Taking the pulse of environmental and fisheries law: the Common Fisheries Policy, the Habitats Directive and Brexit

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With Marine Conservation Society and (potentially Client Earth)

Key words

Fisheries Environment marine conservation Habitats Brexit

1 Introduction

There has long been an intrinsic tension between environmental regulation and the European Common Fisheries Policy (CFP). For many years there was a presumption (in fact if not in law) that the flagship piece EU environmental legislation, the Habitats Directive,[1]("the Directive") did not automatically apply to fisheries. This was partly as a consequence of an overlap in different European competences; competence for environmental matters is shared competence between the EU[2] and member states, while the 'conservation of marine biological resources' is the exclusive competence of the EU.[3] In practice this clash of competences made it far harder for member states to adopt the requirements of the Directive in fisheries than for other industries. The core problem for legislators was that it was questionable whether member states' domestic environmental legislation could be imposed on other member states' vessels, since those vessels were usually managed under the CFP;[4] any domestic environmental regulation, which purported to apply to other member states' vessels could result in a case in the European Court of Justice, not a welcoming prospect for a member state's environment department. As a result a myth grew up that somehow fisheries were 'exempt' from the Directive. However that was never the case, and finally over the last 15 years the Directive has started to take effect on fisheries.

This paper will focus on the implementation of article 6 of the Directive and the management of European Marine Sites (EMS), it will assess whether the successful English management approach for inshore waters ('the revised approach') can be adapted for offshore waters, investigate the mechanisms for applying the Directive under the CFP and reflect on the Brexit negotiations and their impact on the management of EMS.

2 The Habitats Directive and fisheries legal practice

Commercial fisheries in Europe were first regulated under the Directive in 2002 when the *Waddenzee* ruling which held that Dutch mechanical cocklepickers in the Waddenzee EMS were subject to the provisions of the Directive.[5] Gradually member states began to accept their potential responsibilities

for fisheries, though the nature of those responsibilities was still confusing because of the precise wording of the Directive.

Article 6(2) of the Directive states:

> *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*.

Article 6(3) states:

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

The *Waddenzee* ruling held that the licensed Dutch cocklepickers were a 'plan or project' and therefore required an 'appropriate assessment' before a licence could be granted as they would be likely to have a 'significant effect' on the site. In the UK the Department for the Environment, Food and Rural Affairs (Defra) tried to distinguish the case by saying:

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

The view was that since there was no licensing authority, there was no plan or project. This view was successfully challenged by environmental NGOs who contested that the fishing vessel license was granted by a licensing body (or 'competent authority' in the wording of the Directive) and in any event Article 6(2) required management of the site.[7] After some years Defra accepted the position and adopted a 'revised approach' to fisheries management in England which led to Defra and the local management bodies, the Inshore Fisheries and Conservation Authorities (IFCAs) adopting a risk-based approach and managing out the activities most likely to damage the site. A process that

perhaps avoided strict compliance with Article 6(3) but instead properly applied article 6(2) and represented a pragmatic solution to the issue.[8]

This approach was possible because the 'revised approach' was only adopted inside the 6 nautical mile limit,[9] an area within the exclusive control of the UK. Beyond that the application of the Directive is still very problematic because of the use by vessels from multiple nations.

3 Application of the Habitats Directive beyond the 6 nautical mile limit

The 2013 reforms of the CFP, explicitly incorporated environmental objectives,[10] within a new CFP regulation (known as the 'Basic Regulation').[11] The Basic Regulation expressly included obligations to comply with the Directive,[12] following the 'integration principle'- an established principle in environmental law[13] which supports the incorporation of environmental law into other policy areas. In this context however, integration posed a problem, where there had (at least in theory) been a clear-cut distinction between shared environmental competence and exclusive fisheries competence the incorporation into the CFP of environmental objectives had the potential effect of expanding the exclusive competence of the EU for fishing into other environmental law when a measure affected fishing. It could also be argued that the 2013 reforms made the process simpler by at least establishing a system by which environmental obligations could be enforced. This section will investigate the effect of the reforms.

