Legal implications of the CFP and NATURA 2000

The purpose of this text is to outline some of the legal complexities between the CFP and the EU Habitat Directive and if and how the Habitat Directive applies to fishery activities, especially regarding Natura 2000 sites.

Are permits needed?

A key question is if a permit is required under national law and EU law for fishing activities that can impact the environment in a Natura 2000 area (designated under both directives 2009/147/EG, Bird Directive and 92/43/EEG, Habitat Directive). Even though this question always needs to be decided with regard to the environmental effects in each individual fishing situation, in EU law, the rules that apply have a wide scope that must be considered to apply to various types of commercial fishing. This is due to the following, clarified also by case law:

- Fishing (bottom-trawling as well as other fishing methods) is a type of activity that should be considered as a “plan or project” under article 6.3 of the Habitats Directive.

- A permit is required for fishing activities if the activity could have a “significant effect” on the conservation objectives of the site. Even a small possibility of such impacts is sufficient to trigger the requirement of a permit. The Court of Justice of the European Union (CJEU) announced in the Waddenzee case, “if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned”. An assessment of impacts must include not only those that are direct, but also those that are indirect (such as effect on the food web) and cumulative (such as the impact from other fisheries or other activities). The decisive factor is not whether the fishing occurs within a Natura 2000 area, but rather how it impacts the Natura 2000 area.²

- Recurring fishing activities should be considered individual projects which require new environmental impact assessments with each occurrence under article 6.3 of the Habitats Directive, even if the fishing activity began before the designation of the Natura 2000 area. This interpretation follows from the case law of the CJEU³ pertaining to article 6.3 of the Habitats Directive. Article 6.2 is also applicable to recurring fishing activities. This article contains the general responsibility to take appropriate steps to protect the environment in designated areas.

- Because recurring fishing activities should be seen as individual projects, fishing occurring after the entry into force of the national law⁴ is not exempted from the requirements of that national law regardless of when the fishing activity occurred for the first time. As stated previously, article 6.2 of the Habitats Directive also applies. Issuing permanent fishing permits is not acceptable EU law, as a way to get around the regulation.

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¹ National law in which the Habitat Directive has been transposed
³ C-127/02
⁴ Valid for any EU Member State law in which the Habitat Directive has been transposed
Habitat Directive in conflict with Common Fisheries Policy?

The problem of what Member States can or cannot do has been clarified by article 11 of the 2013 EU Regulation on the Common Fisheries Policy (CFP) where it is stated that "Member States are empowered to adopt conservation measures...". National obligations under article 6 of the Habitats Directive apply to the entire exclusive economic zone. Any Member State can under certain conditions take more stringent measures to conserve Natura 2000 areas than are prescribed by article 6 of the Habitats Directive (see below). These obligations can apply also to other states’ fishing activities, but a special procedure has to be followed when measures are directed at other states fishing activities and must be non-discriminating measures.

To require permits for fishing operations within Natura 2000 sites clearly falls within the remits of national competence, if such fishery activities have effects on the conservation objectives of the site. When a Member State must act with stricter rules is not fully clarified by case law as of yet.

Legal solutions to regulate fishing activities that can affect Natura 2000 sites

EU law does not in principle prevent national authorities from declaring regulations with specific requirements on fisheries in such a way that it is assured that “significant effect” on the environment does not occur, thereby avoiding the requirement for an environmental impact assessment and permit. According to EU case law, however, there are strict requirements on the content of such regulations. The rules must “ensure” that fishing activities will not have a significant effect on the protected area (again with consideration to all possible direct, indirect and cumulative effects). There have been two cases in which member states’ laws have been invalidated by the CJEU as insufficient to avoid the requirement for assessment and permitting of certain activities under article 6.3 of the Habitats Directive. If generally applicable rules are to be used, they must be continually adapted to changes in the natural environment. Rules would most likely need to be specified for each individual Natura 2000 area.

Another possible solution is to generally prohibit all or certain types of fisheries within and perhaps also in the vicinity of a Natura 2000 area. Article 11 of the Regulation on the Common Fisheries Policy prevents such a prohibition if it is more stringent than provided for in article 6.2 of the Habitats Directive. In contrast, article 20 makes it possible to enact such a prohibition within the 12 nautical miles zone. Article 19 can be used if the objective of the measures is to sustain fish populations and are only directed towards domestic vessels.

National authorities should provide guidance on the applicability of fishing issues. This guidance should be formulated in accordance with the case law of the CJEU, some of which are mentioned in this text. Regional coordination is foreseen in the CFP and all work to create regional and national guidelines must include all authorities responsible for nature protection as well as fisheries, but is reasonable to consider the competent authority responsible for designating and managing Natura 2000 is given the main responsibility for such guidelines.

This text is based on a report on the topic made by Swedish Institute for the Marine Environment, but the authors of that report is not in any way responsible for content and statements made in above text.


5 Case C-98/03, Commission of the European Communities v Federal Republic of Germany. 2006 I-00053; Case C-538/09 European Commission v Kingdom of Belgium. 2011 I-04687