

The Regulatory Framework for Whales, Dolphins and Porpoises in European Waters

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“ No EU citizen wants to eat fish that has been caught at the expense of iconic species like dolphins or whales. The legal framework to prevent the killing of marine mammals exists, now it is just a matter of political will to implement it. ”

Andrea Ripol

Introduction

Interest in whale conservation began in earnest in the late 1940s largely as a response to the unsustainable pressure placed on whale populations by intensified commercial whaling. At first, the aim was to conserve populations in order to continue harvesting them. In the 1970s, as environmental activism heightened, several international agreements for nature protection were signed, including the Bern Convention on the Conservation of European Wildlife and Natural Habitats and the Convention on the Conservation of Migratory Species of Wild Animals (CMS). Today, in addition, cetaceans in European Union (EU) waters are strictly protected by the EU's Habitats Directive, as well as the Marine Strategy Framework Directive, which intends to prevent human-induced decline of biodiversity, targets various pressures and threats and tries to achieve a good environmental status in EU waters.

Legal framework in Europe

Habitats Directive and the Natura 2000 network

The protection of cetaceans in the EU is primarily driven by the Habitats Directive (Council Directive 92/43/EEC), a cornerstone of EU legislation for nature protection, adopted in 1992 (Council of the European Communities, 1992). The Habitats Directive represents the most ambitious and large-scale initiative ever undertaken to conserve Europe's natural heritage from the land to the sea. The Directive protects important habitats and species through the establishment of protected areas, known as Natura 2000 sites, collectively forming the Natura 2000 network¹. To date, the Natura 2000 network comprises 3,797 marine sites, protecting over 11% of the EU marine territory (Fraschetti *et al.*, 2018). The species covered by the Natura 2000 network are found in Annex II of the Directive. In addition, the Habitats Directive aims to establish and implement a strict protection regime for those animal species listed in Annex IV(a) of the Directive throughout EU waters (Articles 12 and 16 Habitats Directive). Both tools (Natura 2000 network and species protection) aim to bring the EU's most remarkable and vulnerable species and habitats back to a Favourable Conservation Status. For species, the factors that define Favourable Conservation Status include population dynamics, natural range and size of natural habitat.

Two species of cetaceans, the bottlenose dolphin (*Tursiops truncatus*), and the harbour porpoise, (*Phocoena phocoena*) are listed in Annex II of the Habitats Directive '*Animal and plant species of community interest whose conservation requires designation of special areas of conservation*'. Therefore, EU Member States are required to designate the species' core habitat as a Natura 2000 site and to manage it in accordance with the ecological needs of the species. For aquatic species ranging over large areas (e.g. migratory species), sites that clearly represent areas essential for their life and reproduction should be designated as Natura 2000 areas. When proposed to the EU as a 'site of community importance', the Member State has the obligation to prevent deterioration of the species' habitats as well as any significant disturbance of the species within the designated area (Article 6(2) Habitats Directive). To achieve this, Member States must undertake an Appropriate Assessment of plans or projects likely to have a significant effect on the site, and must implement only those plans/projects that will not adversely affect the integrity of the site (Article 6(3) Habitats Directive). Jurisprudence of the Court of Justice of the European Union has previously ruled that fisheries should be considered as a plan/project and are therefore subject to an Appropriate Assessment, including those fisheries well-established in the area².

Within 6 years of the site's designation as a Special Area of Conservation (SAC), the Habitats Directive requires all necessary conservation measures for the protection of the species to be in place (Article 6(1) Habitats Directive). The protection of human health, public safety and other imperative reasons of overriding interest can supersede these requirements but only if the country has shown that there is no alternative solution and has taken all necessary compensatory measures (Article 6(4) Habitats Directive).

