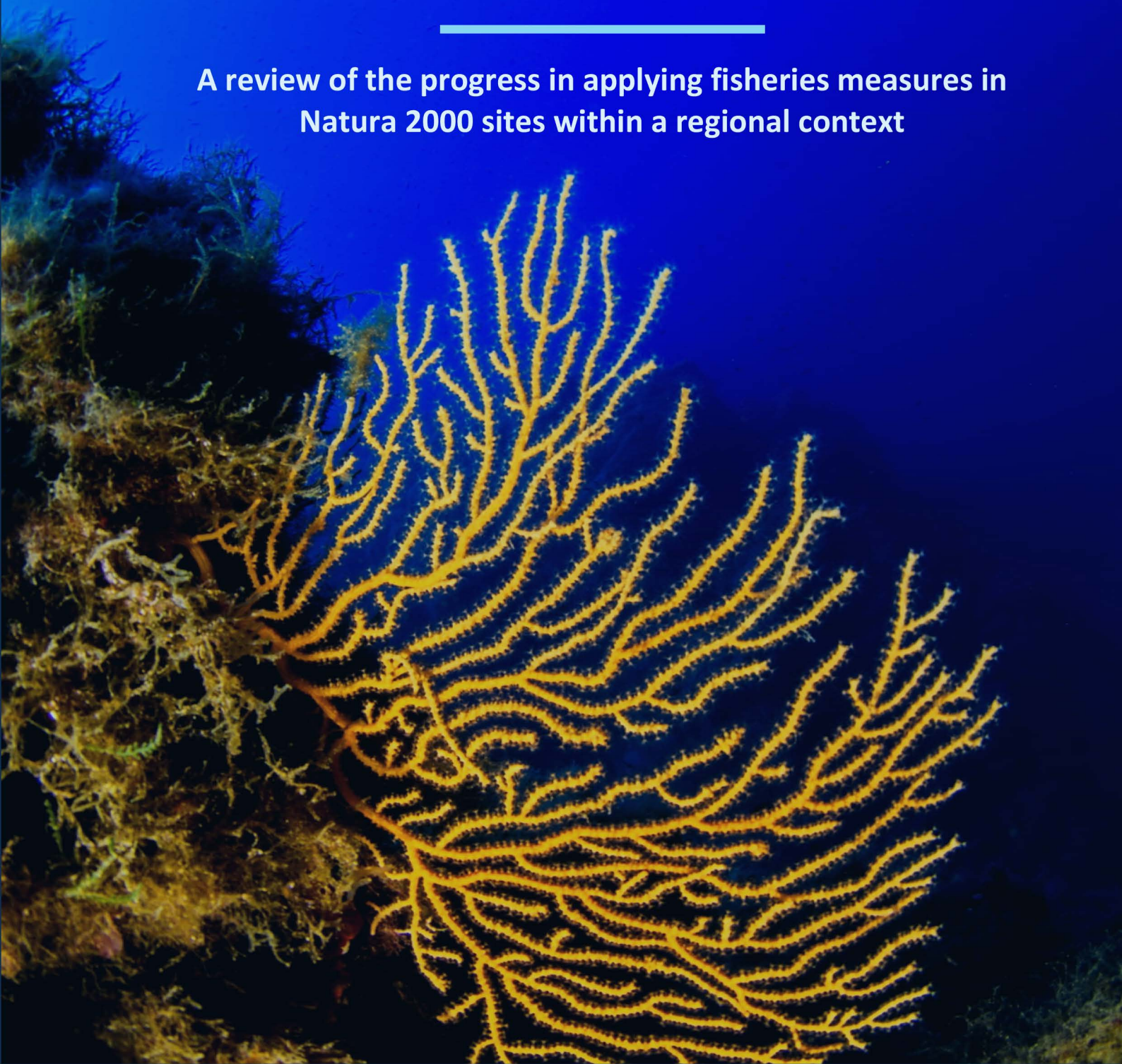


WAS ARTICLE 11 OF THE CFP DOOMED TO FAIL?

A review of the progress in applying fisheries measures in
Natura 2000 sites within a regional context



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Cover photo: Yellow gorgonian in a Natura 2000 site in the Aeolian Islands.
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Executive summary

1. The EU has set out strong objectives for marine protection in its waters. This began with the adoption of the Habitats Directive in 1992 and has been continually re-emphasised in later policy outlines, the latest being the 2030 Biodiversity Strategy which sets a target of protecting 30% of the marine habitat with 10% being strictly protected.
2. When it comes to setting fisheries measures in areas outside the 12 nautical miles zone, where multiple countries have fishing interests, measures have been developed for very few Marine Protected Areas (MPAs). Most of the areas that have been designated as MPAs have no measures implemented.
3. In the CFP reform of 2013, Article 11 was introduced which sets out the process for Member States to adopt a Joint Recommendation for fisheries measures within MPAs in a regional set-up, which is then transposed into a Delegated Act by the Commission.
4. In the eight years since its adoption only three delegated acts related to Article 11 have come into force. All the areas concerned, found within existing MPAs, are small in size and only have two Member States (the initiating Member State and one other) with significant fishing interests in the designated area.
5. Even though the CFP allows the Commission to take short-term emergency measures within Natura 2000 sites when there is an urgent conservation need and no measures are taken by Member States, there are no cases of this happening.
6. This report reviews the challenges faced in implementing Article 11 through specific case studies and through interviews with stakeholders (from policy, the fishing industry, and NGOs) to pinpoint where improvements can be made.
7. We recommend focusing on three distinct areas of improvement: clarity on process & timelines, arbitration & conflict resolution, and transparency & accountability. All three areas require improvements at Member State, regional and Commission level.
8. Clarity on process & timelines: the legal text in the CFP leaves room for interpretation on the roles and responsibilities of the different parties, which can be used to stall or derail the process. The initial phase in which the initiating Member State drafts a basic document to share with the regional group has no timeline or formal end point and neither does the deliberation phase in the regional group; information provided needs to be 'sufficient' without a definition of what constitutes sufficient information.
9. Clarity on process & timelines: the responsibility for development of measures in MPAs is shared between environment and fisheries departments, which tend to operate very differently. Fisheries departments are focused on sustainable extraction of marine resources with their environmental counterparts working to protect (certain elements) of the marine ecosystem. As Article 11 is within the realm of the CFP but the outcomes need to adhere to

the EU Nature Directives and the Marine Strategy Framework Directive there is a clear mismatch in how to manage these sites.

10. Arbitration & conflict resolution: if parties cannot agree on a joint way forward the whole process can become blocked with no way to move ahead. There is no mechanism to have parties take ownership of the conservation needs. Objectives are often watered down to appease Member States or stakeholders (at a national level) with no way to prevent that from happening if the initiating Member State is not in a capacity to invest political capital in the outcome of the process.
11. Arbitration & conflict resolution: a legal interpretation of the relationship between the CFP and the Nature Directives has never been performed. It is unclear how the environmental goals are embedded in the CFP and how the environmental and fisheries legislation are aligned. As the EU legislators are hesitant to take steps in this, the route through the European Court of Justice is a good option to create jurisprudence.
12. Arbitration & conflict resolution: the timing of the scientific advice from STECF is late in the process, by which time conflicts may have occurred. As it is not the role of science to solve these conflicts, the process could be strengthened by including a scientific check at an early stage of the Joint Recommendation to review if the proposal meets the environmental objectives, and then suggest improvements and clarifications which can be accommodated in the Joint Recommendation within the agreed time frame.
13. Transparency & accountability: the process has very few checks and balances to allow scrutiny of the decision being made. It is left up to the discretion of the initiating Member State to consult with stakeholders at a national level. Regional groups are, at best, only partly open to observers. Advisory Councils have to be consulted but their advice can be put aside with no explanation and the Commission only provides minimal information once it has received the Joint Recommendation.
14. We conclude that the current legislative and policy framework as expressed in Article 11 has the potential to reach the EU's environmental objectives, but that the implementation can be improved by better understanding of the environmental goals embedded in the CFP, in order to align the environmental and fisheries legislation. Moreover, it is essential to create clarity on the roles and responsibilities of all actors in the process and to improve transparency in order to ensure a collective ownership for a successful outcome.
15. In future, the legislator, in particular the Commission, can utilise the upcoming opportunities, for example the revision of Multiannual Plans, as well as the further roll out of the Biodiversity Strategy in the form of the *EU Action Plan to conserve fisheries resources and protect marine ecosystems* or, at a later date, an EU restoration law. By using these political opportunities to set hard targets for implementation and put clear restrictions on practices allowed within MPAs, a better balance can be found among the different interests at play. In this way the implementation deadlock, that many of these areas are in now, can be broken.



Lost fishing gear within an Alboran Sea Natura 2000 site – © OCEANA / Carlos Minguell

Background

Introduction

Protected areas (PA) are the fundamental tool for global biodiversity protection and Europe is among the regions with the largest share of territory protected on paper. At the International Our Ocean conference in 2018, the EU proudly stated that 10.8% of its waters were designated as MPAs¹. To ensure that conservation and restoration targets for ecosystems are met, and to halt the loss of biodiversity, MPAs need to be effectively managed. This is clearly recognised by the EU and strongly emphasised in the new 2030 EU Biodiversity Strategy² which highlights the importance of healthy marine ecosystems and the role in that regard of effectively managed marine protected areas (MPAs), with clearly defined conservation objectives and measures.

In 2013 the EU introduced a regionalised process for introducing fisheries management measures in MPAs in the revised Common Fisheries Policy (CFP)³. CFP Articles 11 and 18 were designed to guide Member States in setting measures for areas in which fishing interests of several Member States were represented.

CFP Article 11 is a potentially powerful instrument in the protection of the marine environment. It allows Member States to designate specific fisheries and spatial measures for the conservation of marine biological resources or the marine ecosystems in their waters. Successful implementation of this article is essential for the role of the CFP in marine conservation. But is it fit for purpose? Eight years after it came into force, about forty relatively small areas, found within 18 Natura 2000 sites in the North Sea and the Baltic Sea have successfully completed an Article 11 procedure, with the bulk of other MPAs designated in the EU still waiting for measures to be introduced⁴.

The aim of this study is to assess the uptake and effectiveness of Article 11 of the CFP in introducing management measures in MPAs in the context of obligations under relevant marine conservation legislation, as well as to point out the shortcomings and pitfalls which impede effective implementation of this tool. The study had three parts: it started with a literature review on the background of marine spatial policy as a preparation for the second step of four analytical case studies of Article 11 procedures, and thirdly a series of interviews with key stakeholders from policy, NGO and the fishing industry.

We conclude with an overview of the main learning points from our research and recommendations on how the process for introducing fisheries measures in MPAs can be improved. Learning from past successes and mistakes will provide a basis for the future development of well-managed protected areas.

Rationale for protecting Marine Areas

The regional seas surrounding Europe include vast, open oceans as well as almost entirely landlocked seas. These seas are home to a diverse range of habitats that sustain thousands of species of plants and animals, a biodiversity which is the foundation for marine ecosystems and their capacity to deliver the services from which we benefit. In addition, more than 5 million Europeans depend on the sea, its ecosystem services and its resources to support their daily livelihoods as well as those working in the recreation and leisure industry.

In spite of the sea's key role, human activities in the marine environment are jeopardising the state of marine ecosystems. Moreover, land-based activities are also impacting the sea. Scientists — both globally, and within Europe — have observed an accelerated rate of biodiversity loss through

(ecological) extinctions and extirpations of marine species. Biodiversity loss is caused by multiple human activities burdening ecosystems with different pressures: damage and loss of habitats, extraction of resources, introduction of non-indigenous species, pollution and the effects of climatic change. The cumulative effect of these pressures is damaging the state of marine ecosystems⁵.

Well placed MPAs are a key policy measure and management tool for addressing these increasingly complex threats to marine ecosystems. By protecting key features and biodiversity hotspots of an ecosystem they can function as a refuge for the surrounding areas that will also benefit from the stability MPAs provide. MPAs — and networks of MPAs spanning large areas — are a key mechanism to safeguard biodiversity and increase the resilience of ecosystems to unwanted change⁶.

Background on Marine Protected Areas in Europe

A range of pressures is affecting Europe's seas, their biodiversity, and the services they provide for human use. These pressures stem directly and indirectly from human activities. Moreover, the prospect for improving this situation in the near future is uncertain at best, given the expected increase of human activities and the systemic nature of pressures and impacts affecting ecosystems⁷. To address these sustainability issues, an ecosystem-based approach to management (EBM) was introduced in key EU policies and legislation: the Integrated Maritime Policy (based on the communication *An Integrated Maritime Policy for the European Union*; the Common Fisheries Policy (CFP), the 2020 EU Biodiversity Strategy (based on the communication *Our life insurance, our natural capital: an EU biodiversity strategy to 2020*; and the Marine Strategy Framework Directive (MSFD)⁸. EBM works by striking a balance between continuing to manage the complex relationship between human and natural systems and safely adapting to change⁹.

Introduction of Natura2000

The Natura 2000 network is the most extensive protected area system in the world, comprising more than 27,300 sites covering approximately 18% of the EU land area. It consists of Special Protection Areas (SPAs) and Special Areas of Conservation (SACs), classified under the EU Birds and Habitats Directives respectively. The SPAs and SACs, forming the Natura 2000 network, should contribute to the maintenance and restoration of favourable conservation status of the habitats and species listed in the annexes of the Habitats and Birds Directives (known together as the EU Nature Directives)¹⁰.

In parallel with global processes, in 1992 the EU adopted the Habitats Directive, which aims to protect vulnerable natural habitats and wild fauna and flora including those considered rare and/or endemic. Together with the Birds Directive, which had been in use for creating Special Protection Areas (SPAs) since 1979, it remains at the core of EU nature conservation efforts. A central component of these directives is the use of special conservation areas to help achieve their objectives, through a 'coherent European ecological network' (Natura 2000) covering both land and sea¹¹.

