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The Marine Strategy Framework Directive: A new European approach to the regulation of the marine environment, marine natural resources and marine ecological services

By Ronán Long*

Abstract

This article reviews the Marine Strategy Framework Directive which requires the Member States of the European Union to put in place measures to achieve and maintain good environmental status of marine waters by 2020. Apart from redressing a longstanding lacuna in EU Law, the Directive is also the first concerted attempt by the EU to apply an ecosystems-based approach in the regulation and management of the marine environment, marine natural resources and marine ecological services. The legislative history, conceptual approach, structure and content of the Directive, as well as some of its unique regulatory features are discussed here. This article concludes that the Directive is primarily focused on harmonising the regulatory and administrative activities of the Member States and that it is too early in the transposition process to identify the practical impacts of the new instrument on the activities of offshore industries and businesses. The Directive nonetheless has the potential to become the principal source of marine environmental management measures in the EU for many decades to come.

Introduction

In 2008, the European Union (EU) made a fundamental change to its traditional *laissez-faire* approach to the regulation and management of the marine environment, marine natural resources and marine ecological services. In order to fully understand this change, and to illustrate the historical absence of adequate EU regulatory instruments to protect and preserve the marine environment in a holistic manner, it may be appropriate to commence this article by recalling the brief but relatively acrimonious legal dispute between Ireland and the United Kingdom (UK) over the

reprocessing of radioactive material and the production of nuclear fuel at the so-called Mixed Oxide (MOX) Plant located at Sellafield in Cumbria on the eastern margin of the Irish Sea.[1] One of the reasons why Ireland sought a remedy to this dispute through international arbitration,[2] and away from the normal avenues of redress open to Member States of the European Union (EU) in the European Court of Justice (ECJ), was the absence of EU legislation focused on regulating the discharge of radioactive substances into the marine environment and which prescribed standards regarding the transport of such substances by sea.[3] Despite the paucity of EU

∗ Ronán Long holds the Jean Monnet Chair of European Law at the School of Law, National University of Ireland Galway: email: ronan.long@marinelaw.ie. He is the author/co-editor of several books on oceans law and policy including *Enforcing the Common Fisheries Policy* (Oxford, 2000); *Marine Resource Law* (Dublin, 2007), *Law, Science and Ocean Management* (Boston/Leiden, 2007), and *Legal Challenges in Maritime Security* (Boston/Leiden, 2008). As the Managing Director of Marine Law and Ocean Policy Research Services Ltd., an off campus SME, he is currently participating in the ODEMM Project which is examining various management options for implementing the ecosystems approach in the European marine environment. This project is supported by the European Commission's 7th Framework Research Programme, Theme ENV.2009.2.2.1.1, Project No 244273. Further information: http://www.liv.ac.uk/odemm/. The author wishes to acknowledge the constructive comments of two peer reviewers on a previous draft of this article.

[1] See, *inter alia*: R. Long, *Marine Resource Law*, (Thomson Round Hall, Dublin 2007) at 640-642 and the articles cited therein, including; N. Lavranos, "The MOX Plant and IJzeren Rijn Disputes: Which Court Is the Supreme Arbiter?" (2006) 19(1) *Leiden Journal of International Law* 223; R.R. Churchill, J. Scott, "The Mox Plant Litigation: The First Half- Life" (2004) 53(3) *International and Comparative Law Quarterly* 643; M. Tanaki, "Lessons from the Protracted Mox Plant Dispute: A Proposed Protocol on Environmental Impact Assessment to the United Nations Convention on the Law of the Sea" (2004) 25(2) *Michigan Journal of International Law* 337; Y. Shany, "The First Mox Plant Award: The Need to Harmonise Competing Environmental Regimes and Dispute Settlement Procedures" (2004) 17(4) *Leiden Journal of International Law* 815; B. Kwiatkowska, "The Ireland v. United Kingdom (Mox Plant) Case: Applying the Doctrine of Treaty Parallelism" (2003) 18(1) *International Journal of Marine and Coastal Law* 1; D.J. Devine, "Provisional Measures Ordered by the International Tribunal for the Law of the Sea in the Area of Pollution, the Mox Plant Case (Ireland v. United Kingdom) ITLOS Case No 10, 3 December 2001" (2003) 28 *South African Yearbook of International Law* 263.

[2] The first set of arbitral proceedings were initiated by Ireland in 2001 and entitled, *Dispute concerning Access to Information under Art 9 of the Convention for the Protection of the Marine Environment of the North-East Atlantic* (referred to as the "OSPAR Convention"). On that occasion, the OSPAR Arbitration Tribunal chaired by M. Reisman held that Ireland's claim for information did not come within scope of the Convention. For information see www.pca-cpa.org. At the same time as these proceedings were pending, Ireland initiated arbitration proceedings under Annex VII of the 1982 United Nations Convention on the Law of the Sea and lodged a request for provisional measures under Art 290 of the said Convention. An order for the latter was issued subsequently by the International Tribunal for the Law of the Sea which required both parties to exchange information, monitor risks, and to devise, as appropriate, measures to prevent pollution of the marine environment of the Irish Sea which might result from the operation of the MOX Plant, and to submit a report to ITLOS. *The MOX Plant Case (Ireland v United Kingdom)* ITLOS Order of 3 December 2001. Available at http://www.itlos.org/cgi-bin/cases/case_detail.pl?id=10&lang=en#order. Thereafter, Ireland and the UK set about establishing an arbitration panel and the Permanent Court of Arbitration was appointed as Registrar in 2002. The case was entitled *Dispute Concerning the MOX Plant, International Movement of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea.* The latter proceedings were suspended when the European Commission opened proceedings against Ireland in the ECJ under the EC Treaty. In light of the decision of the ECJ, Ireland withdrew its claim against the UK and the Annex VII proceedings were terminated by the Tribunal. Order No 6 Available at: http://www.pca-cpa.org/showpage.asp?pag_id=1148

[3] Case C-459/03, *Commission* v *Ireland* ECR I-4635, para. 73.

legislation in these particular fields, Ireland was nonetheless censured by the ECJ for instituting dispute-settlement proceedings outside the European legal order and thereby failing to uphold its obligations under the EU treaties.[4] Somewhat ironically, throughout the period when international arbitral proceedings between Ireland and the UK were in progress, the European institutions were working steadily towards the adoption of a new legal instrument, the Marine Strategy Framework Directive (the MSFD), which provides a solid basis for regulatory action in the field of marine environmental policy.[5] Both Ireland and the UK were obliged to transpose the MSFD into national law by the 15th July 2010 and the difficult task of implementing its complex provisions is now underway in all 27 Member States (22 of whom are coastal Member States) with a view to achieving and maintaining good environmental status (GES) of all European marine waters by 2020.[6]

Although its adoption was clearly unrelated and had no bearing on the outcome of the *Mox Plant* dispute, the MSFD marks an important milestone in the development of the EU's marine environmental policy in so far as it is the first framework instrument which is aimed expressly at protecting and preserving the marine environment,

[4] *Ibid*, para. 184. The failure of Ireland to challenge the UK under the environmental impact assessment directive was noted by the ECJ and some commentators have since pointed out that there were other European legislative instruments such as the directive on environmental information which could have also have been applied to the dispute, see, S. Marsden, "MOX Plant and the Espoo Convention: Can Member State Disputes Concerning Mixed Environmental Agreements be Resolved Outside EC Law?" (2009) 18(3) *RECIEL* 312-317 at 313.

[5] 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 164/19, 25.6.2008. For commentary on this Directive from a political science perspective, see, L. Juda "The European Union and the Marine Strategy Framework Directive: Continuing the Development of Ocean Use Management", (2010) 41 *ODIL* 34–54; and by the same author, The European Union and Ocean Use Management: The Marine Strategy and the Maritime Policy," (2007) 38 *ODIL* 259–282. For a number of other perspectives, see, Hans-Joachim Rätz *et al.*, "Complementary roles of European and national institutions under the Common Fisheries Policy and the Marine Strategy Framework Directive", (2010) 34 *Marine Policy* 1028–1035; N. Westaway "The New European Marine Strategy Framework Directive" (2008) 10 *Env L Rev* 218-224; S. Fletcher "Converting science to policy through stakeholder involvement: an analysis of the European Marine Strategy Directive" (2007) 54 *Marine Pollution Bulletin* 1881–1886; L. D. Mee *et al.*, "How good is good? Human values and Europe's proposed Marine Strategy Directive (200 8) 56 *Marine Pollution Bulletin* 187–204; A. Borja "The new European Marine Strategy Directive: difficulties, opportunities, and challenges. (2006) 52 *Marine Pollution Bulletin* 239–42.

[6] The 22 coastal Member States of the EU are: Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Malta, Poland, Netherlands, Portugal, Romania, Slovenia, Spain, Sweden, and the UK. In the UK, the first part of transposition is achieved by the Marine Strategy Regulations 2010, S.I. 2010 No. 1627, entry into force 15.07.2010. At the time of writing, Ireland has not adopted a transposition instrument. Information on the transposition measures adopted by Member States is available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:72008L0056:EN:NOT

preventing its deterioration or, where practicable, restoring marine ecosystems in areas where they have been adversely affected.[7] The reasons why the EU is pursuing this ambitious goal are founded on the belief that "the marine environment is a precious heritage that must be protected, preserved and, where practicable, restored with the ultimate aim of maintaining biodiversity and providing diverse and dynamic oceans and seas which are clean, healthy and productive."[8] In the words of the preamble of the Directive, this objective cannot be sufficiently achieved by Member States alone and can therefore, by reason of the scale and effects, be better achieved at EU level.[9] For all intents and purposes, the Directive sets out a comprehensive blueprint to realise these laudable objectives on a regional basis in the North-east Atlantic Ocean, the Mediterranean Sea, the Baltic Sea, and the Black Sea. By doing so, it is the first concerted attempt by the EU to apply an ecosystems-based approach to the management of human activities that impinge upon the quality of the marine environment and to expedite the progress made by Member States in adopting specific management tools such as maritime spatial planning as a means to resolve conflicting uses of the ocean environment.[10] As the environmental pillar of the EU's integrated maritime policy, it is anticipated that the MSFD will have a major bearing on the future regulation of offshore industries in general and those based in the European coastal environment in particular including the hydrocarbon, aggregate, fishing, and energy industries. [11] Moreover, as will be seen below, the Directive is tangible

[7] Recital 43 of Directive 2008/56/EC.
[8] Recital 3 of Directive 2008/56/EC.
[9] This accords with the subsidiarity principle as codified in Art 5(3) of the Treaty on European Union which provides that, "in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".
[10] On marine spatial planning, see, *inter alia*: Roadmap for Maritime Spatial Planning: Achieving Common Principles in the EU, COM(2008) 791, 25.11.2008; F. Maes, "The International Legal Framework for Marine Spatial Planning" (2008) 32(5) *Marine Policy* 797–810; F. Douvere, "The importance of marine spatial planning in advancing ecosystem-based sea use management" (2008) 32(5) *Marine Policy* 762-771.
[11] On the European Maritime Policy, see, Green Paper, Towards a future Maritime Policy for the Union: A European vision for the oceans and seas, COM(2006) 275, 5.6.2006; Communication from the Commission, An Integrated Maritime Policy for the European Union, COM(2007) 575 final, Brussels, 10.10.2007; Commission Staff Working Document, SEC(2007) 1278, Brussels, 10.10.2007; Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Progress Report on the EU's Integrated Maritime Policy, COM (2009) 540, Brussels, 15.10.2009. For commentary, *inter alia*: T. Koivurova "A Note on the European Union's Integrated Maritime Policy" (2009) 40 *ODIL* 171-183; H. Siemers "A European Integrated Maritime Policy: An Innovative Approach to Policy-making" (2009) 23 *Ocean Yearbook* 231-250; L. Juda The European Union and Ocean Use Management: The Marine Strategy and the

evidence of the considerable efforts undertaken by the EU in recent years to fulfil its obligation under several international agreements aimed at halting the loss of biodiversity and conserving marine ecological systems including the 1992 Convention on Biological Diversity.[12]

All of these considerations strongly suggest that each of the substantive provisions of the MSFD merits careful consideration in their own right. For reasons of space, however, the discussion in this article is limited to describing its legislative history, conceptual approach, the links with other policy initiatives and legal instruments, its geographical scope of application, as well as some of its unique regulatory features. This is followed by a short analysis of the Directive focusing on whether it provides a solid legal plinth on which to build a coherent EU policy in relation to the protection and preservation of the marine environment, as well as the sustainable utilisation of offshore resources.

