



**Policy Brief for the EP Environment Committee
IP/A/ENVI/FWC/2005-35**

Marine Thematic Strategy

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POLICY BRIEF FOR THE EP ENVIRONMENT COMMITTEE

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Marine Thematic Strategy

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EXECUTIVE SUMMARY

In October 2005 the Commission adopted the Thematic Strategy (TS) on the protection and Conservation of the Marine Environment. The main component of the Marine Strategy is a proposal for a Directive – a Marine Strategy Directive – with the aim of achieving ‘good environmental status’ in the marine environment by 2021, at the latest. These two documents were accompanied by a Commission impact assessment.

This briefing considers the following issues relating to the TS:

- The adequacy of the proposal with reference to marine conventions, emissions from marine and land sources, integration with the CFP, ICZM and marine protected areas;
- The degree to which it will deliver environmental benefits;
- A comparison with an earlier draft produced by DG Environment;
- A consideration of how endocrine disruptors have been taken into account;
- The implications of the proposed use of comitology; and
- The use of the Commission impact assessment.

The briefing concluded, *inter alia*, that:

- An EU marine strategy Directive would be an important new instrument for the integration of the existing and future EU, regional and national policies affecting marine issues.
- There are limitations in the draft proposal, such as in the conservation of fisheries, which are of critical concern in ensuring sustainable marine ecosystems.
- The TS does not seek to replace the work of the regional seas conventions, but stresses the utility of building on existing structures. The draft Directive would require Member States to build upon existing programmes and activities developed in the conventions, but omits explicit reference to the substantive obligations resulting from those agreements. However, the proposed Directive could nevertheless provide benefits over and above the existing regional conventions, especially for the Mediterranean.
- The proposed Directive does not add anything to the designation of marine protected areas.
- The definition of good environmental status will be central to the weight of the Directive, but the proposal would relegate agreement of generic descriptors for good environmental status to a Committee procedure under which the European Parliament’s powers of scrutiny are extremely limited and time-constrained.
- The proposal does not take account for the implications of future EU enlargement, e.g. inclusion of Black Sea in 2007
- The requirement for Member States to co-operate is weak, and indeed weaker than in the water framework Directive.
- The proposal requires that Member States must ensure that measures are cost-effective, technically feasible, and shall carry out impact assessments prior to

the introduction of new measures. This provides a potentially large 'loop-hole' for Member States to fail to deliver the fundamental objectives of the Directive.

1 INTRODUCTION

The Thematic Strategy on the Protection and Conservation of the Marine Environment should establish a ten-year programme for protecting Europe's regional seas. This briefing for the Environment Committee of the European Parliament considers, *inter alia*, the following issues:

- assessment of the adequacy of the option proposed (given the objectives in the 6EAP);
- the degree to which the proposal will deliver environmental benefits;
- a comparison with the earlier DG ENV proposal not accepted by the Commission as a whole;
- assessment of how endocrine disruptors were taken into account in the IA;
- the implications of the comitology of the TS; and
- an assessment of whether the right proposal was brought forward given the IA.

1.1 The Marine Thematic Strategy

On 24 October 2005 the Commission adopted the Thematic Strategy on the protection and Conservation of the Marine Environment (COM(2005)504). The main component of the Marine Strategy is a proposal for a Directive – a Marine Strategy Directive (COM(2005)505) – with the aim of achieving ‘good environmental status’ in the marine environment by 2021, at the latest. These two documents were accompanied by a Commission impact assessment (SEC(2005)1290).

The Marine Thematic Strategy (TS) sets the scene for the introduction of the Marine Strategy Directive (hereafter, the ‘proposed Directive’), by arguing that the existing measures at EU and national levels are inadequate and insufficient to address the threats to the marine environment. In order to address this gap, the Strategy suggests that four different approaches to the design and implementation of EU policy be taken: a dual EU/regional approach; a knowledge-based approach; an eco-system approach; and a cooperative approach. The Marine Strategy Directive is the main implementing element of the TS.

The TS itself contains very few, if any, new ideas or approaches that the EU will pursue. Rather, it outlines some of the ongoing activities (eg Maritime Policy development) and existing legislation (eg the Common Fisheries Policy (CFP), the water framework Directive and the habitats and birds Directives). Furthermore, as the TS itself is a Communication, it carries no legal weight.