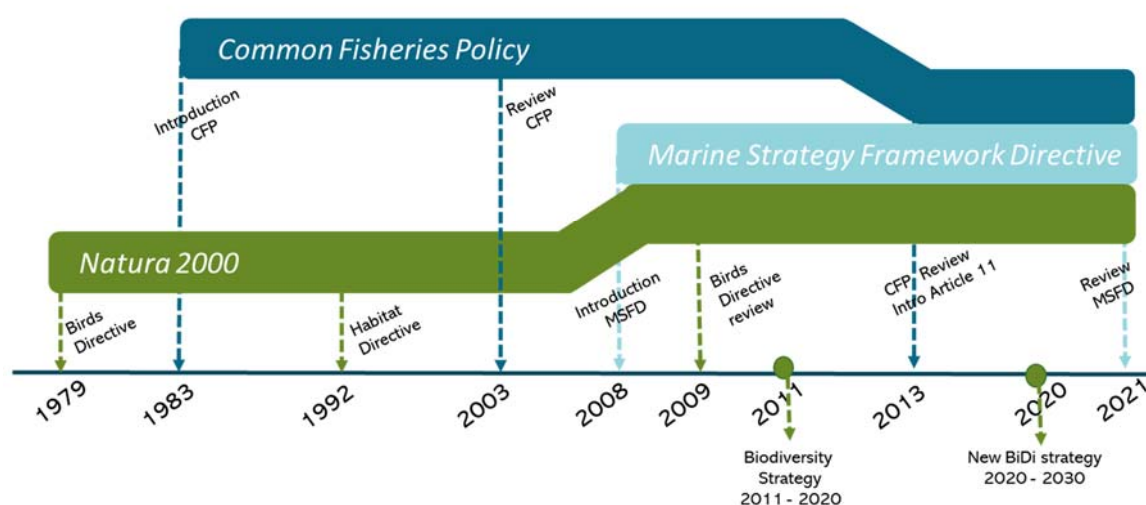
As the Natura 2000 network is meant for both protection of vulnerable nature on land and in the sea, it also includes an extensive amount of Marine Protected Areas – currently it has over marine 3,000 sites covering over 318,133 km², corresponding to just over 10% of EU seas. These areas are designated by Member States based on their importance for marine biodiversity and protection of vulnerable and threatened species¹².

Despite providing, in principle, a coherent approach to the protection of seabirds, turtles and marine mammals, the Nature Directives provide limited possibilities for the protection of marine fish and invertebrate species and marine habitats. The directives thus exclude significant aspects of the marine ecosystem from formal protection schemes. This is especially obvious for offshore habitats, for example sandbanks below 20 m or soft-bottom habitats, and the associated communities of fauna

and flora. This shortfall is apparent from the distribution of the Natura 2000 network, in which the majority of protected areas are situated within coastal regions.

In response, the EU produced new legislation: in particular, the Marine Strategy Framework Directive (MSFD) aims to launch measures for achieving or maintaining Good Environmental Status (GES) in the marine environment by 2020. One of the measures to be implemented is the use of 'spatial protection measures' contributing to the creation of coherent and representative networks of MPAs, adequately covering the diversity of the constituent ecosystems. Furthermore, Directive 2014/89/EU establishing a framework for maritime spatial planning is to contribute to the effective management of maritime activities and the sustainable use of marine resources in the marine environment.

Timeline of legislation introduction

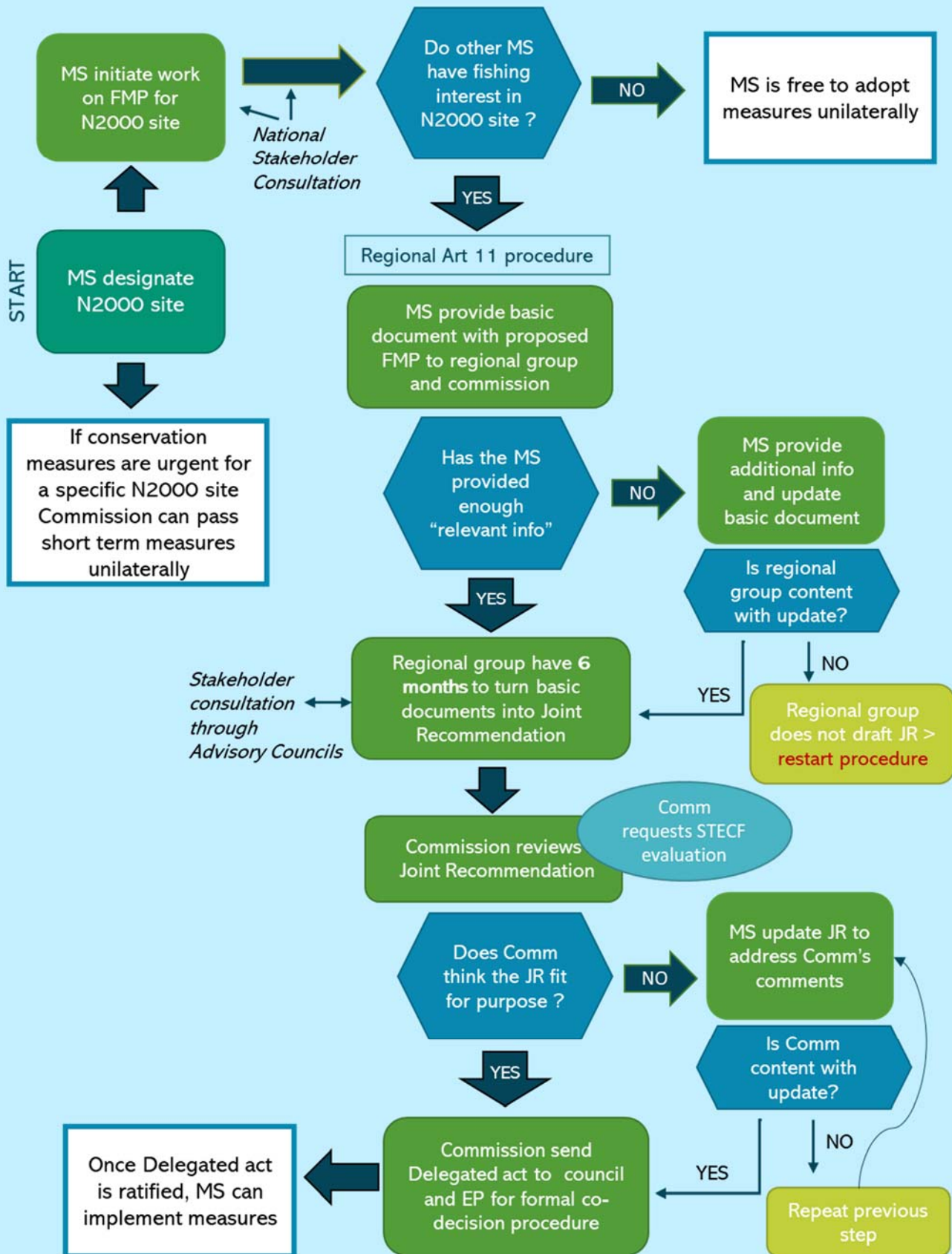


Fisheries and Natura 2000

When first introduced, the Natura 2000 legislation had no immediate effect on fisheries management through the CFP because Member States initially saw their obligations restricted to territorial waters (i.e., areas 12 nautical miles from the baselines, where the CFP applies only under certain conditions). The Commission consistently challenged this interpretation of the Habitats Directive and this opinion was confirmed by the European Court of Justice in 2005 (case C-6/04 of 20 October 2005). For Member States, a new deadline to report site nominations was then set for September 2008. Most Member States complied with this and designated sites within their waters. However, to date, very few were able to set fisheries measures within them¹³.

Until the reform of the CFP in 2013 there were only soft law guidelines for fisheries measures for marine Natura 2000 sites; under the 2003 revision of the Common Fisheries Policy there was an option to facilitate the process of restricting harmful fishing methods in MPAs. The process started with an application by the Member States for measures in their MPAs to the Commission, sometimes followed by advice from the International Council for the Exploration of the Sea (ICES) or a stakeholder opinion through the then newly formed Regional Advisory Councils (RACs). The Member States then had to find a way to coordinate their management plans with other Member States, but no framework existed to facilitate this. Overall, the procedure was lengthy, unclear and in need of major revision, there was ambiguity on which route to follow to implement measures in marine Natura 2000 sites and, as a result, very few of the sites designated had measures introduced. This was a concern that was addressed in the revision of the Common Fisheries Policy in 2013.

Flowchart CFP Article 11



CFP Article 11

Within the CFP reform of 2013 legislators adopted new wording that was meant to provide clarity for Member States on the procedural steps to follow in order to adopt conservation measures to meet environmental obligations within their Marine Protected Areas, related specifically to Article 6 of the Habitats Directive, Article 4 of the Birds Directive and Article 13(4) of the Marine Strategy Framework Directive. The new CFP Articles (11 and 18) were part of a new regionalised approach to fisheries management where Member States ranging on the same sea basin work together on setting measures that are relevant to their area. Member States can present proposals for measures to the European Commission in the form of a Joint Recommendation which then becomes part of EU law through a Delegated Act.

The key changes after the 2013 reform for setting fisheries measures within MPAs in the 12 nautical mile zone were:

- Article 11 (hard law) on introducing fisheries conservation measures in MPAs;
- The group of Member States expanded from neighbouring /initiating ones to include those with a direct management interest within a defined regional sea;
- Measures can now only be decided on through a consensus-based system by the regional Member States (which created the risk, which was to prove high, of Member States struggling to reach agreement on a Joint Recommendations);
- The role of Advisory Councils was included as part of regional cooperation (Art 18).

Article 11 sets out three options for implementing fisheries management measures in MPAs. The first deals with the setting of conservation measures where the measures in question do not affect other Member States' fishing vessels (Article 11.1), in which case the initiating Member State has the sole competence to adopt measures. The second option is for situations where one or more Member States have fishing interests in the proposed area. In this case the initiating Member State drafts a proposed Fisheries Management Plan (FMP) and consequently Member States should work together in drafting a Joint Recommendation (through the regional process outlined in Article 18 of the CFP) that they present to the European Commission. If approved by the European Commission, the Joint Recommendation is then transposed into law through a Delegated Act which has to be officially approved by Council and Parliament. (Article 11.2 and 11.3). The third option is meant for cases where urgent action is needed and allows for the European Commission to take emergency measures (Article 11.4 and 11.5)¹⁴.

The Scientific, Technical, Economic Committee on Fisheries (STECF)

Under Article 18 the legislators can obtain an interpretation on the best available science related to the MPA under discussion. In practice this means that the Commission asks the Scientific, Technical, Economic Committee for Fisheries (STECF) to review Joint Recommendation proposals once they are received.

The STECF is a group made up of 30-35 members who advise the Commission in implementing fisheries policy: “to implement Union policy in the area of fisheries and aquaculture, the assistance of highly qualified scientific experts is required, particularly in the application of marine and fisheries biology, fishing gear technology, fisheries economics, fisheries governance, ecosystem effects of fisheries, aquaculture or similar disciplines, or in the field of collection, aquaculture data. (para (2) of Commission Decision (2016/C 74/05)).” Members of STECF are appointed by the Director-General of DG Maritime Affairs and Fisheries.

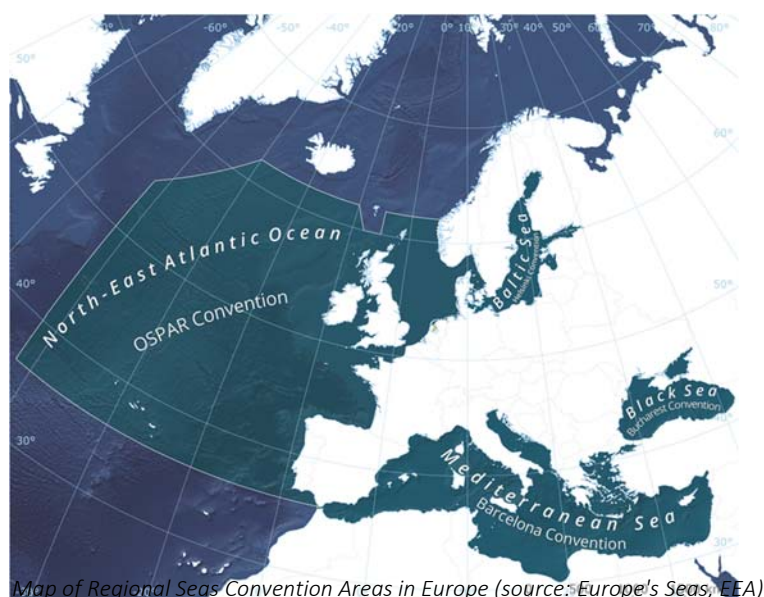
The STECF group may set up sub-groups to examine specific questions on the basis of the terms of reference defined by the Commission. The sub-groups consist of at least two STECF members and external experts (including a chair), who are chosen by the STECF chair and members. Sub-groups report to STECF within a given time frame in accordance with those terms of reference. The report is presented to the STECF Plenary by the chair and STECF formulates its own conclusions. Such sub-groups are disbanded as soon as their mandate is fulfilled. (Article 6.4 of Commission Decision (2016/C 74/05)). Since 2011 specific working groups of the STECF are labelled as Expert Working Groups (EWG) with a clear and concise title.

Regional seas conventions

Within the different regional seas surrounding Europe, the Regional Sea Conventions (RSCs) engage neighbouring countries for the conservation of their common marine environment. Their work areas cover maritime activities and pressures resulting from them, as well as biodiversity and ecosystem protection. The RSCs implement coordinated monitoring programmes in the regional sea basins and perform joint assessments of the state of the environment. Article 6 of the MSFD requires EU Member States to use existing institutional cooperation structures such as the RSCs in order to implement the marine strategies in the most coherent way at the regional level¹⁵.