Legislative history of the MSFD

In order to fully comprehend the legislative history of the MSFD it is perhaps first necessary to recall that the EU's approach to environmental protection outside of the domain of sea fisheries has been piecemeal until relatively recently.[13] In addition, it is also pertinent to note that the EU has regulated marine based activities as a matter of practice over the past four decades by means of a number of sector policies such as the common transport policy and the common fisheries policy.[14] These policies were, and in some instances still remain, "stand-alone policies" with few common features

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Maritime Policy (2007) 38 *ODIL* 259-282. For further information see, http://ec.europa.eu/maritimeaffairs/.

[12] 1760 UNTS 79; 31 ILM 818, which was approved by Council Decision 93/626/EEC OJ L 309, 13.12.1993, p. 1.

[13] See, for example, the diffuse range of marine environmental protection measures listed by the European Community in the Appendix of the Declaration lodged with the Secretary General of the United Nations in 1998 concerning the competence of the EC with regard to matters governed by the United Nations Convention on the Law of the Sea of 10 December 1982 and the Agreement of 28 July 1994 relating to the Implementation of Part XI of the Convention. A copy of the Declaration is available at OJ L 179/129, 23.6.98

[14] Proposal for a Directive 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) COM(2005) 505 final, Brussels, 24.10.2005.

aimed at the protection and conservation of the marine environment in a holistic or homogenous manner.

The reasons for this sector-by-sector approach to the regulation of maritime activities have never been fully explained in the official publications of the EU institutions although one leading authority has suggested that the absence of such measures facilitated amongst other matters the discharge of radioactive substances into the sea and allowed Member States a degree of independence in influencing the conservation decisions taken by international organisations with responsibility for the protection of the marine environment.[15] Whether this is a valid assessment or not, it now appears that the first important initiative in the progressive development of a new European approach to the management of the marine environment was the adoption of the *Thematic Strategy for the Protection and Conservation of the Marine Environment* by the European Council and European Parliament as part of the Sixth Community Environment Action Programme in 2002.[16] Once again it is important to appreciate that thematic strategies by themselves are not legally binding and have little practical effect in the Member States unless they are followed by more substantive legislative measures in the form of European directives or regulations. The importance of thematic strategies in the policy process should not be discounted however as they allow the European institutions to articulate broad policy objectives on topics such as natural resource management.[17] How this process works in practice can be seen when one examines the objectives of the *Thematic Strategy on the Marine Environment*

[15] L. Kramer, *EC Environmental Law*, 6th Edition, (London, Sweet and Maxwell, 2010) p. 299. Professor Kramer is well placed to make such comments as the former Head of the Unit for Governance in the Directorate-General for the Environment in the European Commission. This placed him at the forefront of regulatory initiatives within the European institutions in the field of environmental policy over the past three decades. With the benefit of hindsight, however, there appears to be a number of valid reasons for the sector approach in so far as the EU shares legal competence with Member States in relation to the regulation of many marine matters outside of the domain of the conservation of fisheries conservation where the EU has exclusive legal competence. Moreover, similar to national administrations in the Member States, the vertical organisation of the Commission, with separate Directorates General for different marine matters such as the environment and transport facilitated the implementation of the sector approach.

[16] Council Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme OJ L 242, 10.9.2002, p. 1. Referred to as the *Thematic Strategy on the Marine Environment* herein after. For a commentary on the European Community and the development of the strategy on the marine environment, see, V. Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea: Implementing Global Obligations at the Regional Level* (Leiden, Martinus Nijhoff, 2007) 94-105.

[17] Thematic strategies have been adopted for the following: air; waste prevention and recycling; marine environment; soil; pesticides, natural resources; and the urban environment. They are scheduled for review in 2010, for further information see: http://ec.europa.eu/environment/newprg/strategies_en.htm

which is aimed at promoting the sustainable use of the seas and the conservation of marine ecosystems with a view to ensuring that current and future generations enjoy the benefits from biologically diverse and dynamic oceans and seas.[18] From a legal perspective, this is little more than a political statement and legal substance was only added when preparatory work commenced within the European institutions on the drafting of the MSFD in 2002. This in turn took over two years to complete as it entailed extensive consultation with, *inter alia*: specialist regulatory bodies in the Member States; non EU countries sharing regional seas with the Member States; sixteen international organisations concerned with the management of the marine environment; as well as various interest groups representing civil society, the scientific community and offshore industries.[19] Much of this consultation was focused on discussing matters of common concern such as: the application of the ecosystem-based approach to the management of offshore activities, as well as scientific monitoring and assessment issues.[20] In general, the consultation process revealed that the principal threats to the European marine environment stemmed from a broad spectrum of natural and anthropogenic activities including "the effects of climate change; impacts of commercial fishing; oil spills and discharges; introduction of non-native species; eutrophication and the related growth of harmful algal blooms; litter pollution; contamination by dangerous substances and microbiological pollution; radionuclide discharges; and noise pollution".[21]

In 2005, the Commission reviewed a number of policy and regulatory options on how best to respond to these threats.[22] Overall, the range of options reviewed were wide-ranging and included: not taking any action at an EU level, tightening up existing legislation, loose coordination of Member State action, the adoption of a prescriptive

[18] Communication from the Commission to the Council and the European Parliament, Thematic Strategy on the Protection and Conservation of the Marine Environment, COM(2005)504 final, Brussels, 24.10.2005, p.4.
[19] Proposal for a Directive 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) COM(2005) 505 final, Brussels, 24.10.2005, p. 4.
[20] As part of the preparatory phase, a number of specialist reports were delivered under the auspices of the International Council for the Exploration of the Sea and the European Joint Research Centre at Ispra, Italy. These included: a guidance document on the application of the ecosystem-based approach to the marine environment; and a study on the identification of marine regions on the basis of hydrological, oceanographic and bio-geographic features to guide implementation of the *Thematic Strategy on the Marine Environment*. These reports are available at: http://www.ices.dk/indexfla.asp
[21] COM(2005) 505 final, Brussels, 24.10.2005, p. 5.
[22] SEC(2005) 129, Brussels, 24.10.2005.

instrument in the form of a regulation or a relatively inflexible directive, a voluntary approach by Member States to management measures based upon a non-binding EU recommendation, or the adoption of a flexible instrument in the form of a framework instrument which would be "ambitious in its scope but not overly prescriptive in its tools".[23] On the basis of the findings of the review which made a compelling case that effective and firm action was urgently required at an EU level, the Commission went for the latter option and brought forward a draft proposal for a European Directive establishing a framework for community action in the field of marine environmental policy.[24] Surprisingly, the extensive period of consultation did not lead to a speedy transit for the draft legislation through the European institutions as this was only completed in 2008, an incredible six years after the publication of the *Thematic Strategy on the Marine Environment* and two years and eight months after the Commission had first introduced their legislative proposal. When one now looks back, however, part of this delay may be attributed to the diametrically opposed positions taken by environmental and economic interests in the Member States regarding the content of the draft Directive.[25] Also, there is little doubt but that the 117 amendments to the draft instrument initially tabled by the European Parliament contributed to the delay in the law-making process.[26] That said, the scale and rigour of parliamentary scrutiny of the draft MSFD was not unusual as the European Parliament has traditionally played a prominent and progressive role in strengthening environmental legislation and in asserting EU competence regarding the regulation and use of natural resources.[27]

A brief perusal of the parliamentary amendments reveals that many of them were aimed at cutting the time afforded to Member States in implementing the Directive, ensuring that the technical aspects of achieving GES were comprehensively addressed in the instrument, and ensuring that the level of cooperation between Member States and third countries required by the Directive is in keeping with international

[23] COM(2005) 505 final, Brussels, 24.10.2005.
[24] http://www.europarl.europa.eu/oeil/OpenDetailFiche.do?ficheId=346&language=en
[25] On the various tensions at play during the drafting process see, *inter alia*: M. Salomon "The European Commission proposal for a Marine Strategy: Lacking substance" (2006) 52 *Marine Pollution Bulletin* 1328–1329; L. Mee *et al*., "How good is good? Human values and Europe's proposed Marine Strategy Directive" (2008) 56 *Marine Pollution Bulletin* 187–204; L. Juda, "The European Union and Ocean Use Management: The Marine Strategy and the Maritime Policy," (2007) 38 *ODIL* 259–282.
[26] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0005:FIN:EN:PDF
[27] L. Kramer, *EC Environmental Law*, 6th Edition, (London, Sweet and Maxwell, 2007) 46-48.

environmental agreements that are binding on the EU and the Member States.[28] Despite the unseemly delay, the legislative process was completed when the Council and Parliament finally agreed on a compromise package of 54 amendments as part of their joint law-making powers under the EC Treaty.[29] This allowed both institutions to adopt a "common position" on the draft legislation on the 17th June 2008, and the Directive entered in to force twenty days after its publication in the Official Journal of the European Union on the 14th July 2008.[30] Since then, the MSFD has quickly established itself as the cornerstone of all future EU regulatory measures that are applicable to the marine environment.

Before delving into its unique regulatory features and conceptual basis, it may be useful at this point in the discussion to provide a brief overview of the MSFD. Briefly stated, the Directive provides for the establishment of marine regions / sub-regions on the basis of geographical and environmental criteria. Each Member State is required by 2012 to develop strategies for sea areas under their sovereignty and jurisdiction and these must contain a detailed assessment of the state of the environment, a definition of GES at a regional level, as well as the establishment of clear environmental targets and monitoring programmes. Each Member State must then draw up a programme of cost-effective measures by 2015 in coordination with other Member States in their marine region. Prior to the implementation of any new measure there is a requirement to undertake an impact assessment which contains a detailed cost-benefit analysis of the proposed measures. Where Member States cannot reach the environmental targets, the MSFD provides a legal basis for the adoption of EU measures. The overall aim of the Directive is to protect the resource base upon which all marine-related economic and social activities depend and this requires all Member States to achieve GES of marine waters by 2020 at the latest.

Conceptual approach underpinning the MSFD

[28] For the various parliamentary amendments see:
http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=2&procnum=COD/2005/0211
[29] This procedure was laid down in Art 251 of the EC Treaty which is now repealed and replaced by Art 291 of the Treaty on the Functioning of the European Union.
[30] OJ C 242 E, 16.10.2007, p. 11.

The conceptual approach to environmental protection and natural resources management underpinning the MSFD reflects a number of important normative principles on environmental policy that are enshrined in the Treaty on the Functioning of the European Union including the precautionary principle, and the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.[31] Although not justiciable *per se*, these treaty principles are often used by the European institutions as a guide in law-making to the substance and form of secondary legal instruments which address particular aspects of environmental protection and natural resource management. Indeed, the preamble of the MSFD expressly provides that the action taken by Member States pursuant to its objectives should be based on the "principles referred to in Article 174 of the Treaty, in particular the precautionary principle." [32] In addition, these principles have acquired somewhat of an elevated status in the European legal order because they are relied upon by the ECJ as an interpretative tool in contentious cases where there are competing trade or environmental interests.[33] These principles are therefore central to our understanding of where the MSFD fits within the broader scheme of EU environmental and natural resources law. In this context, it is important to keep in mind that the MSFD is predicated on the view that a high level of marine environmental protection is a *sine qua non* for the EU to realise the full economic potential of the marine resources and ecological services that are available in sea areas under the sovereignty and jurisdiction of the Member States.[34] The *raison d'etre* for European legislative action in this particular field is based not only on the traditional inadequacy of European legal instruments in protecting and preserving the marine environment but is also intended to address the failure of the

[31] Art 191 of the Treaty on the Functioning of the European Union. For a discussion of these principles see, L. Kramer, EC Environmental Law, 6th Edition, (London, Sweet and Maxwell, 2007) pp.14-29.

[32] Recital 44 of Directive 2008/56/EC. This principle is now codified in Art 191(2) of the Treaty on the Functioning of the EU. In Case T 74 and 76 *Artegodan v Commission* [2002] ECR II-327, the European Court of First Instance held that the precautionary principle can be defined "as a general principle of Community law requiring the competent authorities to take appropriate measures to prevent specific potential risks to public health, safety and the environment, by giving precedence to the requirements relating to the protection of those interests over economic interests". On the application of the principle see N. de Sadeleer, "The Precautionary Principle in EC Health and Environmental Law" 2006 (12)(2) *European Law Journal* pp. 139-172.

