is clear from the wording of Article 6(1), Member States have three options for implementing the necessary conservation measures:

- **Statutory measures**, which are prescribed under law (e.g. included in a decree, regulation, byelaw) and which can set specific requirements concerning the activities the activities that can be allowed, restricted or prohibited in the site.
- **Administrative measures**, which can take the form of a government policy or procedure, and can set relevant provisions for implementing conservation measures or authorising activities in the site , or
- **Contractual measures**, which involve establishing contracts or agreements usually among managing authorities and landowners or users on the site.³⁹

While the choice of measures is a matter for the Member States, they must choose at least one of these three categories.⁴⁰

If necessary, these conservation measures should involve management plans specifically designed for the sites or integrated into other development plans. According to the Commission, such management plans “should address all existing activities, including regular ongoing activities such as day-to-day agricultural activities.”⁴¹ By analogy, management plans for marine sites should address any existing fishing activities affecting the site that occur on a regular basis. Management plans can be stand-

where it is certain that there will be no adverse effects on the site. (This is the interpretation that was put forward by the Advocate General in *Waddenzee* (C-127/02) – see AG’s Opinion, para 106).

³⁸ Commission Guidance (n 25) 16.

³⁹ Commission Guidance (n 25) 24.

⁴⁰ Commission Guidance (n 25) 24. See also *Commission v Austria* (C-508/04) para 76 and *Commission v Spain* (C-90/10) (available in Spanish and French only).

⁴¹ Commission Guidance (n 25) 22.

alone plans or can be “integrated into other development plans”.⁴² In the case of an integrated plan, the competent authority must ensure that clear conservation objectives and measures are set for the relevant habitats and species present on the site.

In the context of fishing activities, conservation measures could include prohibiting fishing with particularly damaging gears (e.g. bottom-contacting gears), placing limits on the fishing effort; prohibiting the catching of fish whose favourable conservation is indispensable to maintaining the integrity of the site etc. For further examples of such measures, see the N2K Group’s publication [Review of fisheries management measures in Natura 2000 sites](#).

What are conservation measures that correspond to the ecological requirements of the site?

The conservation measures implemented under Article 6(1) must correspond to the “ecological requirements” of the natural habitat types in Annex I and the species in Annex II present on the site concerned. The aim of this requirement is to ensure that the general objective of achieving favourable conservation status for all habitat types and species listed in Annexes I and II is translated into site-level conservation objectives.⁴³

Although the Directive does not define “ecological requirements”, the Commission has interpreted it as involving “all the ecological needs, including both abiotic and biotic factors, which are deemed necessary to ensure the conservation of the habitat types and species, including their relations with the physical environment (air, water, soil, vegetation, etc.).”⁴⁴ Conservation measures must therefore address not merely the particular habitat or species in isolation but must also the environment that it lives in. Thus if good water quality is essential to ensuring the conservation status of a particular marine species, then the conservation measures would need to detail a programme for protecting the water quality in the MPA.

These ecological requirements are determined by the need to ensure favourable conservation status. The conservative status of a natural habitat will be taken as “favourable” when:

- its natural range and areas it covers within that range are stable or increasing, and
- the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and
- the conservation status of its typical species is “favourable” as defined below.

In turn, the conservation status of its typical species is taken as “favourable” when:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.

These ecological requirements should be based on scientific knowledge as ascertained on a case-by-case basis in relation to the site.⁴⁵

⁴² Habitats Directive, art 6(3).

⁴³ Commission Guidance (n 25) 17.

⁴⁴ Commission Guidance (n 25) 21.

⁴⁵ Commission Guidance (n 25) 21.

Legal Text: Article 6(2) HD

“Member States shall take **appropriate steps to avoid**, in the special areas of conservation, the **deterioration of natural habitats and the habitats of species** as well as **disturbance of the species** for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.”

What are ‘appropriate steps’ to avoid the deterioration of the natural habitat and the habitats of species?

Article 6(2) obliges Member States to take “appropriate steps” to avoid the deterioration of the natural habitats and the habitats of species for which the Natura 2000 marine site has been designated. CJEU rulings have confirmed the need for the legal regime to be specific, coherent and complete, and capable of ensuring the sustainable management and effective protection of the sites concerned.⁴⁶

In the context of fishing activities, appropriate steps could include (but are not limited to) risk assessments of potential impacts (although this is not a substitute for the obligation to carry out an appropriate assessment under Article 6(3)), reviews of fishing operations and fisheries plans, technical measures such as gear restrictions, and management measures such as zoning schemes.⁴⁷ These steps must enable the competent authority to guarantee that the relevant activity will not cause deterioration or disturbance that could be significant in relation to the objectives of the Directive.⁴⁸

This is an obligation to take preventive measures, based on principle of prevention that is enshrined as a fundamental environmental principle of EU law and policy.⁴⁹ European Commission guidance states that such measures go beyond mere management measures, which are already covered by Article 6(1). Since the measures are based on prevention, “It is not acceptable to wait until deterioration or disturbances occur before taking measures.”⁵⁰

According to the CJEU, “a preventive measure complies with Article 6(2) of the Habitats Directive only if it is **guaranteed** that it will not cause any disturbance likely significantly to affect the objectives of that directive, particularly its conservation objectives.”⁵¹

Article 6(2) not only involves measures taken inside the protected site but may also encompass measure taken outside the site if those measures are necessary to avoid the deterioration or disturbance within the site. Furthermore, preventive measures need to be assessed on a case-by-

⁴⁶ *Commission v Greece* (C-293/07) paras 26 – 29 (available in French and Greek only).

⁴⁷ See N2K Group, *Review of fisheries management measures in Natura 2000 sites* <https://ec.europa.eu/environment/nature/natura2000/marine/docs/Review%20of%20fisheries%20management%20measures%20in%20Natura%202000%20sites.pdf>

⁴⁸ *Grüne Liga Sachsen* (C-399/14) para 53.

⁴⁹ The Principle of Prevention is enshrined in Article 191 TFEU as a fundamental environmental principle of EU law and policy.

⁵⁰ Commission Guidance (n 25) 26, citing *Commission v Ireland* (C-418/04) paras 207, 208.

⁵¹ *Commission v France* (C-241/08) para 32.

case⁵² basis and may require a Member State to take measures in relation to activities such as fishing and aquaculture; the CJEU jurisprudence makes clear that it is not permissible for Member States to generally exempt such activities from the scope of Article 6(2).⁵³

What is deterioration of natural habitats and habitats of species?

Under Article 6(2), measures are required to prevent the “deterioration of natural habitats and habitats of species.” These are the habitats listed in Annex I for which the site has been designated as well as habitats of species listed in Annex II of the Habitats Directive and Annex I of the Birds Directive, and of the migratory species covered by Article 4(2) of the Birds Directive for which the site has been designated.

Habitat deterioration occurs on a site when the area covered by the habitat type or habitat of the species in this site is reduced, or the specific structure and functions necessary for the long-term maintenance of that habitat or the status of the species which are associated with this habitat are reduced in comparison to their initial or restored condition. This assessment is done according to the site’s conservation objectives and its contribution to the coherence of the network.⁵⁴

By way of example, in *Commission v Ireland* the European Court of Justice (ECJ) held that Ireland had breached Article 6(2) of the Habitats Directive because it had not taken appropriate steps to prevent the deterioration of a protected habitat from overgrazing by sheep.⁵⁵ By analogy, it can be argued that Member States are required to take appropriate steps to prevent the deterioration of protected marine habitats from fishing activities such as bottom-trawling.

What is significant disturbance?

Under Article 6(2), Member States must also take appropriate steps to avoid significant disturbance to the species for which the site has been designated. As stated in Article 6(2), any such disturbance is to be assessed by reference to the objectives of the Directive i.e. to ensure that species are maintained at favourable conservation status. The definition of “favourable conservation status of species” in Article 1(i) set out several factors in this regard:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable element of its natural habitats;
- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future;
- There is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.

CJEU case law has confirmed that effects such as noise, vibrations, and isolation of sub-populations of a species are capable of causing significant species disturbance.⁵⁶ Therefore, failure by a Member State to take appropriate steps to prevent them constitutes a failure to fulfil obligations under Article 6(2) of the Habitats Directive.

⁵² Commission Guidance (n 25) 30.

⁵³ *Commission v France* (C-241/08) para 39.

⁵⁴ Commission Guidance (n 25) 31.

⁵⁵ *Commission v Ireland* (C-117/00).

⁵⁶ *Commission v Spain* (C-404/09) paras 135 – 152.

Accordingly, there is a strong basis for arguing that Member States are obliged to take measures in EU MPAs to prevent noise and vibrations produced by fishing vessels and fishing gears or as a result of drilling and constructions activities, which are liable to significantly disturb protected marine species. This is particularly so for the many marine mammals that are acutely sensitive to noise and whose conservation status is liable to be adversely impacted by its effects.

Article 6(2) must also be interpreted in accordance with the precautionary principle. This means that the very existence of a risk that an activity on a protected site might cause significant disturbances for a species is capable of constituting an infringement of Article 6(2) of the Habitats Directive, without a cause and effect relationship between that activity and significant disturbance to the species having to be proved.

While this toolkit focusses on Article 6 of the Habitats Directive, it is worth noting that the Directive sets out additional legal obligations for Member States to protect the species listed in Annex IV of the Directive (this covers a number of marine species, including all cetacean species). Under Article 12, Member States must take the requisite measures to establish a system of strict protection for these animal species, prohibiting all forms of deliberate capture or killing of specimens of these species in the wild and deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration. Under Article 12(4), Member States must also establish conservation measures to prevent the incidental capture of these species (e.g. being caught in fishing gear). These measures, including those to prevent disturbance, must be established both inside and outside of MPAs when necessary to protect Annex IV species.

How is Article 6(2) relevant to fishing activities?

Article 6(2) is relevant to fishing activities because it obliges Member States to take appropriate steps to prevent such activities causing habitat deterioration or species disturbance in EU MPAs.

Furthermore, the Commission Guidance suggests that Article 6(2) applies to a broader range of activities than Article 6(3). While Article 6(3) applies only to plans and projects, Article 6(2) applies to the “the performance of all ongoing activities, like agriculture, **fishing or water management**, that may not fall within the scope of Article 6(3).”⁵⁷

Therefore, and irrespective of the conclusion that fishing licences amount to a 'plan or project' within the meaning of Article 6(3) of the Habitats Directive (as discussed below), the competent authority is duty-bound under Article 6(2) of the Directive to take appropriate steps to avoid deterioration and disturbance of habitats and species in marine Natura 2000 sites as a result of fishing.

Do Articles 6(2) and 6(3) of the Habitats Directive provide the same level of protection?

CJEU case law has confirmed that Articles 6(2) and 6(3) of the Habitats Directive are designed to ensure the same level of protection.⁵⁸ Consequently, where Article 6(2) applies to the authorisation of an activity, such authorisation must be 'in substantive terms' the same as an authorisation under Article 6(3).⁵⁹

⁵⁷ Commission Guidance (n 25) 26.

⁵⁸ See *Sweetman* (C-258/11) at paras 32-33, which confirms earlier rulings in *Commission v France* (C-241/08) para 30 and *Commission v Ireland* (C-418/04).