Four RSCs have been established in Europe: OSPAR for the North-East Atlantic; HELCOM for the Baltic; the Barcelona Convention for the Mediterranean; and the Bucharest Convention for the Black Sea.

RSCs play an important role in agreeing and streamlining environmental measures within their regions and in setting objectives for marine protection. But as fisheries are not part of their remit, they cannot play an active role in setting fisheries measures in MPAs; this instead falls under the Regional groups that operate in parallel to the RSCs.



Regional groups

The 2013 CFP review introduced the process of regionalisation, as before there was no formal EU process at a regional level to take decisions on fisheries measures. The CFP calls for the set-up of regional cooperative management structures in which governments work together to prepare proposals for the implementation of EU legislation in the form of Joint Recommendations that the Commission then turns into delegated acts, which makes them legally binding. Member States had to begin organising themselves in regional groups that could take decisions jointly. In total eight groups were founded:

- Baltfish for the Baltic Sea ecoregion
- Scheveningen group for the North Sea
- North Western Waters regional group for West of Scotland, Irish Sea, Celtic Sea and Channel
- South Western Waters regional group which deals with Atlantic waters from the Bay of Biscay to the Strait of Gibraltar
- The Mediterranean has three groups for different regions (Pescamed for the West, Sudestmed for the South and a group for the Adriatic)
- Black Sea regional group

As there is no formal guidance for the organisation of these groups, there is great variety between groups in their remit and workplans. The eight Baltic Member States were the only ones who already had an organisation in place, as Baltfish had been active for several years (it was initiated in 2009). This served as a model for other Member States to organise themselves. They all have a two-tiered system where proposals are prepared in a working group and decision are taken in a High Level Group (HLG) in which fisheries directors of ministries and the European Commission sit and the secretariat rotates between Member States.

However, where Baltfish allows active stakeholder participation in the working group (the Baltfish Forum), all the other groups are opaquer in the way their work is organised and decisions are taken. Most are informal in character and kept outside EU transparency regulations, so observers are not allowed to participate, except when specifically invited for part of the meeting, and the minutes are classified.

Implementation of Article 11

All regional groups are active in drafting Joint Recommendations for annual Discard Plans associated with the implementation of the Landing Obligation (Articles 15 and 16 of the CFP) but only a few have worked on Article 11 processes. In the eight years after the adoption of Article 11, Baltfish, the Scheveningen group, and the North Western Waters regional group have initiated discussions on Article 11 procedures for Natura 2000 sites where multiple Member States have fishing interests, but to date only Denmark and Sweden have managed to conclude the full Article 11 process for a limited number of sites, and only a few habitats types (e.g., reefs). Two delegated acts (one in 2016 and the other in 2019), were adopted for a total of 18 MPAs in the Danish EEZ and one for Sweden¹⁶.

To organize themselves in the process of drafting Joint Recommendations, in 2014, the Scheveningen High Level group, for example, adopted Terms of Reference (ToR) for regional coordination in relation to Articles 11 and 18. The ToR allows for the establishment of ad-hoc groups within the regional group to deal with specific fisheries management proposals with representatives from Member States having direct management interests in the conservation measures expected to participate in the ad-hoc groups. It is unclear if such groups have ever been formed.

In 2018 the European Commission published a Commission Staff Working Document¹⁷ on the establishment of conservation measures under the Common Fisheries Policy for Natura 2000 sites and for Marine Strategy Framework Directive purposes. This document was drafted by DG MARE in close coordination with DG Environment as a guidance for those implementing Articles 11 and 18.

The aim of the document “is to describe good practices on the elements to be considered by the Member States when preparing Joint Recommendations for the adoption of conservation measures under the Common Fisheries Policy (CFP) to comply with their obligations pertaining to Article 6 of the Habitats Directive, Article 4 of the Birds Directive and Article 13(4) of the Marine Strategy Framework Directive (MSFD). It aims to recall the rules and procedures relating to the submission of a Joint Recommendation by the Member States, in order for the Commission to adopt conservation measures by means of a delegated act pursuant to Articles 11(2) and 11(3) of the CFP.”

The working document was presented to all regional groups and widely distributed to all stakeholders. But as it is a guidance document it has no formal status within EU legislation; its use is optional and the recommendations within it need not be followed.

In November 2020 the European Court of Auditors (ECA) published a comprehensive review of the EU’s progress in the implementation of its targets for the protection of marine ecosystems and resources under the title: *Marine environment: EU protection is wide but not deep*¹⁸. The conclusions are quite damning on the progress made in protecting European Seas:

“EU protection rules have not led to the recovery of significant ecosystems and habitats. The network of marine protected areas was not representative of the EU’s diverse seas and sometimes provided little protection. In practice, the provisions to coordinate fisheries policy with environmental policy had not worked as intended”

Interesting to note is that in this report the Member States interviewed who mainly represented countries in the south of Europe indicated they had no interest in starting Article 11 processes for designating fisheries measures within MPAs as they viewed the process as complicated and cumbersome and expected it could lead to watering down of protection measures needed.

Other relevant policy processes

Green Deal

To deal with the global challenge of climate change as well as the biodiversity crisis the European Commission announced a Green Deal for Europe in 2020. The Green Deal serves as a roadmap for making all processes in the EU sustainable, and it will work through a framework of strategies, regulations and legislation setting clear overarching targets. One of the strategies introduced shortly after the Green Deal was announced is the updated Biodiversity Strategy that extends to 2030, which replaces the previous Biodiversity Strategy which ran from 2010 to 2020.

Biodiversity strategy 2010 to 2030

The EU recognised that the loss of biodiversity was continuing, and also that this loss was posing a major threat to long-term sustainable development, both within the EU and beyond. To address this challenge, and reflecting global commitment to the same cause, the EU has launched a series of action plans and strategies, starting with the EU Biodiversity Action Plan in 2006 (EC, 2006), followed by the EU Biodiversity Strategy to 2020 (EC, 2011) which was updated last year to the EU Biodiversity Strategy for 2030 (EC, 2020).

If they were fully implemented, the Habitats Directives (from 1992) and the Birds Directive (from 2009) would provide more than enough legal backing to safeguard marine biodiversity in the EU. However, the EU acknowledged that implementation had been slow and incomplete. The Commission is still reviewing the effect of the Biodiversity Strategy to 2020 but for the marine Natura 2000 areas the conclusion can be that little progress was made. The reasons for not reaching the strategies objectives were similar to those identified in 2010 as the main blockages to progress then:

- Insufficient sense of urgency in implementing environmental and nature legislation
- Lack of coordination with other policy areas (fisheries, transport, energy, etc.)
- Lack of financial resources

Concerning Protected Areas, and the Natura 2000 network in particular, the new Biodiversity Strategy for 2030 observes that the: “protection has been incomplete, restoration has been small-scale, and the implementation and enforcement of legislation has been insufficient”.

Among the objectives of the Biodiversity Strategy, the European Commission wants to “improve and widen our network of Protected Areas and develop an ambitious EU Nature Restoration Plan.” The strategy further states that the EU should:

- Build a coherent Trans-Europe Nature Network.
- Legally protect a minimum of 30% of the EU’s land areas and 30% of the EU sea area and integrate ecological corridors. (This means an extra of 4% of land and 19% for seas areas as compared to today)
- Strictly protect one third of protected areas, covering 10% of EU land and 10% of EU sea. (Today, only 3% of land and less than 1% of marine areas are under strict protection.)

Although these are strong objectives, a considerable effort will have to be made to implement the Biodiversity Strategy for 2030 when it comes to MPAs. Only a very small fraction (+/- 0.5%) of MPAs provide full protection against all extracting activities¹⁹. These fully protected or no-take MPAs are of great importance for marine biodiversity and are also more likely to be successful in reaching the conservation objectives set²⁰. Many MPAs in Europe are multiple-use MPAs in which many activities are permitted. A recent study assessed 727 MPAs designated in the EU and found that commercial

trawling was happening in the majority of these MPAs (59%). The data also demonstrated that trawling intensity was actually higher inside MPAs, in comparison to non-protected areas²¹. Major shipping lines may also intersect MPAs. For example, in the Baltic Sea, some major shipping lines go through MPAs or are very close to MPAs and fishing activities take place within MPAs.

Action plan to conserve fisheries resources and protect marine ecosystems

As part of the new Biodiversity Strategy for 2030, an *Action Plan to conserve fisheries resources and protect marine ecosystems* is to be developed, and should be published before the end of 2021. The plan will address the by-catch of sensitive species and adverse impacts on sensitive habitats by introduced measures to limit the use of fishing gear most harmful to biodiversity, including on the seabed. It will also look at how to reconcile the use of bottom-contacting fishing gear with biodiversity goals. Interestingly, the Roadmap for the Action Plan²² specifically mentions the need to link this strategy to the implementation of the Bird and Habitats Directives, in this way allowing spatial measures to be incorporated.

Multiannual Plans

As part of the Regionalisation process introduced in the CFP reform, from 2013 the obligation for Regional Member State Groups to develop Multiannual Plans (MAPs) was introduced. In these plans Member States active in a certain sea basin were tasked to create a tailor-made plan relevant to the local conditions that set out how the CFP objectives on fisheries (e.g., MSY) are to be obtained for the region. This can include fishing effort restrictions and contain specific control rules and technical measures.

Although spatial management is not specifically mentioned in the articles related to the Multiannual Plans, Article 9.5 does have scope for spatial measures to be incorporated as it relates to the ecosystem approach, which in an EU context is developed under the Marine Strategy Framework Directive (Article 9.5): *“Multiannual plans may contain specific conservation objectives and measures based on the ecosystem approach in order to address the specific problems of mixed fisheries in relation to the achievement of the objectives set out in Article 2(2) for the mixture of stocks covered by the plan in cases where scientific advice indicates that increases in selectivity cannot be achieved. Where necessary, the multiannual plan shall include specific alternative conservation measures, based on the ecosystem approach, for some of the stocks that it covers.”*

The first Multiannual Plan (for the Baltic Sea) was agreed in 2016, the plans for the North Sea in 2018, and for Western Waters and for the Mediterranean in 2019. None of the current plans incorporate technical measures, as the focus lies on fishing limits and flexibilities in mixed fisheries. These plans will need to be revised in the near future, and the first steps for the revision of the Baltic Sea MAP have already been taken with a review of the implementation of this plan published by ICES in 2019²³.



Top: Grey seal in the northern North Sea – © OCEANA / Juan Cuetos

Bottom: Marine life in an Aeolian Islands Natura 2000 site – © OCEANA / Juan Cuetos

Methods

Interviews

Participants were selected from a list with key stakeholders from policy, fishing industry, and NGO backgrounds and efforts were made to have a geographical spread in the interviewees. A total of eight interviews were conducted between May and June 2021. The in-depth semi-structured interviews were conducted through video calls based on a protocol that divided the interview in two parts:

The first part dealt with EU MPA policy in general, with attention on the following topics:

- the perception of the implementation of Article 11 in general
- the role of the Commission, Member States and stakeholders in the process
- the content of the EC staff working document

In the second part, respondents were asked in detail about specific Article 11 procedures they had worked on, both in terms of the broad outlines of the process and also specific examples of things that worked very well or not at all.

The route to a fisheries management plan for an MPA roughly breaks down into four phases:

1. First exploration/draft within Member State
2. Collecting information/stakeholder consultations
3. International alignment towards Joint Recommendation
4. Review by European Commission (+ request STECF) towards Delegated Act

In the interviews, these phases were used as a guideline to ensure that cases from different countries could be compared. All interviewees provided consent for the recording on the basis of anonymity in the report. The interviews were recorded, transcribed verbatim, and analysed using a general inductive approach. All quotes were anonymised using standard practice removing names and locations. The outline of the interview can be found in Annex 2.

Case studies

Four cases where Member States implemented or tried to implement an Article 11 process were selected. (1) Sweden – Kattegat / Skagerrak MPAs; (2) Scotland – North of Scotland, North Sea MPAs; (3) Belgium – Belgian North Sea; and (4) Germany, Netherlands, UK – Dogger Bank.

The case studies consist of a summary and map of the process, a detailed overview of the content of the proposal and the policy process towards a delegated act and end with an appraisal of the strengths and weaknesses in both the proposal and the process.

Information for the case studies came from publicly available sources, supplemented with intelligence provided by the respondents to the interviews. Initially Denmark was supposed to be one to the case studies, as this is one of the few examples of a completed Article 11 process, but no respondents could be found from this country. In three cases contact was also sought with experts that were not part of the interview pool to check certain elements of the case studies.

Results

Findings were captured in overarching themes: (national process, regional process, role of stakeholders, role of scientific underpinning, role of the Commission and use of the Staff Working Document) that emerged in the interviewing process as well as the case studies.

Review

Process in Initiating Member States

Art 11 3. The initiating Member State shall provide the Commission and the other Member States having a direct management interest with relevant information on the measures required, including their **rationale, scientific evidence** in support and **details on their practical implementation and enforcement**.

The first phase of designing fisheries measures for the conservation measures within an MPA starts within the initiating Member State. Under the Habitats Directive as well as the MSFD, each Member State must define the conservation objectives and develop strategies for its own waters. In all of the case studies reviewed, Member States chose to develop their initial proposal on their own and only present to the wider regional group once they had a proposal ready.

Measures relating to the implementation of the CFP fall within the remit of the fisheries department within the Member State whilst the protection of the marine ecosystems and species falls within the environment department. In many countries these are part of different ministries which leads to confusion about the type of measures that can be taken and how to propose them.

“The ministry is responsible both for fisheries and for marine protected areas. ...I understand that in many Member States the knowledge of people who have to work with marine conservation about the tools [available through the CFP] are not so very well developed.... So I think there is a need to share information with the people working more on conservation on these tools, to make it more effective.”