[33] See, for example, *inter* alia: Case 302/86 *Commission v Denmark* [1988] ECR 4607; Case C-2/90 *Commission v Belgium* [1992] ECR I-4431; Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213.

[34] See, Note from the European Council, Brussels, 4 June 2010. http://register.consilium.europa.eu/pdf/en/10/st10/st10545.en10.pdf

Member States to undertake sufficient scientific monitoring of the status of the ocean environment, as well as the natural resources and ecological systems that it supports.[35]

Apart from being firmly rooted in the environmental provisions of the Treaty on the Functioning of the EU, one notable feature of the MSFD from a normative perspective is that it provides a solid legal basis for the application of an ecosystems based approach to the management of human activities affecting the marine environment and ecological systems, all with a view to ensuring that they are not irreversibly damaged by the cumulative affects of natural and anthropogenic pressures.[36] Although expert opinion is somewhat divided on what this means in practice, there appears to be some consensus among expert opinion that it will entail the adoption of an integrated management solution to the various "stand alone" maritime sector activities such as fishing and maritime transport, as well the mitigation of the demands placed on the ocean environment to ensure that it continues to deliver essential goods and services for present and future generations.[37]

In this context, the MSFD is a clear articulation of the obligation enshrined in both the Treaty on the Functioning of the EU and the Charter of Fundamental Rights that environmental protection requirements must be integrated into the definition and implementation of the EU's policies and activities with a view to promoting sustainable development.[38] The MSFD, however, goes much further than simply requiring the integration of environmental principles into EU policies in so far as it establishes a science-driven and iterative process for environmental management which acknowledges that the status of marine ecosystems may evolve over time with the different patterns of human activities and in response to different impacts including those attributed to climate change.[39]

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[35] Communication from the Commission to the Council and the European Parliament, Thematic Strategy on the Protection and Conservation of the Marine Environment, COM(2005)504 final, Brussels, 24.10.2005, p.4.

[36] Recital 44 and Art 2(3) of Directive 2008/56/EC

[37] See, for example, the evidence of the European Commission to the UK House of Lords Select Committee on the EU. UK House of Lords Paper 146-II. European Union Committee. 21st Report. *The Progress of the Common Fisheries Policy*. Volume II: Report. Chairman: Lord Sewel. Session 2007-08, at 209. Available at: http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/146/146.pdf.

[38] Article 11 of the Treaty on the Functioning of the European Union. Article 37 of the Charter of Fundamental Rights.

[39] Recital 34 of Directive 2008/56/EC

For this reason, the normative framework established by the Directive is designed to take into account scientific and technological development, and remains flexible enough to respond to the various threats and pressures posed by human activities to marine ecosystems in the future.[40] In some instances, this may entail the application of a graduated or incremental response on a regional basis as the EU shares responsibility for the management of the regional seas with non-EU countries (referred to as "third countries") such as the Russian Federation in the Baltic Sea, and with over a dozen third countries in the Mediterranean Sea,[41] and with four third countries in the Black Sea.[42] Likewise in the north-east Atlantic, responsibility for the management of the marine environment is shared with Norway and Iceland among others. [43] In practice, few of these countries, apart from the latter two, have perhaps the same technical capacity and resources available to them as the EU with a view to taking measures aimed at the conservation, protection and restoration of ecosystems in the marine environment in line with broad objectives of the MSFD. This will undoubtedly become a key issue that will need to be reconciled in the fullness of time if the normative framework established by the MSFD is to achieve its full potential at a regional sea level.

Relationship with other legal instruments

The MSFD cannot be read as a standalone legislative act as it is intended to complement a number of other European, regional and international instruments.[44] In particular, it is intended to provide a regulatory platform for implementing the environmental objectives of the European Integrated Maritime Policy.[45] The latter started as a political initiative within the European institutions when the Commission decided that the creation of such a policy was one of its strategic objectives for the period 2005-2009.[46] The overall aim of this policy is to develop a thriving maritime

[40] Recital 34 of Directive 2008/56/EC
[41] Morocco; Algeria, Tunisia, Libya, Egypt, Israel, Lebanon, Syria, Turkey, Albania, Macedonia, Bosnia, and Croatia.
[42] Georgia, Russia, Turkey and Ukraine.
[43] Iceland is a candidate State for accession to the EU. Negotiations were also opened with Turkey and Croatia in 2008. http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1011&type=HTML
[44] Recital 9 of Directive 2008/56/EC.
[45] Recital 3 of Directive 2008/56/EC
[46] *Op.cit.*, note 11.

economy in an environmentally sustainable manner. Initially, it consisted of a number of soft law instruments aimed at improving ocean governance.[47] These in turn paved the way for the adoption of the MSFD as black letter law but relatively flexible instrument linking a whole raft of EU secondary legislation and regional agreements that are applicable to the marine environment. How this complex relationship is intended to work in practice can be seen if we look at a number of examples of how the MSFD is linked to other instruments.

First and foremost, the MSFD is firmly linked to the European Habitats and Birds Directives which provide a legal basis for the designation of protected areas in sea areas under the sovereignty and jurisdiction of the Member States.[48] A brief inspection reveals that there are a number of common threads running through these Directives. The monitoring programmes for the ongoing assessment of the environmental status of marine waters implemented by Member States pursuant to the MSFD, for example, must be compatible with the relevant provisions for assessment and monitoring set down by the Habitats and Birds Directives.[49] On a similar vein, the MSFD sets down a specific obligation on the Commission to report to the European Parliament and Council on the progress made by Member States in establishing marine protected areas having regard to the obligations that arise under EU and international law.[50] From a multilateral treaty point of view, this linkage sits very comfortably with the position taken by the EU at a number of international fora regarding the need for the application of spatially based conservation measures to protect marine biodiversity in sea areas both within and beyond national jurisdiction.[51] Noteably, it will allow the EU to make a significant contribution towards discharging the 2002 World Summit on Sustainable Development goal of establishing a global

[47] *Ibid*.

[48] Art 13(4) of Directive 2008/56/EC. 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. Directive as last amended by Directive 2006/105/EC (OJ L 363, 20.12.2006, p. 368). Council Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, OJ 2010 L20/7.

[49] Art 11(1) of Directive 2008/56/EC.

[50] Art 21(4) of Directive 2008/56/EC.

[51] See, for example, EU Presidency Statement at the United Nations 6th Committee: Agenda item 5(c) - The role of area-based management tools. Available at: http://www.europa-eu-un.org/articles/en/article_7850_en.htm. One notable initiative by a Member State in this regard has been the designation of the "Rainbow" hydrothermal vent field, located on the Portuguese continental shelf beyond the 200 nautical mile EEZ, as a special area of conservation under the Habitats Directive. See R. M. Chantal, The 'Rainbow': The First National Marine Protected Area Proposed Under the High Seas, (2010) *IJMCL* 25(2) 183-207

network of marine protected areas by 2012.[52] This approach is also fully consistent with the programme of work on halting the loss of marine and coastal biodiversity adopted by the Seventh Conference of the Parties to the 1992 Convention on Biological Diversity.[53]

In light of the fact that one of the primary forms of marine pollution is pollution from land-based sources, the regulatory structure established by the MSFD is closely interwoven with the Water Framework Directive which requires Member States to achieve good ecological and chemical status in their terrestrial and coastal water bodies by 2015.[54] The latter instrument has only very limited application to the coastal environment and the precise geographical overlap of the two instruments is examined in further detail below.[55] Suffice to note here that the methodology and the criteria set down in the MSFD for the attainment of GES builds upon existing obligations that arise under the Water Framework Directive.[56] For instance, the initial assessment of the environmental status of marine waters under the MSFD must take into account the results of the assessment of coastal and transitional waters under the Water Framework Directive.[57] Similarly, the programme of measures adopted by Member States as part their marine strategies to achieve GES must take into account relevant measures that have already been adopted under the Water Framework Directive.[58] These linkages are facilitated by the establishment of a number of new administrative structures at a European level each tasked with overseeing the coordination of Member State actions under both Directives.[59] In some instances, this may entail joint action between Member States and third countries using the

[52] Johannesburg Plan of Implementation, para 32 (d). Available at: www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf.
[53] Recital 18 of Directive 2008/56/EC
[54] 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, 22.12.2000, p. 1. Directive as last amended by Directive 2008/32/EC (OJ L 81, 20.3.2008, p. 60). On the relationship between the two instruments, see, A. Borja *et al.*, "Marine management – Towards an integrated implementation of the European Marine Strategy Framework and the Water Framework Directives" 2010 *Marine Pollution Bulletin* (in press) 12 pp.
[55] See discussion of the geographical scope of application of Directive 2008/56/EC *infra.*
[56] See discussion of good environmental status of Directive 2008/56/EC *infra*
[57] Art 8(2) of Directive 2008/56/EC.
[58] Art 13(2) of Directive 2008/56/EC.
[59] Recital 12 and Art 6(2) of Directive 2008/56/EC. See evaluation of the Directive *infra.*

institutional structures that have been established for managing transboundary rivers.[60]

Perhaps the regulatory linkage that has the potential for the greatest controversy is the link between the MSFD and the European common fisheries policy (CFP).[61] The latter policy provides for the adoption of a broad range of EU legal measures concerning, *inter alia*: the management of living aquatic resources; technical restrictions on the environmental impact of fishing; conditions of access to waters and resources for fishing vessels; a structural policy for the management of the fishing fleet in the Member States; as well as enforcement measures applicable to the fisheries sector.[62] Moreover, the scope of the policy extends to aquaculture, the common organization of the market in fishery products, bilateral relations between the EU and third countries, as well as general international relations on fisheries matters. In some instances, achieving the objectives of the MSFD may entail the adoption of additional fisheries management measures under the CFP with a view to maintaining or restoring fish stocks, as well as to ensure the structure and functioning of ecosystems.[63] Indeed, one of the qualitative criteria for determining GES under the MSFD is focused on ensuring that the populations of all commercially exploited fish and shellfish are within safe biological limits and exhibit characteristics that are consistent with healthy stocks.[64] Although the specification of such a criterion in the regulatory framework clearly establishes a firm bond between the MSFD and the CFP, it is important to emphasise that fishery management measures can only be taken by the EU institutions following the procedures set down by the Treaty on the

[60] Art 13 (5) of Directive 2008/56/EC. The EU is party to a number of international conventions concerning rivers including; the Bonn Convention for the Protection of the Rhine against Chemical Pollution which is given effect by Council Decision 77/586 [1977] OJ L240/35; the Helsinki Convention on the Protection and use of Transboundary Watercourses and International Lakes given effect by Council Decision 95/308, OJ L 186/42.

[61] See, *inter alia*: Hans-Joachim Rätz *et al.*, "Complementary roles of European and national institutions under the Common Fisheries Policy and the Marine Strategy Framework Directive" *op. cit.* note 5; J. Wakefield, 'Undermining the Integrated Maritime Policy', (2010) 60 *Marine Pollution Bulletin* 323-333.

[62] For a comprehensive discussion of the law applicable to the CFP, see, R.R. Churchill, D. Owen, *The EU Common Fisheries Policy* (Oxford: Oxford University Press, 2010) *passim*.

[63] Recital 9 of Directive 2008/56/EC.