1.2 The Marine Strategy Directive

The proposed Directive takes a regional approach to ensure international collaboration on marine protection. Member States would be required to develop strategies for their respective waters within each Marine Region, aiming to reach the Directive's objective of achieving good environmental status in the Marine Environment by 2021. The definition of ‘good environmental status’ would be formulated by Member States

for each Marine Region, based on generic criteria and standards which would be adopted by the Commission via a comitology procedure.

The proposed regional approach is framed around the three main Marine Regions in European waters¹:

1. the Baltic and Arctic Sea;
2. the North East Atlantic Ocean; and
3. the Mediterranean Sea

In addition, the proposed Directive suggests that these regions can be broken down into sub-regions in order to take into account the specificities of a particular area.

The proposed Directive establishes a process to be undertaken by Member States, comprised of a preparation stage to be completed within six years of its entry into force, and a programme of measures to be developed by 2016 and in operation by 2018. This would include:

- conducting an initial assessment;
- determination of good environmental status
- establishing environmental targets; and
- drawing up a monitoring programme.

Thereafter, Member States would have to review each of these elements every six years. In addition, Member States would be encouraged to collaborate within their Marine Region or Sub-Region, and be encouraged as far as possible to build upon existing programmes, structures and international agreements. No specific measures would be set at EU level, but national programmes would have to be approved by the Commission, which would publish a first implementation report by 2021 at the latest. The proposal however foresees that there may be particular situations and areas where it would be impossible to achieve the level of environmental targets set in the framework Directive.

¹ For the implementation of the ecosystem approach, 13 eco-regions in the European waters were proposed. Those eco-regions were then re-grouped into "4 key zones" for the Commission's Impact Assessment: 1) Baltic and Arctic zone; 2) Black Sea zone; 3) Mediterranean zone; and 4) North-East Atlantic zone. The Thematic Strategy however, does not take into consideration future EU enlargement and thus the inclusion of the Black Sea in 2007.

2 ASSESSMENT OF THE ADEQUACY OF THE OPTION PROPOSED

In assessing whether the proposed Directive is sufficiently adequate, we should recall the relevant objectives of the 6th Environmental Action Programme (6EAP) (Article 6, Decision 1600/2002/EC). Article 6 of the 6EAP sets out objectives and priority areas for action on nature and biodiversity. These priority actions include those in Article 6(2)(g):

‘promoting sustainable use of the seas and conservation of marine ecosystems, including sea beds, estuarine and coastal areas, paying special attention to sites holding a high biodiversity value, through:

- promoting greater integration of environmental considerations in the **Common Fisheries Policy (CFP)**, taking the opportunity of its **review** in 2002;
- a **thematic strategy** for the protection and conservation of the **marine environment** taking into account, inter alia, the terms and implementation obligations of marine Conventions, and the need to reduce emissions and impacts of sea transport and other sea and land-based activities;
- promoting **integrated management of coastal zones**;
- further promote the **protection of marine areas**, in particular with the Natura 2000 network as well as by other feasible Community means’ [emphasis added]

The 6EAP also states that the ecosystem approach, as adopted in the UN Convention on Biological Diversity (CBD), should be applied whenever appropriate.

The proposed Directive relates most closely to the second action listed (the thematic strategy). Indeed, the legislative proposal accompanies the Thematic Strategy which was elaborated to fulfil the objective set out in the 6EAP. The question remains, however, as to whether the detail of the proposed Directive adequately accounts for the overarching objective of promoting sustainable use of the seas and conservation of marine ecosystems and how and whether it contributes to the other priority actions listed.

2.1 Objectives and Good Environmental Status

While the body of the Directive is not explicit in its aims or objectives, the preamble states that ‘the end objective of the proposed Directive is to achieve good environmental status of the marine environment by 2021.’ Article 1 then continues to state that:

‘This Directive establishes a framework for the development of Marine Strategies designed to achieve good environmental status in the marine environment by the year 2021 at the latest, and to ensure the continued protection and preservation of that environment and the prevention of deterioration.’

This is adequate as an overall objective. However, whether the obligations in the Directive will lead to this objective being met depends upon the fine detail of the proposal.

2.2 Terms and Implementation Obligations of Marine Conventions

The TS highlights the inadequacy of the current institutional framework for marine protection in Europe. EU law is piecemeal in its action on the marine environment. However, regional Conventions do exist for each regional sea, to which both the Community and the Member States concerned are contracting parties under international law. The importance of these existing international obligations was duly stressed in the water framework Directive but, oddly, rather seems to be downplayed by the Commission in its explanatory memorandum of the proposed Marine Strategy Directive.