The fisheries department policy objectives will, in most cases, be worded about sustainable use of marine resources whilst the narrative from their environmental counterparts will be more centred around preventing harm to species and habitats. This can lead to diverging interpretations of what consists of relevant measures for a certain area.

For example, in the Belgian case, even though the federal environmental department is responsible for the MPA, the negotiations were led by the regional (Flemish) fisheries department in close coordination with the Belgian industry. If this is compared to the Swedish case where the drafting was driven by the nature department, the initial ambition for the protection was much higher than in the Belgian case. Sweden consistently based its proposal on the precautionary approach (under the MSFD) which enabled it to set quite stringent measures when it came to disturbance.

This discrepancy in defining the path to management measures is clear in the official texts. CFP Article 11.3 refers to “direct management interest” (of the Member State), which is further elaborated on in the Staff Working Document as “this direct management interest consists of either fishing opportunities or a fishery taking place in the exclusive economic zone of the initiating Member State.” Management in the context of the Habitats Directive Article 6.1 is conservation management (ecological requirements) and Article 13.4 of the MSFD does not mention management, only (spatial protection) measures. In the interviews we heard that from a fisheries perspective the goal would be to develop measures to move towards sustainable fisheries, whereas those speaking from a nature conservation point of view, or applying the precautionary approach, were working towards goals as defined in the national legislation for the Birds and Habitat Directives and MSFD. This is an inconsistency which echoes throughout the whole process giving scope for fisheries and conservation to be played out against each other. This happens despite the perception of the Commission, which is

that measures taken under the CFP Articles contribute to meeting environmental objectives. This discrepancy has to be addressed.

“As a Member State you have to make a trade-off between achieving goals on the one hand and the economy on the other. And certainly in the case of fishing with a certain gear. But we as a Member State have not said we are going for a total ban on gear, not anywhere. So that's one reason those goals aren't being met.”

CFP Article 20

Aside from Article 11 of the CFP, Article 20 also provides Member States with the opportunity to adopt conservation measures within their 12-mile zone. Measures taken have to be non-discriminatory, applying to all operators active in the area. Article 20 differs from Article 11 in that where the latter forces the proposing Member State to seek consensus with all other Member States with a fishing interest in the area, under an Article 20 procedure the proponent only has to **inform** other Member States and the relevant Advisory Council(s).

Some of the respondents thought that this option was under-utilised by Member States as it provides a much simpler process for the adoption of measures.

"Article 20, as far as it applies, is simply an easy way out that Member States do not really dare to use, because they are unfamiliar with it. But it's really simple and some of the areas that can be registered that are within 12 miles and that can just be done in a very simple procedure of Article 20. But the Commission does not encourage that because the Article 20 procedure largely sidelines the Commission."

Whilst others pointed out that Article 20 can be viewed as a blunt instrument as it bypasses all discussion and can lead to opposition from affected Member States on other measures. They therefore only thought it was useful for small areas where there was hardly any fishing interest from outside the proponent's country.

“When it comes to implementing measures which affect other Member States, having buy in from the other fisheries is essential. So this [using Article 20] is not the way for us.”

Member States with fishing interest and Regional Groups

Staff Working Document. 3.1. Preparing a Joint Recommendation

In preparing a Joint Recommendation, the following steps should be envisaged.

- Identifying other Member States concerned

It is the responsibility of the initiating Member State to determine whether the measures may affect fishing vessels flying the flag of other Member States or which other Member States have a direct management interest in the fishery to be affected by measures it intends to adopt. Pursuant to Article 4(1)(22) of the CFP, **this direct management interest consists of either fishing opportunities or a fishery taking place in the exclusive economic zone of the initiating Member State.** A broad and transparent approach in consulting the other Member States may help to identify which Member States have a direct management interest in the fishery to be affected. It is highly recommended that the relevant national authorities engage in early cooperation at Member State level between fisheries and nature conservation authorities, as well as other relevant departments (e.g., fisheries control, marine, etc.).

The regionalisation process was hailed as a great improvement after the 2013 CFP reform by policymakers. This would allow targeted measures that were tailored to the specific situation in each sea basin, something for which both Member States and some stakeholders had advocated for years.

Nearly a decade after the introduction of Articles 11 and 18, more and more stakeholders are concluding that the regionalisation process is not delivering on its objectives of setting fisheries measures in MPAs.

“I don’t know how you could claim that Article 11 as it’s currently been operationalised has been successful. We’ve seen maybe 5 or 6 Joint Recommendations that have been sent to the Commission and led to delegated conservation measures since 2013 and I imagine it would cover a very small area [of marine Natura 2000 sites] and presuming the goal would have been that fishery management measures would have been in place for all of these Natura2000’s sites”

The CFP calls for establishing specific, EU-only, regional management bodies, which are the regional management groups consisting of a high level and working group, whilst the coordination of environmental issues happened under Regional Sea Conventions. So from the onset there was a disjointed approach to policy coordination and integration.

Regional Groups setup

The CFP only stipulates that the Regional Groups shall be set up but does not add guidance on their organisation. As outlined in the dedicated section in the first chapter of this report, there is great variety between groups in their remit and workplans and the level of stakeholder participation allowed. Some groups allow stakeholders to join at a working group level, although that is mostly through the Advisory Councils, whilst others only allow minimal participation. In all regional groups the meetings of the High Level Group (HLG, in which fisheries directors of ministries and the European Commission take final decisions) are closed to outside participation. In general, there are no notes of these meetings available and the agenda is not public.

“What I’m saying is there is very little transparency happening with the high-level groups when they sit around to negotiate or they actually want to agree on for the Joint Recommendation. That’s a problem for the stakeholder consultation and it’s probably also a problem for figuring out who’s responsible when the measures are watered down; to try to pinpoint who’s the responsible party for doing this”

Harmonisation of approach

Harmonising implementation of different EU policies at the regional level also faces a number of challenges. There is a mismatch of scales between the design and focus of the different EU policies and the implementation modes. In order for policy implementation to be harmonised between coastal states it helps for legal scales to be aligned. In the case of setting fisheries measures in MPAs, this is not the case. On the one hand, the CFP is a regulation and under European law its measures take immediate effect, whilst on the other hand the Habitats, Birds, and Marine Strategy Framework Directives require Member States to prepare a national implementation plan within their own remit. As a result, governance systems and structures, management measures, and even the indicators used to measure the level of implementation and success differ among Member States and so hamper the overall effective operationalisation.

This was apparent in the case study of the Dogger Bank process (also see Dogger Bank Case Study) where different interpretations of the Habitats Directive led to the three initiating Member States having differences in formulating their objectives for the habitat in the area even though they all agreed on its unfavourable status.

The mismatch is further exacerbated by the fact that, in most countries, the CFP lies within the competence of fisheries ministries whilst implementation of the environmental directives is handled by the environment ministries. Or as one respondent reflected on the objectives of the Habitats Directive vs the CFP:

"It might not be about the habitat but maybe it's about the gear. The fishers are not forced into a permanent process of becoming more sustainable this way and that's a shame."

Timelines and pathways

Art 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**.

Art 18 2. (Regional cooperation) For the purpose of paragraph 1 (*Ed. MS agree to submit JR*), Member States having a direct management interest affected by the measures referred to in paragraph 1 shall cooperate with one another in **formulating joint recommendations**. They shall also consult the relevant **Advisory Councils**. The **Commission shall facilitate the cooperation between Member States**, including, where necessary, by ensuring that **a scientific contribution** is obtained from the relevant scientific bodies.

Article 11.3 of the CFP provides a crucial element of the implementation process as it contains the only clear timeline that Member States need to adhere to within the process. When assessing the uptake of Article 11, it is clear that the provisions in this article are not enough to prevent confusion on the process and bad actors to be effective in causing delays or even blocking the whole process.

In three of the four cases reviewed, the process from the initiating Member State starting discussion within the Regional Group to the Joint Recommendation being finalised was the longest part of the process. The only initiating Member State that managed to prevent this was Sweden. However, in that case only one other Member State (Denmark) had a strong fishing interest in the area.

The term sufficient information is not defined within the context of Article 11, which can lead to confusion and unwanted delays whilst there is disagreement if the knowledge base is strong enough to go forward.

"More often than not asking for more additional information is a delay tactic. And I think if there could be clear guidelines that if the proposal is put forward, if there are objections then within X days the country objecting has got to list its objections and the reasons as to why it's objecting. And then if there's new information to be provided it's got to be done similarly within a set number of days. "

The way in which Article 11.3 is worded technically gives any Member State with fishing interest a veto on the process, and there are ample examples of this happening. This can be done actively, as happened for example when the Dutch parliament voted against the fisheries measures proposed for the Dogger Bank SAC, after which the whole process had to be redone. But Member States can also passively block progress, as they did in the case of the Scottish Joint Recommendation proposals whereby by simply refusing to engage in the process, due to concerns around Brexit, all progress was blocked.

“it becomes highly politicised and as we have seen, and the Member States seem to be impotent to prevent that or to have some sense of balance and say well... you know I hear what you say but we have to press on with this... so I mean it is almost laughable. You end up with this incredibly torturous process where the environment loses out, you know, still no protection after 10 years”

Several respondents pointed to the need to have more clarity on roles and responsibilities and a way to bring in arbitration in the Article 11 process, to ensure the process is concluded in a timely manner and that the ambition is not watered down.

“The problem with Article 11 is that in normal circumstances it’s quite easy to pinpoint if the Member State is at fault for not complying with the European laws, because it’s just one Member State. It’s their responsibility to take action in the protected sites, so that’s quite clear, but under Article 11 it becomes a lot more complicated with other Member States being involved”

“Sweden has very strong political willingness internally to do this and have a relatively easy situation in relation to their own fisheries sector. And still it took them years to put through a Joint Recommendation that is protecting relatively small areas. So when is France ever going to protect its massive MPA in the French Atlantic? It’s huge, and they designated it but there is not a single measure in that MPA and there’s Spanish boats in there. When is that ever going to happen without binding legislation that says you’ve got to stop”

Role of Stakeholders

Neither Article 11 nor Article 18 give clarity on how the Regional Group should engage with the Advisory Councils or other stakeholders. Article 18.2 merely states that, in cooperating with one another in formulating Joint Recommendations, Member States having a direct management interest ‘shall consult the relevant Advisory Councils’. This is frustrating according to some respondents as it is quite unclear how and if advice is taken on board and how stakeholders can participate.

“an issue of you have the advisory council giving advice to the high level group, and to what sense that advice is taken on board as well. There is very little transparency happening with the high-level groups when they sit around to negotiate to agree on for the Joint Recommendation, and that’s a problem for the stakeholder consultation”

Article 11 is descriptive on the issue of regional cooperation in agreeing conservation measures but does not stipulate how much say in the process stakeholders get. Article 18 also gives no guidance on the specific consultation requirements.

This has led a lack of uniformity in the approach taken by different Member States. This was apparent in all the processes reviewed as case studies in this report. In the case of the Dogger Bank, Member

States tried to have a stakeholder-driven approach at first, asking the North Sea Advisory Council to come up with a zoning plan that would form the basis of the Joint Recommendation. But this approach was later abandoned when the stakeholders could not find agreement. After the introduction of Article 11, the North Sea Advisory Council advised several times on the progress on the Dogger Bank but they were quite frustrated in the lack of response they got on their advice from both the Member States and the Commission²⁴. Sweden made sure stakeholders were fully informed of every stage of the process but opted not to give them a say in the setting of measures, as that was fully aligned to national policy. In the case of Belgium, lack of stakeholder involvement at the Joint Recommendation stage led to them coming in at the last minute to instigate a block of the Delegated Act at a European Parliament level.

Role of scientific underpinning

Art 11 3. The Commission shall adopt the measures, taking into account **any available scientific advice** (= STECF), within **three months** from receipt of a complete request.

Art 26. Consulting scientific bodies. “The Commission **shall consult** appropriate scientific bodies. **STECF** shall be consulted, where appropriate, on matters pertaining to the conservation and management of living marine resources, including biological, economic, environmental, social and technical considerations. Consultations of scientific bodies shall take into account the proper management of public funds, with the aim of avoiding duplication of work by such bodies.”

The role of scientific expertise, although specifically referred to in the CFP legal text, is not interpreted in the same way by all parties within the process. Although all agree that it is a role of importance, the timing and role of scientific grounding is not defined.

STECF advice in the Article 11 process

The role of the EU Scientific, Technical, Economic Committee for Fisheries (STECF) in the Article 11 process is an evaluation of proposed fisheries measures. STECF reviews the content of the Joint Recommendation after submission and is asked to indicate if proposed measures will contribute to the goals under the relevant directive(s) for the area. If the information is found to be insufficient or does not support the goals, this is reported to the Commission.

Some interviewees thought that the STECF role could be improved if more scientists with a thorough understanding of the functioning of marine ecosystems and nature conservation were added to the panel, as the majority of members are experts in fisheries and economics.

“I think someone like STECF should be advising on what are the scientific impacts or what are the environmental, ecological impacts of fishing. And the problem is once they make a reference to socio-economic factors that just undermines all of the work. It gives governments a free reign to not implement measures that are needed.”

From STECF Plenary reports, it is clear that STECF often does not have much time to evaluate the Joint Recommendations received through the Article 11 process. Considering the specific nature of Article 11 Joint Recommendations, taking these requests out of the regular work of the STECF might give the members more time to address them.

“They’re given a very short period of time to provide advice. It’s matter of days on joint recommendation and they can only do so much in that period of time...”

Timing of scientific input in the Article 11 process

As stated above, the STECF is only consulted by the Commission after the Joint Recommendation is submitted by the relevant Member States. If the information in the proposal is found to be insufficient or does not support the goals for the MPA, then the Commission can opt to request the proposing Member States to address the concerns or provide additional information. This means that any comments, criticisms and suggestions for improvement made by STECF and to be addressed by the initiating Member State come once the Joint Recommendation process has already been concluded. This leads to delays and irritation.

