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MARINE STRATEGY FRAMEWORK DIRECTIVE: POTENTIAL AND SHORTCOMINGS

Master Thesis

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CONTENTS

INTRODUCTION

Relevance and problematic issues. It is believed that the sea water is a source of all life, and is known to be a habitat for many different species of flora and fauna as well as an important asset of human life and wellbeing. Despite their significance the environmental status of marine waters is constantly deteriorating because of human activities such as shipping, overfishing and polluting. Moreover, "*climate change has further altered the state of the marine environment and is expected to do so even more in the next decades*"[1]. At the moment one of the biggest issues is nutrient input into marine environment that leads to eutrophication causing poor oxygen conditions and resulting in death of particular sea organisms which seems to be especially apparent in the Baltic Sea, where ecological status is regarded as mostly poor or bad.[2] The above mentioned is only one of the environmental problems found in the European seas. Biodiversity and good status of marine environment is vital for the well-being of people, while the current state of European marine environment is a cause for concern and calls for action. Nevertheless, protective measures in the marine environment are not as easy to conduct as they are on land due to the transboundary effect of the marine environment, where impacts of negative factors such as overfishing and pollution move from sea to sea without abiding jurisdictional rules and thus requiring a high level of cooperation between states in this field of environmental protection.[3]

Real effort to salvage the state of European marine environment began in 2008 when European Union came up with the Directive Establishing a Framework for Community Action in the Field of Marine Environmental Policy commonly known as the Marine Strategy Framework Directive. This Directive was drawn up in order to protect, preserve and even restore marine environment in an effective and efficient way. Directive has a legally binding power over the Member States on the objective they have to reach, while providing them with enough flexibility to choose the most suitable measures for the implementation. According to part one of the first Article "*this Directive establishes a framework within which Member States shall take the necessary measures to achieve or maintain good environmental status in the marine environment by the year 2020 at the latest*"[4]. Marine Strategy Framework Directive aims to make the marine

[1] Commission Staff Working Paper Relationship between the initial assessment of marine waters and the criteria for good environmental status. [2011] SEC(2011) 1255 final, p. 69.
[2] *The European Environment – state and outlook 2010: synthesis*. Copenhagen: European Environment Agency, 2010, p. 61, 64.
[3] Frank, V. *The European Community and Marine Environmental Protection in the International Law of the Sea: Implementing Global Obligations at the Regional Level*. Leiden: Martinus Nijhoff Publishers, 2007, p. 9.
[4] 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). [2008] OJ L164/19, Article 1(1).

environment more sustainable and to protect it in the most effective manner by encouraging the use of ecosystem-based approach.

However, it is clear that some problems with the Marine Strategy Framework Directive do exist and it does not set perfect regulation of marine environmental protection. This is apparent from the fact that in 2010 the European Commission started infringement proceedings for the failure to properly implement the Directive against 18 out of 27 (at that time) member states.[5] It is important to note that all of them were coastal states to which the Directive applies for the most part. When many member states have the infringement action started against them it proves one of the following factors: either the provisions of the Marine Strategy Framework Directive are extremely unclear and understood differently by separate states, the Commission did not take a sufficiently strong position in explaining the Directive or there existed a strong opposition towards the Directive from particular member states.

It has to be stressed that environmental issues have such a huge impact on society nowadays and are so widely disputed, while neither the deficiencies nor the potential of the Marine Strategy Framework Directive have been sufficiently discussed and call for further attention.

The purpose of the master thesis. The purpose of this master thesis is to determine, scrutinise and evaluate the potential and shortcomings of the Marine Strategy Framework Directive resulting in the conclusion whether the deficiencies of the Directive override the potential.

The tasks of the master thesis. In order to achieve the established purpose of the present master thesis, these tasks have to be carried out:

1. Determining the need for the Marine Strategy Framework Directive by analysing the early efforts to regulate the protection of marine environment.
2. Establishing and evaluating shortcomings of the Marine Strategy Framework Directive by scrutinizing the provisions of the Directive and scholar's opinions on the subject.
3. Providing insight on the possible solution to the established shortcomings of the Marine Strategy Framework Directive.
4. Determining the potential of the Marine Strategy Framework Directive by comparing it to the Regional Sea Conventions for the protection of marine environment.

Hypothesis. The shortcomings of the Marine Strategy Framework Directive are significant enough to deem it insufficiently effective or incapable of achieving the objective it sets out to reach.

[5] Commission Staff Working Paper Statistical Annex: Annex IV – Part 1, Part 2 and Part 3, Accompanying the document Report from the Commission 28th Annual Report on Monitoring the Application of EU Law (2010). [2011] SEC(2011) 1094 final, p. 141, 142.

Object of the master thesis. The object of this master thesis is the protection of marine environment under the Marine Strategy Framework Directive.

Subject of the master thesis. European Union marine environmental protection, international marine environmental protection, Marine Strategy Framework Directive, Regional Sea Conventions.

Methods used in the master thesis. Research is based on the historical, analytical, linguistic, comparative and logical methods.

Historical method was applied when focusing on the legislative changes in regulation of the marine environmental protection.

Analytical method was applied when analysing the legal acts, scholars' articles as well as relevant case law and opinions of advocate general.

Linguistic method was applied when analysing the provisions of legal acts, relevant decisions in the case law and opinions of advocate general.

Comparative method was applied when comparing relevant legal acts, especially the ones adopted under the European Union law and international law.

Logical method was applied when determining the shortcoming and the potential of the Marine Strategy Framework Directive and comprehending their significance and effect.

Sources of the master thesis. The main groups of sources of the work are European Union and international legal acts, jurisprudence of Court of Justice of the European Union and scientific literature. EU and international legal acts used in the analysis include the Marine Strategy Framework Directive, Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (further referred to as Barcelona Convention), Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992 (further referred to as Helsinki Convention), Convention for the Protection of the Marine Environment of the North-East Atlantic (further referred to as OSPAR Convention), Convention on the Protection of the Black Sea Against Pollution (further referred to as Bucharest Convention), the Water Framework Directive and the Treaty on Functioning of the European Union. Jurisprudence of the CJEU is comprised of legal decisions relating to the exceptions established in the Marine Strategy Framework Directive as well as decisions portraying relations between the European Union and Regional Sea Conventions. Scientific literature includes books and articles from well-known scholars such as V. Frank, T. Markus, L. Juda, N. Westaway, R. Barnes, D. Metcalfe, R. Long, P. Eeckhout and others.

Novelty and relevance of the master thesis. The above mentioned authors have described the basic functioning of the Marine Strategy Framework Directive, while Marcus and Long have even detected some of its shortcomings. However, a deeper and more significant analysis of the

shortcomings has not been provided. Furthermore, most of the scholar's works have been released just after the adoption of this Directive and thus do not include analysis of the European Commission's decisions, reports or communications, as well as Marine Environmental Protection Strategies, all of which contribute to the understanding of the Directive's potential and shortcomings. What is more, the relations between the Marine Strategy Framework Directive and Regional Sea Conventions have barely been mentioned by the scholars, while this work provides an extensive analysis of their interactions.

Practical and academic importance of the master thesis. The analysis provided in this master thesis can be used by the European Union institutions to improve the legal framework regulating the protection of marine environment and to correct the existing shortcomings identified in this work. Furthermore, the European Commission can use the discussion on possible shortcomings to prevent their emergence into full effect. The governmental institutions of European Union member states can apply the findings of this master thesis to avoid deficiencies in marine environmental protection and provide a best possible regulation at the national level, as well as ensure proper implementation of the Marine Strategy Framework Directive. This master thesis also improves and extends the understanding of marine environmental protection in European seas.

Structure. The master thesis consists of five chapters divided into smaller parts.

The first chapter of this work will briefly discuss the history behind the Marine Strategy Framework Directive, in particular the early attempts to regulate protection of marine environment at the European level and the need for a legal instrument aimed specifically at combating problems of this sector. The objective of this chapter is to contribute to the full understanding of the importance of this Directive, focusing on its potential.

The second chapter will focus on the significance in determining the meaning of 'good environmental status' and the criteria for its attainment. It will also analyse the problematic aspect of the current definition of the status and the legal implications this provides. In addition, a solution to the existing shortcoming will be offered.

The third chapter will evaluate the possible application of exceptions established in the Marine Strategy Framework Directive and discuss the limits to the discretion provided to the member states. The significance of this shortcoming will be established throughout the chapter.

The fourth chapter will analyse the relations between the Marine Strategy framework Directive and Regional Sea Conventions emphasising the benefits the Directive provides over the international level of regulation. Some problematic aspects of the relations will also be mentioned.

The fifth chapter will determine dispute settlement possibilities in the field of marine environmental protection and provide reasoning for the best options at enforcing legal obligations arising from the Directive and Regional Sea Conventions.

1. A NEED FOR A LEGAL INSTRUMENT COVERING THE PROTECTION OF MARINE ENVIRONEMNT

Before we begin a deeper analysis of the potential and shortcomings of the Marine Strategy Framework Directive, it is necessary to establish why there was a need for this type of legal instrument to be created in the first place. The present chapter of the master thesis will concentrate on this particular topic. The upcoming parts will address the efforts by the European Union to control the impact that human activities have on the marine environment prior to the creation of Marine Strategy Framework Directive, in addition to discussing actions and steps leading up to its adoption. The potential and novelty that this Directive brings to the protection of marine environment will also be analysed in this chapter. The specific ways in which the Marine Strategy Framework Directive benefits the protection of marine waters will be further discussed in some of the following chapters of this work.

1.1. Early efforts to control the impact on marine environment

Even though this part of the chapter is called 'early efforts' it has to be mentioned that the initial attempts to control marine environmental impacts were taken quite late in the functioning of the European Union. First actions effecting the wellbeing of the marine waters were eventually taken in the field of marine safety, which became a subject of interest to the European Union member states after some disastrous oil spills occurred, and resulted in the adoption of Directive 93/75/EEC Concerning Minimum Requirements for Vessels Bound for or Leaving Community Ports and Carrying Dangerous or Polluting Goods, Directive 94/57/EC on Common Rules and Standards for Ships Inspection and Survey Organisations and for the Relevant Activities Dangerous or Polluting Goods as well as the Directive 95/21/EC Concerning the Enforcement, in Respect of Shipping Using Community Ports and Sailing in the Waters Under the Jurisdiction of the Member States, of International Standards for Ship Safety, Pollution Prevention and Shipboard Living and Working Conditions.[6] These legal instruments were not specifically created for the protection of marine environment but they did have a positive effect on it by providing safeguards from certain types of pollution. It should also be noted that other legal instruments in different fields of environmental policy were also to some extent covering the field of marine environment, in particular these were the Directive 76/464/EEC on Pollution

[6] Macrory, R. *Reflections on 30 Years of EU Environmental Law: A High Level of Protection?* Groningen: Europa Law Publishing, 2006, p. 310, 311, 312; Jans, H. J.; Vedder, H.H.B. *European Environmental Law* 3rd edition. Groningen: Europa Law Publishing, 2008, page 372; Kramer, L. *EU Environmental Law* 7th edition. London: Sweet & Maxwell, 2011, p. 277.

Caused by Certain Dangerous Substances Discharged into the Aquatic Environment of the Community, Directive 91/676/EC Concerning the Protection of Waters Against Pollution Caused by Nitrates from Agricultural Sources, Directive 91/271/EEC Concerning Urban Waste Water Treatment, Directive 2000/60/EC of the European Parliament and of the Council, Establishing a Framework for Community Action in the Field of Water Policy (further referred to as the Water Framework Directive), in addition to Directive 79/409/EEC on the Conservation of Wild Birds and Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora (further referred to as the Habitats Directive).[7] Moreover, part of EU's common fisheries policy as well as the common transport policy were associated with regulating activities effecting marine environment and in a way attempted to protect it.[8] Hence, the combination of legal instruments resulting from several European Union policies and several different fields of environmental policy offered some level of protection for the marine environment in the European seas.

The problem, however, was that the composition of different legal instruments was not providing an adequate level of protection as deterioration of the marine environment was not ceasing but rather increasing.[9] This was because the actions in the field of marine environment were extremely divided through "*sector by sector approach resulting in a patchwork of policies, legislation, programmes and actions plans at national, regional, EU and international level*".[10] Precisely because of these environmental actions that were quite ineffective in the field of marine waters, there was a need for a single legal instrument at the European Union level that would unify all efforts to protect the marine environment. The measures had to be taken at the European level, because "*EU can provide the structure and institutional capability for the development and oversight of the needed, integrated policy with the required consistency over appropriate spatial units*"[11] and also "*action at the EU level could better obtain desired results, and the efforts at this level would be limited to what member states could not accomplish by themselves*"[12]. Thus actions towards the adoption of Marine Strategy Framework Directive began.

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[7] Macrory, R., *supra* note 6, p. 266, 267, 271, 272, 273.
[8] Jans, H. J.; Vedder, H.H.B., *supra* note 6, p. 372; Long, R. Marine Strategy Framework Directive: A New European Approach to the Regulation of the Marine Environment, Marine Natural Resources and Marine Ecological Services. *Journal of Energy & Natural Resources Law* [serial online]. 2011, 29 (1): 1-44, p. 6.
[9] Proposal for a Directive of the European Parliament and of the Council establishing a Framework for Community Action in the field of Marine Environmental Policy (Marine Strategy Directive). COM(2005) 505 final 2005/0211 (COD), p. 2; Juda, L. The European Union and Ocean Use Management: The Marine Strategy and the Maritime Policy. *Ocean Development & International Law* [serial online]. 2007, 38 (3): 259-282, p. 261.
[10] Proposal for a Directive, *op. cit*., p. 2.
[11] Juda, L., *op. cit*., p. 261.
[12] *Ibid.*, p. 264.

1.2. Steps toward the adoption of Marine Strategy Framework Directive

As already established in the previous part of this chapter there was a need for a single legal instrument that would integrate all European Union policies, thus providing adequate level of protection in the European marine environment. The Sixth Environmental Action Programme paved the way for the adoption of such instrument by encouraging the drawing up of the European Commissions' Thematic Strategy for the Protection of the Marine Environment, the creation of which began in 2002 with the Commissions communication 'Towards a Strategy to Protect and Conserve the Marine Environment'.[13] At this point there were deliberations on two options that could be taken for the protection of marine environment, first being the absolutely voluntary approach that would simply suggest recommendations to the member states on the measures that could be taken to improve the marine environment, while the second suggested a creation of a flexible legal instrument that would be ambitious in its scope but not very prescriptive in tools to be applied.[14] The latter option was chosen and thus the creation of Marine Strategy Framework Directive began. It needs to be mentioned at this point that a number of changes have been made to the original text from the time proposal for a Marine Strategy Directive was introduced until the present text of the Directive was adopted. A quite noticeable change, for example, was an alteration in the time period by which 'good environmental status' of the European marine environment has to be attained, switching from the year 2021 to 2020.[15] The number of changes proves that it was quite difficult for the European Commission and member states to find common grounds on the wording that had to be used in the provisions of the Marine Strategy Framework Directive.

The flexible approach that has been taken in the protection of marine environment is sometimes criticised, however, the choice of regulation or a stricter directive would have resulted in active opposition from many member states such as France or United Kingdom that in the past were quite negligent when exercising their sea environment politics and would claim national sovereignty so that they could escape the acceptance of stricter EU marine environmental initiatives.[16] "*Generally speaking, it is possible to divide member states into three main groups, namely: those with strong maritime interests (e.g., Cyprus, Denmark, Greece, Malta and, to some extent, Belgium, the Netherlands, and the UK); those with strong fisheries interests (e.g., Ireland, Italy, Portugal and Spain, and, to some extent, Estonia, France, Latvia, Lithuania and*

[13] Macrory, R., *supra* note 6, p. 312, 313; Jans, H. J.; Vedder, H.H.B., *supra* note 6, p. 373; Kramer, L., *supra* note 6, p. 273; Proposal for a Directive, *supra* note 9, p. 2.
[14] *Ibid*., p. 5, 7.
[15] *Ibid.*, p. 14 Article 1; Directive 2008/56/EC, *supra* note 4, Article 1(1).
[16] Proposal for a Directive, *op. cit*., p. 7; Kramer, L., *op. cit*., p. 275.

Poland); and the more environmentally-oriented countries (e.g., Germany, Finland and Sweden and, to some extent, the Netherlands)"[17]. The fact that member states had such a different view on marine environment made it difficult to impose on them equivalent standards, by using stricter legal instrument such as regulation. Because of this the adoption of 'framework directive' that is relatively flexible in its implementation at that time seemed like the most suitable choice for both European Institutions and member states as it would give them enough discretion to exercise their sovereignty without compromising the objective to be attained.