⁵⁹ *Waddenzee* (C-127/02) para 36.

Legal Text: Article 6(3) HD

“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.”

What activities constitute a ‘plan or project’ for the purpose of Article 6(3)?

The terms 'plan' and 'project' are not defined in the Habitats Directive. However, the CJEU has defined these terms in a broad manner so that they cover a wide range of activities, including fishing.

It is clear that the granting of a fishing licence can constitute a 'plan or project' within the meaning of Article 6(3). In the Waddenzee case – a landmark judgment from the CJEU on Article 6 of the Habitats Directive – the Court ruled that licences authorising a fleet of mechanical cockle fishers were covered by the definition of project for the purpose of Article 6(3). This was because the activity constituted an “intervention in the natural surroundings and landscape.”⁶⁰ In addition, the fact that the activity had been carried out at the protected site periodically for several years and that a licence had to be obtained for it every year, did not prevent it from being considered, at the time of each application for a new licence, as a distinct plan or project within the meaning of the Habitats Directive.⁶¹

Even where an activity does not constitute an intervention in the natural surroundings and landscape, it may be still be classified as a project or plan for the purpose of the Habitats Directive. In *Coöperatie Mobilisation*, the ECJ ruled that the grazing of cattle and the application of fertilisers on the surface of land or below its surface in the vicinity of Natura 2000 sites may be classified as a “project” requiring the need to carry out an appropriate assessment.⁶² In its judgment, the ECJ confirmed an expansive definition of a “project” that would require an appropriate assessment: the **crucial factor is whether the activity concerned is likely to have a significant effect on the protected site** by reference to the site's conservation objectives.⁶³

Accordingly, any fishing activity that is likely to have a significant effect on a protected site is legally required to be subject to an appropriate assessment.

In the context of plans, the ECJ has ruled that land use or spatial plans are covered by Article 6(3) to the extent that they are likely to have significant effects on a protected site.⁶⁴ By analogy, it can be argued that marine plans such as integrated coastal management plans or maritime spatial plans also need to be subject to an appropriate assessment.

⁶⁰ *Waddenzee* (C-127/02) para 29.

⁶¹ *Waddenzee* (C-127/02) para 28.

⁶² *Coöperatie Mobilisation* (C-293/17 and C-294/17) para 73.

⁶³ *Coöperatie Mobilisation* (C-293/17 and C-294/17) para 70. See also AG's Opinion para 117.

⁶⁴ *Commission v UK* (C-6/04) paras 51 – 56.

Aside from fishing activities, many other marine activities, such as aquaculture,⁶⁵ the construction of windfarms,⁶⁶ or fossil fuel extraction are also captured by the definition of project or plan.

Key Case: *Waddenzee* (C-127/02)

In the *Waddenzee* case, the ECJ delivered a landmark ruling on the Habitats Directive, particularly as it relates to fishing activities. Here, two NGOs brought a case before the Dutch national court, challenging the licence granted to a fishery for mechanical cockle fishing in the Wadden Sea SPA. They contended that this activity was adversely affecting the marine site through silt churning, destruction or impairment of mussel beds and seagrass meadows, and by causing a shortage of food resources for birds as a result of overfishing. The national court made a preliminary reference to the ECJ for the determination of a number of legal questions and in particular whether this activity fell within the scope of a project or plan under Article 6(3).

The ECJ ruled that mechanical cockle fishing did constitute a project for the purpose of the Habitats Directive. By relying on another EU law (the Environmental impact Assessment Directive 85/337/EEC) that did define the term ‘project’, the ECJ held that the relevant test in this case was whether the activity amounted to an “intervention in the natural surroundings and landscape”.

Furthermore, the fact that the activity had been carried out at the protected site periodically for several years, and that a licence had to be obtained for it every year, did not prevent it from being considered, at the time of each application for a new licence, as a distinct plan or project within the meaning of the Habitats Directive.

Accordingly, it was necessary to carry out an appropriate assessment before granting a mechanical cockle fishing licence if the competent authority determined that such a licence was likely to have a significant effect on the site.

When is an ‘appropriate assessment’ of plans or projects required?

An appropriate assessment must be carried out when a plan or project is “likely to have a significant effect” on an EU MPA. The Courts have repeatedly emphasised that this test of “likely significant effect” is a low threshold, requiring an assessment to be carried out whenever there is a doubt about the effects of a plan or project. The competent authority should conduct a screening to assess whether the project or plan is likely to have a significant effect on the site such that an “appropriate assessment” is necessary.⁶⁷

The case law has established that this test of “likely significant effect” means that an appropriate assessment must be conducted if it “cannot be excluded on the basis of objective information” that the plan or project will have significant effects on the site concerned.⁶⁸ In accordance with the precautionary principle, where there is any doubt as to the absence of significant effects (or in layman

⁶⁵ *Commission v Ireland* (C-418/04).

⁶⁶ European Commission, *Guidance Document: Wind energy developments and Natura 2000* https://ec.europa.eu/environment/nature/natura2000/management/docs/Wind_farms.pdf

⁶⁷ See eg *People over Wind* (C-323/17).

⁶⁸ *Waddenzee* (C-127/02) paras 43-45.

terms, unless it is 100% certain that the activity will not have any significant effect), an appropriate assessment must be carried out.⁶⁹

The CJEU has confirmed several other principles for determining when an appropriate assessment is necessary:

- The requirement to carry out an appropriate assessment may arise not only from plans or projects located within a protected site but also from plans or projects located outside a protected site. The test is whether there is likely to be a significant effect on the integrity of the protected site, regardless of where the project or plan is located.⁷⁰
- The practice of generally exempting certain activities, for instance fisheries activities, from the requirement to carry out an appropriate assessment does not comply with the provisions of Article 6(3).⁷¹ As each activity is unique, the assessment of site implications needs to be done on a case-by-case basis.⁷²
- Plans or projects cannot be excluded from the assessment obligation simply because they are not subject to prior authorisation under domestic law.⁷³ Thus, the fact that a fishing activity can be carried out without obtaining a fishing licence does not mean that it can be automatically exempted from the requirement to carry out an appropriate assessment. In such circumstances, the competent authority should immediately act to safeguard the MPA by suspending such activity until such time as a screening has been completed to determine whether the unlicensed fishing activity is likely to have a significant effect on the site. If so, an appropriate assessment will be required to fully assess the impacts.
- The size of the project is not relevant to the need to carry out an appropriate assessment, as this does not in itself preclude the possibility that it is likely to have a significant effect on a protected site."⁷⁴

Can pre-existing activities require an appropriate assessment?

An activity which has been carried out for many years, pre-dating the designation of the site as a protected area, and is repeatedly authorised for a limited period, may still constitute a plan or project.⁷⁵ Any such activity must therefore be subject to appropriate assessment if it is likely to have a significant effect on the site.

In *Stadt Papenburg*, the ECJ confirmed that no principle based on legal certainty or legitimate expectation precluded an activity from being subject to Article 6(3), even where that activity had been permanently authorised before the Habitats Directive came into effect.⁷⁶

A fishing activity must therefore be subject to appropriate assessment if it is likely to have a significant effect, regardless of when it has been undertaken for the first time.

What are the requirements for an appropriate assessment?

⁶⁹ *Waddenzee* (C-127/02) para 44.

⁷⁰ Commission Guidance (n 25) 41, citing *Commission v Germany* (C-142/16) para 29.

⁷¹ *Commission v France* (C-241/08)

⁷² *Waddenzee* (C-127/02) para 48. See also Commission Guidance (n 25) 50.

⁷³ *Commission v Germany* (C-98/03) paras 43- 45.

⁷⁴ *Commission v Ireland* (C-418/04) para 244.

⁷⁵ *Waddenzee* (C-127/02) para 28. See also AG's Opinion at paras 39 and 40.

⁷⁶ *Stadt Papenburg* (C-266/08) para 44.

The appropriate assessment must enable the Member State authority to establish whether a plan or project will have **adverse effects** on the integrity of the site in view of the site's conservation objectives. Although there is no prescribed procedure for carrying out the appropriate assessment, CJEU jurisprudence provides guidance on some of the legal requirements:

- The assessment must be based on the **best available scientific knowledge** in the field to identify the effects of the plan or project on the conservation objectives of the site.⁷⁷
- The appropriate assessment must **identify and catalogue the entire extent of the habitats and species for which the site is protected**.⁷⁸
- The assessment must "compare all the adverse effects arising from the plan or project with the site's conservation objectives. To that end, **both the adverse effects and the conservation objectives must be identified**."⁷⁹
- the assessment must also identify and **examine the implications of the proposed project for the typical species and habitats present on the site**, as their conservation may be essential for ensuring the favourable conservation status of the protected habitats and/or species on the site. The appropriate assessment must **also assess the implications of the project on the protected habitat types and species found outside the boundaries of the site**, insofar as this may also affect the conservation objectives of the site..⁸⁰
- An assessment cannot be considered appropriate "if it contains gaps and lacks complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubts as to the effects of the works proposed on the [protected site]".⁸¹
- Where the competent authority rejects the findings in a scientific expert opinion recommending that additional information be obtained, the appropriate assessment must include an **explicit and detailed statement of reasons**, capable of dispelling all reasonable scientific doubt concerning the effects of the work envisaged on the site concerned.⁸²
- The assessment must be undertaken **before any decision** on whether a plan or project will proceed is made.⁸³ It should be undertaken as soon as the effects that the project in question is likely to have on a protected site are sufficiently identifiable.⁸⁴
- The assessment of the project or plan has to be on a bespoke, case-by-case basis so that the effects of the proposed project or plan are ascertained in light of the specific characteristics and environmental conditions of the site concerned.⁸⁵ As such, **it is not permissible to generally exempt certain types of projects or plans from the appropriate assessment requirement**.

⁷⁷ *Waddenzee* (C-127/02) para 54.

⁷⁸ *Holohan v An Bord Pleanála* (C-461/17) para 37.

⁷⁹ *Waddenzee* (C-127/02) AG's Opinion, para 97.

⁸⁰ *Holohan v An Bord Pleanála* (C-461/17) para 40.

⁸¹ *Commission v Spain* (C-404/09) para 100.

⁸² *Holohan v An Bord Pleanála* (C-461/17) paras 48-52.

⁸³ *Waddenzee* (C-127/02) para 42.

⁸⁴ *Inter-Environnement Wallonie* (C-411/17) para 143.

⁸⁵ *Waddenzee* (C-127/02) para 48. See also Commission Guidance (n 25) 51.

Is there an obligation to consider cumulative impacts when doing the appropriate assessment?

Yes. Article 6(3) requires an 'in combination' assessment of each plan or project. That is, an assessment of the combined impacts of multiple plans or projects on the protected site must be performed by reference to the site's conservation objectives. As the ECJ has confirmed, "All aspects of the plan or project in question which may, either individually or in combination with other plans or projects, affect the conservation objectives of that site must be identified, in light of the best scientific knowledge in the field."⁸⁶

The Commission has also interpreted 'in-combination' as meaning the need to take account of cumulative impacts occurring over time. Accordingly, it may be necessary to consider other plans or projects which are "completed, approved but uncompleted, or proposed."⁸⁷ In its guidance, the Commission provides the example of a new project to build a road through a protected area. This may on its own not adversely affect the integrity of the site, but when considered in combination with an already approved housing development plan for the same area, these impacts may become significant enough to affect the integrity of the site.⁸⁸

In the context of fishing activities, an appropriate assessment would be required where:

- Where several licensed fishing activities in combination may be a threat to a marine Natura 2000 site, even if one individual fishing activity might not pose such a risk; or
- Where a non-fishing marine plan or project is being considered for authorisation which in combination with fishing may be a threat to a marine Natura 2000 site.

