Chapter 4

Float or Sinker for Europe’s Seas?
The Role of Law in Marine Governance

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Introduction – Law and the Environment

Marine environmental governance is hugely challenging. This follows both from the multitude of human activities within and beyond the marine area which affect the quality of the environment and from the complexity, variability and interconnectedness of the marine ecosystems themselves and their inhabitants. In addition, each marine region or sub-region has its own particular conditions that call for specific measures. Is the law pertaining to marine governance in Europe up to meeting this challenge?

A key task of law is to provide structures for coordinated measures that are needed over time to achieve certain goals. Core values of any legal system aiming for legitimacy are legal certainty and stability, which allow actors to predict how the system will affect them in the future and adapt their behaviour accordingly. This holds true in the field of marine governance, which requires coordination between various states and sub-state actors in tackling multifaceted phenomena. Many stakeholders, from states to companies and individuals are also expecting the rules to be transparent and the outcomes of future measures within the legal framework to be reasonably foreseeable. At the same time the effectiveness of any piece of legislation addressing ecosystems and the interaction between human societies and those systems hinges on its ability to utilize scientific information and enable appropriate responses to changes in the environmental situation. Successful marine governance thus needs to build on legal structures that provide both stability and a high degree of flexibility and responsiveness to change in ecosystems, our understanding of those systems, and the human behaviour that affects them.

If these two requirements can be successfully balanced within the legal system – without crossing those lines that may constitute breaking points for functioning ecosystems – and the required measures can be effectively implemented, then law may serve as a “floater”, helping to maintain a sustainable relationship between human societies and their ecological foundations. If, however, the law fails to be sufficiently adaptive or if its responses to scientific data are too heavily compromised by competing objectives – either due to systemic flaws in the law itself, or because its implementation or enforcement are ineffectual – then law
may rather act as a ‘sinker’, entrenching unsustainable action, while projecting an image of purposeful measures being taken. Attempts at flexibility can also render the system so complex and supple as to make it unable to provide sufficient steering force.

The prevalence of, inter alia, overfishing, eutrophication, and the spread of toxic substances in marine ecosystems certainly casts doubts on the ability of current legal structures to achieve marine sustainability, despite the multitude of partly overlapping legal rules and mechanisms in existence.

The challenge of combining stability with adaptability – without sacrificing effectiveness – on the regional level is made so much greater by the perceived weakness of many international legal structures, and by the complexity of multilevel regulation, which is particularly prevalent in the European context. At the same time, the unique regional structure of the EU provides unparalleled opportunities for policy-making and enforcement on a regional scale.

This chapter charts the web of rules and processes that make up the legal aspect of marine governance in Europe. In doing so it focuses on pertinent international law – both global and regional – and the particular legal system established by the EU. The extent to which individual states retain a policy space of their own – and whether that is positive or negative from a sustainability perspective – follows from the characteristics and operation of these international and supranational legal structures.

Having set the regulatory scene, the chapter aims to assess to what extent law – in the particularly multileveled form it takes in Europe – currently serves as the reliable floater it ought to be for marine environmental governance, and what may be needed to bolster its buoyancy. At the heart of the analysis will be the ecosystem approach, which has come to play an ever more central role in the attempts to fine-tune the legal system to the demands of ecological and societal realities.

The Role of International Law

Background

The regulation of human activities at sea is one of the oldest tasks of international law, well-represented in international legal writing at least since the seminal works of Hugo Grotius in the early 17th century. The evolution of a comprehensive regulation of the sea has often been spurred by competing claims regarding the right to exercise control over parts of the oceans and the activities that may be carried out there. The fundamental tension has been between claims by coastal states to regulate ever larger areas of the sea adjacent to the coasts and opposing demands by states with a strong navy or commercial fleet for an extensive ‘freedom of the seas’. Although the trend during the 21st century
was clearly towards extending the rights of coastal states, the jurisdiction that these states may exercise remains significantly circumscribed, particularly with respect to the passage of ships in the vicinity of their coasts. Beyond any coastal state’s jurisdiction, on the so-called high seas, the classical freedoms still reign.

Given the openness and interconnectedness of the seas it is obvious that any meaningful preservation of the environment and resources of the seas has to be a joint or at least coordinated effort undertaken by many actors, not least coastal states and flag states. However, coordination presupposes the existence of distinct competences and thus the ability to allocate rights and responsibilities between the actors concerned.

**International Legal Structures and Frameworks**

**UNCLOS/International Law**

The fundamental rules on activities at sea or otherwise directly relating to the seas were laid down in the 1982 United Nations Convention on the Law of the Sea (UNCLOS), to which the EU as well as the member states are all parties. Large parts of the Convention are considered to reflect customary international law, meaning that they are binding also on states, such as the USA, that are not parties.

