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REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT

Contribution of the Marine Strategy Framework Directive (2008/56/EC) to the implementation of existing obligations, commitments and initiatives of the Member States or the EU at EU or international level in the sphere of environmental protection in marine waters

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1. INTRODUCTION

The Marine Strategy Framework Directive (hereafter referred to as Marine Directive or MSFD)[1] aims to achieve Good Environmental Status of the EU's marine waters by 2020 and to protect the resource base upon which marine-related economic and social activities depend. Environmental status will be assessed on the basis of 11 qualitative descriptors[2], considering environmental state, pressures and impacts on marine ecosystems, and good status is to be achieved via the development and implementation of a strategy for marine waters in each Member State, addressing all impacts and pressures affecting the marine environment. Increased cooperation across borders within marine regions and subregions is also at the heart of the Marine Directive.

This report aims to meet the requirements of Article 20 (2) of the MSFD: to assess the Directive's contribution to the implementation of existing obligations, commitments and initiatives of the Member States or the EU in the sphere of environmental protection in marine waters. While recognising some constitute obligations originating from international agreements, these various strands will be addressed under the term 'commitments' for the purpose of this report.

The Marine Directive translates a very large number of international and EU commitments related to environmental protection in the marine environment to the legal order of the Union. It also plays an important role in enhancing the coherence of the action of the EU and its Member States under international agreements.

The full breadth of these commitments has been analysed in depth in the "Study on the contribution of the Marine Strategy Framework Directive to existing international obligations"[3]. This report focuses on highlighting the MSFD contribution to essential principles established at international level, to some key international commitments, including Regional Sea Conventions and to major EU policies.

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1 Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) OJ L 164, 25.6.2008.

2 The 11 descriptors are 1. Biodiversity is maintained; 2. Non-indigenous species do not adversely alter the ecosystem; 3. Populations of commercial fish species are healthy; 4. Elements of food webs ensure long-term abundance and reproduction; 5. Eutrophication is minimised; 6. Sea floor integrity ensures the functioning of the ecosystem; 7. Permanent alteration of hydrographical conditions does not adversely affect the ecosystem; 8. Concentrations of contaminants have no effects; 9. Contaminants in seafood are within safe levels; 10. Marine litter does not cause harm; 11. Introduction of energy (including underwater noise) does not adversely affect the ecosystem.

3 http://ec.europa.eu/environment/marine/

2. GENERAL PRINCIPLES OF ENVIRONMENT AND MARINE POLICY

Some general environment principles agreed at the international level, such as those of the Rio Declaration[4] are reflected, whenever relevant, in the MSFD. These are reaffirmed in the Rio+20 outcome document "The Future we want"[5].

2.1. The ecosystem-based approach is at the heart of the Marine Strategy Framework Directive

The ecosystem-based approach to the management of the marine environment is an essential feature of the MSFD. There is no single internationally agreed definition of the approach, but its overall aim is to ensure that the collective pressures of human activities do not exceed levels that compromise the capacity of ecosystems to respond.

Decisions taken by the Conference of Parties to the UN Convention on Biodiversity (CBD) (COP Decisions V/6 and VII/5), and the Johannesburg Plan of Implementation (JPoI) for instance, include explicit requirements, reaffirmed at the Rio+20 conference, to adopt or follow an ecosystem-based approach to the management of human activities affecting the marine environment.

The Marine Directive not only explicitly refers to the ecosystem-based approach to management of the marine environment as a guiding principle (recitals 8 and 44), but also requires its application in marine strategies (Articles 1 and 3). Thus, by virtue of the MSFD, the ecosystem-based approach becomes a legally-binding principle for the management of the marine environment.

2.2. Integration of environmental concerns into other policies, and integrated cross-sectoral management of marine waters

The need to integrate objectives of environmental protection into socio-economic activities and other policies is often stressed in international instruments, together with the necessity to manage the marine environment and coastal areas in an integrated manner. These requirements are in particular included in the Agenda 21[6] commitments, in CBD Decisions, and confirmed in the Rio+20 outcome document. It is a fundamental principle of the EU environmental policy stressed in the TFEU[7]. The MSFD explicitly makes this approach one of its objectives (Article 1(4)).