[64] See, para 3 of Annex I of Directive 2008/56/EC, and Descriptor 1, Part B of the Annex to Commission Decision of 1 September 2010 on criteria and methodological standards on GES of marine waters, OJ L 232/14, 2.9.2010

Functioning of the EU for the adoption of fishery conservation measures.[65] In other words, the MSFD does not provide a legal basis for Member States to adopt unilateral conservation or management measures aimed at safeguarding fish stocks or marine ecosystems. On the contrary, the power of Member States in fisheries management is limited by the MSFD to making recommendations to the Commission when action cannot be taken at a national level and where EU measures are needed.[66] In the long-term, this should not prove to be an insurmountable obstacle to the implementation of the ecosystem approach under the MSFD as considerable efforts have been undertaken over the past decade to apply this approach to the management of EU fisheries by means of the regulatory measures giving effect to the CFP.[67] We can therefore expect that the precise nature of the relationship between the MSFD and the CFP will be subject to additional consolidation and harmonisation when the CFP is subject to further reform in 2012.[68]

On the broader landscape of international law, the MSFD is aimed at fulfilling a number of obligations that arise under the 1982 United Nations Convention on the Law of the Sea (1982 UNCLOS).[69] Although it is beyond the scope of this article to examine this linkage in any great detail it should be mentioned that the 1982 UNCLOS obliges all states parties, including the EU which is party to the treaty in its own right, to protect and preserve the marine environment.[70] The MSFD is therefore directly relevant to fulfilling the general duty that arises for all parties to the 1982 UNCLOS, to take all measures that are necessary to prevent, reduce and control pollution of the marine environment, as well as the more specific obligations not to transfer damage or hazards from one area to another, or transform one type of

[65] Arts 38-44 of the Treaty on the Functioning of the EU. The precise procedures are set down in 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.
[66] Art 15 of Directive 2008/56/EC.
[67] See European Commission's evidence to the UK House of Lords, 2008, Paper 146-II, p. 209 which that these include measures to protect specific vulnerable habitats, to reduce incidental by-catch of sea mammals, to protect specific stocks on which sea bird colonies depend, or to ban destructive fishing practices. On the role of the CFP in implementing an ecosystem approach to marine management, see Communication from the Commission - COM(2008) 187.
[68] See Green Paper on the Reform of the Common Fisheries Policy COM (2009) 163 final, p. 19.
[69] United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 397; Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, 17 August 1994, 33 ILM 1309 (1994), in force since 28 July 1996. Both the EU and the 27 Member States are party to the 1982 United Nations Convention on the Law of the Sea and the 1994 Implementation Agreement. See http://www.un.org/Depts/los/index.htm.
[70] Art 192 of the 1982 UNCLOS.

pollution into another.[71] In line with the 1982 UNCLOS, the MSFD aims to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.[72] On a regional basis, the MSFD will assist Member States in meeting their obligations under several regional treaties applicable to the marine environment including: the Convention on the Protection of the Marine Environment of the Baltic Sea Area ;[73] the Convention for the Protection of the Marine Environment of the North-East Atlantic:[74] the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean;[75] the Protocol for the Protection of the Mediterranean Sea Against Pollution from Land-Based Sources.[76] Similarly, the MSFD will contribute to the fulfilment of the obligations that arise for Bulgaria and Romania under the 1992 Convention on the Protection of the Black Sea against Pollution.[77] As will be seen below, this linkage between the MSFD and the regional treaties is very much a symbiotic partnership as it will entail the EU and the Member States using the regional institutional structures under these treaties to help deliver some of the key policy objectives of the Directive.[78]

From this brief review, it is evident that the MSFD establishes a regulatory structure that is intended to bind together a broad range of EU secondary legislation, regional and international agreements. In some instance, the Directive aims to add to existing law which provide for the protection of the terrestrial or coastal environment. For example, the regulation of discharges and emissions resulting from the use of radioactive material will continue to be addressed at an EU level through the Euratom

[71] Arts 194 and 195 of the 1982 UNCLOS. See Recital 17 of Directive 2008/56/EC.
[72] Art 194(5) of 1982 UNCLOS
[73] Approved by Council Decision 94/157/EC, OJ L 73, 16.3.1994, p. 19
[74] Approved by Council Decision 98/249/EC, OJ L 104, 3.4.1998, p. 1. Annex V of the Convention and its corresponding Appendix 3 was approved by Council Decision 2000/340/EC, OJ L 118, 19.5.2000, p. 44.
[75] Approved by Council Decision 77/585/EEC OJ L 240, 19.9.1977, p. 1. and its amendments from 1995, approved by Council Decision 1999/802/EC, OJ L 322, 14.12.1999, p. 32.
[76] Approved by Council Decision 83/101/EEC OJ L 67, 12.3.1983, p. 1., and its amendments from 1996, approved by Council Decision 1999/801/EC OJ L 322, 14.12.1999, p. 18.
[77] At the time of writing, the EU was not party to this agreement but enjoys observer status at the meetings of Contracting Parties. Bulgaria and Romania are however party to this Convention. The other parties are the Russian Federation, Georgia, Turkey and Ukraine. Into force 15 January 1994. 1764 U.N.T.S. 4.
[78] The relationship between Directive 2008/56/EC and the regional treaties is subject to further study under the 7th Framework Research Project, ODEMM. Further information: http://www.liv.ac.uk/odemm/.

Treaty and not through the framework set down by the MSFD.[79] Although this issue is only raised in the preamble of the Directive, such an approach is quite ironic in light of the protracted litigation between Ireland and the UK concerning the MOX Plant mentioned above in the introduction to this article.[80] Similarly, regulatory instruments, such as the Nitrates Directive, the Bathing Water Directive and the Urban Waste Water Directive, that are predominantly focused on preventing specific types of land-based pollution of the aquatic environment, are not replaced by the MSFD but make an important contribution towards the attainment of its objectives. [81] In other words, the MSFD sets a goal for Member States to achieve, GES for their waters, but it does not itself lay down any substantive measures to attain that goal. In this context, however, it should not be forgotten that the Directive provides for future regulatory action at an EU level to address specific concerns regarding the protection and preservation of the marine environment. More specifically, where a Member State identifies an issue which has an impact on the environmental status of marine waters but which cannot be tackled by measures taken at national level or which is linked to another EU policy or to an international agreement, then the Directive provides that they must notify the Commission and make appropriate recommendation for action at an EU level.[82] Moreover, the Commission must respond to any such recommendation within a period of six months and, as appropriate, reflect the Member State recommendations when presenting related proposals to the European Parliament and to the Council.[83] Accordingly, the relationship between the MSFD and other legal instruments is dynamic and can be expected to evolve over time on the basis of experience encountered in the implementation process.

Legal form, structure and content of the MSFD

[79] Recital 19 of Directive 2008/56/EC. Articles 30 and 31 of the Euratom Treaty
[80] See note 2 *supra*.
[81] Directive 91/676/EEC, OJ L 375/1, 31.12.1991; Directive 91/271/EEC, OJ L 135/40, 30.5.1991; Directive 2006/7/EC, OJ L 64/37, 4.3.2006.
[82] Art 15(1) of Directive 2008/56/EC.
[83] Art 15(1) of Directive 2008/56/EC.

The MSFD is addressed to the Member States of the EU.[84] The reference to "framework" in the title of the Directive does not have any great legal significance apart from signalling that it is putting in place a legislative scheme within which the Member States and the Commission must act and which may be enhanced by the adoption of more specific measures in the fullness of time.[85] The selection of this particular form of legal instrument, that is to say a directive as opposed to a regulation, calls for a number of comments. First of all, there is nothing unusual in this choice as directives are the main instruments of harmonisation used by the EU institutions to coordinate Member State regulatory action in a particular field such as energy, or to harmonise the disparate laws of the Member States in areas such as environmental protection. Furthermore, the rules governing the transposition of environmental directives into national law in the Member States are well settled and have been clarified by the ECJ in a series of cases concerning matters such as the protection of drinking water, the management of waste, and the need to undertake environmental impact assessment for certain categories of public and private development projects.[86] Importantly, directives offer a unique form of harmonisation in so far as they bind Member States as to the result to be achieved by European law but leave the choice of form to the national authorities in the Member States.[87] This means that implementation need not be uniform in every Member State provided national transposition measures achieve the overall aim of the directive in practice. Despite the flexibility offered to Member States by this form of legislation, it is important to emphasise that the transposition of the provisions directives into national law must be achieved by binding legal instrument where they establish quality standards, give legal rights to individuals, and where legal certainty and transparency are required.[88] In recent years, the general trend is for environmental directives to be very general in nature and far less prescriptive than regulations.[89] The MSFD is very

[84] Art 28 of Directive 2008/56/EC.
[85] See, for example, Commission Decision of 1 September 2010 on criteria and methodological standards on GES of marine waters, OJ L 232/14, 2.9.2010 discussed *infra*.
[86] Case C-337/89 *Commission v UK* [1992] ECR I-6103; Case C-56/90 *Commission v United Kingdom* [1993] ECR I-4109; Case C-494/01 *Commission v Ireland* [2005] ECR I-3331; Case C-287/98 *Luxemburg v Linster* [2000] ECR 1-6917.
[87] Art 288, Treaty on the Functioning of the European Union
[88] Case C-96/81 *Commission v Netherlands* [1982] ECR 1791; Case C-131/88 *Commission v Germany* [1991] ECR 1-825; Case 361/88 *Commission v Germany* [1991] ECR I-2567; Case C-58/89 *Commission v Germany* [1991] ECR I-4983; Case C-13/90, *Commission v France* [1991] ECR I-4327; Case C-262/95 *Commission v Germany* [1996] ECR I-5729.
[89] *L* Kramer, EC Environmental Law, 6th Edition, (London, Sweet and Maxwell, 2008) p.

typical of this approach and it could be argued as a result that many of its provisions are insufficiently clear and precise to be pleaded by a private individual in a national Court if a Member States fails to adopt appropriate transposition or implementation measures.[90] For instance, it is unlikely that the general obligation placed on Member States under the MSFD to achieve or maintain GES of marine waters by the year 2020 at the latest could be used as a legal basis for private individuals to take enforcement proceedings in a national Court against statutory bodies on the grounds that they had failed to adequately protect the marine environment.[91] This is not such a major lacuna in the regulatory framework as it first appears in so far as there is a general requirement under EU law for public bodies within the Member States, such as the Environmental Protection Agencies in the United Kingdom and Ireland, to give proper effect to secondary legislation within the prescribed time limits, otherwise the parent Member State may be subject to enforcement proceedings in the ECJ at the behest of the Commission or another Member State.[92] In such an instance, experience regarding the implementation of other EU environmental directives suggest, it may not be open to a Member State to argue that it is taking all reasonable steps to achieve GES of marine waters if it has not complied with the specific requirements of the Directive.[93] That being said, the principal point for the purpose of this article is that any putative legal challenge by private individuals or non-governmental organisations based on the failure of a Member State to properly implement the MSFD is more likely to be about process than about the attainment of a particular standard in relation to the quality of the marine environment.[94]

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[90] This is referred to as the doctrine of direct effect in EU law. The jurisprudence of the Court has been slightly inconsistent on this point, contrast, for example, Case C-236/92 *Comitato di Coordinamento per la Difesa della Cava v. Regione Lombardia* [1994] ECR 1-483 with Case C-365/97 *Commission* v. *Italy* [1999] ECR I-7773 where the court held that general measures did not have direct effect. On the other hand, if Member States goes beyond the bounds of discretion by failing to implement the Directive properly, then its provisions may be capable of being enforced in national courts through the application of the concept of useful effect which has been developed by the ECJ in its jurisprudence dealing with the discretion afforded to Member States in implementing the directive on environmental impact assessment in cases such as C-72/95 *Aanemersbedrijf P. K. Kraaijeveld v Gedeputeerde Staten van Zuid-Hooland* [1996] ECR I-5403 and Case C-287/98 *Luxembourg v Linster* [2000] ECR I-6917.

[91] For a similar analogy in relation to the direct effect of provisions in the Water Framework Directive see S. Bell, D. McGillivray *Environmental Law* (Oxford University Press, Oxford, 2008), pp 209-210.

[92] Arts 258-259 of the Treaty on the Functioning of the EU.

[93] Thus, for example, the ECJ rejected a similar argument from the UK that it had taken all reasonable steps to comply with the Drinking Water Directive in Case C-337/89, *Commission v United Kingdom* [1992] ECR 6102.

[94] A similar point is made in relation to the Water Framework Directive by S. Bell, D. McGillivray *Environmental Law* (University Press, Oxford, 2008) at 595.

Moving on to the structure of the MSFD, the first notable feature is that it is a relatively brief instrument which runs to 21 pages in the Official Journal of the EU. This may be compared to the new generation of European environmental directives such as the Water Framework Directive which on occasion can exceed 60 pages in length. Again as is the norm with other EU environmental directives, the substantive text of the MSFD is preceded by a lengthy preamble which indicates the legal basis for the instrument in the EC Treaty,[95] the European institutional bodies which were consulted in the law-making process and the procedure that was followed,[96] as well as the detailed reasons for its enactment. The statement of such an elaborate list of reasons in the preamble not only provides all interested parties with very useful political and legal insights on the *raison d'être* for the MSFD but may also stave off any future challenge to the legality of the instrument in judicial review proceedings before the ECJ on the grounds of insufficient "reasons for enactment".[97] In the case of the MSFD, it may be reasonable to assume that such a challenge is unlikely to be successful in light of the lengthy and substantial reasons cited for its enactment.