UNCLOS establishes a ‘legal infrastructure’ by determining what competences – primarily legislative and executive jurisdiction in relation to various activities – different categories of states may exercise in different areas. On the high seas, where the so-called freedoms of the seas apply, all states (and thus their citizens) enjoy freedom of navigation, fishing, the laying of submarine cables and pipelines, and over-flight of aircraft. An old principle reaffirmed by UNCLOS is flag state jurisdiction meaning that the state whose flag a ship carries always has jurisdiction over the actions or omissions of that ship. On the high seas this principle reigns almost exclusively. An important implication of this is that any effort at regulating e.g. fishing at the high seas must involve virtually all states whose ships engage in fishing in a particular area.

However, it is only on the high seas that the flag state is the sole wielder of regulatory power. The closer a ship comes to the shore of a foreign country the more extensive the legitimate claims of that country for exercising jurisdiction will be. For example, by regulating what kind of activities – such as fishing, carrying nuclear arms, or disgorging oil sludge – it may engage in. Already 200 nautical miles (nm) from the coast, or more exactly the baseline, the exclusive

1 Compared to the previous century that is. The 15th and 16th centuries, however, had seen claims of exclusive rights over very large areas.

2 The notions of ‘coastal state’ and ‘flag state’ are discussed under ‘UNCLOS/International law’ below.

3 The ‘baseline’ is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal state (normal baseline). Where the coastline is deeply
economic zone, or EEZ, commences (provided it is physically possible and the coastal state has claimed such a zone). Here the coastal state has sovereign rights for the purpose of exploring and exploiting, conserving and managing the living as well as non-living natural resources and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds. In this area it also has jurisdiction with regard to the protection and preservation of the marine environment; marine scientific research; and the establishment and use of artificial islands, installations and structures (UNCLOS, article 56). That, inter alia, protection and preservation of the marine environment are subject to the coastal state’s jurisdiction rather than its sovereign rights signals that the state’s powers may be subject to significant restrictions as defined in UNCLOS itself. To the extent that the freedoms of the seas are not affected by the specific rights of the coastal state in the EEZ they also apply in the EEZ.

Where geography allows, the so-called territorial sea begins at a distance of 12 nm from the coast. Here the coastal state in most respects enjoys competences similar to those that apply on land. The significant exception is the right to so-called innocent passage, which guarantees that ships from other states may navigate in this area as long as their passage is continuous and expeditious and they don’t engage in activities prejudicial to the peace, good order or security of the coastal state. This precludes any fishing activities, any act of wilful and serious pollution contrary to UNCLOS, as well as the carrying out of research or survey activities (UNCLOS, articles 17-19).

Accordingly, coastal states have far-reaching rights to regulate potentially environmentally harmful or hazardous activities in the vicinity of their coasts. But that does not mean that coastal states necessarily have the ability to actually protect and preserve the environment within this area. This follows both from the fact that the environment is affected by various activities carried out outside the coastal area, and from the problem of effectively enforcing applicable rules even within the territorial sea or the EEZ. Common standards that apply to all actors who may affect the environmental quality and resources of any particular area are thus needed.

In addition to defining competences UNCLOS sets out substantive rules in many areas, including protection of the marine environment and management of its living resources. The overall obligation incumbent on states in this respect is to protect and preserve the marine environment (article 192). States shall, individually or jointly, take all measures necessary to prevent, reduce and control pollution of the marine environment from any source. Using for this purpose the best practicable means at their disposal and measures necessary to protect and

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indented and cut into or, if there is a fringe of islands along the coast in its immediate vicinity, so-called straight baselines may be drawn by joining appropriate points on the coast or on certain elevations. On the drawing of such baselines see further UNCLOS, article 7.
preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life. States shall also take all measures necessary to ensure that activities under their jurisdiction or control are conducted so as not to cause damage by pollution to other states and their environment (article 194). However, these provisions are far from detailed and in many cases serve more as a platform for further elaboration than as operative rules for actual activities. Part IX of UNCLOS also establishes that states bordering an enclosed or semi-enclosed sea should cooperate in the management and conservation of marine living resources, if appropriate through regional organizations (articles 122-123). It is hence appropriate that UNCLOS has been complemented by many other international agreements establishing more specific rules and procedures, either for a certain activity or subject matter (such as dumping, vessel source pollution, fishing) or for a region, such as the Baltic Sea or the Mediterranean. The global agreements addressing different forms of polluting activities have mostly been developed and continue to be administrated by the International Maritime Organization (IMO), which is the United Nations specialized agency responsible for the safety and security of shipping and the prevention of marine pollution by ships.

As regards regional measures the United Nations Environment Programme (UNEP) launched a special Regional Seas Programme already in 1974. The programme aims to address the marine environmental degradation by engaging states that share a common body of water in comprehensive protection actions. In some cases this has also led to the adoption of regional treaties.

These agreements, like UNCLOS itself, are all part of international law, which is based on the notion of consent. States may not be subjected to international obligations without having, at least tacitly, consented to being so. The mere weight of an objective or urgency of an action cannot per se create binding obligations on states. Also adjudication rests on consent, meaning that in cases of diverging views on the nature of law or facts, there may not be any organ competent to provide an authoritative answer. Nor are states typically enthusiastic about having recourse to legally binding means of dispute resolution. Even when breaches of international obligations can be established, it is common that international law does not offer very strong mechanisms for enforcement, but largely relies on the concerned states’ loyalty to the system, their perceived self-interest, ‘naming and shaming’, and incentives such as financial support to enable future compliance. This characteristic is quite salient in the field of environmental protection.