¹ <https://ec.europa.eu/environment/nature/natura2000/>

² Judgment of the Court (Grand Chamber) of 7 September 2004. Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij. Reference for a preliminary ruling: Raad van State - Netherlands. Directive 92/43/EEC - Conservation of natural habitats and of wild flora and fauna - Concept of "plan" or "project" - Assessment of the implications of certain plans or projects for the protected site. Case C-127/02. Available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-127/02>

All cetaceans found in EU waters are listed on Annex IV of the Habitats Directive meaning they require a strict protection regime applied across the entire range of the species, both within and outside Natura 2000 sites. Deliberate capture, killing or disturbance of these species in the wild is prohibited, as well as the deliberate destruction of breeding and resting sites. The Directive and additional jurisprudence from the Court of Justice of the European Union define that ‘a strict protection regime’ compels Member States to adopt ‘a set of coherent and coordinated measures of a preventive nature’, which include ensuring that Environmental Impact Assessments (EIAs) take into account the impacts on those species protected and included in national conservation plans. In the case of cetaceans, this is relevant when considering sea-based oil and gas extraction platforms which must be subject to EIAs prior to licencing. When considering incidental catches, Member States must establish and implement a system to monitor the incidental capture and killing of animals listed in Annex IV and ensure these factors do not have a significant impact on the species concerned.

Derogations to the system of strict protection are possible in very specific situations. A request for derogation must be justified by one of the reasons listed in Article 16 of the Directive, which include inter alia to prevent serious damage to fisheries or for reasons of public health and safety. In any case, a derogation can be granted only if a particular activity will not harm the overall aim of conserving biodiversity.

Conflicts with EU fisheries legislation

Despite the creation of the Habitats Directive more than 25 years ago, most marine Natura 2000 areas still do not have management measures in place and many cetacean species under strict protection have not reached Favourable Conservation Status. Cetaceans are at high risk of incidental capture (bycatch) in fisheries (as discussed in chapter 6 of this report).

The Habitats Directive clarifies that when an activity is likely to place significant impact on protected species, conservation measures should be taken. However, regarding fisheries, Member States cannot always take unilateral measures to restrict fishing activities. In the EU, fisheries are regulated by the Common Fisheries Policy (Regulation (EU) No 1380/2013), an exclusive competence of the EU. Beyond 12 nautical miles, a Member State cannot restrict certain fisheries of its own accord, for instance, to stop cetacean bycatch, because of the likelihood that vessels from other Member States also fish there. Article 11 of the Common Fisheries Policy allows Member States fishing in a specific area and protected under EU law (Habitats Directive or Marine Strategy Framework Directive) to produce a Joint Recommendation of fisheries management measures to achieve the conservation objectives of the area, which is then adopted by the European Commission in a delegated act, if the Parliament and Council do not oppose. However, negotiating Joint Recommendations among Member States sharing a fishing interest has proven lengthy and prone to political trade-offs leading to the adoption of a limited number of fisheries management measures that are weak in their protection and enforcement measures.

Since cetaceans are at high risk of bycatch from fishing vessels, a specific regulation (EU Regulation 812/2004) was adopted in 2004 to minimise the worst impacts of fishing activities on cetaceans. It included clear monitoring and reporting requirements which should have allowed Member States to better understand pressures on cetacean populations. The Regulation specifically addressed mitigation measures to prevent cetacean incidental catches, mainly by using acoustic deterrent devices, i.e. pingers, and by having on-board sea observers for specific boats. The Regulation was not well implemented by Member States and it was repealed in 2019. Mitigation measures to reduce incidental catches of cetaceans (and other sensitive species) are now included in the broader Regulation (EU) 2019/1241 on the ‘conservation of fisheries resources and the protection of marine ecosystems through technical measures’ which was adopted by the European Parliament in June 2019 to support the Common Fisheries Policy. The legislation prohibits certain types of gears to be installed in fishing vessels, provides specifications for gear design and use, and refers to minimum mesh sizes for nets and to selective gear to reduce unwanted catches. While progress compared to previous legislation is clear, shortcomings in the governance mechanisms for fisheries management in the EU leave the door open to wide differences in how Member States will implement the Regulation and how effective ensuing protection against bycatch will be.

The Marine Strategy Framework Directive (Marine Directive)

In 2008, the Marine Directive (Directive 2008/56/EC) established a framework for community action in marine environmental policy that represents the first EU legislative instrument addressing threats to marine biodiversity in a holistic manner³. The overall objective of the Directive was to achieve Good Environmental Status (GES) of EU marine waters by 2020, while ensuring the sustainable use of marine resources. The responsibility for achieving this objective is placed at national and regional levels, meaning that Member States can choose specific measures to address pressures and impacts on marine biodiversity, provided they reach the Directive's goal. In 2012, the Marine Directive reserved a 6-year implementation cycle comprising a series of steps each Member State should perform, including an assessment of marine waters, definition of GES and setting of targets and the establishment and implementation of monitoring programmes and programmes of measures.

