

Getting to the bottom of rules on the strict protection of species and bycatches from fisheries (in the Exclusive Economic Zone) through the lens of the Baltic Proper Harbour Porpoise

Rebecka Thurfjell*

Abstract

This article examines the intersection between fishery and environmental policy in the European Union, with particular focus on bycatch of marine species that are subject to rules under Article 12 of the Habitats Directive. More precisely, the article aims to analyze to what extent Member States are *obliged* to take measures against fisheries to eliminate bycatches of strictly protected species in their marine waters, according to Article 12 of the Habitats Directive, and thus to analyze to what extent the obligations under the Article applies to fisheries. Thereafter, the article will assess to what extent Member States have the *power* to take measures against fisheries to protect Annex IV species from bycatch outside marine protected areas in the EEZ. An aim is also to contribute with new knowledge on the legal preconditions to implement an ecosystem approach to fisheries management, an approach that should be applied according to the CFP Regulation. The EU has adopted the Technical Regulation as a tool for implementing Article 12, with general rules to mitigate and monitor bycatch and a regionalization process under which Member States can initiate additional measures for the same purpose. Conclusions show that if applied fully in accordance with the requirements of Article 12, the Technical Regulation has potential as a tool for contributing to the objectives of the Habitats Directive. However, lack of political ambition by Member States risk leading to weak measures and non-compliance.

Key words: Common fisheries policy, Habitats Directive, integration principle, ecosystem approach, exclusive competence

1. Introduction

The threat to marine biodiversity is, quite literally, a problem not visible on the surface. Still, the loss of species in the marine environment is

a fact, and it is increasing at an unprecedented rate. Research shows that a worrying number of species are threatened by anthropogenic impact, and in the Baltic Sea, the condition of several species is critical, where fishing is considered a significant threat.¹ One of these species is the

* Doctoral Candidate in Environmental Law, Faculty of Law, Stockholm University (rebecka.thurfjell@juridicum.su.se). The author thanks PhD Ida Carlén for her advice and comments regarding bycatch of the Baltic Proper harbour porpoise, and for her guidance on carving out the most important scientific knowledge in relation to conservation of the species. The author is grateful to Assoc. Prof./Assoc. Sen. Lec. Anna Christiernsson at the Stockholm Faculty of law for her counseling and comments on endless drafts. Thank you Assoc. Prof. Sofia Wikström at Stockholm University Baltic Sea Centre, JD/Sen. Lec. Brita Bohman at the Stockholm Faculty of

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¹ HELCOM 2013, HELCOM Red List of Baltic Sea Species in Danger of Becoming Extinct (Baltic Sea Environment Proceedings No. 140) (hereafter HELCOM 2013).

Baltic Proper harbour porpoise (*Phocoena phocoena*)², a species listed in Annex IV of the Habitats Directive.³ The Directive is, together with the Birds Directive, the main instrument for implementing the Bern Convention and the Convention on Biological Diversity (CBD) in the European Union (EU).⁴ Since listed in Annex IV, the species has been identified by the EU legislator as a species of community interest. It is thus subject to the rules under the Habitats Directive laying down obligations on Member States of the EU to adopt a *system of strict protection*, to restore and maintain species at a *favourable conservation status*.⁵ The most severe threat to the species in the waters of the Baltic Sea is bycatch, where the animals get caught as non-target species in fishing nets and die from drowning.⁶

In the policy area relating to the conservation of marine biological resources under the common fisheries policy (CFP), the EU has *exclusive competence*.⁷ This means that the power to adopt legally binding acts in that area remains with the

EU, and Member States are able to take actions to conserve marine biological resources through measures against fisheries only after a delegation of competence from the EU. When competence is exercised, the integration principle requires integration of environmental requirements into the definition and implementation of the Union's policies and activities.⁸ During the reform of the CFP Regulation⁹ in 2013, the integration of environmental concerns into the fisheries policy was an important question.¹⁰ The new regulation therefore gave Member States extended powers in regard to implementing obligations under the Habitats Directive.¹¹ However, this power only encompasses requirements following from certain provisions relating to habitat protection in the Habitats and Birds Directives and the Marine Strategy Framework Directive (MSFD)¹² in waters under a Member States sovereignty or jurisdiction, i.e. the territorial sea and the exclusive economic zone (EEZ).¹³ Regarding the territori-

² It is estimated that there are around 500 individuals in Baltic waters, but only just under 100 of them are considered as reproductive. The Swedish Agency for Marine and Water Management, *Action Plan for Porpoise: Phocoena phocoena* (Report 2021:11) and Amundin et al., 2022. *Estimating the abundance of the critically endangered Baltic Proper harbour porpoise (Phocoena phocoena) population using passive acoustic monitoring*, Ecology and Evolution 12, e8554. <https://doi.org/10.1002/ece3.8554> (hereafter Amundin et al. 2022).

³ Council Directive 92/43/EEC of May 1992 on the conservation of natural habitats and of wild fauna and flora OJ L206/7 (hereafter Habitats Directive).

⁴ Convention on the Conservation of European Wildlife and Natural Habitats of Sept 19, 1979, C.E.T.S. No. 104; Convention on Biological Diversity of 5 June 1992, 1760 U.N.T.S. 69.

⁵ Habitats Directive, Articles 2(2) and 12.

⁶ Carlén et al., *Basin-scale distribution of harbour porpoises in the Baltic Sea provides basis for effective conservation actions* (2018), p. 44, in Biological Conservation 226, p. 42–53.

⁷ Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012 OJ L 326/47–326/390 (TFEU), Article 3(d).

⁸ TFEU, Article 11.

⁹ Regulation (EU) No 1380/2013 of the European parliament and of the council of 11 December 2013 on the Common Fisheries Policy, [...] OJ L 354/22 (hereafter CFP Regulation).

¹⁰ European Commission, *Reform of the Common Fisheries Policy*, Green Paper, COM (2009) 163 final, 22 April 2009. See, e.g. section 2, 4.2, 5.5 and 5.8.

¹¹ CFP Regulation, Article 11 regulates what measures Member States can take against fisheries in the exclusive economic zone. For further reading on the topic, see Christiernsson, Michanek and Nilsson, *Marine Natura 2000 and Fishery – The Case of Sweden*, Journal for European Environmental & Planning Law 12 (2015) 22–49 (hereafter Christiernsson et al. 2015).

¹² Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy OJ L 164/19.

¹³ CFP Regulation, Article 11 states that Member States are empowered to adopt conservation measures for the purpose of complying with the requirements under Article 13(4) MSFD, Article 4 of the Birds Directive and Article 6 of the Habitats Directive. See also case C-683/16, *Deutscher Naturschutzring*, ECLI:EU:C:2018:433, paras 57–59, where the court states that nothing in the provision indicates that the list of provisions therein is not

al sea, there is also an authorization under the CFP Regulation empowering Member States to adopt national measures to maintain or improve the conservation status of marine ecosystems.¹⁴ The scope is broad and the authorization can be used to implement requirements because of the Habitats Directive. This leaves the question open if, and to what extent, Member States can take measures against fisheries in the EEZ to comply with Article 12 of the Habitats Directive, also when there are no obligations according to the habitat protection provisions.¹⁵

Against this backdrop, this article aims to analyze to what extent Member States are obliged to take measures against fisheries to eliminate bycatches of strictly protected species in their marine waters, according to Article 12 of the Habitats Directive, and thus to analyze to what extent the obligations under the Article applies to fisheries. Thereafter, the article will assess to what extent Member States have the power to take measures against fisheries to protect Annex IV species from bycatch outside marine protected areas (MPAs) in the EEZ. An aim is also to contribute with new knowledge on the legal preconditions to implement an ecosystem approach to fisheries management, an approach that *should be applied* according to the CFP Regulation¹⁶ and is recommended by the parties to the

exhaustive. This means that the authorization is limited to measures necessary to comply with the three provisions listed therein, and Member States are therefore not authorized to take measures for the purpose of complying with Article 12 of the Habitats Directive through the provision.