The EU

In a European context the European Union (EU) plays an increasingly central role in marine governance. It not only has a direct impact on the domestic legal orders of the now 28 member states, but it is also an important actor in the creation and implementation of international law. According to the Treaty on the European Union (TEU), one of the EU’s founding documents, the union shall contribute to
‘the strict observance and the development of international law’ as well as to the ‘sustainable development of the Earth’ (article 3 (3) TEU).

The EU is party to many international and regional agreements of relevance for marine governance, including UNCLOS, the global London Convention on dumping (with its 1996 protocol), the 1992 Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area, the OSPAR Convention for the Protection of the marine Environment of the North-East Atlantic, and the Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution. Furthermore the EU has observer status – and some of the member states are parties – to the Convention on the Protection of the Black Sea Against Pollution (the Bucharest Convention).

When the EU becomes party to an international agreement it acquires an independent obligation – parallel to that of the member states who are themselves parties – to enforce the agreement. The Union therefore regularly transforms its international obligations into provisions of EU law which, in many cases, are directly applicable in the member states’ legal orders (in the form of so called EU regulations). This is particularly important since the EU also has mechanisms for compliance control and adjudication more resembling those of a state than those found in traditional international law.

A pivotal principle of EU law is that the powers of the EU only go so far as the member states have transferred – through the EU treaties – the required competence to the union (article 5(1) of the TEU). All legislative acts adopted by the EU based on this competence are collectively referred to as secondary EU law, whereas the treaties that establish the Union and define its competences and institutions are known as primary law.

Several policy areas, among them international trade, the internal market, fisheries, and environmental protection are largely subject to supranational decision-making, meaning that individual member states have relinquished the ability to block legislation that attracts support by a qualified majority of member states representing a qualified majority of the EU citizens.

When the EU legislates on a particular matter the EU rules may constitute total harmonization, barring – with little room for exceptions – national legislation that goes beyond mere implementation. However, it may also constitute minimum harmonization, which is an important feature of EU environmental legislation, meaning that the member states are allowed to take more, but not less, protective measures compared to the EU rules.

Since legislation based on the EU’s environmental policy only entails minimum harmonization individual member states may opt in favour of more far-reaching protective measures as long as they are compatible with the aim of the secondary EU law, are proportional and not arbitrarily discriminatory in their effects on trade between the member states.\footnote{To be precise, such measures adopted by an individual member state have to be consistent with the EU treaties, not least the rules on free movement of goods set out in articles 34 to 36 TFEU and the case law of the EU Court.} Important legislation relating to
marine governance, such as the Marine Strategy Framework Directive (2008/56/EC) belong to this category, whereas other pieces of legislation with significant implications for the marine environment, such as the chemicals regulation 1907/2006 ‘REACH’, or Directive 2005/35/EC on ship-source pollution belong to other policy areas and thus generally entail full harmonization. There is, however, a strong tendency among member states to also regard EU environmental legislation as setting a standard which national legislation should not go beyond for fear of harming the individual states’ economic interests (Jans et al. 2009).

In a few policy areas, among them conservation of marine biological resources under the common fisheries policy, the EU enjoys exclusive competence. In these areas the member states are barred from adopting any legislation unless given such a right by specific EU secondary law. This follows from the Treaty on the functioning of the European Union (TFEU), which sets out the competences of the different organs of the EU (article 3).

The implementation and enforcement of EU legislation are the responsibility of the member states. The EU legal order provides for (in comparison to international law) relatively strong monitoring and enforcement instruments to ensure compliance by individual member states.

Against this backdrop it is no surprise that EU law stands a better chance of being effectively enforced than purely international agreements do. At the same time EU legislation, particularly that based on the rationale of the internal EU market,\(^5\) has much more potential to restrain individual states that want to take protective measures of their own than international law does.

**Ecosystems, Law and Adaptability**

The EU policy on the environment shall contribute, inter alia, to pursuit of the objectives of preserving, protecting and improving the quality of the environment, protection of human health, and rational utilization of natural resources (article 191 TFEU). This is also reflected in the EU framework directives on water and marine environmental policy (2000/60/EC and 2008/56/EC), which both aim at achieving good ecological and environmental water status, taking as their point of departure the environmental conditions and the ecosystems (see further the sections ‘The Water Framework Directive’ and ‘Marine Strategy Framework Directive’ below).

One concept that has increasingly become a guiding principle for environmental agreements, and which plays a prominent role in these directives, is the so-called *ecosystem approach*.

This concept signifies a view on management that takes the ecosystem, its functions and dynamics, as the departure point for regulation. The state of the ecosystem itself is used as an indicator by which to identify the measures and

\(^5\) I.e. secondary legislation based on article 113 TFEU or its predecessor article 95 in the previous EC Treaty.
actions needed for proper management. The importance of this approach should also be seen in contrast to earlier legislation addressing each sector separately.