Following on from the elaborate nature of the preamble, the substantive text of the MSFD is well structured and easy to follow. This is facilitated by division of the instrument into five chapters, the first of which sets out the subject matter, scope, definitions, marine regions and sub-regions, marine strategies, rules for coordination and cooperation between Member States and competent authorities.[98] The second chapter deals with the preparation of marine strategies and has provisions on assessment, determination of good environmental status, establishment of environmental targets, monitoring programmes, notification and assessment.[99] The third chapter deals with programmes of measures, exceptions, recommendations for Community action, notification and Commission's assessment.[100] The penultimate chapter addresses the important issues of updating, interim reports, public consultation and information, Commission reports, progress reports on protected

[95] Art 175(1) EC Treaty
[96] The European Economic and Social Committee, the Committee of the Regions, and Art 251 of the EC Treaty which set out the co-decision procedure that must be followed by the Council and Parliament when adopting joint measures.
[97] The absence of sufficient reasons may result in annulment of a measure by the EU courts, see, for example, Case T-471/93 *Tiercé Ladbroke SA v Commission* [1995] ECR II-2537.
[98] Arts 1 through to 7 of Directive 2008/56/EC
[99] Arts 8 through to 12 of Directive 2008/56/EC
[100] Arts 13 through to 16 of Directive 2008/56/EC

areas, Community financing and the future review of the Directive.[101] The final chapter provides for technical adaptations, regulatory committee, transposition, entry into force and addressees.[102] Throughout the text of the Directive, there are many ambulatory references to the six technical Annexes which are appended to the instrument and address the following: qualitative descriptors for determining good environmental status;[103] competent authorities in the Member States;[104] indicative lists of characteristics, pressures and impacts;[105] monitoring programmes and programme of measures.[106] The placing of much of the technical detail in the Annexes is to be welcomed from a drafting technique point of view as it will undoubtedly facilitate the future amendment and updating of the MSFD in light of scientific and technical progress.

Geographical scope of application

As is well known, one weakness in EU law over the past three decades has been the failure of the EU legislature to explicitly state the geographical scope of application of secondary legislation. In one high profile case, this omission led to litigation in the ECJ regarding the precise extent of the geographical applicability of the Habitats Directive to the marine environment.[107] Fortunately, this failure does not extend to the MSFD which has specific provisions regarding its geographical scope of application in sea areas under the sovereignty and jurisdiction of the Member States. More specifically, these provide that it applies to "marine waters" which means, *inter alia*: "the waters, the seabed and subsoil on the seaward side of the baseline from which the extent of territorial waters is measured extending to the outmost reach of the area where a Member State has and/or exercises jurisdictional rights, in accordance with the 1982 United Nations Law of the Sea Convention".[108] The Directive consequently applies to the following maritime jurisdictional zones: the territorial sea; the exclusive economic zone (EEZ), or in the case of the UK which

[101] Arts 17 through to 23 of Directive 2008/56/EC
[102] Arts 24 through to 28 of Directive 2008/56/EC
[103] Annex 1 of Directive 2008/56/EC
[104] Annex II of Directive 2008/56/EC
[105] Annex III of Directive 2008/56/EC
[106] Annexes V and VI of Directive 2008/56/EC
[107] Case C-6/04 *Commission v United Kingdom* [2005] ECR I-9017.
[108] Art 3(1)(a) of Directive 2008/56/EC.

does not have an EEZ to the 200 mile renewable energy zone;[109] the continental shelf including potentially those areas of the shelf which extends beyond the 200 mile EEZ.

There are two general qualifications on the geographical scope of application of the MSFD. First, it does not apply to the waters adjacent to the countries and territories mentioned in Annex II to the Treaty and French Overseas Departments and Collectivities.[110] There is nothing unusual in this exception as the overseas territories and dependencies of the Member States often escape the full application of EU law.[111] Secondly, the Directive only applies to coastal waters of the Member States as defined in the Water Framework Directive in so far as the environmental status of those waters is not already addressed in that instrument or in other European legislation.[112] This means that the Water Framework Directive applies to the first nautical mile of the territorial sea on the seaward side of the baselines extending where appropriate up to the outer limit of transitional waters and the MSFD applies to all other marine waters in line with the functional jurisdiction exercised by the coastal Member State under public international law. [113] The seamless overlap of the geographical scope of both instruments (the MSFD and the Water Framework Directive) is an important consideration in light of the fact that river-basin management under the Water Framework Directive and its success in combating pollution from land-based sources via rivers and coastal run-off has a major bearing on the quality of the marine

[109] s. 41 of the Marine and Coastal Access Act 2009 provides for the establishment of an EEZ for the UK by Order in Council. At the time of writing, no such Order has been made.

[110] Art 3(1)(a) of Directive 2008/56/EC. Accordingly, the Directive does not apply to the marine waters of Greenland, New Caledonia and Dependencies, French Polynesia, French Southern and Antarctic Territories, Wallis and Futuna Islands, Mayotte, Saint Pierre and Miquelon, Aruba, Netherlands Antilles, Bonaire, Curaçao, Saba, Sint Eustatius, Sint Maarten, Anguilla, Cayman Islands, Falkland Islands, South Georgia and the South Sandwich Islands, Montserrat, Pitcairn, Saint Helena and Dependencies, British Antarctic Territory, British Indian Ocean Territory, Turks and Caicos Islands, British Virgin Islands, and Bermuda.

[111] See J. Ziller "The European Union and the Territorial Scope Of European Territories" (2007) 38 VUWLR 51-63

[112] See the Explanatory Memorandum prepared by the Department for the Environment, Food and Rural Affairs in the United kingdom on the Marine Strategy Regulations 2010, 2010 No. 1627.

[113] Under Art 2(7) of Directive 2000/60/EC, the term "coastal water" means surface water on the landward side of a line, every point of which is at a distance of one nautical mile on the seaward side from the nearest point of the baseline from which the breadth of territorial waters is measured, extending where appropriate up to the outer limit of transitional waters. Under Art 2(6) of the same Directive, "transitional waters" are described as bodies of surface water in the vicinity of river mouths which are partly saline in character as a result of their proximity to coastal waters but which are substantially influenced by freshwater flows.

environment.[114] For this reason, the MSFD applies to the landlocked states of the EU (Austria, Luxembourg, Slovakia, the Czech Republic, and Hungary) in the catchment area of a marine region or sub-region to the extent that is necessary to allow all Member States to meet their obligations under both Directives.[115]

In practice, applying the Directive in the territorial seas and the EEZ's of the Member States ought to be a relatively straight forward exercise in the Baltic Sea and the North-east Atlantic given the extensive maritime jurisdictional zones claimed by the Member States in those regions. This may be contrasted with the more complex issues that arise in the Mediterranean Sea due to the unique geopolitical features of the region stemming from the absence of EEZs and the competing maritime claims made by coastal States, many of whom are not members of the EU.[116] Similarly, in view of the settled nature of international customary and treaty law, the application of the Direction to the continental shelf of the Member States within 200 miles of the baselines should not be excessively problematic from a legal perpective as long as it does not affect the legal status of the superjacent water or the air space above those waters.[117] Also, its implementation must not infringe or result in any unjustifiable interference with navigation and the other freedoms enjoyed by all States under international law.[118] The application of the Directive to the "outer continental shelf", that is to say where the continental shelf extends beyond 200 miles measured from the baselines of the coastal State, is particularly topical as more and more coastal States, including Member States of the EU, make submissions to the UN Commission on the Limits of the Continental Shelf (CLCS) and the management of the marine environment and marine natural resources in such areas becomes more pressing.[119]

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[114] In the case of the river Rhine, for example, it is estimated that 80% of the overall pollution from the Rhine comes from land-based sources and the successful implementation of the Water Framework Directive will thus have a direct impact on what action needs to be taken in combating pollution in the North Sea. See paper by P. Gammeltoft, General Overview of the Marine Strategy Framework Directive. Available at: http://www.ifremer.fr/2012MarineTargets/actes/Gammeltoft.html.

[115] Art 6(2) of Directive 2008/56/EC. Art 26(3) requires landlocked countries to bring into force only those measures that are necessary to ensure compliance with requirements under Art 6 (Regional Cooperation) and Art 7 (Competent Authorities) of Directive 2008/56/EC.

[116] See, A. Del Vecchio Capotosti "In Maiore Stat Minus: A Note on the EEZ and the Zones of Ecological Protection in the Mediterranean Sea" (2008) 39(3) *ODIL* 287-297.

[117] Art 78(1) of the 1982 UNCLOS.

[118] Art 78(2) of the 1982 UNCLOS.

[119] The CLCS is the international body which is vested with the powers to make a legally binding recommendation to coastal States regarding the establishment of the outer limit of their continental shelf under Art 76(8) of the 1982 UNCLOS. At the time of writing, France, Ireland, Portugal, Spain and the United Kingdom have made submissions to the CLCS.

Suffice to note here that the Directive only applies to the seabed and subsoil of the outer continental shelf in line with the rights accorded to coastal States under international law.[120] Moreover, by utilising the well established institutional structures under the regional seas convention for implementation as opposed to national measures, the MSFD should not jeopardise or hamper the work of the CLCS or unduly impinge upon any current or future negotiations on the delimitation of the continental shelf between Member States with opposite or adjacent coasts. The implementation of the MSFD and the emphasis on the ecosystem approach would thus appear not to jeopardise the delineation and delimitation of maritime boundaries by the Member States in accordance with the relevant provisions of the1982 UNCLOS.

One other point can be made about the geographical scope of the MSFD which is topical and that is its application to other areas of global concern such as the Arctic. Although this is not directly addressed in the substantive provisions of the Directive, the preamble provides us with a useful pointer on EU thinking on this matter in so far as it provides that: "the serious environmental concerns, in particular those due to climate change, relating to the Arctic waters, a neighbouring marine environment of particular importance for the Community, need to be assessed by the Community institutions and may require action to ensure the environmental protection of the Arctic".[121] The importance of such action cannot be overstated in view of the fact that three Member States, Denmark (Greenland), Finland and Sweden, have territories in the Arctic. Also, two other Arctic states, Iceland (a candidate Member State of the EU) and Norway, are members of the European Economic Area. Furthermore, the Commission published a Communication on the EU and the Arctic region in 2008, subsequently endorsed by the Foreign Affairs Council meeting in Brussels in December 2009, which called for the integration of Arctic considerations into EU policies and negotiations. [122] Significantly, in the Communication, the Commission proposed opening-up negotiations with Norway and Iceland on how the MSFD will be integrated into the European Economic Area Agreement and its application to a

[120] Art 77 of the 1982 United Nations Law of the Sea Convention
[121] Recital 42 of Directive 2008/56/EC.
[122] Communication from the Commission to the Council and the European Parliament,The European Union and the Arctic Region, COM(2008) 763 final, Brussels, 20.11.2008; Council of the European Union conclusions on Arctic issues, Brussels, 8.12.2009, available at: http://ec.europa.eu/maritimeaffairs/pdf/arctic_council_conclusions_09_en.pdf.

part of the Arctic Ocean.[123] Accordingly, we can expect EU policy on this issue to evolve over the lifetime of the Directive.

Key regulatory features

The MSFD introduces a number of new concepts into EU law for the first time including: marine region/subregion; marine strategies, good environmental status and programme of measures. In light of their far reaching implications, it may be appropriate at this point in the article to say a little more about these terms and what precisely they entail for the Member States and the Commission in practice.

Marine Region / Subregion

One of the most notable changes brought about by the MSFD to the regulation of the marine environment is the introduction of the new concepts of "marine region" and "marine subregion" into EU law for the first time. More specifically, the Directive requires Member States to cooperate and coordinate their actions with other Member States in designing and implementing marine strategies (this term is explained below) within the following marine regions: the Baltic Sea, the North-east Atlantic Ocean, the Mediterranean Sea, and the Black Sea.[124] Provision is also made for the establishment of subregions in the North-east Atlantic and the Mediterranean Sea for the purpose of applying the Directive and with a view to taking specific management actions in a particular area.[125] The eight potential sub-regions are: (i) the Greater North Sea, including the Kattegat, and the English Channel; (ii) the Celtic Seas; (iii) the Bay of Biscay and the Iberian Coast; (iv) in the Atlantic Ocean, the Macaronesian biogeographic region, being the waters surrounding the Azores, Madeira and the Canary Islands. In the case of the Mediterranean Sea, they are: (i) the Western Mediterranean Sea; (ii) the Adriatic Sea; (iii) the Ionian Sea and the Central Mediterranean Sea; (iv) the Aegean-Levantine Sea. These regions are illustrated in Map 1 below.

