

THE CONSERVATION OF BELGIAN MARINE NATURA 2000 SITES: THE FIRST STEPS INTO A BRAVE NEW WORLD?

An Cliquet¹, Hendrik Schoukens¹ and Liesbeth Lecomte¹

¹ Department of Public International Law
Ghent University, Universiteitstraat 4, 9000 Gent, Belgium
E-mail: An.Cliquet@ugent.be, Hendrik.Schoukens@ugent.be

I. The designation of the first marine protected areas in the Belgian part of the North Sea

In Belgium the legal basis for the designation and management of Natura 2000 sites is the 1999 Law on the protection of the marine environment under Belgian jurisdiction (as amended in 2005) (see Cliquet et al. 2008). After a rather difficult and lengthy process (see Bogaert et al. 2008), five Natura 2000 sites were designated in 2005 by Belgian Royal Decree. Three sites were designated as Special Protection Areas (SPAs) under the Birds Directive. Two sites (Trapegeer-Stroombank and Vlakte van de Raan) were designated as Special Areas of Conservation (SACs) under the Habitats Directive. The two Habitats Directive sites were both included on the List of Community Importance by 2008. The designation of one site, Vlakte van de Raan, was annulled by the Belgian Council of State in 2008, following a complaint by an electricity company, which had plans to build a windmill offshore park in that area. The environmental and building permit for the construction, which had been granted before the designation of the site as a Natura 2000 site, had afterwards been abrogated by the Belgian government. However, the site is still included on the Community List and therefore needs to be designated again at the national level.

In 2009 a scientific report on the designation of additional SACs in the marine environment was ordered by the federal government. Two proposals were made in this document: a substantial extension of the existing SAC Trapegeer Stroombank and the (re)designation of the Vlakte van de Raan. The policy summary by the federal government of this scientific report only dealt with the first area (Trapegeer-Stroombank). The extended site was included in the Community List in 2011. The area, which would become the largest protected site in the Belgian part of the North Sea, is to be formally designated by national legislation.

II. The establishment of a regulatory framework with several loopholes

Regarding the conservation of the SPAs/SACs, the Law on the marine environment (as amended in 2005), provides that, by Royal Decree, harmful activities can be restricted or forbidden within the sites. By virtue of the designation Decree of 2005, the following activities are prohibited: all building activities, industrial activities and activities of commercial and advertising enterprises. In the SAC Trapegeer-Stroombank, the dumping of dredged material and inert materials of natural origin is also forbidden. In SPA 1 and SPA 2, common tern, sandwich tern, little gull and great crested grebe are protected. During winter, helicopter flights at altitudes of less than 500 ft, the passage of high speed vessels and offshore water sports are forbidden. Furthermore, an appropriate assessment has to be made of all new plans and projects that are likely to have a significant effect on the site in view of the site's conservation objectives. A new plan or project can only be allowed if it does not adversely affect the integrity of the site concerned. In case of a negative assessment, the plan or project can only be allowed under certain strict conditions as provided in the Royal Decree (which implements Article 6, § 4 of the EU Habitats Directive).

At first sight the protection regime seems to be quite severe. Yet, the possibility of regulating harmful activities and interventions is excluded for certain activities mentioned in the Law (such as fishing, dredging, etc.). The reasoning behind this legal provision is connected with a certain view on the division of competences between the federal and Flemish level for the North Sea. It is reasoned that, as some of these activities belong to

Flemish competences, they cannot be regulated by the federal government, which is only competent for marine nature conservation. This complicates the establishment of conservation objectives and management measures and might impede the favourable conservation status of the habitats and species for which the sites have been designated. Indeed, several of the so-called 'Flemish activities', such as fisheries and dredging, can cause a significant deterioration of the habitats and/or species present in the protected areas.

The above mentioned measures show the idea underlying designation at that time: the designated areas had to be protected against the potential impact of future activities. Hence, current activities within the sites were not perceived as a threat to reaching the objectives. Yet one - rather 'soft' - instrument was introduced to tackle possible harmful ongoing activities. For all the protected sites, voluntary user agreements can be concluded with user groups. Agreements have already been concluded with organizations of the water sports recreation sector. Those agreements mainly emphasize the distribution of information on the protected areas by the water sports organizations to their members. Moreover they recommend some measures for the protection of the marine environment (e.g. the recommendations not to fish close to wrecks, to avoid damage to the sea bed when dropping anchor, to respect fauna and flora at sea).

Lastly, the regulatory framework requires the formulation of a policy plan within three years after the designation of each site. In 2009 the Minister responsible for the marine environment approved the first policy plan for the marine protected areas in the Belgian part of the North Sea. The plan contains a description of the sites, a description of the different uses and an overview of existing measures and user agreements. Finally the plan suggests 14 measures. The measures include different issues, such as communication about the sites, setting up of advisory commissions and the setting up of a monitoring programme. Most of the proposed measures however lack a detailed and concrete character and are still in the planning phase. For instance, an agreement will be concluded with the competent Flemish authority to stop the negative effects of beam trawl fishing. Also, new proposals for the redesignation of the SPAs will be made. The plan does not mention the redesignation of the Vlakte van de Raan as an SAC.