Although this concept already started to take shape at the time of the Stockholm Conference on the Human Environment in 1972 (the Stockholm Conference) there is still no universal definition. However, the parties to the Convention on Biological Diversity (CBD) have agreed on the first definition of global applicability. According to that the ecosystem approach ‘... is a strategy for the integrated management of land, water and living resources, promoting conservation and sustainable use in an equitable way ...’ (CBD, COP 5, Decision V/6). This definition has been complemented by twelve principles on how to apply the concept to management as well as guidance for the CBD parties on how to interpret and integrate the approach has also been developed. Neither the definition nor the principles are formally binding but may provide important guidance.

Similar formulations are found in the frameworks of all of the regional agreements on marine governance in Europe (or in their amendments), all of which endorse an ecosystem approach. When applied to the marine environment, it will include a dimension of coordination between all states in the relevant drainage basins and measures taking into account all kinds of sources and activities that may negatively affect the marine environment.

The ecosystem approach is challenging since it necessitates a broad knowledge base, deep and systematic understanding of the environment, and the ability to address complex environmental problems in a new way – not least from a legal point of view. A major challenge is how to adapt the often rigid and linear structures of the legal system to meet the needs of diverse and non-linear natural systems.

Attempts at translating the ecosystem approach into functional substantive law are described in the next subsection.

Marine Regional Agreements and EU Law

Regional Agreements
As mentioned above the EU is party to many international and regional agreements that are of relevance for marine governance, and that complement UNCLOS.

Both the Helsinki Convention for the protection of the Baltic Sea and the OSPAR Convention, protecting the North Sea and the North-East Atlantic, trace their roots to the 1970s and were forerunners of and important to the development of marine protection of today. They are crucial for regional cooperation, both between the parties to these agreements themselves and for the wider cooperation within the EU’s regional seas. Together with the Barcelona Convention for the protection of the Mediterranean these regional conventions have been promoting good environmental status for many years and will, not least due to their institutional structures, play a crucial role in the implementation of EU marine legislation.

6 The so-called Malawi Principles adopted at the CBD, COP 5 (Decision V/6) and Operational Guidance in accordance with CBD COP 7, Decision VII/11.
Today all of the regional seas agreements to which the EU is party profess to the ecosystem approach in one way or another, and most of them have adopted quite progressive action plans or protocols to complement the provisions found in the conventions. The Helsinki Convention covers the whole of the Baltic Sea area, including inland waters as well as the water of the sea itself and the seabed. Measures are to be taken in the whole catchment area of the Baltic Sea to reduce land-based pollution. The Helsinki Convention and its administrative body the Helsinki Commission (HELCOM) take a holistic view on the marine environment, and the Convention regulates all kinds of activities and forms of pollution. The definition of ecosystem approach applied by HELCOM is:

The comprehensive integrated management of human activities based on the best available scientific knowledge about the ecosystem and its dynamics, in order to identify and take action on influences which are critical to the health of marine ecosystems, thereby achieving sustainable use of ecosystem goods and services and maintenance of ecosystem integrity.7

Furthermore the Helsinki Convention has recently adopted a specific action plan (BSAP) with four main focus areas. These are areas that are considered to be specifically crucial for the environmental status of the Baltic. The plan, which was adopted in 2007, contains specific regulations for measures to be taken by the contracting parties within these areas and aims to implement an ecosystem approach. The BSAP is even presented as a regional implementation of the EU Marine Strategy Framework Directive (MSFD) (HELCOM 2011). As the vast majority of the parties to the Helsinki Convention are EU member states, this region has a good potential for successful integration of the different regulatory regimes and thus effective implementation of the MSFD (see further ‘Marine Strategy Framework Directive’ below). To a large extent HELCOM, as well as other international river and regional seas commissions, have actually changed position and are increasingly focused on implementing European law and policy rather than developing their own international obligations to be implemented by their respective parties and the EU (Hey 2009).

The OSPAR Convention for the protection of the North Sea and the North East Atlantic was originally two Conventions (the 1972 Oslo Convention and the 1974 Paris Convention) that were merged to become the OSPAR Convention in 1992. It is an agreement with fifteen parties. Unlike the other regional agreements addressed here OSPAR does not cover an enclosed or semi-enclosed sea but rather aims to regulate activities in a significant part of the Atlantic Ocean. However, the OSPAR-area also includes more confined bodies of water such as the English Channel and the Kattegat Bay.

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The main tasks of OSPAR has been to provide monitoring structures and, through the OSPAR Commission, to be an organ for cooperation in the region. A large number of the parties are also members of the EU. In 2010 the OSPAR Convention adopted a special Environmental Strategy for the North East Atlantic with a number of focus areas important for the environmental status of the sea. This strategy emphasizes the ecosystem approach as a basic concept and makes references to the MSFD. OSPAR intends to take an active role in facilitating a coherent and coordinated implementation of the MSFD. However, considering the geographical scope of the convention and the number of member states this will be a challenging task.