When can plans or projects proceed in a Natura 2000 site?

After Member States have undertaken the appropriate assessment, and in light of the conclusions of that assessment, the plan or project may only be approved if it can be ascertained that it will not adversely affect the integrity of the site concerned. Consistent with the precautionary principle, this is the case where "no reasonable scientific doubt remains as to the absence of such effects" (or in layman terms, when it is 100% certain that the plan or project will not have any adverse effect on the integrity of the site)⁸⁹ Such an assessment should be made by an independent scientific expert who does not have vested interests with the fishing industry or civil society.

Accordingly, the relevant competent authority must refuse to authorise the plan or project being considered where uncertainty remains as to whether there would be adverse effects on the integrity of the site.⁹⁰

What is the meaning of 'site integrity'?

A plan or project cannot proceed under Article 6(3) unless it is established that it will not adversely affect the integrity of the site concerned. The concept of "site integrity" is therefore of paramount importance when assessing the impacts of a project or plan.

"Site integrity" is not defined in the Habitats Directive, but the European courts have established that site integrity requires that:

⁸⁶ *Holohan v An Bord Pleanála* (C-461/17) para 43.

⁸⁷ Commission Guidance (n 25) 43.

⁸⁸ Commission Guidance (n 25) 43.

⁸⁹ *Waddenzee* (C-127/02) para 61.

⁹⁰ *Sweetman* (C-258/11) para 41.

- the site in question is preserved at a 'favourable conservation status';
- this entails “the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs, in accordance with the directive.”⁹¹

From an ecological perspective, the Commission has interpreted “site integrity” as meaning “the coherent sum of the site’s ecological structure, function and ecological processes, across its whole area, which enables it to sustain the habitats, complex of habitats and/or population of species for which the site is designated.”⁹²

As site integrity requires that the site in question is preserved at ‘favourable conservation status’, the definitions set out in Article 2(e) of the Habitats Directive shed further light on the meaning of site integrity:

“Conservation status of a natural habitat means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within the territory referred to in Article 2.

The conservative status of a natural habitat will be taken as "favourable" when:

- its natural range and areas it covers within that range are stable or increasing, and
- the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and
- the conservation status of its typical species is favourable”.

Accordingly, the Commission explains that an appropriate assessment of a plan or project must evaluate its effects on all the essential elements of the protected habitats, **including the typical species and those that play a role in the food chain of the site’s target features.**⁹³

As this makes clear, avoiding adverse effects on site integrity means taking an ‘ecosystem-based’ or ‘whole-site’ approach when assessing the impact of an activity on a site and deciding whether to allow an activity to go ahead or continue.⁹⁴ However, regulators and others often consider the impact of an activity on designated features (e.g. seagrass) in isolation, whereas the concept of ‘site integrity’ actually requires them to consider the impacts on other elements of the ecosystem – for example, the typical species associated with a protected habitat.

Applying the concept of site integrity to the assessment of fishing activities in MPAs, it is not sufficient for regulators to only assess the interactions between the fishing gear in question and the designated features of the site in isolation. Rather, the wider ecosystem impacts of the proposed activity must be assessed, including the impacts on the protected habitat’s typical species. For many offshore MPAs

⁹¹ *Sweetman* (C-258/11) para 39. See also AG’s Opinion paras 54 – 56.

⁹² Commission Guidance (n 25) 49.

⁹³ Commission Guidance (n 25) 5.

⁹⁴ JL Solandt and other, ‘Managing marine protected areas in Europe: moving from ‘feature-based’ to ‘whole-site’ management of sites’ (2019) https://www.researchgate.net/publication/336413838_Managing_marine_protected_areas_in_Europe_moving_from_'feature-based'_to_'whole-site'_management_of_sites

designated to protect sandbank habitats types (H1110), conservation measures have been proposed in the form of ‘partially protected sites’ that close between 5% and 40% of the site to bottom-towed fishing. However, such partial closures are not sufficient to protect the overall integrity of the site, its natural populations and functions. In these circumstances, the concept of site integrity means that regulators should close the entire site to fishing with bottom-towed gear.

Where the relevant site hosts a “priority natural habitat” (as defined in Article 2 of the Directive and marked with an asterisk in Annex I of the Directive - *Posidonia* seagrass beds and coastal lagoons in the marine environment), the competent authority cannot authorise activities where there is a risk of lasting harm to the ecological characteristics of the site.⁹⁵ Furthermore, “the lasting and irreparable loss of the whole or part of a priority of a priority natural habitat type whose conservation was the objective that justified the designation of the site will adversely affect the integrity of that site.”⁹⁶ In those circumstances, the plan or project cannot be authorised on the basis of Article 6(3) of the Habitats Directive. Although these pronouncements were made in relation to a priority natural habitat, the Commission has noted that the logic of this approach would also appear to apply to non-priority habitats.⁹⁷

As this section has sought to explain, the concept of site integrity means that regulators must assess the impacts of a project or plan on the basis of the whole-site features associated with the particular habitat type, including its typical species. These features will vary depending on the habitat type for which the site in question is designated. In order to assist in assessing these whole-site features, **Annex II** of this toolkit provides a set of ‘site integrity’ briefings for the most common marine habitat types protected under the Habitats Directive.

⁹⁵ *Sweetman* (C-258/11) para 43.

⁹⁶ *Sweetman* (C-258/11) para 46.

⁹⁷ Commission Guidance (n 25) 49.

Key Case: *Sweetman* (C-258/11)

This case related to a proposal for a road bypass, which would bring about the partial and permanent loss of a limestone pavement within a SAC. That SAC had been partially designated to protect the limestone pavement, a globally rare habitat that is listed in Annex I of the Habitats Directive as a Natura 2000 'priority' habitat.

In *Sweetman*, it was found that there was an adverse effect on 'site integrity', even though only 1.47 ha out of 270 ha of limestone pavement was lost. This demonstrates that 'site integrity' can be adversely affected even if there are only relatively small direct impacts on the protected habitat itself.

In paragraph 43 of the judgment, the ECJ held that competent national authorities cannot authorise interventions where there is a risk of lasting harm to the ecological characteristics of sites which host priority natural habitat types. That would particularly be so where there is a risk that an intervention of a particular kind will bring about the disappearance or the partial and irreparable destruction of a priority natural habitat type present on the site concerned.

The ECJ also held that if the competent national authority concludes that the plan or project will lead to **the lasting and irreparable loss of the whole or part of a priority natural habitat type** whose conservation was the objective that justified the designation of the site concerned as an SCI, the view should be taken that such a plan or project will adversely affect the integrity of that site (i.e. the plan or project should not be authorised – unless the Art 6(4) exemption is available).

The conclusions in *Sweetman* clearly support a holistic approach to the question of whether 'site integrity' is affected. They require protection not only of the protected habitats and species directly, but also of the constitutive characteristics of the site that are connected to a protected habitat or the habitat of a protected species.

What are 'mitigation measures' and how can the competent authority rely on them?

Mitigation measures are measures taken by the competent authority to prevent a project or plan from damaging a Natura 2000 site. Competent authorities can implement mitigation measures as way of complying with the Article 6(3) requirement that projects or plans do not adversely affect site integrity.

Importantly, such measures aim to prevent harmful effects from ever arising or from arising to a significant degree. By contrast, compensation measures, which are discussed below, do not prevent harmful effects, but aim to offset those effects by way of a separate project.

Mitigation measures, while not explicitly mentioned in the Habitats Directive, are relevant to the second prong of Article 6(3), the examination of potential adverse effects to the site.⁹⁸ Mitigation measures may be proposed by the proponent of the plan or project, and/or may be required by the competent authority.⁹⁹

In its guidance, the Commission indicates that mitigation measures may cover, for example:

⁹⁸ *Waddenzee* (C-127/02) para 108.

⁹⁹ Commission Guidance (n 25) 52.

- the dates and timetable of the implementation of the plan or project, for example, to avoid operations during the breeding season of protected species;
- the type of tools and operation to be carried out, for example, to avoid affecting a fragile habitat by using a specific dredge at an agreed distance from the shore; and
- rules determining which areas of the site are strictly inaccessible, for example, the hibernation burrows of a specific species.¹⁰⁰

The Commission Guidance also advises that the mitigation measures must be directly linked to the likely impacts that have been identified in the appropriate assessment and can only be defined once those impacts have been fully assessed and described in the appropriate assessment.¹⁰¹ Each mitigation measure must be described in detail, with an explanation based on scientific evidence of how it will eliminate or reduce the potential adverse impacts that have been identified. The ECJ has also stated that mitigation measures can only be taken into account in the appropriate assessment “when it is sufficiently certain that a measure will make an effective contribution to avoiding harm, guaranteeing beyond all reasonable doubt that the project will not adversely affect the integrity of the area.”¹⁰²

In the context of fishing activities, mitigation measures could encompass:

- the use of selective fishing gears to prevent the deterioration of protected habitats and reduce the bycatch of protected species.
- closing the sites (or parts of them) to fishing during times of the year where protected habitats and/or species are particularly vulnerable to fishing impacts
- requiring the use of acoustic deterrent devices to reduce levels of marine mammal bycatch

While mitigation measures can help to reduce the environmental damage of certain fishing methods, they are not always a panacea for preventing impacts to site integrity. For example, in one of our **Annex I** case studies below, the selective mesh used in the brown shrimp North Sea fishery in the Wash (a nearshore beam trawl fishery) has used some form of selection panel that reduces the amount of bycatch. It does not however eliminate bycatch. Such gear still leads to a huge number of individual cod being captured at a juvenile stage). As such, mitigation measures can still leave scientific doubt as to the significant effect on the integrity of the site and its populations of typical species. Similarly, there are often doubts about the effectiveness of acoustic deterrent devices (i.e. pingers) in preventing bycatch of certain marine mammals in fishing gears.

Mitigation measures cannot be taken into account during the screening stage to determine whether an appropriate assessment is required.¹⁰³ The fact that mitigation measures are envisaged presupposes that the project or plan is likely to have a significant effect on the site concerned; consequently, an appropriate assessment should be carried out.¹⁰⁴

¹⁰⁰ Commission Guidance (n 25) 51.

¹⁰¹ Commission Guidance (n 25) 51.

¹⁰² *Grace v An Bord Pleanála* (Case- C164/17)

¹⁰³ *People Over Wind* (C-323/17).

¹⁰⁴ *People Over Wind* (C-323/17) para 35.

Legal Text: Article 6(4) HD

“If, in spite of a negative assessment of the implications for the site and **in the absence of alternative solutions**, a plan or project must nevertheless be carried out for **imperative reasons of overriding public interest**, including those of a social or economic nature, the Member State shall **take all compensatory measures necessary** to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a **priority natural habitat type and/or a priority species**, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.”