¹⁴ CFP Regulation, Article 20. Member States may take non-discriminatory measures for the maintenance or improvement of the conservation status of marine ecosystems in the territorial zone.

¹⁵ See note 13.

¹⁶ CFP Regulation, Article 2(3), an *ecosystem based approach to fisheries management* should be applied to minimize negative impacts of fisheries on the marine environment.

CBD.¹⁷ The CFP requires an integrated approach to fisheries management, to maintain fisheries “within ecologically meaningful boundaries... while preserving both the biological wealth and the biological processes necessary to safeguard the composition, structure and functioning of the habitats of the ecosystem affected.”¹⁸ In order to implement the ecosystem approach to fisheries, Member States therefore have to be able to take measures against fishing for the purpose of, *inter alia*, protecting marine species listed in Annex IV of the Habitats Directive, in the absence of Union measures.¹⁹

The assessments have been carried out through an application of an EU law methodological approach. The point of departure is thus the text of relevant provisions regarding species protection and fisheries and case law of the Court of Justice of the EU (CJEU) and the methods of textual, contextual and teleological interpretation.²⁰ Non-binding sources used are pre-

¹⁷ See the Malawi principles in the Annex of COP decision V/6 (2000) and Annex I of COP decision VII/11 (2004). According to the FAO Fishery Resources Division (FIR) in their guidelines, an ecosystem approach to fisheries is defined as striving “to balance diverse societal objectives, by taking into account of the knowledge and uncertainties about biotic, abiotic and human components of ecosystems and their interactions and applying an integrated approach to fisheries within ecologically meaningful boundaries”, FAO, Fisheries Management – 2. The Ecosystem Approach to Fisheries. FAO Technical Guidelines for Responsible Fisheries. No. 4. Suppl. 2. Rome, 2003, p. 14.

¹⁸ CFP Regulation, Article 4(1)(9).

¹⁹ For further reading about the relevance of an ecosystem approach to fisheries management see Wakefield, J., *The Ecosystem Approach and the Common Fisheries Policy*, in Langlet and Rayfuse (eds.), *The Ecosystem Approach in Ocean Planning and Governance*, BrillNijhoff (2019). See also Michanek and Christiernsson, *Adaptive Management of EU Marine Ecosystems – About Time to Include Fishery*, Scandinavian Studies in Law (2014), p. 201–240.

²⁰ See Case 26/62, *van Gend en Loos* ECLI:EU:C:1963:1, 12–13 and Case C-129/19, *Presidenza del Consiglio dei Ministri v BV* ECLI:EU:C:2020:566, para 38. In the first case, the court stated, in relation to ascertaining the meaning and effects of EU provisions, that “it is necessary to con-

paratory work for the Habitats Directive and for the Technical Regulation under the CFP.²¹ The legislation is analyzed through the lens of the Baltic Proper harbour porpoise. The aim however, is not limited to analyzing the legal situation for this species alone, but to paint a broader picture of the overall function of EU law in the area of bycatch of Annex IV species and fisheries, and thus the intersection between two of the Union's policy areas. Based on the fact that scientific research shows that marine species under the responsibility of EU Member States are threatened and that fishing is one of the drivers of biodiversity loss, a single example of a threatened species will help to identify possible deficits in the legal system and analyze the integration between two policy areas.

The article thus takes its point of departure from the presumption that anthropogenic activities, such as fisheries, can affect species and their habitats negatively. Managing such activities is therefore central for supporting biodiversity and to implement an ecosystem-based approach to fisheries.²² This in turn, is seen as vital in order to create and uphold a sustainable fishery that ensures the preservation of biodiversity. Healthy ecosystems and conservation of their inhabitants

sider the spirit, the general scheme and the wording of those provisions". In the latter case the court held that when interpreting an EU law provision, "it is necessary to consider not only the wording of that provision, but also its context and the objectives of the legislation of which it forms part".

²¹ European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive*, 92/43/EE, C(2021) 7301 final (Brussels 2021) (hereafter *Guidance Document Habitats Directive*) and *Proposal for a regulation of the European Parliament and of the Council on the conservation of fishery resources and the protection of marine ecosystems through technical measures [...]*, COM/2016/0134 final, (Brussels 2016) (hereafter *Commission proposal 2016*), p. 3..

²² See *inter alia* Christiernsson and Michanek, *Miljöbalken och fisket*, 1 Nordisk Miljörättslig Tidskrift, p. 11–28, where the authors address the issue of impact of fisheries on species and ecosystems.

are in turn essential for processes that support life, including human life, as well as for achieving the objectives of the CFP.²³ In the case of the Baltic Proper harbour porpoise, researchers have moreover concluded that existing protected areas are insufficient to safeguard the future survival of the species, and that the bycatch risk is high in parts of the area. It is also emphasized that although there are designated areas with effective regulations to protect the species within MPAs, protection in its entire population range is vital for preventing bycatch and to ensure a favourable conservation status.²⁴

2. Bycatch of the Baltic Proper Harbour Porpoise

The Baltic Proper harbour porpoise has its main distribution in the Baltic Proper, and is one of three harbour porpoise populations in the Baltic Sea Region.²⁵ Unlike its relatives in the Belt Sea, Kattegat and Skagerrak, the Baltic Proper population is classified as Critically Endangered by the International Union for Conservation of Nature (IUCN)²⁶ and the Baltic Marine Environment Protection Commission (HELCOM)²⁷. The decline of the Baltic Proper population became severe in the 1960s with the emergence of serious threats such as environmental contaminations and fisheries bycatch. The introduction of thin nylon nets caused a significant increase in

²³ CFP Regulation, Article 4(1)(8).

²⁴ *Bycatch in Baltic Sea commercial fisheries: High-risk areas and evaluation of measures to reduce bycatch*, HELCOM ACTION (2021) (hereafter *HELCOM ACTION 2021*), p. 21 and Carlström, J and Carlén, I, *Skyddsvärda områden för tumlare i svenska vatten* (2016), AquaBiota Report 2016:04, p. 9.

²⁵ Carlén, *Ecology and Conservation of the Baltic Proper Harbour Porpoise* (2022), Doctoral Thesis in Animal Ecology, Stockholm University, Department of Zoology, Stockholm 2022 (hereafter *Carlén 2022*), p. 3.

²⁶ Carlström et al. (2023). *Phocoena phocoena* (Baltic Sea subpopulation). *The IUCN Red List of Threatened Species* 2023: e.T17031A50370773.

²⁷ HELCOM 2013, p. 7.

static net fishing effort and hence very likely in bycatch of harbour porpoises.²⁸ The use of static nets, such as gillnets and trammel nets, has been shown to be associated with the greatest risk of bycatch, and small-scale²⁹ gillnet fisheries is pointed out as the most problematic in terms of bycatch of marine mammals.³⁰ Because of the alarming situation for, *inter alia*, the Baltic Proper population, a group of NGOs submitted a proposal to the Commission in 2019 to adopt emergency measures to prevent further bycatch.³¹ This resulted in the Commission sending a special request to The International Council for the Exploration of the Sea (ICES) for scientific advice regarding bycatch mitigation in the Baltic Sea. The request, in turn, resulted in a report from ICES on emergency measures to prevent bycatch.³² Since acoustic deterrent devices (pingers) on nets have been shown to reduce the bycatch rate significantly, ICES recommends the use of pingers in *all* commercial gillnet fisheries within the distribution range of the population, besides measures taken within protected areas.³³

²⁸ Carlén, Nunny and Simmonds, *Out of Sight, Out of Mind: How Conservation is Failing European Porpoises* (2021), *Frontiers in Marine Science*, 8:617478, p. 6.