Within the Black Sea area the Bucharest Convention for the protection of the Black Sea from 1992 is applicable. The catchment area of the Black Sea is about six times larger than the surface area of the sea itself. Hence the Black Sea is particularly sensitive to land-based pollution. The runoff districts, however, include a large number of countries that are not Black Sea coastal states and hence not parties to the Convention. This makes it more difficult to effectively control pollution discharges.

In addition to the Bucharest Convention, the 1994 Danube River Protection Convention also applies to part of the Black Sea area and complements the rather narrow geographical application of the Bucharest Convention. Like most river basin conventions, and in parallel to the WFD’s river basin approach, the Danube Convention takes a hydrological basin approach, applied to the Danube river catchment area. The protocols to the Bucharest Convention in some cases have a wider area of application than the Convention itself. The general feature of regional agreements for ocean management is otherwise to only include the coastal states. A likely explanation is that generally only the coastal states have a genuine and not least an economic interest in the status of the marine waters. Of all regional agreements only the OSPAR Convention has among its parties non-coastal states: Luxembourg, Switzerland and Finland8 (Vinogradov 2007: 589-597). These states are parties due to the fact that their territories lie within the catchment areas of the region, and thus contribute to the land-based pollution of the sea.

The Bucharest Convention, which is a framework convention with very few precise regulations, derives much of its substance from in total four protocols focusing on different sectors of activities. This approach to regulation is common to all agreements adopted within the UNEP Regional Seas Programme (also see ‘UNCLOS/International law’ above). Of all the regional agreements in Europe the Bucharest Convention itself appears as the least modern instrument, with far too general provisions and traditionally lacking most of the environmental principles, such as the precautionary principle and the principle of best available technique (BAT), that are central to comparable instruments (Vinogradov 2007:

8 Finland is a coastal state but not of the North Sea or the North East Atlantic. However, some of its rivers flow to the Barents Sea, and historically it was involved in efforts to control the dumping of hazardous waste in the Atlantic and the North Sea.
However, the parties to the Bucharest Convention have agreed on a strategic action plan to further the implementation of the Convention mechanisms and the regional compliance with ecosystem quality objectives. The action plan was revised in 2008. With the revision of the action plan principles like sustainable development practices, the precautionary principle and public participation was adopted (Strategic Action Plan for the Black Sea 2009, BS-SAP). This action plan also includes principles and mechanisms such as integrated coastal zone management (ICZM); the ecosystem approach; and integrated river basin management (IRBM).

To establish a system for observation of the marine conditions in the Black Sea region, the Black Sea Integrated Monitoring and Assessment Programme was set up by the UNEP Regional Seas Programme in collaboration with the Black Sea Commission. Only two of the Black Sea Coastal states are member states to the EU and thus bound by EU law. However this has triggered an initiative by the EU to increase cooperation with the whole region. (DiMento and Hickman 2012).

For regional geopolitical reasons the legal division of the Mediterranean into coastal zones, EEZ and high seas has been debated ever since UNCLOS was signed in 1982. This complicates coastal and marine governance in the area. However, in recent years several protocols that further the objectives of the Barcelona Convention have been adopted to combat the deterioration of the environment of the Mediterranean, not least the increasing loss of biodiversity. The Barcelona Convention, which was first adopted in 1976, was comprehensively amended, expanded and re-named in line with Agenda 21 in 1995.

Unlike for example the Helsinki and OSPAR Conventions, which contain some quite precise requirements, the Barcelona Convention, like the Bucharest Convention, is a framework treaty adopted within the UNEP Regional Seas Programme. It lays down general rules that have subsequently been supplemented by more detailed protocols. Although this means that the convention as such has little steering power this model creates a structure for cooperation and for continuously addressing areas or activities that are in need of better regulation. It has enabled new topics to be dealt with without necessitating amendments to the convention. The latest addition, a protocol on ICZM, entered into force in 2011. This protocol itself takes the form of a framework agreement with six aims; sustainable development of coastal zones by rational planning of activities; preservation of coastal zones; sustainable use of natural resources; preservation of ecosystems and coastlines; prevention and reduction of natural disasters and climate change; and improvement of cooperation. With the protocol on ICZM the Mediterranean area claims to step beyond the problems of traditional state jurisdiction and instead develop new tools for environmental protection. As with the Black Sea the effective implementation of EU marine law in this region is challenged by the large number of Mediterranean coastal states that are not EU member states, some of which are also in a state of political uncertainty (Del Vecchio Capotosti 2008, Gavouneli 2008, Birnie et al. 2009: 395-396).
All the regional agreements are important, not least for providing a legal and political frame, and all aim for cooperation towards environmental protection across geographical, ecological and political differences. The efforts taken so far under these agreements have seen varying results. It continues to be a great challenge in all these regional contexts to effectively implement the measures needed to combat serious and complex environmental problems. This follows from the nature of the problems but also from the diversity of states involved and the complex institutional structures that these differences both create and demand. Effective legal control is hard to achieve on an international or regional level. The ecosystem approach is a promising instrument if effectively operationalized. The MSFD will also have an important coordinating role in this work. As mentioned the MSFD has also become an important driver for law creation within these international organizations, particularly with respect to the Baltic Sea and the North-East Atlantic. This adds to the effect of the EU directive and related legal acts. However the number of non-EU member states in the marine regions complicates coordination and implementation and is therefore an obstacle that will have to be managed.