For non-fisheries related EMS, the enforcement of environmental protective measures through the Directive is straightforward. The Directive requires the creation by member states of certain protected areas across the EU according to Habitat type. Sites are proposed by member states to the Commission, who then consider the application and (if satisfactory) adopts the proposed site and finally it is up to the member state to formally designate the site. [14] If the member state fails to live up to its obligations, either by not designating enough habitat[15] or failing to implement management measures[16] the European Commission can (and does) infract member states and which can ultimately result in substantial fines through the European Court of Justice. This is to avoid a race to the bottom with one member state obtaining a competitive advantage by failing to protect its environment.

With equal access to member states' waters[17] fisheries should be an obvious industry to benefit from harmonised regulation under the Directive and have the added benefit that a fecund marine environment directly benefits the commercial fishery. The creation of European level regulation theoretically means that even where there is equal access by differing member states' vessels regulations should bind all members and there should not be a question of seeking antic-competitive

measures to protect a domestic industry through feigned environmental measures.[18] Yet because of exclusive competence for fisheries policy the EU institutions are unable to properly undertake their policeman function; the normal mechanisms for infraction proceedings by the European Commission do not apply and it has been left the European Parliament to perform the policeman function.[19]

The inclusions of Article 11 in the 2013 Basic Regulation should have solved the problem by creating a mechanism to ensure compliance with the Directive:

> *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 6 of Directive 92/43/EEC,*

However this article, while permitting an action by a member state against its own vessels, does not permit an action against other member state's vessels. Instead there is a notification process 'initiated' under Article 11(2) to 11(5) but which aims at a political settlement (with the Commission performing an emergency role). On the face of it this permits a resolution process against other member state's vessels fishing in its waters. But there is a danger that in reality it makes regulating fishing in Natura 2000 sites a discretionary process:

(a) It is up to the member state where it 'considers' there is a need for measures;

(b) The Commission is 'empowered' to adopt management measures; and

(c) In the absence of agreement the Commission 'may' submit a proposal.

There is none of the mandatory language present in the Habitats Directive.

The Article 11 process is currently being undertaken in the North Sea

[J-L to describe this process – allude if you can to the Dutch electric beam trawl fleet]

[All to conclude on the effectiveness of the A11 process – but emphasise the weakened role of the Commission in enforcing the Directive when it also has a stated role…. And the consequences of blurred competence.]

4 Alternative mechanisms for the application of the Directive

There are two alternative mechanisms for member states directly enforcing the Directive against fishing vessels. One using trust law and one relying on shared competence.

In a very thorough paper Leijen[20] recognised the inherent conflict between the exclusive competence to the EU of fisheries policy and shared competence between the EU and member states for the environment. He cites a letter from Maria Damanaki and Janez Potocnik of DG MARE to Gerda Verburg, then Minister of Agriculture, Nature and Food Quality of the Netherlands:

> *In their letter, the Commissioners wrote that measures affecting fisheries should, as a general rule, be taken under the common fisheries policy (CFP), even where they have nature protection as their objective.*

However, a letter from European Commissioners has no status in the law, other than an expression of their opinion. Leijen's own view is that the ambit of the exclusive competence of the EU is the Commissioners have overstated their claim:

> *….[T]he exclusive competence within the CFP is limited to conservation of marine biological resources. Following the wording of the Treaty the exclusive competence does not extend to the conservation of habitats. It could therefore be argued that in the area of marine habitats conservation, the EU has to share competence with the Member States, be it within the framework of fisheries excluding the conservation of marine biological resources, or within the framework of environment, as the Union in fact did when enacting the Habitats and Birds Directives. However, in the CFP Basic Regulation – ie secondary law – the scope of the exclusive competence is impliedly broadened to the conservation of marine ecosystems, which could include marine habitats. Measures aiming at contributing to the achievement of the objectives of the Habitats and Birds Directives have been taken within the CFP framework.*