1.3. The expectations from Marine Strategy Framework Directive

As it will be seen from further analysis of the potential and shortcomings of the Marine Strategy Framework Directive it attempts to bring into play many of the principles and approaches established under the international marine environmental law. This and other particular qualities of the Directive make it one of the most contemporary instruments in marine environmental protection. The present part of this chapter will discuss some of the potential the Directive is expected to retain, without the obvious potential of it being the "*first framework instrument which is aimed expressly at protecting and preserving the marine environment, preventing its deterioration or, where practicable, restoring marine ecosystems in areas where they have been adversely affected*"[18]. The present part of the chapter will concentrate on some of the provisions of this Directive that introduce some important aspects for the protection of marine environment.

First thing that has to be mentioned, is that the Marine Strategy Framework Directive encourages a high level of cooperation, which is an evident contrast to the former sector by sector approach. This cooperation requirement applies not only to "*Member States and, whenever possible, third countries sharing the same marine region or subregion*"[19] or even structures of Regional Sea Conventions, but also to different EU policies, as the Directive "*shall contribute to coherence between, and aim to ensure the integration of environmental concerns into, the different policies, agreements and legislative measures which have an impact on the marine environment*"[20]. This provision should be regarded as cooperation between EU policies and even though there is no mention in which form the 'integration of environmental concerns' will take place, it non the less provides a great potential for the protection of marine environment. The cooperation provisions of the Marine Strategy Framework Directive

[17] Frank, V., *supra* note 3, p. 82, 83.
[18] Long, R., *supra* note 8, p. 4.
[19] Directive 2008/56/EC, *supra* note 4, Article 3(9).
[20] *Ibid*., Article 1(4).

(cooperation is emphasised in many provisions throughout the Directive) are very important as it would "*not be possible for a single Member State or sector to achieve good environmental status by acting alone*"[21].

Another great quality of the Directive is the requirement to apply the ecosystem-based approach, which has never been attempted by the European Union, to manage human activities in the marine environment.[22] Even though the Marine Strategy Framework Directive itself does not further explain the particular meaning of this approach in the "*Commission's Communication <…> it is regarded as an approach whereby human activities affecting the marine environment will be managed in an integrated manner promoting conservation and sustainable use in an equitable way of oceans and seas*"[23]. The use of the ecosystem-based approach should be explained together with the principle of sustainability which has also been entrenched in the Directive, by stating that the mentioned approach should be applied "*while enabling a sustainable use of marine goods and services*"[24] and that high level of environmental protection in general should be achieved "*in accordance with the principle of sustainable development*"[25]. This principle is relevant and therefore mentioned in many articles of the Marine Strategy Framework Directive. The meaning of sustainable development principle has been explained as encouraging harmony between the exploitation of resources and protection of the environment, by meeting developmental and environmental needs of present and future generations.[26] If we take a look at the text of the Directive its Article 1(3) (that also established the use of ecosystem-based approach) portraits the exact same idea about sustainability. Because of this, it should be stated that Marine Strategy Framework Directive entrenches these two internationally praised approaches.

Furthermore, it has to be mentioned that a great potential of the Directive arises from articles governing the extensive monitoring, updating and reporting procedures. The ongoing monitoring programmes have to be established on the basis of Article 11 of the Directive, while the requirements for updating of marine strategies are fixed in Article 17. A visible amount of attention in the Marine Strategy Framework Directive is assigned to reporting procedures, which are established under Articles 18, 20 and 21. The reporting provisions are made to assist in

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[21] Markus, T.; Schlacke, S.; Maier, N. Legal Implementation of Integrated Ocean Policies: The EU's Marine Strategy Framework Directive. *International Journal Of Marine & Coastal Law* [serial online]. 2011, 26 (1):59-90, p. 88.

[22] Directive 2008/56/EC, *op. cit*., Article 1(3); Long, R., *op. cit.*, p. 5.

[23] Kroepelien, K. F. The Norwegian Barents Sea Management Plan and the EC Marine Strategy Directive: Some Political and Legal Challenges with an Ecosystem-Based Approach to the Protection of the European Marine Environment. *Review of European Community & International Environmental Law* [serial online]. 2007, 16 (1): 24-35, p. 26.

[24] Directive 2008/56/EC, *supra* note 4, Recital 8.

[25] *Ibid.*, Recital 45.

[26] Avilés, L. Sustainable Development and the Legal Protection of the Environment in Europe. *Sustainable Development Law & Policy* [serial online]. 2012, 12 (3): 29-57, p. 29, 30.

determining the progress made in the achievement of the Directive's objective. All of the mentioned provisions are aimed at ensuring the best level of implementation of the Directive as well as its contemporariness.

What is more, Article 15 of the Marine Strategy Framework Directive provides that where an issue of the marine environment is identified but cannot be tackled on a member state level, recommendations can be made for an action to be taken at the European Union level.[27] This provides additional effectiveness in protecting the marine environment as well as consistency with the principle of subsidiarity. Another provision of the Directive establishes rules for public consultation and information. It provides that "*Member States shall ensure that all interested parties are given early and effective opportunities to participate in the implementation of this Directive*"[28] and that they will "*publish and make available for comment to the public summaries of elements of their marine strategies*".[29] The mentioned provision aims to ensure transparency and thus transposes another important international principle.

1.4. Final remarks

From what has been provided in this chapter it can be stated that the importance of the Marine Strategy Framework Directive in protection of the marine environment in Europe cannot be denied. Moreover, it is evident that there existed a clear need for such legal instrument. What is more, a number of advantages this directive established in comparison with the previous attempts at regulating the protection of marine waters is very significant. Nonetheless, it will be further discussed in the following chapters of this work whether the Marine Strategy Framework Directive is likely to succeeded in what it strived to achieve upon its adoption. The next two chapters of the present work, will analyse whether discretions provided to the member states through some specific provisions of this Directive are suitable or create its shortcomings.

[27] Directive 2008/56/EC, *op. cit.*, Article 19(1).
[28] Directive 2008/56/EC, *supra* note 4, Article 15.
[29] Kroepelien, K. F., *supra* note 23, p. 30.

2. PROBLEMS IN DETERMINING 'GOOD ENVIRONMENTAL STATUS' OF THE MARINE ENVIRONEMNT

The first Article defining the objective that has to be achieved by the Marine Strategy Framework Directive states that the purpose of this Directive is to "*achieve or maintain good environmental status in the marine environment by the year 2020 at the latest*"[30]. A slightly more detailed explanation of the term 'good environmental status' is provided in Article 3 of the directive, which defines it as status of marine waters that are ecologically diverse, dynamic, clean, healthy, resilient to environmental changes caused by human activities and used sustainably, without causing pollution, thus keeping them in this state for the future generations to enjoy.[31] The definition provided in the mentioned article coincide in many ways with the qualitative descriptors for determining good environmental status established in Annex I. The definition provided in the Directive "*will have different meanings in different marine regions or sub-regions, and is therefore open to both interpretation and extension*"[32]. From this we can establish, that neither the definition imparted in the text of the Directive, nor the qualitative descriptors are explicit enough to provide the European Union member states with specific standards that have to be attained for the 'good environmental status' to be reached. This is where a major shortcoming of the Marine Strategy Framework Directive arises. If this status cannot be defined by scientific criteria, for example by determining the exact levels of contaminants that would still render marine waters as having 'good environmental status', how will it be decided if the Directive was properly implemented by the member states if the objective that has to be achieved is completely not clear and a subject for speculations. What is more, member states are left to determine characteristics for good environmental status in their relevant marine region or subregion by themselves.[33] Some authors claim that such shortcoming can even make the Directive ineffective as the status will be declared 'good' without any changes to the marine environment actually happening.[34]

The present chapter will try to identify the scope of the mentioned shortcoming in terms of outcome it has on the implementation of the Marine Strategy Framework Directive and the effective protection of the European marine environment exercised through the use of this legal instrument. Moreover, this chapter will analyse the attempts to mend this shortcoming through

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[30] Directive 2008/56/EC, *supra* note 4, Article 1.
[31] *Ibid*., Article 3(5).
[32] Barnes, R.; Metcalfe, D. Current Legal Developments the European Union. *International Journal of Marine & Coastal Law* [serial online]. 2010, 25 (1): 81-91, p. 86.
[33] Directive 2008/56/EC, *op. cit*., Article 9(1); Marcus, T. Changing the Base: Legal Implications of Scientific Criteria and Methodological Standards on what Constitutes Good Marine Environmental Status. *Transnational Environmental Law*, Cambridge University Press. 2012, 2(1): 145-165, p. 76.
[34] Kramer, L., *supra* note 6, p. 274.

European Commission legislation. Finally, the recommendations for possible solutions will be introduced at the end of this chapter.

2.1. Why defining 'good environmental status' is important for adequate implementation of the Marine Strategy Framework Directive

The first thing that has to be determined is whether the definition of 'good environmental status' needs to be clear and unconditional, maybe the Directive can function just as well without such determination. The significance of this definition will be the subject discussed in the present part of the chapter. What is more, one part of the answer to the question why it is important to define 'good environmental status' for adequate implementation of the Marine Strategy Framework Directive has actually been provided in the introduction to this chapter and is connected with the objective set by this Directive in Article 1.

An essential aspect that needs to be stressed is that the starting point of implementing the Marine Strategy Framework Directive is the development of coherent approaches and establishment of comprehensive set of environmental targets and that is why determining common criteria and methodological standards, which will be used to determine 'good environmental status', is of high importance.[35] From this we can see that the meaning of 'good environmental status' is crucial not only in terms of what has to be achieved by this Directive, but also in determining measures that have to be applied to attain this objective. In addition, the "*criteria and standards will contribute to the shaping of the conceptual frames used by those who develop and apply the EU's marine environmental policies and regulations in the future. To a large degree, these conceptual frames determine the way in which policy-makers and lawyers perceive and value the marine environment*"[36]. This point makes an even greater emphasis on the measures that will be used to define 'good environmental status', as they will influence not only the implementation of the Marine Strategy Framework Directive, but all future attempts to regulate the field of marine environment. The imminent measures for the protection of marine environment will be adopted depending on the definition of 'good environmental status' and what standards have to be attained. Partly because of this it has also been argued that "*Regional Sea Conventions should be consulted before any criteria and methodological standards for determining GES are proposed by Member States*"[37], since current "*frameworks, such as the*

[35] Lyons, B.P., et al. Using biological effects tools to define Good Environmental Status under the European Union Marine Strategy Framework Directive. *Marine Pollution Bulletin* [serial online]. 2010, 60 (10): 1647-1651, p. 1647; Commission Decision of 1 September 2010 on criteria and methodological standards on good environmental status of marine waters. [2010] OJ L232/14, Recital 1; Commission Staff Working Paper, *supra* note 1, p. 8.
[36] Marcus, T., *supra* note 33, p. 164.
[37] Lyons, B.P., et al., *op. cit.*, p. 1648.

Ecological Quality Objectives of OSPAR, HELCOM, and other regional conventions, should be integrated where possible and adapted to fit"[38] the Marine Strategy Framework Directive. Evidently, the definition of 'good environmental status' will determine not only the actions of EU member states but will significantly influence the measures taken in the field of marine environmental protection by the third countries sharing the same marine region or subregion.

From this we can see, that a clear and unconditional definition of 'good environmental status' has influence on three principal things. First and foremost, it is the key principle in reaching the objective of the Marine Strategy Framework Directive. Secondly, it is the base for developing measures that have to be used in order to attain the goal of the Directive. And finally, it is the foundation for regional cooperation with the non-EU countries that share the same marine waters.

2.2. The efforts of European Commission to establish criteria that would assist setting the conditions for 'good environmental status'

The reason for providing a genuinely vague definition of 'good environmental status' in the Marine Strategy Framework Directive in the first place, could be a consequence of limited knowledge in the field of marine environment, as there were some serious gaps in the discovery of effects human activities have in this particular environment and the lack in understanding marine ecosystems at the time of adoption of this Directive and, in some cases, even now.[39] However, some steps to improve this deficiency of the Directive have been made. This part will concentrate on analysing these attempts.

The first attempt to establish clearer explanation for the indicators that help to determine 'good environmental status' was the adoption of Commission Decision on criteria and methodological standards on good environmental status (further referred to as the Commission Decision). As mentioned before, if a higher level of scientific knowledge was needed to further specify the meaning of 'good environmental status' a question arises if the two year period, between the adoption of Commission Decision and the Directive itself, was commensurable to obtain such knowledge. In other words, it is highly unlikely that such a short period of time was sufficient to make revelations in factors that affect marine environment in the most significant way and gather the scientific expertise to fully determine what indications should compose a

[38] Heslenfeld, P.; Enserink, E. OSPAR Ecological Quality Objectives: the utility of health indicators for the North Sea. *ICES Journal Of Marine Science / Journal Du Conseil* [serial online]. 2008, 65 (8): 1392-1397, p. 1396.
[39] Marcus, T., *supra* note 33, p. 146, 148, 151, 154, 158, 163, 164, 165; Commission Decision of 1 September 2010, *supra* note 35, Recital 3; Commission Staff Working Paper, *supra* note 1, p. 69, 75, 76, 77; Borja, Á., et al. Marine management – Towards an integrated implementation of the European Marine Strategy Framework and the Water Framework Directives. *Marine Pollution Bulletin* [serial online]. 2010, 60(12): 2175-2186, p. 2178.

'good environmental status'. Nonetheless, part B of Annex to the Commission Decision contains a specification for each of the eleven qualitative descriptors entrenched in the Directive. The indicator serves as a title, followed by determination of level of application in which the assessment of the condition of the particular indicator should take place and methodological requirements as well as some characteristics that should be used while conducting such an assessment. Let us take qualitative descriptor number five – 'Human-induced eutrophication is minimised, especially adverse effects thereof, such as losses in biodiversity, ecosystem degradation, harmful algal blooms and oxygen deficiency in bottom waters', as an example of this. The level of application attributed to this qualitative indicator covers the assessment for coastal and transitional waters under the Water Framework Directive.[40] As will be seen from a chapter of this work that talks about the relations between the Marine Strategy Framework Directive and Regional Sea Conventions, the scope of application of this Directive does not cover coastal waters of member states, so the fact that qualitative indicators can apply to such extent proves that protection of marine environment in Europe is an integrated effort of a number of legal instruments. Methodological requirements attached to this indicator call for evaluation of nutrient levels, as well as direct and indirect effect of nutrient enrichment, with a slight explanation of what has to be determined in each criteria (for example chlorophyll concentration in the water column, water transparency related to increase in suspended algae, abundance of opportunistic macroalgae, etc.).[41] From this we can see that Commission Decision specifies each qualitative indicator by providing guidance for factors that have to be examined for the result of the indicator to be determined. However, the Decision does not provide any specific parameters that would determine the fulfilment of a particular qualitative indicator. In other words "*criteria and methodological standards only provide options for how to assess, quantify, and eventually define the marine environment; they do not ultimately set the boundaries of what GES is*"[42]. Establishing methods for assessing environmental status in general is one thing, but the results of such assessment meaning that the marine waters have reached a 'good environmental status' is another thing completely.

Some of the criticism, aimed at the descriptors provided in the Commission Decision, states that "*deciding which criteria and standards are to be used (or not used) to assess and quantify ecosystems, that to a large extent determines which segments of the marine environment, or aspects of certain phenomena, will be recognized under marine environmental law and eventually receive legal protection*"[43]. However, there has been no determination by the

[40] Commission Decision of 1 September 2010, *supra* note 35, p. 21.
[41] *Ibid*., p. 22.
[42] Marcus, T., *supra* note 33, p. 153.
[43] *Ibid*., p. 157.

European Commission that member states cannot apply additional criteria in assessing environmental status. Furthermore, the fact that "*criteria and standards providing analytical tools may also include substantial value judgments*"[44] has also been criticised. In spite of this criticism it has to be admitted that Commission Decision at least provides some clarity for the assessment of good environmental status, as without this member states could exercise an even more subjective examination of marine waters.

Another step towards explanation what 'good environmental status' actually stands for was the Commission Staff Working Paper on the Relationship between the initial assessment of marine waters and the criteria for good environmental status (further referred to as the Working Paper), that followed shortly after (one year after) the Commission Decision was introduced. The main aim of the Working Paper was to provide "*supplementary technical information on certain elements contained in the Commission Decision on GES criteria*"[45]. The Working Paper indeed provides some clarity in criteria and indicators to determine 'good environmental status', especially by presenting ideas for their further development, giving explanations on linkages between them, other policies and international agreements, such as Regional Sea Conventions, or discussing monitoring and further research needs. Nonetheless, despite its lengthy extent this attempt does not provide any clearer understanding on what specific standards have to be reached for a 'good environmental status' to be achieved. The Working Paper itself states that "*useful approach could be to address elements of ecosystem structure and functioning through the development of specific metrics and indicators*"[46], as if admitting that the existing shortcoming of the Marine Strategy Framework Directive has not been solved. What is more it continues by elaborating that characteristics aimed to determine 'good environmental status' "*need to be designed in a dynamic manner to accommodate ongoing and future ecosystem changes and climate variation, in a context compatible with sustainable use*"[47] confirming that the ones provided in the Commission Decision are not suitable. From this we can determine that the two attempts by the European Commission to deliberate the meaning of 'good environmental status' left it lacking substance that was hoped for. In addition it seems that Directive attributes too much discretion to the member states.