Member States interpret the meaning of GES using eleven qualitative descriptors which describe a healthy marine environment. These descriptors were further defined through a set of criteria and standards in Commission Decision 2017/848 on good environmental status of marine waters (European Commission, 2017). For cetaceans (mammals), GES is defined through the following criteria:

- The mortality rate per species from incidental bycatch is below levels which threaten the species, such that its long-term viability is ensured.
- The population abundance of the species is not adversely affected due to anthropogenic pressures, such that its long-term viability is ensured.
- The species distributional range and, where relevant, pattern is in line with prevailing physiographic, geographic and climatic conditions.
- The habitat for the species has the necessary extent and condition to support the different stages in the life history of the species.

Regarding cetaceans, in addition to the main threat of bycatch from fisheries, the Marine Directive addresses three other threats strongly correlated to the health of cetaceans: the concentration of contaminants (Descriptor 8), marine litter (Descriptor 10) and ocean noise (Descriptor 11). The aim of the Directive is to ensure that the levels of these threats are below levels at which harm can occur to the marine environment. A 2018 analysis by the European Commission of the Member States' programme of measures concluded that the measures are not ambitious and highlighted that with current measures, GES would not be reached by 2020 (European Commission, 2018). The level to which cetaceans are addressed in these measures is unknown and would require a country by country analysis. Based on the cumulative number of pressures on cetaceans in European seas, ranging from fisheries bycatch to pollution and interference with human activities, there is no doubt, however, that GES was not achieved by 2020. As a specific example, Peltier *et al.* (2019) found that the rate of ship strikes on large cetaceans along French coasts alone meant that GES of marine mammal populations would not be met.

The situation of the UK

At the time of writing, the United Kingdom has recently left the EU which puts it and its extensive waters outside of EU law. This means that the measures listed above are no longer directly relevant to the UK but, of course, conservation measures in the UK can still be compared with those applied within the EU block. For cetacean conservation, the UK's other international commitments will become more important – for example the ASCOBANS agreement which is described below.

³ https://ec.europa.eu/environment/marine/eu-coast-and-marine-policy/marine-strategy-framework-directive/index_en.htm

