

possibly introducing a new provision in section 4, an alteration to the licensing system and the amendment of section 14.

DEFRA has made it quite clear that it is fully aware of the problems and of the need for reform. Indeed, in its recent review of Part I of the Act,<sup>38</sup> it has put forward a positive proposal, which, if adopted, should ameliorate the situation. However, until the amended Part I has been passed into law, it will not be possible to assess exactly what has been achieved.

### **Killing of dolphins and other cetaceans as “bycatch”**

*Alan Bates  
Barrister, Monckton Chambers*

Few animals inspire as much public affection across the EU as dolphins. And yet still the battered and bloodied bodies of these beautiful mammals shame the beaches of South-west England and Northern France each winter, sacrifices to the European Common Fisheries Policy (CFP) and the European Commission’s dilatory processes.

Around 2,500 dolphins and other cetaceans are thought to be killed by pair trawler nets in the Western Channel every year. The pitiful carcasses that cause such public outrage on the South-west coast are but a fraction of the total killing, since it is estimated that less than 10% of cetaceans that die as a result of contact with fishing nets are washed ashore. Pair trawlers fishing for sea bass are thought likely to be the most frequent culprits.

Pair trawling is the practice of towing a huge net (which can be large enough to contain the Sydney Opera House) between two boats. Although the mesh nearest to the boats is wide enough to allow dolphins to escape, the mesh at the bottom of the net is much finer. As the net is towed through the water, the wanted fish, as well as “bycatch” (unwanted fish, cetaceans and other sea creatures), are gathered at the bottom of the net ready to be hauled out of the water. The

wanted fish are kept; the bycatch are swept roughly back into the sea.

Washed-up cetacean carcasses are often found to have broken beaks, jaws or teeth, bloody scarring and torn fins. Once a dolphin has become entangled in a net and is unable to rise for air, it will panic and thrash around furiously in an attempt to break free. Eventually it will run out of oxygen, suffocate and die. Thus, the death of dolphins and porpoises in fishing nets is not only a conservation issue, but also a critical welfare matter.

### The relevant legislation

The UK Government is under an obligation to address the bycatching of small cetaceans pursuant to the EU Habitats Directive<sup>39</sup> and the Agreement on the Conservation of Small Mammals of the Baltic and North Seas (“ASCOBANS”).<sup>40</sup> At the third meeting of the parties to ASCOBANS in 2001 a resolution was passed calling on the competent fisheries authorities to ensure that the total “anthropogenic removal” (a euphemism for killing) of marine mammals was below 1.7% of the best estimate of abundance, and to work towards bringing that figure down to below 1%.

The UK Government’s domestic law power to act to protect cetaceans includes powers to prohibit all or specified fishing in any specified area (Sea Fish Conservation Act 1967, sections 5 and 5A). That power is ostensibly very wide, allowing for that ban to cover both UK and non-UK boats fishing within 200 nautical miles of the UK coast.

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<sup>39</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p.7, Article 12(4) of which requires Member States to establish a system to monitor the incidental killing of (among other animals) cetaceans and, in the light of the information gathered, to take further measures to ensure that incidental capture and killing do not have a significant negative impact on the species concerned.

<sup>40</sup> Entered into force in 1994.

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<sup>38</sup> Ibid. p.41

The UK's powers to act are in practice, however, constrained by the CFP. This is unfortunate in circumstances where the EU's own measures to protect small cetaceans<sup>41</sup> do not include any specific measures to reduce bycatch, partly because little data was available about the scale of the problem and partly because of a lack of effective remedies (other than the politically unpalatable option of closing the relevant fisheries or prohibiting pair trawling).

Article 7 of the CFP Framework Regulation<sup>42</sup> authorises the Commission to impose emergency measures lasting no more than six months "if there is evidence of a serious threat to the conservation of living aquatic resources, or to the marine ecosystem resulting from fishing activities and requiring immediate action". But Article 8 only allows Member States to take such action within their territorial waters if there is a "serious *and unforeseen* threat" – and even then only for up to three months and subject to the Commission's right to confirm, cancel or amend the measures in question. Article 9 allows Member States a more general right to adopt non-discriminatory measures which apply only within 12 nautical miles of their baselines, but those measures, insofar as they affect the vessels of another Member State, may be cancelled by the Commission.

#### UK action

The UK has been commendably prominent in funding research into levels of bycatch and how those levels can be reduced. One of the bodies in receipt of UK Government funding is the Sea Mammals Research Unit (SMRU). In the summer of 2004, the SMRU presented the Department for the Environment, Food

and Rural Affairs (DEFRA) with a report showing a substantial increase in bycatch dolphin deaths in the 2003/2004 season as compared with previous seasons, and that the level of deaths had exceeded the 1.7% ASCOBANS limit. Accordingly, the UK Government asked the Commission to take action under Article 7 of the CFP Framework Regulation to close the Western English Channel bass fishery. The Commission refused to do so, and the UK was therefore left having to decide what measures it could take itself.