[123] Communication The European Union and the Arctic Region, COM(2008) 763 final, Brussels, 20.11.2008 at 11.
[124] Art 4(1) of Directive 2008/56/EC.
[125] Art 4(2) of Directive 2008/56/EC.

The introduction of the geographical concepts of the marine regions / subregions must be viewed favourably as this approach not only acknowledges implicitly the diversity of the regional seas but will also have many practical consequences as it facilitates the management of activities on the basis of the natural hydrological, oceanographic and biographic features of the various regional sea basins. This may be contrasted with the traditional approach to marine resources management in the EU which as a general rule (except in the case of fisheries management under the CFP) is based on administrative or political boundaries. Moreover, as seen above, many of the natural and anthropogenic threats to the quality of the European marine environment are transboundary in nature and often demand solutions at sea basin level.[126] The introduction of the concepts of the marine region / subregions into EU marine environmental law therefore makes good scientific sense from an ecological viewpoint and will certainly facilitate the application of the ecosystems approach on a regional basis.[127] This sea basin management model is of course fully consistent with the management approach adopted under the common fisheries policy since the 1970s which provides for the adoption of pan-European conservation measures irrespective of the maritime political boundaries of the Member States.[128] In the longer-term, it may also help Member States overcome some of the difficulties that they encounter in adopting management measures for areas where maritime boundaries have not been delineated or are disputed between opposite or adjacent States. An example of such an area is the south-east corner of the Celtic Sea and the Bay of Biscay where four Member States of the EU (Ireland, United Kingdom, France and Spain) have yet to fully delimit their respective continental shelf boundaries.[129] In other words, Member States will have to coordinate their approach in adopting the programme of measures for the entire region or subregion following the ecosystem approach irrespective of boundary disputes.

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[126] COM(2005) 505 final, Brussels, 24.10.2005, p. 5. *Op cit* note 18.

[127] Art 6 of Directive 2008/56/EC.

[128] See R.R. Churchill, D. Owen, *The EU Common Fisheries Policy* (Oxford: Oxford University Press, 2010) pp. 48-66.

[129] In 2009, the Commission on the Limits of the Continental Shelf (CLCS) adopted a Recommendation regarding the Joint Submission made by France, Ireland, Spain and the United Kingdom of Great Britain and Northern Ireland in respect of the area of the Celtic Sea and the Bay of Biscay in 2006. These States have yet to agree their respective boundaries within this area. For a summary of the CLCS Recommendation, see, http://www.un.org/Depts/los/clcs_new/submissions_files/frgbires06/fisu_clcs_recommendations_summary2009.pdf

Marine strategies

The MSFD establishes a framework which requires Member States to take a number of actions to achieve or maintain GES in their marine waters by 2020. A key component in this approach is the development by each Member State of a *marine strategy* for its marine waters following a number of procedural and administrative steps set down by the Directive.[130] At a practical level, the term "marine strategy" is best understood as an action plan for applying an ecosystem-based approach to the management of human activities in the marine environment.[131]

The first step in the process is the completion by Member States of an initial assessment of the current environmental status of marine waters by 2012.[132] This in itself is a major exercise as Annex III of the Directive provides an indicative list of characteristics, pressures and impacts on marine waters which must be included by Member States in the initial assessment. These include: physical and chemical features; habitat types; biological features and other features such as a description of the situation with regard to chemicals, including chemicals giving rise to concern; sediment contamination; hotspots; health issues and contamination of biota (especially biota meant for human consumption).[133] Pressures and impacts are described in the Directive as including physical loss and damage, physical disturbance from underwater noise or from marine litter, interference with hydrological processes leading to significant changes in thermal regime (e.g. by outfalls from power stations), contamination by hazardous substances, systematic or intentional release of substances, nutrient and organic enrichment as well as biological disturbance.[134] This initial assessment of the status of marine waters must include an economic and social analysis of the use of those waters and the cost of degradation of the marine environment.[135]

[130] Art 5 of Directive 2008/56/EC.
[131] Art 3(1)(3) of Directive 2008/56/EC defines marine strategy to mean "the strategy to be developed and implemented in respect of each marine region or subregion concerned as laid down in Article 5"
[132] Art 7 of Directive 2008/56/EC.
[133] Table 1, Annex III of Directive 2008/56/EC
[134] Table 2, Annex III of Directive 2008/56/EC
[135] Art 8(1)(c) of Directive 2008/56/EC.

As seen above, a central strand running through the Directive is the requirement for Member States to coordinate their efforts to ensure that assessment methodologies are consistent for the region / subregion and that transboundary impacts and features are taken into account when preparing the initial assessment of the status of their marine waters.[136] The scale of the assessment task is somewhat mitigated by the provision in the Directive which allows Member States to take into account data obtained under the Water Framework Directive on the status of coastal, transitional and territorial waters, as well as assessments carried out pursuant to obligations arising under the Regional Sea Conventions.[137] In this regard, the publication of the *Quality Status Report 2010* by the OSPAR Commission is particularly timely as it will form a major element of the initial assessment that Member States are required to prepare under the MSFD for the North-east Atlantic Ocean.[138] Similarly, the *Assessment of Assessments* published by UNEP in 2009 is clearly germane to the completion of the initial assessment under the MSFD as it contains a detailed overview of the status of the global marine environment including a report on regional seas such as the Mediterranean Sea.[139] At the same time as Member States are undertaking their initial assessment of the status of marine waters, they must develop by 2012 a set of characteristics which describe what GES means for those waters and establish precise environmental targets and associated indicators that are designed to achieve GES.[140] In doing this, they must take into account existing environmental objectives laid down at national, European and international levels.[141]

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[136] Art 8(3) of Directive 2008/56/EC.
[137] Art 8(2) of Directive 2008/56/EC.
[138] Available at www.ospar.org. This reviews all aspects of human influence on quality of the marine environment of the OSPAR maritime area which is divided into five regions (the Arctic Waters, Greater North Sea, Celtic Seas, Bay of Biscay and Iberian Coast, Wider Atlantic) and includes an assessment of contaminants, nutrient pollution and radioactive substances and the effects of human activities such as the offshore oil and gas industry, offshore wind farms, maritime transport, and fisheries. On the differences between GES under Directive 2008/56/EC and 'marine ecological quality' under the OSPAR Convention, see, N. Westaway, 'The New European Marine Strategy Directive', (2008) 10 *Environmental Law Review* 218 at 223.
[139] UNEP and IOC-UNESCO 2009, *An Assessment of Assessments, Findings of the Group of Experts. Start-up Phase of a Regular Process for Global Reporting and Assessment of the State of the Marine Environment including Socio-economic Aspects* (Malta, 2010).
Available at: www.unga-regular-process.org/index.php?option=com_content&task=view&id=18&Itemid=20 (accessed on November 12, 2010)
[140] Art 10(1) of Directive 2008/56/EC.
[141] *Ibid*

The second step in the process is the establishment of monitoring programmes by Member States for the ongoing assessment of the environmental status of marine waters on the basis of the list of elements set out in Annex III and V of the Directive, as well as by reference to the list of environmental targets.[142] Essentially, these programmes are aimed at evaluating the status of marine waters on an on-going and regular basis. For obvious reasons relating to efficiency, monitoring programmes must be compatible with other programmes within the same marine region or subregion, and with the schemes set down in other EU legislation and international agreements including the Birds and Habitats Directives.[143]

The third step in the development of marine strategies is the adoption by Member States of a programme of management measures capable of achieving or maintaining GES within three years of completing the initial assessment.[144] These are examined in further detail below. Suffice to note here that while marine strategies are specific to each Member State's waters, they must reflect the overall perspective of the marine region or subregion concerned. In other words, Member States sharing a marine region or subregion must endeavour to follow a common approach in preparing and implementing their marine strategies.[145] As can be seen from Figure 2 below, the development and implementation of marine strategies establishes an iterative process which is reviewed and updated by the Member States in consultation with the Commission every six years after their initial development.[146] The paradigm is designed to evolve steadily over the coming decade and to generate questions and hypothesis regarding how best to achieve and maintain GES of marine waters.

[142] Art 11(1) of Directive 2008/56/EC
[143] *Ibid*
[144] Arts 13 of Directive 2008/56/EC
[145] Art 5(2) of Directive 2008/56/EC
[146] Art 17(2) of Directive 2008/56/EC

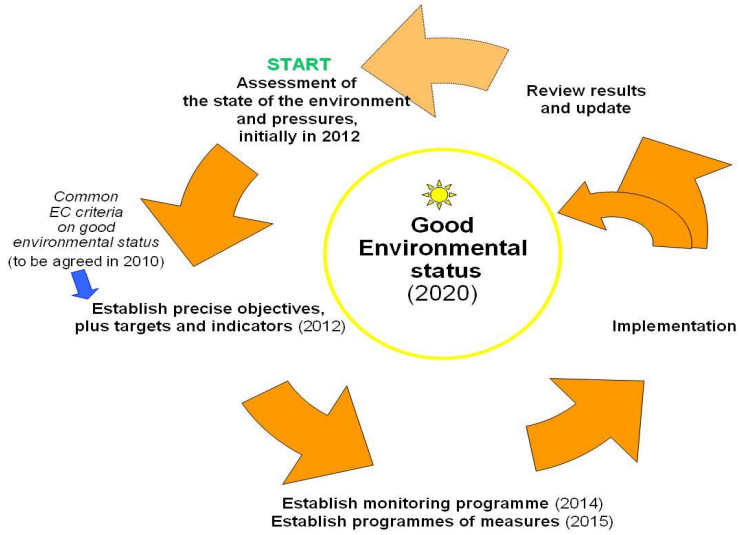

Figure 2: Process and timetable for achieving GES under the MSFD[147]

Good environmental status

The fundamental obligation placed on Member States under the MSFD is that they achieve or maintain GES for marine waters by 2020.[148] This is therefore a central concept in the scheme of protection introduced by the Directive which provides an expansive definition of GES as:

> "…the environmental status of marine waters where these provide ecologically diverse and dynamic oceans and seas which are clean, healthy and productive within their intrinsic conditions, and the use of the marine environment is at a level that is sustainable, thus safeguarding the potential for uses and activities by current and future generations".[149]

[147] Source: European Commission. Available at: https://webgate.ec.europa.eu/fpfis/iwt/sites/default/files/Birgit_Snoeren%20-%20EU%20policy%20framework%20adaptation%20coasts%20and%20seas.pdf

[148] This date was selected to coincide with the first review of River Basin Management Plans under the Water Framework Directive in order to facilitate "synergies on the further implementation of both Directives". Communication from the Commission to the Council and the European Parliament, Thematic Strategy on the Protection and Conservation of the Marine Environment, COM(2005)504 final, Brussels, 24.10.2005, p.5.

[149] Art 3(5) of Directive 2008/56/EC.