In this context, it is important to recall the Convention on the Protection of the Black Sea against Pollution, signed in Bucharest on 21 April 1992² and the relevant provisions of the Water Framework Directive (WFD). Recital 21 of WFD states:

‘The Community and Member States are party to various international agreements containing important obligations on the protection of marine waters from pollution, in particular the Convention on the Protection of the Marine Environment of the Baltic Sea Area, signed in Helsinki on 9 April 1992 and approved by Council Decision 94/157/EC, the Convention for the Protection of the Marine Environment of the North-East Atlantic, signed in Paris on 22 September 1992 and approved by Council Decision 98/249/EC, and the Convention for the Protection of the Mediterranean Sea Against Pollution, signed in Barcelona on 16 February 1976 and approved by Council Decision 77/585/EEC, and its Protocol for the Protection of the Mediterranean Sea Against Pollution from Land-Based Sources, signed in Athens on 17 May 1980 and approved by Council Decision 83/101/EEC. This Directive is to make a contribution towards enabling the Community and Member States to meet those obligations.’

The purpose of the water framework Directive, which applies not only to inland surface waters, but also to transitional waters and coastal waters and even, to a limited extent, to the territorial waters of the Member States beyond the limit of the coastal waters as defined by the Directive, includes the protection of the marine environment, as the water framework Directive, according to its Article 1, aims to ‘contribute’ to ‘the protection of territorial and marine waters’, and, more specifically, to ‘achieving the objectives of relevant international agreements, including those which aim to prevent and eliminate pollution of the marine environment’.

The TS does not seek to replace the work of the Conventions, indeed it stresses the utility of building on existing structures. The proposed Directive contains a preambular reference to the same regional seas conventions as the water framework Directive (recital 11), as well as to the obligations of the Community and the Member States under the United Nations Convention on the Law of the Seas (recital 9) and its

² The Convention has been ratified by Bulgaria, Romania, Russian Federation, Georgia, Ukraine and Turkey in 1994. The establishment of the Black Sea Environment Programme in 1993 and the Strategic Action Plan followed this shortly for the Rehabilitation and Protection of the Black Sea adopted in 1996. The Strategic Action Plan for the Rehabilitation and Protection of the Black Sea was amended in Sofia, Bulgaria 22-26 June 2002.

preamble further states that ‘this Directive should enhance the effectiveness of the Community’s contribution under international agreements’ (recital 8). But, in odd contrast with the water framework Directive, the operative provisions of the proposed Marine Strategy Directive do not explicitly refer to the objectives of the regional seas conventions as regards prevention and elimination of marine pollution. The draft Directive contains a provision that would require Member States to ‘as far as possible, build upon existing programmes and activities developed in the framework of structures stemming from international agreements’ (Article 5(2)), but omits any explicit reference to the substantive obligations resulting from those agreements. Article 9(1) would merely require Member States to ‘*take into account* the continuing application of existing environmental targets set out at ... international level in respect of the same waters.’ (emphasis added)

The explanatory memorandum points out that ‘international cooperation notably in the framework of regional marine conventions has produced mixed results due to the lack of enforcement and control of these organisations’ (p 6). While it is true that the effectiveness of these conventions has often been limited, the fact that agreements and action programmes adopted by the intergovernmental bodies established by the conventions are, in most, though not all cases, ‘soft law’ compared to the ‘hard law’ of EU Directives has had both positive and negative outcomes. Soft law can encourage parties to take action, but there is no possibility of enforcement under international law if action fails to materialise.

However, the Commission fails to mention the fact that the conventions themselves contain binding provisions and that some legally binding decisions have also been adopted by their respective regional intergovernmental bodies. Recent case-law of the Court of Justice has confirmed that the obligations of Member States under international environmental treaties to which the Community and the Member States are contracting parties are incorporated into Community law and enforceable in the Community legal order. In fact, the Commission itself successfully took legal action before the ECJ against France for its failure to take action to comply with some of its obligations with respect to the prevention and abatement of pollution under the Barcelona Convention and its Protocol on Land-Based Sources. (Case C-239/03, *Etang de Berre*)

A Marine Strategy Directive could nevertheless provide benefits over and above the existing regional conventions. These might be relatively limited in more ‘advanced’ regions, such as the Baltic area covered by HELCOM, but for the Mediterranean there has been a conspicuous lack of progress in getting recently agreed Protocols or amendments to existing Protocols to come into force, such the 1996 Syracuse Amendments on land-based sources of pollution. In this region (and, in future, in the Black Sea) the proposed Directive would be likely to add value to the existing institutional structures.

