

## Marine strategy directive: A legal tool for European SEAS protection

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**Abstract.** The Marine Strategy Framework Directive constitutes the main vital environmental component for the future EU maritime policy, designed to achieve full economic potential of oceans and seas in accordance with the marine environment. Given the fact that the contents of the Directive will be subject to review by 2023 we aim to highlight, based on maritime legislation, the main principles to be amended so that it should be an effective legal tool in order to stop the decline of biodiversity in European seas. The analyzed issues relate to: the subsidiarity principle vs. an integrated policy to protect the marine environment; the inadequate connectivity of Marine Strategy Directive with regional seas conventions and relevant EU legislation; the lack of an appropriate definition for the term "good environmental status"; difficulties regarding transposition into national legislations; lack of consistency regarding the interest of the parties involved; the ecosystem-based approach vs. the precautionary principle.

**Key Words:** Marine Strategy Framework Directive, good environmental status, stakeholders, principle of subsidiarity, precautionary principle.

**Rezumat.** Directiva Cadru „Strategia pentru mediul marin” constituie componenta de mediu vitală pentru viitoarea politică maritimă a UE proiectată să obțină potențialul economic deplin al mărilor și oceanelor în armonie cu mediul marin. Având în vedere faptul că textul Directivei va fi supus revizuirii până în 2023 ne propunem să evidențiem pe baza literaturii de specialitate principalele aspecte care trebuie amendate pentru ca aceasta să fie un instrument juridic eficient de stopare a declinului biodiversității în mările europene. Aspectele analizate se referă la: principiul subsidiarității vs. o politică integrată de protecție a mediului marin; conectivitatea inadecvată a Directivei cu convențiile mărilor regionale și legislația UE relevantă; lipsa unei definiții corespunzătoare pentru „starea ecologică bună”; dificultăți legate de transpunere în legislațiile naționale; lipsa de coerență în ceea ce privește implicarea părților interesate; abordarea bazată pe ecosistem vs. principiul precauției.

**Cuvinte cheie:** Directiva Cadru „Strategia pentru mediul marin”, „starea ecologică bună”, părțile interesate, principiul subsidiarității, principiul precauției.

**Introduction.** The institutional structure to protect Europe's seas and oceans has become highly developed for the last 35 years, including the 1972 and 1974 Oslo and Paris Conventions (merged in 1992 in to the OSPAR Convention on the Protection of the Marine Environment of the North-East Atlantic), the United Nations Convention on the Law of the Seas (UNCLOS), the 1992 Rio Agenda 21, the Regional Conventions for the Protection of the Baltic Sea (HELCOM), the Black Sea, and the Mediterranean, as well as Johannesburg Plan of Implementation (JPOI) of 2002 (van Hoof & van Tatenhove 2009). In EU many Directorates of the Commission which include Agricultural and Rural Development, the Environment, Fishery area and Maritime Affairs, External Relations, Regional Development, Transport and Energy have jurisdictional and/or programmatic responsibilities upon the activities within or which affect the marine environment. The relevant programmatic policies broadly include the Common Fisheries Policy (CFP), the Water Framework Directive, the Common Agriculture Policy, Coastal Zone Management initiatives, and EU efforts to tackle the pollution resulted from maritime shipping in European waters (Juda 2007). They are complemented by the existence of several international organizations and of regional conventions regarding the European seas (OSPAR, HELCOM, ICES, WSSD, the Barcelona Convention, IMO MEDPOL, etc.) (Borja 2006).

As outlined in the assessment of this political and legislative framework drawn up by the European Commission in 2005, the measures for controlling and reducing the different sources of pressure which affect the marine environment do exist, but they were developed within a local policy; there is little coordination and some overlapping between the evaluation/monitoring mechanisms, strategies and tools, as well as large informational gaps (Frank 2006), beside the lack of some adequate enforcement mechanisms (Borja 2006; Mee et al 2008). These legislative and political gaps to protect the EU maritime areas have started the process of adopting a new legislation to comply with the Water Framework Directive (2000/60/EC) and which has ultimately resulted in the adoption of the Marine Strategy Framework Directive (Mee et al 2008).

Given the fact that the contents of the Directive will be subject to review by 2023 we aim to highlight, based on maritime legislation, the main principles to be amended so that Marine Strategy Directive should be an effective legal tool in order to stop the decline of biodiversity in European seas.