What is the Article 6(4) exception and when does it apply?

Where the appropriate assessment carried out under Article 6(3) shows that the project or plan in question will adversely affect a Natura 2000 MPA, the public authority will usually have to refuse permission for the activity. However, Article 6(4) sets out an exception to this requirement, enabling the authority to authorise the plan or project in spite of a negative assessment. It is important to note that this is a limited exception, interpreted strictly by the European Courts, which is only available where all the conditions required by the Habitats Directive are fully satisfied.

The Article 6(4) exception is only available where all of the following conditions are satisfied:

- there is an absence of alternative solutions;
- the project or plan is necessary for imperative reasons of overriding public interest (IROPI); and
- the Member State takes all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.

In our view, it is highly unlikely that a destructive fishing project or plan could satisfy these conditions. There are likely to be alternative solutions available, such as permitting fishing in areas where there will not be an adverse effect on a protected site or requiring the use of less destructive fishing gear so as not to damage protected habitats. As discussed below, it is also unlikely that fishing would satisfy the IROPI test.

What are imperative reasons of overriding public interest?

If the competent authority can prove that there is an 'absence of alternatives' to the proposed plan or project, then it can still only proceed for 'imperative reasons of overriding public interest' (IROPI). This can include reasons of a social or economic nature where non-priority habitats or species will be affected (most marine habitats and species are classified as non-priority – see the [legal overview](#) above). In *Solva*, the CJEU considered the meaning of IROPI. It stated that, for an interest to be capable of justifying a plan or project under Article 6(4), it must be both 'public' and 'overriding'. That means that "it must be of such an importance that it can be weighed up against the objective of the

conservation of natural habitats and wild fauna and flora."¹⁰⁵ Examples of IROPI proposals that have previously been considered by the Commission can be found in the Commission's Guidance on Article 6(4) of the Habitats Directive.¹⁰⁶

Where the site in question hosts priority habitats or species,¹⁰⁷ the categories of IROPI that may apply are more limited. Specifically, only plans or projects relating to "human or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest" may be considered.¹⁰⁸ The more limited nature of IROPI in relation to priority sites was illustrated in *Commission v Spain*.¹⁰⁹ That case involved the approval of mining operations in a Natura 2000 site which was host to the brown bear, a priority species. The noise and vibrations caused by the mines, as well as the closure of a transit corridor of great importance to the bear population, caused significant disturbances to the site. The Spanish authorities argued that there were IROPI in favour of maintaining the mining operations, namely security of supply, the maintenance of employment, and the definitive character of the authorisations. The CJEU held that the reasons could not support a derogation in that case, as they did not fall within the specific categories listed in Article 6(4), and the site was host to a priority species.¹¹⁰

In reality, the Article 6(4) exemption is unlikely to apply in the case of fishing.¹¹¹ It is almost impossible to conclude that fishing by commercial companies is an imperative reason of overriding public interest; rather the main purpose of this exemption is to facilitate significant infrastructure works, such as port developments.¹¹² The Commission has also taken the view that "the public interest can only be overridden if it is a long-term interest; short-term economic interests or other interests which would only yield short-term benefits for the society would not appear to be sufficient to outweigh the long-term conservation interests protected by the Directive."¹¹³ It can thus be argued that destructive fishing would only deliver short-term benefits (if any) that would not be in the public interest when weighed against the long-term benefit provided by the MPA (including economic benefits¹¹⁴) and the public interest in conserving them for future generations. Additionally, there are likely to be alternative solutions available, such as fishing in areas where there will not be an adverse effect on a protected site or using less destructive fishing gear so as not to damage protected habitats.

What are 'compensatory measures' and how can the competent authority rely on them?

In contrast to mitigation measures, compensatory measures do not prevent harmful effects in an MPA, but aim to compensate for those effects by providing suitable habitats elsewhere. Such measures are

¹⁰⁵ *Solvay* (C-182/10) para 75.

¹⁰⁶ European Commission, *Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC* (2007) 8 https://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf

¹⁰⁷ See section [hyperlink to be inserted] above.

¹⁰⁸ Habitats Directive, art 6(4).

¹⁰⁹ *Commission v Spain* (C-404/09)

¹¹⁰ *Commission v Spain* (C-404/09) paras 193-195.

¹¹¹ For academic analysis, see T Appleby and J Harrison, 'Taking the Pulse of Environmental and Fisheries Law: The Common Fisheries Policy, the Habitats Directive, and Brexit' (2019) 31 *Journal of Environmental Law* 443, 447.

¹¹² see 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* (2007) 7-9.

¹¹³ European Commission, *Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC* (2007) 8 https://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf

¹¹⁴ <https://ieep.eu/publications/the-economic-benefits-of-marine-protected-areas-in-europe>

required where a competent authority proceeds with a project or plan that will adversely affect site integrity, but this can only happen in the limited circumstances set out under Article 6(4) of the Habitats Directive.

Compensatory measures can only be considered in the context of a decision to authorise a plan or project after it has already been determined that that project or plan will adversely affect the site concerned. As such, compensatory measures do not form part of the appropriate assessment under Article 6(3) and cannot be relied upon to claim that site integrity will not be impacted.

Where a project or plan is likely to have a significant effect on site integrity, compensatory measures will only be appropriate where (i) there is no alternative solution and (ii) the project or plan must be carried out for “imperative reasons of overriding public interest”. It is not possible to simply offer compensation in order to bypass these tests.

What are adequate compensatory measures?

In terms of what might constitute an adequate compensation measure, the Commission indicates that such measures could consist of "the re-creation of a comparable habitat, the biological improvement of a substandard habitat or even the addition to Natura 2000 of an existing site the proposal of which under the [Habitats Directive] had not been deemed essential at the time of the drawing up of the biogeographical list."¹¹⁵

In *Briels*, the ECJ held that the provision of new habitat within a protected site constitutes a compensatory measure, not a mitigation measure, and therefore had to comply with the IROPI requirements of Article 6(4).¹¹⁶

Frequently Asked Questions – MPAs and the Common Fisheries Policy

Please note that the following questions are relevant only where the activity being challenged is a fishing activity.

What is the relationship between the Common Fisheries Policy and EU conservation legislation?

Fishing activities represent the most serious pressure on the marine protected habitats and species in EU waters, particularly in MPAs where trawling intensity can be greater than in waters not designated as MPAs.¹¹⁷ Fish are a shared resource among the EU member states, with EU-registered vessels in general having equal fishing access to all the EU waters and resources that are managed under the EU's Common Fisheries Policy (CFP).¹¹⁸ Given the shared nature of this resource, fishing under the CFP is regulated as an exclusive competence of the EU.¹¹⁹

The entitlement of member state vessels to fish in the waters of another member state can give rise to conflict where a member state seeks to introduce conservation measures for an MPA which are likely to affect the fishing rights of vessels of other member states. This scenario arises in respect of

¹¹⁵ Commission Guidance (n 25) 64.

¹¹⁶ *Briels v Minister van Infrastructuur en Milieu* (C-521/12).

¹¹⁷ Dureuil et al. 2019. Elevated trawling inside protected areas undermines conservation outcomes in global fishing hot spot. *Science* 21: 1403-1407.

¹¹⁸ There are several exceptions to this entitlement. For example, EU countries can impose certain limitations on other Member States vessels from fishing in waters up to 12 nautical miles from their coasts.

¹¹⁹ TFEU, art 3.

offshore MPAs located beyond the 12 nautical miles zone, where other member states have access rights under the CFP.

Article 11 of the CFP Basic Regulation 1380/2013 sets out procedures for introducing conservation measures in such circumstances. Member states may adopt such measures for the purpose of complying with their obligations under Article 13(4) of the Marine Strategy Framework Directive, Article 4 of the Birds Directive or Article 6 of the Habitats Directive. The objective of Article 11 is wholly concerned with environmental conservation, not fisheries conservation (i.e. the conservation of fish stocks). As such, all measures passed pursuant to Article 11 need to be sufficiently environmentally robust to ensure that the Member State is complying with its EU environmental law obligations.

Legal Text: Article 11 CFP

Article 11 (1) “Member States are empowered to adopt **conservation measures** not affecting fishing vessels of other Member States that are applicable to waters under their sovereignty or jurisdiction and that are necessary for the purpose of complying with their obligations under Article 13(4) of Directive 2008/56/EC, Article 4 of Directive 2009/147/EC or Article 6 of Directive 92/43/EEC [...]”

Article 11(2) “Where a Member State (“the initiating Member State”) considers that measures need to be adopted for the purpose of complying with the obligations referred to in paragraph 1 and **other Member States have a direct management interest** in the fishery to be affected by such measures, the Commission shall be empowered to adopt such measures, upon request, by means of delegated acts [...]”

Article 11(3) “[...] The initiating Member State and the other Member States having a direct management interest may submit a **joint recommendation**, as referred to in Article 18(1), within six months from the provision of sufficient information. The Commission shall adopt the measures, taking into account any available scientific advice, within three months from receipt of a complete request [...]”

How are the conservation measures adopted under Article 11 CFP?

Article 11 CFP enables the adoption of conservation measures in marine protected areas where those measures are necessary under Article 6 of the Habitats Directive, Article 4 of the Birds Directive or Article 13(4) of the Marine Strategy Framework Directive. There are two scenarios for the adoption of such measures:

- I. Where the proposed measures do not affect fishing vessels of other Member States, the Member State under whose sovereignty or jurisdiction the MPA is located is empowered to unilaterally adopt conservation measures in accordance with Article 11(1) CFP.
- II. The second scenario arises where the proposed conservation measures would affect a fishery in which another Member State has a direct management interest. In this case, the relevant Member States may cooperate at a regional level to prepare and submit a joint recommendation to the Commission. After assessing whether the proposed measures are necessary in accordance with the obligations set out in Article 11(1), the Commission is empowered to adopt a delegated act to give effect to the measures.

How does the joint recommendation procedure work?

The joint recommendation procedure provides for a collaborative process between affected Member States for proposing conservation measures, with the Commission having the ultimate decision-making powers in respect of the adoption of such measures.

First, the initiating Member State must provide the European Commission and the potentially affected Member States with 'relevant' information on the measures. Relevant information includes the rationale of measures, scientific evidence in support and details on practical implementation and enforcement.

The initiating Member States and the affected Member States then work together to submit a joint recommendation to the Commission setting out the proposed conservation measures. This has to be done within six months of the provision of 'sufficient information' by the initiating Member State.

The European Commission is then empowered to adopt the recommended measures by way of a delegated act within three months from receipt of a "complete request", taking into account any available scientific advice. If the Member States have not been able to agree to a joint recommendation or if the joint recommendation they have agreed to does not comply with the conservation obligations set out in Article 11(1), then the Commission is empowered to propose its own conservation measures by way of the co-decision legislative procedure.