According to the Directive, this will be achieved when the structure, functions and processes of marine ecosystems are fully considered, marine species and habitats are protected and human-induced decline of biodiversity is prevented.[150] Clearly, the first part of this definition is little more than a political aspiration regarding marine environmental management and says nothing about the substantive detail of the criteria that are to be used by Member States in determining GES. Fortunately, its hortatory nature is fleshed out by the obligation placed on Member States to assess the status of their marine waters against 11 high level criteria which are described as "qualitative descriptors" in the Directive. These include: the maintenance of biological diversity; the non-introduction of non-indigenous species; the maintenance of fish stocks and elements of the marine food web within safe biological limits and at levels ensuring their long-term abundance; the minimisation of eutrophication; the maintenance of sea floor integrity at a level that ensures that the structure and functions of the ecosystems are safeguarded and benthic ecosystems, in particular, are not adversely affected; by ensuring that the permanent alteration of hydrographical conditions does not adversely affect marine ecosystems; by ensuring that the levels of contaminants do not cause marine pollution or in the case of fish or other seafood used for human consumption do not exceed established by legislation; and by ensuring that the impacts of marine litter and underwater noise do not cause adverse effects on the marine environment.[151] When a Member State considers that it is inappropriate to use one or more of these descriptors they must notify and justify their decision to the Commission accordingly.[152]

At one level, this elaborate list of qualitative descriptors appears to afford considerable discretion to Member States to make a determination on what constitutes GES for sea areas under their sovereignty and jurisdiction and to develop an associated set of targets and indicators to guide progress towards achieving it. In reality, however, the European Commission appointed a number of task groups made-up of scientific and technical experts from the Member States to develop pan-European criteria and the methodology that will be used by all Member States to

[150] *Ibid*
[151] Annex I of Directive 2008/56/EC
[152] *Ibid*

assess the status of their marine waters against these descriptors.[153] This group received scientific and technical support from the European Joint Research Centre and the International Council from the Exploration of the Sea (ICES).[154] In September 2010, drawing upon the outputs of the various working groups as well as the knowledge gathered pursuant to other EU legal instruments and within the framework of the Regional Seas Conventions, the Commission adopted a Decision setting down the criteria and methodological standards to be applied in determining GES of marine waters.[155] These are set out in a technical annex to the Decision which lists 29 criteria and 56 associated indicators.[156] In some cases, they will require further refinement and as noted in the preamble of the Decision, the determination of GES will have to be adapted over time, taking into account the dynamic nature of marine ecosystems, their natural variability, and the fact that the pressures and impacts on them may vary with the evolution of different patterns of human activity and the impact of climate change.[157] The Decision allows for the application of some selected criteria and related indicators to screen at a broader scale prior to applying a finer assessment to specific areas having regard to various impacts and threats on the marine environment.[158] Unsurprisingly, the criteria and methodological standards for determining GES set down by the Decision build on existing obligations and developments in EU legislation. They also cover elements of the marine environment which are not yet addressed by EU legislation and it is clearly foreseen that they may have to be revised taking into account new scientific knowledge and the development

[153]This group of experts was made-up of representatives from: the European Commission and European Environment Agency; Member States; the secretariats of the regional sea conventions; other marine environmental protection conventions; European stakeholder organisations and international marine scientific organisations. For the Terms of Reference of the group, see: http://marine-team.eucc-d.de/tl_files/EUCC_marine_team_shared_docs/WG%20GES%20terms%20of%20reference.pdf

[154] In total, 10 technical reports were prepared relating to the descriptors of GES listed in Annex I of the Directive. This was made-up of Eight reports were prepared by groups of independent experts coordinated by JRC and ICES, and two reports on contaminants in fish and other seafood and marine litter were written by expert groups coordinated by DG SANCO in the European Commission and the French national research agency (IFREMER) respectively. See, for example, http://www.ices.dk/projects/MSFD/TG8%20Report_Final_vII.pdf.

[155] Commission Decision of 1 September 2010 on criteria and methodological standards on GES of marine waters, OJ L 232/14, 2.9.2010.

[156] *Ibid.*

[157] 4th Recital of the Preamble, Commission Decision of 1 September 2010 on criteria and methodological standards on GES of marine waters, OJ L 232/14, 2.9.2010

[158] Para 4, Part A of Annex, Commission Decision of 1 September 2010 on criteria and methodological standards on GES of marine waters, OJ L 232/14, 2.9.2010

of a more coherent approach by the EU to the regulation and management of the marine environment under the scheme set down by the MSFD.[159]

Programme of measures

The key mechanism in the MSFD for delivering sustainable use of the marine environment is the programme of measures that Member States are required to implement by 2016 to guide progress towards the achievement of GES. The Directive calls on Member States to cooperate with third States in the same region, making use 'where practical and appropriate' of the relevant regional pollution commission and other relevant regional bodies and agreements.[160] Although the MSFD is silent on what specific management measures ought to make-up the programme of measures, it nevertheless states in the Preamble of the Directive that those "measures should be devised on the basis of the precautionary principle and the principles that preventive action should be taken, that environmental damage should, as a priority, be rectified at source and that the polluter should pay".[161] This tells us very little about the substance of specific measures and fortunately much more detail is provided in Annex VI of the Directive. This Annex enumerates eight different types of management measures, including: (1) input controls: management measures that influence the amount of a human activity that is permitted; (2) output controls: management measures that influence the degree of perturbation of an ecosystem component that is permitted; (3) spatial and temporal distribution controls: management measures that influence where and when an activity is allowed to occur; (4) management coordination measures: tools to ensure that management is coordinated; (5) measures to improve the traceability, where feasible, of marine pollution; (6) economic incentives: management measures which make it in the economic interest of those using the marine ecosystems to act in ways which help to achieve the good environmental status objective; (7) mitigation and remediation tools: management tools which guide human activities to restore damaged components of marine

[159] See Press Release from the Commission on the 1st September 2010. Available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1084&format=HTML&aged=0&language=EN&guiLanguage=en
[160] Arts. 5(2) and 6 of Directive 2008/56/EC.
[161] Recital 27 of the Preamble of Directive 2008/56/EC.

ecosystems; (8) communication, stakeholder involvement and raising public awareness.

In principle, the precise nature of the management measures adopted under the programme will depend on the results of the initial assessment of the status of marine waters, the determination of GES and the establishment of environmental targets, which must all be completed by 2012. Apart from the need to comply with obligations that arise under other European and international legislation, some of which were outlined above,[162] Member States appear to have considerable discretion in selecting specific management measures to counter a particular threat in the marine environment. In designing their programme of measures, however, Member States must give due consideration to sustainable development and to the social and economic impacts of the envisaged measure.[163] They must also ensure that new measures are cost-effective and technically feasible by undertaking impact assessment and cost-benefit analysis prior to their introduction.[164] Furthermore, with a view to ensuring that Member States do not avoid their obligations, all Member States must indicate in their programmes of measures how specific measures are to be implemented and how they will contribute to the attainment of the overall objectives of achieving GES by 2020.[165] The MSFD clearly attempts to forestall delay in implementation of its provisions in so far as it stipulates that measures must be operational within one year of their adoption by a Member State.[166] The *realpolitic* of marine environmental management in the EU is further acknowledged by the provision in the MSFD that make it possible for the early entry into operation of the programme of measures in marine regions or sub-regions where the status of the sea is critical to the extent that urgent action is needed by Member States.[167] In line with the iterative process described above, there is considerable emphasis in the Directive on the continuous development of national and European marine scientific research

[162] As mentioned previously, under Art 13(4) of Directive 2008/56/EC, the programme of management measures must include spatial protection measures which contribute to the network of marine protected areas established pursuant to European and international legal instruments and entail joint action with international organisations. See discussion on the relationship between Directive 2008/56/EC and other legal instruments *supra.*
[163] Art 13 (3) of Directive 2008/56/EC.
[164] *Ibid.*
[165] Art 13(9) of Directive 2008/56/EC.
[166] Art 13(11) of Directive 2008/56/EC.
[167] Art 5(3) of Directive 2008/56/EC.

programmes with a view to ensuring that the programme of measures are devised on the basis of the best available scientific knowledge of the status of the marine environment in a given region.[168]

The flexible nature of the new regulatory regime introduced by the MSFD is underlined by the broad range of exceptions which allow Member State to derogate from its core environmental objectives once certain conditions are fulfilled.[169] More specifically, they must indicate clearly in their programme of measures and notify the Commission if they cannot achieve the environmental targets or GES because of one of the following reasons: (a) action or inaction for which the Member State concerned is not responsible; (b) natural causes; (c) force majeure; (d) modifications or alterations to the physical characteristics of marine waters brought about by actions taken for reasons of overriding public interest which outweigh the negative impact on the environment, including any transboundary impact; or, (e) if the natural conditions do not allow timely improvement in the status of the marine waters within the prescribed time schedule.[170] In identifying such circumstances in their programme of measures, a Member State must consider the consequences for other Member States in the marine region or subregion. They do not escape their obligations entirely in so far as the Directive provides that they must also take appropriate *ad-hoc* measures to pursue the environmental targets and to prevent further deterioration in the status of the marine waters.[171] Obviously, the latter obligation does not arise in cases where the Member State is not responsible for a particular action or inaction (point (a) above) or where the natural conditions preclude an improvement in the environmental status of the waters within the prescribed time limits.[172]

Other wide-ranging exceptions stem from the provision which allows Member States not to take specific management measures where there is no significant risk to the marine environment, or where the costs are disproportionate taking into account the risks to the marine environment.[173] Again this is subject to a number of conditions including the requirement that they carry out an initial assessment of the status of the

[168] Recital 23 of the Preamble to Directive 2008/56/EC.
[169] Art 14 of Directive 2008/56/EC.
[170] Art 14(1) of Directive 2008/56/EC.
[171] *Ibid.*
[172] *Id.*
[173] Art 14 (4) of Directive 2008/56/EC.

marine environment, provide the Commission with the necessary justification to substantiate their decision, and most importantly of all perhaps, avoid permanently compromising the attainment of GES.[174] This leads to one particular question which is particularly topical in light of the global recession and that is whether Member States can rely on the disproportionate costs derogation to frustrate the scheme of the Directive by not adopting appropriate management measures. There are no clear answers to this question and it must be assumed that any request from a Member State to derogate from the provisions of the Directive will be assessed on its merits by the Commission. When considering this issue it may be instructive to note that the ECJ has tended to view similar derogations in other environmental directives restrictively.[175] Accordingly, it remains to be seen whether the inherently open-ended nature of the exceptions in the MSFD will undermine the overall effectiveness of the scheme of protection and management introduced by its provisions.

In many instances, the adoption of the programme of measures will entail joint action by Member States within a particular region or sub-region.[176] Furthermore, as mentioned previously, where regulatory action is required at an EU level to address an issue which cannot be tackled at a national level, Member States may make a request to the Commission and where appropriate it will bring forward legislative proposals to the Parliament and Council.[177] This provision in the Directive does not of course impede the Commission from bringing forward proposals on its own initiative in accordance with its role in the law-making process under the EU treaties.

Evaluation of the MSFD

The brief review undertaken in this article indicates that the MSFD is a sophisticated if somewhat technocratic instrument which establishes for the first time a comprehensive legislative framework at an EU level aimed at protecting and preserving the marine environment. This is achieved through the elaboration of a

[174] *Ibid.*
[175] Thus, for example, the Court has viewed derogations from the Environmental Impact Assessment Directive restrictively. See *inter alia*: Case C-287/98 *Luxembourg v Linster* [2000] ECR I-6917; Case C-435/97 *WWF and Others v Autonome Provinz Bozen and Others* [1999] ECR I-5613.
[176] Art 6 of Directive 2008/56/EC.
[177] Art 15 of Directive 2008/56/EC.

number of procedural and administrative steps which must be followed by the Member States and the Commission with a view to achieving and maintaining GES of marine waters by 2020 at the latest. Although this represents a new departure in EU law as it applies to the marine environment, this approach is not entirely innovative as it shares some similarities to the one adopted in other EU environmental directives such as the Water Framework Directive.[178] For instance, one common feature in this new generation of EU legal instruments is that they establish a methodology for the management of natural resources that is science-driven, adaptive and focused on enhanced Member State cooperation and coordination at regional levels. This methodology also extends to the prescription of an overarching legislative structure at an EU level, as well as the adoption of a tight timetable for various actions by the Member States within clearly defined deadlines. In this regard, one of the great strengths of the MSFD is that it contains extensive provisions on updating, reporting and public information.[179] These provisions ought to ensure a high degree of transparency in the implementation process and this in turn ought to facilitate enforcement proceedings by the Commission against Member States should they fail to uphold their obligations under the Directive.[180] Another positive feature of the MSFD is that it actively promotes greater public access to information and decision-making regarding the status of the marine environment and the management of maritime activities.[181] This extends to placing an express obligation on Member States to ensure that all interested parties are provided with early and effective opportunities to participate in the implementation of the MSFD.[182] In order to facilitate such participation, it is foreseen that use will be made of existing public

[178] *Op.cit.*, note 54.

[179] Arts 17 through to 19 of Directive 2008/56/EC. More specifically, Member States are obliged to update their marine strategies every six years after their initial establishment and to advise the Commission, the Regional Sea Commissions, and other relevant Member States within 3 months of their publication. They are also obliged to provide an interim report within three years of the publication of each programme of measures or update thereof. The Commission in turn is required to present the first evaluation report on the implementation of this Directive within two years of receiving all programmes of measures and by the end of 2018 at the latest. The aim of the review will be to describe progress in the implementation of the Directive and further reviews will be achieved every 6 years thereafter.

[180] Enforcement proceedings may be initiated by the European Commission under Art 258 of the Treaty on the Functioning of the EU.