Specific tools for integrated cross-sectoral management of marine waters have been advanced at the international level. The Integrated Coastal Zone Management (ICZM) approach has been developed as a management tool for coastal areas. The requirement to adopt and implement ICZM is explicitly included in Agenda 21, and in the Protocol on ICZM of the Barcelona Convention. The Marine Spatial Planning (MSP) process is another complementary tool for addressing competing uses at sea whilst ensuring protection of the environment, which has been developed and promoted at the international level more recently

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4 The Rio Declaration on Environment and Development, from the 1992 United Nations Conference on Environment and Development (UNCED), proclaimed 27 fundamental principles intended to guide future decisions and policies considering the environmental implications of socio-economic development.

5 A/CONF.216/L.1.

6 Agenda 21 is a non-binding blueprint and global action plan for sustainable development, agreed at the 1992 UNCED http://www.un.org/esa/dsd/agenda21/.

7 Article 11 of the Treaty on the Functioning of the European Union (TFEU).

(included in COP Decision X/29 of the CBD) and is being developed in the context of the EU Integrated Maritime Policy (IMP).

By considering overall cumulative impacts, rather than regulating specific uses in isolation, the Marine Directive contributes to the implementation of an integrated management of the marine waters. The Directive requires Member State to include spatial and temporal distribution controls measures in their programmes of measures (Annex VI), such as ICZM and MSP.

2.3. The precautionary principle and the polluter pays principle in the marine environment

The precautionary principle and the polluter pays principle are two fundamental principles of environmental protection policy and both have a basis in the TFEU[8]. Both are included in a number of international instruments dealing with environment issues and are also referred to specifically in relation to protection of the marine environment since Agenda 21 (chap. 17.22), and the CBD (COP Decisions IV/5 and VIII/24).

In line with these provisions, both principles are included in the Marine Directive, as guiding principles for its implementation, in recitals 27 and 44. In particular they are a basis for the programmes of measures Member States must develop to ensure their marine waters reach Good Environmental Status.

2.4. Knowledge-based adaptive management and public information and participation

The need for knowledge-based adaptive management is also a key principle addressed in many international obligations[9]. With regard to the protection of the marine environment, where there are still many uncertainties, this need is of particular importance.

By requiring an initial assessment (Article 8) and monitoring programmes (Article 11), the MSFD contributes to the global review of the state of the marine environment. Furthermore, the Directive ensures that the knowledge base thus established informs subsequent management measures by requiring that the environmental targets (Article 10) and the programmes of measures (Article 13) are based on the initial assessment. This leads to the concept of adaptive management, explicit in the MSFD (Article 3 (5)), which requires updating marine strategies in a six-year cycle.

This approach is fully coherent with the commitment to develop a UN Regular Process for global reporting and assessment of the state of the marine environment, which supports such knowledge-based adaptive management.

Access to information, public consultation and education are also general principles promoted at the international level in environmental commitments. The Aarhus Convention[10], in particular, is a specific international agreement making this Rio principle operational. The Marine Directive includes specific and explicit requirements (Article 19 and Annex VI (8)) contributing to the implementation of these commitments.

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8 Article 191 TFEU.

9 Agenda 21, the CBD, the UN Regular Process promote adaptive management, and most Regional Sea Conventions have reflected this approach in their instruments.

10 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, of the United Nations Economic Commission for Europe, adopted in 1998.

3. MAJOR INTERNATIONAL TREATIES AND MULTILATERAL ENVIRONMENTAL AGREEMENTS

Beyond these general environment principles, the Marine Directive makes a large number of more specific commitments drawn from Multilateral Environmental Agreements and other international agreements part of the EU's legal order for marine waters.

