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ASCOBANS Baltic Recovery Plan (Jastarnia Plan)

EC Law and the Conservation of the Baltic Harbour Porpoise

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EC Law and the Conservation of the Baltic Harbour Porpoise: A Report for the ASCOBANS Jastarnia Group

Action Requested

- take note of the information submitted
- comment

Submitted by

Secretariat



NOTE:
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EC Law and the Conservation of the Baltic Harbour Porpoise: A Report for the ASCOBANS Jastarnia Group

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1. Introduction

The Baltic harbour porpoise (*phocoena phocoena*) has experienced significant population decline throughout the latter part of the Twentieth Century, due both to natural factors, such as extreme winter conditions, and anthropogenic influences, especially incidental catches in commercial fishing operations, habitat degradation and disturbance, pollution and prey depletion. Accordingly, the conservation status of the Baltic populations of this species has become a matter of serious concern. One of the primary areas of activity of ASCOBANS in recent years has been the elaboration of a distinct recovery plan for the Baltic harbour porpoise, with a view towards restoring the Baltic populations to at least 80% of its carrying capacity. The ASCOBANS Recovery Plan for Baltic Harbour Porpoises, the Jastarnia Plan, was duly established and is subject to periodic review by representatives of the Baltic Sea parties to ASCOBANS.

At the second meeting of the Jastarnia Group in 2006, Recommendation 10 was adopted in which it was suggested that “the Advisory Committee should explore the possibility of commissioning a report on EU legislation relevant to harbour porpoise conservation and therefore to ASCOBANS”. In July 2007, Mr. Richard Caddell, Lecturer in Law at Swansea University, UK, an academic lawyer with a specialist research interest in the international and regional legal framework addressing cetaceans, was commissioned to prepare this report.

The aim of this report is to provide an outline of the current operation of European Community law pertinent to addressing the conservation status of the Baltic harbour porpoise. Notwithstanding this specific focus, the overwhelming majority of the legal provisions discussed below will also apply to the other species of cetaceans caught under the recently expanded geographical purview of ASCOBANS and may also prove instructive to the Advisory Committee as a reference document in due course.

In recent years, cetaceans have attracted the regulatory attention of the EU institutions on an unprecedented scale, with particular reference to the growing threat to stocks posed by interactions with commercial fisheries, as well as habitat degradation and disturbance. In this respect, a clear framework of EC legislation pertinent to the Baltic harbour porpoise (and cetaceans generally) now presents itself.

Firstly, a series of overarching policy documents have been elaborated that are intended to frame present and future legislative and policy activity on the part of the EC in relation to biodiversity. A number of specific actions are prescribed within these documents that are potentially applicable to the Baltic harbour porpoise. These policy documents are envisaged as a means of guiding future policies in the areas of

marine environmental protection and biodiversity conservation, and will accordingly prove instructive as to the future development of specific legislation with a bearing on cetaceans in waters under EC jurisdiction.

Secondly, the harbour porpoise is protected under the Habitats Directive of 1992, the pre-eminent legal provision on nature conservation within the broad framework of EC environmental law. The Habitats Directive aims to establish a Community-wide network of Special Areas of Conservation (SACs), known as the Natura 2000 project, with all Member States obliged to designate relevant areas within their terrestrial and maritime jurisdiction. In 2007 an important breakthrough was made in the marine application of the Habitats Directive, with the establishment of a long-awaited series of guidelines for the establishment of SACs in coastal and maritime regions, which will have a profound impact upon the conservation possibilities of the Habitats Directive vis-à-vis aquatic species, including the possibility of developing further such areas for the Baltic harbour porpoise.

Thirdly, many of the legislative provisions directly relevant to the Baltic harbour porpoise have emerged in the context of the Common Fisheries Policy, which has been undergoing a process of substantial reform to correct perceived ecological deficiencies within this area of Community policy. This has culminated in the adoption of a distinct Regulation on cetacean by-catches and the continued reform of fisheries measures applicable to the Baltic Sea.

Fourthly, a series of measures have been elaborated by the EC to address issues relevant to the conservation of the Baltic harbour porpoise, such as pollution from land-based sources, climate change issues and environmental impact assessment requirements. For reasons of focus, and to avoid an expansive discussion of substantial legal instruments that are somewhat more abstract to the conservation of cetaceans, this section will present a concise summary of these measures.

2. EC Biodiversity Policies and the Baltic Harbour Porpoise

In detailing the specific legislative responses to the conservation needs of the Baltic harbour porpoise it is first important to establish the over-arching nature conservation objectives established in relation to biodiversity that are of practical relevance for cetaceans in EC waters. Such documents may be considered to be particularly instructive as they seek to establish the priority areas for Community activity in the period up to 2010 and beyond.

The immediate starting point of an outline of the relevant policy framework is the current (Sixth) Community Environment Action Programme (EAP).¹ The Sixth EAP is significant as it outlines, in broad terms, the primary areas of priority activity for the EU institutions in relation to the environment in the short- to medium-term. In this respect, Article 1 of the Sixth EAP establishes four distinct areas listed as “the key environmental activities to be met by the Community”, namely climate change, nature and biodiversity, environment and health and quality of life and natural resources and

¹ Decision No. 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme [2002] *Official Journal* L242/1.

waste. As far as considerations of nature and biodiversity are concerned, a number of key elements are established under the Sixth EAP in relation to marine species:

- Article 3, which addresses strategic approaches to meeting environmental objectives, states that one such approach is “to encourage and promote effective and sustainable use and management of land and sea taking account of environmental concerns”, with particular emphasis on *inter alia*, the Integrated Coastal Zone Management programme.²
- Article 6(1), which establishes objectives for the conservation of nature and biodiversity, includes *inter alia*, “conservation appropriate restoration and sustainable use of marine environment, coast and wetlands”.
- Article 6(2), which established priority actions in relation to these broad objectives “promoting sustainable use of the seas and conservation of marine ecosystems, including sea beds, estuarine and coastal areas, paying special attention to sites holding a high biodiversity value, through:
 - promoting greater integration of environmental considerations in the Common Fisheries Policy, taking the opportunity of its review in 2002;
 - a thematic strategy for the protection and conservation of the marine environment taking into account, *inter alia*, the terms and implementation obligations of marine Conventions, and the need to reduce emissions and impacts of sea transport and other sea and land-based activities;
 - promoting integrated management of coastal zones;
 - further promote the protection of marine areas, in particular with the Natura 2000 network as well as by other feasible Community means”³

Prior to the adoption of the Sixth EAP, the European Commission formally adopted a distinct EC Biodiversity Strategy, designed to facilitate the further management and conservation measures required to address problems of biodiversity loss within the Community.⁴ This strategy was further augmented in 2001 with the adoption of four distinct Biodiversity Action Plans (BAPs) each addressing a key policy area, namely natural resources, agriculture, fisheries and development and economic cooperation. In this respect, with the exception of the BAP on agriculture, these policy documents are of practical relevance to the Baltic harbour porpoise.