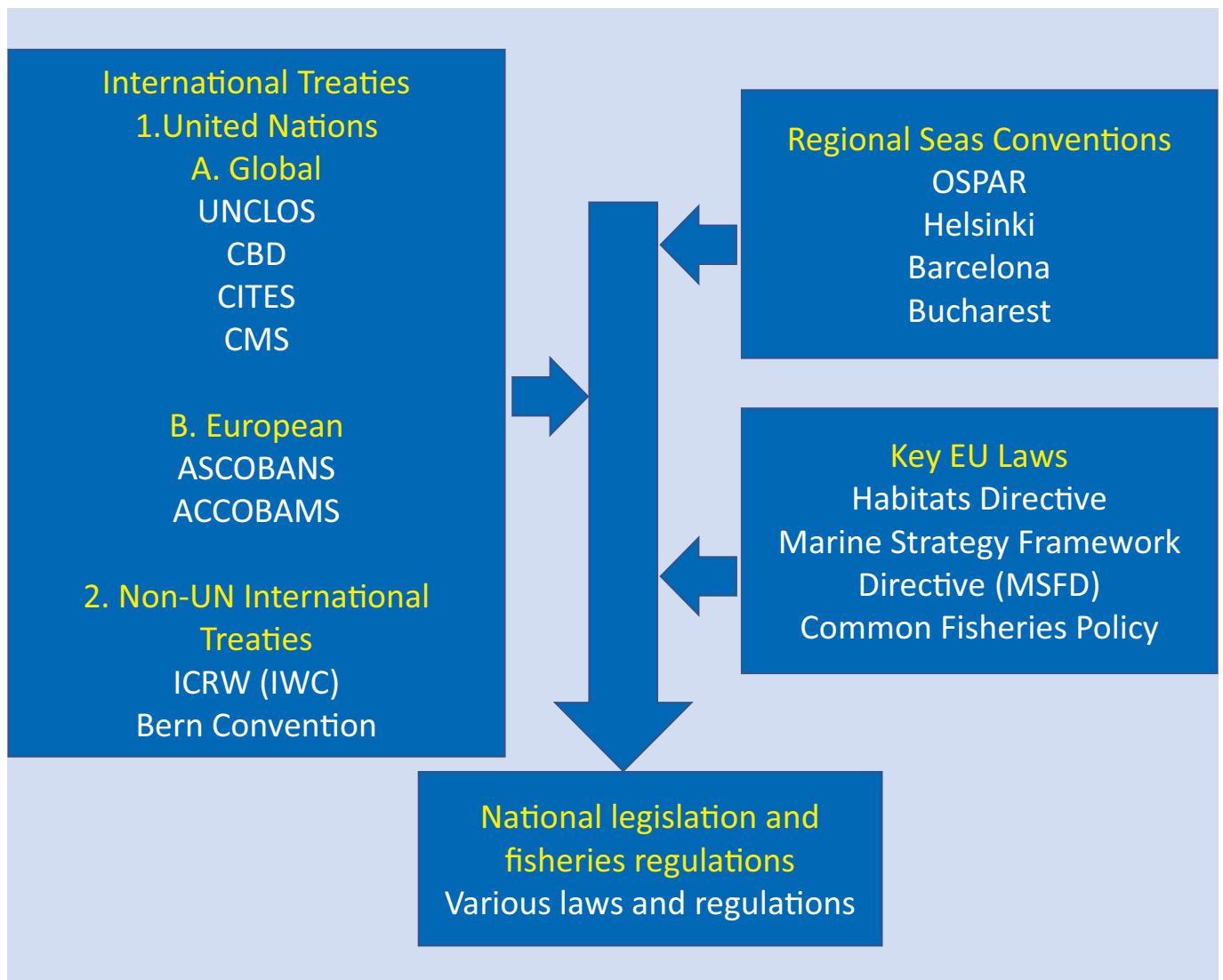


Figure 1: The International Legal Regime Affecting Cetaceans (see text for fuller details)

EU Biodiversity Strategy for 2030

In May 2020, the EU Biodiversity Strategy for 2030 was adopted as part of the European Green Deal through which the Commission shows its commitment to turning the tide on environmental degradation and biodiversity collapse⁴. The EU Biodiversity Strategy for 2030 aims to get Europe's biodiversity on the road to recovery by 2030 by protecting wildlife and combating the illegal wildlife trade. It specifically mentions the need to address the problem of bycatch of sensitive species, not only through the necessary mitigation measures but also by stepping up the collection of scientific data. The Biodiversity Strategy highlights the need for GES of marine ecosystems and states that the full implementation of the Common Fisheries Policy, the Marine Directive and the Birds and Habitats Directives is essential (European Commission, 2020). The Biodiversity Strategy also aims to promote areas of very high biodiversity value or potential with a goal of strictly protecting at least 10% of EU seas. Moreover, it commits to publishing an action plan for the conservation of fisheries resources and the protection of marine ecosystems, by 2021. Under such an action plan, the adverse impacts that fishing has on the marine environment will be addressed, and where necessary, measures to limit the use of fishing gear most harmful to biodiversity will be introduced.

⁴ https://ec.europa.eu/environment/nature/biodiversity/strategy/index_en.htm

International legal framework

International Convention for the Regulation of Whaling

In 1946, The International Convention for the Regulation of Whaling (ICRW), which established the International Whaling Commission (IWC), was signed. The main objectives of this convention were to establish a system of international regulations to manage the whale fisheries, protect whales from overhunting and promote whale conservation. Recently, new issues have started to be addressed such as reducing bycatch, entanglement, ocean noise, chemical pollution, marine litter, ship strikes and promoting sustainable whale watching, have been added. The convention, therefore, now provides a holistic approach to whale conservation.

The IWC currently comprises 88 member states⁵. In 1982, due to the near collapse of several commercial whale species, the IWC announced a ban on commercial whaling. Today, all the EU nations that are members of the IWC and the UK and Monaco are strong supporters of the moratorium on commercial whaling. The 1946 Convention does not define 'whale', although a list of twelve species was annexed to the Convention. Some IWC members believe that the IWC has the legal competence to regulate catches of the so-called 'Great Whales' only. Other members believe that all cetaceans, including the smaller dolphins and porpoises, fall within IWC jurisdiction. The IWC has never regulated small cetacean hunts and no consensus has so far been reached. See chapter 5 for further discussion about the IWC.

Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention)

In 1979, the Bern Convention was signed, establishing the first international treaty aimed at protecting both habitats and species and promoting European cooperation on the issue of nature conservation (Council of Europe, 1979). It covers all national European marine waters up to Exclusive Economic Zone (EEZ) boundaries. The Bern Convention emphasizes the importance of protecting endangered habitats and species and addresses the challenge of the conservation of migratory species. Within this convention, thirty cetacean species are listed as *strictly protected* species (Annex II) and the remaining (those not mentioned in Annex II) as *protected* species (Annex III).

For species classified as 'strictly protected', the following are prohibited: deliberate capture and deliberate killing; deliberate damage or destruction of breeding and resting sites; deliberate disturbance of wild fauna and the possession and trade of these animals. The Bern Convention was a pioneer in introducing the concept of "deliberate" as "acceptance of foreseeable consequences". For species listed as 'protected', exploitation should be regulated to keep populations out of danger. To achieve the conservation targets of the Convention, a network of protected areas, named the Emerald Network, was set up, preceding the aforementioned EU Natura 2000 network⁶.

Convention on the Conservation of Migratory Species of Wild Animals (CMS)

The CMS Convention (also known as the Bonn Convention) was signed in 1979 and is overseen by the United Nations Environment Programme (UNEP)⁷. The CMS Convention covers the conservation of all migratory animals, including many cetaceans⁸. Migratory species in danger of extinction are listed on Appendix I of the Convention. Fifteen cetacean species or subspecies are currently on Appendix I, nine of which are found in European waters. CMS Parties strive towards strictly protecting these animals, conserving or restoring the places where they live, mitigating obstacles to migration and controlling other factors that might endanger them. Besides establishing obligations for each State joining the Convention, CMS promotes concerted action among the Range States for many of these species.

⁵ <https://iwc.int/members>

⁶ <https://www.coe.int/en/web/bern-convention/emerald-network>

⁷ <https://www.cms.int/en/convention-text>

⁸ See <https://www.cms.int/en/species> for CMS listings.

Migratory species that need or would significantly benefit from international co-operation are listed in Appendix II of the Convention. For this reason, the Convention encourages the Range States to conclude global or regional agreements. The conservation of migratory species is particularly challenging, as species can be affected by multiple threats across several of their habitats. For protection to be effective, all core and transitional habitats need to be protected. Eighteen of the 42 cetacean species or subspecies currently listed on Appendix II are found in European waters.

Regional agreements for the conservation of cetaceans: ASCOBANS and ACCOBAMS

Today, all European states bordering the Mediterranean and Black Seas, except Bosnia-Herzegovina and the Russian Federation, are signatories and parties to the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and contiguous Atlantic area (ACCOBAMS) which was signed in 1996 and entered into force in 2001. Based on its text ACCOBAMS may be seen as a strong conservation and protection agreement for cetaceans. The Treaty foresees that Parties shall prohibit and take all necessary measures to eliminate, where this is not already done, any deliberate taking of cetaceans. Parties shall also cooperate to create and maintain a network of specially protected areas to conserve cetaceans. The Conservation Plan, Annex 2 of the Treaty, specifies further action such as Parties shall, among others, “work out and implement measures to minimize the fishing negative effects on the conservation of cetacean”, “require impact assessments to be carried out in order to provide a basis for either allowing or prohibiting the continuation or the future development of activities that may affect cetaceans or their habitat in the Agreement area, including fisheries, offshore exploration and exploitation, nautical sports, tourism and cetacean watching, as well as establishing the conditions under which such activities may be conducted”, as well as “to establish and manage specially protected areas for cetaceans corresponding to the areas which serve as habitats of cetaceans and/or which provide important food resources for them.”

The role, history, progress and contribution to conservation of ASCOBANS has recently been comprehensively considered by Evans (2020). The Agreement was concluded in 1992 as the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas and entered into force in 1994. In February 2008, an extension of the agreement area came into force which changed the name to “Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas”.

In all, 36 of the world’s 90 cetacean species have been recorded within the ASCOBANS Agreement Area (Evans, 2020). Of these, 27 species are small cetaceans within the infraorder Odontoceti, the toothed whales, for which the ASCOBANS Agreement currently applies. Many, but not all, range states are parties. The ASCOBANS aims and agreement text are similar to those of ACCOBAMS but it has been criticised as being a ‘softened’ version of ACCOBAMS (Simmonds, 2020). Nonetheless, it may be increasingly important because it applies to the UK’s extensive marine territory which is no longer directly subject to EU protection for cetaceans.