3.1. UNCLOS and IMO

The United Nations Convention on the Law of the Sea (UNCLOS) sets out the responsibilities and rights of nations with regard to seas and oceans and includes a number of obligations in relation to the protection and preservation of the marine environment. These cover, for instance, provisions on monitoring and assessment of the state of the marine environment, the prevention of pollution at sea and requirements for global and regional cooperation. The Marine Directive recognizes and takes full account of obligations under UNCLOS[11]. In addition, within its geographical scope, the Directive translates the UNCLOS requirement for States to observe and measure the risks or effects of pollution of the marine environment[12]. It also implements various other obligations requiring States to take measures to prevent, reduce and control pollution of the marine environment from land-based sources, to prevent pollution at sea of the seabed and the subsoil and to prevent the introduction of non-indigenous species. The MSFD also translates UNCLOS provisions as regards sustainable fisheries and aquaculture, innovation and investment in research. Last but not least, it facilitates the obligation of States under UNCLOS to cooperate to protect the marine environment, through its emphasis on regional cooperation[13].

Some UNCLOS provisions, notably those on limiting pollution at source and on developing environmental impact assessments are also addressed by legislation outside the MSFD, such as the IPPC directive[14] and the EIA/SEA directives[15].

Much the same can be said of IMO rules, such as those under MARPOL[16] as modified by its 1987 protocol, or the OPRC Convention and its OPRC-HNS protocol[17], but also of the agreement for cooperation in dealing with pollution of the North Sea by oil and other harmful substances (though outside IMO)[18]. There, a number of EU laws complementary to the MSFD contribute practical solutions and mechanisms to address the MSFD aims such as the Directive on Port State control[19], on waste reception facilities in EU ports[20] or the Council Decision establishing a Community Civil Protection Mechanism[21].

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11 See MSFD recital 17.

12 See MSFD Article 11 and Annex V.

13 See MSFD article 6.

14 Integrated Pollution Prevention and Control Directive 2008/1/EC, OJ L 24, 29.1.2008, p. 8–29

15 Directives 2011/92/EU and 2001/42/EC.

16 The International Convention for the Prevention of Pollution from Ships (MARPOL).

17 The International Convention on Oil Pollution Preparedness, Response and Co-operation and the Protocol on Preparedness, Response and Co-operation to pollution Incidents by Hazardous and Noxious Substances.

18 Agreement for cooperation in dealing with pollution of the North Sea by oil and other harmful substances.

19 Directive 2009/16/EC, OJ L 131, 28.5.2009, p. 57–100.

20 Directive 2000/59/EC, OJ L 332, 28.12.2000, p. 81–90, as last amended by Regulation (EC) No 1137/2008.

21 Council Decision 2007/779/EC, Euratom (recast).

3.2. The MSFD, a key contribution to the implementation of international commitments on marine biodiversity

The Marine Directive is the first EU legislative instrument explicitly related to the protection of marine biodiversity in its entirety. It contains the specific regulatory objective that "biodiversity is maintained by 2020", as the cornerstone for achieving Good Environmental Status of oceans and seas. It therefore provides, together with the Habitats and Bird Directives[22], a strong policy and legal framework to comply with international commitments related to the protection of marine biodiversity, such as those under the CBD (mentioned in recital 18 of the MSFD), or the Convention on Trade in Endangered Species.

In addition to implementing the CBD's ecosystem approach and principle of adaptive management, the MSFD also addresses some of more specific requirements of the CBD, such as for example the establishment of Marine Protected Areas (MPAs), which Member States must include in their marine strategies, as part of an overall approach to protecting the marine environment. In addition, the Directive will bring together these MPAs set up under various other EU or international obligations into one framework: a coherent and representative network of MPAs (see below 5).

3.3. The link to international climate change commitments

The Marine Directive concerns itself with the impacts of climate change on oceans and, as such, contributes indirectly to the UN Framework Convention on Climate Change (UNFCC) and other instruments dealing with this issue.

The MSFD improves knowledge of climate impacts on the marine environment. It requires Member States to consider, in their initial assessments, various climate-related factors such as changes in sea temperature and ice cover and ocean acidification.