²⁹ In the EU, small-scale fisheries is defined, in relation to vessel size, as fisheries carried out by fishing vessels of an overall length of 12 m or less, see Regulation (EU) No 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund [...] OJ L 149/1, Article 3(2)(14).

³⁰ HELCOM ACTION 2021, p. 29.

³¹ Seas at Risk (2019), *Groups Call on the European Commission to take action over huge numbers of cetacean deaths* (hereafter Seas at Risk 2019) (press release), 10 July 2019, <https://seas-at-risk.org/press-releases/groups-call-on-the-european-commission-to-take-action-over-huge-number-of-cetacean-deaths/>. (Accessed 18-08-23.)

³² ICES 2020, *EU request on emergency measures to prevent bycatch of common dolphin (*Delphinus delphis*) and Baltic Proper harbour porpoise (*Phocoena phocoena*) in the North-east Atlantic* (hereafter ICES Advice 2020), in Report of the ICES Advisory Committee, 2020. ICES Advice 2020, sr.2020.04. <https://10.17895/ices.advice.6023>.

³³ Carlén 2022, p. 3 and Moan and Bjørge, *Pingers reduce harbour porpoise bycatch in Norwegian gillnet fisheries, with*

In a report from 2019, they also indicate that there is a need for bycatch monitoring of vessels smaller than 15 m, stating that monitoring of smaller vessels has been poor, and that data need to ensure “representative coverage of relevant métiers for protected species bycatch”.³⁴ In their advice from 2020, they state that enhanced monitoring is required to, *inter alia*, assess the effectiveness of management measures.³⁵

A study carried out between 2011 to 2013 estimated, for the first time, the density and abundance of the Baltic Proper population.³⁶ The study included spatial and temporal variables and showed when and where the species is likely to be present during the year and concluded that the species inhabits large parts of the Baltic Sea. The results of the study thus give Member States a powerful tool to take informed conservation measures based on scientific knowledge to mitigate bycatch in the fisheries posing a threat to the species.

There is a lack of data on bycatch of the Baltic Proper population, but an approximation, based on bycatch numbers of the Belt Sea population, suggests that 7 specimens (1.4% of the population) are bycaught every year in Baltic waters.³⁷ The maximum mortality that the population can handle without risking extinction is estimated to 0.7 specimens per year.³⁸ Based on the low number of individuals in Baltic waters and these estimations, every bycatch, especially of a fertile

little impact on day-to-day fishing operations, Fisheries Research 259 (2023) 106564 and ICES Advice 2020, p. 7 f.

³⁴ ICES 2019, Working Group on Bycatch of Protected Species (WGBYC), ICES Scientific Reports, 1:51, 163 pp. <http://doi.org/10.17895/ices.pub.5563>, p. 3.

³⁵ ICES Advice 2020, p. 7.

³⁶ The results of the study were published in 2021, see Amundin et al. 2022.

³⁷ IMR/NAMMCO 2018, *International Workshop on the Status of Harbour Porpoises in the North Atlantic*, Report, https://nammco.no/wp-content/uploads/2020/03/final-report_hpws_2018_rev2020.pdf, p. 45.

³⁸ Ibid.

female, risks major negative consequences for the population.³⁹ Today, there are measures in place to mitigate bycatch in some Natura 2000 sites and an adjacent area within the population range of the Baltic Proper harbour porpoise.⁴⁰ However, given the fact that the population is spread over large parts of the Baltic Sea, research emphasize that there is need for bycatch mitigation measures in their *entire* distribution range to ensure the survival of the population.⁴¹ This is further supported by the fact that porpoise occurrence in many cases coincides with areas where fishing takes place, which increases the risk of bycatch.⁴²

3. The relationship between environmental law and the fisheries policy framework

The question of whether the Habitats Directive applies to fisheries is important since it has implications for how the requirements on Member States are to be interpreted. For many years, there was in fact a presumption that the Habitats and Birds Directives did not automatically apply to fisheries, because of the exclusive competence of the EU in questions regarding conservation of marine resources, which made it more difficult for Member States to fulfil their obligations under the Directives in relation to fisheries compared to other sectors.⁴³ The consolidation of the

CFP as a field of exclusive competence of the EU was established by the CJEU⁴⁴ already in the late 1970s and early 1980s, although the legal basis of the competence was not introduced until 2007, and entered into force through the Treaty of Lisbon in 2009.⁴⁵ The presumption that the species protection did not apply to fisheries was partially disproved by the court already in 1987, in a case regarding the protection of wild birds.⁴⁶ In their law transposing the Birds Directive, Germany excepted the general prohibitions in Article 5 of the Directive, which prohibits harmful deliberate actions, for activities taking place in “the normal use of the land for agricultural, forestry or fishing purposes”. Germany argued that such activities should be excepted, since agricultural, forestry or fishing activities having the intention of harmful deliberate actions could not be described as “normal” activities. The court found that such an exemption was in breach of the Birds Directive, and thus that rules on species protection are applicable to all types of land use, including fisheries. In 2004, the application of the Habitats Directive to fisheries was recog-

³⁹ Seas at Risk 2019.

⁴⁰ See Commission Delegated Regulation (EU) 2022/303 of 15 December 2021 [...] as regards measures to reduce incidental catches of the resident population of the Baltic Proper harbour porpoise (*Phocoena phocoena*) OJ L 46/67.

⁴¹ Carlén 2022, p. 13 f.

⁴² Sveegaard et al., *Spatial interactions between marine predators and their prey: herring abundance as a driver for the distribution of mackerel and harbour porpoise*, Marine Ecology Progress Series 468, 245–253 (2012).

⁴³ Appleby and Harrison, *Taking the Pulse of Environmental and Fisheries Law: The Common Fisheries Policy, the Habitats Directive, and Brexit* (2019), Journal of Environmental Law, 2019, 0, 1–22, p. 1 f.

⁴⁴ At the time, the Court of Justice of the European Communities.

⁴⁵ Joined cases 3/76, 4/76 and 6/76 [1976], where the move into fisheries conservation was endorsed by the court, and Case 804/79 [1981] ECR 1045, paras 17–18, where the court clarified that the legislative jurisdiction in the area of fisheries conservation is exclusive. The judgements raised the question whether the exclusive competence related to fisheries conservation only, and not the power to adopt measures to minimize the effect of fishing to the marine ecosystem, see Owen, D, *Interaction between the EU Common Fisheries Policy and the Habitats and Birds Directives*, Institute for European Environmental Policy (2004), section 2.4.1. This question was as stated clarified by the adoption of the Treaty of Lisbon, by which the TFEU was revised and thus recognized the conservation of marine biological resources as an exclusive competence of the Union.