As briefly mentioned before the ultimate power to determine what constitutes 'good environmental status' has been left to the member states: "*Member States shall, in respect of each marine region or subregion concerned, determine, for the marine waters, a set of*

[44] Marcus, T., *supra* note 33, p. 157.
[45] Commission Staff Working Paper, *supra* note 1, p. 4.
[46] *Ibid.*, p. 68.
[47] *Ibid.*, p. 69.

characteristics for good environmental status"[48]. If we take the example of Baltic Marine Environment Protection Strategy, we could see that specific standards which have to be achieved to constitute 'good environmental status' were indeed determined in this document as required by the Marine Strategy Framework Directive. Analysing the already used example of qualitative indicator number five (Human-induced eutrophication is minimised, especially adverse effects thereof, such as losses in biodiversity, ecosystem degradation, harmful algal blooms and oxygen deficiency in bottom waters) we can also notice how specific standards are set in comparison to Commission Decision and Working Paper. According to this Marine Environment Protection Strategy eutrophication in the Baltic Sea should be reduced by diminishing nutrient inputs into the marine environment, so that it would not exceed 11750 tons of nitrogen and 880 tons of phosphorus.[49] As we can see these are very specific indications. However, one thing that needs to be mentioned at this point, is that only scientists specialising in marine environment could decide if the standards established in the Baltic Marine Environment Protection Strategy are high enough, that is why this aspect will not be judged in present work. Maybe these standards offer adequate protection to the marine environment and is the maximum of what could be achieved by the year 2020. Nevertheless, it is important to consider the interest of every particular member state to protect the marine environment, as some of them could be very environment oriented, while others could be concentrating on their maritime interests rather than protecting marine waters. The point that has to be emphasised, is that European Union member states could have established characteristics of 'good environmental status' in their Marine Environment Protection Strategies that are relatively easy to achieve, thus granting them unencumbered implementation of the Marine Strategy Framework Directive. To this extent it should be stated, that even though characteristics for determining 'good environmental status' have been established, the shortcoming that has been analysed in this chapter has not been resolved.

2.3. Proposition for clearer definition of 'good environmental status' and more explicit explanation of qualitative descriptors

Before proposing a recommendation for solving the shortcoming which was discussed in the present chapter it has to be stated that it will reflect a lawyers' point of view, without providing scientific or environmental outlook. As we saw from the previous part of this chapter, the shortcoming connected to determination of 'good environmental status' still exists, even with the Marine Environment Protection Strategies establishing specific metrics and standards for

[48] Directive 2008/56/EC, *supra* note 4, Article 9(1).
[49] Government of the Republic of Lithuania Resolution on the Baltic Sea Environmental Protection Strategy Approval 25th of August 2010, No. 1264. *Valstybės žinios*, 2010, Nr: 105 -5431, p. 3.

marine waters in particular regions. The following should be considered as a possibility for a solution to this deficiency of the Marine Strategy Framework Directive and its implementing legislation.

To begin with, scientific experts in the field of marine environment should conduct an independent (independent from EU member states) and extensive research on effects human activities have on the European marine environment and present a report addressing realistic improvements that could be done to the marine waters by the year 2020, specifying every particular marine region and subregion as set in Article 4 of the Marine Strategy Framework Directive. This is a step that needs to be done in order to give member states specific targets that are set for the benefit of marine environment and are objective. Clearly these targets could not be determined completely by scientists and require cooperation between the latter and European Union institutions. The following step that should be taken, after clear indications and standards to be achieved have been determined, is the amendment to Article 9 of the Marine Strategy Framework Directive. This step has to be taken because Article 9 is the basis for member states' competence to determine characteristics of 'good environmental status' and the substance of this particular shortcoming. The article should be replaced with a reference to a new Commission Decision, setting the minimum standards that have to be achieved based on the mentioned objectives. Amendment to the Marine Strategy Framework Directive could be done through the exercise of its Article 23, which provides that "*the Commission shall review this Directive by 15 July 2023 and shall, where appropriate, propose any necessary amendments*"[50]. From the wording of this provision it is clear that this right could be exercised before the mentioned date.

Another thing that has to be stressed is that minimum standards would clearly have to be different in all of the four marine regions, based on the fact that challenges each of the region is faced with differ. Adoption of such Commission Decision would unavoidably mean that amendments to the Marine Environment Protection Strategies would also have to be made. This could be done through the use of updating process established in Article 17 of the Marine Strategy Framework Directive. The establishment of minimum standards to be achieved in every marine region will guarantee that the characteristics of what consists a 'good environmental status' would not be subjective. What is more, establishing minimum standards would not deprive member states from setting a higher level of protection, as they could decide on higher standards that they believe to be necessary and achievable. This would ensure that marine environment would not simply be deemed as having 'good environmental status', without the occurrence of any actual changes. Nonetheless, it should be expected that this possibility for a

[50] Directive 2008/56/EC, *supra* note 4, Article 23.

solution to this particular shortcoming would face a great deal of disparagement from some of the member states, for reasons mentioned before.

The final point that has to be made when discussing this possible solution is the fact, that by setting specific standards to be attained in each marine region, European Union will make the right for private individuals to claim state liability in cases of a breach in the implementation of the Marine Strategy Framework Directive more accessible as it would be clear when their rights have been breached. This however, will be further discussed in upcoming chapters.

2.4. Final remarks

To sum up what has been said in this chapter, it should be stated that a shortcoming in the way ‘good environmental status’ is determined clearly exists until the present day. Moreover, the seriousness of this shortcoming should not be denied as it effects most of the key provisions of the Marine Strategy Framework Directive and the policy of protecting marine environment in general. It is too early to determine, however, whether this shortcoming makes the Directive practically ineffective and just a political statement of commitment to protect marine waters in Europe. It could be also stated that the severity of this deficiency highly depends on the member states and the Marine Environment Protection Strategies they develop. If the Marine Environment Protection Strategies provide marine waters with a suitable amount of protection this shortcoming could be deemed inexistent. Nonetheless, discretion awarded to the member states by the Marine Strategy Framework Directive to determine characteristics of what ‘good environmental status’ actually stands for, suggests that there is a real potential for the member states to take the least possible amount of action in protecting and preserving marine environment. What is more, it should be mentioned that the solution to this deficiency of the Directive is not very complicated and could be executed quite easily if not faced with political opposition from some member states.

In the following chapter, this work will continue to discuss another possible shortcoming of the Marine Strategy Framework Directive and the influence it has on its effect and efficiency.

3. THE USE OF EXCEPTIONS ESTABLISHED IN THE MARINE STRATEGY FRAMEWORK DIRECTIVE

Continuing the discussion about the deficiencies of the Marine Strategy Framework Directive it should be mentioned, that Directive "*includes a number of broadly drafted exceptions which give Member States a lot of room to limit their commitment to take concrete measures for achieving GES*"[51]. These exceptions are established in Article 14 of the Directive and should be divided into two categories, first covering instances during occurrence of which "*environmental targets or good environmental status cannot be achieved in every aspect*"[52] and the second during which "*they cannot be achieved within the time schedule concerned*"[53]. The difference between the two will be explained in the following parts of this chapter. An additional category would be situations "*where there is no significant risk to the marine environment, or where the costs would be disproportionate taking account of the risk to the marine environment*"[54], which because of their particularity and characteristic to cause the most concern on the effectiveness of the Marine Strategy Framework Directive will be discussed separately from the other two.

When analysing Article 14 of the Marine Strategy Framework Directive, it should be noted that it is perfectly normal to establish exceptions which would allow the goals and targets set in the Directive to be attained at a later instance or in a slightly different manner than generally prescribed if the occurring situations hamper or make the objectives impossible to achieve. There is a need to determine these exceptions in the provisions of the Directive as marine environment has the quality of being particularly variable and easily affected by factors that would not necessarily be controlled by the member states. The question that will be discussed in this chapter is not whether the exceptions are necessary, but rather if they are too extensive, thus providing member states with an opportunity to avoid proper implementation of the Marine Strategy Framework Directive or appropriate attainment of its objectives. If this proves to be the case it would conclude another serious shortcoming of the Directive. For the purpose of determining the extent to which these exceptions apply, every instance that could grant such exceptions as established in the Marine Strategy Framework Directive will be analysed separately in the present chapter.

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[51] Marcus, T., *supra* note 33, p. 159, 160.
[52] Directive 2008/56/EC, *supra* note 4, Article 14(1).
[53] *Ibid.*
[54] *Ibid*., Article 14(4).

3.1. Instances hampering the full achievement of environmental targets or good environmental status

As mentioned in the previous chapter achieving good environmental status is complicated in itself as it could be deliberated what specific standards need to be reached. Nonetheless, even if the good environmental status is clearly set there are specific occurrences that can make it particularly difficult to attain this status and thus require member states to achieve it only to the extent that is possible. The present part of the chapter will concentrate on these instances, which in accordance with the Marine Strategy Framework Directive include action or inaction for which the member state is not responsible, natural causes, force majeure and overriding public interest.[55] Whenever a dispute from applying such exceptions arises, the Court of Justice of the European Union is able to give an explanation, through procedures established under the European Union law that will be briefly discussed in the upcoming chapter, whether the particular situations fall under any of these exceptions or not. However, there still has not been any occurrence that required the Court to do so, as it is slightly too early in the implementation process of the Marine Strategy Framework Directive. Because of this, it will be attempted to as much as possible interpret the extent to which CJEU could apply such exceptions, based on the previous rulings by the court that are not necessarily connected to the marine environmental protection.

The first instance established in the Marine Strategy Framework Directive that would render achievement of every aspect of the targets and good environmental status impossible is action or inaction for which the member state concerned is not responsible.[56] Court of Justice of the European Union unfortunately has not established what would deem member states not responsible for certain actions or inactions, especially in a relatively compatible field like environment. Nonetheless, a logical conclusion is that these would be happenings that could not or should not be controlled by the member states. For example, this could be pollution or other damage to the marine environment from the actions of a third country, which is not a European Union member state, acting in its own territory of jurisdiction that would make the set environmental targets impossible to achieve. Since the marine environment has a transboundary quality to it, such situation would be absolutely probable.

The second situation prescribed in the Marine Strategy Framework Directive – natural causes also has not been much deliberated on by the CJEU. In spite of that, a sort of definition of the term natural causes alongside force majeure has been established by the Water Framework

[55] Directive 2008/56/EC, *supra* note 4, Article 14(1).
[56] *Ibid.*

Directive, which states that they include instances "*which are exceptional or could not reasonably have been foreseen <…> or the result of circumstances due to accidents which could not reasonably have been foreseen*"[57]. It can be seen that when it comes to force majeure, the Court of Justice of the European Union has provided a number of explanations. An example of this could be a description provided in the case between the European Commission and Italy, concerning failure to fulfil obligations on waste management, which states that "*although the notion of force majeure is not predicated on absolute impossibility, it nevertheless requires the non-performance of the act in question to be attributable to circumstances, beyond the control of the party claiming force majeure, which are abnormal and unforeseeable and the consequences of which could not have been avoided despite the exercise of all due diligence*"[58]. This is only a recent case of the elaboration provided by the Court on the application of force majeure, there has been many more heretofore. This particular wording, explaining force majeure has been used since Case 296/86 McNicol and Others of 1988. [59] Moreover, a similar idea was presented in opinion of Advocate General Jacobs, who stated that "*a plea of force majeure might at most be accepted if, as a result of unforeseeable circumstances, which were extraneous to and beyond the control of the Member State, that State was faced with insurmountable difficulties preventing it from implementing the directive*"[60]. Because of this, it would be reasonable to believe that the Court of Justice of the European Union would continue to explain it in the same or very similar manner. What is more, when talking about private parties failing to comply with European Union law the Court has explained that "*circumstances constituting force majeure presupposes that the external cause relied on by individuals has consequences which are inexorable and inevitable to the point of making it objectively impossible for the persons concerned to comply with their obligations*"[61]. From this we can see, that so far force majeure is the only exception that has a clear meaning provided by the Court of Justice of the European Union.

The last instance falling under this category of exceptions is "*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*"[62]. This exception is quite extensively defined in the Directive itself, however it should be further elaborated by the Court of Justice of the European Union on the meaning of 'overriding public interest' and when it can be applied. Some authors believe, that

[57] Directive 2008/56/EC, *supra* note 4, Article 4(6).
[58] Case C-297/08, *European Commission v. Italian Republic* [2010] ECR I-1749, paragraph 85.
[59] *Ibid*., paragraphs 47 and 85.
[60] Opinion of Advocate General Jacobs delivered on 16 March 2000 Case C-236/99 *Commission of the European Communities v. Kingdom of Belgium* [2000] ECR I-5657, paragraph 25.
[61] Case C‑203/12, *Billerud Karlsborg AB and Billerud Skärblacka AB v. Naturvårdsverket* [2013] OJ C184/7, paragraph 31.
[62] Directive 2008/56/EC, *op. cit*., Article 14(1).

this exception "*for example, might apply to the planning and establishment of off-shore wind farms or off-shore gas pipelines which, in turn, may contribute to a reduction of greenhouse gases.*"[63] It has to be noted, that it is not stated in the Directive that the actions mentioned in this exception has to benefit the environment, as provided in the example. The Court of Justice of the European Union has stated that "*assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration*"[64], which has been repeated throughout its case law. This imposes a point of view that the exception in question could be applicable even if these actions have a negative effect on the environment, as long as the benefit received from them is greater than the damage. Even if the benefit is evident in an area not connected with environment. Nonetheless a further explanation by the CJEU could be extremely useful. What is more, the application of this exception is limited, as further specified in the Marine Strategy Framework Directive, which states that "*Member States shall ensure that the modifications or alterations do not permanently preclude or compromise the achievement of good environmental status at the level of the marine region or subregion concerned or in the marine waters of other Member States*"[65]. This means that when satisfying its own public interest the member state in question still has the responsibility to protect the marine environment to the extent it would affect other member states.

All in all, it seems that the exceptions provided for instances hampering the full achievement of environmental targets or good environmental status are not very clear and could not be easily identified by applying already existing case law on environmental policy, not including force majeure which is relatively well explained. For this reason, when a dispute in this field arises Court of Justice of the European Union should provide detailed explanations for the application of every mentioned exception.

3.2. Instances hampering the timely achievement of environmental targets or good environmental status

The difference between this category of situations and the ones analysed in the previous part of this chapter is that the latter ones make it impossible to achieve the objectives set, thus requiring them to be altered to the extent that could actually be attained, while instances falling under this category will only hamper with the amount of time that is needed for those objectives to be fully reached. The mentioned objectives, targets and goals will nevertheless be achieved to

[63] Markus, T.; Schlacke, S.; Maier, N., *supra* note 21, p. 83.
[64] Case C‑182/10, *Marie-Noëlle Solvay and Others v. Région wallonne* [2012] 2 CMLR 19, paragraph 74.
[65] Directive 2008/56/EC, *supra* note 4, Article 14(2).

the same extent, only later than scheduled. The present category, however, includes a single exception that is "*natural conditions which do not allow timely improvement in the status of the marine waters concerned*"[66].

To fully understand the meaning of this exception, the term 'natural conditions' has to be explained. Also, as those previously, this exception and the instances to which it might apply was not discussed by the Court of Justice of the European Union, therefore leaving it inaccurate. This inaccuracy might result in member states trying to exploit the application of this exception. Rather than being accused by the European Commission of a failure to implement the Marine Strategy Framework Directive, member states would claim that natural conditions were in the way of timely implementation. Moreover, lack of explanation can result in abuse of all of the previously mentioned exceptions. Some authors, however, claim that the already mentioned exceptions do "*not permit a wholesale derogation from obligations, as Member States must still take appropriate ad hoc measures to prevent the deterioration of the marine waters and to mitigate impacts*"[67]. Nonetheless, preventing deterioration is not the same as achieving set targets or in some cases even restoring marine environment. What is more, there is also a need to decide what stands for 'appropriate ad hoc measures' and who determines if the measures taken are indeed appropriate. The problem with the exceptions of Article 14 will be further elaborated in the following part of the present chapter.

3.3. Problems with the exceptions

As mentioned in the previous parts of this chapter there exists a lack of clarity to the extent exceptions established under Article 14(1) should be applied. This is mainly a consequence of the absence of case law in this particular field, as the Marine Strategy Framework Directive is a relatively new legal instrument. However, the problem with the exceptions of Article 14(1) is insignificant when compared to part four of the same article.