The Water Framework Directive

The aquatic environment has been the subject of extensive EU regulation, to a degree as a result of the EU being party to many agreements in the field of water protection and marine governance. Since emissions of all kinds have a tendency to eventually end up in watercourses and oceans the marine environment is in fact affected by many pieces of EU legislation. For reasons of space, however, we focus here on legal acts directly dealing with the marine environment.

The Water Framework Directive (WFD) was the first and most significant step within the EU towards a more coupled and holistic view of water management. This directive is now complemented by the Marine Strategy Framework Directive (MSFD). Together they cover the complete water regimes of the EU. They both embrace an ecosystem-based approach and aim to guarantee that certain environmental quality goals are reached for each area concerned. The directives are also devised to embrace and take into account the regional differences existing between the different European seas. Furthermore, an important purpose of these directives is to enforce regional agreements to which the EU is party.

In the WFD the environmental water quality goals are assessed specifically for every river basin, river basin district or coastal area, and are based on the specific biology and aquatic ecosystem conditions found within that area, i.e. a river basin approach (articles 2(13) and 3(1)). What protection measures to take depends on the actual conditions in these run off districts (article 2(15)). The scope of the WFD is limited mainly to inland waters. However, it is also applicable to the surface waters on the landward side of the baseline and one nautical mile on the seaward side of this line (articles 2(3) and 2(7)).
The purpose of the WFD is to provide a framework for protection of these waters and prevent further deterioration, protect the marine environment, enhance the status of aquatic ecosystems, and generally improve the aquatic environment (article 1). The directive regulates surface water, groundwater, inland water, transitional water\(^9\) and coastal water and calls for ‘good ecological and chemical status’ of freshwater (see definitions in article 2 of the directive). Hence its role for marine areas is fundamental in so far as coastal waters and transitional waters inevitably end up in, and are interconnected with, the marine ocean basins. Land based pollution even contributes the vast majority of all marine pollution according to UNEP.\(^{10}\) The aim is to enhance the protection and the improvement of the aquatic ecosystems through the establishment of measures for progressive reduction of discharges and emissions of some priority substances. This is done through a complex system of reference elements and quality standards and characteristics set for different types of waters and ecological aspects. The member states are required to establish monitoring programs in order to establish a coherent and comprehensive overview of the water status within each river basin district and to determine whether the water status is high, good or moderate, and what measure to take to improve it. The WFD also emphasizes the need for achieving the objectives of relevant international agreements, and establishes innovative principles for water management, including public participation in planning and economic approaches (article 1).

One important feature of the WFD is the coordination of administrative arrangements. As the WFD obligates the member states to identify and assign special river basin districts as ecologically suitable, the states are also to assign a governmental body or appropriate competent authority to govern the area (article 3), and hence be responsible for measuring, monitoring and data sampling in that district. Hence the directive takes a holistic approach also in this regard, as it emphasizes the environmental and ecological boundaries rather than the geographical or political ones.

The WFD is to be evaluated in 2015, when all quality goals set out in the directive and by the river district authorities are to be fulfilled. It is a very ambitious piece of legislation, which has attracted a lot of criticism. Some has claimed that the quality indicators are contra-productive to the ecosystem approach since they once again imply a fragmentation rather than an integrated approach and cause difficulties for appropriate and coherent implementation in-between different member states (see for example Grimeaud 2001: part 3, Keessen et al. 2010, Josefsson and Baaner 2011). However it is also argued that much of the complexities are due to the many exceptions found in the

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\(^9\) ‘Transitional waters’ are 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. WFD, article 2(6).

\(^{10}\) http://www.unep.org/regionalseas/issues/landactivities/default.asp [14 February 2014].
directive (Lee 2009: 34, Jans and Vedder 2012: 395). Another critique is that the actual goals are too unclear, although some numerical standards are set by the directive many of the factors to be taken into account are only mentioned in very general terms as a result of the need for flexibility. The directive’s reporting and information requirements might also be a problem in terms of implementation since absence of knowledge will affect the assessments and decisions (Lee 2009: 31 and 36 ff). Hence, although the aims are ambitious there are several obstacles and uncertainties to be overcome.


Unlike the WFD, the MSFD is applicable to the EU’s marine waters, beyond the baseline. According to the MSFD the states concerned within each area of the European regional seas are to evaluate the conditions and make a plan for their marine region. The MSFD is applicable to coastal zones with respect to issues not already addressed by the WFD, and also to the seabed and subsoil in the coastal zones (article 3(1)). Furthermore the directives correlate in the sense that the results of the monitoring under the WFD are to be taken into account when assessing the marine waters according to the MSFD (article 8). Just as the WFD, the MSFD focuses on natural geographical and ecological boundaries, the regional specifics and the drainage areas rather than on national borders. The MSFD aims at achieving ‘good environmental status’ of the EU’s marine waters until 2020. The term ‘good environmental status’ is defined as ‘… the 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 …’ (article 3(5)). This definition is similar to the definition of ‘ecological status’ in the WFD. Hence what signifies good environmental status varies, and is specific to each region, decided on the basis of specific quality descriptors.