Sometimes the STECF advice includes suggestions to increase gear exclusion zones (Belgium (STECF 2017) and Germany (STECF 2019)), or has comments on lack of a monitoring programme, etc. If these issues were flagged at an earlier stage, then solutions might have been possible. For Kattegat (STECF 2021 – Sweden. Denmark) STECF detailed comments and positive outcomes for each of the Terms of References. In 2016, there was an STECF written procedure on the four Danish N2000 areas in the Kattegat, based on the information supplied by Denmark. Germany and Sweden. Some of these areas were later included in the Swedish Joint Recommendation for the Kattegat.

Many of the respondents agreed that it would make sense to have this scientific check, or a similar one, earlier in process, or to carry out a screening of the draft Joint Recommendation before it has been submitted, or to even have a request to ICES from the regional Member State groups on the basic document submitted by the initiating Member States.

“About the basic document then, that would be possible. Also, because they then receive a fairly recent document and not two or three years later. Because as a Member State, you cannot of course predict how quickly the process will go, even if you want to go as quickly as possible. But now perhaps the basic document could also be reviewed by STECF”

Scientific expertise in the Article 11 process

Article 26 of the CFP states that the “Commission shall consult appropriate scientific bodies” which opens up the possibility that a forum other than STECF could be consulted. For the Dogger Bank, a Special Request was sent to ICES in 2012 by Germany, the Netherlands, and the UK as follows: “ICES is requested to advise on the degree to which the implementation of the proposed fisheries measures in the Presentation Paper will contribute to the achievement of the established conservation objectives, taking into account the wish of the Dogger Bank states to consider the Dogger Bank as one ecosystem.” The headline conclusion was: “ICES considers that the diversity, and ambition, of the national conservation objectives makes development of a single management approach complicated and difficult.” The main criticism pointed out by ICES was that each of the countries had a different (conservation) goal in their particular part of the Dogger Bank, which would complicate any attempt at a joint management approach. Taking heed of this initial advice provided by ICES back in 2012 could have saved time and prevented the reiterations of the same criticism by STECF when it was asked to review the Joint Recommendation in 2019.

Role of the Commission

Process

Articles 11 and 18 of the CFP define a specific role for the Commission at different steps in the process.

Art 18 2. (Regional cooperation) For the purpose of paragraph 1 (*Ed. MS agree to submit JR*), Member States having a direct management interest affected by the measures referred to in paragraph 1 shall cooperate with one another in formulating Joint Recommendations. They shall also consult the relevant Advisory Councils. **The Commission shall facilitate the cooperation between Member States**, including, where necessary, by ensuring that a scientific contribution is obtained from the relevant scientific bodies.

There is also an overarching role for the Commission in ensuring that the EU's objectives for the Birds and Habitat Directives, the MSFD, the Biodiversity Strategy for 2030, and other global and regional conservation commitments are met as was pointed out in the European Court of Auditors report from 2020 (see section on this special report in the first chapter of this report).

According to the Commission itself, the responsibility for the Article 11 process lies with the Member States under regionalisation. The interpretation of the Commission of their facilitation role within the process is fulfilled by providing information such as the Staff Working Document, by organising workshops and seminars, and by attending meetings of the Regional Groups. They do not take an active role when negotiations are stalled or there is disagreement between Member States.

"And I think if there could be clear guidelines that you know... that the proposal is put forward, if there are objections then within 14 days the country objecting has got to list its objections and the reasons as to why it's objecting. And then if there's new information to be provided it's got to be done similarly within 14 to 28 days... but then there's got to be some way of arbitration, you can't have nothing happen in the absence of an agreement... So, I think there's got to be a clear timeline and pathway for situations where there is an objection."

Interpretation of the role of the Commission

Articles 11 and 18 set out a clear role for the Commission in the designation process, but most of those interviewed were quite critical of the efficacy of the Commission and most found the Commission to be lacking in leadership or coming to the process too late. Looking at the reactions of the interviewees, it is clear that the expectations of the role the Commission should play do not tally with the perception of the Commission. Improving this pattern would be beneficial.

"We felt a bit abandoned because no one from the Commission reacted to our requests."

".. the guardian is the Commission. The Commission has to put its first on the table and say, enough, we have to make progress on this JR. You have three months to give us a proposal that responds to the requirements of this and this and that and such. And if you don't, we will open infringement procedures against your country"

In this respect it would be advisable to clarify the roles of DG Environment vs DG MARE.

Interviewees were quite sceptical of the balance between the two DGs and pointed out there was ample room for improvements.

“.. it ties up with all of this due diligence... a much stronger and more integrated role of DG Environment. I mean they are the protectors of the Nature Directives and frankly their involvement in all the processes they have been involved in has been minimal and highly ineffective really... I just don't feel they have their finger on the pulse of these things ... I think DG MARE rules the roosts... ” “... the guardian is the Commission. The Commission has to put its first on the table and say, enough, we have to make progress on this JR. You have three months to give us a proposal that responds to the requirements of this and this and that and such. And if you don't, we will open infringement procedures against your country”

Article 18.2 states that the Commission shall facilitate cooperation between Member States, but opinions differ strongly on what this facilitatory role should be. In a legal briefing developed by Client Earth on Article 11²⁵, they stressed that as Article 18.2 refers to cooperation in relation to implementation and enforcement of the measures adopted under Article 11.2-11.4 and Article 11.6 which are linked to the EU's environmental law, it should be DG Environment that has the primary responsibility for overseeing the processes described in Article 11. This interpretation is not followed by the Regional Groups, that hold that the process is within the remit of the fisheries departments as they are the bodies tasked with the implementation of the CFP.

However, in general all interviewees agreed that the facilitation of cooperation by the Commission was limited and only took shape late in the process after it had become politicised.

“And so, we were happy that DG MARE got involved, but it would have been so much better that I'd gotten involved much, much earlier because you don't want to waste all of this time for anyone. You know, it's such a bad use of civil servants time as well.”

Both from the case studies and the interviews it is clear that there is great frustration with the length of the processes. Even the measures for the relatively simple areas in the Skagerrak and Kattegat took over a decade to materialise. Even though this was already apparent during the CFP reform from 2013, Articles 11 and 18 do not provide a way to take action if processes are stalled and no sanctions are levied if deadlines are missed or exceeded, even for places where there is wording in Article 11 to facilitate this.

“It is really hard for say the European Commission to pinpoint one particular actor... and be like well, you're responsible for this... you're not in compliance with European environmental law we're going to take infringement action against you. At the moment just none of this accountability is happening and so we see that is a huge non-compliance with the Habitats Directive but just nobody's been held accountable for that at the moment. That's the big problem.”

An interesting observation is that even though the Commission has the option to take emergency measures within Natura 2000 sites when no measures are taken by Member States, there are no cases of this happening. There are some cases where emergency measures were taken to protect species (e.g., sea bass, Baltic cod) but the Commission never used its capacity to force action within an MPA to prevent further damage.

Functioning of Article 11

The reactions to the existence and working of Article 11 were varied. Several of the respondents pointed to the importance of having Article 11 in existence as a means to align legislation and include environmental considerations in the CFP.

“But I guess as a member of a club you need club rules. And that’s what it (Art. 11) did. It formalized the behaviors... that each of us should adopt you know.”

“So, we think that Article 11 and regionalisation process is a very good step forward. We have the tools in Article 11. Absolutely, in connection with Article 18.”

Others were more critical about the efficacy of Article 11 and found that it did not provide enough (legal) background for successful implementation.

“it is safe to say that Article 11, even in legal terms, is insufficient.”

“Article 11 is just not enough to guide the civil servants who have to do this job of reconciling fisheries management and nature protection, it is just one article with four paragraphs.”

All those interviewed expected a stronger role by the Commission as far as guiding the process and keeping to the timeline of the Article 11 process is concerned. Once a Joint Recommendation has been submitted, the Commission could have a checklist to see if the information provided is adequate/fit for purpose. Perhaps some sort of risk assessment should be carried out by the Commission at this point.

“... I can see the justification in... you need to have some outside sort of arbitration on whether the Joint Recommendation is fit for purpose...”

Most of those interviewed felt there should be a clear mandate and responsibilities for DG Environment and DG MARE, as well as alignment of the two departments. The Commission appears to have the same ambition for alignment and it is hoped that this will improve with the current Commissioner, who has both departments as his responsibility.

“...it may not be possible in the long run, because it’s the Commission... is that DG Environment take the lead in all of these matters, regarding Article 11... but even if that were not possible, they need to be structurally much more involved than they are. It’s just because it’s fisheries... you know that not enough... without DG MARE’s business it’s an environmental business, first and foremost. “

“But in the end the decision power lies with the marine department. And if they were aligned the environment department and the marine department that doesn’t have to hurt, but you can imagine... I know at a Commission level there is quite some competition between ENVI and MARE“

Some of those interviewed suggested taking the Commission to the European Court of Justice in order to provide clarity on the implementation of Article 11 and supply jurisprudence. This would

provide a means of putting pressure on Member States that have made little progress in establishing fisheries management measures in their MPAs.

“.. until we have proper jurisprudence from the European Court of Justice, we won't know which way to go or how to apply it (Art. 11).”

“.. so this whole big problem about who's legally responsible under Article 11.”

Staff Working Document (SWD)

In 2018, the European Commission brought out a Commission Staff Working Document (SWD) on the establishment of conservation measures under the Common Fisheries Policy for Natura 2000 sites and for Marine Strategy Framework Directive purposes. The document states that “the good practices described in this document are for information purposes only, and are without prejudice to the interpretation of the Court of Justice and the General Court or decisions of the Commission.” This suggests that this document does not have formal status. Most of the interviewees were familiar with the document and appreciated the information presented, but were unsure of its status and use.

“Art. 11 is complemented by a guidance document, but because the article itself is relatively vague, there's so much that the guidance document could do and say, but it cannot be more prescriptive because the guidance document is not the legislation.”

In the SWD are listed ten “Elements of good practice regarding the information to be provided by the Member States with the submission of the Joint Recommendations” but because the status of the

“How much do we rely on this sort of wish list of the staff working document guidance? And how much of that should be hardwired into the legislation and potentially a revision of the common fisheries policy or something.”

document is unclear this information unfortunately does not seem to be used.

The Commission has distributed the document widely and sees the availability of the document and the information presented therein as a way of facilitating the Article 11 process. This sentiment is not shared by all recipients. Many interviewees pointed out that a SWD is a weak tool that is of little use when there is a bad actor blocking progress on a file. An improvement could be to incorporate elements of the SWD into legislation so that they become fixed guidelines for the process and prevent unwanted delays or watering down of objectives.

In addition, the Commission needs to better identify who the document is aimed at, and ensure all recipients have the same level of understanding of both fisheries and environmental policy and legislation. In this respect, it is important to include all those involved in the negotiations from both

“And it just seems too much take or leave... basically what I'm saying is that you know, there really needs to be a kind of triage exercise to see which elements of the staff working documents should be incorporated into the articles themselves, rather than being left to... it's a sort of soft guidance...”

environment and fisheries departments at the European Commission level and even more so in the Member States and Regional Groups.

Recommendations

In the analysis it became clear that the barriers to the successful implementation of Article 11 can be separated in three distinct areas of improvement: clarity on process & timelines, arbitration & conflict resolution and transparency & accountability. All three areas require improvements at Member State, regional and Commission level.

Clarity on process & timelines

The legal text in the CFP leaves room for interpretation on the roles and responsibilities of the different parties, which can be used to stall or derail the process. The initial phase, during which the initiating Member State drafts a basic document to share with the Regional Group, has no timeline or formal end point. Similarly, information provided needs to be 'sufficient' without a definition of what constitutes sufficient information.

"I really can't tell you, because for it to work properly, it has to, you know, to be useful to the people who are meant to use it and the people who are meant to use it as those negotiating in the Scheveningen group and in Baltfish. And these are civil servants from the fisheries ministries most of the time. So this is the target audience... so you have to ... make sure that these people receive it, but also that they understand it and that they support it in a way because it's hard to take a guidance up if you really don't support what's in there, as long as it's not binding."

The responsibility for developing measures in MPAs is shared between environment and fisheries departments, which tend to operate very differently. Fisheries departments are focused on sustainable extraction of marine resources with their environmental counterparts working to protect (certain elements) of the marine ecosystem. As Article 11 is within the legal realm of the CFP but the outcomes need to adhere to the Nature Directives and the MSFD, there is a clear mismatch in how to manage these sites. There are hardly any deadlines within the process, and no consequences for delays.

Suggested Improvements

The European Commission to take an active role as far as facilitator and timekeeper of the process. The Commission could initiate meetings, ask Member States to provide formal updates of the implementation process in their designated MPAs, and set a clear annual agenda for this process, similar to the one for the delegated acts on the discard plans.

The European Commission and Member States to seek legal guidance on clarifying the division of responsibility between fisheries and environment departments, specifically in cases where fisheries interest can be overruled when they prevent reaching environmental objectives.

The European Commission to start infringement procedures against Member States that have failed to implement fisheries measures in MPAs which have been designated in the past but have no fisheries management measures or other conservation measures in place.

The European Commission should set a clear annual agenda for Article 11 procedures, similar to the one for discard plans, with dates for the submission of Joint Recommendations, STECF evaluation, and publication of the evaluation by the Commission.

The European Commission can take emergency measures in Natura 2000 sites that have been designated but have no management measures in place based on the precautionary approach.

The European Commission and/or Member States can use other legislative and policy processes to strengthen the implementation capabilities and add hard deadlines for MPAs that have already been designated, for example through the review of the Technical Measures Regulation or the revision of the Multiannual Plans.

Member States to ensure that civil servants from both fisheries and environment departments are actively involved in both the drafting and the negotiation process.