In October 2004 DEFRA consulted on a proposal to ban all bass pair trawling within the 12-mile zone (pursuant to Article 9 of the CFP Framework Regulation), and also to introduce a system of licensing for UK vessels within the 12 to 200 miles zone in order to restrict UK access to that fishery to boats with a long-term involvement in that fishery and which were willing to employ devices to mitigate the amount of cetacean bycatch and carry scientific observers.

Greenpeace, the RSPCA, the SMRU and a number of other conservation bodies reacted unenthusiastically, pointing out that a ban within the 12-mile limit might simply displace fishing vessels to outside of that limit. Since the available evidence suggested that levels of cetacean bycatch were greater outside of the 12-mile limit than within it, the ban was likely to be counterproductive, ironically increasing the number of dolphins killed. Its real political impact would be to reduce the public pressure on the UK Government, since the number of dolphins washed up on beaches in South-west England would fall and the Government would be able to claim it had taken decisive action, even if that action had not resulted in a net reduction in cetacean deaths. Despite these concerns the UK Government decided to press ahead with the ban.<sup>43</sup>

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<sup>41</sup> Council Regulation (EC) No 812/2004 of 26.4.2004 laying down measures concerning incidental catches of cetaceans in fisheries and amending Regulation (EC) No 88/98, OJ L 150, 30.4.2004, p. 12.

<sup>42</sup> Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, OJ L 358, 31.12.2002, p. 59.

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<sup>43</sup> The ban was imposed by way of the South-west Territorial Waters (Prohibition of Pair Trawling) Order 2004 (Statutory Instrument 2004/3397).

In February 2005 Greenpeace commenced judicial review proceedings. Shortly afterwards, the Commission rejected the UK's request to apply the ban to vessels from other Member States, giving as one of its reasons the fact that the ban was an "arbitrary measure, unlikely to achieve the desired goal" since pair trawler activity would simply be displaced elsewhere. As a result, the ban could only be applied to UK vessels.

When the claim came before Stanley Burnton J in the High Court, Greenpeace argued that the Minister had failed to take into account the views of the consultation respondents that the ban was liable to increase the number of dolphin deaths. DEFRA then obtained an adjournment to adduce evidence that the Minister had in fact been alive to the possibility of the ban causing displacement of pair trawler activity to outside of the 12-mile limit.<sup>44</sup>

What was clear from DEFRA's evidence was that the motivation for the ban was political: the UK Government wished to demonstrate its willingness to take action even at the cost of UK interests, thereby increasing the moral pressure on France and the Commission to agree to EU-sponsored action (which would be far more effective than any action that the UK could take unilaterally). As the judge found, the ban had no scientific basis whatsoever: even the Minister had accepted that the ban was "more of a gesture ... than anything that would actually help the dolphin and porpoise population".<sup>45</sup>

Nevertheless, the judge refused to quash the ban for irrationality, holding that the

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<sup>44</sup> DEFRA also argued that the risk of displacement was limited, both by the proposed licensing scheme (which had not, in the event, proved necessary to prevent displacement or opportunistic fishing from occurring) and because smaller vessels which had been operating within the 12-mile limit might not, for reasons of health and safety, be able or willing to move further out to sea.

<sup>45</sup> *R (Greenpeace Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2005] EWHC 2144 (Admin), [2006] Env LR 19, at para. 68.

Minister had considered the relevant issues (including the risk and potential impact of displacement) and had genuinely been motivated by a desire to reduce cetacean mortality. The validity of the ban did not rest on its intrinsic individual merits: it was legitimate for the Minister to adopt a "stepwise" approach of introducing the ban as a step towards further hoped-for action at the EU level.<sup>46</sup>

The Court of Appeal dismissed an appeal in which Greenpeace had argued, *inter alia*, that the Minister lacked the power to introduce a ban which was (as the judge had found) devoid of any scientific basis.<sup>47</sup>

This unhappy tale illustrates the lack of transparency and accountability that frequently afflict popular campaigns to achieve improvements in environmental and animal welfare standards in areas within the competence of the EU. Both the High Court and Court of Appeal found themselves upholding the rationality of a ban which lacked any scientific justification and was introduced almost entirely for political reasons (to put pressure on the Commission and other Member States, but also, no doubt, to appease public anger over the number of dolphins being washed up on the South-west coast). It is time for animal welfare and environmental campaigners to join the calls for democratisation of the EU's decision-making processes to make them more responsive to popular concerns about these vital issues.

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<sup>46</sup> However, no order for costs was made, partly in recognition of the lateness with which DEFRA had introduced the further evidence, but also in recognition of the principle that "there should be free access to [the] court when genuine questions arise as to the lawfulness of government actions" and of the "important common interest [of both parties] in the preservation of all species of cetaceans".

<sup>47</sup> *R (Greenpeace Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2005] EWCA Civ 1656 (unrep., judgment of 31 October 2005). In addition, the Court of Appeal refused DEFRA permission to appeal against the judge's refusal to award costs.