An initial assessment of the marine areas was to be made by July 2012. By the same time member states were to determine what conditions represent ‘good environmental status’ and establish the environmental targets and associated indicators. A monitoring program for ongoing assessment and regular updating of targets is required to be established and implemented by 2014 by each state. Thereafter, the states should develop and enter into operation a program of measures designed to achieve or maintain ‘good environmental status’. This programme of measures is to be developed by 2015.

The aim of the MSFD is to more effectively protect the marine environment across Europe. It is based, and focuses specifically, on the four maritime regions of the EU: the Mediterranean Sea, the Baltic Sea, the Black Sea and the North-east Atlantic Ocean, including the waters surrounding the Azores, Madeira and the Canary Islands. The purpose of this is that the states in these regions shall cooperate and take into account the specific regional conditions when developing the plans for how to implement the directive. Furthermore the
member states are encouraged to also seek cooperation with third party countries and base this cooperation on existing regional agreements. In the area of the Black Sea for example, this implies cooperation primarily with Georgia, the Russian Federation, Turkey and Ukraine (which are not members of the EU) and to consolidate the MSFD implementation with the work done in the Bucharest Convention and the Black Sea Commission, as well as under the Strategic Action Plan for the Black Sea. However, seen in the light of the ecosystem approach, cooperation with third party countries could probably also imply cooperation with non-coastal states that are part of a run off district which causes discharges in one of the regional seas. If relevant non-member states and non-coastal states are not actively involved in the work it could be difficult for the member states to reach the environmental objectives and thus comply with their obligations. As an example, the run off districts of the Black Sea include about twenty countries (BS-SAP, p. 2).

The encouragement to cooperate and incorporate regional agreements is important as an attempt to apply an ecosystem approach. It is also of value by enabling knowledge already gathered on the problems and of the environmental status in a specific area to be used within the EU framework. Hence the MSFD encourages the member states to work progressively to incorporate all the efforts already made by regional organs like HELCOM and the OSPAR Commission (the administrative organs of the Helsinki Convention and the OSPAR Convention) and the administrative structures, for example for monitoring of the water status, already set up. It furthermore allows for more effective and consistent interpretation of these agreements through the legal regime of the EU. Through the adoption of the MSFD the EU has initiated a new kind of transboundary public governance (Hey 2009).

Both HELCOM and the OSPAR Commission have been valuable to marine protection as regards their monitoring structures. Within the frames of its work the OSPAR Convention has tried to identify threats to the marine environment and organized programmes and measures for national action. As a consequence of its efforts to do so it has also been a successful example of how to ensure monitoring and assessment of the quality status of the seas by setting internationally agreed goals, and by making sure that participating states deliver what is needed to keep this up. This latter task falls on the OSPAR Commission. These kinds of monitoring structures are today adopted by most regional seas conventions in one way or another.

The OSPAR Commission and HELCOM have also initiated cooperation in developing strategies on how to implement the ecosystem approach and especially the pertinent EU directives, within their regions and with respect to the non-EU member states. This is a requirement and a prerequisite for achieving good environmental status in the whole region. OSPAR and HELCOM are similar also in this regard since both conventions have very few non-EU member states (Iceland and Norway, and the Russian Federation respectively). This is a much more challenging task for the other regional agreements where the EU
member states are a minority and thus have less basis for pushing the EU regime as a model for the region.

According to the MSFD each member state – cooperating with other member states and non-EU countries within a marine region – is required to develop strategies for its marine waters (article 5(1)). The core idea of the directive is for each country to cooperate within its marine region to create a marine strategy with the aim of reaching good environmental status. This work shall be coordinated to attain coherence between the states in the area, so that all countries in the area endeavour to find a common approach. However the evaluations or assessments of the water quality needed to fulfil the aim of the directive are still to be made individually rather than jointly within each sub-region. The same is true for evaluating measures to be carried out. It could be questioned whether it would not be more effective if these assessments and evaluations of measures were made and implemented in cooperation.

Remaining Challenges

Despite the very promising features of recent EU action, particularly the increasing emphasis on coordination, science-based governance, and the ecosystem approach, there remain several challenges, which may undermine the ability to actually deliver on the environmental goals. Prominent among these is the far-reaching coordination needed. It will be challenging in practice to apply the requirement for ‘good environmental status’ in a consistent manner over regions and sub-regions. Not least due to the need for evaluating and deciding on appropriate measures. In an attempt to come to terms with this the EU has created an implementing strategy developed by the European Commission (EC). This strategy, the Common Implementation Strategy provides instructions on what to take into account in developing a marine strategy and is to be coordinated further with both the WFD and the work pursued within regional agreements.