⁴⁶ Case C-412/85, *Commission v the Federal Republic of Germany* [1987] ECLI:EU:C:1987:370.

nized for the first time.⁴⁷ The case regarded mechanical fishing of cockles and the question as to whether the fishery qualified as a plan or project under Article 6(3) of the Directive.⁴⁸ The court concluded that fisheries can qualify as a plan or a project in the meaning of the Article and that Member States are required to conduct an appropriate assessment of fisheries that are likely to have a significant effect on a Natura 2000 site. Member States may only authorize such fisheries after having ascertained that it will not adversely affect the integrity of the site concerned. In the more recent case *Skydda Skogen*, the court concluded that the prohibitions listed in Article 12(1)(a) to (c) in the Habitats Directive are also applicable to activities where the purpose is *manifestly different* from capture or killing in the meaning of the Article.⁴⁹ The court exemplifies such activities with forestry work or land development, but do not preclude fishing activities by doing so, since the words “such as” implies that the list of examples is not exhaustive. On the opposite, it implies that the list would include a wide range of activities, such as e.g. fishing. Additionally, nothing in the Habitats Directive indicates that fishing would be exempted from the rules therein, a conclusion that is supported by the rulings of the CJEU referred to above. Thus, all measures necessary to implement the requirements of the Directive must be adopted in the EEZ.⁵⁰ Further, the CFP Regulation explicitly

states that the Regulation shall be coherent with the Union environmental legislation.⁵¹ This is partly reflected in the Technical Regulation, that in its objectives states that it shall contribute to having in place fisheries management measures for the purpose of complying with, *inter alia*, the Habitats Directive.⁵²

The main secondary EU acts that have been adopted in the two policy areas that are of relevance for this article are the CFP Regulation and the Habitats Directive, which both apply in the EEZ.⁵³ Among the objectives of the CFP Regulation is that the CFP shall be coherent with the Union environmental legislation and thus, *inter alia*, the Habitats Directive.⁵⁴ However, despite this objective, the CFP Regulation does not contain an explicit competence for Member States to implement rules on the strict protection of species in the EEZ.⁵⁵ In 2019, a new regulation on technical measures entered into force.⁵⁶ The purpose of the Regulation is to contribute to achieving the objectives of the CFP.⁵⁷ The measures shall contribute to achieving, *inter alia*, the objective of ensuring that incidental catches (bycatches) of sensitive species, which includes species listed in Annex IV of the Habitats Directive, are minimized and where possible eliminated so that they do not represent a threat to the con-

⁴⁷ Case C-127/02, *Landeliljke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] ECLI:EU:C:2004:482.

⁴⁸ See Christiernsson et al. 2015 for a deeper analysis of the case.

⁴⁹ Joint cases C-473/19 and C-474/19, *Föreningen Skydda Skogen, Naturskyddsföreningen i Härryda, Göteborgs Ornitologiska Förening v The County Board* [2021] ECLI:EU:C:2021:166, para 53.

⁵⁰ Case C-6/04, *Commission v United Kingdom of Great Britain and Northern Ireland*, [2005] ECLI:EU:C:2005:626, para 121.

⁵¹ CFP regulation, Article 2(5)(j).

⁵² Regulation 2019/1241, Article 3(2)(d).

⁵³ See CFP Regulation, Article 1(2)(b) and Case C-6/04, para 117.

⁵⁴ CFP Regulation, Article 2(5)(j). The same provision emphasizes the importance of the Regulation being coherent with the objective of achieving a good environmental status by 2020 as set out in Article 1(1) of the MSFD.

⁵⁵ See, *inter alia*, Christiernsson and Michanek 2015, section 3.1, where the authors discuss the relationship between fisheries and the environment.

⁵⁶ Regulation (EU) 2019/1241 of the European Parliament and of the Council of 20 June 2019 on the conservation of fisheries resources and the protection of marine ecosystems through technical measures [...] OJ L 198/105.

⁵⁷ Regulation 2019/1241, Article 3(1).

conservation status of these species.⁵⁸ Targets of the technical measures include aiming to ensure that incidental catches of marine mammals do not exceed levels provided for in Union legislation.⁵⁹ The measures of the Regulation shall moreover, in particular, contribute to achieving the objective of having in place fisheries management measures for the purpose of complying with the Habitats Directive.⁶⁰

The main aim of the Habitats Directive is, according to Article 2(1), to “contribute towards ensuring biodiversity through the conservation of wild fauna and flora”. The preamble points out that this aim makes a contribution to the general objective of sustainable development, which in turn emphasizes the importance of a development that meets the needs of both present and future generations.⁶¹ The species listed in the Habitats Directive are all considered in need of protection from a European perspective, and the Directive divides species into categories, with different levels of protection. Annex IV lists the most vulnerable species, that are in need of strict protection in their natural range.

⁵⁸ Regulation 2019/1241, Article 3(2)(b). Article 6(8) defines sensitive species as a species whose conservation status, including its habitat, distribution, population size or population condition is adversely affected by pressures arising from human activities, including fishing activities. This includes species listed in Annexes II and IV of the Habitats Directive, species covered by the Birds Directive as well as species whose protection is necessary to achieve good environmental status under the MSFD.

⁵⁹ Regulation 2019/1241, Article 4(1)(b). Such targets shall be identified through threshold values for the status classification of marine species in accordance with several criteria, for the purpose of determining “good environmental status” under the MSFD. This has been specified by the Commission in Decision 2017/848 of 17 May 2017 laying down criteria and methodological standards on good environmental status of marine waters and specifications and standardised methods for monitoring and assessment [...] OJ L 125/43.

⁶⁰ Regulation 2019/1241, Article 3(2)(d).

⁶¹ See recital 3 in the preamble. Although the recitals are not legally binding, they give a clear indication of the intent behind the Directive.

Measures taken under the Directive shall be designed to “maintain or restore, at favorable conservation status, natural habitats and species of wild fauna and flora of Community interest”.⁶² Member states shall therefore surveil the conservation status of species of community interest, to identify whether they reach a *favorable conservation status*, which in turn comprises appropriate scientific and ecological research.⁶³ Such a status should be achieved at the national level and also, if a species’ natural range stretches over several Member States, at a cross-border level.⁶⁴ In light of the overall objective of the Habitats Directive, i.e. to achieve and maintain favorable conservation status for all habitats and species of Community interest, the surveillance must provide clear information about the conservation status of relevant species, including indications on the effectiveness of the Directive. The information will thus be the starting point when determining what measures that need to be taken to protect species of community interest, and thereby meeting the requirements of the Directive.

Member States are obliged to faithfully implement and apply the directives in conformity with the intent of the legislator.⁶⁵ This is particularly important in relation to the Birds and the Habitats Directives, since the Member States have been trusted with the management of the

⁶² Habitats Directive, Article 2(2).

⁶³ Habitats Directive, Article 11. For an interdisciplinary understanding of the term *favourable conservation status* in a European context, see Epstein, López-Bao, and Chapron, *A Legal-Ecological Understanding of Favorable Conservation Status for Species in Europe* (2015), Conservation Letters, March/April 2016, p. 81–88.

⁶⁴ Case C-674/17, *Luonnonsuojeluyhdistys Tapiola Pohjois-Savo – Kainuu ry* [2019] ECLI:EU:C:2019:851, para 61.

⁶⁵ This obligation follows from the principle of sincere cooperation, which applies generally “to ensure fulfilment of the obligations arising out of the Treaties”. Consolidated Version of the Treaty on the European Union, 26 October 2012 OJ C 326/13 (TEU), Article 4(3).

common heritage.⁶⁶ An important note in relation to the interpretation and application of the Directive, is that the precautionary principle shall apply where there is uncertainty as to the existence or extent of risks.⁶⁷ This means that lack of full scientific certainty should not be used as reason for postponing measures to avoid or minimize threats.⁶⁸ According to the CJEU, protective measures may therefore be taken without having to wait until the reality and seriousness of risks become fully apparent.⁶⁹ Since the precautionary principle is one of the foundations of environmental protection, rules must be interpreted in light of the principle so as to contribute to the main aim of the Directive, i.e. to ensure biodiversity through conservation measures to restore, *inter alia*, populations of species of wild fauna at a favorable status.⁷⁰

4. Protection of species

4.2 Prohibition and requirements

Member States are obliged to establish a system of strict protection in the natural range of species listed in Annex IV of the Directive. The system has to include prohibiting, *inter alia*, all forms of deliberate capture or killing of specimens of these species in the wild.⁷¹ The prohibition aims

to address a wide range of threats for the concerned animal species, and the protection must be efficient when it comes to preventing them.⁷² According to the CJEU, the transposition of the provision requires not only the adoption of a comprehensive legislative framework, but also the implementation of concrete and specific protective measures.⁷³ The system must thus be coherent, coordinated and of a preventive nature in order to be able to implement the prohibitions in relation to specific species.⁷⁴