United Nations Convention on the Law of the Sea (UNCLOS)

UNCLOS was signed in 1982 and it came into force in 1994. It is often considered the *Constitution for the Oceans*, as it established a global framework for the exploitation and conservation of marine resources (United Nations, 1982). UNCLOS splits the ocean into territorial waters (up to 12 nautical miles from the coastline), Exclusive Economic Zone (EEZ; 200 nautical miles from the coastline) and the high seas (beyond the EEZ) and attributes governance powers accordingly. Cetaceans found in territorial waters are governed directly by the coastal state. Similarly, in the EEZ, the coastal state has exclusive rights and obligations regarding the exploration and exploitation of marine resources. Cetaceans are addressed within Articles 65 and 120. Accordingly, coastal states should cooperate for the conservation, management and study of cetaceans.

Convention on Biological Diversity (CBD)

The CBD was signed in 1992 and currently has 196 parties (168 signatures)⁹. It is the most widely supported of all international environmental agreements and commits member governments to protecting biological resources through conservation and sustainable use of biological resources. The CBD calls for the establishment of effectively managed protected areas with conservation measures implemented to preserve and monitor biodiversity, identify and control destructive activities and, importantly, integrate consideration of biodiversity within national decision-making. The CBD covers countries' EEZs as well as the high seas and calls for the cooperation of member states to address protection in those areas. The CBD has given rise to talks about high seas conservation and provides the basis for the establishment of Marine Protected Areas (MPAs) in international waters, particularly sensitive areas for migratory species such as cetaceans.

Regional Seas Conventions

Four regional seas conventions cover European waters:

- The Convention for the Protection of the Marine Environment of the North-East Atlantic of 1992 – the OSPAR Convention (OSPAR)
- The Convention on the Protection of the Marine Environment in the Baltic Sea Area of 1992 – the Helsinki Convention (HELCOM)
- The Convention for the Protection of Marine Environment and the Coastal Region of the Mediterranean of 1995 – the Barcelona Convention (UNEP-MAP)
- The Convention for the Protection of the Black Sea of 1992 – the Bucharest Convention.

These conventions aim to protect the marine environment, while promoting cooperation among member states and neighbouring countries that share marine waters. All four conventions work on similar principles; calling for action to reduce human-related threats and preserve marine biodiversity via the sustainable use of marine resources. The conventions promote the establishment of a system of coastal and offshore marine protected areas. One important achievement of the Barcelona Convention has been the establishment of the Pelagos Sanctuary, a Specially Protected Area of Mediterranean Importance (SPAMI) spanning over 87,500 square kilometres in the Western Mediterranean; an area subject to an agreement between Italy, Monaco and France. Its sole purpose is the protection of marine mammals living in the area. The agreement invites countries to create joint initiatives to protect cetaceans from various disturbances, such as bycatch, pollution and noise. Its effectiveness is, however, questionable as countries have not yet put in place any fisheries regulations to stop bycatch which is, arguably, the largest threat to the animals living there.

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

CITES is an international agreement which ensures that international trade in specimens of wild animals does not threaten their survival¹⁰. Species listed on Appendix I are threatened with extinction and trade in these species is only permitted in exceptional circumstances. Appendix II species may not be threatened with extinction, but trade must be controlled so that they are not exploited in a way which is incompatible with their survival. All cetacean species are listed on either Appendix I or Appendix II. There are 183 Parties to CITES¹¹. CITES is implemented in the EU through the EU Wildlife Trade Regulations, where all cetacean species are listed in Annex A which is equivalent to Appendix I CITES, giving them a high level of protection from international trade¹². CITES is highly relevant to cetacean conservation, including any potential live trade and has recently been invoked in the consideration of trade in live Black Sea bottlenose dolphins (*T. truncatus ponticus*).

⁹ <https://www.cbd.int/information/parties.shtml>

¹⁰ <https://cites.org/eng/disc/how.php>

¹¹ <https://www.cites.org/eng/disc/parties/index.php>

¹² https://ec.europa.eu/environment/cites/legislation_en.htm

Conclusion

Cetaceans are highly protected across much of Europe in both EU and international law. Consideration of how effective this is in practice is outside of the scope of this chapter but is considered in other chapters in this volume. The application of laws to the marine environment offers some challenges and spotting offences may be especially difficult.

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