III. Important legal challenges around the corner?

In the past ten years some important steps for the establishment of a marine network of protected areas in the Belgian part of the North Sea have been taken. However, as the situation is today, the conservation and protection regime for the Natura 2000 sites, which is part of the Belgian regulatory framework, is not sufficient to comply with the requirements of the Birds and Habitats Directives (see Cliquet & Declerck 2007; Bogaert et al. 2009).

The federal administration, dealing with marine nature conservation, was aware of this and ordered a study on the legal problems in the existing legislation, as well as proposals for amendments. This study was concluded in February 2012 (Schoukens et al. 2012). This paper gives an overview of some of the findings of the study. It focuses more specifically on the issue of human activities with a possible effect on Natura 2000 sites. Based on the obligations of the Birds and Habitats Directives, the case law of the European Court of Justice, guidelines by the Commission and legislation in other European countries, the study proposes a management regime for the Nature 2000 sites that seeks a balance between nature conservation and human activities.

One of the most important legal problems that was identified in the existing law is the lack of a clear implementation of Article 6, §1 and §2 of the Habitats Directive. Article 6, §1 of the Habitats Directive requires that Member States establish the necessary conservation measures which correspond to the ecological requirements of the habitats or species listed on the sites. Article 6, § 2 of the Habitats Directive requires Member States to take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated. Moreover, according to case law of the European Court of Justice, it is not permissible to exclude certain activities from the

obligations of article 6, § 2 of the Habitats Directive in advance. This makes clear that the general exemption of several 'Flemish' activities from the federal protection regime is contradictory to the approach of the Habitats Directive. As fisheries are a Flemish competence, limitation of fisheries could be done by the Flemish government, but a Flemish legal framework that aims at regulating fisheries in marine Natura 2000 sites is absent. Also, the lack of a clear framework for the establishment of conservation objectives and measures seems contradictory to article 6, §1 and §2 of the Habitats Directive. Especially for existing harmful activities, the establishment of specific conservation plans seems indispensable.

But also with respect to the obligation to carry out an appropriate assessment for harmful plans and programs, the study concludes that the existing regime lacks consistency and appears to be in contradiction with the European framework. The present regime provides no clear limitation of its scope of application. After all, one gets the impression that only larger infrastructural projects and/or plans should be subject to an appropriate assessment, whereas smaller interventions seem to be exempted from this regime. On several occasions, the Court of Justice stated that such an approach is not allowed in the light of article 6, §3 of the Habitats Directive, as it does not allow tackling the cumulative effects which might be linked with these interventions. The study recommends the establishment of a so called 'Natura 2000'-permit, which should be able to close all loopholes in the existing permitting regimes.

It remains to be seen to what extent the conclusions of the study will be implemented during the next reform of the regulatory regime for the Natura 2000-sites in the Belgian part of the North Sea. Nonetheless, taking into account the many deficiencies of the existing framework, providing a more clear legal and regulatory framework on the conservation and the protection of the Natura 2000 sites in the Belgian marine environment will enhance legal certainties and could prove a model for a balance between nature conservation in the marine environment and the different human activities within this environment.

References

- Bogaert D., Cliquet A., De Waen D. & Maes F. 2008. The designation of Marine Protected Areas in Belgium. An Analysis of the Decision Making Process. In: Bogaert D., Maes F. (eds.). *Who Rules the Coast. Policy Processes in Belgian MPAs and Beach Spatial Planning*. Antwerpen, Maklu, 57-105.
- Bogaert D., Cliquet A., & Maes F. 2009. Designation of marine protected areas in Belgium: legal and ecological success? *Marine Policy* 33: 878-886.
- Cliquet A. & Declerck K. 2007. Natura 2000 in de Belgische Noordzee: meer dan een 'papieren' bescherming? *De levende natuur* 6: 270-272.
- Cliquet A., Bogaert D. & Maes F. 2008. The legal framework for marine protected areas in Belgium. In: Bogaert D. & MAES F. (eds.). *Who Rules the Coast. Policy Processes in Belgian MPAs and Beach Spatial Planning*. Antwerpen, MAKLU, 21-56.
- Schoukens H., Lecomte, L., Cliquet A. & De Smedt P. 2012. Juridische ondersteuning voor de aanwijzing van mariene beschermde gebieden in uitvoering van de Europese en internationale regelgeving in het Belgische deel van de Noordzee, studie in opdracht van de Federale Overheidsdienst Volksgezondheid, Veiligheid van de voedselketen en leefmilieu, Directoraat-generaal Leefmilieu - Dienst Marien Milieu, Universiteit Gent en LDR-Advocaten, 262p.