Unfortunately, as the European Environment Agency has stated, the joint recommendation procedure has "not ensure[d] the efficient management and regulation of fisheries activities that have a negative impact on protected habitats and species in designated Natura 2000 sites."¹²⁰ The procedure is open to abuse from Member States who seek to prioritise their own fishing interests and obstruct any efforts to agree reasonable conservation measures. The Commission has now sought to address this by confirming in a recent discussion paper that during the joint recommendation procedure all participating Member States have a 'shared responsibility' to ensure that the legal requirements of the Habitats Directive are met through the introduction of appropriate conservation measures. A refusal to agree to a joint recommendation can therefore constitute an infringement of the 'shared responsibility' doctrine as well as the Habitats Directive, even where the MPA concerned is located outside the territory of the obstructing Member State.

What are the opportunities for advocacy in relation to the joint recommendation procedure?

There are several opportunities for NGOs and other campaigners to engage in advocacy during the joint recommendation procedure. These opportunities are illustrated in the flowcharts set out below.

Most importantly, it is very important to try to be part of the discussions with the authorities as early as possible, while the process is still in its informal stage. Past experiences have shown that even when the first proposal by the initiating Member State was good, later negotiations with neighbouring countries have inevitably led to a watering down of the measures proposed. This means that:

- National NGOs should push for as ambitious proposals as possible from the start
- NGOs in the initiating Member State should ask support from NGO networks, such as Seas At Risk, to get NGOs in neighbouring countries involved and secure the support of neighbouring governments for ambitious measures as early as possible.

¹²⁰ <https://www.eea.europa.eu/publications/marine-messages-2> (see p. 31).

Seas At Risk and ClientEarth have previously given a webinar on the process for establishing conservation measures under Art 11 CFP and how NGOs can get involved in this process. For more information, a recording of this webinar is available [online](#).

How can Member States adopt conservation measures in relation to inshore fishing?

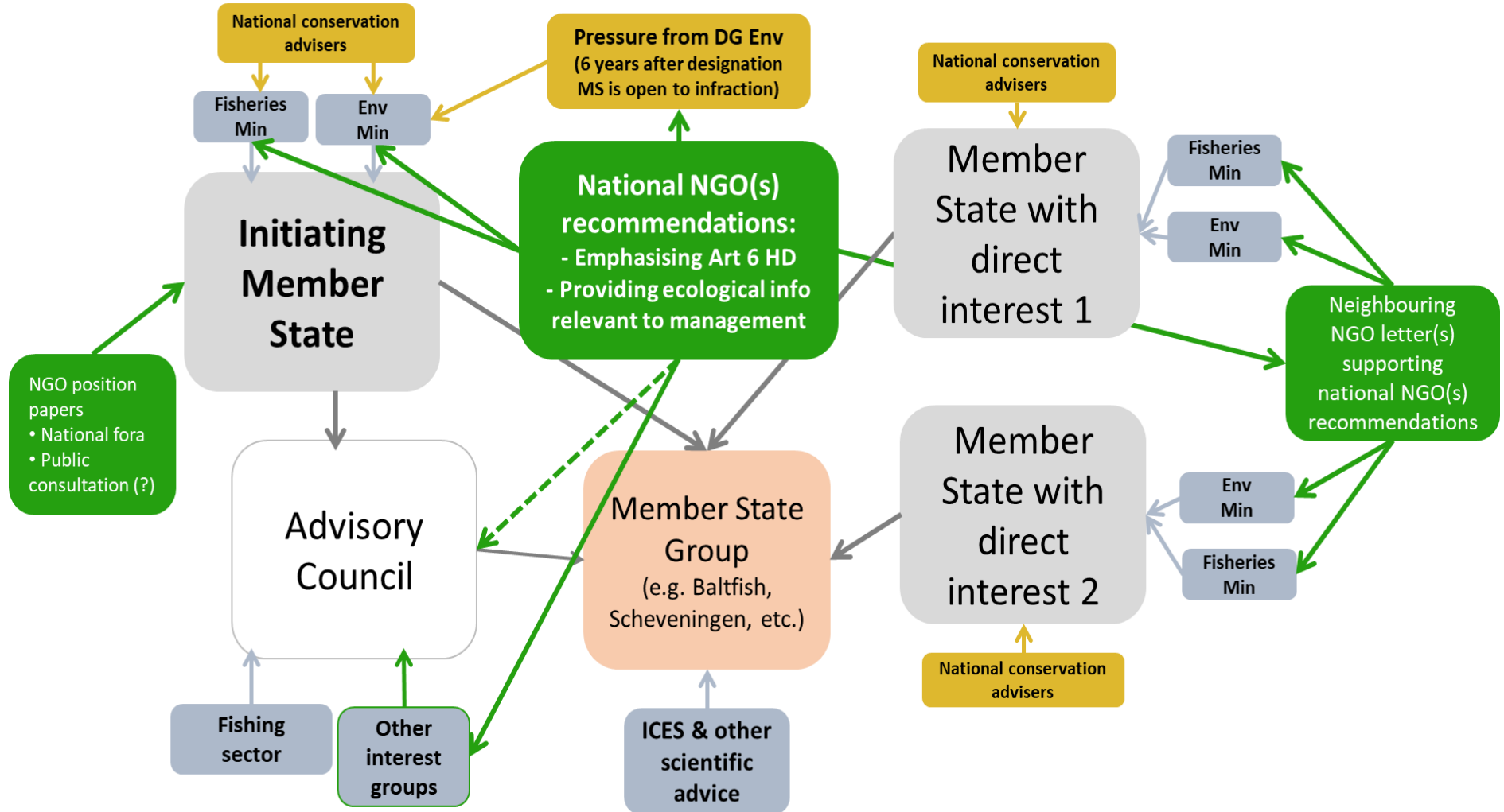
Aside from the procedures under Article 11 CFP, Member States are also entitled to adopt conservation measures within 12 nautical miles of its baseline, in accordance with Art 20 CFP. The Commission has supported this interpretation in its Staff Working Document, where it is stated that “[w]ithout prejudice to the [Article 11 scenarios], where the conservation measures apply exclusively within the 12 nautical miles zone, Member States may also adopt them pursuant to Article 20 of the CFP under the conditions set therein.”¹²¹ The requirements for adopting conservation measures under Article 20 CFP are that:

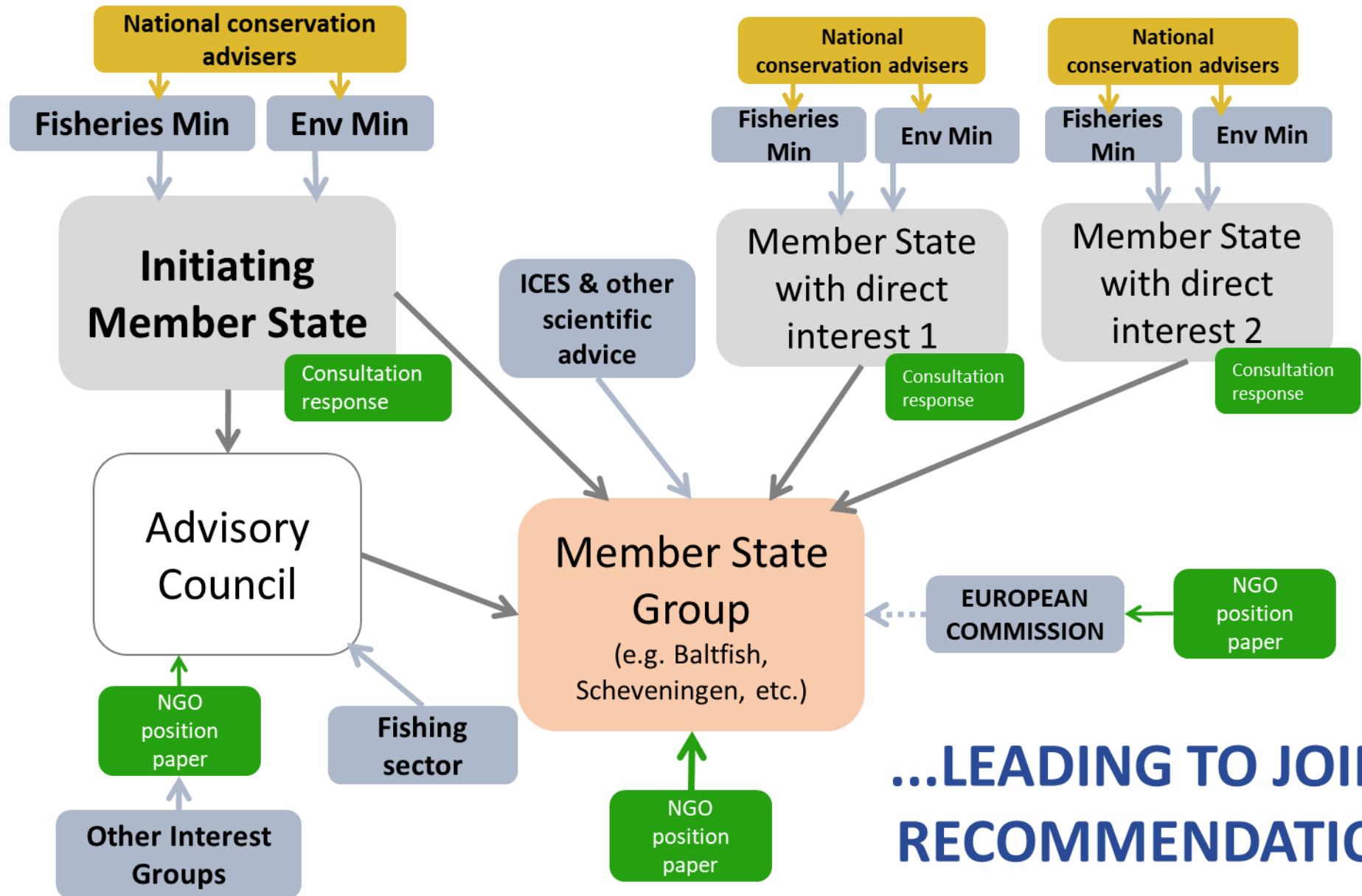
- I. the measures are within the Member State’s 12 nautical mile zone;
- I. the measures are “non-discriminatory” (i.e. the measures must ensure that all vessels regardless of their flag state are operating under similar conditions so that there is a level playing field for all fishers);
- II. the Union has not adopted measures addressing conservation and management specifically for the marine area concerned or specifically addressing the problem identified by the Member State concerned;
- III. the measures are compatible with the objectives set out in Article 2 of the CFP and shall be at least as stringent as measures under Union law. The introduction of appropriate conservation measures are likely to be compatible with the objectives of the CFP, which include implementing the ecosystem-based approach to fisheries management so as to ensure that negative impacts of fishing activities on the marine ecosystem are minimised, and ensuring that aquaculture and fisheries activities avoid the degradation of the marine environment.
- IV. Where the measures are liable to affect the fishing vessels of other Member States, consultation with the Commission, the relevant Member States and the relevant Advisory Councils is necessary before the measures can be adopted.

Finally, while the CFP does permit conservation measures to be introduced within the 12 nautical mile zone, it is worth bearing in mind that a Member State may still have fishing access agreements in place with another Member State that could affect the ability to introduce conservation measures within the 12 nautical mile zone.

¹²¹ 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* (SWD 2018) 2.