This part states that member states will not be required "*to take specific steps where there is no significant risk to the marine environment, or where the costs would be disproportionate taking account of the risks to the marine environment, and provided that there is no further deterioration*"[68]. It has been claimed that "*the disproportionate costs exemption may leave the door open to Member States to refuse to undertake expensive protective measures in cases where environmental risks are undervalued or poorly understood*"[69]. This can also be the case with the

[66] Directive 2008/56/EC, *supra* note 4, Article 14(1).
[67] Barnes, R.; Metcalfe, D., *supra* note 32, p. 85.
[68] Directive 2008/56/EC, *op. cit*., Article 14(4).
[69] Barnes, R.; Metcalfe, D., *op. cit*., p. 85.

first part of the exception. As mentioned in the previous chapter, there is an evident lack of scientific research and information about the impact human activities have on the marine environment. Even if the research on marine environment and the factors that affect it is ongoing there is no clear deadline to know when it will be sufficient and all the risks will be examined. Because of this, some action that is at the moment considered as not having any 'significant risk', after further investigation could be deemed hazardous. Moreover, the term 'significant risk' could be understood as meaning that to some extent member states are not required to act even if some risk exists. That is why many authors agree that "*opt-out potential of Article 14 is quite substantial and appears to contradict the purpose of the MSDF*"[70]. Going back to the exception based on 'disproportionate costs', it has to be noted that "*ocean management efforts involve opportunity costs*"[71]. This means that particular fields, such as shipping, mineral exploitation or fishing industries will most likely suffer some additional costs because of new environmental requirements or will suffer some monetary loss, because of restrictions of action.[72] The question then arises whether this exception of 'disproportionate costs' could be used not only when environmental measures would be especially costly but also when the use of such measures would cause significant 'opportunity costs'.

However, it has to be mentioned that some control over the application of these exceptions is established in the second paragraph of Article 14(4), which provides that if "*a Member State does not take any steps, it shall provide the Commission with the necessary justification to substantiate its decision, while avoiding that the achievement of good environmental status be permanently compromised*"[73]. This means that the European Commission has the power to approve or disapprove the inaction of member states. Nonetheless, this provision imposes that if some type of action is taken it cannot be applied anymore as its wording states 'not take any steps'. It should be therefore understood that even if an action or a step is not significant enough to make a positive impact on the marine environment, it would still be enough and would not require a justification from the member state. However, the notion that 'good environmental status' should not be compromised gives an additional value to the restriction to apply the mentioned exceptions. This should mean that ultimately the Commission will base its decision on the impact the inaction would have on the marine environment and not the fact that some type of action was taken. Consequently, it depends on the European Commission whether the use of these exceptions will become a shortcoming of the Marine Strategy Framework Directive or not.

[70] Markus, T.; Schlacke, S.; Maier, N., *supra* note 21, p. 84.
[71] Juda, L., *supra* note 9, p. 270.
[72] *Ibid.*
[73] Directive 2008/56/EC, *supra* note 4, Article 14(4).

3.4. Final remarks

To sum up, the unrestricted application of exceptions established in Article 14 of the Marine Strategy Framework Directive has the potential to become a shortcoming if not appropriately supervised by the European Commission. However, it should not be agreed with authors who claim that these exceptions could result in derogation by member states from fulfilling the obligations of the Directive and thus defeating its whole purpose.[74] Even though a potential shortcoming exists here, as mentioned before it could be controlled by the European Commission and even more, it could be easily corrected through the case law of the Court of Justice of the European Union. Nonetheless, this shortcoming together with the freedom to determine what consists a 'good environmental status' in a particular region provides the European Union member states with a lot of elbow-room in the field of marine environmental protection.

[74] Markus, T.; Schlacke, S.; Maier, N., *supra* note 21, p. 84 and Westaway, N. Legislation and Policy. *Environmental Law Review* [serial online]. 2008, 10 (3): 218-224, p. 221.

4. RELATIONS BETWEEN MARINE STRATEGY FRAMEWORK DIRECTIVE AND REGIONAL SEA CONVENTIONS

The previous chapters of this work analysed the two most serious shortcomings of the Marine Strategy Framework Directive. This chapter is aimed at examining complicated relations between the first European Union concentrated effort to regulate marine environment – Marine Strategy Framework Directive and Regional Sea Conventions regulating the environment of the European Seas, in particular the Helsinki Convention, the Barcelona Convention, the OSPAR Convention and the Bucharest Convention. These international legal instruments "*have been promoting good environmental status in their Regions for many years and have already developed important indicators, monitoring programmes and improvement programmes*"[75]. Moreover, the Marine Strategy Framework Directive encourages member states to use institutions established under the mentioned Regional Sea Conventions in order to advance regional cooperation and coordination not only between European Union member states, but also amongst non-EU states that share ecologically defined marine regions.[76] Because of this it is of substance to understand relations between them together with problems arising from their interaction.

First, this chapter will provide a brief introduction to the Regional Sea Conventions allowing for a better understanding of the functioning of their mechanisms, and will define the scope of application of the Marine Strategy Framework Directive and the mentioned Conventions, as well as, will analyse in which way they coincide and the legal implications this provides. Further focus will be achieved by analysing some indications on problematic aspects of the relations between the Directive and Regional Sea Conventions by comparing the two legal regimes. The conclusion to this chapter should answer the question whether Marine Strategy Framework Directive and Regional Sea Conventions have a sufficient level of coherence between them to provide effective and efficient protection of marine environment in the European seas, as well as the question if both levels of protection are necessary.

Before we start to emphasise the above stated aspects of the Marine Strategy Framework Directive and Regional Sea Conventions it is important to stress a couple of points. The first one is the fact that the relations between the Marine Strategy Framework Directive and different Regional Sea Conventions highly depend on the European Union's participation in the work of each Convention, the legal scope of each Convention, as well as their functioning (this includes

[75] Barnes, R.; Metcalfe, D., *supra* note 32, p. 87.
[76] Juda, L. The European Union and the Marine Strategy Framework Directive: Continuing the Development of European Ocean Use Management. *Ocean Development & International Law* [serial online]. 2010, 41 (1): 34-54, p. 41; Directive 2008/56/EC, *supra* note 4, Article 6(1).

the voting procedure and the legal status of the acts they adopt). Another important factor is the political stand point of the parties to the Conventions, including both European Union member states and non-member states, which in some cases make the majority of participants to a particular Regional Sea Convention. Furthermore, European Union is a full member of OSPAR, Helsinki and Barcelona Conventions, but it only has the status of an observer in the Bucharest Convention, since the Convention has to be amended for the possible accession of the Union as it is not allowed under the current provisions. As the European Commission states in its 2007 Communication on Black Sea Synergy: "*The EU Marine Strategy will require EU Member States in all regional seas bordered by the EU to ensure cooperation with all countries in the region. To this end, Member States will be encouraged to work within the framework of regional seas conventions – including the Black Sea Commission. Community accession to the Convention on the Protection of the Black Sea against Pollution is a priority.*"[77] Nevertheless, the accession to the Bucharest Convention still has not taken place. The problematic aspects of this fact in addition to relations between the Bucharest Convention and the Marine Strategy Framework Directive will be analysed further in this chapter separately from other three Regional Sea Conventions in order to avoid confusion, as well as, to provide this work with a clear structure.

4.1. The scope of the Regional Sea Conventions and Marine Strategy Framework Directive

This part of the chapter is meant to discuss the geographical and substantial scope of both the Marine Strategy Framework Directive and Regional Sea Conventions. The conclusions done in this part will play an important role in understanding the similarities and differences of the mentioned legal instruments and form a foundation for the analysis of their relations and coherence between them. It is essential to establish the scope of these documents to see whether there are significant differences in application of Regional Sea Conventions and Marine Strategy Framework Directive. If the substantial scope as well as the geographical scope of application matches in both of these legal instruments it will mean that there exists a double regulation for the protection of marine waters in Europe. If this turns out to be the case, there will be a need to distinguish what benefits Marine Strategy Framework Directive adds to the already existing system of Regional Sea Conventions.

To fully comprehend the Marine Strategy Framework Directive it is essential to discuss its geographical scope that is defined in Article 2, which, as claimed by some authors, "*more than*

[77] Communication from the Commission to the Council and the European Parliament Black Sea Synergy – a New Regional Cooperation Initiative. [2007] COM(2007) 160 final, p. 6.

doubles the geographical scope of European Union environmental law"[78]. The Directive is meant to apply to all marine waters, which includes "*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 UNCLOS*"[79]. One of the focuses of the United Nations Convention on the Law of the Sea, to which the Directive refers, is environmental protection and that is why it provides coastal states with extensive jurisdiction in order to protect and preserve their marine environment within exclusive economic zones and territorial seas.[80] Consequently the Directive applies to "*the territorial sea; the exclusive economic zone (EEZ), or in the case of the UK which does not have an EEZ to the 200-mile renewable energy zone; and the continental shelf including, potentially, those areas of the shelf which extend beyond the 200-mile EEZ*"[81]. The Directive also mentions some marine territories that do not fall under its geographical scope of application. These, for example, are "*territories mentioned in Annex II to the Treaty and the French Overseas Departments and Collectivities"*[82]. This is a generally logical and calculated reservation, because these territories would not fit to any marine region or subregion covered by the Directive. The second and far more interesting exclusion from the Directive's geographical scope of application is "*coastal waters as defined by Directive 2000/60/EC*"[83] – the Water Framework Directive. Marine waters include coastal water in so far as particular aspects of the environmental stakes of the marine environment are not already addressed. Marine Strategy Framework Directive in its preamble gives a sort of justification for this by stating that it is meant to "*ensure complementarily while avoiding unnecessary overlaps*"[84]. Since the Water Framework Directive defines coastal waters to which it is applicable as "*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*"[85], that should be considered the limit to which Marine Strategy Framework Directive does not apply. So as can be seen from what has been stated, the Marine Strategy Framework Directive seems to provide a clear limitation to its geographical scope of application.

[78] Westaway, N., *supra* note 74, p. 218.
[79] Directive 2008/56/EC, *supra* note 4, Article 3(1).
[80] Rothwell, D. D.; Stephens, T. *The International Law of the Sea*. Oxford, Portland: Hart Publishing, 2010, p. 338.
[81] Long, R., *supra* note 8, p. 23.
[82] Directive 2008/56/EC; *op. cit*., Article 3(1).
[83] *Ibid.*
[84] *Ibid.*, Recital 12.
[85] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for the Community action in the field of water policy. [2000] OJ L327/1, Article 2(7).

The geographical scope of each Regional Sea Conventions is different in terms of regional seas that they cover and it could not be otherwise, since the Conventions apply to absolutely distinct marine regions that are affected by different environmental factors. However, the territorial limits to which the Conventions apply are usually very similar, including territorial seas as well as coastal areas. The Barcelona Convention covers waters of the Mediterranean Sea, "*including its gulfs and seas bounded to the west by the meridian passing through Cape Spartel lighthouse, at the entrance of the Straits of Gibraltar, and to the east by the southern limits of the Straits of the Dardanelles between Mehmetcik and Kumkale lighthouses*"[86]. Nevertheless, it is further stated in the Barcelona Convention that its geographical scope could extend to coastal areas if the contracting parties would choose so as well as the fact that the scope of application can be extended through Protocols to the Convention.[87] For example "*the 1995 Areas Protocol <...> is applicable to all the marine waters of the Mediterranean, irrespective of their legal status, as well as to the seabed, its subsoil and to the terrestrial coastal areas designated by each party, including wetlands*"[88]. This is an example of how protocols to the Barcelona Convention can extend its geographical scope of application. The Helsinki Convention applies to the Baltic Sea Area and includes "*internal waters, i.e., for the purpose of this Convention waters on the landward side of the base lines from which the breadth of the territorial sea is measured up to the landward limit according to the designation by the Contracting Parties*"[89]. The need to include internal waters into the geographical scope of the Helsinki Convention is a result of efforts to eliminate toxic substances from the Baltic Sea and prevent pollution from different sources.[90] Moreover, the geographical scope of the OSPAR Convention is so extensive that it includes "*internal waters and the territorial seas of the Contracting Parties, the sea beyond and adjacent to the territorial sea under the jurisdiction of the coastal state to the extent recognised by international law, and the high seas, including the bed of all those waters and its sub-soil*"[91]. The geographical scope established by the OSPAR Convention is so comprehensive that it covers areas beyond national jurisdiction, in particular the high seas that normally cannot be subjected to any states sovereignty. The coverage of the high seas "*is irrelevant for the North*

[86] Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (adopted in 1976, revised in 1995, entered into force on 9 July 2004). 1102 UNTS 27, Article 1(1).
[87] *Ibid*., Articles 1(2) and 1(3).
[88] Pisupati, B.; Leary, D. K. *The Future Of International Environmental Law* [e-book]. Tokyo: United Nations University, 2010, p. 85.
[89] Convention on the protection of the marine environment of the Baltic Sea area, 1992 (Helsinki Convention) (adopted in 1974, revised in 1992, entered into force on 17 January 2000). 1507 UNTS 167; 1994 OJ (L 73) 20, Article 1.
[90] Klumbytė, S. Comparative analysis of 1974 and 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area. *Jurisprudencija*. 2007, 4 (94): 67-73, p. 70.
[91] Convention for the protection of the marine environment of the North-East Atlantic (adopted in 1992, entered into force on 25 March 1998). 2354 UNTS 67 (1993), Article 1(a).

Sea as it falls entirely within the jurisdiction of the coastal states"[92], but expands the normal capacity to take environmental actions in other sea waters included in this Convention. Another thing that should be mentioned is that the geographical scope of OSPAR Convention does not breach provisions of the United Nations Convention on the Law of the Sea, because the latter allows regional cooperation for the protection of marine environment in areas beyond national jurisdiction, even if there is another fora for setting such standards.[93] However, the extent to which measures can be taken and the effect they might have in the area beyond national jurisdiction is a subject of deliberations, even if "*the OSPAR Commission and its subsidiary bodies have been considering the procedures to be followed in designating MPAs in ABNJ and how a regulatory regime should be adopted and implemented*"[94].

It should also be noted that the high seas do not exist in the Baltic Sea so there would be no point in extending geographical scope of Helsinki Convention since it already covers all area of these marine waters. From the first glance such extension of scope would seem beneficial in the Barcelona Convention "*as some coastal states have not yet established an exclusive economic zone (EEZ), there are in the Mediterranean extents of waters located beyond the 12-mile territorial limit which still have the status of high seas*"[95]. However, if all "*coastal States have declared their EEZs, the high seas will disappear from the Mediterranean*"[96] and thus there would be no need to go beyond national jurisdiction for the protection of marine environment. So it seems that the fact that Marine Strategy Framework Directive does not apply to areas beyond national jurisdiction should not be considered as an important discrepancy between it and the Regional Sea Conventions.

From what has been discussed above it is clear that it is quite complicated to separate the geographical scope of application between the Regional Sea Conventions and Marine Strategy Framework Directive as they are meant to cover same marine regions and extend to practically the same areas of marine waters. Besides the extension of the scope in some Regional Sea Conventions to cover the area of high seas, which is still a new and not fully developed approach, there are not many areas that would be covered by the Conventions but not covered by the European Union law.

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[92] Trouwborst, A.; Dotinga, H. Comparing European Instruments for Marine Nature Conservation: The OSPAR Convention, the Bern Convention, the Birds and Habitats Directives, and the Added Value of the Marine Strategy Framework Directive. *European Energy & Environmental Law Review* [serial online]. 2011, 20 (4): 129-149, p. 133.

[93] Molenaar, E. J.; Oude Elferink, A. G. Marine protected areas in areas beyond national jurisdiction the pioneering efforts under the OSPAR Convention. *Utrecht Law Review* [serial online]. 2009, 5 (1): 5-20, p. 10, 18.

[94] *Ibid*., p. 16.

[95] Pisupati, B.; Leary, D. K., *supra* note 88, p. 85.

[96] Drankier, P. Marine Protected Areas in Areas beyond National Jurisdiction. *International Journal Of Marine & Coastal Law* [serial online]. 2012, 27 (2): 291-350, p. 321.

Moving on to the substantive scope of Marine Strategy Framework Directive, it appears that it is not defined in one particular article, but could be determined from generalizing the whole Directive as applicable to cover human activities that might have an adverse effect on the marine environment and its biodiversity. However, similarly to the geographical scope of application reservations to Directive's substantive scope should be made in fields that are already covered by appropriate European Union legislation, example of this could be the Common Fisheries Policy. There is no need to include policies and areas already covered by EU legislation, because European Union's legal system functions as a whole and interactions between such legal instruments as the Marine Strategy Framework Directive and, for instance, the Habitats Directive or Water Framework Directive are unavoidable.