The European Commission and Member States incorporate elements of the Staff Working Document into a Delegated Act, so that they form a proper binding set of guidelines for the Article 11 process.

Arbitration & conflict resolution

If parties cannot agree on a joint way forward, the whole process can become blocked with no way to progress. There is no mechanism to have parties take ownership of the conservation needs.

Objectives are often watered down to appease Member States or stakeholders (at a national level) with no way to prevent that from happening if the initiating Member State is not in a capacity to invest political capital in the outcome of the process.

Suggested Improvements

The European Commission could start a procedure against Member States with the European Court of Justice for not implementing their designated MPAs, in order to create jurisprudence on Article 11. Alternatively, a civil society group could take the Commission to court for not delivering on its environmental targets.

The European Commission and/or Member States to carry out a risk assessment on the basic document produced to indicate which elements are likely to need additional work to prevent delays later in the process.

Member States should agree formally which information can be used and which scientific authorities can be consulted when there is disagreement on the severity of fisheries measures needed.

The European Commission and Member States could strengthen the scientific underpinning by including a scientific check at an early stage of the Joint Recommendation process (shortly after the basic document is presented by the initiating Member State), to review if the proposal meets the environmental objectives and then suggest improvements and clarifications.

The European Commission can request STECF to initiate Expert Groups (EGs) to deal with specific topics, which then report to the plenary meeting for STECF to formulate advice. These EGs work independently and allow the possibility to involve participants with a specific expertise.

Alternatively, Member States could formulate special requests to ICES in early stages of negotiations or on draft Joint Recommendations and use the resulting information to prepare the final Joint Recommendation.

Transparency & accountability

The process has very few checks and balances to allow scrutiny of the decisions being made. It is left up to the discretion of the initiating Member State to consult with stakeholders at a national level. Regional Groups are at best only partly open to observers. Advisory Councils have to be consulted, but their advice can be put aside with no explanation and the European Commission only provides minimal information once it has received the Joint Recommendation, even to the initiating Member State.

Suggested Improvements

The European Commission and Member States to agree on formal guidelines for the organisation of Regional Groups and ratify these guidelines within a delegated act. These should include the obligation to publish agendas and notes of meetings as well as meeting documents. The meetings should be open to the participation of stakeholders and observers and there should be a formal decision-making process and arbitration in case of diverging opinions.

The European Commission to request Member States to publish a proposed timeline and update this timeline throughout the process, for the route towards a Joint Recommendation to be shared with relevant stakeholders and available online.

The European Commission and Member States to provide written responses to the STECF evaluation which clarifies what (if anything) they have done address any concerns flagged by the scientists.



Top: Mediterranean red sea fan in a Natura 2000 site in the Aeolian Islands - © OCEANA / Juan Cuetos

Bottom: Common dolphin, Algarve, Portugal – © OCEANA / Carlos Suárez

Conclusions

We conclude that the current legislative and policy framework, as expressed in Article 11 of the CFP, has the potential to reach the EU's environmental objectives, but that its implementation needs to be improved. The current situation leads to a tug-of-war between fishing and environmental interests when it comes to marine protected areas, which results in unwanted delays in implementation and the watering down of objectives.

The lack of alignment between the EU's environmental directives and fisheries legislation creates a grey area in which parties can deny they have responsibility. Bad actors can exploit this unclarity with endless delay tactics and eventual watering down of conservation objectives, once all involved in the process have grown numb from waiting. All involved only take partial responsibility for the outcome, and so when the process fails to result in effective management they can point to 'the other' as the one who prevented a successful outcome. As long as this lack of ownership prevails, it is unlikely that the Article 11 process will improve. There is a clear need for a better understanding of the environmental goals embedded in the CFP in order to align the environmental and fisheries legislation. As the EU legislators are hesitant to take such steps, the route through the European Court of Justice would be a good option to create jurisprudence. A clear case could be made that the lack of management has led to a degradation of the conservation status of protected habitats and more action is warranted.

In addition, it is essential to have clarity on the roles and responsibilities of all actors in the process and to improve transparency throughout. There are very few deadlines within the process, apart from the six-month period after the Regional Group decides to put forward a Joint Recommendation, but even then there is no action if a deadline is missed. For outsiders, it is nearly impossible to find out timelines of processes or know when certain discussions are held. Even the Advisory Councils, the official stakeholder bodies in the process, have pointed out repeatedly that they do not feel they are provided with enough information to play a meaningful role in the process.

In terms of both these shortcomings, the European Commission is the one who has the capacity to improve the Article 11 process, as: (1) they have the legal capacity to enforce EU environmental legislation; (2) they can request interpretation of legislation as well as scientific expertise on effectiveness of management measures; and (3) they can put pressure on regional processes by setting deadlines and initiating meetings with relevant Member States.

Article 11 and the CFP do not exist in a vacuum. They are part of the EU legislative and policy framework that is meant to ensure a sustainable future for the European environment and its fishing sector. This should be reflected better in the way MPA management is integrated in other laws and directives. The legislator, in particular the European Commission, can utilise upcoming opportunities, for example the revision of Multiannual Plans, the further roll-out of the Biodiversity Strategy in the form of the *EU Action Plan to conserve fisheries resources and protect marine ecosystems* or, in the future, EU restoration law. By using these political opportunities to set hard targets for implementation and put clear restrictions on practices allowed within MPAs, a better balance in the different interest at play can be found. In this way, the implementation deadlock in which many of these areas currently stand, can be broken.

ANNEX 1: Case Studies

Case study: Sweden

Sweden – Kattegat / Skagerrak

Marine Protected Areas: Fladen, Lilla Middelgrund (LM), Stora Middelgrund och Röde bank (SM/RB) and Morups bank (MB) in the Kattegat

Summary

Areas were selected for features related to the Habitats and Birds Directives, as well as the MSFD, and

are also part of OSPAR's and HELCOM's networks of marine protected areas. Fisheries measures proposed the precautionary approach with several areas completely closed to commercial and recreational fisheries.

Areas were designated between 2006 and 2009 but the process towards implementing fisheries measures did not start until 2017.

There is only one Member State with a substantial fishing interest in the area (Denmark).

The Joint Recommendation is in its final stage and the Delegated Act is expected to be published in the autumn of 2021.



SITE DESCRIPTION

Initiating Member State	Sweden
MS having fishing interest	Denmark and Germany to a minor extent
Status of proposed under regulation	The areas are designated under the Habitats Directive, Birds Directive, the MSFD and are also part of OSPAR's and HELCOM's networks of marine protected areas
Species protected	Fladen: none LM: razorbill, guillemot, black-legged kittiwake, harbour porpoise SM/RB: Harbour porpoise M bank: none
Habitats protected	Fladen: Sandbanks which are slightly covered by sea water all the time (habitat code 1110), Reefs (habitat code 1170), Submarine structures made by leaking gases (habitat code 1180) LM: 1110, 1170 SM/RB: 1110, 1170 M bank: 1110, 1170
MPA area (km ²)	Fladen: 103.90 km ² LM: 178.44 km ² SM/RB: 114.11 km ² M bank: 5.66 km ²
No-take area (km ²)	The whole of Lilla Middelgrund and Morups Bank
Fisheries operating in area	All by Danish and Swedish industry Fladen: lobster trawl with commercial flatfish bycatch; gillnet sole fishery with commercial flatfish bycatch LM: trawl for Norway lobster and flatfish; winter pelagic fishery for herring SM/RB: trawl for flatfish and Norway lobster; gillnet sole fishery with commercial flatfish bycatch M bank: Norway lobster trawl fishery
Justification for fisheries measures	Sweden had implemented the precautionary approach for taking conservation measures in MPAs. Therefore, in order to maintain and improve ecosystem functions, the recommended fisheries conservation measures comprise the establishment of no-take zones and restricted fishery zones where only fishing with handheld gears like rod and line, fishing for crustaceans with pots, and fishing with pelagic floating trawls are allowed. In no-take zones, the zones will be protected from all fisheries, both commercial and recreational, allowing the protection of fish and invertebrates and of bottom habitats. In order to protect and facilitate the recovery of benthic structures, habitats and species (e.g., sea pen and burrowing megafauna), only fishing with selective gear with minimal benthic impact will be allowed in the restricted fishery zones. Accordingly, the prohibition of fishing activities in the no-take zones and the regulations regarding the restricted fishery zones, as set out in the proposal, should be included.
Control measures proposed	To increase information on bycatch of harbour porpoise and seabirds in a small-scale net fishery around the edges of the no-take zone, all vessels operating in this fishery will be obliged to report in a national research program and use remote electronic monitoring, including CCTV.

PROCESS TOWARDS DELEGATED ACT

Status of proposals	Waiting for Sweden to resubmit with additional information on fisheries measures for net fishery
Year site first designated by initiating MS	Fladen: 2006 LM: 2008 SM/RB: 2009 M bank: 2009

Timeline	2017: National consultation Fisheries Management Plan 2018: Information sent to Member States with fishing interest March 2020: 1 st draft Joint Recommendation sent to Scheveningen WG and to AC (Skagerrak -Kattegat WG) Sept 2020: 2 nd draft Joint Recommendation sent to Scheveningen HLG and to AC (ExCom) Nov 2020: Joint Recommendation submitted March 2021: STECF evaluation May 2021: Commission request for additional information on control of small-scale, static gear fisheries
Policy background + measures in place	The Swedish Agency for Marine and Water Management is in charge of designing and implementing measures for MPAs, but the central government is responsible for CFP negotiations and implementation.
Scientific evaluation	STECF evaluation published March 2021 Conclusion: Habitat protection measures = trawl ban = sufficient Species protection – large fish = no take / trawl ban = sufficient Species protection – porpoise + seabird = insufficient as gillnets still allowed, but STECF understand rationale of allowing monitoring program for data collection on bycatch levels. Control = AIS pings = sufficient
AC advice	NSAC: Skagerrak-Kattegat WG advice – May 2020 ExCom advice – November 2020 The NSAC delivered fully split advice on the fisheries management proposals, with the fishing industry objecting to all restrictive measures and the OIG supporting all measures apart from not prohibiting the small-scale net fishery in the restricted fishery zone.

Evaluation

Proposed conservation measures

By basing the Fisheries Management Plan on the MSFD, the Swedish administration could fully incorporate the precautionary approach, which allowed the establishment of considerable no-take zones in the areas as a precautionary measure. This is a stark contrast to Member States that elected to use a risk-based approach where the burden of proof is reversed and it has to be proven (or at least made probable) that a certain fishing gear impedes the conservation objectives.

The areas proposed by Sweden are quite small compared to some of the other MPAs proposed within the EU. This could have helped in making the implementation process relatively smooth.

Process

Although the time between site designation and the proposal of fisheries and the first proposition for the fisheries management plan was long (national designation of Fladen in 2006, and the first FMP proposal in 2017), the time between the FMP proposal and the conclusion of the Joint Recommendation process was relatively short (three years from national consultation to submission). This could be related to the limited number of MS involved (only Denmark has a substantial interest).

The fast resolution can also be linked to the political capital Sweden was willing to invest and the choices made in regard to stakeholder involvement. The administration actively informed the North Sea Advisory Council and received its advice, but in the end made its own decision on the measures it wanted to take and stood by them.

Case study: North of Scotland

Scotland – North Sea

Marine Protected Areas: Braemar Pockmarks SAC; Central Fladen MPA; East of Gannet and Montrose Fields MPA; Faeroe-Shetland Sponge Belt MPA; Firth of Forth Banks Complex MPA; North-East Faeroe-Shetland Channel MPA; Norwegian Boundary Sediment Plain MPA; Pobie Bank SAC; Scanner Pockmark SAC

Summary

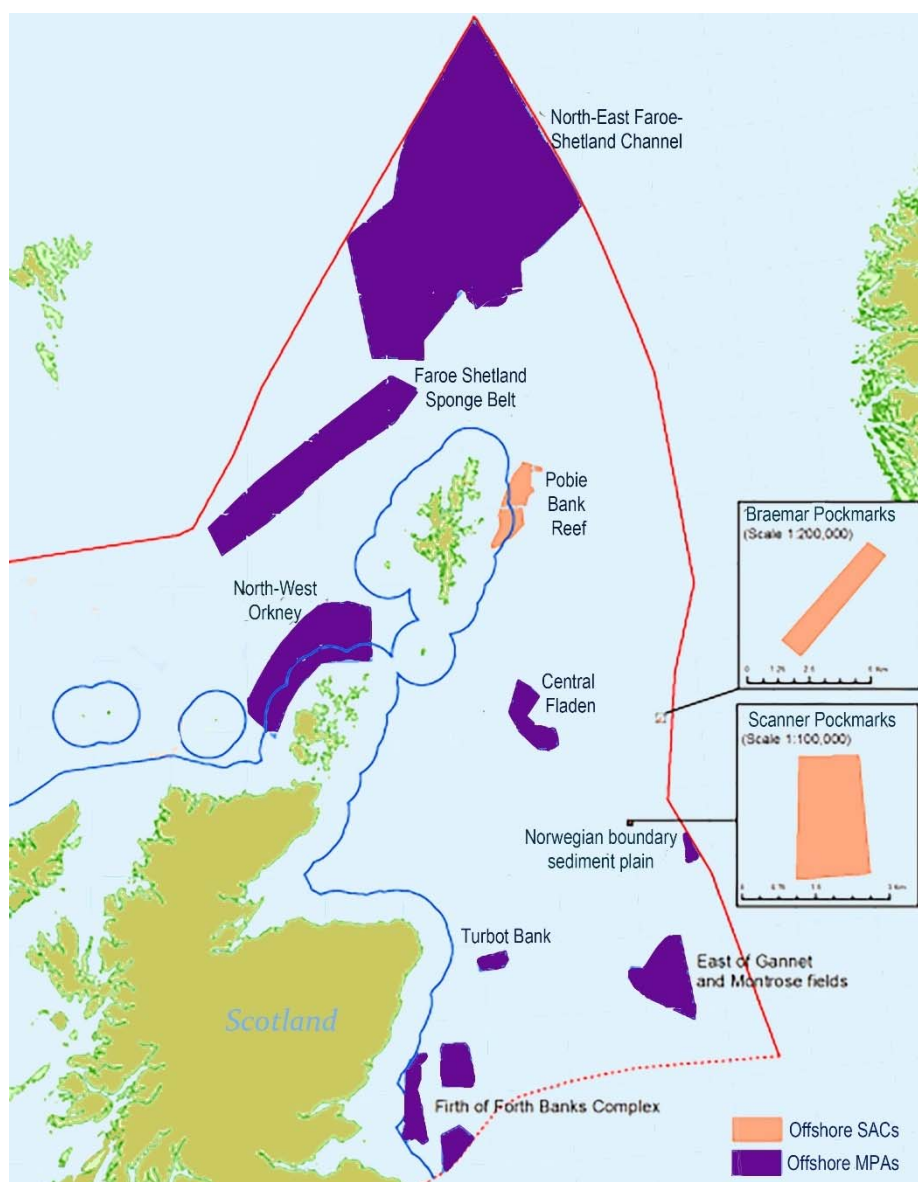
Some areas (i.e., the three SACs) were selected for both Habitats Directive features, while the others (i.e., Nature Conservation MPAs) protect Scottish Priority Marine Features (PMFs), identified by

applying guidelines agreed within the OSPAR remit. Fisheries measures were proposed following a risk-based approach, where measures were only proposed if it was considered that a fishing activity may pose a risk to the protected features of the site.