According to the aims of the Directive, it seeks to restore, as well as to *maintain* a favourable conservation status.⁷⁵ There is thus a requirement to maintain the status over time.⁷⁶ Further, it follows from Article 12(1)(a) that the strict protection requires protection of individual specimens in relation to deliberate capture or killing. Regarding “specimens”, the CJEU has stated, in the case *Skydda Skogen*, that the situation at the level of each individual of the relevant species shall be assessed.⁷⁷ The court thus confirmed that the strict protection of species applies at the individual level, which means that every deliberate capture or killing of individual specimens of a strictly protected species is prohibited.⁷⁸ Therefore, the provision applies not only to species that have not reached a favorable conservation status, but to all species listed in Annex IV, regardless of their status, and regardless if an

⁶⁶ See e.g. Case 262/85, *Commission v Italy* [1987] ECLI:EU:C:1987:340, para 9 and Case C-38/99, *Commission v France* [2000] ECLI:EU:C:2000:674, para 53.

⁶⁷ The principle is established, however not clearly defined, in Article 191(2) of the TFEU.

⁶⁸ See preamble of the Convention on Biological Diversity (CBD) where the precautionary principle is defined.

⁶⁹ Case C-499/18 P, *Bayer CropScience AG and Others v Commission* [2021] ECLI:EU:2021:367, para 80. See also C-473/19 and C-474/19 *Skydda Skogen*, para 60, where the court stated that an interpretation of Article 12(1)(a) to (c) where the applicability of the prohibitions would be conditional on the risk that an activity may have an adverse effect on the conservation status of a species would not be consistent with the precautionary principle.

⁷⁰ See C-127/02 *Waddenzee*, paras 44 and 58. See also, by analogy, Case C-180/96, *United Kingdom v Commission* [1998] ECLI:EU:C:1998:192, paras 105 and 107.

⁷¹ Habitats Directive, Article 12(1)(a).

⁷² Case C-88/19, *Alianta pentru combaterea abuzurilor v TM, UN, Directia pentru Monitorizarea si Protectia Animalilor* [2020] ECLI:EU:2020:458, para 23.

⁷³ C-383/09, *Commission v France* [2011] ECLI:EU:C:2011:369, para 19.

⁷⁴ *Ibid.*, para 20.

⁷⁵ Habitats Directive, Article 2(2).

⁷⁶ C-473/19 and C-474/19 *Skydda Skogen*, paras 64 to 66. See also Christiernsson, *Is the Swedish Brown Bear Management in Compliance with EU Biodiversity Law?*, *Journal for European Environmental & Planning Law*, Volume 16:3, p. 237–261, p. 242.

⁷⁷ C-473/19 and C-474/19 *Skydda Skogen*, para 54.

⁷⁸ *Ibid.*

activity does not risk affecting their status negatively.⁷⁹

4.2 Deliberate capture and killing of species

The Directive prohibits actions that are deliberate in the meaning of the Directive. The concept has been interpreted extensively by the CJEU, stretching beyond a direct intent, where the person or body performing an action *consciously accepts* the risk that it could cause harm to a protected species. The *Caretta Caretta* case regarded deliberate disturbance of the loggerhead sea turtle, where a beach area in the bay of Laganas was used as a breeding site by turtles.⁸⁰ Mopeds were prohibited on the beach and the surrounding sea area was classified as an absolute protection area. Despite the fact that information was available about the presence of turtle nests on the beach and special notices about the protection area had been erected, mopeds were used by people on the beach, and pedalos and small boats were present in the sea area. The court stated that the presence of mopeds, pedalos and small boats constituted deliberate disturbance during the species breeding period.⁸¹ Thus, the statement of the court should be interpreted as *deliberate* meaning a conscious acceptance of consequences.⁸² A later judgement concerned bycatching of otters in fox hunting. In that case, the Commission argued that permitting the use of stopped snares in fox hunting endangering the protected otter should be seen as *deliberate capture* since (the Commission claimed) author-

ities were aware that otters were present in the area.⁸³ The court however, found that the action did not constitute deliberate capture since the intent was not to capture otters and that it had not been established that otters were present in the area. It had therefore not been established that the authorities were aware that they risked endangering otters by issuing a permit for fox hunting. In the case, the court clarified that for an action to be deliberate, the one performing the activity must have the *intent* to capture or kill the concerned species or “at the very least” must have *accepted* the possibility of such capture or killing.⁸⁴ The judgement in the *Spanish Otter* case raises the question of the meaning of a species being present in an area, since this is bound to the risk of deliberate capture or killing. That a species is present in an area, means that the area in question is equivalent to, or forms a part of, the species natural range.⁸⁵ According to the CJEU, the natural range of an animal species is a dynamic concept that corresponds to the geographical area in which the species concerned is present or distributed in the course of its natural behavior.⁸⁶ The Commission based their argument that otters were present in the area on a standard data sheet drawn up for the relevant area by the Spanish authorities. According to the sheet, otters were supposed to exist in the area. However, the court, as regards the information in the sheet, stated that it was unlikely that otters would move into the area, based on information about the topographic conditions as well as the direction of waterways affecting the distribution of the species.⁸⁷ This means that the geograph-

⁷⁹ C-473/19 and C-474/19 *Skydda Skogen*, para 66.

⁸⁰ Case C-103/00, *Commission v Greece* [2002] ECLI:EU:2002:60.

⁸¹ C-103/00 *Caretta Caretta*, paras 32–40. In the case, the court not only condemned Greece for not establishing a necessary legal framework, but also for not taking concrete and effective measures to protect the breeding sites.

⁸² See para 118 of the Advocate General’s opinion in Case C-6/04, *Commission v United Kingdom of Great Britain and Northern Ireland*, [2005] ECLI:EU:C:2005:372.

⁸³ Case C-221/04, *Commission v Spain* [2006] ECLI:EU:C:2006:329.

⁸⁴ C-221/04 *Commission v Spain*, paras 69, 71–74.

⁸⁵ Since Article 12(1) is applicable in the natural range of all Annex IV-species.

⁸⁶ C-88/19 *Alianta pentru combaterea abuzuliror*, paras 38 and 40.

⁸⁷ C-221/04 *Commission v Spain*, para 60.

ic area for which the data sheet that the Commission based their argument on did not correspond to the *natural range* of the concerned otter population. This also means that scientific data mapping the natural range of Annex IV-species has to be reliable and updated in order for it to be established that a species is present in an area.

Member States are obliged to establish a legal framework for coherent and coordinated measures as well as to apply and enforce the prohibitions. It is therefore rarely sufficient to issue a ban; preventive measures may also be required, which in turn requires Member States to anticipate threats and risks that a species may face. The system can thus include a wide range of measures, tailored to specific activities and specific species that are to be protected. With regard to ongoing activities, such as fishing, various forms of planning instruments, codes of conduct and practical information and guidance can potentially satisfy legal requirements.⁸⁸ Were they do not take “all of the specific measures necessary” to prevent deliberate actions, Member States have failed to fulfill their obligation to implement a system of strict protection under Article 12(1).⁸⁹ For example, in the *Caretta Caretta* case, measures including information about prohibited actions and activities along with information about species occurrence were insufficient for the implementation of a strict protection system.