Member States' marine strategies under the MSFD can also address adaptation to climate change. Given that pressures and impacts may vary according to different patterns of human activity and the impact of climate change, the determination of Good Environmental Status may have to be adapted over time[23].

Finally, healthy oceans play an important mitigation role, as carbon sinks. The marine area can be used for the purpose of renewable energy generation, and carbon capture and storage (CCS). These are human activities whose pressures and impacts need to be managed in the context of the Directive.

4. THE KEY ROLE OF REGIONAL SEA CONVENTIONS

Four Regional Sea Conventions (RSCs) cover the marine waters of MSFD: the Convention for the Protection of Marine Environment of the North East Atlantic (OSPAR), the Convention for the Protection of the Marine Environment of the Baltic Sea (HELCOM), the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention) and the Convention for the Protection of the Black Sea against Pollution (Bucharest Convention)[24]. Some significant differences exist between

[22] Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora and Birds Directive codified 2009/147/EC, OJ L 20, 26.1.2010, p. 7–25.

[23] Recital 34.

[24] See MSFD recital 19.

them, especially as far as the role of non-EU countries is concerned (e.g. 9 out of 10 parties are EU Member States in the Baltic, 7 out of 22 in the Mediterranean).

The RSCs aim to improve regional governance of the marine regions and to reinforce the protection of the marine environment. The Marine Directive includes numerous provisions which aim at ensuring that its implementation not only contributes, but also builds upon the activities of the conventions, which cover EU marine regions or sub-regions.

Article 6(1) clearly requires Member States to use existing regional institutional cooperation structures, including those under RSCs, to achieve coordination. Several of these Conventions have expressly agreed to take up the function to facilitate the regional implementation of the MSFD. Article 6(2) requires Member States to make every effort, using relevant international forums, including mechanisms of the RSCs, to coordinate their actions with third countries for the purpose of establishing and implementing marine strategies, and to extend, where appropriate, coordination and co-operation to all Member States including land-locked countries.

The MSFD ensures that RSCs and other international agreements are taken into account at all stages of the development of marine strategies, making sure that the methodologies used are consistent across the marine regions or sub-regions and that transboundary impacts are taken into account.

On the other hand, the Marine Directive contributes to the fulfilment of the obligations and important commitments of the EU and the Member States under these RSCs.

This includes, for example, obligations to take all possible steps to prevent and eliminate pollution from sea-based and land-based sources, including the impact of point source discharges on the maritime environment. The RSCs have also integrated explicit commitments to adopt or follow an ecosystem-based approach to the management of marine waters and to conserve marine resources, including obligations to take measures to protect and conserve ecosystems and the biological diversity such as requirements to regulate the introduction of invasive species. The Marine Directive takes up all these elements, as essential characteristics for achieving Good Environmental Status.

The RSCs also contain provisions on access to information on the state of the marine environment, on the obligation of States to undertake monitoring and research programmes and subsequent reporting obligations, which are integrated in the Marine Directive (see section 2.4).

5. MSFD AND OTHER RELEVANT EU POLICIES

Many EU policies affect the marine environment, in particular those dealing with fisheries, transport, industry, agriculture, regional development, research, energy, external relations, as well as important elements of environment policy such as water. But these policies are not specifically designed to protect the marine environment in a coordinated manner. Accordingly, human activities impacting the marine environment are addressed in a sector-by-sector manner.

The MSFD aims at ensuring the coherence, consistency and integration of measures taken pursuant to various other EU legal instruments in order to meet its key objective. Therefore, as stipulated by Article 20, when considering the contribution of the MSFD to international

obligations and commitments, it is necessary to take into account obligations set and measures provided by other EU legislation at community level.

The Water Framework Directive[25] (WFD) is closely linked to the Marine Directive. It sets the goal of achieving Good Status for all EU ground and surface waters, including coastal waters, by 2015, complementing the goal of achieving Good Environmental Status under the Marine Directive. Actions taken under the WFD will reduce marine pollution and nutrient input from land-based sources and will protect ecosystems in coastal and transitional waters, which are vital spawning grounds for many marine fish species.