Still, the criteria provided to determine ‘good environmental status’ range from the general and vague to the very complex. There is also an inherent conflict between exactness and comparability on the one hand and flexibility on the other which may leave member states with very significant discretion (Markus et al. 2011: 79). That discretion is further increased by the exceptions that member states may legitimately apply in order not to take measures otherwise prescribed by the MSFD or the WFD. Taken together this can allow member states to act – or fail to act – in a manner that is counter to the objectives of sustainable governance without there being any transgression of the legal requirements, and thus no clear case for using legal remedies to correct the situation.

One should also remember that the MSFD contains very little in terms of concrete measures that directly affect the environmental situation. It sets goals and establishes processes but relies heavily on other (more fragmented) EU-law and international agreements for substantive instruments to effect change. This also means that individual member states are left to strike the balance between
stability and legal certainty on the one hand and adaptability and responsiveness on the other in concrete cases. The struggle between competing interests is thus likely to play out once more – as it did at EU level when the directives were drafted – at member state level when specific measures are to be devised and implemented. This situation can also potentially create another problem in regard to compliance control and enforcement procedures. Since the obligations incumbent on the states are rather vague enforcement is of great importance, not least as a means of coordination and by generating authoritative interpretations. At the same time the line where enforcement action may be triggered is blurred by that same vagueness. And while the EU at least formally has a far-reaching competence to act on non-compliance, most of the regional organizations have very little such competence and are thus unlikely to contribute significantly to filling the functions of an effective enforcement mechanism.

Furthermore, while the member states are largely responsible for achieving the environmental goals, important measures remain outside their control and may only be taken at the EU level or in international forums. The first applies e.g. to fisheries and marine conservation, which is tightly regulated by the EU, but also to a large extent to agriculture and transport. The latter applies to numerous measures in regions where action by non-EU member states is vital for achieving the goals.

Conclusions

The legal rules and procedures applicable to the governance of Europe’s seas are plentiful and complex. They include measures at global-, regional-, EU- and national levels. In many cases they are over-lapping and synergetic, and support regional marine governance, or at least provide a good structure for governance measures. Much of the pertinent legislation is ambitious and promising, providing a ground for a more coordinated and compound implementation, and introducing new judicial tools and mechanisms.

Although it is difficult to devise legislation that fits all marine regions in Europe, the EU framework directives in particular are of vital importance, not least politically. They raise the issue of marine governance, but also set quality standards for the marine environment. The EU also has the potential to function as a node, distributing creative forms of regulation devised in regional agreements to other regions within the EU. The EU commission and the EU Court play important roles in enhancing the implementation of these regional agreements. With more resources directed towards technical support, monitoring and enforcement, that role could be even greater.

However, there is no lack of factors that may counteract successful governance. It will, inter alia, be quite interesting to see whether the EU’s member states and institutions can manage the far-reaching coordination between policy areas and regional legal regimes envisioned by the MSFD. Clearly, that will require
considerable effort and commitment. To promote the achievements and potential of regional agreements for the attainment of the MSFD’s goals without suffering setbacks caused by conflicting interests, fragmentation and requirements for unanimity in decision-making will also be a toll order. Eventually, even stronger regional and/or supranational mechanisms might be necessary to reach the environmental quality goals.

Undoubtedly, continued and effective integration of environmental considerations in all relevant policy areas of the EU – including agriculture, fisheries, transport and certain aspects of the internal market – will be indispensable. Otherwise these policies risk hamstrung the member states; and may in some cases bar necessary action. Also international agreements can sometimes restrict the ability to take effective measures, particularly with respect to pollution from ships and other sea-based activities. This will necessitate continued and increased commitment from member states and the EU alike to press for raising the protective level of pertinent international standards.

The ecosystem approach has been instrumental for placing scientific knowledge about the ecosystems and their variability at the heart of marine governance. But the ecosystem approach is not only hard to define with precision but might also get into conflict with traditional legal requirements for legal certainty and coherence. Such conflicts are seldom addressed in substance in international or EU law, but rather left to individual states to manage in the concrete circumstances. It remains to be seen how the MSFD’s objectives will be reconciled with competing objectives at member state level. Further clarification of what measures EU member states are expected to take – and will be allowed to take considering harmonizing EU policies – when needed to meet environmental quality standards might be necessary, although it can conflict with the desired far-reaching flexibility.

Although much of the critique directed at the frameworks implementing the ecosystem approach is justified, these frameworks constitute an important step towards putting environmental quality and ecosystem dynamics, rather than administrative or activity specific boundaries, at the centre of governance.

A major hurdle to achieving good environmental status is deficiencies in implementation. When criticizing the applicable regulation it is, however, important to realize that many of the legal structures and regimes governing our seas, although beginning to take shape already in the seventies, have only been in force for a decade or less. One needs to have some patience with the fact that it takes time for new structures and regulations to be fully incorporated and made to operate to their full potential.

Obviously, good implementation and enforcement is a continuous endeavour that requires commitment and resources. And the legal framework can over time never be better than the policies it is devised to effectuate – as the common fisheries policy of the EU has so prominently shown. Continued political commitment to marine governance is thus a prerequisite for the law to serve as the strong floater that it ought to be, and which it shows promising signs of becoming.
References


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List of Conventions and EU Legal Acts

International Conventions

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EU Legal Acts