4.3 Incidental capture and killing of species

In addition to the requirements following from Article 12(1), Member States are also obliged to establish a system to monitor the *incidental* capture and killing of animal species listed in Annex

IV, under Article 12(4).⁹⁰ The provision works complementary to Article 12(1) for activities that are not deliberate in the meaning of the Directive, and its purpose is to gather reliable data and to take conservation measures if needed “to ensure that incidental capture or killing does not have a *significant negative impact* on the species concerned” (author’s italics). The provisions may thus impose different obligations on Member States. Namely, the conservation status of the species in question has no significance in the assessment whether the prohibition in Article 12(1) is applicable.⁹¹ Article 12(4), however, is linked to the incidental capture or killing risking a significant negative impact on the species for conservation measures to be required. In that way, conservation measures taken for the purpose of ensuring that incidental capture or killing does not have a significant negative impact on a species may serve the purpose to comply with the requirements following from Article 12(1). The word “system” implies that the monitoring can involve several complementary methods, which can be used, if necessary to determine whether incidental capture or killing risks a significant negative impact on the concerned species. The Commission provides some examples on what the monitoring system could cover, included bycatch of cetaceans or sea turtles in fishing gear.⁹² The collected data, combined with the results

⁹⁰ In the marine area, such a monitoring system can rely on the data collected by Member States under the fisheries data collection framework. See Regulation (EU) 2017/1004 of the European Parliament and of the Council of 17 May 2017 on the establishment of a Union framework for the collection, management and use of data in the fisheries sector and support for scientific advice regarding the common fisheries policy [...] OJ L 157/1. Member States shall collect data, including data on bycatch, for fisheries management following their national work plans and shall submit an annual report to the Commission on their implementation, see CFP Regulation, Article 25.

⁹¹ C-473/19 and C-474/19 *Skydda Skogen*, para 66.

⁹² Guidance Document Habitats Directive, p. 40.

⁸⁸ Guidance Document Habitats Directive, p. 18.

⁸⁹ C-473/19 and C-474/19 *Skydda Skogen*, para 52.

of surveillance of a species conservation status, works to determine if measures are needed.⁹³ The Directive does not define “significant negative impact”. However, the concept must be viewed in light of the relevant species’ conservation status, since the surveillance of the conservation status is a part of the assessment under Article 12(4). The Commission states that the impact will need to be assessed on a case-by-case basis, where the gathered information on the effect of incidental capture and killing on the populations of a species, together with the achievement or maintenance of its favourable conservation status, is crucial.⁹⁴ The Commission identifies three factors relevant to the assessment: the life history of the species, the magnitude and duration of bycatch and the conservation status and trend of the species. According to the Commission, the impact could thus be seen as significant if a species is in unfavorable conservation status and incidental capture and killing causes further decline in numbers of the species, in particular if future recovery prospects are affected.⁹⁵ Finally, the precautionary principle applies in lack of data on the conservation status and/or a lack of the actual level of incidental capture and killing.⁹⁶ A conclusion is therefore, that in the case where a Member State has failed to implement a monitoring system under Article 12(4), and/or failed to implement the surveillance of the conservation status under Article 11 for a specific species, conservation measures may be required. This has support in case law from the CJEU⁹⁷ and in the very nature of the precautionary principle, meaning that protective measures shall be taken where there is a lack of scientific certainty in relation to risks. Additionally, the purpose behind

the provision is to establish a monitoring system and to take conservation measures if needed to ensure that incidental capture or killing does not have a significant negative impact on the species concerned.⁹⁸ The provision in itself therefore expresses a precautionary approach in relation to the need for conservation measures.

5. Fisheries regulation to address species protection?

During the development of the current CFP Regulation, it was emphasized that the regulatory structure of the Technical Regulation was “sub-optimal”.⁹⁹ Among the issues mentioned was the fact that the current measures did not provide incentives to fish selectively since there was no cost of catching sensitive species, which had resulted in limited protection. There had been attempts to align the Regulation in e.g. the Baltic Sea, but the attempts had failed due to the negotiations moving away from alignment to detailed substance of the Regulation, which was another issue that was emphasized in the critique of the then current regulation.¹⁰⁰ Before the Technical Regulation entered into force, there were also a number of standalone regulations containing technical measures, among them a regulation explicitly dedicated to mitigate bycatches of cetaceans in fisheries. This changed with the new regulatory structure, to simplify and strengthen the long-term approach to, *inter alia*, conservation, and the regulation now in-

⁹³ Ibid.

⁹⁴ Ibid., p. 43.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ See section 3.

⁹⁸ This can be compared to the judgment in the *Waddenzee* case. The case concerned Article 6(3) of the Directive, where the court concluded that already the risk of a significant effect on a site is relevant for requiring prior assessment of a plan or project. This follows from the legal text “likely to have”. In the case, the court stated that an assessment has to be made “if it cannot be excluded, on the basis of objective information, that it will have significant effects on that site” (author’s italics). See C-127/02 *Waddenzee*, para 45.

⁹⁹ Commission proposal 2016, p. 3.

¹⁰⁰ Ibid., p. 4.

cludes an annex explicitly dedicated to measures for the purpose of reducing bycatch of sensitive marine species.¹⁰¹ One mechanism introduced for the purpose of simplifying the structure was the governance approach of regionalization. It was emphasized that such an approach would give scope to limit the need for detailed technical measures adopted by the European Parliament and the Council of Ministers under co-decision. Through the new process, measures could be regionally devised and tailored to different fisheries.¹⁰² Thus, the regulation went from micro-management towards a results-based management approach.

The Technical Regulation sets out technical conservation measures that govern when, where and how fishing is allowed. It sets out general baseline measures that apply to all EU waters as well as provides for the adoption of additional technical measures responding to regional fisheries, where Member States are provided with the incentive to play an active role in implementing measures against national vessels and in initiating measures against foreign vessels. Baseline measures include, *inter alia*, a prohibition of driftnets with a total length over 2,5 km, with a total prohibition on driftnets in the Baltic Sea.¹⁰³ The Regulation moreover contains a general prohibition on the catching, retention onboard, transshipment and landing of Annex IV-species, where the three latter shall be permitted in cases of accidental catches where it is necessary for e.g. research purposes when the animal has been killed due to the catching.¹⁰⁴ The same provision, which also applies to recreational fisheries, authorizes Member States to adopt, for vessels flying their flag, national mitigation measures or restrictions on the use of fishing gear for the pur-

pose of minimizing bycatches.¹⁰⁵ The measures must be at least equivalent to existing baseline measures under the regulation.¹⁰⁶

Regional technical measures, with baseline measures applying in the respective region, are set out in a number of annexes, which can be amended or supplemented through delegated acts by the Commission at the initiative of Member States.¹⁰⁷ The initiating Member State and Member States affected by the measures may submit joint recommendations for the purpose of adopting such delegated acts that take into account regional specificities of their fisheries.¹⁰⁸ The technical measures adopted through delegated acts shall *aim* at achieving the objectives and targets set out in that regulation, and shall “as a minimum lead to such benefits for the conservation of marine biological resources that are at least equivalent ... to the measures” according to the respective annexes.¹⁰⁹ This means that a delegated act alone should not be required to ensure the objectives and targets of the Regulation and that there is no requirement for the measures adopted under such an act to be more stringent than under the existing annexes.

The Commission shall adopt the delegated acts on the basis of a joint recommendation submitted in accordance with, *inter alia*, the regionalization process under Article 18 of the CFP Regulation.¹¹⁰ According to the CFP Regulation, concerned Member States shall cooperate at a regional level to formulate a joint recommendation if the measures to be adopted would affect a fishery where more than one Member State has a direct management interest.¹¹¹ The joint rec-

¹⁰¹ See Regulation 2019/1241, Annex XIII.

¹⁰² Commission proposal 2016, p. 6.

¹⁰³ Regulation 2019/1241, Article 9(1) and 9(3).