Firstly, the BAP on development and economic cooperation noted with concern the degradation of a number of key areas of habitats, including coastal and marine regions, and one of its seven stated BAP Actions was listed as being “[t]o support sustainable use of natural resources, particularly in relation to forests, grasslands and marine/coastal ecosystems. Of more immediate application, however, are the BAPs on natural resources and fisheries. The BAP on natural resources noted that there were serious deficiencies and delays in securing full compliance with the Habitats

² Article 3(10).

³ Article 6(2)(g).

⁴ COM (1998) 42.

Directive, and observed that the conservation of aquatic living resources by taking into full consideration the implications of fisheries and aquaculture for the marine ecosystem was currently being addressed through the Common Fisheries Policy of the EC (see below) and that such a policy should continue to be pursued. Likewise, the BAP on fisheries raised particular concerns over the impact of commercial fisheries on non-target stocks, a point observed repeatedly in the context of the Baltic harbour porpoise in the elaboration of the Jastarnia Plan itself.

In May 2004 a stakeholders' conference was convened in Malahide, Republic of Ireland to review the progress made under the auspices of the EC Biodiversity Strategy. Given that biodiversity loss was widely acknowledged to be continuing at "alarming rates" the results of this conference, known as the "Message from Malahide" established a series of priority objectives and targets for 2010. In particular, a need for reinforced action was reiterated, with the European Council formally urged to accelerate its work towards a more responsible management of national resources. In this sense, the lack of progress made under the Habitats Directive in relation to the marine environment was observed to be a significant problem and a target was set for the Natura 2000 network to be completed for marine sites by 2008, with management objectives agreed and instigated by 2010.⁵ Furthermore, it was established by 2010 that "technical measures, including marine protected areas, [should be] effectively implemented to help ensure favourable conservation status of marine habitats and species not commercially exploited".⁶

Following the Malahide Conference, the European Commission issued a Communication on the further implementation of the relevant biodiversity provisions,⁷ establishing ten priority objectives including the need "to conserve and restore biodiversity and ecosystem services in the wider EU marine environment".⁸ In January 2008, progress in relation to these priority objectives was comprehensively reviewed. In relation to the reduction of principal pollutant pressures on marine biodiversity, which is to be "substantially reduced by 2010, and again by 2013", little concrete progress had been listed in relation to the need to significantly reduce point-source pollutant pressures on marine ecosystems and to reduce pollution from airborne and agricultural sources. Progress had been made in relation to aspects of fisheries impacts on non-target species, although in relation to species other than cetaceans such as sharks.

In addition to the policy guidance advanced under the EC Biodiversity Strategy and related instruments, recent developments in the marine sphere relevant to the Baltic harbour porpoise include the new thematic strategy currently being finalised in respect of the marine environment. The EC Marine Strategy will eventually form part of a wider EC policy, the European Maritime Policy, which will govern the conduct of marine affairs throughout the Community, with the Marine Strategy essentially addressing the key environmental issues raised by shipping and anthropogenic uses of the sea. In this respect, the key communication from the Commission regarding the need for a distinct EC Marine Strategy⁹ identified a number of deficiencies within the

⁵ Objective 1.1.

⁶ Objective 7.3.

⁷ COM(2006) 216 final.

⁸ Objective 3.

⁹ COM (2005) 504 final.

current framework addressing the marine environment, with particular emphasis upon an inadequate institutional framework and a deficient knowledge base, identifying the need to proceed with a dual-EU/regional approach, a knowledge-based approach, an ecosystem-based approach and a co-operative approach in framing future marine policy. In December 2007 formally approved the most recent draft of the Marine Strategy Framework Directive.

The legislative process for the Marine Strategy Framework Directive (MSFD) is currently approaching its formal conclusion, with the consolidated text having been agreed by both the European Council and the European Parliament. The objectives of the MSFD are nonetheless clear, and the Member States are required to take the necessary measures to achieve or maintain a “good environmental status” in the marine environment by 2020 at the latest. To this end, Member States must develop Marine Strategies to protect and preserve the marine environment and to prevent and reduce inputs into the marine environment.

A number of features may be particularly relevant to the Baltic harbour porpoise in the context of the MSFD:

- Member States are essentially required to operate in Marine Regions and Sub-Regions in developing marine environmental targets. Of these, the Baltic Sea is identified as a particular region, although the Kattegat is listed within “the Greater North Sea” as a distinct Sub-Region.
- In this respect, Member States are to develop a particular Marine Strategy for waters within these Regions and Sub-Regions.
- Member States are encouraged to use existing regional institutional cooperation structures to this end, including – but not confined to – the relevant regional seas conventions. Accordingly, the Jastarnia Group may be come within this interpretation, as well as ASCOBANS and HELCOM.
- Distinct environmental targets and monitoring programmes are to be instituted under the terms of the Directive, which could entail a remit in relation to *inter alia*, the Baltic harbour porpoise.

In this respect, the MSFD will address marine environmental concerns predominantly by empowering groups of coastal states to develop regional policies in respect of their individual and collective marine environments. Such an approach will clearly provide a mandate for the Member States of the Baltic Sea region to facilitate further conservation and management measures in due course in respect of a host of species and ecosystems – including a potential application to the Baltic harbour porpoise. Beyond the Baltic area, such an approach could also be applied to other species of cetaceans in other areas of Community waters to similar effect.

These overarching policy documents are largely facilitative in the sense that they may either provide guidance in relation to the future direction of marine environmental policies and, in the case of the emerging Marine Strategy, confer a greater degree of impetus towards the development of regional initiatives. To date, however, the primary legislative provisions that directly impact upon the conservation of the Baltic harbour porpoise remain those adopted under the Habitats Directive and pursuant to the development of the Common Fisheries Policy of the EC.

3. The Conservation of the Baltic Harbour Porpoise under the Habitats Directive

The Habitats Directive¹⁰ is perhaps the best-known provision of EC environmental law and the most pertinent in terms of prescribing clear obligations for the conservation of the Baltic harbour porpoise. Indeed, prior to the conclusion of a series of distinct measures vis-à-vis cetaceans and by-catch policy in the Baltic Sea region, the Habitats Directive remained virtually the only legal avenue through which the conservation needs of the Baltic harbour porpoise could be comprehensively addressed. The Habitats Directive was adopted in 1992 and has quickly established itself as the primary legal instrument through which EC nature conservation objectives are to be realised.

The main aims and objectives of the Habitats Directive are listed in Article 2 as being to “contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States”, with measures taken under the directive designed to maintain or restore, at favourable conservation status, natural habitats and species of “Community interest”. In the pursuit of these objectives, the Habitats Directive adopts a two-pronged approach to the conservation of European fauna and flora.

In the first instance, the directive provides for the creation of a network of Special Areas of Conservation (SACs), known collectively as “Natura 2000”. The Natura 2000 network consists of SACs that are established by the Member States which comprise particular habitat types (listed in Annex I of the directive) as well as the habitats of particular species (listed in Annex II of the directive). The harbour porpoise (including all Baltic populations) is listed in Annex II of the Habitats Directive, and therefore areas of crucial habitats for the Baltic harbour porpoise should be considered by the Member States as potential SACs, with a view towards contributing to the Natura 2000 network.