Advocacy Opportunities during Article 11 CFP Joint Recommendation Procedure





4. LEGAL TOOLS FOR INTERVENTION

KEY POINTS

If you are local campaigner or NGO fighting to protect an EU MPA, there are a number of legal tools available to you to ensure that the site is being managed in accordance with EU conservation law and to hold the public authority accountable for its decision-making. This section aims to empower campaigners by providing an overview of these tools and how they can be used to protect the marine environment.

As a preliminary issue, one of the most important tasks is to identify the competent authority who will be the object of much of the campaign strategy. The competent authority is the public body responsible for managing the Natura 2000 site or for regulating activities that may affect the site. For further information on identifying the competent authority, see the [Factual Background](#) section above.

This section provides information on the following tools for intervention:

- Making a request for environmental information;
- Engaging in advocacy with the competent authority; and
- Bringing a legal case before a national court.

Access to environmental information

As is clear from the factual briefing section above, information gathering is a vital component of successfully challenging decisions that permit environmentally destructive activities in MPAs. Much of this information may be held by the relevant competent authority or other public bodies responsible for the management of the site in question. Such information could include:

- Reports on the conservation status of the site, including its protected habitats/and or species;
- Information about the conservation measures that have been established for the site and any scientific information underpinning them;
- The details of any licences or permits that have been granted for activities affecting the site;
- The details of any assessments undertaken relating to the impacts of activities on the site;
- The details of any decisions affecting the site that have been made by a public authority and the reasons for those decisions.

If relevant information is not already publicly available on the authority's website, then it can be requested directly from the authority. This section provides guidance on how to request such environmental information.

The right of access to environmental information is a cornerstone of environmental democracy and justice in the EU. Under the Environmental Information Directive, members of the public have a right to request environmental information from public authorities and such a request can only be refused

in limited circumstances.¹²² The Directive has been implemented in national laws in all EU Member States.¹²³ We describe below the minimum obligations flowing from the Directive that should apply in all Member States.

Article 2(1) provides a broad and non-exhaustive definition of the type environmental information that can be sought. Of particular relevance to this toolkit, it includes:

“any information in written, visual, aural, electronic or any other material form on:

(a) **the state of the elements of the environment**, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, **coastal and marine areas**, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

...

(c) **measures (including administrative measures)**, such as **policies, legislation, plans, programmes, environmental agreements, and activities** affecting or likely to affect the elements and factors referred to in (a) ...as well as measures or activities designed to protect those elements;

...

The definition is not just limited to documents; environmental information can include information in any material form, including paper documents, photographs, illustrations, video and audio recordings and computer files.

The Environmental Information Directive requires that public authorities make available environmental information held by or for it to any applicant at his request and without an interest having to be stated.¹²⁴ Requests for access to information shall be responded to as soon as possible and, in any event, within one month after receipt, unless the volume and complexity of the requested information justifies an extension to two months.¹²⁵ Public authorities must also provide adequate reasons for refusing access to environmental information, which refusal can only be based on the limited grounds provided for under the Directive.¹²⁶ Examination of information on site shall be free of charge and public authorities may not charge more than a reasonable amount for supplying information.¹²⁷ Authorities also have a duty to inform members of the public of their rights in relation to accessing environmental information and to provide information and guidance on the exercise of those rights.¹²⁸

¹²² Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC

¹²³ The EU Commission provides a list of implementing legislation under the following link: <<https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32003L0004>>. The list is not necessarily fully up-to-date but may be a good starting point.

¹²⁴ Environmental Information Directive, art 3(1)

¹²⁵ Environmental Information Directive, art 3(2).

¹²⁶ Environmental Information Directive, art 4.

¹²⁷ Environmental Information Directive, art 5.

¹²⁸ Environmental Information Directive, art 3(5).

Making a Request for Environmental information

A request for environmental information should generally be made in written format to the public body that holds the information.

It is useful to bear in mind the following points when making a request:

- Notify the authority that you are making a request for information and that you consider the information to fall under the definition of “environmental information” under the Environmental Information Directive.¹²⁹ If possible, also cite the national law implementing the Environmental Information Directive. This will help to remind the authority that it has a legal obligation to reply to your request within the time limits.
- Information requests should always be targeted. Public authorities can justify not replying within the legal deadlines if a request is overly broad. You may also risk compromising relations with the authority. To make your request as targeted as possible, think about narrowing it down based on the following considerations:
 - The form/type of information, e.g. by reference to specific documents or categories of documents that are relevant to the matter concerned, including correspondence, meeting minutes, draft decisions, notifications, legal advice etc.;
 - A specific author/actor, e.g. all correspondence/meeting with a specific person or rank of an official;
 - The content of the document, e.g. all information containing positions taken by the public authorities, lobby positions sent by third parties, etc;
 - A decision-making process, e.g. all information pertaining to the granting of a specific license;
 - A time span, e.g. all information created during a period between two identified dates and that is relevant to the matter complained of.
- As regards environmental information, there is no need to give a reason to justify your request – you can simply state what information or documents you are looking for. However, since certain national information laws require this a precondition, it can at times be useful to include a justification if you are not sure that all of the information you request is to be considered “environmental”.
- You can ask for information to be made available in a specific format (it is common to ask authorities to provide the information electronically).
- Ask the authority to confirm that they have received your information access request and to confirm the date by which they will provide the information.
- In certain Member States (such as Germany), the public authorities sometimes impose charges for disclosing environmental information. In these Member States, it is advisable to

¹²⁹ EU Member States also usually have access to information laws that allow for the public to request information that does not relate to the environment. However, in many states the regime for access to environmental information is more favourable to the applicant, so you want to indicate that you consider the information to be “environmental information.”

indicate in the request that you would like to be informed beforehand if costs above a certain threshold (such as €50) arise from the processing of the request.

If you do not receive an acknowledgement of receipt of your request within 2-3 days, it is advisable to remind the authority of your request. Once you have received an acknowledgement of receipt, be sure to mark in your calendar the date by which the deadline to reply expires (this should be one month maximum, sometimes less based on national law). Be sure to follow up with the authority, if you do not receive a reply by the legal deadline.

If you receive a (partial) refusal to your request and you disagree with that refusal, it can be worth filing an administrative challenge of the decision. Such administrative challenges are in most Member States at minimal costs. In ClientEarth's experience, more access tends to be granted following a well-reasoned administrative appeal. The most common ground to challenge a refusal are:

- (a) Lack of reply;
- (b) Mischaracterisation of the scope of the request;
- (c) Failure to identify environmental information;
- (d) Failure to consider partial disclosure;
- (e) Failure to rely on an exception / give reasons;
- (f) Errors in law in relying on specific exceptions;
- (g) Failure to consider/weigh public interest in disclosure;
- (h) Failure to characterize information as relating to emissions into the environment.

For additional information about how to make access to information requests and, in particular, how to challenge refusals, here are some resources:

- On challenging information refusals: <https://www.youtube.com/watch?v=GoCT6AUDIZ0>
- On access to environmental information and access to justice in the EU, see chapter 1 of ClientEarth's '[Access to Justice in European Union Law: A Legal guide on Access to Justice in environmental matters](#)'.

Advocacy with the competent authority

During the initial phase of the campaign, advocacy with the competent authority will be the most cost-effective method for challenging activities in marine protected sites. Even where no litigation is contemplated, civic engagement can influence decision-making by leveraging strong legal arguments supported by scientific evidence together with public pressure for the environmental protection of the site.

Correspondence with the Competent Authority

Engaging in written correspondence with the competent authority can be an effective way to point out the legal requirements and communicate your recommendations for managing the marine site concerned. It is worth taking the following on board when corresponding with the competent authority:

- Clearly identify the facts at issue, such as the name of the site, the activities concerned, and how those activities are adversely affecting the site. Where necessary, refer to relevant scientific evidence and other evidence in support of your factual claims.
- Explain what the law requires and how the competent authority is acting unlawfully by failing to address this situation.

- Support your arguments by reference to EU legislation and case law. Use the exact terms set out in the Habitats Directive where relevant.
- Lead with the strongest argument. If you have other good arguments, be sure to also include them later in the letter but take care not to include personal attacks or legal arguments that have no legal basis.
- If possible, set out what action needs to be taken to ensure that the marine site is lawfully managed.
- If you are collaborating with other NGOs, ask them to contribute to and co-sign the letter. This will give greater weight to your letter by showing that your arguments have broad support.
- If it is likely to take some time for the competent authority to respond in full to your letter, ask the authority to confirm that they have received your letter and to provide a timeline for providing a substantive response.
- When responding to a letter from the authority, respond point by point. This will help to clarify points of agreement and disagreement.
- Demand justifications for any differences in the competent authority's interpretation of the law – so that you can understand and refute their point.

If you would like to see a draft sample letter to competent authorities setting out the relevant legal arguments, please get in touch with Seas At Risk or ClientEarth who can provide you with a copy.

Reports and Position Papers

It may be worth preparing a report or position paper as part of the advocacy strategy. Such documents can be highly effective for communicating the key legal arguments, establishing the factual basis for challenging the management of Natura 2000 sites, and rallying public support.

A position paper is a short document succinctly setting out the position of a campaign on a particular issue, such as a project or plan that will affect an MPA. To be an effective advocacy tool, the paper should set out the NGO's position by reference to strong legal arguments and scientific evidence. A summary of the key asks or recommendations should be set out at the start of the paper where it is most likely to catch the attention of key decision-makers.

NGO-commissioned reports, based on the best available scientific evidence, can often provide a strong factual basis for challenging the management of MPAs. Such reports can also significantly shape the course of legal proceedings. For example, in *Commission v Ireland*, the Commission relied on a report by BirdWatch Ireland and the Royal Society for the Protection of Birds to successfully bring infringement proceedings against Ireland for failing to take steps to avoid the deterioration of a protected site.¹³⁰ Reports can also be useful reference points when engaging in correspondence with competent authorities.

Public consultations and official working groups

Public consultations provide another avenue for engaging in advocacy with public authorities, who are usually required to consult the public before taking environmental decisions. Public consultations can

¹³⁰ *Commission v Ireland* (C-418/04) paras 116 – 119.

take various forms, such as public meetings or notices in the local media inviting comments from members of the public.

Under Article 6(3) of the Habitats Directive, Member States are obliged to only authorise a plan or project where “if appropriate, after having obtained the opinion of the general public.” More generally, the Aarhus Convention provides that members of the public are entitled to participate in environmental decision-making in relation to the approval of specific activities that have a significant effect on the environment that are likely to affect them or are otherwise of interest to them.¹³¹ The Convention also requires that there are appropriate arrangements for the public to participate in the preparation of plans and programmes, policies, executive regulations and laws.¹³²

If you become aware that the relevant authority is planning to make a decision but has not announced any consultation, you should intervene by asking the authority to conduct a public consultation in accordance with the requirements of the Aarhus Convention and all applicable national laws. If a decision has already been made without a public consultation, you should write to the authority calling on them to justify why no public consultation happened and to explain to you how that is in accordance with the requirements of the Habitats Directive and the Aarhus Convention.

In a growing number of countries, authorities have established working groups to consult stakeholders on a wide range of issues, including MPAs. Find out whether such a group exists and whether your organisation can take part in the discussions. Often these groups will be consulted in advance on government proposals and will be given the opportunity to debate proposals in open discussions with authorities. If possible, form alliances with other NGOs in the group to present unified views on the issues discussed.