Leijen's paper predated the reforms of the CFP in 2013, but if the only process by which the application of the Directive can be undertaken by member states is that set out in Article 11(2) that would mean the EU impliedly had exclusive competence for habitats under the CFP. The European Court of Justice has never ruled that such conservation measures are part of the exclusive competence – and as a rule secondary legislation (in this case the Basic Regulation) can only be reflect the competences established in primary legislation (the Treaties), any legislation not emanating from specific authority can be set aside as *ultra vires* (beyond the powers of the legislative body). The European Court of Justice is increasingly aware of the dangers of 'competence creep' and since the *Germany v European Parliament and the Council of the European Union (Tobacco Advertising I)*[21] has increasingly supported requirements for the EU institutions to operate within the range of powers expressly conferred by the European Treaties.[22]

Leijen posits that the member state route for application of the Directive still remains open. He argues that the concept of "trusteeship" enables member states to undertake actions, even where there is exclusive competence of the EU, where the EU organs have failed in their duties. In practice any attempt by a member state to adopt this approach will be difficult; the Article 11(2) process is now available, and it would only be after the demonstrable failure of this process that a trusteeship approach may be established. It would also be necessary for a member state to have the political will to undertake such an activity – something often lacking for environmental concerns.

The reform of the CFP in 2013 has, however, opened a second potential approach for member state action. A careful reading of Article 11(1) indicates a move away from Damanaki and Potocnik's claim of exclusive competence for fisheries management in this area, to restate the article:

> *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 6 of Directive 92/43/EEC*

This can be fairly interpreted to mean:

> *Member states are empowered to adopt conservation measures affecting their own fishing vessels in waters under their jurisdiction.*

The principle of equal access to each other's waters[23] means that fishing vessels licensed by one member state can operate in another's waters, thereby having concurrent jurisdiction for their vessels with the coastal state.[24] For instance Dutch flagged vessels operating within the UK exclusive economic zone (beyond territorial waters to the 200 nautical mile limit or median line) are still operating within the jurisdiction of the Dutch government (for fishing vessel licensing). The application of coastal state's environmental law to foreign flagged vessels in its exclusive economic zone is expressly covered by UNCLOS and has been the subject of a recent opinion by the International Tribunal on the Law of the Sea:

> *The Tribunal is of the view that article 62, paragraph 4, of the [United Nations] Convention [on the Law of the Sea] imposes an obligation on States to ensure that their nationals engaged in fishing activities within the exclusive economic zone of a coastal State comply with the conservation measures and with the other terms and conditions established in its laws and regulations.*[25]

Continuing with the example, on this basis the Nertherlands should, when licensing its vessels to operate within the UK EEZ, ensure that they comply with UK (and by implication EU) law. Article 11

of the Basic Regulation therefore contains two alternative routes for meeting obligations under the Directive: one for member states to take action against their flagged vessels under Article 11(1), and another to seek a diplomatic settlement under the process set out in Article 11(2) onwards.

In practice the Article 11(1) route is more satisfactory since it normalises the competences in this area and brings practice into line with the application of the Directive to all other industries. This means member states vessel licensing bodies (competent authorities for the purposes of the Directive) must take action to ensure article 6(2) and (3) of the Directive are complied with or the member state will face infraction proceedings.

As a result the different competent authorities of each member state should collaborate to ensure that the requirements of Article 6 of the Directive are met. The lessons learned in the 'revised approach' by the UK authorities could be usefully applied here.

[To this end the Marine Conservation Society has written to European environment ministers, fisheries ministers and the heads of their conservation agencies to warn them of the potential for infraction if proper compliance with the Directive is not swiftly achieved] – [It would be good to put these up online]

[Conclusion to this section needed]

5 The impact of Brexit

It is of utmost importance that the UK's decision exercise Article 50 and begin negotiations to leave the European Union do not upset the hard won fisheries and conservation gains [citation needed –] by the improved CFP. [some stats would be useful here]. Investigations into the effects of Brexit could be lengthy but there are three key issues: the status of EMS; the status of European fisheries management; and whether EU vessels continue to operate in UK waters post Brexit. In principle these three issues are relatively straightforward.