Secondly, the directive formally requires Member States to establish a system for the strict protection in their natural range of animal species that are specifically listed in Annex IV(a). In this respect, “all species” of cetaceans are listed in Annex IV(a), clearly establishing that the Baltic harbour porpoise is subject to these provisions; thereby all Member States are formally required to ensure that the distinct conservation and management requirements listed for such species are adhered to in areas of national jurisdiction.

Under Article 2, the Habitats Directive applies in the “European territory” of the Member States. Consequently, in terms of the seaward application of the directive, the concept of “territory” has been a matter of some debate. The various zones of maritime jurisdiction currently recognised under international law have been established pursuant to the UN Convention on the Law of the Sea 1982 (LOSC); however it was initially considered by a majority of Member States at the time of the

¹⁰ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] *Official Journal* L206/7. The most recent consolidated version of the Directive was established on 1 January 2007, following the latest round of accession to the EU, incorporating Bulgaria and Romania into a further enlarged EU of twenty-seven Member States.

conclusion and entry into force of the Habitats Directive that “territory” was essentially analogous with the concept of the “territorial sea”, which extends twelve nautical miles from the national baseline. Accordingly, such a restrictive definition would pertain only to coastal species with a highly limited range, or to those present at intervals within these waters, with such a restriction long considered by the European Commission to be ecologically unsatisfactory.

In 2000, litigation brought by the environmental campaign group Greenpeace in the UK courts¹¹ led to the declaration by the national courts of one Member State that the application of the Habitats Directive (as understood by the UK judiciary) extended beyond the twelve-mile limit and instead incorporated the exclusive economic zone, which extends a further 188 nautical miles seaward from the outer limits of the territorial sea. This case is significant, not only from the point of view of the jurisdictional reach of the directive, but also in relation to its distinct subject matter – namely the granting of licences by the UK authorities for oil exploration within the exclusive economic zone, which the applicant felt would have serious implications for the conservation status of cetaceans resident both permanently and temporarily in this area. The UK courts ruled that the relevant authorities were under a distinct duty to take the considerations established under the Habitats Directive into account when granting such licences in this and future applications.¹²

Following this judgment, which had been highly influential in the thinking of legal specialists in the other Member States in relation to this issue, the European Court of Justice formally declared in the case of *Commission v. UK*¹³ that the nature conservation provisions of the Habitats Directive did indeed apply within zones of national maritime jurisdiction, specifically including the exclusive economic zone, hence the provisions of the directive are to be enforced by Member States within this expanded marine area.

In order to ascertain the application of the Habitats Directive to the Baltic harbour porpoise, it is necessary to examine both aspects of the conservation regime prescribed by the directive, namely the scope for the establishment of Special Areas of Conservation and the strict protection measures provided for in the latter part of this provision.

3.1 Special Areas of Conservation

The most visible aspect of the conservation and management policies pursued under the auspices of the Habitats Directive is the establishment of the Natura 2000 network. The practical mechanics of this project are laid down in Article 4 of the Directive, whereby it is incumbent upon Member States to propose a list of appropriate sites containing the natural habitat types listed in Annex I, as well as those that host species listed in Annex II, that are native to the state in question. A series of general criteria for the designation of SACs is provided within the directive itself in Annex III. In general terms, as far as Annex II species are concerned, Annex III lays down the following considerations as site assessment criteria:

¹¹ *R v. Secretary of State for Trade and Industry, ex parte Greenpeace Ltd* [2000] Env LR 221.

¹² A further complication may be raised in relation to oil exploration activities and the jurisdictional reach of the Habitats Directive in the context of the continental shelf; this issue is discussed below.

¹³ Case C-6/04.

- Size and density of the population of the species present on the site in relation to the populations present within national territory.
- The degree of conservation of the features of the habitat which are important for the species concerned and restoration possibilities.
- The degree of isolation of the population present on the site in relation to the natural range of the species.
- The global assessment of the value of the site for the conservation of the species concerned.

The list produced by the Member State in question is then transmitted to the Commission, together with documentation providing information about the name, location and extent of the site, together with a map the area, as well as the data generated in the application of the Annex III criteria. Once this has been submitted, the Commission will then draw up a draft list of sites of Community importance, identifying those that host one or more priority natural habitat types (as designated in Annex I) or priority species (those listed in Annex II). The list of sites designated as sites of Community importance are then to be formally adopted by the Commission. Following this, the Member State is then required to officially designate any such site within their jurisdiction as a SAC. The designation of a site of Community importance as a SAC should be made “as soon as possible and within six years at most”. In early 2008, sites of Community importance to the geographical areas relevant to the Baltic harbour porpoise were published, namely for the Boreal biogeographical region¹⁴ (encompassing Finland, Sweden, Estonia, Latvia and Lithuania) and the Continental biogeographical region (Poland, Germany and Denmark).¹⁵

Once a site is designated as a SAC, a series of obligations laid down under Article 6 of the Habitats Directive becomes formally operational. Under Article 6(1), Member States are required to establish “the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements” of the Annex I habitat types or the Annex II species present on the sites. Accordingly, the onus is on the Member State to regulate activities in relation to these areas, and to establish legislative or other prescriptive measures to protect the ecological integrity of these sites. Additionally, under Article 11, Member States are obliged to undertake surveillance of the conservation status of the natural habitats and species types, with particular emphasis upon Annex I habitats and Annex II species.

Further obligations are prescribed in Articles 6(2), (3) and (4), which also become operational as soon as a site is designated a site of Community importance.¹⁶ Under Article 6(2) there is an obligation to “take appropriate steps” to avoid the deterioration

¹⁴ Council Decision 2008/24/EC of 12 November 2007 adopting, pursuant to Council Directive 92/43/EEC, a first updated list of sites of Community importance for the Boreal biogeographical region [2008] *Official Journal* L12/118.

¹⁵ Council Decision 2008/25/EC of 12 November 2007 adopting, pursuant to Council Directive 92/43/EEC, a first updated list of sites of Community importance for the Continental biogeographical region [2008] *Official Journal* L12/383.

¹⁶ Article 4(5): under this provision, the requirements listed in Article 6(1) do not become operational until the site is formally established as an SAC.

of Annex I habitats, and those for Annex II species, in the SAC. Article 6(3) establishes a process for plans and projects connected with the site in question, demonstrating that designation under the Habitats Directive does not necessarily prohibit anthropogenic activities from occurring in such areas. Instead, under Article 6(3), any such plans or projects are to be “subject to appropriate assessment of its implications for the site in view of the assessment of the site’s conservation objectives”, with the national authorities required to authorise any such activity once it has been ascertained that “it will not adversely affect the integrity of the site concerned”.¹⁷

Even if a negative assessment of the proposed plan or project has been made, under Article 6(4) it will still be possible for such activities to proceed within the SAC, provided that “it must necessarily be carried out for imperative reasons of overriding public interest, including those of a social or economic nature”.¹⁸ Generally accepted academic opinion suggests that Article 6(4) should be subject to a “balance of interests” approach, whereby a project that offers great public interest but has a limited detrimental effect upon the environment should be treated rather differently to a development with a converse cost/benefit projection. Where such a decision is made, the Member State is obliged to “take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected”.