Pre-litigation procedure

Where, despite a strenuous advocacy campaign, the competent authority continues to act in a way that is likely to jeopardise the MPA concerned, then it may be necessary to bring a legal case asking a court, tribunal, or administrative body to determine the legality of the competent authority’s conduct.

While legal action can be a highly effective way of ensuring appropriate management of EU MPAs where there has been a clear breach of legal obligations, it is important to carefully consider all the options available before bringing a legal case. Losing a case brings both reputational risks and financial risks, and a negative judicial ruling in some jurisdictions can create an unhelpful precedent, hindering you or other environmental NGOs from bringing similar cases in the future. While it can be difficult to predict whether a legal case will be successful, you should always discuss the merits of your claim with a lawyer before committing to this course of action.

Instructing lawyers

The first thing to do in preparing for litigation is to instruct lawyers who can advise on legal matters related to the case, prepare the necessary legal papers, and represent you in court (if necessary). Finding the right lawyer can make a big difference to your chances of success. If possible, make sure that your lawyers have experience in bringing environmental cases under the Habitats Directive, even if it is not in the marine environment.

¹³¹ UNECE Convention on Access to information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (‘Aarhus Convention’), arts 6, 7.

¹³² Aarhus Convention, arts 7 and 8. The obligations for plans and programmes are stronger (clearly mandatory), while the obligations for policies, executive regulations and generally applicable legally binding normative instruments (laws) are more aspirational.

You may decide that you want to represent yourself without a lawyer and, subject to national law, you may be entitled to do so. However, be aware that having a skilled and knowledgeable lawyer to advise you can significantly increase your chance of winning a case. Furthermore, you may still be exposed to financial risks if you lose the case.

Assessing time limits and legal standing

Before initiating the legal claim, ask your lawyer to confirm that you have “legal standing” to bring the claim and that you are within the time limit permitted for bringing the claim. If these preconditions are not met, your case may be dismissed without any hearing of the merits of your legal arguments.

“Standing” is a legal doctrine that requires a person to demonstrate that they have a sufficiently close connection to the subject matter of the claim. Standing rules differ from Member State to Member State and there are substantial differences as to when an individual or NGO is to be considered as having a sufficient “interest” in the matter that entitles them to bring a claim. Moreover, certain countries have specific laws that give extended rights of standing to environmental NGOs.

While national standing rules differ, as a matter of EU law it must be possible for an environmental NGO to bring judicial proceedings to challenge a potential violation of Article 6(3) of the Habitats Directive.¹³³ However, does not prevent Member States from imposing specific requirements that an NGO needs to fulfil in order to be granted standing, as long as these are not unduly restrictive. For instance, certain Member States require that an NGO has a particular statutory purpose related to nature protection or require NGOs to demonstrate a history of being involved in environmental protection of a specific area and in engaging in civic advocacy with the relevant competent authority.

As a matter of EU law, the rights for individual claimants is less clear, though an argument can be made that persons “directly concerned” by such a violation must also have access to the national courts. In some Member States, individuals will find it difficult to substantiate standing in the case of a harm that does not specifically affect their health or property but “only” nature. In other Member States, individuals will be able to obtain standing if they reside close to the marine site or can establish that the decision to be challenge will impact them in some way.

It is also critical to ascertain the time limit for bringing a claim. Cases challenging the decision-making of a public body usually need to be brought promptly (within a matter of months or even weeks) after the decision has been made. If a claim is initiated after this deadline, there is a high risk that it will be barred from progressing.

Legal costs

Going to court or a tribunal can be expensive, so you should talk to your lawyer about the legal costs involved as soon as possible. In some jurisdictions, it is part of the professional code of conduct for lawyers to provide information about their legal fees. Apart from your lawyer’s fees, other legal costs could include expert fees, court administration fees and, if you lose, possibly the legal costs of the other party to the proceedings. Although it can be difficult to predict litigation costs with any certainty, it may be helpful to ask your lawyer for an estimate of the legal costs that could be incurred.

You can also talk to your lawyer about the different options for funding a case. In some jurisdictions, legal aid may be available for bringing public interest environmental law claims. Your lawyer could also be willing to work on a conditional fee arrangement, whereby a fee is only charged if the claim is successful and some or all of the fees can be recovered from the losing party. Litigation crowdfunding may also be available, where members of the public are asked to make a contribution to the legal

¹³³ Case C-243/15, *Lesoochránárske zoskupenie VLK v Obvodný úrad Trenčín* (Slovak Bears II) para 56.

costs of the case. The availability of funding options varies from jurisdiction to jurisdiction and in some instances may be prohibited. It is therefore essential to first discuss any alternative funding arrangements with your lawyer.

Litigation at the national level

Where the decision making of a national competent authority is unlawful, it may be possible to be bring a challenge before a national court or body. The availability of such a legal challenge differs across the EU Member States – in some jurisdictions there can be prohibitive restrictions relating to legal costs or the need to demonstrate “standing” that curtail access to justice for environmental claims. Litigation before the national courts can be available for inshore MPAs within the Member State’s 12 nautical mile zone. However, where the MPA is located outside the 12 nautical mile zone, legal intervention will generally need to be taken at the EU level, as addressed below.

Overview of Litigation Procedure

The litigation procedure varies between different Member States but often involves the preparation of written submissions setting out legal arguments and witness statements evidencing the facts of the dispute. If you decide to instruct a lawyer, they will usually be responsible for this process, preparing legal submissions on your behalf and making sure that all the court procedures are complied with.

In certain jurisdictions, litigation will involve a hearing, where you lawyer will make oral legal arguments and rebut the legal arguments presented by the lawyer for the competent authority. In other jurisdictions, the questions might be considered purely on paper without the need for oral argument. Having considered the evidence and legal arguments, the judge or tribunal will then issue a ruling on the matter. If the judge finds that the decision of the competent authority is unlawful, then they may direct the authority to reconsider its decision so that it can be made in accordance with the law (i.e. the Habitats Directive). In some jurisdictions the court or tribunal can substitute its own decision for that of the competent authority.

Emergency orders

Litigation can be a protracted process, taking months or even years before a judgment is delivered. During that time, the activity being challenged may be ongoing on the site, causing irreparable damage to protected habitats and species. In such circumstances, it may be possible to ask the Court for an order temporarily prohibiting that activity until such time as the Court has made its final determination in the case. This type of order is sometimes called an interim measure or interim injunction.

For example, in September 2019 the environmental NGO Coastwatch succeeded in getting an injunction from the Irish High Court in relation to a decision permitting commercial razor clam fishing in an MPA.¹³⁴ As a result, the Irish authority was obliged to suspend the fishing activity until the full hearing of the case. More information about this is provided in the Coastwatch case study in **Annex I** of the toolkit.

It should be noted that such interim measures are not available everywhere, and may give rise to significant additional risks and legal costs. Furthermore, the Court may only be willing to grant such an order for urgent and compelling reasons.

¹³⁴ <https://www.irishexaminer.com/breakingnews/ireland/permission-granted-to-ngo-challenge-decision-to-allow-commercial-razor-clam-fishing-in-waterford-estuary-951662.html>

Legal Interventions at the EU level

As addressed in the Legal FAQs on the Common Fisheries Policy above, Member States are not permitted to unilaterally introduce conservation measures in offshore MPAs if those measures are likely to affect the fishing interests of other Member States. Here, only the European Commission has the power to introduce conservation measures, usually following a joint recommendation from Member States with a fishing interest in the MPA.

In these circumstances, national courts will usually not have the authority to determine the legality of the conservation measures that have been applied to the site. Any legal interventions will instead need to be taken at the EU level.

EU citizens have very limited standing rights to bring cases directly to the European courts challenging EU legislative decision-making.¹³⁵ So far, no individual or NGO was able to bring a “public interest” environmental case (i.e. a case to protect the environment as opposed to personal economic interests) to the European Courts. However, it is possible to lodge a legal complaint with the Commission challenging the conservation measures that have been jointly proposed by the Member States. Any such complaint could ask the Commission to refuse to adopt the proposed conservation measures on the basis that they do not meet the legal requirements under the Habitats Directive. The Commission has a dedicated web [portal](#) that provides additional information and enables individual to submit their complaint online.

It is also worth bearing in mind that complaints to the Commission can be made for breaches of EU law relating to inshore MPAs, although the Commission will generally expect the complainant to first look for redress at the national level before escalating a complaint to the EU level.

If you are aware of any offshore MPAs that you believe are not being managed in accordance with the Habitats Directive, please do contact Seas At Risk and ClientEarth. Given our experience in interventions at the EU level, we can provide further information and guidance.

¹³⁵ A natural person may challenge the legality of EU legislative act under Article 263(4) TFEU, but only where the act is addressed to that person or it is of direct and individual concern to them. This requirement has been strictly interpreted by the CJEU under what has become known as the “*Plaumann*” test.

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Annex I: MPA Case Studies

1. Marine Conservation Society: Shrimp Fishing in the Wash, UK

Description	Shrimp fishing in the Wash, UK.
NGO	Marine Conservation Society, (Dr Jean-Luc Solandt, Jean-Luc.Solandt@mcsuk.org).
Site	The Wash and North Norfolk Coast SAC (UK0017075)
Location	Inshore
Regulator / Competent Authority	Eastern Inshore Fisheries and Conservation Authority
Designating features	mudflats and sandflats, sandbanks, reefs (<i>Sabellaria</i> biogenic reefs).
Period of consultation and byelaw development	2013-2017

2013-2014

Initial proposals were for 'high risk' features to be protected. This was reefs, saltmarshes, seagrass beds. These were protected from the beam trawling in 2014. After a good deal of negotiation and consultation between local (fishers and some conservationists) and national (national fishing and conservation bodies) stakeholders.

2014 Positive results: Some measures being put in place. A precedent.

2014 Negatives: Measures were a year late (from central government timetable that ALL 'red risk' features should be protected by December 2013). Ineffective measures to protect the feature(s) within the site (*Sabellaria*). Measures not fit for purpose for a reef feature that is naturally ephemeral – it can occur in different parts of the time in different years. Monitoring evidence of the distribution of vulnerable biogenic reefs (to abrasion by bottom trawling) was done only after wide-scale bottom trawling had been permitted for many years (decades). So the site is compromised by an ongoing damaging activity (Article 6(2)) whilst this management was being recommended and pushed through. The result was a minimal protection measure to protect about 4% of the site. The IFCA was managing against a baseline of an already impacted feature prior to and at the period the site was designated. Another negative factor was the lack of public engagement on a wider national basis on this byelaw proposal and campaigns. Shrimp fishing and mudflats was more of a 'niche' issue for the public than perhaps dolphin bycatch in MPAs, or damage to picturesque reef habitats in southwest England or Scotland.

2014-2018

The IFCA was then tasked with managing the remaining sandbank and mudflat features (58% of the site – see table 1 below). Unfortunately resulting management measures permitted continuing access for shrimp beam trawling to the parts of the sites that had traditionally had the greatest historical shrimp trawling effort (See table 1 and 2 below). Larger areas of the site were however closed (about 15%), including a greater proportion of the original biogenic reef feature (*Sabellaria*) as evidence emerged from the conservation agency that areas of reef 'crust' should be protected.