When talking about Regional Sea Conventions' scope of application it is worth to mention that all three of the Conventions that will be discussed in this part have a slightly different substantial scope. The OSPAR Convention is meant to protect the marine environment from all sources of marine degradation, but it does not cover atmospheric pollution as well as fishing and with some limitations shipping, which are considered to be already regulated appropriately in line with other international frameworks.[97] On the other hand, the 1992 Helsinki Convention in addition to marine environmental protection against pollution "*contains some general provisions on shipping and does not expressly exclude fishing*"[98] which makes the scope wider in comparison to OSPAR Convention. The Barcelona Convention's substantive scope applies to protection of Mediterranean Sea Area from all different types and sources of pollution, which includes pollution caused by dumping from ships and aircraft or inaction at sea, discharge from ships, pollution resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil, as well as transboundary movements of hazardous waste and even pollution from land-based sources.[99] The scope of this Convention neither includes nor excludes fishing simply because there is no mention of it in articles determining the scope of application.

Determining the substantive scope of application of Regional Sea Conventions is also important for understanding European Union's competence to exercise its duties, in other words, adopt appropriate legislation in order to comply with the obligations set in the Conventions. The general rule in participating at Regional Sea Conventions is that European Union fulfils its obligations under Conventions in the field of its exclusive competence and only where the competence is shared member states can maintain their autonomy of action, that is why the states always try to allege existence of shared competence while the Commission tries to prove that all

[97] Frank, V., *supra* note 3, p. 33; Drankier, P., *supra* note 96, p. 313; Molenaar, E. J.; Oude Elferink, A. G., *supra* note 93, p. 14.
[98] Frank, V., *op. cit.*, p.36.
[99] Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, *supra* note 86, Articles 5, 6, 7, 8 and 11.

substances regulated at the European level fall under Unions exclusive competence.[100] This means that when the scope of Regional Sea Conventions extends beyond environment (which is the competence that Union shares with its member states under Article 4(2) TFEU) to cover a field that falls under the exclusive competence of European Union, for example fishing, member states cannot individually exercise its duties under the Convention.

From what has been said while analysing the substantive scope of Regional Sea Conventions, it seems that Marine Strategy Framework Directive or other relevant European Union legislation regulates all the activities covered by the Conventions.

After determining the substantive and geographical scopes of application in both the Marine Strategy Framework Directive and Regional Sea Conventions it is evident that there indeed exists a double regulation for the protection of marine environment in Europe. In addition, all four marine regions established under Article 4(1) of the Marine Strategy Framework Directive coincide with particular Regional Sea Conventions.[101] This raises a question whether there was really a need for an additional legal instrument at the European Union level where Regional Sea Conventions were already functioning under international law. It would be logical to assume that such necessity only existed if the system of Regional Sea Convention was lacking something which could be provided by the Marine Strategy Framework Directive. The upcoming parts of this chapter will further deliberate on whether such double regulation should be considered as an advantage of the marine environmental protection or a cause for confusion, as well as, discuss ways in which the Marine Strategy Framework Directive contributes to the already existing protection under the Regional Sea Conventions. However, before we start analysing the novelties introduced by the Directive, the problem of Bucharest Convention has to be analysed.

4.2. The problem of the Bucharest Convention

This part of the work is not meant to cover the effectiveness or efficiency of Bucharest Convention as an international instrument for the protection of marine environment in the Black Sea. For the purpose of the present paper we are only concentrating on the relations this Convention has with the Marine Strategy Framework Directive and European Union as a whole. It was already mentioned at the beginning of this chapter that the Bucharest Convention is the only one out of the four Regional Sea Conventions relevant to Marine Strategy Framework

[100] Frank, V., *op. cit.*, p. 175.
[101] Hey, E. Multi-Dimensional Public Governance Arrangements for the Protection of Transboundary Aquatic Environment in the European Union - The Changing Interplay between European and Public International Law. 2009, 1-22p, p. 5; Directive 2008/56/EC, *supra* note 4, Article 4(1).

Directive to which European Union has not acceded. The relevance of this Convention for European marine environmental protection can be seen from looking at several articles in the Directive. As mentioned in the previous part of the present chapter, Article 4 of the Marine Strategy Framework Directive establishes marine regions which have to be regarded by member states "*when implementing their obligations under this Directive*"[102]. Black Sea region covered by the Bucharest Convention is no exception. Moreover, another article of the Directive unequivocally states that "*Member States shall, where practical and appropriate, use existing regional institutional cooperation structures, including those under Regional Sea Conventions, covering that marine region or subregion*"[103]. The connection of these two articles makes it seem that the Marine Strategy Framework Directive is implying that there has to be a high level of concentration in regional cooperation and the work done by Regional Sea Conventions. On the other hand, unlike with the OSPAR Convention, where the European Union is influential to a great extent it can only observe the work performed under the provisions of Bucharest Convention and that is where the problem emerges.

It is clear that the contracting parties to the Bucharest Convention that are also members of the European Union, in particular Bulgaria, Romania and Greece, can still fulfil its obligations described in Article 6 of the Marine Strategy Framework Directive and use the structures constructed by the Convention to their advantage and proper cooperation in the region. This is clearly not where the problem lies. Contrary to the other three Regional Sea Conventions the European Union was not able to accede to Bucharest Convention. This was a quite common issue with all of the conventions when the European Union was relatively small, but as it expanded both in terms of members and its increased competence it seemed vital that it would become one of the contracting parties to the Regional Sea Conventions, mainly so it could exercise its exclusive competence. In the work of Bucharest Convention important decisions, such as amendments of the Convention, its Protocols or Annexes, are taken by a consensus at a Diplomatic Conference of the Contracting Parties, moreover, any of them can propose those amendments to the Bucharest Convention.[104] This in itself means a lot of political power for one member to the convention. Certainly one of the EU member states could represent the Unions interest by proposing suitable amendments or blocking the amendments or adoption of additional measures. Nevertheless it would restrict the ability of European Union to exercise its exclusive competence in particular fields of marine environmental protection. One can argue that no problem exists here since Greece, Bulgaria and Romania will still have to reach objectives

[102] Directive 2008/56/EC, *supra* note 4, Article 4(1).
[103] *Ibid.*, Article 6(1).
[104] The Convention on the Protection of the Black Sea Against Pollution (adopted in 1992, entered into force on 15 January 1994). 32 ILM 1110 (1993), Articles 20 and 21.

established by the Marine Strategy Framework Directive and it would be absolutely correct to state so, however, these countries will have to struggle to fulfil their obligations under both legal instruments.

Furthermore, a problem can arise if European Union adopted more stringent rules than those of the Regional Sea Conventions. This could seriously affect exchange Union normally has with its neighbouring non-EU states by creating some inconsistencies within the functioning of shipping industries. For example, if European Union would establish stricter standards for transporting hazardous substances and identify some substance as being hazardous while it would not be considered as such according to the Bucharest Convention, shipment of such substance originating from non-EU states that has not adopted the same standards could be restricted to enter the territorial sea of EU member states. In order to avoid this problem the marine environmental standards should be more or less equivalent in international law and European Union law.

There is no doubt that for the purpose of better cooperation in the Black Sea region European Union should be allowed to accede to the Bucharest Convention. It would benefit both EU member states and non-members by providing a more consistent regulation of the marine environment and assist at avoiding possible problems that might rise from application of different standards. In addition it could supplement each other by providing a forum for sharing and negotiating relevant topics, as well as, increasing the political and legal weight of the decisions taken. It is also important to note, that international law only becomes part of European Union law after it accedes to a certain international agreement, in this situation Bucharest Convention does not form part of EU law whereas other Regional Sea Conventions do.

4.3. The functioning of Regional Sea Conventions and the European Union entrenchment in it

It was established in the first part of this chapter that the existence of Marine Strategy Framework Directive and Regional Sea Conventions creates a double regulation in the field of marine environmental protection in Europe. However, it was presumed that there should exist some advantages of the Directive in comparison to the Conventions, for such legal instrument to have been adopted. The present and the upcoming parts of this chapter will further deliberate on this presumption.

The first way in which the Marine Strategy Framework Directive contributes to the protection of marine environment in Europe can be seen through analysing the functioning of the Regional Sea Conventions. As we already know, in the international level the Regional Sea

Conventions are the basis for coordinating measures taken in the field of marine environmental protection. The regional approach is taken, because it is important to tackle specific problems of enclosed or semi-enclosed seas that are affected by various factors. The transboundary nature of marine environment is also a crucial argument to support the adoption of Regional Sea Conventions as the measures taken by individual states would not have a large-scale effect. This part of the chapter will explain the functioning of the Conventions through analysing the decision making procedure, the legal nature of the decisions and determining the role European Union plays in their implementation.

OSPARCOM and HELCOM are the relevant bodies granted with the leading role in enforcing the implementation of OSPAR Convention and Helsinki Convention, while Barcelona Convention does not have an appointed body such as Commission and has designated United Nations Environmental Programme to carry out some of the secretariat functions.[105] OSPARCOM is capable of adopting decisions which are legally binding on the contracting parties in addition to non-binding recommendations, both of which are adopted by unanimous vote and only where unanimity is not possible three-quarters majority vote will be acceptable.[106] Furthermore, "*a decision shall be binding on the expiry of a period of two hundred days after its adoption for those Contracting Parties that voted for it*"[107], which implies that even legally binding decisions are not obligatory to be complied with if the contracting party voted against its adoption. HELCOM can unanimously adopt only non-binding recommendations, that in spite of their legally non-binding nature possess political influence.[108] Since Barcelona Convention does not have a Commission it adopts legally non-binding ministerial declarations during the meeting of its contracting parties.[109] From this it is clear that the structures of Regional Sea Conventions are applying soft law for the implementation of the Conventions.

It should also be noted that the legal power (binding or non-binding) of the decisions taken in the work carried out under the Regional Sea Conventions as well as the voting procedure for their adoption has an important role in determining the influence European Union has in their operating. For example, the three-quarter majority voting procedure in OSPARCOM means that 12 out of 16 contracting parties (15 states and European Union) have to agree on the relevant decisions or non-binding recommendations, but this might raise a certain problem in the future,

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[105] Convention on the protection of the marine environment of the Baltic Sea area, 1992 (Helsinki Convention), *supra* note 89, Article 19; Convention for the protection of the marine environment of the North-East Atlantic, *supra* note 91, Article 10; Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, *supra* note 86, Article 17.
[106] Convention for the protection of the marine environment of the North-East Atlantic, *op. cit.*, Articles 13(1), 13(2) and 6.
[107] *Ibid.*, Article 13(2).
[108] Frank, V., *supra* note 3, p. 36; Convention on the protection of the marine environment of the Baltic Sea area, 1992 (Helsinki Convention), *op. cit.*, Article 20(1).
[109] Frank, V., *op. cit.*, 39.

since only Iceland, Norway and Switzerland are not member states of the European Union it has the potential power to block decisions in the OSPARCOM.[110] This, however, is only the case when the subject of the relevant decision falls under the Union's exclusive competence and thus the twelve member states do not enjoy any decision making power in that field, otherwise all 12 member states would have to agree for the decision to be blocked. As we can see, contrary to the situation in Bucharest Convention, here the Union can fully exercise its exclusive competence.

Further focus will be achieved by discussing the procedures to amend the Regional Sea Conventions and the ratification process. Amending the Barcelona Convention, its Protocols or Annexes requires three-fourths majority[111], whereas amendments to Helsinki Convention "*shall be deemed to have been accepted at the end of a period determined by the Commission unless within that period any one of the Contracting Parties has, by written notification to the Depositary, objected to the amendment*"[112]. OSPAR Convention on the other hand requires unanimous vote for the amendment of the Convention while amending or adopting an Annex requires only three-quarters majority vote.[113] Moving on to the ratification process, it is logical that the Conventions require ratification, but it is also sometimes needed for the amendments to the Conventions and accession to their Protocols and Annexes.[114] Only after the ratification a full accession is completed and Protocols enter into force. This has caused a delay in the functioning of some Protocols as can be seen from the example of Barcelona Convention, where the Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean was adopted in 1995 and in 2011 was "*ratified by all Contracting Parties, including the EU, except for Bosnia and Herzegovina, Greece, Israel and Libya*"[115]. In April of 2013 these counties have still not ratified that Protocol and there are many more (like the 1994 Offshore Protocol or 1996 Hazardous Wastes Protocol) awaiting to be signed and ratified so they could enter into force.[116]

From what has been said it is clear that the use of soft law in the work of Regional Sea Conventions should be considered as a disadvantage when compared to the legally binding nature of the Marine Strategy Framework Directive. The legally non-binding characteristic of

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[110] OSPAR Commission's official website / OSPAR Commission – Contracting Parties. <http://www.ospar.org/content/content.asp?menu=00380108110000_000000_000000>; Frank, V., *op. cit.*, p. 173.

[111] Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, *supra* note 86, Articles 22(3) and 23(2).

[112] Convention on the protection of the marine environment of the Baltic Sea area, 1992 (Helsinki Convention), *supra* note 89, Article 32(3).

[113] Convention for the protection of the marine environment of the North-East Atlantic, *supra* note 91, Articles 15(3), 16 and 17.

[114] Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, *op. cit.*, Article 31; Convention for the protection of the marine environment of the North-East Atlantic, *op. cit.*, Articles 15(4) and 29.

[115] Drankier, P., *supra* note 96, p. 319.

[116] Signatures and Ratifications of the Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean and its Protocols as at 17th April 2013 [accessed 2013-11-20]. <http://195.97.36.231/dbases/webdocs/BCP/StatusOfSignaturesAndRatifications.doc>

recommendations and even decisions, when the contracting party did not vote for its adoption, created during the work of structures established under the Conventions is probably an attractive solution for contracting parties, however, it limits the effectiveness of the Regional Sea Conventions. For the purpose of protection, conservation and restoration of marine environment we shall take the view that best results will be achieved through legally binding instruments. Furthermore, if we take the example of Barcelona Convention the ratification and entrance into force of some of its Protocols have taken a significant amount of time.[117] This occurs because "*governments are sometimes led by different reasons to balance environmental needs with other interests, and may be hesitant to promptly endorse the most advanced instruments*"[118]. What is more, we can see from the provisions discussing the amendments of the Regional Sea Conventions as well as the voting process for adopting decisions or recommendations that "*the principle of international conventions remains based on consensus <…> in contrast to that, EU environmental measures are normally adopted by qualified majority, which allows measures to be taken against the will of an objecting Member State*"[119]. Consequently, this approach could be less favourable by states since their sovereignty might be disregarded if the majority believes the measures are necessary, however, it ensures a more effective environmental protection. To sum up, even though Marine Strategy Framework Directive creates a double regulation of the marine environmental protection in Europe, it was necessary to create a legally binding obligation on the European Union member states as the Regional Sea Conventions are clearly not very efficient in this sense. Further focus on this will be achieved through the upcoming parts of this chapter.

4.4. HELCOM Baltic Sea Action Plan versus the Baltic Marine Environment Protection Strategy

It has already been discussed in previous chapters what impact the Baltic Marine Environment Protection Strategy and other Marine Environment Protection Strategies have on the implementation of the Marine Strategy Framework Directive. The Strategies establish the exact and final goal the Directive aims to achieve, which is the attainment of good environmental status in European marine waters, in other words, they define the criteria for its attainment. What Baltic Marine Environment Protection Strategy is to the Marine Strategy Framework Directive, the Baltic Sea Action Plan is to the Helsinki Convention. For even clearer understanding of the relations between the Directive and Regional Sea Conventions these two documents will be briefly compared.

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[117] Pisupati, B.; Leary, D. K., *supra* note 88, p. 96; Drankier, P., *supra* note 96, p. 319.
[118] Pisupati, B.; Leary, D. K., *op. cit.*, p. 96.
[119] Kramer, L., *supra* note 6, p. 275.

The first thing that needs to be noted is that the Baltic Marine Environment Protection Strategy itself states that its purpose is to implement the Marine Strategy Framework Directive and regulate the Baltic Sea Action Plan adopted by the HELCOM.[120] This shows that the Strategy not only sets clear standards to be attained in the marine waters of the Baltic seas as required by the Marine Strategy Framework Directive, but also helps to implement already existing obligations under the Helsinki Convention. On the other hand, some authors claim that the Baltic Sea Action Plan "*also serves as a de facto regional pilot of the European Marine Strategy Framework Directive*"[121]. So it seems that the two legal documents should complement each other.