Insofar as the Baltic harbour porpoise is affected by this provision, Article 6(4) provides that for sites hosting a priority species (i.e., those listed on Annex II of the directive), the Member State may only invoke four possible grounds for permitting a plan or project to proceed, namely:

- Considerations of human health or public safety.
- Beneficial consequences of primary importance to the environment.
- An opinion from the European Commission.
- “Other imperative reasons of overriding public interest”.

Thus far, plans and projects permitted under the scope of Article 6(4) have been predominantly in the field of major infrastructure projects in Objective 1 regions and the need for construction developments in the context of the Airbus A3XX project.

The grounds on which development activities may be permitted in SACs established for the conservation of the Baltic harbour porpoise therefore remain largely an exercise in conjecture, especially in the context of the expansively worded sweep-up clause, “other imperative reasons of overriding public interest”. This, it may be submitted, could include oil and gas exploration, the construction of underwater pipelines in the Baltic Sea (such as the Russia-Germany pipeline, for instance), shipping activities and maritime transportation and even substantial fisheries interests. Likewise, military activities would be permitted under the “public safety” exception and, as demonstrated below in the context of military sonar activities, the EU has proved deeply reluctant to address this issue beyond drawing the potential threat to

¹⁷ The opinion of the general public may be considered “if appropriate”.

¹⁸ It should also be noted at this juncture that there are strident provisions under EC law vis-à-vis the requirement to conduct full Environmental Impact Assessments by the Member States, which may also have an application for marine activities that could potentially affect the Baltic harbour porpoise in an adverse manner.

marine mammals to the attention of Member States, on the basis that its competence to do so in the sphere of military affairs is, at present, embryonic.

Accordingly, it may be suggested that while the Habitats Directive offers particular benefits to the Baltic harbour porpoise in the context of establishing SACs, there remains in practice a considerable scope for a Member State to justify the continuance of anthropogenic activities in these areas that may impact upon the conservation status of this species.

To date, the establishment of SACs generally has proved to be a protracted process in practice. Indeed, the Member States that were within the EU umbrella at the time of the conclusion of the Habitats Directive were originally scheduled to have furnished the European Commission with the requisite national lists by June 1995, with a list of sites of Community importance due to have been finalised by June 1998. The lack of progress in this respect has, as noted above, proved a cause for concern in the various reviews of Community environmental and biodiversity policies conducted in recent years. Furthermore, particular practical difficulties in the identification and designation of appropriate marine sites as potential SACs have also been experienced. Broadly speaking, three main difficulties have become apparent in the designation of marine sites:

- It is significantly less feasible to physically demarcate such areas at sea than in relation to terrestrial sites. Physical structures such as fences and other barriers may be created to clearly identify such areas on land and to curtail anthropogenic interferences; it is highly problematic, if not impossible to do so at sea.
- Consequently, marine sites must, by practical necessity, be multi-purpose in nature. Given the difficulties inherent in designating such sites, it is important that a marine SAC must offer the maximum conservation benefits for as many aquatic species and habitat types as possible, which creates additional logistical difficulties and delays in the formulation of appropriate marine sites.
- These practical difficulties have been exacerbated by a marked lack of uniform guidance on the part of the EU institutions vis-à-vis the establishment of marine SACs, a shortcoming that is beginning to be rectified – but only as recently as May 2007, with the publication by the European Commission of a set of general guidelines for the creation of protected areas for marine species subject to the Habitats Directive and Wild Birds Directive of 1979.

Insofar as the establishment of marine SACs is concerned, the Habitats Directive has historically offered little direct guidance, aside from a requirement in Article 4(1) that “[f]or aquatic species which range over wide areas, such sites will be proposed only where there is a clearly identifiable area representing the physical and biological factors essential to their life and reproduction”; a provision that is not particularly conducive to swift and decisive action on the part of the various Member States to develop such locations as potential SACs.

Nevertheless, as noted above, in May 2007 a series of guidelines were formally published by the Commission in respect of the creation of marine SACs, a project that was postponed until this stage due to practical difficulties and a lack of consensus on the exact parameters of the seawards reach of the directive. The procedure and

considerations for the identification and designation of such sites lies outside the general expertise of a legal commentator, but it should be observed in the context of the relevant EC legislation that the Commission guidelines establish a series of matters to be taken into account in the designation of sites for Annex II species, specifically using the harbour porpoise as an example.

The guidelines explicitly note that it is often difficult to identify suitable sites for cetaceans due to the problems inherent in observing species in the wild and the cost and complexity of the research required to provide definitive answers to this issues raised in relation to their conservation needs. Nevertheless, an ad hoc working group held under the auspices of the EC Habitats Committee in December 2000 concluded that as far as migratory porpoises are concerned, it is possible to determine identifiable areas representing the crucial factors for the life-cycle of the species, especially where:

- There is a continuous or regular presence of the species, subject to seasonal variations.
- There is a good population density in relation to other areas.
- There is a high ratio of young to adults during certain periods of the year.

Such considerations are not considered to be exhaustive and other relevant biological factors may also be pertinent to the identification of such sites, as far as (Baltic) harbour porpoises are concerned. It may therefore be considered that a uniform set of sub-guidelines may ultimately need to be elaborated and agreed for the designation of sites as being of importance to species of cetaceans before a concerted series of SACs may be developed throughout Community waters, unless a consensus is reached within the scientific community that the general indicators listed in the current guidelines are sufficient for the designation of appropriate protected areas under the Habitats Directive.

3.2 Strict protection measures

The second key conservation policy pursued under the auspices of the Habitats Directive is that Member States are formally required to establish a system of strict protection for the various animal species listed in Annex IV(a) in their natural range which, as noted above, includes Baltic populations of the harbour porpoise. Accordingly, a series of obligations are prescribed in Article 12 in respect of Annex IV(a) species.

Article 12(1) prohibits the following conduct:

- All forms of deliberate capture or killing of specimens of these species in the wild.
- Deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration.¹⁹
- Deliberate destruction or taking of eggs from the wild.
- Deterioration or destruction of breeding sites or resting places.

¹⁹ By virtue of Article 12(3), these two obligations “shall apply to all stages of life of the animals”, as indeed does the obligation concerning sale and trade of the species in Article 12(2).

Furthermore, the keeping, transport, sale or exchange or offering for sale or exchange of such species is also prohibited under Article 12(2). A further obligation of considerable importance to the Baltic harbour porpoise in terms of incidental catches is prescribed under Article 12(4):

“Member States shall establish a system to monitor the incidental capture and killing of the animal species listed in Annex IV(a). In the light of the information gathered, Member States shall take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned”.

