Legal arguments - Fishing in Natura 2000 sites

Legal arguments developed in a campaign to prevent damaging fishing in English marine Nature 2000 sites

For a long time general commercial fishing licences were issued in England without any requirements for site-specific assessment of the impact of potentially environmentally damaging fishing operations on marine Natura 2000 site. This was despite the clear legal obligation in respect of such sites under EU law. The Marine Conservation Society (MCS) and ClientEarth challenged this status quo.

The campaign was launched in 2008. In 2012 a revised approach to fishing activities in marine Natura 2000 sites was announced by Defra, the competent authority. Since then continued stakeholder meetings help to ensure compliance of EU law in the implementation of this new approach.[1]

This document

This document sets out the main legal arguments used in MCS and ClientEarth's campaign, updated to take into account recent developments. The arguments mainly relate to Article 6(2) and Article 6(3) of the Habitats Directive,[2] and are grouped under headings that correspond to the relevant elements of those provisions. The full citations for the Court of Justice of the European Union (CJEU) cases referenced throughout this document can be found in the index at the end of this document.

This document aims to provide campaigners in other Member States with a set of legal arguments to employ in campaigns to prevent damaging fishing in marine Nature 2000 sites. Clearly, work to tailor these arguments to the context of a specific Member State or region within a Member State, will make a campaign more compelling and likely to get a positive reaction from the relevant competent authorities.

Most of the arguments presented here are not context specific, but where necessary a short outline of the English context has been given.

[1] See also ClientEarth and MCS, *Revised approach to fishing in European Marine Sites: A status report*, December 2014, Accessible at: http://www.clientearth.org/reports/20150108-Revised-approach-to-fishing-in-European-Marine-Sites-a-status-report-December-2014.pdf

[2] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, last amended by Council Directive 2006/105/EC of 20 November 2006.

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Member States and competent authorities have obligations to protect marine Natura 2000 sites from damage from fishing

The Habitats Directive seeks to prevent activities which are likely to damage the environment from being authorised without prior assessment of their impact on the environment.

Certain fishing activities are likely to have significant negative effects on the marine environment. The findings of scientific studies demonstrate the potential for damaging effects of certain fishing activities.

Findings relevant in the English context and that we used in our advocacy included:

- Otter trawl doors can dig into sediments.
- Rock-hopper gear allows reef and hard grounds to be exploited.
- Beam trawling modifies many seabed habitats, and reduces diversity of epibenthic fauna and habitats.

1. Both Article 6(2) and Article 6(3) require the regulation of damaging fishing activities by the competent authority

All management of Natura 2000 sites must aim to achieve the goals of the Habitats Directive – to maintain and restore, at favourable conservation status, the habitats and species protected under the Directive. Article 6 of the Habitats Directive describes the measures that Member States must take to achieve this objective, including in relation to all marine Natura 2000 sites.

Article 6(3) applies specifically to potential plans or projects[3] in Natura 2000 sites and introduces the requirement to undertake an assessment of their effect and impact on the site. Plans or projects can only be allowed if they:

(a) do not pose a threat of likely significant effect; or

[3] See below (argument 5) for arguments that fishing is a plan or project.

(b) they do pose a threat of likely significant effect, but an appropriate assessment has been carried out that proves that they will not adversely affect the integrity of the site.

Article 6(2) is broader in scope and it is applicable to the performance of all activities within or otherwise affecting Natura 2000 sites, even those which will not invoke the application of Article 6(3). Although it establishes a requirement to 'take appropriate steps to avoid ... the deterioration of natural habitats and the habitats of species', Article 6(2) contains no specific rules on how protection of the site is to be achieved. However, its purpose is very clear. The Court has said '[Article 6(2) is] a provision which makes it possible to satisfy the fundamental objective of preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, and establishes a general obligation of protection consisting in avoiding deterioration and disturbance which could have significant effects in the light of the directive's objectives'.[4]

The law requires the competent authority to act under Article 6(2). And the law requires the authority to ensure that an appropriate assessment is carried out in the circumstances specified in Article 6(3). The legal requirement to produce an appropriate assessment, where it is required, rests with the competent authority.

2. Article 6(2) and Article 6(3) have a similarity of approach and require the same standard of protection

Various CJEU cases have confirmed that Articles 6(2) and 6(3) of the Habitats Directive are designed to ensure the same level of protection.[5]

The reasoning is most clearly explained in the Advocate-General's Opinion in relation to *Waddenzee* (C-127/02, AG Opinion):

- the measures required under Article 6(2), 'may be no less effective than the procedure under Article 6(3) of the Habitats Directive. This standard of protection would not be provided if authorisation [under Article 6(2)] were granted even though reasonable doubts existed as to the absence of adverse effects of the integrity of the site concerned'[6] (at para 119).
- Where Article 6(2) applies to the authorisation of an activity, such authorisation must 'in substantive terms' be the same as an authorisation under Article 6(3) (at para 120).