Secondly, the objectives to be achieved in accordance with the Strategy and the Action Plan have to be analysed. The Baltic Marine Environment Protection Strategy establishes five objectives – use of ecosystem-based approach in the protection of marine environment, reduction of nutrient input, reduction of concentration of hazardous chemical substances, achievement of appropriate preservation level of biodiversity and execution of navigation or other economic activities in environmentally favourable way, while the Baltic Sea Action Plan concentrates on eutrophication, biodiversity, hazardous substances and maritime activities.[122] From this we can see that the only difference that seems to exist between the objectives is the inclusion of ecosystem-based approach into objectives of the Strategy. Nonetheless, some authors claim that the Baltic Sea Action Plan "*is the first attempt by a regional seas convention to incorporate the ecosystem-based approach to the management of human activities into the protection of the marine environment*"[123]. It is worth mentioning that the ecosystem-based approach is entrenched in the Marine Strategy Framework Directive but there is no mention of it in the Helsinki Convention itself. However, it cannot be denied that the objectives and aims of both the Baltic Sea Action Plan and the Baltic Marine Environment Protection Strategy are very similar, especially if we look at a previously mentioned requirement for the Republic of Lithuania to reduce input of "*nitrogen – up to 11 750 tons, phosphorus – up to 880*"[124] and the identical standard set by the Action Plan.[125]

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[120] Government of the Republic of Lithuania Resolution, *supra* note 49, p. 5.
[121] Backer, H. Indicators and scientific knowledge in regional Baltic Sea environmental policy. *ICES Journal Of Marine Science / Journal Du Conseil* [serial online]. 2008, 65 (8): 1398-1401, p. 1398.
[122] Government of the Republic of Lithuania Resolution, *op. cit.*, p. 2, 3, 4 and 5; Official HELCOM website / Baltic Sea Action Plan [accessed 2013-11-06]. <http://helcom.fi/baltic-sea-action-plan>; Pyhala, M. HELCOM Baltic Sea Action Plan: An Ecosystem Approach to the Management of Human Activities. *Climate Impacts on the Baltic Sea: From Science to Policy*. Berlin: Springer-Verlag, 2012, p. 45–69, p. 51.
[123] *Ibid.*, p. 50.
[124] Government of the Republic of Lithuania Resolution, *op. cit.*, p. 16.
[125] See HELCOM Baltic Sea Action Plan Adopted in HELCOM Ministerial Meeting – Krakow, Poland, 15 November 2007, p. 9.

One difference that has to be mentioned is the time limits in these two documents. The HELCOM Action Plan "*aims to reduce pollution to the Baltic Sea and reverse its degradation by 2021*"[126] whereas the Baltic Marine Environment Protection Strategy in accordance with the Marine Strategy Framework Directive has "*to achieve and (or) maintain the good environmental state of Baltic Sea by the year 2020*"[127]. From this it is evident that the Strategy aims to achieve practically the same objectives one year earlier than the Action Plan.

When it comes to the financing provisions, the Baltic Marine Environment Protection Strategy states that it should be implemented from the budget of member states, funds of particular municipalities and the European Union structural funds where necessary.[128] The Baltic Sea Action Plan encourages the use of EU funds as well by stating that "*the main sources of funding are state budgets and EU's structural funds including the Cohesion Fund, which are made available to the new EU Member States also for implementation relevant EU directives*"[129] whereas "*non-EU Member States can benefit from financing in the context of the EU Neighbourhood and Partnership Instruments*"[130]. The provisions on the funding for the implementation of these instruments highlight another benefit of the Marine Strategy Framework Directive in comparison to Regional Sea Conventions. Only few of the non-EU states which are parties to the Regional Sea Conventions have equivalent resources or same technical capacity that is available to the European Union in terms of protecting and restoring marine environment.[131] In addition, Regional Sea Conventions have not established financing funds for the implementation of their measures. Notwithstanding, this disadvantage is not so evident in Helsinki or OSPAR Conventions where all of the contracting parties are either EU member states or states with analogous technical capacity and corresponding resources. Evidently this could be a significant problem with contracting parties to Bucharest Convention and even more so Barcelona Convention which includes many developing countries. From the problem of financing in the Regional Sea Conventions comes another benefit of the Marine Strategy Framework Directive. Even though European Union has not established an environmental fund the environmental policies are known to be supported from the Regional Fund and Cohesion Fund, as well as, LIFE+ Regulation (to protect nature and biodiversity)[132], so the implementation of Marine Strategy Framework Directive is supported by already existing European Union's financial instruments. Since the protection of marine environment in Europe is a common aim in

[126] Pyhala, M., *op. cit.*, p. 50.
[127] Government of the Republic of Lithuania Resolution, *op. cit.*, p. 16.
[128] *Ibid.*, p. 18.
[129] HELCOM Baltic Sea Action Plan, *supra* note 125, p. 33.
[130] *Ibid.*
[131] Long, R., *supra* note 8, p. 13.
[132] Kramer, L., *supra* note 6, p. 149, 150, 153.

both the Directive and Regional Sea Conventions, the use of EU funds will help to attain this aim.

From all that has been said it is clear that the similarities between the Baltic Marine Environment Protection Strategy and the Baltic Sea Action Plan are undeniable. However, the fact that the Strategy has a legally binding nature as well as the fact that it has to reach its objectives a year earlier than the Action Plan makes a great significance for the protection of marine environment in the Baltic Sea. An advantage in the similarity of the objectives in these two instruments can be seen from a fact that "*the Commission may play an important role in reinforcing obligations where they are mutually operative under international instruments*"[133]. Another thing that needs to be emphasised is that the implementation of the Strategy and the Action Plan relies on the funding from European Union financial instruments, that can be used for the achievement of goals set in the Directive.

4.5. Ways in which Marine Strategy Framework Directive contributes to the implementation of existing obligations under the Regional Sea Conventions

The final point that has to be analysed in this chapter, examining the relations between the Marine Strategy Framework Directive and Regional Sea Conventions, is the contribution of the Directive to implementing European Union's and its member states' international obligations that arose from acceding to the mentioned Conventions. Through ecosystem-based approach, integration of environmental concerns into other policies, knowledge-based adaptive management, monitoring and assessment procedures, as well as public information and participation the Marine Strategy Framework Directive has helped to implement international obligations under United Nations Convention on Biodiversity, Johannesburg Plan of Implementation, Agenda 21 (even if it is non-binding it still possesses political power), Aarhus Convention, UNCLOS and few other international agreements and initiatives.[134] This part, however, will concentrate purely on the benefits Marine Strategy Framework Directive has on implementing the international commitments in the field of European marine environmental protection, more precisely on the ones established under the Regional Sea Conventions.

To start with, the fact that Marine Strategy Framework Directive explicitly states that "*Member States shall, as far as possible, build upon relevant existing programmes and activities developed in the framework of structures stemming from international agreements such as*

[133] Barnes, R.; Metcalfe, D., *supra* note 32, p. 87.
[134] Report from the Commission to the Council and the European Parliament Contribution of the Marine Strategy Framework Directive (2008/56/EC) to the implementation of existing obligations, commitments and initiatives of the Member States or the EU at EU or international level in the sphere of environmental protection in marine waters. [2012] COM(2012) 662 final, p. 2-5.

Regional Sea Conventions"[135] and "*contribute to the fulfilment of the obligations and important commitments of the Community and the Member States*"[136] already demonstrates the intention of the makers of the Directive to implement Union's international obligations in the field of marine environment through use of its provisions. Some authors consider such connection to be a serious shortcoming of the Marine Strategy Framework Directive, claiming that it limits Directive's capabilities to sole reporting purposes while letting structures established under Regional Sea Conventions to determine, elaborate and monitor the actual programmes.[137] As we have established through analysing the scope of these legal instruments, a double regulation in the field of marine environmental protection does exist in Europe. Nonetheless, the Marine Strategy Framework Directive is not limited to establishing the monitoring for the progress achieved, even though monitoring and reporting provisions in the Directive are quite detailed. As can be seen from the previous parts of this chapter there are more than one way in which the Directive fills in the gaps left by the Regional Sea Conventions in the protection of marine environment.

From specific features of the Directive we can see that it enforces many of the standpoints found in specific Regional Sea Conventions, their Annexes or Protocols. Ecosystem-based approach that is incorporated into the provisions of Marine Strategy Framework Directive could be taken as an excellent example of this. As mentioned in one of the first chapters of this work, the ecosystem-based approach is an exclusive feature of this Directive that makes it the only European Union legally binding instrument integrating such treatment.[138] Protection of marine waters based on ecosystem approach means that the marine environment should be protected as a whole and promoted in every relevant policy areas.[139] This is an essential aspect of the Marine Strategy Framework Directive as it sheds any use of sectoral management in the field of marine environment. This is of high importance, because the decision to use ecosystem-based approach was taken in the meeting of HELCOM and OSPAR Ministerial Meeting thus resulting in a possibly non-binding nature.[140] The explicit establishment of this approach in the Directive created a legal obligation on the EU member states to apply it in the protection of marine environment. Through this Marine Strategy Framework Directive gave legally binding power to

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[135] Directive 2008/56/EC, *supra* note 4, Article 6(2).
[136] *Ibid.*, Recital 19.
[137] Kramer, L., *supra* note 6, p. 274; Lyons, B.P., et al., *supra* note 35, p. 1648.
[138] European Commission, Directorate General for the environment Study on the contribution of the Marine Strategy Framework Directive to existing international obligations Final report, 16 April 2012, p. 6, 25, 26, 27.
[139] Hildering, A.; Keessen, A.; Van Rijswick, H. Tackling pollution of the Mediterranean Sea from land-based sources by an integrated ecosystem approach and the use of the combined international and European legal regimes. *Utrecht Law Review* [serial online]. 2009, 5 (1): 80-100, p. 95.
[140] European Commission, Directorate General for the environment Study on the contribution of the Marine Strategy Framework Directive to existing international obligations, *op. cit.*, p. 26; Commission Staff Working Paper, *supra* note 1, p. 71; Backer, H., *supra* note 121, p. 1398; Molenaar, E. J.; Oude Elferink, A. G., *supra* note 93, p. 14.

the decision of the structures of Regional Sea Conventions. As stated in the Baltic Marine Environment Protection Strategy the "*marine environment protection management should be applied on the ecosystems-based approach, ensuring, that the impact of human would not disturb to achieve or to maintain the good status of the marine environment quality, and, where would not be made harm for the capacity of marine ecosystems to react into changes affected by people*"[141].

What is more, the encouragement of regional cooperation is a feature that can be found in all Regional Sea Conventions and that is repeatedly established several times in the Directive.[142] Regional cooperation is necessary for effective protection of the marine environment to be possible, so it is understandable that it was established in both the Directive and the Conventions. In addition a number of other Marine Strategy Framework Directives provisions should be mentioned as they implement the obligations obtained from the Conventions. The Directive, OSPAR and Helsinki Conventions all require the establishment of Marine Protected Areas (even if some MPAs have already been established prior to the adoption of the Marine Strategy Framework Directive), the same can be said about restoration of marine ecosystem that is common throughout all four relevant Regional Sea Conventions.[143] It is therefore clear that the Marine Strategy Framework Directive "*appears to have added both substance and legal teeth to the pre-existing legal framework concerning the protection, management and restoration of marine species, habitats and ecosystems in Europe*"[144].

To recapitulate all that has been stated above, the importance of the Marine Strategy Framework Directive's role in implementing European Union's obligation under the Regional Sea Conventions has to be stressed. Such enforcement of the obligations already undertaken by the member states and the Union provides added legal value to each of the commitments, both legally binding and non-binding, and assists at protecting the marine environment in a more efficient manner. Furthermore, a lot of the provisions in the Directive could be seen as including approaches and principles formulated in international initiatives, agreements and programmes aimed at protecting marine environment. The Regional Sea Conventions themselves have to be seen as reflecting international documents like UNCLOS or Agenda 21 so there is no surprise that the Marine Strategy Framework Directive helps to implement a lot of obligations flowing from the texts of the mentioned Conventions, their Protocols, Annexes or even Commissions' decisions.

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[141] Government of the Republic of Lithuania Resolution, *supra* note 49, p. 16.
[142] Directive 2008/56/EC, *supra* note 4, Article 5(2); Lyons, B.P., et al., *supra* note 35, p. 1648.
[143] European Commission, Directorate General for the environment Study on the contribution of the Marine Strategy Framework Directive to existing international obligations, *supra* note 138, p. 43, 44.
[144] Trouwborst, A.; Dotinga, H., *supra* note 92, p. 149.

4.6. Final remarks

To conclude the main points of the present chapter it is clear that protection of marine environment in the European Union requires a great deal of cooperation and coordination between the European Union's own Marine Strategy Framework Directive and Regional Sea Conventions. These legal instruments interact in numerous ways. For example, the institutional framework of the Regional Sea Conventions establishing fora for negotiations and determinations in relevant marine regions can assist EU member states to achieve the objectives of Marine Strategy Framework Directive. This is especially important for the cooperation between European Union and non-member states. Moreover, the use of already existing fora can be treated as a convenience since the Directive does not require creation of additional institutions, but instead employs experienced structures. Through its legally binding provisions the Marine Strategy Framework Directive enforces member states to use ecosystem-based approach, international cooperation, establishment of Marine Protected Areas and many other principles. Another benefit of the Marine Strategy Framework Directive is the fact that "*EU has at its disposal mechanisms for monitoring, implementation and enforcement*"[145] and through its exhaustive reporting and assessment provisions this Directive ensures such enforcement of marine environmental protection in terms of compliance with its provisions as well as the obligations arising from Regional Sea Convention. These and other before mentioned qualities of the Marine Strategy Framework Directive fill in the existing gaps of the Regional Sea Convention system. Final benefit that need to be noted could be assigned to the European Union system as a whole, not solely to the Marine Strategy Framework Directive, even though it empowers the use of this advantage. The benefit in question is the financing opportunities provided from the European Union funds to implement the goals of the Directive as the Regional Sea Conventions have no such financing provisions and contracting parties are encouraged to relay on their own finances.

The most important aspect that should be taken from the analysis provided in this chapter is that the two legal regimes complement each other. While none of them are perfect, their imperfections or shortcomings do not render them ineffective, contrary both the Marine Strategy Framework Directive and Regional Sea Conventions are considered to be the most modern and well developed attempts at regulating the marine environment in Europe. As will be seen from the upcoming chapter, another benefit that the Marine Strategy Framework Directive brings to the protection of marine environment is reinforcement of measures adopted by the Commissions of the relevant Regional Sea Conventions by bringing them within the direct scrutiny of the

[145] Macrory, R., *supra* note 6, p. 319.

European Commission and the Court of Justice of the European Union.[146] The need for such enforcement and the procedures that can be applied will be discussed as follows.

[146] Trouwborst, A.; Dotinga, H., *supra* note 92, p. 132; Hey, E., *supra* note 101, page 13.

5. DISPUTE SETTLEMENT POSSIBILITIES IN THE MARINE ENVIRONMENTAL LAW

A very important benefit that the Marine Strategy Framework Directive brings to the protection of marine environment in Europe will be discussed in the present chapter. This chapter will be aimed at determining possibilities of action that could be taken by European Union member states and non-EU countries, that are contracting parties to the Regional Sea Conventions, for the breach of Marine Strategy Framework Directive or, where appropriate, Regional Sea Conventions. It should be noted that the analysis provided will not be exhaustive enough to cover all the possibilities for dispute settlement, but it will cover the main or most frequently used ones. Furthermore, each of the procedures for dispute settlement will not be discussed in great detail, but rather briefly described, mentioning their most important features. What is more, one part of the present chapter will be aimed directly at analysing possibilities of private individual to bring an action against a state for a breach of Marine Strategy Framework Directive and Regional Sea Conventions. Finally some dispute settlement outcome assessment, discussing best options for the European Union, its member states and non-EU countries in defending their interests will be provided.

5.1. Procedures for dispute settlement established under Regional Sea Conventions

This part will discuss the most obvious dispute settlement possibilities that are established under certain provisions of the Regional Sea Conventions. The Settlement of dispute clause in an international agreement is meant to make the contracting parties aware of the procedure they might undergo in case of difference of opinion. These possibilities, however, only apply to contracting parties to the Regional Sea Conventions as they deal with disputes on the implementation and interpretation of these Conventions. Nonetheless, where European Union is a contracting party to the convention it is also able to be a party to a dispute settlement proceeding. This is not the case with the Bucharest Convention for evident reasons that have been mentioned before.

If we take a look at the texts of Regional Sea Conventions, the priority in dispute settlement always goes to peaceful means such as negotiating and only after the peaceful means have been exhausted, in cases where the dispute cannot be solved peacefully, they resort to arbitration. For example, in Barcelona Convention this is established under Article 28(1), whereas details for the arbitration are stated in Annex A. Further evidence of this dispute solving tendencies is provided in Article 26(1) of the Helsinki Convention. The wording in OSPAR

Convention is slightly different and encourages the first step of dispute resolution to be "*by means of inquiry or conciliation within the Commission*"[147], which are nonetheless peaceful means for settling a dispute. What is more, the Bucharest Convention makes such an emphasis on dispute settlement "*through negotiations or any other peaceful means of their own choice*"[148] that it does not provide any other measures for resolving the dispute. Prioritising in settling disputes peacefully is not a trait common only to Regional Sea Conventions but more so to international agreements in general.