There is an extensive maritime legislation concerning the Marine Strategy Framework Directive (MSD). While the "contemporary" work of the first versions of the Directive (Salomon 2006; Borja 2006; Juda 2007; Frank 2006; Krämer 2007) primarily focus on critical analysis of the provisions mentioned in the contents of the Directive, other articles consider the analysis of the Directive requirements, regarding the involvement of the parties interested in drawing up the environmental policy (Fletcher 2007) the interpretation of the concept of "good ecological status" within space-time background and as human value of reference (Mee et al 2008), the institutional changes that MSD brings concerning the Common Fishery Policy and the way in which both policies affect the fishery management (van Hoof & van Tatenhove 2009), the failure of the integrated marine approach seen from the point of view of fishery policy perspective and the link between MSD and the fishery policy with reference to the protection of fishery resources (Wakefield 2010), exploring the linking concept from science and politics in the context of legal framework and MSD analysis within the Integrated Maritime Policy and Marine Strategy (De Santo 2010).

**Marine Strategy Framework Directive: the legal component.** The MSD project was launched in 2005 as the main component of Marine Strategy, one of seven thematic strategies suggested by the European Commission in 2005-2006 in order to address various environmental issues (De Santo 2010). The final revised version of the Marine Strategy Framework Directive (MSFD) was agreed by the European Council and Parliament in late 2007 and was launched in 2008 (De Santo 2010).

The decision to adopt the instrument of a Directive was the result of legal and interrelated reasons of ecosystemic and legal nature. The Commission wanted to gather the constitutional requirements of subsidiarity and proportionality on the basis of realities/regional ecosystems diversity (Juda 2007). Both factors have asserted recognition of a considerable freedom of action for Member States through a challenging directive, seen as a purpose, but not being too rigid in its mechanisms (Frank 2006).

The Marine Strategy Framework Directive represents the vital environmental component for the future EU maritime policy designed to achieve full economic potential of oceans and seas in accordance with the marine environment (European Commission 2010). The objective of the Directive is to obtain or maintain a "good environmental status" of the marine environment, not later than 2020 (Art. 1). For this purpose, each Member State is obliged to prepare, for each region or marine sub-region, a strategy for the marine environment which can be applied to its maritime waters, based on a program of action (Art. 5). This program of action contains a preparation stage and a program of measurements (Art. 5, par. 1 and 2).

Within the preparation stage, Member States are obliged to carry out an initial assessment of their marine waters and the environmental impact of human activities on these waters (Art. 8), to determine the "good ecological status" of these waters (Art. 9), to establish environmental objectives and some associated indicators (Art. 10), to develop and implement a monitoring program (Art. 11).

The second stage concerns the development (until 2015) and the application (until 2016) of a program of measures designed to achieve or maintain the "good environmental status" (Art. 13). The Commission is informed on the achieved evaluation, the environmental objectives are set, so are the monitoring programs and the measurements programs and it assesses, regarding each Member State, if these elements constitute an appropriate framework to meet the requirements of the Directive (Art. 12 and 16). In the Directive vision, accomplishing the objectives and the marine strategies is primarily based on the cooperation between the riparian States of a region or sub-region on the basis of the existing regional institutional structures and of the regional seas conventions to which they belong (Art. 6) (European Parliament and Council of The European Union 2008).

**Criticable aspects of the Directive.** A lot of criticism has come in for, mainly within the maritime legislation field, regarding several aspects, concerned both with the versions of the Directive draft and with its final form.

The main criticized issue is that EU does not currently have an integrated comprehensive policy for the marine environment protection (Krämer 2007). The responsibility for solving complex problems of marine environment is largely "renationalized", being in this way given effect to the principle of subsidiarity (Salomon 2006). Despite the diversity of Europe's marine environment, the primary justification of the principle of subsidiarity, the requirements of international conventions for the protection of regional seas show that it would still be possible to assign the Framework Directive a greater regulatory power (Salomon 2009). A further argument is that, regarding the agriculture and fishery policy, the sectors which seem to constitute the main causes of damage towards marine environment in some marine regions, EU has centralized powers (Salomon 2006). The scientific literature considers that no substantial progress can be made in these strategic areas using the actual national strategies for marine protection the way they are being planned now (Salomon 2006, 2009).

Although the environmental policy is "renationalized", all measures adopted in all regions and sub-regions are EC measures. In order to ensure that these measures are applied in practice, the Commission boasts of the infringement procedure established in EC Treaty, art. 226 (Krämer 2007). It is questionable whether the Commission will have political will and determination to take these measures, in case the Member States will not conform to them. The examples from the past, concerning the regional seas conventions, which are part of EC law, show that this fact is very unlikely to happen (Krämer 2007).