¹⁰⁴ Regulation 2019/1241, Article 11(1) and 11(3).

¹⁰⁵ Regulation 2019/1241, Article 2(2) states that Article 11 applies to recreational fisheries.

¹⁰⁶ Regulation 2019/1241, Article 11(4).

¹⁰⁷ Regulation 2019/1241, Article 15(2).

¹⁰⁸ Regulation 2019/1241, Articles 15(2) and 15(3).

¹⁰⁹ Regulation 2019/1241, Article 15(4)(a) and (d).

¹¹⁰ Regulation 2019/1241, Article 15(2).

¹¹¹ CFP Regulation, Article 18(2).

ommendation must be compatible with the objectives of the CFP Regulation and the measures must be at least as stringent as measures under Union law.¹¹² The objectives include applying the precautionary approach and implementing the ecosystem based approach to fisheries management as well as contributing to the collection of scientific data.¹¹³ They also include a wording stating that the CFP *shall* be coherent with the Union environmental legislation.¹¹⁴ If the concerned Member State do not agree on a joint recommendation *or* if the proposed measures are not compatible with the objectives and quantifiable targets of the conservation measures in question, measures may be adopted by the Commission through the ordinary legislative procedure.¹¹⁵

Annex XIII to the Regulation includes a requirement for Member States to take necessary steps to collect scientific data on incidental catches of sensitive species. The Annex also includes a requirement for Member States to monitor and assess the effectiveness of existing mitigation measures for the purpose of reducing incidental catches of cetaceans in the Baltic Sea, such as the requirement on the use of active acoustic deterrent devices (pingers) in parts of the Baltic Sea on vessels with an overall length of 12 m or more when using bottom-set gillnets or entangling nets.¹¹⁶ In relation to data collection on bycatch, there is a requirement to monitor cetacean bycatch on an annual basis in the Baltic Sea, that applies to national vessels with an overall length of 15 m or more, when using pelagic trawls, bottom-set gillnets or entangling

nets with a mesh size equal to or greater than 80 mm.¹¹⁷ Where there is scientific evidence to support the negative impact of fishing gear on sensitive species, Member States are *required* to submit joint recommendations for additional mitigation measures to prevent bycatch. The measures are adopted by the Commission under the same procedure as regional technical measures.¹¹⁸ The measures can include e.g., restricted areas, periods and gear limitations in relation to fisheries.¹¹⁹ The list is not exhaustive and can thus include a wide range of measures in relation to the protection of sensitive species.

Every three years, the Commission shall submit a report on the implementation of the Regulation, which shall assess to what extent the measures have contributed to achieving the objectives and targets of the Regulation, both at regional and Union level. The information on which the assessment shall be made should be supplied by the Member States and the relevant advisory councils, evaluated by STECF.¹²⁰ Where there is evidence that the objectives and targets of the Regulation have not been met at a regional level, relevant Member States shall submit a plan setting out the actions to be taken to contribute to achieving them.¹²¹

Under the headline “Deliberate capture or killing of specimens of Annex IV(a) species” in its guidelines, the Commission argues that

¹¹⁷ Regulation 2019/1241, Annex XIII, Part A 2.2.1.

¹¹⁸ Regulation 2019/1241, Annex XIII, Articles 2–3, where Article 3 refers to the regionalization process under Article 15(2) and states that the scientific evidence must be validated by ICES or the Scientific, Technical and Economic Committee for Fisheries (STECF). One example of a delegated act adopted under Article 15(2) is Commission Delegated Regulation (EU) 2022/303 of 15 December 2021 [...] as regards measures to reduce incidental catches of the resident population of the Baltic Proper harbour porpoise (*Phocoena phocoena*) OJ L 46/67. The Regulation applies in certain MPAs in the Baltic Sea.

¹¹⁹ Regulation 2019/1241, Article 21.

¹²⁰ Regulation 2019/1241, Article 31(1).

¹²¹ Regulation 2019/1241, Article 31(3).

¹¹² CFP Regulation, Article 18(5)(a) and (d).

¹¹³ CFP Regulation, Article 2(2) to (4).

¹¹⁴ CFP Regulation, Article 2(5)(j). It is worth noting that this is expressed as a requirement, despite being part of the objectives of the Regulation.

¹¹⁵ CFP Regulation, Article 18(6).

¹¹⁶ Regulation 2019/1241, Annex XIII, Article 4 and part A 1.1.1.

the need for information from Member States to fishermen is highly relevant in cases of accidental bycatch of marine species during fishing operations *conducted in breach of fisheries rules*.¹²² The rules that the Commission refers to is the Regulation on technical measures. The Commission develops its' statement by using the prohibition in the Regulation for certain vessels to use certain types of fishing gear without the simultaneous use of pingers as an example, and state that "Member States must not only ensure that the use of acoustic deterrents is effectively controlled and enforced but also that the fishers are fully informed of this obligation". Two conclusions can be drawn from the Commission's statement, the first being that the Technical Regulation can work as a tool for implementing Article 12 of the Habitats Directive. The second conclusion is that the statement can be seen as an argument that bycatch of a strictly protected marine species occurring during a fishing operation would constitute *deliberate* capture or killing if the operation is conducted in breach of the rules under the Technical Regulation (provided that scientific evidence shows that the species is likely to be present in the concerned area). This could also mean that if the bycatch occurs under the same conditions, but without any fishing rules being breached, it would not constitute deliberate capture or killing, but *incidental* capture or killing. This would mean that fishing operations conducted in line with technical rules issued pursuant to the CFP should not be seen as deliberate. This argument is supported by the principle of legal certainty; all operators have the right to be able to foresee the legal consequences of their actions. However, for Member States to be able to comply with the requirements following from Article 12 of the Habitats Directive, the Technical Regulation has to ensure compliance

with the provision. If not, Member States will be held in a vacuum between the obligations following from the Habitats Directive and the principle of legality, where they are hindered from acting outside their powers. In the preparatory act during the reform of the technical measures, the Commission stated that the objectives of the new regulation were consistent with, *inter alia*, the Habitats Directive.¹²³ This could heal the deficiency of the CFP Regulation not empowering Member States to comply with Article 12 of the Directive in the EEZ.

6. Does the Technical Regulation ensure compliance with Article 12 of the Habitats Directive?

Since Article 12 of the Habitats Directive applies to fisheries, Member States are required to take measures against fisheries to prevent deliberate bycatch as well as to ensure that incidental bycatch does not have a significant negative impact on Annex IV species. In order not to conflict with Article 12, Member States must therefore prevent every case of deliberate bycatch as well as monitor incidental bycatch and take conservation measures if needed to avoid significant negative impact on species. One alternative to avoid conflict with Article 12 has been adopted under the Technical Regulation, through the regionalization process. In order to meet the requirements of the Habitats Directive through the Regulation, Member states must take "all of the specific measures necessary" within that framework. This means that Member States must adopt measures or submit joint recommenda-

¹²² See Guidance Document Habitats Directive, p. 25.

¹²³ Commission proposal 2016, p. 6. It should be noted that several proposals from the Commission were not included in the adopted regulation. Therefore, the original proposal and the adopted regulation are not identical. However, the objectives and targets suggested by the Commission largely correspond to those in the adopted regulation.

tions for additional technical measures in their fisheries that correspond to the requirements under Article 12. The authorization to adopt national mitigation measures or restrictions on the use of fishing gear under Article 11(4) could thus be seen as a requirement rather than an option, if necessary to comply with Article 12.¹²⁴ It also means that Member States in the Baltic region must cooperate to adopt additional regional measures, e.g. under Annex XIII and on the basis of Article 15(2), in the natural range of the harbour porpoise and based on validated scientific evidence. This can include e.g., a requirement on the use of pingers relating to net type rather than vessel size, to include small-scale fisheries. If necessary, it could also involve a closure of relevant fisheries in certain areas, permanently or during limited time periods over the year.