The requirement to carry out an Environmental Impact Assessment (EIA) for projects and activities in the EU, on land and at sea is set out in the Directive 2011/92/EU; similar obligations exist for the preparation of plans and programmes under Directive 2001/42/EC, known as the Strategic Environmental Assessment (SEA) Directive. MSFD does not expressly contain the requirement to carry out an SEA for plans and programmes affecting the marine environment. However, the SEA applies on its own merits, as confirmed by the Court of Justice[26], provided that its conditions are met, in particular that the plan in question sets the framework for future development of projects. Depending on their content, marine strategies may have to be made subject to an SEA. Programmes of measures are likely to have to undergo an SEA, as Annex VI of the MSFD foresees that they may set the framework for future projects and activities.

In addition the Habitats Directive[27](Article 6) requires an appropriate assessment to be carried out for any plans or projects likely to have significant effects on the special areas of conservation (SAC) established under the Directive and special protection areas (SPA) established under the Birds Directive. As these special areas of conservation contribute to the Marine Protected Areas established under the MSFD, an assessment under Article 6 of the Habitats Directive is normally required for marine strategies and programmes of measures such activities. These assessments can be integrated into SEA procedures.

A number of high-level political commitments on the protection of biodiversity have been made by the EU. The headline target is to halt the loss of biodiversity and the degradation of ecosystem services in the EU by 2020, and restoring them in so far as feasible. These political objectives have been enshrined in the EU2020 Biodiversity Strategy[28] and are spelled out in specific targets and actions linked to the achievement of the objective of the Marine Directive and other pieces of EU legislation dealing with the protection of endangered species and the sustainable exploitation of fish stocks.

Under the Habitats and Birds Directives, Member States are to ensure a favourable conservation status of a series of marine habitats and species and a positive population status of all naturally occurring marine species including migratory bird species. A large area of the EU's coastal and marine areas has already or will be designated as Natura 2000 sites under these Directives. The MSFD recognises that the establishment of MPAs, including Natura 2000 sites designated or to be designated under the Habitats and Birds Directives, are an important contribution to the achievement of Good Environmental Status and requires

[25] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy. OJ L 327 on 22.12.2000.

[26] See cases C-105/09 and C-295/10.

[27] 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).

[28] COM (2011) 244 final. Our life insurance, our natural capital: an EU biodiversity strategy to 2020.

networks of MPAs to be included in programmes of measures of the marine strategies (Article 13(4)). In addition, Article 13(4) of the MSFD requires that the networks of MPAs are coherent and representative, adequately covering the diversity of the constituent ecosystems, and expressly goes beyond Natura 2000 by extending such networks to those MPAs established under the RSCs. Furthermore, Article 13(5) ensures that an explicit link is made between the establishment of MPAs and possible measures under the Common Fisheries Policy (CFP). The MSFD thus acts in this case specifically as a framework within which existing measures can be integrated and complemented with new initiatives.

For the regulation of fishery and aquaculture activities, the CFP sets out a collaborative approach to managing the EU's shared fisheries. The proposed reform of the CFP in 2011[29] requires all stock to be above levels capable of producing maximum sustainable yield and to take into account the environmental impacts of fishing. It requires expressly integrating the objectives of the MSFD. Thus the Marine Directive complements the CFP, providing the link between fishery policies and other essential aspects of environmental protection (such as biodiversity conservation, protection of habitats and associated species).

Various EU legislative instruments have an impact on the degree of pollution of the marine environment down the line, such as the Nitrates Directive[30], the Priority Substances Directive[31], and the Waste Framework Directive[32]. The MSFD complements these particular pieces of EU legislation.

There are also close linkages between the Marine Directive and the EU civil protection policy which establishes a framework for cooperation at EU level for managing all types of disasters in all phases of the disaster management cycle, including prevention, preparedness, response and recovery[33].