It is important to recognise that The UK played a leading role in negotiating the Habitats Directive as the UK Government made clear at the time: [26]

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

As a UK sanctioned regulation and one which has its basis in international law the main requirements of the Habitats Directive will be difficult to unpick. Moreover the corpus of

international law has shifted further in favour of marine protected areas and thus EMS type arrangements in both the Convention on Biological Diversity and the OSPAR Convention.[27] Recent fitness checks by the European Commission[28] and Defra[29] both concluded the Directive generally worked well. As such there is no obvious reason why Brexit should affect the principle of the Directive. It may however impact on its mechanics.

One aspect which causes serious concern is that the European Commission has in the past played in significant role in implementing the Directive through infraction proceedings. Depending on the eventual Brexit settlement the Commission may no longer be able to take that role in the future. In the past this has been supplemented by access to justice in the UK courts via judicial review. Recent changes in funding of such cases have led to concerns over the availability of access to environmental justice.[30] The remedy is also not equally available in all UK jurisdictions, Scotland for instance has a poor track record for successful judicial review claims.[31] So while on paper at least the Directive may not be in danger, if it becomes discretionary then the effectiveness of the Directive could be materially weakened. It should however be remembered that at present an article 11(1) approach has not been adopted by either the member states or the European Commission. The loose language contained in article 11(2) onward of the Basic Regulation has the effect of making the Directive discretionary, at least for international fisheries.

As far as the CFP is concerned the issue of straddling stocks means that there will continue to be some form of shared management, as this is a requirement under international law. [32] Such an agreement need not contain the depth of regulation contained in the CFP and unless member states' vessels continued to operate in UK waters enacting measures to protect UK EMS would be a matter for the UK government directly against its own vessels – so a process similar to the 'revised approach' could (at least in theory) be easily carried out. Matters become more complicated (at least in law) if the UK continues to allow EU vessels into its waters, and this is a real possibility. Before the UK joined the EU it had already recognised historic access rights to nearshore waters under the London Fisheries Convention of 1964 and so the precedent for continued access predates UK's membership of the EU, and indeed is likely to continue at least during any transition arrangements.[33]

There are therefore two scenarios in the future, if the UK succeeds in removing EU vessels from its waters as a result of Brexit – then the UK will still need to enact similar measures to comply with its international obligations. If the principle of shared access continues the UK, the EU and its member states should also comply with their international obligations and protect EMS. In either event there seems little chance (and little point) in changing the direction of travel: the development of active

management measures for marine protected areas created under the Directive must continue post Brexit.

Conclusion

This paper has ramifications not just for UK waters but for all EU waters which contain European Marine Sites. The clash of competences between the EU and member states over the implementation of the Habitats Directive should not be used as an excuse to make mandatory conservation measures discretionary. It is clear that under both international law and EU law member states are legally required to protect EMS from harmful fishing activities. The UK has succeeded in managing English inshore waters successfully according to the 'revised approach.' It merely remains for the UK and other member states to ensure that similar protective measures are enforced in offshore waters. Although Brexit undoubtedly complicates the political landscape, international law, the Habitats Directive and EU law continue to operate in offshore UK waters and unless and until those regulations are changed they should be properly enforced, moreover it is not all clear at this stage that Brexit will substantively alter the current arrangements.

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[3] *Commission v United Kingdom* Case 804/79 [1981] ECR 1045.
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[5] *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* Case C-127/02
[6] Department of the Environment, Food and Rural Affairs correspondence reported by Symes, D. and Boyes, S., (2005) *Review of Fisheries Management Regimes and Relevant Legislation in UK waters.* Institute of Estuarine and Coastal Studies: University of Hull. p55
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[9] Article 2, the Basic Regulation
[10] van Hoof, L. (2015) Fisheries management, the ecosystem approach, regionalisation and the elephants in the room *Marine Policy* 60 20-26
[11] EU Regulation 1380/2013
[12] Article 11, the Basic Regulation
[13] Article 8, United Nations Conference on Environment and Development (1992) Rio Declaration on Environment and Development
[14] Article 4, the Habitats Directive
[15] *Commission v Bulgaria* Case C-141/14.

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