Article 12(4) sets the bar that determines how bycatch monitoring should be implemented and requires that a monitoring system for *incidental* catches be adopted. The Commission states that for the implementation of the provision, it is irrelevant whether the bycatch is deliberate or not, but does not provide any arguments to support their standpoint.¹²⁵ It is correct that for the requirement to take conservation measures, it is irrelevant whether the bycatch is deliberate or incidental, under the condition that incidental bycatch risks a significant negative impact on the concerned species. However, it is not clear if this is what the Commission aims to

point to. A lexical interpretation of the provision would however not support the conclusion that the requirement for monitoring applies to both deliberate and incidental bycatches.¹²⁶ Further, the Habitats Directive does not separate between commercial and recreational activities, which means that the requirement for monitoring applies to commercial fisheries as well as recreational fisheries.¹²⁷ Member States thus have a requirement to monitor incidental bycatch in commercial as well as recreational fisheries. Finally, in relation to incidental bycatch, estimations suggests that 7 specimens of the population are bycaught every year while as few as 0,7 specimens is acceptable, which in turn would suggest that incidental bycatch has a significant negative impact on the population and that conservation measures therefore shall be taken.¹²⁸

Despite the Commissions' statement that the objectives of the Technical Regulation are consistent with the Habitats Directive, there are challenges regarding compliance with Article 12 in relation to the Regulation. The first challenge relates to Annex XIII and its requirements. The vast majority (94%) of European gillnet vessels are smaller than 12 m.¹²⁹ This means that the requirement to use pingers as well as the requirement for a monitoring scheme relating to by-

¹²⁴ The provision states that Member States *may*, on the basis of best available scientific advice, put in place measures or restrictions.

¹²⁵ European Commission, *Reasoned Opinion addressed to Kingdom of Sweden under Article 258 of the Treaty on the Functioning of the European Union on account of its failure to fulfil its obligation under Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora*, Brussels 7.2.2024 INFR(2020)4037, C(2024)158 final (hereafter Commission reasoned opinion), para 40.

¹²⁶ It should be noted though, that since the Habitats Directive is adopted on the basis of Article 192 TFEU, Article 193 TFEU provides for Member States to adopt more stringent protective measures than required by the Directive, if the measures are compatible with the Treaty and are notified to the Commission.

¹²⁷ C-103/00 *Caretta Caretta* case regarded recreational activities.

¹²⁸ In their reasoned opinion regarding the infringement case against Sweden, the Commission claims that incidental bycatch already has such negative impact on the Baltic Proper population, see Commission reasoned opinion, para 44.

¹²⁹ Rogan, Read, and Berggren, *Empty promises: The European Union is failing to protect dolphins and porpoises from fisheries by-catch*, *Fish and Fisheries*, 2021; 22: 865–869, p. 866.

catch of cetaceans only applies to a fraction of the relevant fisheries. This in turn means that there are most likely many cases of bycatch which could be avoided and that estimations of bycatch do not reflect the reality. Additionally, even though recreational fishing takes place in all parts of the Baltic Sea, using a variety of gear, including gillnets, the requirements under Annex XIII do not apply to recreational fisheries.¹³⁰

The regionalization process under the Regulation is another weakness, due to its design. Annex XIII *requires* Member States to take measures on the basis of scientific evidence, but the process to submit joint recommendations under Article 15 depends on whether Member States reach unanimous agreement, at least in practice.¹³¹ This can potentially hinder the initiating Member State in its ambitions to comply with the Directive, if other Member States are less ambitious. This in turn can lead to no measures being agreed or that the weakest measures proposed by the relevant Member States are being adopted, which counteracts both the objectives under the Technical Regulation as well as the objectives and requirements under the Habitats Directive.

The obligation for Member States to submit a plan containing future planned measures when the implementation of the Regulation has not met the objectives and targets of the Regulation, can be one of several tools to motivate Member States in their work to implement the requirements following from Article 12. However, based on the weak requirements under the regionalization process, there is a risk that im-

plementation will be slow, delaying the fulfillment of the objectives of the Habitats Directive.

To conclude, adhering to general and regional baseline measures set out in the Regulation is not enough for Member States to comply with the requirements following from Article 12 of the Habitats Directive. In order for Member States to implement Article 12 fully and by that contributing to the objectives of the Directive, additional measures adapted to regional fisheries must be initiated and implemented.

7. Concluding remarks

This article has concluded that Article 12 of the Habitats Directive applies to fisheries and that Member States of the European Union have a far-reaching obligation to protect the Baltic Proper harbour porpoise from bycatch. Member States have an obligation not only to implement a comprehensive regulatory framework but also to take concrete and preventive measures to meet the requirements under the Directive. This is particularly important in relation to migrating aquatic species, such as the harbour porpoise, since the process of designating areas for their conservation that become part of the Natura 2000 network is limited to sites “where there is a clearly identifiable area representing the physical and biological factors essential to their life and reproduction”.¹³² This should be compared to terrestrial species, where no exact corresponding limitation exists, which makes the strict protection of the harbour porpoise crucial in order to restore the Baltic Proper population at a favourable conservation status.¹³³ Because of the

¹³⁰ Regulation 2019/1241, Article 2(2). Note though, that Article 11 of the Regulation applies to recreational fisheries.

¹³¹ If the Commission considers that the proposed measures are not compatible with the objectives and quantifiable targets of the conservation measures in question, measures may be adopted by the Commission through the ordinary legislative procedure.

¹³² Habitats Directive, Article 4(1).

¹³³ *Ibid.* For migrating *terrestrial* species, the sites shall correspond to the places within the natural range of such species which represent the physical or biological factors essential to their life and reproduction. There is thus no requirement that the site must be “clearly identifiable” in relation to such species. For non-migrating terrestrial

increased ambition in relation to environmental concerns with the reform of the CFP Regulation and the Technical Regulation, Member States were given greater scope in relation to the implementation of measures to comply with the Habitats Directive. This means that since competence has been delegated, Member States are *required* to take measures if needed to comply with the Directive. More than ten years have now passed since the reform, and even though it is not visible “on the surface”, scientific research clearly shows that compliance with the Habitats Directive in the marine area is poor. The lack of conservation measures can thus not be blamed on knowledge gaps regarding the status, range and distribution of the Baltic Proper harbour porpoise. Since research indicates that incidental bycatch has a significant negative impact on the population, measures to *mitigate* bycatch should be prioritized. In addition, the knowledge about the natural range of the population indicates that the scope of Article 12(4) is fairly limited, which speaks in favor of the conclusion that mitigation measures to comply with Article 12(1) should be prioritized. However, the Technical Regulation does not separate between deliberate and inci-

dental bycatch and therefore includes general baseline measures to mitigate as well as to monitor bycatch. It also includes a regionalization process under which Member States can initiate additional measures for the same purposes. Following the baseline measures set out in the Regulation will not ensure full implementation; to comply with the requirements under Article 12 and to restore the population at a favourable conservation status, Member States are obliged to adopt and initiate regional measures at national and cross-border level. Therefore, if applied fully in accordance with the requirements following from Article 12, the Technical Regulation has potential as a tool for contributing to the objectives of the Habitats Directive. However, lack of political ambition risk to result in weak measures and non-compliance with the requirements following from the Directive as well as with the requirement for an ecosystem approach to fisheries management under the CFP Regulation. Picking up on one of the motives for a new Technical Regulation, that there were “no cost of catching sensitive species”¹³⁴, in lack of additional measures taken under the Regulation, there still is no such cost.

species, a site shall indicate which species that are “native to its territory”.

¹³⁴ Commission proposal 2016, p. 4.