MSD connectivity has been particularly criticized regarding the uncertainty about how the Directive will link with the existing international conventions to protect the marine environment (OSPAR Convention, Helsinki and Barcelona) (Fletcher 2007) and EU legislation (De Santo 2010). Relating to the first issue, one considers that, in its objective, the Directive is inadequate to provide a better implementation of international conventions. MSD specifies only the fact that, when developing their national strategies for marine protection, the Member States will rely, as possible, on already existent programs and activities, which are developed within the structures resulted from international agreements (Salomon 2006). A more explicit integration within the European Marine Strategy of the objectives and programs already approved on the basis of international conventions to protect marine areas is required (Salomon 2006, 2009). But there are big differences between marine regions and sub-regions regarding this aspect. The progress is considered to be relatively satisfying for North and Baltic Sea. For Mediterranean and Black Sea the situation seems not to significantly change unless EC future legislation is strongly enhanced and EC becomes active in monitoring the development and application of environmental measures (Krämer 2007).

The other objectionable matter focuses on the need to integrate MSD with EU legislation: modification of existing EU environmental legislation, particularly the Water Framework Directive and the Nitrates Directive for integrating the protection requirements of marine environment (Salomon 2006); a stronger integration of marine ecosystems protection within relevant area policies such as the Common Agricultural

Policy and Common Fisheries Policy (Salomon 2006, 2009). Authors such as De Santo (2010) considers that there is a potential of harmonization based on qualitative measures contained in Annex I of MSD that overlap with requirements of other EC normative acts, such as the Common Fisheries Policy, the Habitats Directive and the Water Framework Directive. But harmonization depends on the appropriate guidance of the Member States by the Commission and on sharing best practice (De Santo 2010).

The good environmental status (GES) definition provided by MSD is considered inaccurate (Krämer 2007; De Santo 2010) within the scientific literature, entirely aspirational and with a limited practical application (Mee et al 2008). This definition contained in article 3 par. 4 states that "good ecological status" stands for "the ecological status of marine waters which is defined by means of ecologically diversity and dynamic of oceans and seas, which are clean, in good health condition and productive within their intrinsic conditions and through a sustainable use of marine environment, thus safeguarding its potential for uses and activities of actual and future generations". The concept of good environmental status elaborates the basic criteria:

(a) Structure, functions and processes of the marine ecosystems, together with the associated physiographic, geographic and climatic factors, allow those ecosystems to function fully and maintain their resilience. Marine species and habitats are protected, human induced decline of biodiversity is prevented and diverse biological components function in balance (Mee et al 2008);

(b) Hydro-morphological, physical and chemical properties of the ecosystems, including those properties resulting from human activities in the area concerned, support the ecosystems as described above. Anthropogenic inputs of substances and energy into the marine environment do not cause pollution effects (Mee et al 2008).

It is estimated that not only the complete achievement of all these criteria will be extremely difficult in practice but also the fact that it would require a massive revision of EU Common Fisheries Policy. It was also noted that these criteria refer to physical and chemical changes of the system but they circumvent the key problem related to environmental disturbance which is connected to the current human lifestyle (Mee et al 2008).

The major point of debates while negotiating various projects was the fact that the countries will have to agree on how to express, define and measure "good environmental status". Currently, this responsibility lies with groups of countries working on the basis of a regional sea (Mee et al 2008). But it was initially intended that each country should suggest definitions of GES for their waters and the European Commission should act to resolve differences (Mee et al 2008). This change at the level of implication of a central authority is more related to the distribution of power than the differences in values. However, debates that reflect different values have started to emerge when definitions have been proposed (Mee et al 2008).

The notion of "good ecological status" contains values that vary depending on time and space and "good" is not a property that is intrinsic related to nature, but it is an extension of our system of human values (Mee et al 2008). In connection with this last issue, maritime legislation argues that: "science will be needed to determine the changing level of a particular marine environment, but this fact must be evaluated related to the expectations of the value-based society. Thus, while scientists charged with defining the terms and implementation of the Directive can advise on the nature and necessity of ecosystem changes, the society will need to consider whether they are large enough to justify an action. Unfortunately, scientific understanding of environmental human values is in its infancy and it is particularly weak in the context of the seas" (Mee et al 2008).

Based on space-time variables and depending on the collective views of the world, trying to develop more GES pragmatic definitions will be considered a difficult task. More, the whole process will be at risk of dominance by one or more strong sectors or by the Member States, because the participatory component of adaptive management is poorly defined (Mee et al 2008).

Achieving a "good environmental status" within the European waters until 2020 is considered inappropriate in this actual form; this requires development of a realistic

program, and also of necessary intermediate targets (Salomon 2009). It is necessary, in this manner, at different levels of government, to have a new approach of marine monitoring and evaluation, combined with the use of existing scientific information in order to identify and fill the gaps related to knowledge, to reduce double data collection and research, and to promote harmonization, dissemination and use of marine science and related data (Borja 2006).