2.3 Reduction of emissions and impacts of sea transport and other sea and land-based activities

The scope of the Directive is restricted to European marine waters (Article 2). However, the pressures and impacts that should be monitored, and hence which should be responded to, are not limited to those only occurring in the marine

environment. The list of pressures that should be monitored includes run-off (as an example of siltation), anti-foulants (as an example of toxic contamination) and boat activity (as an example of noise). This list is not exhaustive; therefore Member States can monitor and address other wider land based or sea transport source pressures. However, there are no clear *requirements* for Member States to do so.

2.4 Integration of Environmental Concerns into the CFP

The contribution of the Directive to CFP environmental integration is minimal, with fisheries management barely touched upon. Fish populations are included as one of the biological elements that Member States are required to include in their assessments of their European marine waters, together with commercial and recreational fishing as pressures (Annex II). Which fish stocks should be monitored is not specified. Many commercially exploited stocks are already assessed for fisheries management, although the proportion of exploited stocks assessed varies by regional sea. The potential expansion of monitoring to include recreational fishing would be new, as it is not currently required under the CFP.

Member States are required to identify measures to achieve good environmental status in light of the assessments. However, no provisions are provided for Member States to take measures related to fisheries management. The preamble justifies this absence on the basis that measures regulating fisheries management can only be taken in the context of the CFP basic Regulation (2371/2002). While this may be the case, with EU fisheries management largely being an area of EU exclusive competence, this approach contrasts with the habitats Directive, which requires Member States to avoid deterioration of natural habitats and disturbance of designated species in Natura 2000 sites but does not explicitly single out fisheries in the preamble as an area in which Member States can not take action. While providing context, the preamble does not carry legal weight, however, so the Directive nonetheless creates the same dilemma as the habitats Directive, whereby Member States are required to protect the marine environment but find their hands are tied in managing fishing, one of the most significant pressures.

The information Article (Article 14) provides a mechanism for Member States to inform the Commission of issues which cannot be tackled by national level measures, which should be accompanied by substantiating evidence. This would include fisheries. This article is weak however. At a minimum, the Commission could be expected to acknowledge the information submission, preferably with a proposal for a response, be it legislative or otherwise. As it stands, the Directive adds nothing to the ability for Member States to take fisheries management measures or to the requirements for any EU level response. Aside from additional information gathering requirements, the Directive therefore adds little to the CFP. This shortcoming is particularly notable given that fisheries, together with climate change, were identified as one of the two most important pressures on the marine environment in the explanatory memorandum of the proposed Directive.

2.5 Integrated Coastal Zone Management

In May 2002 a Recommendation (2002/413) was adopted by the Council and the Parliament on the implementation of Integrated Coastal Zone Management (ICZM) in

Europe. This recommends a strategic approach and sets out principles that Member States should follow in undertaking national ICZM stocktaking and national ICZM strategies. The Directive should contribute to the implementation of the ICZM Recommendation as the scope and coverage of the Directive includes ‘all European waters on the seaward side of the baseline from which the extent of territorial waters is measured... including the bed of all those waters and its sub-soils’ (Article 2). The assessments should take into account elements regarding coastal, transitional and territorial waters covered by the water framework Directive (2000/60/EC) (Article 7).

2.6 Marine Protected Areas

In the preamble, the proposed Directive recognizes the commitments made under the CBD to create a global network of marine protected areas (MPAs) by 2012. Rather than creating new legal provisions or requirements for designating MPAs, the proposed Directive supports the implementation of existing legislation, notably the habitats Directive, and designation of Natura 2000 sites.

In their assessment programmes (Annex II), Member States should:

- include the predominant habitat type(s);
- identify and map special habitat types, especially those recognised or identified under the habitats and birds Directives or international conventions as being of special scientific or biodiversity interest; and
- cover other special areas which by virtue of their characteristics, location, or strategic importance merit a particular reference eg areas subject to intense or specific pressures or areas which merit a specific protection regime.

Member States are not *required* to designate MPAs under the proposed Directive. Rather, Member States are required to ‘identify measures’ that need to be taken in order to achieve good environmental status, ‘taking into consideration’ the types of measures listed in Annex V. Of the measures in Annex V, the most relevant to MPAs are ‘Spatial and temporal distribution controls: management measures which influence where and when an activity is allowed to occur.’