This requirement to address incidental capture is further bolstered in Article 15 of the directive, which provides that “Member States shall prohibit the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of such species”. Indeed, prior to the adoption of Regulations 812/2004 and 2187/2005 in relation to driftnet fishing (as detailed below), these provisions could be interpreted collectively as establishing a remit for Member States to address particularly indiscriminate fishing practices with the potential to cause substantial damage to stocks of cetaceans, although there is little evidence to suggest that Article 12(4) provided much in the way of a regulatory spur in this respect.

As with the provisions in respect of SACs, it is possible for a Member State to derogate from the strict protection measures prescribed under the Habitats Directive, provided that “there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations concerned at a favourable conservation status in their natural range”.²⁰ Derogations are permitted for a number of reasons, particularly in the context of damage to crops and property, for research and education initiatives and to pursue further conservation measures in respect of the species affected and of habitats. A limited and selective amount of directed hunting and capture is also permissible, “under strictly supervised conditions”.²¹

In addition, Article 16(1)(c) reproduces the SAC exemption practically verbatim, permitting a derogation to be made “in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance to the environment”. As in the case of SACs, there is scope within this provision to permit maritime and coastal activities with the potential to impact upon the Baltic harbour porpoise, although it is subject to the stronger requirement absent from Article 6 that such activities do not jeopardise a favourable conservation status of the species within its natural range. Where a derogation is entered on the part of a Member State, the relevant national authorities are required to enter a reasoned report to the Commission, which will in turn provide a formal Opinion on the compatibility of such activities with the Habitats Directive within twelve months of receipt. A Member State seeking to enter such a derogation in relation to the Baltic harbour porpoise – as

²⁰ Article 16(1).

²¹ Article 16(1)(e).

indeed for any species of cetaceans, or any other species listed under Annex IV(a) – must specify:

- The species subject to the derogation, as well as the reasons advanced for the derogation, including the nature of the risk. This is to include “if appropriate” references to the alternatives rejected by the authorities and any scientific data used in arriving at this decision.
- The means, devices or methods that have been authorised for the capture or killing of such species, and the reason for their use.
- The circumstances of when and where such derogations are granted.
- The specific authority responsible for checking what means, devices or methods may be used and by whom.
- The supervisory measures used and the results obtained.

There is little decided authority in relation to these requirements that is directly centred on the specific needs of cetaceans, but the decision in *Commission v. Ireland*²² is highly instructive in relation to the strength of the obligations prescribed and the expected conduct of the Member States as far as cetaceans are concerned. In this case, the European Commission brought an action against the Irish government for a series of alleged breaches of the Habitats Directive in relation to an eclectic group of species, including a number of species of cetaceans. In particular, the Commission was concerned at the imputed failure to establish a comprehensive, adequate and on-going monitoring programme for cetaceans that would enable a system of strict protection for that species to be devised. The Irish authorities contended that a national biological records database had been established for cetaceans, in addition to the observer data generated under the application of Regulation 812/2004, as well as a series of monitoring projects around the coast of Ireland and the official designation of national waters as a whale and dolphin sanctuary was sufficient to discharge the relevant obligations under the Habitats Directive.

The European Court of Justice, however, disagreed with this contention and ruled that the studies in question were essentially *ad hoc* in nature and confined to certain geographical areas. Consequently, it was held that the respondent state had not in fact demonstrated that cetaceans were subject to a comprehensive and on-going monitoring programme and were thereby in breach of the directive, which appears to establish a very strident set of expectations with regard to monitoring activities expected in relation to cetaceans. Furthermore, it was held that the use of explosives in seismic exploration activities within Irish waters had been authorised without the necessary derogation having been secured and also constituted a violation of these provisions. A further instructive aspect of this decision in relation to cetacean conservation under the Habitats Directive lies in the rejection of a proposed defence by Ireland. The Irish government argued that a series of strict protection measures was currently under development within the legislature. Nevertheless the European Court of Justice ruled, rather self-evidently perhaps, that to demonstrate good intentions and emerging legislation was insufficient to meet the demands of the directive; indeed, to permit a defence of this nature would be essentially to legitimise inaction on the part of the Member States.

²² Case C-183/05.

4. The Conservation of Baltic Harbour Porpoise under the Common Fisheries Policy

By common consensus, incidental catches in commercial fisheries represents the most pressing threat currently facing the Baltic harbour porpoise, both in terms of mortality rates and in impeding the recovery of the stock. As noted above, the Habitats Directive establishes a firm obligation to monitor the incidental capture of all species of cetaceans. However, notwithstanding the intrinsic value of this provision, in practice the distinct technical measures required to reduce by-catches are more likely to be introduced in the context of more specialised fisheries provisions, as opposed to more generalised legislation addressing biodiversity concerns. In this respect, the role of EC fisheries law is especially relevant. Legislative competence over fisheries in the Member States of the European Union has been transferred to the EC, which governs fisheries issues through the Common Fisheries Policy (CFP). In recent years, a number of provisions have been adopted under the CFP that have particular relevance to the Baltic harbour porpoise.

The CFP was introduced primarily to address the political and economic issues raised by the exploitation of Community fisheries resources, which has proved to be a consistent source of friction between coastal States. This has been especially true among the various European fleets, which have been involved in some of the most acrimonious disputes over fishing rights to date.²³ The original Treaty of Rome creating the EEC facilitated the establishment of a common policy on fisheries²⁴ and the CFP was formally inaugurated in October 1970, laying down the principle of “equal access” of Member States to each other’s national fishing grounds. Since then, the CFP has been predominantly concerned with maintaining harmonious relations between the various Member States in relation to fishing rights, while attempting to prevent further damage to the already depleted Community fish stocks by establishing and monitoring a Total Allowable Catch scheme, with varying degrees of success. However, given that the CFP has historically concentrated upon promoting these policy priorities, a limited amount of regulatory attention has been focussed on the detrimental impacts of fishing upon the wider marine environment until relatively recently.

Until 2002, by-catches of cetaceans were addressed on a rather piecemeal basis, with the adoption of *ad hoc* technical measures to promote enhanced selectivity of fishing gear and techniques. In October 1992, a Regulation was adopted prohibiting the practice of encirclement fishing,²⁵ identified as being a technique that “may result in the pointless catching and killing of marine mammals”.²⁶ Regulation 3034/92 is no longer in force, and the use of purse-seine nets is now governed by a subsequent

²³ Particularly notorious examples of this include the Anglo-Icelandic “Cod Wars” of 1958 and the early 1970s, and the protracted *Factortame* litigation between the UK and Spain in the 1990s.

²⁴ The original mandate for the creation of the CFP was laid down in Articles 38 to 43 of the Treaty of Rome, concerning a common policy in the sphere of agriculture.

²⁵ Council Regulation (EEC) No. 3034/92 of 19 October 1992 amending, for the fourteenth time, Regulation (EEC) No. 3094/86 laying down certain technical measures for the conservation of fishery resources [1992] *Official Journal* L307/1. Encirclement fishing involves the setting of purse-seine nets around groups of marine mammals to catch fish, such as tuna, that are found in close association with these mammals.