2018 Positive results: More of the site protected for 'amber risk' sandbank and mudflat features (about 15%). Management was communicated with fishers.

2018 Negative results: The management measure was 2 years late for the timetable outlined by central government. The measure did not discount a significant effect to the site. MCS challenged the partial protection (about 15% of the features in the site) of 'sandbanks' and 'mudflats' that cover about 58% of the site. We challenged their byelaw over 2 issues:

1. That the areas open to fishing that have ecological tolerance to fishing are in that situation because the benthic habitat is adapted – after many years - to fishing using beam trawls. i.e. it is so denuded and degraded that surveys would always show a habitat that was able to take a trawl without being compromised (see Figure below). The lack of long-term, large-scale, no trawl 'controls' discounts the ability to make statements of the impact of trawling at the site level.
2. Most pertinently is the issue of 'site integrity' – where we argued that the 'typical species' associated with the sandbank and mudflat features were being compromised. Essentially by direct impact, but more pertinently because of bycatch of juvenile fish. The quantitative stats of bycatch from the small mesh size in the beam trawls showed catch of 100s of thousands of juvenile fish, even where the gear used selective panels to reduce bycatch. We used this argument to state that the gear itself was likely to be damaging the favourable conservation status of typical species associated with the seabed feature. i.e. that there could be no assurance that there wouldn't be an adverse effect on site integrity from continuing this form of fishing in the site.

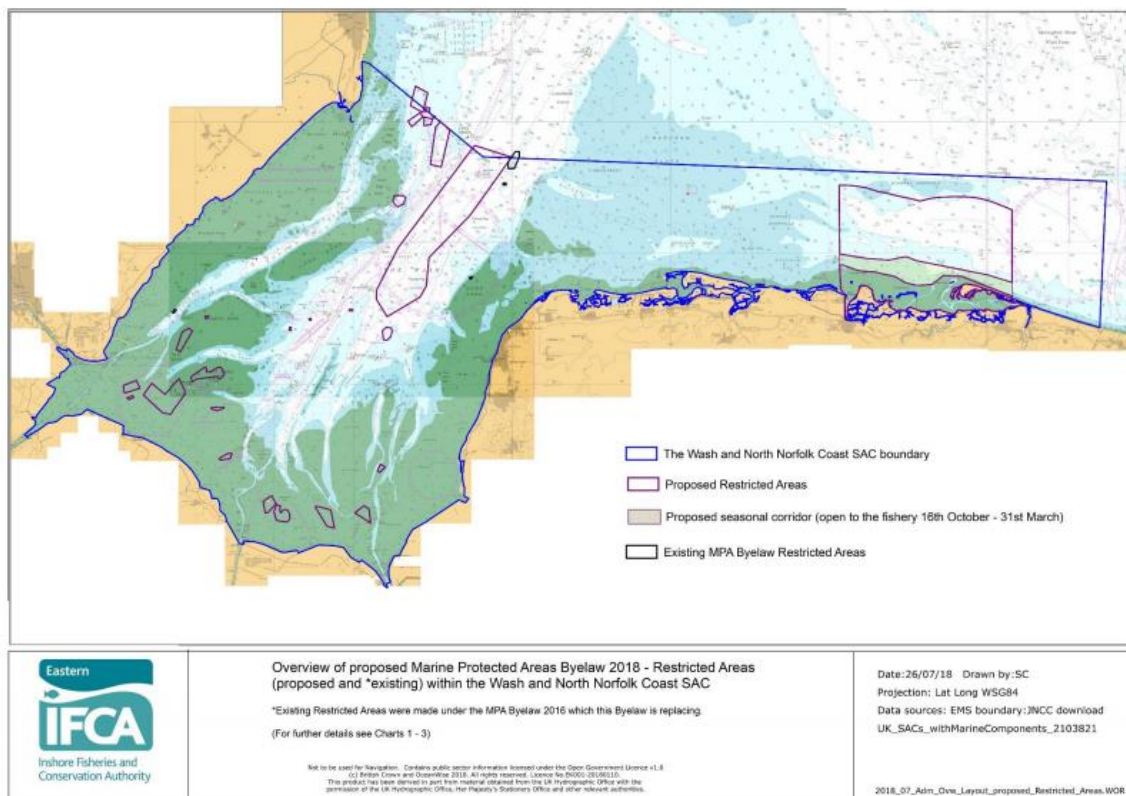


Figure 1: Closed areas within the Wash SAC site for reefs (to the north and west of the site), for sandbank and mudflat feature (to the east, and small polygons in the intertidal to the southwest). Fishing activity is mainly in the gaps (see figure below).

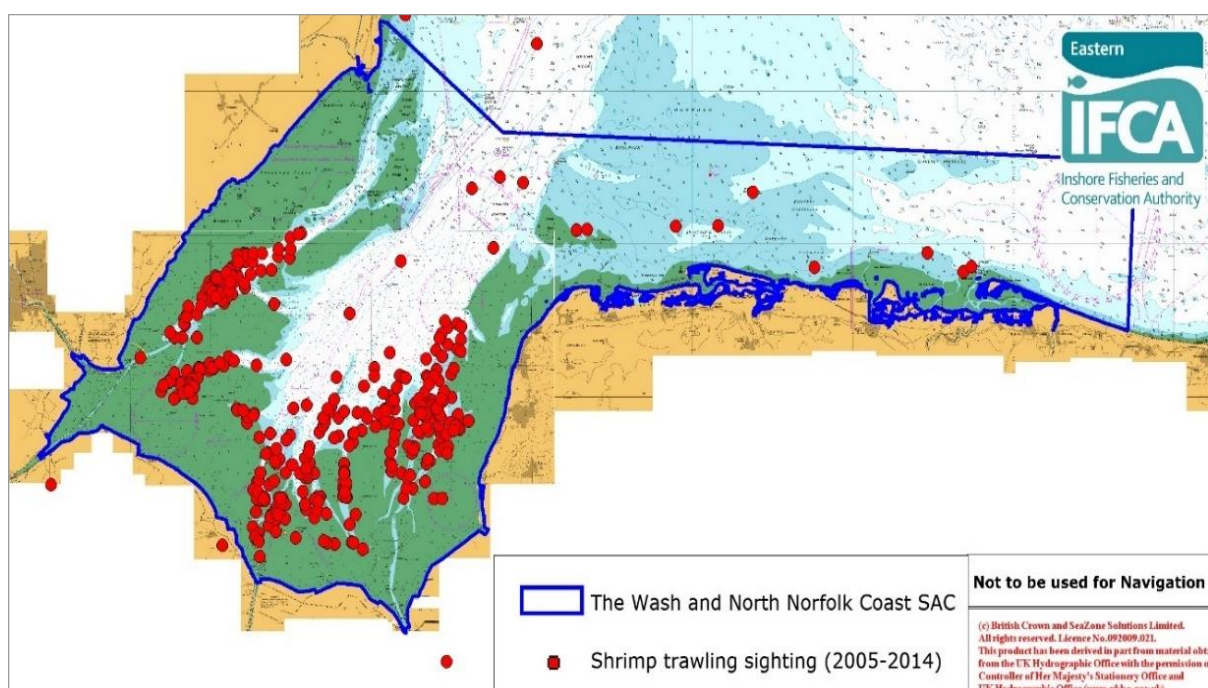


Figure 2: Fishing activity by shrimp beam trawlers. Note the fishing away from the protected zones in Figure 1.

Table 1: A note on 'site integrity' being ill-considered in terms of bycatch of 'typical species' that we included in our consultation response to the fisheries management byelaw.

Feature (% of site)	Vulnerable sub-features	Associated species feature at threat from shrimp trawls
H1110 – sandbanks which are slightly covered by seawaters (41% of site)	Fish (dab, sole, plaice, sandeels, cod, dab, whiting), benthic inverts (sand-mason worms, ross corals, dead men's fingers). Sabellaria crusts, echinoderms, brittlestars, crabs.	Grey seal, harbour seal, seabirds (SPA feature) that feeds on fish and molluscs
H1160 – Large shallow inlets and bays (39% of site)	All the above, juvenile fish, adult fish.	Grey seal, harbour seal, seabirds (SPA feature) that feed on fish and molluscs
H1140 – Mudflats and sandflats not covered by seawater at low tide (17% of site)	Mussel beds, juvenile fish, and other features, brittlestars, echinoderms.	Seabirds that feed on mussels

Bycatch report (2011): *It was estimated that during 2006 the UK brown shrimp fishery discarded approximately 4.5 (\pm 0.5) million plaice, 1.2 (\pm 0.2) million dab, 1.6 (\pm 0.2) million whiting and approximately 0.1 million cod during 2006 even with the use sieve nets (Catchpole et al., 2008). However, landings between 2000 and 2010 were lowest during 2006 (Figure 3.1.2.1), thus, average annual numbers of discarded fish are likely to be higher than those suggested by Catchpole et al. (2008).'*

Annex II: Site Integrity Briefings

The concept of site integrity requires that the impacts of a project or plan on an MPA must be assessed by reference to the whole-site features associated the protected habitat type, including its typical species. These features depend on the habitat type for which the site in question is designated.

This Annex provides a set of ‘site integrity’ briefings for some of the main marine habitat types protected under the Habitats Directive. Each briefing provides:

- information about typical species, ecosystem functions, and sensitivity to fishing pressures;
- examples of how legal arguments relating to ‘site integrity’ can be deployed to ensure maximum protection and recover;
- a case study, demonstrating how action can be taken to ensure site integrity; and
- a collection of scientific literature.

Sandbanks (H1110)

Site integrity briefing: https://seas-at-risk.org/images/pdf/Other_pdfs/Site_integrity_and_sandbanks_fin.pdf

Reefs (H1170)

Site integrity briefing: https://seas-at-risk.org/images/pdf/Other_pdfs/Site_integrity_and_reefs_fin.pdf

Estuaries (H1130) and shallow inlets and bays (H1160)

Site integrity briefing: https://seas-at-risk.org/images/pdf/Other_pdfs/Site_integrity_and_estuaries_shallow_inlets_bays_fin.pdf

Seagrass beds (i.e. posidonia beds) (H1120*)

Site integrity briefing: https://seas-at-risk.org/images/pdf/Other_pdfs/Site_integrity_and_seagrass_fin.pdf

This toolkit advocates for the ‘whole-site approach as the most effective means of ensuring site integrity. As addressed in the FAQs above, this approach is consistent with the ECJ’s interpretation of the Habitats Directive, which have held that the obligation to maintain site integrity requires regulators to assess the impacts of a project or plan on the basis of the whole-site features associated with the particular habitat type, including its typical species. This assessment should therefore not be limited to addressing the impacts on only the protected habitats and species (although that does form an important part of the assessment). For further information on the ‘whole-site approach’, see the paper co-authored by Dr Jean-Luc Solandt of the Marine Conservation Society, entitled ‘Emerging themes to support ambitious UK marine biodiversity conservation’.¹³⁶

¹³⁶ <https://www.sciencedirect.com/science/article/pii/S0308597X1930199X>