Areas were all designated in 2014 after a review process that started in 2012.

Scotland finished the first draft of the Joint Recommendation (JR)²⁶ for these areas in 2016, but as this coincided with the UK referendum to leave the EU, the process was never concluded. The Member States having a fishing interest in the area elected not to respond to the draft JR.

The areas are now part the Scottish MPA network and it is within the remit of the



Scottish devolved government to propose unilateral fisheries management measures for this area²⁷.

SITE DESCRIPTION

Initiating Member State	United Kingdom (Scottish devolved government)
MS having fishing interest	Denmark, Netherlands, France, Germany
Species protected	Central Fladen MPA (CF): tall sea pen (<i>Funiculina quadrangularis</i>) East of Gannet and Montrose Fields MPA (EG/MF): ocean quahog (<i>Arctica islandica</i>) Faeroe-Shetland Sponge Belt MPA (FSS): deep-sea sponge aggregations & ocean quahog Firth of Forth Banks Complex MPA (FFBC): ocean quahog North-East Faeroe-Shetland Channel MPA (NE FS): deep-sea sponge aggregations Norwegian Boundary Sediment Plain MPA: (NBSP) ocean quahog Turbot Bank MPA (TB): sandeel (spawning ground)
Habitats protected	Braemar Pockmarks SAC (BP): Submarine structures made by leaking gases (habitat code 1180) Central Fladen MPA: burrowed mud (PMF) East of Gannet and Montrose Fields MPA: offshore deep-sea muds (PMF) Faeroe-Shetland Sponge Belt MPA: deep-sea sponge aggregations (PMF), offshore subtidal sands and gravel (PMF) Firth of Forth Banks Complex MPA: offshore subtidal sands and gravel (PMF) North-East Faeroe-Shetland Channel MPA: offshore subtidal sands and gravel (PMF), and offshore deep-sea muds (PMF) Norwegian Boundary Sediment Plain MPA: sands and gravel that support ocean quahog Pobie Bank SAC (PB): Annex I reef (habitat code 1170) Scanner Pockmark SAC (SP): submarine structures made by leaking gases (habitat code 1180)
MPA area (km ²)	BP: 5 km ² CF: 925 km ² EG/MF: 1840 km ² FSS: 5281 km ² FFBC: 2131 km ² NE FS: 23 758 km ² NBSP: 164 km ² PB: 966 km ² SP: 3 km ² TB: 251 km ²
Proposed no-take area (km ²)	BP: 5 km ² = whole area FSS: 2607 km ² NE FS: 311 km ² SP: 3 km ² = whole area
Fisheries operating in area	BP: some mobile gear, but site too small to assess what type CF: Danish and UK bottom trawl fishery, some UK net fishery EG/MF: Danish and UK bottom trawl fishery FSS: Bottom trawl (UK & FR); Gillnet (UK, FR, DE); long line (UK & FR) FFBC: Bottom trawl (DK & UK); Dredge (NL & UK); seines (UK) NE FS: Bottom trawl (UK, DE, FR); Gillnet (UK & DE) NBSP: Bottom trawl (UK, DK, DE) PB: Bottom trawl (UK & DK); Seines (UK) SP: too small to assess fishing activity TB: no sandeel fishery, no records of other fisheries
Justification for fisheries measures	The Scottish government elected to use a risk-based approach where anthropogenic influence on each site was assessed and interventions were only proposed for features where it was considered that interactions with fishing activity may pose a risk to achievement of the conservation objectives

Control measures proposed	<p>Through VMS data, with a ring fence around the site to ensure that even small sites are adequately covered. Within each site there is a recommendation for frequency of data transmission. Where possible this was set at the minimum requirement of once every 2 hours. However, in some cases where the site is small or there is a complex zoning of measures proposed (e.g., with fishing allowed in some parts but not others), an increase ping frequency is proposed.</p> <p><u>Additional</u> A risk analysis approach is proposed to determine the frequency of surveillance. This will be a combination of routine patrolling to gather intelligence and specific patrolling to investigate potential breaches of the regulation.</p>
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PROCESS TOWARDS DELEGATED ACT

Status of proposals	Withdrawn due to Brexit. Scotland will now instigate unilateral measures in the areas designated, although these have not yet been announced.
Year sites first designated by initiating MS	BP: 2014 CF: 2014 EG/MF: 2014 FSS: 2014 FFBC: 2014 NE FS: 2014 NBSP: 2014 PB: 2014 SP: 2014 TB:2014
Timeline	2012 / 2013: Scientific review of sites carried out by the Joint Nature Conservation Committee (JNCC) 2013: First discussions with stakeholders on site designation 2014: Sites designated, European Commission informed, basic document drafted 2014 / 2015: Stakeholder workshops January 2016: Presentation on Joint Recommendation in development to NSAC demersal WG June 2016: UK voted to leave EU September 2016: 1 st draft Joint Recommendation sent to Scheveningen WG and to NSAC
Policy background + measures in place	<p>Each of the four devolved administrations within the UK (England, Wales, Scotland and Northern Ireland) are responsible for the identification, designation and management of protected sites within their respective marine waters.</p> <p>The Marine (Scotland) Act 2010 provides for the designation of Marine Protected Areas in Scottish waters (including the Nature Conservation MPAs) and for the integration with the CFP for fisheries measures.</p> <p>As part of the MSC certification of the Scottish demersal fishery, there is a voluntary closure of parts of the Fladen MPA to protect sea pens. This is controlled through AIS (spatial control measures).</p> <p>The Habitats Regulations translated the EU Habitats Directive into specific legal obligations in 1994, and were amended in Scotland in 2019, due to the UK leaving the EU. Under the Habitats Regulation, Scotland must continue to apply the requirements of the EU Nature Directives to Natura 2000 sites. All Natura 2000 sites in Scottish waters have been transposed to become part of the Scottish MPA network.</p>
Scientific evaluation?	The Joint Recommendation was never finished, and so was not evaluated by STECF
AC advice	No advice was issued

Evaluation

Proposed conservation measures

By using a risk-based approach, the Scottish administration ensured from the onset that the ambition in the MPAs would be quite low as there needs to be an indication that the fishing activity is indeed harmful before measures can be taken.

Process

There seems to have been little contact with other Member States that have a fishing interest in the area in the initial stages of the process. Only after a draft Joint Recommendation was finished was it sent to other Member States for comments. It is not unthinkable that this did not help the process, as no other MS felt a sense of ownership of the process. As a result, after the Brexit vote they did not lose anything by stopping their engagement on this file. For comparison, The Netherlands and Germany continued working intensively with the UK on the Dogger Bank SAC for years after the Brexit vote. The Dogger Bank process was a collective effort between these three Member States, which is likely to have led to them wanting to finish the process together.

Case study: Belgium

Belgium – North Sea

MPA: Vlaamse Banken

Summary

The area was selected for both Habitats and Birds Directives considerations as well as to address MSFD Descriptor 6 (sea floor integrity) for Belgian waters. The legal set-up of marine MPAs in Belgium is complicated as environmental law related to the MSFD and Natura 2000 sites falls under the federal government, but fisheries are the sole competence of the devolved Flemish government.



The Joint Recommendation for the Vlaamse Banken (Flemish Banks) presented by the Belgium to the European Commission contained four areas which would allow experimental fishing techniques, including electric (pulse) fishing.²⁸

The proposal did not go through at the last moment because the European Parliament blocked the Delegated Act.

SITE DESCRIPTION

Initiating Member State	Belgium
MS having fishing interest	Netherlands, UK, France, Germany and Denmark
Species protected	9 bird species: Red-throated Diver (<i>Gavia stellata</i>); Lesser Black-backed Gull (<i>Larus fuscus</i>); Great Black-backed Gull (<i>Larus marinus</i>); Little Gull (<i>Larus minutus</i>); Common

	Scoter – (<i>Melanitta nigra</i>); Great Crested Grebe (<i>Podiceps cristatus</i>); Little Tern (<i>Sterna albifrons</i> Pallas); Common Tern (<i>Sterna hirundo</i>); Sandwich Tern (<i>Sterna sandvicensis</i>) 3 fish species: Shad (<i>Alosa fallax</i>); River lamprey (<i>Lampetra fluviatilis</i>); Great sea lamprey (<i>Petromyzon marinus</i>).
Habitats protected	Sandbanks which are slightly covered by sea water all the time (habitat code 1110) Reefs (habitat code 1170) MSFD Descriptor 6: seafloor integrity; improving the seafloor Integrity to reach Good Environmental Status
MPA area (km ²)	1099 km ²
Proposed no-take area (km ²)	None
Fisheries operating in area	Main activity: Beam trawl (BE, NL) Shrimp trawl (BE, NL) Limited activity: Otter trawl (FR) The UK does some fishing in the area, but very limited compared to NL and BE Some Danish gillnetting There were no German fisheries active in the area, even though this country co-signed the Joint Recommendation.
Justification for fisheries measures	The Belgian government chose a pragmatic approach in which it elected to start with the introduction of very limited measures with minimal impact on the fisheries in the area, with the aim of expanding the measures over time. It proposed a zoning in the area with different management regimes for each area, including an area where experimental fishing techniques with reduced bottom impact could be trialled. This included pulse trawling.
Control measures proposed	Will not go further than the existing measures in place in Belgium: VMS, aerial, and marine control and technical control on board of vessels. The use of AIS will be limited: it will only be used when there is a suspicion of infringement ²⁹ .

PROCESS TOWARDS DELEGATED ACT

Status of proposals	Withdrawn
Year site first designated by initiating MS	2012
Timeline	<p>2010: First proposed as site October 2012: Designated by Member State 2013: Stakeholder workshops in Belgium and MSP consultation with NL, FR and UK 2014 -2016: Discussion in Scheveningen group on background document and measures to be proposed in Joint Recommendation Early 2017: Joint Recommendation sent to Commission March 2017: Evaluated at STECF Plenary February 2018: Commission sent Delegated Act to council and Parliament May 2018: NGOs lodged complaint against Delegated Act June 2018: European Parliament voted against the adoption of the Delegated Act October 2018: Belgium withdrew the Joint Recommendation</p> <p>Next steps 2021: Belgium restarts work on these sites as they are part of its Nature Policy Plan. It will look again to a zoning approach, and aims to have the Delegated Act approved by the end of 2023.</p>

Policy background + measures in place	Belgium has a partly devolved government, in which the responsibility for implementing environmental legislation lies with the Belgian federal government, but the fisheries is the sole responsibility of Flanders. For marine Natura 2000, sites this means that even though the federal government is responsible for designating the areas and drafting the Joint Recommendation, the Flemish government is responsible for fisheries management measures in the MPA and has a seat in the regional (Scheveningen) group and negotiates with the other Member States.
Scientific evaluation	<p>STECF concluded that: Based on the information available, they could not determine if Good Environmental Status will be achieved for these sites.</p> <p>Fisheries conservation measures may reduce the impact of fisheries with bottom contacting gears and help to maintain and/or improve seafloor integrity in the specified management zones. But based on the available information these could not be quantified.</p> <p>Noting that: For the zone where no high-impact fishing gear is permitted (Zone 3) the effect would be higher than for areas where beam trawl with wheels is permitted (Zone 1). Belgium did not provide information on which criteria would be used to assess the alternative gears that would be allowed in Zones 2 and 4.</p>
AC advice	The North Sea Advisory Council did not provide advice for this area

Evaluation

Proposed conservation measures

The Belgian government showed very little ambition in proposing fisheries management measures for this area. It was focused on getting some measures in place which could then be incrementally expanded as the knowledge base about the site grew.

This also explains why it included the option for pulse fishing and Danish seining in the Joint Recommendation. Neither gear was active in the conservation area at the time, and it was unlikely that they would be introduced there. However, these gears were added to the Joint Recommendation to appease The Netherlands and Denmark, and have them agree to it.

Process

The move from the European Parliament to block measures at the Delegated Act stage was unexpected and unprecedented. Interestingly, it would not have succeeded if there had not been such a strong sentiment against pulse fishing in the Parliament at the time. Normally these measures are viewed as a national issue, and the Parliament does not get involved.

Looking at the years before the Delegated Act was blocked, it would seem that neither the Belgian federal government nor the Flemish administration made an effort to inform stakeholders of their rationale. No advice was requested of the North Sea AC, and NGOs seem only to have become aware of the content of the proposal once the proposed Delegated Act was published.