²⁶ Preamble to the Regulation.

measure²⁷ that prohibits the practice of encirclement fishing and the use of shore-seines (towed nets operated from the shore) from 1 January 2002, unless the Council, by a qualified majority vote, “decides otherwise in the light of scientific data proving that their use does not have a negative impact on resources”.²⁸ Further restrictions on dolphin-associated fishing were introduced by Resolution 894/97,²⁹ which prohibits the encirclement of schools or groups of marine mammals with purse-seine nets³⁰ and restricts the use of trawl nets in specified geographical areas at certain points in the fishing season.³¹

In 2002, the CFP was comprehensively revised in order to mitigate the adverse effects of the Community fishing effort on the marine environment. The roots of this policy may be traced back to the evolution of a distinct environmental agenda under EC law, in particular the development of the so-called “integration principle” in the EC Treaty. The integration principle requires environmental considerations to be incorporated into the broad areas of Community policy, and was first explicitly codified in Article 130r of the EC Treaty under the Single European Act of 1986. This provision was subsequently amended by the Treaty of Maastricht in 1992, before the Treaty of Amsterdam in 1997 enshrined the integration principle in the present Article 6 of the EC Treaty.³² Consequently, the integration of environmental protection measures has now assumed the status of a general principle of EC Law and must be incorporated accordingly within the relevant areas of Community policy.

In recent years, a number of steps have been taken to integrate environmental protection objectives within the CFP. On 20 March 2001, the Commission issued a Green Paper on the future of the CFP,³³ which was highly critical of the way in which the fishing industry had been regulated by the Community throughout the previous twenty years, observing that “[t]he CFP has not managed to sufficiently integrate the environmental problems into management considerations in a proactive manner”.³⁴ As a result, the Green Paper noted that environmental issues affecting the marine ecosystem as a whole were not being addressed in a coherent and co-ordinated fashion.³⁵

²⁷ Council Regulation (EC) No. 1626/94 of 27 June 1994 laying down certain technical measures for the conservation of fishery resources in the Mediterranean [1994] *Official Journal* L171/1.

²⁸ Article 2(3). In addition to these technical restrictions, Regulation 1626/94 requires Member States to “pay attention” to the conservation of “fragile or endangered species” listed in its Annexes. This includes “all marine species of mammals” listed in the Annexes to the CMS and the Bern Convention, which in practice encompasses all species of cetaceans ordinarily and occasionally resident in Community waters.

²⁹ Council Regulation (EC) No. 894/97 of 29 April 1997 laying down certain technical measures for the conservation of fishery resources [1997] *Official Journal* L132/1.

³⁰ Article 10(17).

³¹ Article 10(15).

³² Article 6 states, “[e]nvironmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.” Among the activities listed in Article 3 is “a common policy in the sphere of agriculture and fisheries”: Article 3(e).

³³ COM (2001) 135 final: Green Paper on the future of the Common Fisheries Policy; reproduced at www.europa.eu.int/comm/fisheries/greenpaper/green/volume1_en.pdf.

³⁴ *Ibid.* at 9.

³⁵ *Ibid.* at 10.

As a result, in December 2002, a Regulation was adopted that fundamentally readjusted the aims and objectives of the CFP.³⁶ Mindful of the need to integrate environmental management concerns into the broad areas of Community policy, the main objectives of the CFP were redefined under Article 2(1) of the Regulation, which introduced an ecosystem-based approach to the management of fisheries resources.³⁷ Article 4 of the Regulation lists the types of measures to be taken by the Council in order to pursue these new objectives including, *inter alia*, adopting recovery plans, adopting management plans, limiting catches and limiting fishing efforts. From the perspective of by-catch mitigation, Article 4 also allows for the adoption of technical measures, including the introduction of “specific measures to reduce the impact of fishing activities on marine ecosystems and non-target species”.³⁸

Shortly after issuing the Green Paper, the Commission began to examine the issue of how to integrate environmental concerns effectively within the CFP.³⁹ Here, a number of policy objectives were listed as requiring “the highest priority”, including the improvement of fishing methods to reduce discards and incidental catches, and to mitigate adverse impacts on a variety of marine species, including cetaceans.⁴⁰ Work began in earnest on pursuing these priority objectives and, by mid-2002, the Commission started to address the issue of incidental catches and the protection of cetaceans.

In December 2001 and June 2002, the Scientific, Technical and Economic Committee for Fisheries (STECF) examined the issue of cetacean mortality in European waters, concluding that although the precise number of by-catches was difficult to quantify, harbour porpoises were especially vulnerable to incidental capture, particularly in the Baltic Sea. As a result, the STECF recommended that sweeping measures, including the prohibition of driftnet fishing in the Baltic Sea and the use of acoustic deterrent devices, should be introduced as a matter of priority. In 2003, the Commission published a proposal for a new Regulation to address the incidental capture of

³⁶ Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable development of fisheries resources under the Common Fisheries Policy [2002] *Official Journal* L358/59.

³⁷ Article 2(1) states, “[t]he Common Fisheries Policy shall ensure exploitation of living aquatic resources that provides sustainable economic, environmental and social considerations. For this purpose, the Community shall apply the precautionary approach in taking measures designed to protect and conserve living aquatic resources, to provide for their sustainable exploitation and to minimise the impact of fishing activities on marine eco-systems. It shall aim at a progressive implementation of an eco-system-based approach to fisheries management. It shall aim to contribute to efficient fishing activities within an economically viable and competitive fisheries and aquaculture industry, providing a fair standard of living for those who depend on fishing activities and taking into account the interests of consumers.”

³⁸ Article 4(g)(iv). In addition to this, Article 4(h) allows for measures to be taken to mitigate the environmental impact of fishing activities by “establishing incentives, including those of an economic nature, to promote more selective or low impact fishing”.

³⁹ COM (2002) 186 final: Communication from the Commission setting out a Community Action Plan to integrate environmental protection requirements into the Common Fisheries Policy; reproduced at www.europa.eu.int/comm/fisheries/doc_et_publ/factsheets/legal_texts/docscom/en/com_02_186_en.pdf.

⁴⁰ Other priority actions were to be taken in respect of sharks and seabirds, as well as reducing pressure on fishing grounds and eliminating public aid for modernising fishing fleets.

cetaceans in Community fisheries.⁴¹ In this regard, three key areas were identified by the Commission in which measures should be taken to mitigate by-catches:

- Restrictions were to be imposed on driftnet fishing in the Baltic Sea (given the pending accession of new Member States to the EU from this region), leading to an eventual phase-out of this equipment.
- The use of acoustic deterrent devices (“pingers”) in certain fisheries should be mandatory.
- A co-ordinated monitoring scheme for cetacean by-catches should be implemented.