Therefore, and irrespective of the conclusion that fishing licences amount to a 'plan or project'[7] within the meaning of Article 6(3) of the Habitats Directive, 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.

The CJEU in *Waddenzee* (C-127/02) did not expressly answer the question regarding the concept of 'appropriate steps' within the meaning of Article 6(2), but its judgment (particularly at paragraphs 35 and 36) is entirely consistent with a similarity of approach under Articles 6(2) and 6(3).

[4] See *Stadt Papenburg* (C-266/08 at para 49).
[5] See *Sweetman* (C-258/11 at paras 32-33) which confirms earlier rulings in *Commission v France* (C-241/08 at para 30), and *Commission v Ireland* (C-418/04).
[6] See also *Commission v Ireland,* C-418/04, AG Opinion at para 126.
[7] See below, argument 5.

In terms of damage to a marine Natura 2000 site, the end result of a decision to authorise a fishing activity under Article 6(3) or not to manage that fishing activity under Article 6(2) is the same. Therefore, the authority must meet the test articulated in *Waddenzee* - decision-makers may authorise an activity 'only if they have made certain that it will not adversely affect the integrity of the site' (the Court's answer to question 4 put to the Court). To this end, when authorities are exercising their functions under Article 6(2) they effectively need to carry out an assessment that meets the same purpose as an appropriate assessment under Article 6(3).

3. A precautionary approach towards the regulation of damaging fishing activities is required both under Article 6(2) and Article 6(3)

Under both Articles 6(2) and 6(3), the authority's obligation is to prevent damage, not react to damage. Under Article 6(2), it must 'avoid [...] deterioration [...] as well as disturbance'.

The requirement for prevention was confirmed by the judgment of the CJEU in *Commission v Ireland* (C-418/04 at paras 208 and 217) when deciding that a procedure whereby the minister could seek injunctive relief in response to damage to a marine Natura 2000 site (in this instance one designated under the Birds Directive[8]) was not proper transposition of the preventive obligations within Article 6(2), because it was 'merely reactive measure'. (See also Advocate-General Kokott in *Commission v UK*, C-6/04, AG Opinion at para 16).

Any regulatory response which involves waiting for damage to take place and to be evidenced before prohibitory measures are taken will not comply with the obligations of the Habitats Directive.

Further, the Common Fisheries Policy also requires that the precautionary principle is applied in relation to fishing activities which may be damaging. The Common Fisheries Policy 'basic regulation'[9] lists the precautionary approach to fisheries management as an objective (see Article 2(2)). It refers to the UN Fish Stocks Agreement which requires wide application of the precautionary approach to fisheries management in order to protect the living marine resources and preserve the marine environment. In addition, Article 191 of the Treaty on the Functioning of the European Union requires that Union policy on the environment shall be based on the precautionary principle and, in line with Article 11 of the Treaty, this requirement must be effectively integrated into all EU policies.

In order to strengthen the argument that a reactive approach was not compliant with the Habitats Directive, we set out case studies of different marine Natura 2000 sites where such a reactive approach was taken by the authorities and damaging activities had been undertaken in an Annex, and outlined them in our correspondence with competent authorities.

We used these case studies to show, in particular, that:

(a) damage was being allowed to occur before any action was taken;

(b) damage was still occurring with no action being taken at all;

(c) voluntary agreements are inadequate. In particular, voluntary agreements are inadequate

[8] Directive 2009/147/EC
[9] Regulation (EU) 1380/2013

where the agreement did not correspond to the scientific evidence of how damage is being caused, do not take into account damage that may be caused by dredging close to the feature, or the agreement, (for example, not to travel over reefs) only applies to local vessels party to the agreement, not to out-of-area boats; and

(d) monitoring regimes are not enough because, for example, monitoring does not address the effect of sedimentation caused by scallop dredging on nearby reef features - a risk which would be obviated if there was no fishing within the boundaries of the site as designated.

4. Voluntary measures are not a tool to meet legal obligations under the Habitats Directive

By definition, voluntary measures aiming to mitigate damage are not legally enforceable, and cannot be relied upon to meet legal obligations under the Habitats Directive (see *Marais-Poitevin*, C-96/98 at paras 26-27).