If the peaceful means of dispute settlement prove to be ineffective the parties to the dispute, according to Helsinki, Barcelona and OSPAR Conventions, should continue by going to arbitration. However, this is not an obligation in all of the mentioned Conventions as the Helsinki and Barcelona Conventions establish that the dispute will be submitted to the tribunal only upon common agreement from the parties involved.[149] The OSPAR Convention does not state the same requirement, on the contrary, it establishes that "*the applicant party shall inform the Commission that it has requested the setting up of an arbitral tribunal, stating the name of the other party to the dispute and the Articles of the Convention the interpretation or application of which, in its opinion, is in dispute*"[150], so the initiative from one party is enough. The requirement for 'common agreement' makes the settlement of dispute procedures in Helsinki and Barcelona Conventions very ineffective, as the party that is most likely to be in the wrong can simply refuse to go to arbitration.

Nonetheless, if the parties do have a common agreement, Annex A of the Barcelona Convention states that an arbitration tribunal will be established specifically for the dispute in motion, as well as the fact that parties to the dispute appoint one arbitrator each and then another one on whose appointment both parties to a dispute mutually agree.[151] The mentioned arbitrational tribunal can recommend interim measures and the decision given by the tribunal will be final and binding on the parties to the dispute.[152] The difference in Helsinki Convention is that the parties to the dispute are provided with a choice between ad hoc arbitration tribunal, permanent arbitration tribunal or even International Court of Justice.[153] However, the process for the formation of ad hoc tribunal is not described, like it is done in the Barcelona and OSPAR

[147] Convention for the protection of the marine environment of the North-East Atlantic, *supra* note 91, Article 32(1).
[148] The Convention on the Protection of the Black Sea Against Pollution, *supra* note 104, Article 25.
[149] Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, *supra* note 86, Article 28(2); Convention on the protection of the marine environment of the Baltic Sea area, 1992 (Helsinki Convention), *supra* note 89, Article 26(2).
[150] Convention for the protection of the marine environment of the North-East Atlantic, *op. cit.*, Article 32(3).
[151] Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, *op. cit.*, Annex A, Article 3.
[152] *Ibid.*, Annex A, Articles 6(2) and 7(1).
[153] Convention on the protection of the marine environment of the Baltic Sea area, 1992 (Helsinki Convention), *op. cit.*, Article 26(2).

Conventions. Furthermore, it is important to mention that European Union cannot be a party to dispute settlement proceedings in the International Court of Justice since only states have such ability and that is why if the conflict is between EU and non-member state the parties are left with only two choices for arbitration. The arbitration proceedings established under the provisions of OSPAR Convention are somewhat similar to those of Barcelona Convention as the tribunal is composed for the specific dispute and the process of its formation is also corresponding. The two parties would each appoint an arbitrator of their choice and then the chosen arbitrators appoint the third one, also the arbitration tribunal will be able to recommend interim measures and its decisions will be final and binding on states in the dispute.[154] What is also worth mentioning is the use of word 'recommend' in the Barcelona and OSPAR Conventions when talking about interim measures. This means that the interim measures recommended by the arbitration tribunal are not legally binding on the parties to the dispute. If we have in mind the fact that environmental damage to the marine environment can spread really fast due to its transboundary nature the need for binding measures of interim relief is of great significance. For now it is only relied on the fact that the parties to a dispute will comply with the recommendation made by the arbitration tribunal.

Last thing that has to be mentioned, is that when it comes to private parties claiming damage for the breach of the provisions of Regional Sea Conventions they do not establish such possibility. Even though there was an attempt to change the situation by adopting Guidelines for the Determination of Liability and Compensation for Damage resulting from Pollution of the Marine Environment in the Mediterranean Sea Area, that included damage suffered by private persons (both natural and legal), it did not change anything as the Guidelines were not mandatory.[155] So this is another proof that the use of soft law, which is so popular amongst Regional Sea Conventions, makes the protection of marine environment less effective.

When a conflict concerning the marine environment arises between European Union and non-member states or an EU member and non-member countries dispute settlement proceedings provided under the provisions of Regional Sea Conventions have only one advantage over the procedures functioning under the European Union legal system – the non-EU states are not able to be parties to proceedings in the Court of Justice of the European Union, but they have this ability in arbitration tribunal established in accordance with the relevant Convention. The Regional Sea Conventions provide a clear structure in a way disputes have to be handled moving from the softest means of settlement like negotiation to heavier artillery like arbitration. The efficiency of such proceedings, however, is not completely clear as there are no time limits

[154] Convention for the protection of the marine environment of the North-East Atlantic, *supra* note 91, Article 32.
[155] Pisupati, B.; Leary, D. K., *supra* note 88, p. 93, 94.

established and the peaceful method of dispute solving could take a lot of time to provide any results. What is more, the conduction of arbitrational tribunal could also accelerate time consumption in the dispute settlement proceedings. During that time the dispute will be ongoing and one of the contracting parties will be suffering the consequences. Furthermore, in the case of Barcelona and Helsinki Conventions both sides of the dispute have to agree for the proceedings in arbitration tribunal to be started, making the solving of a dispute not mandatory. So to sum up, the possibilities for dispute settlement under the provisions of Regional Sea Conventions are limited to mostly non-binding negotiations and non-obligatory arbitration. As marine environment is a policy area requiring a prompt dispute resolution decisions have to be made quickly and effectively. This is where procedures established under European Union legal system come in handy.

5.2. Dispute settlement possibilities applicable under European Union law

Where the dispute arises between two European Union member states in an area of marine environmental protection it is evident that dispute should be settled in the Court of Justice of the European Union, even where both of the disputing states are contracting parties to one of the Regional Sea Conventions. Even before the existence of Marine Strategy Framework Directive a very famous MOX Plant Case led us to believe that instituting dispute settlement between two member states in the Court of Justice of the European Union is an obligation under EU treaties even with the absence of EU legislation in a particular field of marine environment.[156] The point of view taken by the Court was that competence conferred upon the European Union to conduct an international agreement (the MOX Plant case was related to UNCLOS, but the mentioned international agreement might as well be one of the Regional Sea Conventions) should mean that there is no need to examine the scope and existence of EU legislation in that field before concluding the agreement and consequently, after it has been concluded, the CJEU has competence to review member states compliance to the obligations under such an agreement.[157] So now, with the existence of the Marine Strategy Framework Directive covering the protection and preservation of marine environment in Europe there is no doubt that any conflicts arising between two member states in this field will be considered falling under the jurisdiction of Court of Justice of the European Union and will need to be solved under European Union law. It is also important to have in mind a before mentioned fact that after European Union accedes to an

[156] Long, R., *supra* note 8, p. 3.
[157] Boelaert-Suominen, S. The European Community, the European Court of Justice and the Law of the Sea. *International Journal Of Marine & Coastal Law* [serial online]. 2008, 23 (4): 643-713, p. 677, 678, 679.

international agreement and it enters into force its provisions become an inclusive part of EU legal system, because this will be significant in this part of the chapter.

What is more, for the purpose of this paper, we will only concentrate on enforcement proceedings (sometimes referred to as the infringement procedure or action) that can be brought before the Court of Justice of the European Union by the Commission under Article 258 TFEU and by one or several member states under Article 259 TFEU, action for review of legality that can be brought on the basis of Article 263 TFEU by a number of applicants for legislative acts of the EU (Article 265 for failure to act will not be discussed because of its close linkage with Article 263) and finally, preliminary ruling procedure under Article 267 TFEU.

5.2.1. Enforcement proceedings under Article 258 TFEU and Article 259 TFEU

First let us discuss the stages of the enforcement proceedings which slightly differ depending on whether Commission, which is the most common situation, or a member state starts an action. When the action for infringement is started by the initiative coming from the Commission under article 258 TFEU the first stage could be referred to as the informal stage during which the Commission communicates to the relevant member state about the breach of European Union law it has committed and waits for its replay with a sort of explanation and justification for its actions.[158] If the explanation provided from the member state, that allegedly breached European Union law, satisfies the Commission the dispute can be solved then and there. This seems to be quite similar to the peaceful means of dispute solving, which are prioritised by the Regional Sea Conventions. However, if the explanation provided does not satisfy the European Commission a formal procedure begins with the formal letter delivered by the Commission to the member state in question on the nature of the infringement it has been accused of. The member state then can give its observations on the matter, before the Commission presents it with its reasoned opinion that is the basis for the enforcement proceedings and also imposes the time limit during which the member state can emendate the breach. So only if the member state does not eliminate the breach in the time provided in the reasoned opinion that the Commission brings the matter before the Court of Justice of the European Union. When the enforcement procedure is initiated by one member state against another under Article 259 TFEU, the first thing it must do is to inform the Commission of such alleged infringement. The Commission than hears out both sides to the dispute and delivers its reasoned opinion after which the case reaches the Court of Justice of the European Union. From

[158] Craig, P.; De Burca, G. *EU Law: Text, Cases, and Materials* 5th edition. New York: Oxford University Press, 2011, p. 413.

the stages of enforcement proceedings we can see that the member states are given plenty of opportunities to resolve the dispute peacefully by eliminating the breach of EU law. This displays a similarity between the dispute settlement proceedings under the provisions of Regional Sea Conventions and enforcement action. Nonetheless, the latter one has strict time limits to ensure that the dispute will be solved as promptly as possible.

An interesting fact which is worth mentioning is that the European Commission may bring an enforcement action against a member state on the basis of article 258 TFEU for the non-compliance with international agreements to which European Union is a party, this however does not work with all international agreements, only the ones that contain provisions coming within European Union's competence.[159] Since the Union has been able to successfully accede to Barcelona, Helsinki and OSPAR Conventions and the particular field their provisions cover fall under EU competences, Commission could bring this type of action for the breach of the provisions of these Regional Sea Conventions. There has even been a case in 2004 brought against France for the breach of provisions of one of the Protocols of Barcelona Convention, concerning pollution from land-based sources, which illustrates that the Court of Justice of the European Union is not afraid to enforce implementation of Regional Sea Conventions and considers such enforcement to fall under its jurisdiction.

In this particular case the damage to the marine environment originated from work of turbines of the hydroelectric power station located at Saint-Chamas that had destructive effects but competent French institutions did not take appropriate measures thus breaching Article 6 (part 1 and 3) of a particular Protocol, as well as Article 4(1) and Article 8 of the Barcelona Convention itself.[160] The European Commission was informed about such derogation from the provisions of Barcelona Convention and started enforcement proceedings against France. The CJEU decided that all of the Commissions complaints are well founded and ordered France to pay the costs.[161] The significance of this case can be seen not from the fact that competent French institutions breached provisions of Barcelona Convention, but rather the fact that the Commissions and CJEU took it upon themselves to ensure member state compliance with the provisions of a Regional Sea Convention. Also the Court of Justice of the European Union through this case "*established that the lack of implementation legislation at the Community level did not release the Member States from their obligation to implement the relevant provisions of the Protocol*"[162]. This case proves that Court of Justice of the European Union indeed has the jurisdiction to conduct decisions on infringement proceedings that flow from the breach of

[159] Eeckhout, P. *EU External Relations Law* 2nd edition. New York: Oxford University Press, 2011, p. 302.
[160] Case C-239/03, *Commission of the European Communities v. French Republic* [2004] ECR I-9325, paragraph 14.
[161] *Ibid.*, paragraphs 87 and 88.
[162] Hildering, A.; Keessen, A.; Van Rijswick, H., *supra* note 139, p. 82.

Regional Sea Conventions. However, there is no mention whether one member state could bring an action for infringement of Regional Sea Conventions by another member state on the basis of Article 259 TFEU, but it would be logical to assume that it could be a possibility since the aim of the enforcement proceedings is to ensure the member states' compliance with EU legal system.

If an enforcement action is brought for a breach of Marine Strategy Framework Directive there is no question whether the Court of Justice of the European Union has the jurisdiction to give a ruling in such case or whether Commission was capable of bringing such an action, because this is the competence explicitly vested to them in the Treaty. Moreover, it is easier for the European Commission to find out about the occurrence of such breach since there is a legal database established for the purpose of member states notifying the Commission about the successful implementation of a directive. That is why any indication of failure to implement the Marine Strategy Framework Directive would be promptly noticed.

What also needs to be mentioned when discussing the infringement procedure is that Articles 278 and 279 TFEU grant power to the Court of Justice of the European Union to assign interim measures, but only where there is a case of urgency, in particular, to prevent serious harm that could be irreparable.[163] This could clearly be used if the breach to the Marine Strategy Framework Directive occurs, because of the distinctiveness of the marine environment that guaranties the need of urgent preventive measures. Such power vested to CJEU is clearly an advantage when compared to the possibilities of international arbitrational tribunals established under Regional Sea Conventions that can only recommend the granting of interim relief measures, but does not have the power to impose them.

It is also worth noting at this point that additional power to the enforcement proceedings under Articles 258 and 259 TFEU is added through Article 260 TFEU which gives the right to Court of Justice of the European Union to impose penalty payments or a lump sum to ensure the compliance with its decision in the infringement action. In a recent case between the European Commission and Poland concerning the implementation of the Marine Strategy Framework Directive the Court of Justice of the European Union did just that, by imposing "*on the Republic of Poland, in accordance with Article 260(3) TFEU, a periodic penalty payment for failure to meet its obligation to notify transposition of Directive 2008/56/EC at a daily rate of 93 492 EUR*"[164]. It is evident therefor that in this aspect European Union dispute settlement procedure is more effective than the one established under Regional Sea Conventions as it does not provide arbitration tribunal with such option.

[163] Craig, P.; De Burca, G., *supra* note 158, p. 439.
[164] Case C-245/12, *European Commission v Republic of Poland* [2012] OJ 2008 L164, p. 19.

5.2.2. Proceedings for the review of legality under Article 263 TFEU

Whereas enforcement proceedings ensure that the member states comply with the EU legal system the review of legality assures such compliance in the legislative process of Union's institutions. These proceedings can be brought "*on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers*"[165] by the member states, European Parliament, Council, Commission, Court of Auditors, European Central Bank, Committee of the Regions and even natural or legal persons in some particular situations. From this we can see that the list of applicants to these proceedings is very extensive. An important point in these proceedings is that they can be brought to review the legality of significant number of different acts by EU. This is clearly done to ensure the best possible protection against breaches of European Union's legal system. However, for some applicants, more specifically natural and legal persons, the conditions to start such proceedings are slightly more complicated than for others as evident from the article 263 TFEU itself. Another thing worth noting is that the time limit to bring such proceedings is relatively short and could make this even more difficult for some applicants.

What is also worth mentioning is that the proceedings for review of legality can be relevant in two particular cases involving agreements concluded by the European Union, first of which is legality to conclude an international agreement (for example if an institution that concluded the international agreement had no such competence) and the second one, that is more interesting and relevant to this work, when European Union institution breaches international agreement through its legislation.[166] Since there is no doubt about the legality of European Union accession to Regional Sea Conventions it leaves only one way this procedure could be used in terms of connection to any of the Regional Sea Conventions and this is when internal act of Union's institution breaches their provisions.

To conclude this brief discussion on the procedure of review of legality it is safe to say that even with few inconveniences to start the proceedings it is an asset to the European Union litigation process. It is one of the essential procedures (together with the preliminary ruling procedure on the validity of an act) to avoid violation of European Union law through its internal acts.

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[165] Consolidated Version of the Treaty on the Functioning of the European Union. [2008] OJ C115/47, Article 263(2).
[166] Eeckhout, P., *supra* note 159, p. 287-298.

5.2.3. Preliminary ruling procedure under Article 267 TFEU

A dispute can arise not only from wrong implementation or no implementation at all, but also from different interpretations of the provisions. In the legal system of the European Union such interpretation is conducted through preliminary ruling procedure. This is a so called "*court to court procedure, with national courts acting as gate-keepers*"[167] to the Court of Justice of the European Union. During this procedure the CJEU interprets the Treaties and secondary legislation, but also can find that a certain internal act is contrary to the Treaty text and thus invalid. As mentioned before, preliminary ruling procedure on validity of an act together with the proceedings for review of legality ensure the European institutions' conformity with EU legal system, while preliminary ruling on the interpretation of European Union law provides a common understanding and uniform applicability of its legal norms throughout all of the member states.