It stands to reason that the Commission could have done more to warn Belgium that its intentions may not have been in line with what was legally expected. However, this was never done, not even after the STECF evaluation provided substantial criticism.

Case study: Dogger Bank

Netherlands, Germany, UK – North Sea

MPA: Dogger Bank

SUMMARY

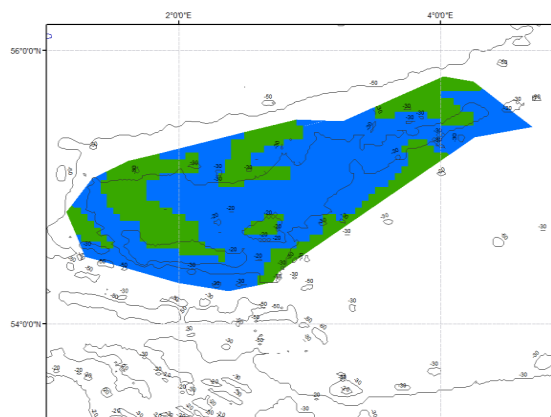
The Dogger Bank Special Area of Conservation (SAC) process was the first time that EU Member States (Germany, Netherlands, and the UK) endeavoured to jointly manage an MPA that is located in different EEZs. The process started before the revision of the CFP was concluded, and so was initiated without guidance from Articles 11 and 18.



All three Member States concluded that the conservation status of habitat type 1110 (submerged sand banks) was assessed as 'Unfavourable', due mainly to the quality of the habitat and disturbance of the biological community by fishing. However, each Member State formulated its objectives for its part of the Dogger Bank in line with the national interpretation of the Habitats and Birds Directives. This led to different levels of ambition and species covered for each country. The Netherlands opted to improve the quality of the habitat, the UK aimed to restore the habitat to favourable condition, and Germany focused on the conservation and restoration of a favourable conservation status of the habitat type (1110), including its typical and threatened communities and species³⁰.

The core question that they needed to answer was: how much of the Dogger Bank needed to be protected from fisheries impact in order to see an improvement in habitat conservation status?

The three Member States were very close to agreeing on measures in 2013, but this was delayed by the Dutch Parliament, which blocked the proposal at the last minute. After that, the process had to



Zoning proposal for Dogger Bank, with green areas closed to beam and board trawling and dredges, and blue areas open.

restart under the revised CFP, as it needed to include all Member States with fishing interests (i.e., Sweden, France, Belgium, and Denmark).

The UK leaving the EU has further complicated the process, as it announced unilaterally that the UK part of the Dogger Bank will be closed to all fisheries. The EU is now reviewing its options to challenge this under the EU–UK Trade and Cooperation Agreement (TCA)³¹.

SITE DESCRIPTION

Initiating Member State	Netherlands, UK, Germany
MS having fishing interest	Denmark, Sweden, France, Belgium
Species protected	Numerous birds, fish and benthic species (different for each Member State) as well as harbour porpoise (<i>Phocoena phocoena</i>), and grey seal (<i>Halichoerus grypus</i>)
Habitats protected	Sandbanks which are slightly covered by sea water all the time (habitat code 1110)
MPA area (km ²)	UK: 12331 km ² NL: 4745 km ² DE: 1692 km ²
Proposed no-take area (km ²)	None in 2019 Joint Recommendation UK now (post-Brexit) proposing to make whole area no-take
Fisheries operating in area	Beam trawl for flatfish: NL, UK (DE, DK minimal) Shrimp trawl: NL Otter trawl for plaice: DK, DE, NL, UK Sandeel & sprat trawl: DK, DE (NL minimal) Dredge: minimal activity Gillnet for cod and sole: DK, UK Seine for sole, cod and plaice: DK, DE, NL, UK
Justification for fisheries measures	All three countries opted for a risk-based approach and agreed on a zoning configuration with 66% of the Bank open to fishing and 34% with restrictions on bottom contacting gear. As there was disagreement on whether fishing with Danish seines impeded the conservation objectives for the area, the Member States opted for different approaches to this gear; The Netherlands allowed it in the area under management and Germany prohibited it.
Control measures proposed	VMS with a ping frequency of once every 30 minutes in combination with existing aerial and marine control and technical control on board of vessels. Each management zone will have an alert area of 4 nautical miles around it.

PROCESS TOWARDS DELEGATED ACT

Status of proposals	Joint Recommendation still under revision by Scheveningen Group, waiting for resolution of conflict between UK and EU
Year site first designated by initiating MS	Germany: 2004 Netherlands: 2009 UK: 2012
Timeline	<p>2006: Germany started EMPAS project on MPAs in national waters</p> <p>2009: FIMPAS discussion started in the Netherlands, stakeholder driven discussion on designating MPAs in the Dutch North Sea</p> <p>2011: Germany proposed to close 50% of its Dogger Bank area to bottom contacting gear</p> <p>2011: UK, DE, DK and NL established Dogger Bank Steering Group (DBSG)</p> <p>2011: DBSG asked NSAC to prepare a position paper proposing a fisheries management plan, consisting of a zoning proposal covering the three national SACs</p> <p>April 2012: NSAC provided split advice with 2 separate zoning proposals, one from industry and the other from NGOs</p> <p>September 2012: ICES advice on zoning in Dogger Bank</p> <p>October 2012: Dutch industry developed its own zoning proposal</p> <p>2013: DBSG developed zoning proposal with 33.4% closure to bottom impacting fisheries</p> <p>July 2013: NL parliament voted against DBSG proposal (after DE, DK and UK had already signed off)</p> <p>July 2013: Revised CFP became active, including Articles 11 & 18</p> <p>October 2016: Germany unilaterally sent Joint Recommendation (on German area) to European Commission³²</p> <p>2016: Germany withdrew Joint Recommendation</p> <p>2015-2016: Discussion on new Joint Recommendation</p> <p>June 2016: UK voted to leave EU</p> <p>2017: Ministerial changes in NL, DE and DK</p> <p>2018: Opposition to Joint Recommendation in Dutch Parliament</p> <p>June 2019: Joint Recommendation submitted</p> <p>June 2019: NGOs lodged complaint against allowance of Danish seines in closed area</p> <p>August 2019: STECF review of Joint Recommendations for Natura 2000 sites at Dogger Bank, Cleaver Bank, Frisian Front and Central Oyster Grounds³³</p> <p>August 2019: STECF review of Joint Recommendations for Natura 2000 sites at Dogger Bank, Cleaver Bank, Frisian Front and Central Oyster Grounds.³⁴</p> <p>October 2019: Commission requested additional information and clarification on fisheries measures and control</p> <p>January 2021: North Sea Agreement (covering Dutch waters of the North Sea) included a ban on Danish seines in proposed management zones on Dogger Bank</p> <p>January 2021: UK left EU</p> <p>February 2021: UK announced it will close its part of the Dogger Bank to all fisheries</p> <p>April 2021: New draft Joint Recommendation from NL and DE sent to NSAC</p> <p>May 2021: European Commission objected to UK for announcing unilateral measures on Dogger Bank</p>
Policy background + measures in place	<p>When the three Member States started working on a joint management proposal, there was no established management framework. This changed with the CFP review from 2013 and the introduction of Articles 11 and 18.</p> <p>All three Member States concluded that the conservation status of habitat type 1110 was assessed as 'Unfavourable', due mainly to the quality of the habitat and disturbance of the biological community by fishing. However, each Member State formulated its objectives for its part of the Dogger Bank in line with the national interpretation of the Habitat and Birds Directives. This led to different levels of ambition and species covered for each country. The Netherlands opted to improve the quality of the habitat, the UK aimed to restore the habitat to favourable condition, and</p>

	<p>Germany focused on the conservation and restoration of a favourable conservation status of the habitat type (1110) including its typical and threatened communities and species.</p> <p>The three Member States were very close to agreeing on measures in 2013, but this was delayed by the Netherlands. After that the process had to restart under the revised CFP, as it needed to include all Member States with fishing interest.</p>
Scientific evaluation	<p>In 2012 the DBSG asked ICES to develop a methodological framework for a zoning proposal, based on the input from the NSAC and all previous preparatory work by EMPAS and FIMPAS (see above).</p> <p>ICES advised that: A comparison of incremental improvement after a full six-year monitoring and assessment period could improve understanding of the implication of scale and provide better scientific guidance for the appropriate location and size of areas needed to achieve the conservation objectives.</p> <p>STECF concluded that: The trade-off between protection of the sandbanks and socioeconomic interests may have negative impacts on the ecological requirements of the natural habitat types and the species present on the Dogger Bank, since fishing with mobile bottom contacting gears would continue in >60% of the Natura 2000 site, and fishing with purse seines would continue in >90% of the site.</p> <p>STECF also noted that more attention should be paid to the potential effects of fishing effort displacement, both within and outside the site.</p> <p>STECF noted that the size and irregular shapes of the managed areas complicate enforcement and control. Furthermore, STECF considered that a VMS ping frequency of 30 minutes may not be frequent enough for the enforcement agency to monitor vessels in the area.</p> <p>STECF concluded that a common and coordinated monitoring program for the whole Dogger Bank should be established and implemented by each Member State concerned. The results after six years of such monitoring may improve understanding and provide better scientific guidance for the appropriate location and size of the areas needed to achieve conservation objectives ³⁵.</p>
AC advice	<p>April 2012: the NSAC (then NSARC) provided split advice with 2 separate zoning proposals, one from industry and the other from NGOs in response to the Dogger Bank Steering Group, which had requested that the NSAC write a zoning proposal for the management of the Dogger Bank³⁶.</p> <p>The NSAC remained involved in the Dogger Bank process through its Dogger Bank Focus Group (under the Ecosystem Focus Group of the NSAC) but did not issue any new advice.</p> <p>In 2020, the NSAC published advice on the lessons learned from the Dogger Bank process with recommendations for improvement on:</p> <ul style="list-style-type: none"> • Clarifying timelines and deadlines of the subsequent stages of the Article 11 process • Ensuring sufficient scientific underpinning of measures to achieve the objectives of the conservation measures under Article 11 • Full integration, transparency and functioning of stakeholders, within NSAC and in relation to Member States in the context of Articles 11 and 18 • Involvement of the European Commission

Evaluation

Proposed conservation measures

The Dogger Bank is a clear example of a lack of scientific information about an area impeding the MPA implementation process. Because the area had been poorly studied in the past, there was disagreement about the baseline from the start. This was not helped by Member States insisting on a risk-based approach, which is a data-hungry way of deciding on measures. Under such an approach, the expected effect of a certain gear on reaching the conservation objectives needs to be scientifically underpinned, which proved difficult in this case.

In the case of the Dogger Bank, Member States were more committed to making the fisheries active in the area sustainable rather than protecting the environment.

Process

With a timespan of nearly a decade, this process is a clear example of the weakness of Article 11 when it comes to ensuring there is momentum to go forward and preventing bad actors from stalling progress. It also shows the influence a single Member State can have in hijacking the process. When the Dutch Parliament voted against the management proposal in 2013, it derailed the whole project and delayed progress for years.

Stakeholders had a central role in the process from the onset; the NSAC had a dedicated focus group on the Dogger Bank which was active for several years and participated in many of the Dogger Bank Steering Group meetings. There was a difference between the Member States in their communication with stakeholders. For example, The Netherlands wanted to share the draft Joint Recommendation with the NSAC for information and comments, but this was refused by the other two Member States. As there is little clarity in the CFP on how stakeholders should be consulted, this deadlock could not be broken.

The European Commission took a very passive role in the process. In the years before Article 11 came into force, it gave minimal guidance to the Member States on what a fisheries management plan for a joint SAC was expected to contain. After 2014, the Commission never actively engaged with the process, waiting until after the STECF gave its evaluation to request action from the Member States. It also did not respond to the complaint lodged by NGOs on the allowance of Danish seines on the Dogger Bank, but opted to forward this directly to the Dutch administration. STECF was not aware of this complaint when it did the review.

ANNEX 2 Interview Outline

This outline was sent to all respondents before the interview:

The first part deals with EU MPA policy in general:

Article 11 was added in the CFP reform of 2013 to clarify the adoption of conservation measures in MPAs under N2000, Habitats and Birds Directives and MSFD and to clarify how in a regionalised setting Member States need to work together in this process.

- Is the legislation sufficient to adequately integrate fisheries management into MPA's?
- Are the roles played by different parties (Member States, committee, regional groups) clear and do parties fulfil that role?
- What was the difference before and after Article 11 came into force (after the CFP reform of 2013)?

In 2018, the European Commission issued a staff working document to serve as a guideline for Member States and the Commission in going through an Article 11 procedure (attached to this email)

- Is this document a sufficient guide to an Article 11 procedure?
- Are there any parts that should still be added or supplemented?

(note: if you feel this goes into too much detail we can skip this section)

After the general part, we would like to talk to you about the area / files that you have worked on, we are particularly interested in the broad outlines but also in specific examples of things that worked very well or not at all in the process.

The route to a fisheries management plan for an MPA roughly breaks down into 4 phases:

- 1) First exploration/draft within Member State
- 2) Collecting information/stakeholder consultations
- 3) International alignment towards Joint Recommendation
- 4) Review by European Commission (+ request STECF) towards Delegated Act

In the interview, we use these phases as a guideline to ensure that cases from different countries can be compared. We have no fixed questions for this section but will roughly stick to the subject in the first section so the roles all actors played, changes/clarifications needed in the process etc.

Finally, we would like to ask you a number of questions about your insights regarding fisheries management in protected areas:

- Do you feel Article 11 improved the adoption of fisheries management measures in MPAs or other measures for the protection of the marine environment?
- Did the process lead to any change in buy-in/compliance from stakeholders?
- What (if anything) should be changed/improved to adopt fisheries management in MPAs?

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