The Marine Directive is also the environmental pillar of the Integrated Maritime Policy (IMP). Its function is highlighted in a range of developments under the IMP, including marine spatial planning, marine knowledge and regional strategies.

As such, the Marine Directive gives direction and contributes to the implementation of several obligations, commitments and initiatives at EU level, ensuring their sustainability and contributing to the objective of wider coherence set out in its Article 1(4).

6. LOOKING AT THE FUTURE: THE MSFD AND THE IMPLEMENTATION OF THE RIO+20 OUTCOME

The Rio+20 outcome document, "The Future We Want", reflects a number of concepts contained in the Marine Directive. It comprises the commitment to protect, and restore, the health, productivity and resilience of oceans and marine ecosystems, and to maintain their biodiversity, enabling their conservation and sustainable use for present and future generations. It stresses the need to effectively apply an ecosystem approach and the

29 COM(2011) 425 final. Proposal for a Regulation of the European Parliament and the Council on the Common Fisheries Policy.

30 Directive 91/676/EEC, OJ L 375, 31.12.1991, p. 1–8, as last amended by Regulation (EC) No 1137/2008 (OJ L 311, 21.11.2008, p. 1–54).

31 Directive 2008/105/EC, OJ L 348, 24.12.2008, p. 84–97.

32 Directive 2008/98/EC, OJ L 312, 22.11.2008, p.3-30.

33 Council Decision 2007/779/EC, Euratom (recast) establishing a Community Civil Protection Mechanism.

precautionary approach in the management of activities having an impact on the marine environment. The document also contains specific commitments, including the need for coordinated strategies to combat pollution, to take action to significantly reduce marine debris by 2025, or to take action on invasive species. The MSFD will be one of the main EU policies to implement Rio+20 marine commitments in the EU.

A major decision at Rio was also to address, on an urgent basis, the issue of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including by taking a decision on the development of an international instrument under UNCLOS. In pursuing this objective, the need to maintain marine biodiversity as agreed at Rio and stipulated by the MSFD, should be taken into consideration, together with sectorial actions agreed at Rio, particularly on fisheries. These include the need to intensify our efforts to meet the 2015 target to maintain or restore stocks to levels that can produce maximum sustainable yield[34] on an urgent basis and to enhance action to manage by catch, discards and other adverse impacts on ecosystems from fisheries, including by eliminating destructive fishing practices.

In addition, the MSFD, like the CBD, combines protection and sustainable use and is indispensable to the pursuit of a green economy. On the basis of the Rio+20 outcome, the EU will continue to support a "blue economy", which extends the principles of the green economy inter alia to the conservation and sustainable use of marine resources.

7. CONCLUSION

The MSFD is a framework directive that promotes an integrated and adaptive management approach to human activities affecting the marine environment. By its very nature, it is a flexible policy instrument to translate international commitments into EU policies for EU waters. In the future, this flexibility, including its regular 6 year cycle for updating marine strategies, will allow it to adapt to new commitments, such as for instance, those stemming from Rio+20 and its follow-up.

Given the Marine Directive's geographical scope, which does not extend to the high seas, not all international commitments on the marine environment are within its remit. In a number of other cases different EU legislative instruments are better adapted to implement international commitments in specific sectors. One positive finding is that they increasingly work in synergy with the mechanisms of the MSFD and contribute to its objectives.

The Marine Directive is now entering a crucial phase in its implementation through the preparation of initial assessments, the determination of Good Environmental Status and the establishment of environmental targets by the Member States which will be analysed for adequacy and coherence by the European Commission. The level of ambition with which the many international commitments addressed by the MSFD will be implemented in Member States is therefore strongly linked to the way in which Good Environmental Status is defined and to the subsequent full implementation at national level of the Directive's provisions.

In this context, the Regional Sea Conventions will continue to play a very important role, and they will be closely involved in the follow-up to the first implementation milestones of the Marine Directive, ensuring better coherence of national approaches within their region.

[34] A target first agreed at the Johannesburg World Summit on Sustainable Development in 2002.