Fishing as 'plan or project' under Article 6(3)

5. Fishing activities are 'plans or projects' according to the CJEU

Although the concept of 'plan or project' employed in Article 6(3) of the Habitats Directive is indeed not defined in the Directive itself, caselaw is clear on the fact that fishing activities fall within the scope of this concept.

The CJEU found in the *Waddenzee* case (C-127/02 at para 26) that the definition of projects used in the EIA Directive[10] could be transferred to the Habitats Directive as both Directives seek to prevent activities which are likely to damage the environment from being authorised without prior assessment of their impact on the environment.

The CJEU established that 'an activity such as mechanical cockle fishing [was] within the concept of ‘project’ as defined in the second indent of Article 1(2) of [the EIA Directive]'. This definition refers to 'other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources'. Consequently, the CJEU held that an activity such as mechanical cockle fishing is covered by the concept of plan or project set out in Article 6(3) (*Waddenzee* para 27).

Building on the *Waddenzee* case (C-127/02), it is therefore clear that commercial fishing should be considered as a plan or project for the purposes of Article 6(3). Therefore, where such fishing is likely to have a significant effect on a Natura 2000 site, it must be subject to an appropriate assessment by a competent authority before it can be authorised to carry on.

[10] The EIA Directive which was examined in Waddenzee was Directive 85/337/EEC. The definition has not changed in the subsequent revision (Directive 2011/92/EU).

6. Fishing licences are unequivocally 'plans or projects'

A fishing licence allows activities to proceed which may or may not be damaging to a marine Natura 2000 site, depending on the site and fishery.

Caselaw has clearly shown that fishing licenses do constitute a 'plan or project' within the meaning of Article 6(3). In the key judgment from the CJEU on Article 6 of the Habitats Directive - the *Waddenzee* case (C-127/02 at para 29) - the Court ruled that 'mechanical cockle fishing, which has been carried on for many years but for which a licence is granted annually for a limited period, with each licence entailing a new assessment both of the possibility of that activity and of the site where it may be carried on, falls within the concept of 'plan' or 'project' within the meaning of Article 6(3) of the Habitats Directive.'

In the UK, fishing activities are subject to licensing by the competent authorities, granted for a 2-year period. We found that those licences permit fishing activities generally and anywhere, including potentially damaging fishing activities in Natura 2000 sites.

We applied the logic of the Court's decision in *Waddenzee* (C-127/02) and argued that there is no material distinction between the *Waddenzee* case and the UK general fishing licence system. By analogy to the Court's evaluation of mechanical cockle fishing, the fishing permitted by such licences is clearly an intervention in the natural surroundings and landscape.

Indeed, if anything, there is a stronger case for the fishing activity carried out under UK licences to be considered as a 'plan or project' rather than the more tailored and specific annual licences considered in *Waddenzee*, which reflected the amount of food required and available for protected bird species in the year in question.

7. Activities first carried out before and at the time of designation as marine Natura 2000 site ('existing activities') must be considered as 'plans or projects'

The Advocate-General's Opinion in *Waddenzee* (C-127/02, AG Opinion at paras 39 and 40) makes clear that an activity which has been carried out for many years, pre-dating designation, and is repeatedly authorised for a limited period, may be a plan or project regardless of whether there is any increase in activity level. It must therefore be subject to appropriate assessment if it is likely to have a significant effect. This is consistent with the CJEU's finding in *Waddenzee* (C-127/02 at para 28) that 'the fact that the activity has been carried on periodically for several years on the site concerned and that a licence has to be obtained for it every year [...] does not in itself constitute an obstacle to considering it, at the time of each application, as a distinct plan or project within the meaning of the Habitats Directive.'

Even further, *Stadt Papenburg* (C-266/08 at para 44) 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.

No carve-out for pre-existing activities is found in the Habitats Directive or its caselaw. 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.

In the UK context, where fishing activities are subject to a two-year licence, we emphasised the CJEU's findings in *Waddenzee.* In that case, (C-127/02 at para 28) the Court found that the fact that the annual granting of the licence included an evaluation of the possibility of carrying on the activity 'does not in itself constitute an obstacle to considering it, at the time of each application, as a distinct plan or project within the meaning of the Habitats Directive' and therefore that the grant of the licence needed to undergo an appropriate assessment each time. Therefore, in the case of a two-year fishing licence, there is even less reason to conclude that an existing level of activity is automatically preserved.