The Council’s draft proposals were adopted largely verbatim by the Council and Regulation 812/2004 formally entered into force on 1 July 2004.⁴²

4.1 The regulation of driftnet fishing

The primary objective of Regulation 812/2004 is to amend EC fisheries policy in the Baltic Sea area in the light of EU enlargement, and to extend the Community-wide prohibition of driftnet fishing to this region. Large-scale pelagic driftnets are perhaps the most notorious type of fishing gear deployed in modern fisheries, having been roundly condemned for their acute lack of selectivity. Since the late 1980s, a series of restrictions have been imposed upon the use of this equipment, culminating in the prohibition on the deployment of driftnets in excess of 2.5km on the high seas by the UN General Assembly,⁴³ effective from 1 January 1992. To a considerable extent these provisions have been well adhered to by the international community, with the overwhelming majority of coastal states, Regional Fisheries Management Organisations and multilateral biodiversity treaties having adopted the 2.5km rule. The EC, however, has gone even further than the UN General Assembly and has prohibited driftnets in their entirety within the pre-2004 enlargement waters, and by virtue of Regulation 812/2004 has instituted a graduated phase-in of the driftnet ban in the Baltic Sea region.

At first, driftnets were permitted up to the 2.5km limit specified by the UN General Assembly, with a specific Regulation introduced in 1992 to this effect.⁴⁴ This Regulation prohibited the use of driftnets above 2.5km in length, both on the high seas and in many areas of Community waters, subject to two exceptions: firstly, the Regulation had no application in the Baltic Sea, Belts and Sound and secondly, an exemption was granted to fleets fishing for albacore tuna in the north-east Atlantic, introduced after lobbying from the French government. This latter exemption was later repealed in 1997,⁴⁵ leaving the Baltic Sea area exemption undisturbed.

⁴¹ COM (2003) 451 final: proposal for a Council Regulation laying down measures concerning incidental catches of cetaceans in fisheries and amending Regulation (EC) No. 88/98.

⁴² Council Regulation (EC) No. 812/2004 of 26 April 2004 laying down measures concerning incidental catches of cetaceans in fisheries and amending Regulation (EC) No. 88/98 [2004] *Official Journal* L150/12.

⁴³ Resolution 46/215, 21 December 1991.

⁴⁴ Council Regulation (EEC) No. 345/92 of 27 January 1992 amending for the eleventh time Council Regulation 3094/86 laying down certain technical measures for the conservation of fishery resources [1992] *Official Journal* L042/15.

⁴⁵ Council Regulation (EC) No. 894/97 of 29 April 1997 laying down certain technical measures for the conservation of fishery resources [1997] *Official Journal* L132/1.

More controversially, in 1998 a new Regulation was introduced, amending Regulation 894/97, so as to prohibit the use of all driftnets – irrespective of size – within listed fisheries throughout the pre-2004 enlargement waters.⁴⁶ Under Article 11a of the revised Regulation 894/97, the fisheries for which the use of driftnets is prohibited are listed in a new Annex VIII to the Regulation, encompassing all the major fisheries in Community waters (apart from the Baltic Sea) as they stood in 1998, namely for Albacore, Bluefin tuna, Bigeye tuna, Skipjack, Atlantic bonito, Yellowfin tuna, Blackfin tuna, Little tuna, Southern bluefin tuna, Frigate tuna, Oceanic sea breams, Marlins, Sailfishes, Swordfishes, Sauries, Dolphinfishes, Sharks and “all species” of Cephalopods.

This measure was then followed by Regulation 812/2004, which amended the previous provisions pertinent to the Baltic Sea area,⁴⁷ introducing a graduated phase-out of driftnets in these waters culminating in a total ban on the use of this equipment throughout the Baltic Sea from 1 January 2008 onwards. Complications with the timetable for the eradication of driftnet fishing meant that some adjustments were made to individual deadlines for certain areas within the Baltic Sea,⁴⁸ but the ultimate deadline for the cessation of driftnetting activities remained undisturbed.

The driftnet issue has proved to be highly controversial in a number of Member States, with concerted opposition to these provisions having been raised by coastal communities in Italy and France in particular. As far as the Baltic Sea area is concerned there has been relatively little formal challenge to the driftnet fishing restrictions, aside from the petitioning of the European Parliament by a collective of Polish fishing interests in February 2006 seeking an exemption for Polish waters on the grounds that the ban would be likely to cause severe economic hardship. This petition was ultimately unsuccessful, although as noted above, Regulation 2187/2005 did adjust the timescale for the eventual entry into force of these restrictions in certain areas of the Baltic region. However, a series of developments has occurred in relation to other areas of Community waters that will be likely to have a bearing upon the practical operation of the Baltic provisions.

In particular, previous meetings of the Jastarnia Group have raised concerns over the practice of using so-called “semi-driftnets”, especially in Polish waters, which has exploited a loophole in the various anti-driftnet provisions by virtue of the ambiguous definition of such equipment. This problem has been raised previously within ASCOBANS – most recently, at the Fifth Meeting of the Parties in 2006, where a call was made for clarification of the legal definition of a driftnet. This loophole has been controversially utilised by France and Italy where, in the absence of a clear and unequivocal legal definition of a “driftnet”, the authorities have sanctioned the use of the *thonaille* and *ferrettara* respectively – netting that is effectively the same type as

⁴⁶ Council Regulation (EC) No. 1239/98 of 8 June 1998 amending Regulation (EC) No 894/97 laying down certain technical measures for the conservation of fishery resources [1998] *Official Journal* L171/1.

⁴⁷ Namely Council Regulation (EC) No. 88/98 of 18 December 1997 laying down certain technical measures for the conservation of fishery resources in the waters of the Baltic Sea, the Belts and the Sound [1997] *Official Journal* L009/1.

⁴⁸ Council Regulation (EC) No. 2187/2005 of 21 December 2005 for the conservation of fishery resources through technical measures in the Baltic Sea, the Belts and the Sound, amending Regulation (EC) No. 1434/98 and repealing Regulation (EC) No. 88/98.

that proscribed under EC law but the modification of which renders it technically distinct and thereby outside the scope of the current provisions. In France, the decision by the relevant fisheries authorities to permit the use of this equipment was successfully challenged and annulled in 2005 by the Conseil d'État, although it appears that the use of the *ferrettara* continues to be permitted – for the moment, at least.

In the light of concerns about the potential lacunae in the EC driftnet provisions, a new Regulation was adopted in June 2007 to amend Regulations 894/97, 812/204 and 2187/2005.⁴⁹ At the proposal stage, the diplomatically-worded intention of this legislation was stated by the European Commission as being to “clarify certain existing provisions to avoid counterproductive misunderstandings as well as facilitate uniformity in the practice of monitoring between Member States”.⁵⁰ Accordingly, the new definition of a driftnet, as established in Regulation 809/2007, is stated to be:

“[A]ny gillnet held on the sea surface or at a certain distance below it by floating devices, drifting with the current, either independently or with the boat to which it may be attached. It may be equipped with devices aiming to stabilise the net or to limit its drifting”.

This Regulation entered into force officially in mid-July 2007 and applies in all waters under the jurisdiction of the EC. Nevertheless, it is true that a certain amount of creativity may be exercised with respect to virtually any final definition of a “driftnet” to create gear that will operate at the outermost parameters of the law. In this respect, monitoring activities by the recently inaugurated Community Fisheries Compliance Agency – as well as by vigilant NGOs and other interested parties – may help to reduce the current opportunities to circumvent the letter and the spirit of the relevant provisions in EC waters, including the Baltic Sea area.