What is also worth mentioning about the preliminary ruling procedure is that correspondingly with enforcement proceedings discussed before, the Court of Justice of the European Union can give a preliminary ruling on the interpretation of provisions of the Regional Sea Conventions. This has occurred in another case in which the French *Cour de Cassation* requested a preliminary ruling on interpretation of Article 6(3) of the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources, where the CJEU gave its interpretation on the provision recognizing its direct effect, without considering whether it has the appropriate jurisdiction to interpret mixed agreements (Regional Sea Convention to which EU is a contracting party).[168] From this we can see that the Court of Justice of the European Union shows no sign of hesitation when interpreting international law that has become a part of EU legal system. This also demonstrates that the interpretation of norms regulating the marine environment conducted in the European level is much broader compared with the interpretation provided by the Conventions' arbitrational tribunals as it covers both purely European Union law, such as Marine Strategy Framework Directive and Regional Sea Conventions that after European Union's accession to it became integral part of its legal system. Another very important conclusion that has been done in this decision of the Court is the recognition of the existence of direct effect in the Protocols. The importance of this can be seen in the upcoming part of this chapter as it implies that private parties can claim state liability for the breach of provisions of this and similar Protocols to the Regional Sea Conventions.

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[167] Chalmers, D.; Davies, G.; Monti, G. *European Union Law* 2nd edition. New York: Cambridge University Press, 2010, p. 151.
[168] Eeckhout, P., *supra* note 159, p. 278.

5.3. Possibility for a private party to bring an action for damage suffered from a breach of Marine Strategy Framework Directive or Regional Sea Conventions

The possibility of private persons to bring an action for the damages they have suffered from wrongful implementation of the European Union directives can be seen from the early cases of Francovich and Brasserie that established and formulated the principle of state liability. This principle provides an opportunity for private individuals to receive a monetary compensation for the breach of European Union law through the failure to implement it, conducted by a member state. It is evident from the establishment of such principle that the Court of Justice of the European Union is seeking absolute effectiveness of the EU legal system. It is, however, clear that not all individuals and not in every situation can seek damages, there are certain conditions that have to be met. According to the judgment in the Brasserie case, the principle of state liability can be applied where "*law breached is intended to confer rights upon individuals, the breach is sufficiently serious and there is a direct causal link between the breach and the damage sustained by the individuals*"[169]. Since the seriousness of the breach and the causal link between the damages and the breach would vary from case to case this part will only discuss whether the provisions of the Marine Strategy Framework Directive fit the first criteria and confer rights on individuals, thus determining whether there is a potential for private individuals to be able to claim and prove damages for the breach in the implementation of this particular Directive. The present part will also briefly discuss the possibility for private parties to bring an action for the infringement of Regional Sea Conventions.

To begin with, it has to be mentioned that one of the most common criticism towards the Marine Strategy Framework Directive is the fact that its provisions are quite abstract and that it limits "*itself to fix objectives and principles, but omits to provide for measures*"[170]. Thus the question arises whether Directive maintaining such traits could really be meant to confer rights on individuals? As mentioned in the previous chapters the goal of the Marine Strategy Framework Directive is to reach the so called good environmental status in the European marine environment. One of the reasons for such goal is to protect the human health, which means that it confers rights to individuals. Nonetheless, since the Directive itself does not explicitly state what level of each indicator has to be reached to consider an existence of good environmental status in a particular marine region it is highly unlikely that a private individual could launch a claim on the basis of member state not reaching such status, because it would be exceptionally difficult to

[169] Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA and Federal Republic of Germany and between The Queen and Secretary of State for Transport, ex parte: Factortame Ltd and Others* [1996] ECR I-1029, Courts Judgment, paragraph 2.
[170] Kramer, L., *supra* note 6, p. 274.

prove that the breach of individual rights has occurred. However, "*where EU law leaves considerable discretion to the national authorities, state liability will depend on a finding of manifest and grave disregard for the limits of that discretion*"[171]. This rule established through the case law of the CJEU for the application of the principle of state liability could mean, that if the Court finds that the measures taken by the state to protect and preserve the marine environment were too insignificant thus disregarding the limits of the discretion to set their own standards for what good environmental status consists from the principle could still be applied.

Another possibility for the application of the principle of state liability in regards to the Marine Strategy Framework Directive could be seen from the point of view of Ronan Long, who states that "*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*"[172]. The point made by R. Long should be understood as meaning that private individuals could only bring action against member state for failure to implement Marine Strategy Framework Directive if the breach has occurred in the compliance with the deadlines, for example those on the preparation of marine strategies defined in Article 5 of the Directive or similar provisions establishing the process for the Directives step by step implementation. Since these articles are very specific and set clear dates for each action to be finished the failure to implement such process provision on time could be easily proven by the private individual who started an action for state liability. Even though the process provisions do not explicitly confer rights on individuals they could still be relied on in cases of state liability for damages as the Marine Strategy Framework Directive as a whole confers such rights. It might seem that applying the principle of state liability for wrongful implementation of the Marine Strategy Framework Directive could be quite complicated, it is nonetheless theoretically possible. It should be waited for the Court of Justice of the European Union to determine whether this Directive indeed has the direct effect or not.

When it comes to Regional Sea Conventions, or other international agreements European Union has acceded to, "*if a Member States fails to comply with the legal provisions of such an international treaty, which imposes upon a Member State, as the member of the EU, particular duties and a private party suffers damage due to that fact, state liability in damages can arise*"[173]. Clearly this requires particularly special circumstances that are nonetheless possible, thus providing private individuals with ability to protect their rights coming from Regional Sea

[171] Craig, P.; De Burca, G., *supra* note 158, p. 250.
[172] Long, R., *supra* note 8, p. 21.
[173] Vaitkevičiūtė, A. The relationship between member state liability in damages for breach of the European Union law and state responsibility for breach of international law. *Jurisprudencija*. 2012, 19 (1): 71–86, p. 81.

Conventions. So the fact that the Union itself is a member of the Conventions provides private parties with such possibility. Moreover, as mentioned in the previous part of this chapter, the Court of Justice of European Union has already established that one Protocol of the Barcelona Convention has a direct effect, so this could be established in cases concerning other Regional Sea Conventions as well. Furthermore, a situation might arise where the provisions of the Marine Strategy Framework Directive that were wrongfully implemented were meant to enforce international obligations from Regional Sea Conventions. As seen from the previous chapter a significant number of such provisions and principles do exist in the Directive. So indirectly, through the state liability for the breach of Marine Strategy Framework Directive, private parties could defend rights conferred to them by the Regional Sea Conventions.

5.4. Observations from discussing possibilities of dispute settlement in marine environmental law

This part of the chapter provided some insight to the possible variations of dispute settlement through the mechanisms established under Regional Sea Conventions or through a number of different litigation provisions established in European Union law. From all that has been said in the last sections some observations can be concluded.

The dispute settlement procedures established under Regional Sea Conventions evidently have a structure common to international law and do not provide many surprises. The possibilities of settling disputes under European Union legal system are much more widely developed and offer numerous choices. Furthermore, procedures under European Union law are clearly structured and function efficiently and relatively promptly while the efficiency of procedures established under the provisions of Regional Sea Conventions is in question. Another thing that is worth mentioning is the fact that European Union gives the possibility for private individuals to claim damages for the wrongful implementation by the member states which is clearly not the case under the Regional Sea Conventions. Moreover, interim measures can be prescribed and enforced by the Court of Justice of the European Union, while arbitrational tribunals can only recommend such measures.

If we consider the effectiveness and efficiency of dispute settlement possibilities in the field of marine environmental law European Union legal system provides much more and better developed possibilities, some of which were not even discussed in this work. The dispute settlement clauses in the Regional Sea Conventions are quite basic and do not provide legal authority that would make the settlement of disputes arising from the Conventions obligatory. To sum up, it is clear that procedures provided under the European Union law can contribute to the

enforcement of marine environmental protection better than the ones established in the Regional Sea Conventions.

CONCLUSIONS

1. The analysis of the regulation of marine environmental protection in the European Union prior to the adoption of the Marine Strategy Framework Directive portrays the need for such legal instrument concentrating specifically on this field of environmental policy. Since the early regulation was extremely fragmented and sectoral it did not manage to achieve significant results. The Directive provides structure and aims to include marine environmental protection into other policies, while promoting sustainability and ecosystem-based approach. Even though the Marine Strategy Framework Directive is flexible it provides European Union member states with an ambitious goal to be achieved.
2. The goal to be achieved by successfully implementing the Marine Strategy Framework Directive is the 'good environmental status' of marine waters in Europe, which is not concrete and despite attempts from the European Commission lacks explanation. This shortcoming of the Directive provides member states with wide discretion to set their own standards and determine the results to be achieved, thus enabling them to set limited targets and make the Marine Strategy Framework Directive ineffective. The Directive relies on the member states' interest to protect the marine environment, disregarding the fact that some states have never demonstrated such interest. The solution for this problem could be particular amendments determining the minimum standard for each qualitative descriptor that has to be achieved in a particular marine region or subregion, thus ensuring at least a minimal level of protection.
3. The second shortcoming of the Marine Strategy Framework Directive, as determined form analysing its provisions, is the possibly unrestrictive application of the exceptions provided. In particular a problem is likely to arise with the use of 'no significant risk' and 'disproportionate costs' exceptions that can be very broadly applicable. It is evident that the current scientific knowledge is not sufficient to clearly determine if the risk in question is significant or not and thus leave an opening for environmental damage if no protective measures are to be taken. This seems to contradict precautionary principle entrenched in several recitals of the Directive. Furthermore, restricting activities that take place in the marine waters will undoubtedly lead to monetary loss, thus providing an opportunity to widely apply this exception. Nonetheless, this shortcoming could be solved by proper supervision from the European Commission on the way the exceptions are being applied.

4. The comparison of the Marine Strategy Framework Directive with the Regional Sea Conventions provided that even though both types of legal instruments are aimed at regulating the same scope, the Directive introduced several benefits into the marine environmental protection in Europe. First being the legally binding nature of all the commitments member states undertake in accordance with the Marine Strategy Framework Directive. Second benefit could be recognised in addition to the first one as the modern methods and approached entrenched in the international law are integrated into the provisions of the Directive giving them a legally binding effect, while the use of the same approaches were only recommended by the structures of Regional Sea Conventions. An example of this is the use of ecosystem-based approach. Another benefit of the Directive in comparison with the Regional Sea Conventions was determined to be financing possibilities for instruments and measures implementing the Marine Strategy Framework Directive as the member states are entitled the usage of EU structural funds.
5. Analysing the relations between the Marine Strategy Framework Directive and Regional Sea Convention highlighted a problem of Bucharest Convention. Since European Union is not allowed to accede to this Convention the cooperation between EU-member states and non-member states is limited. Another important aspect of the problem is the fact that European Union is unable to exercise its exclusive competence within the decisions taken at the Commission on the Protection of the Black Sea Against Pollution.
6. An advantage of marine environmental protection at the European Union level rather than international level can be seen from the dispute settlement possibilities that have been discussed. European Union litigation procedures are much more capable of reinforcing the commitments of member states as they are strict and obligatory in comparison with the dispute settlement procedures established by the Regional Sea Conventions.
7. There seems to exist a couple of possible shortcomings of the Marine Strategy Framework Directive, however they can be easily corrected if this provides to be necessary and thus does not make the Directive ineffective or inefficient, because of this reason the suggested hypothesis should be refused. Moreover, the potential of the Marine Strategy Framework Directive in protecting the marine environment is much more significant than the possibility of its shortcomings.

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SANTRAUKA

Magistro baigiamajame darbe nagrinėjamas Jūrų strategijos pagrindų direktyvos potencialas ir trūkumai. Ši direktyva yra pirmasis Europos Sąjungos koncentruotas bandymas reguliuoti aplinkos apsaugą jūrose. Tai yra svarbus žingsnis aplinkos apsaugos srityje dar ir dėl to, kad dabartinė jūrų vandenų ekologinė būklė Europoje yra itin prasta. Nepaisant šios direktyvos svarbos ji susilaukė nemažai mokslininkų kritikos dėl tikslių priemonių jūrų vandenų aplinkai pagerinti nebuvimo ir nekonkretumo. Kitas įdomus aspektas yra tai, kad dauguma valstybių narių kurioms ši direktyva yra ypač aktuali (pakrantės valstybės) nesuspėjo jos tinkamai įgyvendinti per nustatytą terminą. Dėl šių priežasčių magistro baigiamasis darbas kelia hipotezę, kad Jūrų strategijos pagrindų direktyvos trūkumai yra tokie žymūs jog daro ją neveiksminga ir negebančia įgyvendinti savo galutinio tikslo – geros jūrų aplinkos būklės pasiekimo.

Tam, kad ši hipotezė būtų pagrįsta arba atmesta šis darbas padalintas į penkis skyrius. Pirmasis skyrius analizuoja jūrų aplinkos apsaugos reguliavimo Europoje vienu konkrečiu teisės aktu reikalingumą, bei naujoves, kuriomis pasižymi Jūrų strategijos pagrindų direktyva, palyginus su prieš tai egzistavusiais teisės aktais. Antrasis ir trečiasis skyriai siekia nustatyti direktyvos trūkumus ir galimus trikdžius jos tikslo įgyvendinimui. Juose aptariama „geros jūrų aplinkos būklės“ nustatymo problema, bei galimai plačios išimčių įtvirtintų direktyvos 14 straipsnyje taikymo ribos. Šie skyriai taip pat pateikia galimus minėtųjų trūkumų sprendimo būdus. Priešingai pastariesiems skyriams, ketvirtasis ir penktasis skyriai pabrėžia Jūrų strategijos pagrindų direktyvos potencialą ir naudą kurią ji atneša jūrų aplinkos apsaugos reguliavimo sričiai Europoje. Šie skyriai lygina jūrų aplinkos apsaugos reguliavimą kurį Europos Sąjunga vykdo per Jūrų strategijos pagrindų direktyvą su tarptautiniu tos pačios srities reguliavimu, vykdomu Regioninėmis jūrų konvencijomis. Ketvirtajame skyriuje toks palyginimas atliekamas analizuojant ryšius tarp šių teisės aktų bei aptariant jų skirtumus, tuo tarpu penktajame skyriuje dėmesys skiriamas įsipareigojimų vykdymo užtikrinimo aspektui, dėl to aptariamos įvairios ginčų sprendimo galimybės. Baigiamajame magistro darbe atlikta analizė parodo, kad prieš tai minėtoji hipotezė turėtų būti atmesta nes nepakanka faktų jog galimi ir esami Jūrų strategijos pagrindų direktyvos trūkumai turi ar gali turėti žymią įtaką jos veiksmingumui, tuo labiau dėl to, kad šie trūkumai gali būti sparčiai ir nesunkiai ištaisyti. Verta paminėti ir tai, jog minėtoji analizė parodo, kad direktyvos potencialas ir teigiamosios savybės yra kur kas reikšmingesnės negu jos trūkumai.

SUMMARY

The master thesis analyses the potential and shortcomings of the first concentrated effort by the European Union to regulate the protection of marine environment – Marine Strategy Framework Directive. Since the current status of marine waters in Europe is considered as poor this field of environmental protection requires a lot of attention. In spite of that, the Directive has obtained some criticism from scholars as not providing measures for actually improving the marine environment. Another interesting factor is that most of the member states to which this Directive is especially relevant (coastal states) struggled to implement it during the period of time provided. This is why the master thesis raises a hypothesis that shortcomings of the Marine Strategy Framework Directive are significant enough to deem it ineffective and incapable of achieving the objective it sets out to reach – the attainment of good environmental status in the marine waters.

For the purpose of confirming or refusing the hypothesis this work is divided into five chapters. First chapter analyses the need for a single document regulating the protection of marine environment in Europe and the novelties introduced by the Marine Strategy Framework Directive in comparison to prior regulation. The second and third chapters of the master thesis are devoted to determining the shortcomings and the potential harm they might cause for the proper attainment of the aims of this Directive. The particular shortcomings discussed in these chapters include the unclear definition of 'good environmental status' and the possibly broad application of the exceptions established in Article 14 of the Directive. Some solutions to the mentioned shortcomings are also provided in these chapters. The fourth and the fifth chapters, contrary to the previous two, emphasises the potential and beneficial aspects the Marine Strategy Framework Directive brings to the protection of marine environment in Europe. These chapters make a comparison between the protection of this environmental policy exercised by the European Union through the Marine Strategy Framework Directive and Regional Sea Conventions that are meant to represent the international regulation of the same field. The fourth chapter makes this comparison by evaluating the relations between the two types of documents and the differences they possess, while the fifth chapter concentrates on the enforcement aspect, by discussing the dispute settlement possibilities. The analysis provided in this master thesis grants that the mentioned hypothesis should be refused do to the lack of evidence suggesting that the possible or existing shortcomings of the Marine Strategy Framework Directive could have a significant impact on its effectiveness as they could be easily fixed. Moreover, the potential of the Marine Strategy Framework Directive seems to override the deficiencies as it provides a modern regulation of the marine environmental protection.