[181] This accords with requirements set down by Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information. OJ L 41, 14.2.2003, p. 26. For a critique of stakeholder involvement in the decision-making process under the MSFD, see, S. Fletcher "Converting science to policy through stakeholder involvement: An analysis of the European Marine Strategy Directive" (2007) 54 *Marine Pollution Bulletin* 1881–1886

[182] Art 19 of Directive 2008/56/EC.

consultation structures that have been established under other EU policies such as the Regional Advisory Councils (RACs) under the common fisheries policy.[183]

In general, all of these features suggest that the MSFD is typical of the new generation of EU directives which set down very general normative standards for environmental protection such as the attainment of "good ecological status" under the Water Framework Directive, and "favourable conservation status" under the Habitats and Birds Directives. This in itself is an exciting development but it begs the question whether this approach will provide a legal solution to the serious problems encountered in managing the various activities that adversely affect the quality of the European marine environment?

Regrettably, at this point in time, there does not appear to be any definitive answer to this question in so far as the success of the MSFD is very much dependent upon the quality of transposition of its provisions into national law by the Member States. Moreover, the task of transposition is an unduly onerous one in light of the open texture of many provisions, the introduction of far-reaching concepts and new methodologies, as well as the long lead-in time for implementation which amounts to 12 years before Member States have to achieve or maintain GES. For these reasons, it may be too early in the implementation process to draw firm conclusions regarding the potential long-term success or otherwise of the instrument. That being said, there appears to be several limitations in the regulatory scheme advanced by the MSFD which are worth enumerating here.

First of all, although the instrument is clearly informed, as seen above, by an ecosystem-based approach to the management of human activities, there are a number of inherent normative weaknesses in the scheme of protection introduced by the Directive.[184] For instance, Member States are required to do no more than give 'due consideration' to sustainable development.[185] The measures they should take must be 'cost-effective and technically feasible'; and need not be adopted where their cost

[183] Art 19(1) of Directive 2008/56/EC. On the role of the Regional Advisory Councils in decision-making under the CFP, see, R. Long "The Role of Regional Advisory Councils in the European Common Fisheries Policy: Legal Constrains and Future Options" (2010) 25(3) *IJMCL* 289-346.

[184] The author wishes to acknowledge comments from an anonymous peer-reviewer on the normative weaknesses in Directive 2008/56/EC.

[185] Art. 13(3) of Directive 2008/56/EC.

'would be disproportionate taking account of the risks to the marine environment', provided that 'there is no further deterioration' and the achievement of GES is not 'permanently compromised'.[186] Similarly, a Member State is excused from achieving GES for its marine waters for 'reasons of overriding public interest which outweigh the negative impact on the environment', provided that this does not permanently preclude or compromise the achievement of GES at the level of the marine region or in the marine waters of other Member States.[187] Furthermore, while the preamble provides that Member State measures must be based on the precautionary principle, this requirement is not codified in the substantive provisions of the MSFD.[188]

Secondly, it could be argued that some of the definitions of the key concepts referred to in the MSFD are so general that they could prevent it from being fully effective as a legal instrument. In particular, the definition of GES in the MSFD lacks the legal clarity that one expects for such an important concept. This weakness is somewhat ameliorated by the additional detail that is provided by the Commission Decision setting down the criteria and methodological standards to be applied in determining GES of marine waters which was discussed above.[189] However, this Decision is not itself free from controversy even if it avoided political discourse in the Parliament and the Council which could have delayed the adoption of the MSFD under their joint decision-making procedures in the European institutions.[190] There are no guarantees that the criteria and methodology for determining GES pursuant to this Decision are fair, transparent or effective. This shortcoming, on the other hand, is mitigated by the administrative structures that have been established to coordinate national implementation measures by Member States. In particular, the adoption of a Common Implementation Strategy by Member States in 2008 will undoubtedly contribute to the long-term effectiveness of the Directive and the Decision as this entails amongst other things the convening of informal meetings of EU Marine Directors, hosted every six months by the Member State holding the Presidency of the

[186] Arts. 13(3) and 14(4) of Directive 2008/56/EC.
[187] Art. 14(1)(d) and (2) of Directive 2008/56/EC.
[188] *Op.cit.*, note 32.
[189] See discussion of GES *supra.*
[190] Much of the work was overseen by a Regulatory Committee in the Commission established under Art 25 of Directive 2008/56/EC

Council, and involving all Member States and the Commission.[191] This forum is well-placed to work-out the meaning of particular concepts and to elucidate what many of the provisions of the Directive and the Commission Decision will involve in practice for Member States and those engaged in offshore industries.

Thirdly, most of the burden associated with the implementation of the MSFD is firmly placed on the shoulders of the national bodies and regulatory agencies in the Member States. In marked contrast, the Commission has a supervisory role regarding the definition of GES, the adoption of environmental targets and indicators, as well as the implementation of the monitoring programme and the programme of measures for achieving or maintaining GES by 2020. [192] The long-term success of the MSFD as a regulatory instrument is therefore very much contingent upon the resources that are made available for achieving the objectives of the instrument in the Member States. The first test in this regard will be the resources that are made available to obtain a comprehensive scientific overview of the current and future status of the marine environment.[193] Moreover, at the time of writing, it is not evident whether the range of marine monitoring activities undertaken by the Member States as well as their deep-ocean science capability are sufficient to deliver the data and information that is required to carry out the work required by the Directive. In this context it should be mentioned that a concerted effort is being made at a European level to improve scientific knowledge of the marine environment and to support the application of the ecosystems approach on a regional or subregional basis.[194] In addition, the EU is developing an infrastructure for the sharing and transmission of spatial information and environmental data which will be particularly useful in ensuring that Member States adopt a transparent and consistent approach to implementation of their obligations under the MSFD.[195]

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[191] On the common implementation strategy, see, paragraph 11 of the Note from the European Council, Brussels, 4 June 2010. http://register.consilium.europa.eu/pdf/en/10/st10/st10545.en10.pdf.

[192] Art 12 of Directive 2008/56/EC.

[193] Art 5 of Directive 2008/56/EC.

[194] See, *inter alia*, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: A European Strategy for Marine and Maritime Research. A coherent European Research Area framework in support of a sustainable use of oceans and seas, COM (2008) 534 final, Brussels, 3.9.2008.

[195] Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community (Inspire) OJ L 108, 25.4.2007, p. 1. Under Art 19(3) of the Directive, Member States are obliged to provide the Commission with access to the data and information acquired during the initial assessment in order to fulfil its tasks under the

The fourth weakness in the regulatory structure stems from the fact that the MSFD is silent on the penalties or sanctions to be applied in the event of a breach of its provisions. This omission may not be as fatal as it first appears as there is a general requirement under EU law for Member States to adopt penalties that are equivalent to the sanctions invoked under national law for similar offences and such penalties must be effective, proportionate and dissuasive.[196] If a Member State fails to implement the Directive properly it may be subject to enforcement proceedings in the ECJ at the behest of the Commission or another Member State.[197] Failure by a Member State to comply with a judgement of the Court may result in the payment of an additional lump sum or penalty payments by the recalcitrant Member State.[198] In spite of the deterrent effect of infringement proceedings, Member States retain considerable discretion to prescribe penalties for breaches of national provisions transposing the Directive. In common law jurisdictions such as Ireland and the UK, this may entail the creation of an indictable offence for breaches by natural and legal persons of national measures implementing the requirements of the Directive. This may not be the case in the civil law jurisdictions where greater use may be made of more novel approaches including administrative penalties to ensure compliance with the provisions of the Directive. Such flexibility is part and parcel of EU law but it will still make it difficult if not impossible to assess the precise levels of compliance with the MSFD in all 22 coastal Member States of the EU.

As a final point, it should be noted that the long-lead in time before many of the provisions of the MSFD become fully operational is unlikely to expedite a prompt response from those Member States which have a poor record in meeting their

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Directive. Such information must also be made available to the European Environment Agency for the performance of its tasks pursuant to Art 25 of the Directive. The EU is also developing an information sharing system covering all water-related reporting requirements, ranging from drinking water to urban waste-water treatment. This will include reporting requirements under the MSFD, see, P. Gammeltofy, Genera; Overview of the MSFD, available at: http://www.ifremer.fr/2012MarineTargets/actes/Gammeltoft.html

[196] Case C-68/88 *Commission v Greece* [1998] ECR 2965

[197] Arts 258-259 of the Treaty on the Functioning of the European Union.

[198] Art 260 of the Treaty on the Functioning of the European Union. There have been three cases with an environmental dimension in the ECJ concerning penalty payments: Case C-387/97 *Commission v Hellenic Republic* [2002] ECR I-3823; Case 278/01 *Commission v Spain* [2003] ECR I-14141; Case C-304/02 *Commission v France* [2005] ECR 1-6263.

obligations under EU environmental directives.[199] Indeed, the failure of the majority of EU Member States to meet the initial transposition deadline augurs poorly for the long-term success of the instrument and this may indicate an absence of political will, resources or simple administrative capability to bring into force the laws, regulations and administrative provisions necessary to give full effect to the Directive within the prescribed timetable.[200] In the absence of such transposition legislation in the Member States, it is almost impossible to say at time of writing what exactly achieving GES will involve in practice and what its impact will be, both on marine ecosystems and on businesses and other users operating in the marine environment.[201] On this issue, however, it should be kept in mind that the Commission suggested somewhat ominously as far back as 2006 that the burden of implementation will be unequal and fall primarily on sectors that do most direct damage the marine environment such as fisheries.[202]

Conclusions

Despite some of the shortcomings highlighted in this article, it would be wrong to finish on a negative note as the adoption of the MSFD signals a fundamental change to the traditional *laissez faire* approach of the EU to the protection of the marine environment in general and marine biodiversity in particular. The overall objective of the MSFD is the achievement of GES of marine waters by the year 2020 at the latest. From the brief review undertaken above, it is easy to conclude that the MSFD is incredibly ambitious in its scope and intent. Indeed, an initial evaluation of the instrument suggests that it will deliver a number of immediate benefits including greater scientific knowledge of the status of the marine environment, increased stakeholder participation in the decision-making process concerning the shape and content of future management measures governing maritime activities, and perhaps

[199] Ireland, for example, has a poor records of compliance with EU environmental obligations, see, Y. Scannell, *Environmental and Land Use Law*, (Dublin, Thomson Round Hall, 2006) *passim.*

[200] At the time of writing, three months after the transposition deadline, only nine Member States had adopted national transposition measures. See: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:72008L0056:EN:NOT

[201] A similar point was made by the Department of the Environment, Food and Rural Affairs in the United Kingdom in "Transposition of the Marine Strategy Framework Directive - Final Stage Impact Assessment", June 2010, p.12
Available at: *www.defra.gov.uk/**environment/marine**/documents/legislation/msd-ia.pdf*

[202] SEC(2005) 129, Brussels, 24.10.2005.

most importantly of all, it will provide a stable legal plinth for harmonising Member State regulatory action in the field of marine environmental policy and natural resources law on a regional basis.

These benefits do not belie the fact that the success of the MSFD in the long run will very much depend on the political will and the resources that are committed by the Member States to ensuring that the application of the ecosystems approach on a regional / sub-regional basis works well in practice. The success of the MSFD also depends on a high level of co-operation between Member States and with third countries, as well as with regional bodies mandated with environmental protection responsibilities.

In view of this, it may be fair to conclude this article by suggesting that the most significant contribution made by the MSFD thus far is that it is slowly galvanising the various statutory bodies in the Member States into action on the grounds that the protection of the marine environment, the sustainable management of marine natural resources and the conservation of functioning ecosystems, are now firmly rooted in the EU regulatory code as binding legal obligations. As a result, these tasks can no longer be dismissed as simply political imperatives lacking legal substance. This in turn ought to mean that future damage to the marine environment or marine ecosystems will no longer go unchecked in the EU provided that the Member States remain true to the letter and spirit of the MSFD. What is more, the rigid timetable for the implementation of the broad-range of daunting tasks set down by the Directive provides us with a useful yardstick by which to measure the progress of the Member States and the EU in discharging the commitment given at a number of international fora including the 2002 WSSD to promote sustainable uses of the seas and to conserve marine ecosystems[203] The MSFD should therefore be welcomed by all interested parties as an essential and long overdue regulatory intervention by the EU in the field of marine environmental policy and marine natural resources law. Ultimately, it will be judged on how successful it is in reversing the current trend in natural resource degradation and in implementing strategies to protect ecosystems, as

[203] Communication from the Commission to the Council and European Parliament. The World Summit on Sustainable Development one year on: implementing our commitments. COM(2003) 829 final. Brussels, 23.12.2003. p.5. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0829:FIN:EN:PDF

well as its contribution to the integrated management of the marine environment in line with the EU's commitment at the 2002 WSSD.