4.2 The use of pingers

Perhaps the most ambitious provisions of the new Regulation involve the mandatory use of acoustic deterrent devices by EC fishing vessels.⁵¹ Acoustic deterrent devices (“pingers”) are considered to be potentially a highly effective tool in mitigating cetacean by-catches, although they have not been widely deployed in fisheries to date. Under Article 2(1), all vessels of over 12 metres in length must deploy active acoustic deterrent devices on all fishing gear in certain areas within Community waters,⁵² which should be “fully operational” when set.⁵³ Member States are to take “all necessary steps” to monitor the effects of the use of these devices in the fisheries in question.

Under Regulation 812/2004, which introduced the mandatory phase-in of such equipment, the use of pingers in such fisheries is apparently considered to be a

⁴⁹ Council Regulation (EC) No. 809/2007 of 28 June 2007 amending Regulations (EC) No. 894/97, (EC) No. 812/2004 and (EC) no 218/2005 as concerns drift nets [2007] *Official Journal* L182/1.

⁵⁰ COM (2006) 511 final.

⁵¹ Article 2 of Regulation 812/2004.

⁵² These areas are listed in Appendix I of the Regulation.

⁵³ Article 2(2). This is subject to an exemption in Article 2(3) in respect of scientific research vessels studying by-catch mitigation techniques.

permanent measure. In its current form, the Regulation is silent on the possibility of developing a concerted programme to phase *out* such appliances in Community fisheries. It appears likely that such a position may be revisited in the future, given that the prospect of the long-term use of pingers in the cetacean environment has been viewed negatively by a number of expert groups, including both ASCOBANS and ACCOBAMS, in recent years.

4.3 Monitoring obligations

In order to ensure the effectiveness of these provisions, Article 5 of Regulation 812/2004 requires Member States to design and implement monitoring schemes for incidental catches of cetaceans and to appoint an observer for every fishing vessel with an overall length of 15 metres or more flying the national flag. Observers must be “independent and properly qualified and experienced personnel”,⁵⁴ whose task is to “monitor incidental catches of cetaceans and to collect the data necessary to extrapolate the by-catch observed to the whole fishery concerned”, with a particular emphasis on the monitoring of fishery observations and by-catches of cetaceans.⁵⁵ Observers are required to complete a report compiling all the data collected on the fishing effort as well as observations on incidental catches of cetaceans to the competent authorities of the flag Member State, which in turn must report to the Commission.

As far as smaller vessels are concerned, considerable practical problems are raised by the possibility of an observer programme, with legitimate concerns raised as to the safety implications of such a project, although other technical possibilities exist for these vessels involving mechanical, as opposed to human, observation. The development of monitoring possibilities of smaller vessels and recreational fisheries is an on-going project under EC fisheries law, as evidenced by the recent adoption of a new Regulation mandating both a Community-wide and nationally-based programme of data collection from fishing vessels, with no qualifications based on vessel size.⁵⁶

5. Miscellaneous Responses to Anthropogenic Pressures on the Baltic Harbour Porpoise

In addition to the specific measures pertaining to the Baltic harbour porpoise advanced under the Habitats Directive and the Common Fisheries Policy, there are a series of more *ad hoc* provisions that may also prove to be of relevance in relation to addressing the conservation status of this species of cetacean under EC law.

5.1 Hazardous substances and pollution activities

A number of distinct legislative provisions have been inaugurated by the EC authorities to address pollution incidents, usually in the wake of highly-damaging and

⁵⁴ Article 5(1).

⁵⁵ Article 5(2).

⁵⁶ Council Regulation (EC) No 199/2008 of 25 February 2008 concerning the establishment of a Community Framework for the collection, management and use of data in the fisheries sector and support for scientific advice regarding the Common Fisheries Policy [2008] *Official Journal* L60/1.

well publicised instances of oil pollution with the waters of Member States. Accordingly, much of the provisions that relate to marine pollution are compensatory in nature, or designed to address shipping standards, with little direct application towards addressing wildlife conservation as a holistic concern.

5.2 Seismic surveys and testing

The potential problems raised by seismic exploration activities to the health of cetaceans have been well-documented within a host of multilateral organisations with competence over marine mammals, including the International Whaling Commission, ASCOBANS, ACCOBAMS and the CMS itself. As far as the EC response is concerned, such issues appear to be largely addressed under the purview of the Habitats Directive. In this respect, the legal acceptability of seismic surveys and testing in areas of habitat important to the Baltic harbour porpoise will run the gauntlet of Article 6, if such areas are eventually designated as SACs, and Article 16, where the strict protection of the species is at stake.

It is important to note that there are potential limitations in the jurisdictional reach of the Habitats Directive is concerned in relation to maritime areas affecting the continental shelf. The continental shelf may extend for a distance of between 200 and 350 nautical miles from the baseline. However, for the purposes of Article 76 of the LOSC the continental shelf encompasses the seabed and subsoil, as opposed to the water column above. Accordingly, the provisions of the Habitats Directive will not apply in these waters. Nevertheless, the ECJ has proven to take a restrictive view of seismic testing activities within waters encompassing national jurisdiction and has found that a failure to take the terms of the directive into consideration when licensing such activities will constitute a breach of the Habitats Directive, as illustrated in the aforementioned cases of *Commission v. UK* and *Commission v. Ireland*.

5.3 Military sonar

As with seismic surveys, the use of sonar by the military authorities has attracted concerns of marine mammal scientists in recent years. Although the European Parliament has voiced its concern over the conservation implications of such activities, it appears that the EU institutions have little competence to act in this area, as the operational security of individual Member States remains outside the regulatory purview of the EU. Accordingly, the prospects for the development of a distinct EC policy in this area remain remote.

Richard Caddell
February 2008

6. Postscript: The potential role of the ASCOBANS Jastarnia Group to the EC cetacean agenda

Following the Fourth Meeting of the ASCOBANS Jastarnia Group in February 2008 it was requested that an addendum to this report be made, in which a series of key proposals could be raised as to how the Jastarnia Group could potentially contribute to the work of the EC in the field of cetacean conservation, with particular reference to the Baltic harbour porpoise.

The proposals are as follows:

- Continue to communicate suggestions agreed at the end of each Jastarnia Group meeting to the European Commission as to the modification and improvement of key provisions of EC law that address the conservation status of the Baltic harbour porpoise, such as Regulation 812/2004.
- Provide advice and assistance in relation to areas of importance to the Baltic harbour porpoise, with a view towards ultimately contributing to the development of SACs for this species.
- Provide region- and species-specific advice on the conservation measures and status of the Baltic harbour porpoise to relevant Member States and groups of Member States acting to establish Marine Strategies under the MSFD, and increase the profile of the Jastarnia Group as a “regional institutional cooperation structure” envisaged by the Directive to this end.
- Establish, operate and maintain a database of personnel with professional expertise on issues affecting the Baltic harbour porpoise to generate closer cooperation and develop ideas on how best to advance the conservation needs of Baltic cetaceans under the relevant EC framework

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