8. Article 6(3) requires fishing activities to be taken into account in in-combination assessments

Article 6(3) is clear in its wording as to when it requires an appropriate assessment of plans or projects. An appropriate assessment is required where a plan or project is likely to have a significant effect on a marine Natura 2000 site, whether it has this effect individually or in combination with other plans or projects. Therefore, an appropriate assessment is required to consider the impact of the fishing activity:

- where several licensed fishing activities in combination may be a threat to a marine Natura 2000 site, even if one individual licensed (or indeed so far unlicensed) fishing activity might not pose such a risk.
- 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.

In our campaign, we faced arguments that existing fishing activities should be used as a ‘baseline’ impact within an in combination assessment of other marine licences.

We defeated this argument by underlining that assessing fisheries as a ‘baseline’ impact within an in-combination assessment for marine licences seems to imply that there is an exemption for fisheries activities under the Habitats Directive or other fisheries regulations. In fact, the Advocate-General’s Opinion in *Waddenzee* makes clear that an activity which has been carried on for many years, pre-dating designation, and is repeatedly authorised for a limited period, may be a plan or project regardless of whether there is any increase in activity level (or an increase in other activities that could affect the cumulative effects of the fishing activity; see C-127/02, AG Opinion at paras 39 and 40).

There is nothing in the legislation or caselaw that makes considering fisheries a ‘baseline’ impact within an in-combination assessment for marine licences a legally acceptable approach under Article 6(3) of the Habitats Directive.

‘Threshold’ and test that an appropriate assessment under Article 6(3) has to satisfy

9. The Habitats Directive requires a precautionary approach

The Habitats Directive requires a precautionary approach to management of Natura 2000 sites, including those in the marine environment.

The Court has said that 'where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation' (*Waddenzee*, C-127/02 at para 57). This approach is entirely consistent with the authority's obligation which is to prevent damage, not simply react to damage.

10. Before it can go ahead Article 6(3) requires a high degree of certainty that the fishing activity will not have negative effects on the site

Article 6(3) of the Habitats Directive requires that an appropriate assessment must 'contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the work proposed on the protected site concerned' (*Sweetman*, C-25/11 at para 44).

Therefore, the appropriate assessment for any fishing activity must meet these standards before it is permitted to go ahead. Under Article 6(3), the standard of certainty set by the Court is that the authority must be sure that 'no reasonable scientific doubt remains as to the absence of [adverse effects on site integrity]' (*Waddenzee*, C-127/02 at para 59).

11. Adverse effects on site integrity must be understood to mean more than just the impact on the designated feature[11]

Article 6(3) requires any appropriate assessment to look at whether the plan or project will have adverse effects on the site's integrity. The legislation is clearly drafted so that it is ‘site’ integrity, which is the relevant consideration, rather than the integrity of a specific habitat or species for which a particular site may have been designated.

According to CJEU decision in *Sweetman*, site integrity must be determined by reference to 'the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a priority natural habitat whose preservation was the objective justifying the designation of that site’. The judgment explains that, in order for the integrity of a site not to be adversely affected, the site needs to be preserved at a favourable conservation status.[12] The context of this case related to a priority natural habitat, but there is no reason why the arguments and conclusions should be different in relation to any natural habitat covered by Annex I.

The way that ‘conservation status’ and ‘favourable conservation status’ are defined includes the consideration of factors beyond the state of the designated feature itself, and extending to the

[11] See also ClientEarth and MCS, *Natura 2000 and the meaning of ‘site integrity’,* July 2013. Accessible at: http://www.clientearth.org/reports/natura-2000-site-integrity-briefing.pdf
[12] See *Sweetman* (C-258/11 at paras 36-39).

relevant surroundings/influences and other contributing functions, which determine conservation status.

Therefore, in considering whether a site's integrity will be affected, Member States must have regard to the site's conservation objectives and take account of the wider ecological context of the site as a whole in terms of the plan or project's effects.

12. Article 6(3) does not exempt from an appropriate assessment activities that are rarely undertaken

Some claim that when a fishing method is only rarely undertaken it is not likely to have significant effects and therefore would not require an appropriate assessment under Article 6(3).

However, it is the impact which must be considered not the level of activity. A very small amount of bottom trawling in a sensitive area can do a huge amount of damage and therefore this potential for interaction requires *a priori* management.

Advocate-General Fennelly in *Commission v France*, (C-256/98, AG Opinion at para 36) was explicit that there is not scope under Article 6(3) for Member States to pre-determine categories (e.g. cost of projects or types of projects) that will not have a 'significant effect'. This was supported by the CJEU (para 39). By analogy, without prior assessment, it is also not permissible to pre-determine that there will not be a significant effect on the basis of frequency or intensity of activity and thus avoid following the steps set out in Article 6(3).

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Commission v France	C-256/98 *Commission v France* [2000] I-02487
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