Another criticism regarding the text of the Directive is the lack of consistency in terms of stakeholder engagement (De Santo 2010). In the Directive text there are two entries concerning the stakeholders. The former at article 19 par. 1: "...Member States shall ensure that all stakeholders are given early and effective opportunities to participate in the implementation of this Directive...." and Annex VI, Section 8: "Communication, participation of the interested stakeholder and public awareness". Within the scientific literature, Fletcher (2007) mentions, regarding the stakeholder engagement within MSD, the fact that the Directive lacks clarity with regard to three aspects: the category of external parties that are expected to attend the implementation of MSD; at what stage during the implementation of MSD the external parties should be involved; and the aim and the modality of engaging the external parties in MSD implementation.

The same author concludes that, within MSD, there is an imbalance between the distinct emphasis placed on scientific input into policy making process and by comparison, the relatively limited emphasis placed on stakeholder input, particularly on developing of marine strategies (Fletcher 2007). This fact will compromise, in his opinion its declared objective of protecting the marine environment in Europe (Fletcher 2007).

Art. 19 par. 2 requires the Member States to publish and place the following actions at public comment's disposal: initial assessment and determination of GES, environmental objectives, monitoring programs and programs of measures to their achievement. The article has been criticized for its lack of requiring some actual participation measures in the development of these key operational elements of MSD (Mee et al 2008). Transparency requirement can be circumvented by a minimal consultation of the final results of its own expert group (especially the stakeholders interested in governmental and management research) (Mee et al 2008). It is also considered the fact that, in case there is least common control of GES, it is unlikely that flexible management learning outcomes to be met (Mee et al 2008).

Despite the fact that debates on the bill have emphasized the importance of the precautionary principle, the final version of the MSD formalizes an ecosystem based approach of marine environment management in EU waters, both at national and regional level (De Santo 2010). The ecosystem based approach is defined as: "a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way. The application of the ecosystem based approach will help to reach a balance of the conservation, sustainable use, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources" (Borja 2006). The precautionary-based approach refers at the fact that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation" (Mee et al 2008). From a legal point of view, a key difference between the two approaches is that the precautionary principle puts the onus on the developer to demonstrate there will be no impact whereas the evidence-based approach puts the onus on the legislator/competent authority (Mee et al 2008).

Excluding the precautionary principle from environmental legislation and therefore from the Directive is mainly due to economic and political interests. Thus, Mee et al (2008) argue: "... the rather uncommitted statement regarding the marine protected areas (the word "should" has a non-binding commitment) within MSD and the focus on multiple use schemes such as Special Areas for Conservation (never intended to fulfill the function of marine protected areas) probably reflect pressures from Member States to circumvent such precaution measures ...".

In accordance with the article 26 MSD the Member States must transpose the Directive into national law by July 15, 2010. The way in which the Directive will be implemented, including the provisions for coordination between Member States and the

Commission's role in approving strategies and programs, is a problem (De Santo 2010). The previous experience at a European level shows that the implementation will be different at national and regional level, fact which will affect the development of an equality level. In part, this can be attributed to different institutional arrangements of different countries in terms of national legislation as well as to operative practice and enforcement of measures, leading to different levels of compliance in EU (van Hoof & van Tatenhove 2009). In this regard it is considered that a strong support from the Commission is needed, through the EC Integrated Maritime Policy (IMP), and a unified approach with Member States. Under these circumstances, the key to success will be represented by sharing best practice among countries and regions (De Santo 2010).

**Conclusions.** MSD is currently considered the main legal instrument for the protection of European seas. However, a number of provisions of the Directive may prevent the fulfillment of this role:

-national strategies such as those currently planned may not have significant results; connecting the Directive with conventions of regional seas and EU legislation is not adequate and cannot provide real support for drawing up national strategies, defining "good environmental status" will create differences at the level of regions and sub-regions in which is determined and the timeline for achieving this goal by 2020 is unrealistic;

-the way in which the Directive will be transposed to national level is a problem.

In our opinion there are too many elements on which the carrying out of the Directive role depends, and more, a synchronization of correcting these elements should exist. The solution lies in the fact that the Commission should assume a more active role, through the IMP, and it should own a unified approach with Member States through sharing good practice. A different emphasis should be on monitoring and evaluation, combined with the use of existing scientific information and on promoting harmonization, dissemination and use of marine science and of associated data. Because of the reason that Black Sea area may lead to problems in achieving "good environmental status", we suggest that future studies should address approaching MSD implementation issues within Romanian legislation and investigation the cooperation between Member States and third states in this area in order to achieve a "good environmental status".

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Received: 20 November 2012. Accepted: 18 December 2012. Published online: 18 January 2013.

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How to cite this article:

Adăscăliței O., 2013 Marine strategy directive: A legal tool for European SEAS protection. *AAFL Bioflux* 6(3):155-161.