Member States should integrate measures into a programme, ‘taking into account measures required under relevant Community legislation or international agreements.’ Moreover, Member States should ‘give due consideration to sustainable development and, in particular, to the social and economic impacts of the measures envisaged.’ The proposed Directive cannot be expected to add anything to the birds and habitats Directives, which are the principle body of EU legislation on MPAs. Member States are not required to protect areas, and the process for designating areas under the proposed Directive is vague and secondary to existing legislation. At a time when the designation of marine Natura 2000 sites is behind schedule, and the process of appropriate assessments and the development of management measures the subject of intense debate, the proposed Directive appears to bring nothing new to the table.

3 THE DEGREE TO WHICH THE PROPOSAL WILL DELIVER ENVIRONMENTAL BENEFITS

Articles 1-20 (Chapters I-IV) are analysed in terms of their potential environmental benefits in Table 1 below. Overall, the impacts of the proposed Directive can be expected to be slightly positive, but in many areas they may be neutral. The amount of additional value that the proposed Directive will add to the operations of existing international agreements and Community instruments is questionable.

Table 1: Analysis of Proposed Marine Strategy Directive Provisions – Environmental Benefits

| Article number & title | Brief description of article contents | Discussion of probable environmental impacts | Positive + Negative - Neutral ? |
|-----------------------------------|---|--|---------------------------------|
| 1. Subject matter | | N/A | |
| 2. Scope | Applies to all European marine waters extending to the outmost reach of MS jurisdiction, including the bed of these waters and sub-soils. | Applies further offshore than other environmental Directives (eg water quality, water framework), so adds to existing legislative framework in some areas. | + |
| 3. Marine Regions and Sub-Regions | MS shall take account of Marine Regions and sub-Regions in implementation of the Directive. | Positive in theory, but see further discussion of requirements for coordination below (Article 5). No consideration of the implications of future EU enlargement eg inclusion of Black Sea in 2007 or provisions for further enlargement. | ?/- |
| 4. Marine Strategies | Each MS shall develop a Marine Strategy in respect of each Marine Region concerned: this should include: <ul style="list-style-type: none"> • an initial assessment (within four years of entry into force (ie 2012 assuming adoption in 2008); • a determination of good environmental status (within four years of entry into force (ie 2012)); • establishment of environmental targets (within five years of entry into force (ie 2013)); and • establishment of a monitoring programme (within six years of entry into force (ie 2014)). Programmes of measures should be developed by 2016 and should enter into force by 2018. | Positive, but see discussion of elements below. Relatively generous time period in which to develop and enforce measures. However, an unrealistic expectation that measures will deliver GES within three to five years undermines Directive credibility. This contrasts with water framework Directive flexibility, suggesting that other ‘flexibilities’ are available to the Member States. | ?/+ |
| 5. Coordination and cooperation | MS with marine waters in the same region or sub-region shall coordinate their actions, and shall use existing institutional frameworks where appropriate. MS shall build on existing programmes and activities developed under international agreements. | It is unlikely that this requirement will add much (if anything) to the existing mechanisms for cooperation under international conventions. The requirement for co-operation is weaker than in the water framework Directive. | ? |
| 6. Competent authorities | MS shall designate competent authorities for the implementation of the Directive. | May be positive in terms of raising the profile of marine environment issues and better coordinating the management of the marine environment. This will depend however on the resources provided by MS to such authorities (existing or new), which itself will depend on how strong the requirements are. | ? |

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| 7. Assessment | MS shall make an initial assessment of their European marine waters, comprising an analysis of the characteristics and environmental status; pressures and impacts; and economic and social analysis of use and cost of degradation. | The implementation of Articles 7-10 lead to improved data collection and detection of previously unrecognised environmental problems in some areas. However, it is unclear how much additional data collection will be required in addition to existing requirements under international or regional agreements. The definition of GES will be central to the weight of the Directive. This is undefined, to be worked out MS on the basis of generic descriptors developed by the Commission. By not defining it in the Directive this creates delays. It also significantly reduces EP involvement in the process. GES definition, together with target setting and monitoring programmes are only required for Member State waters, and not regional waters. | +/? |
| 8. Determination of good environmental status | MS shall determine a set of criteria for good environmental status in their European marine waters. The Commission will set out generic qualitative descriptors, criteria and standards for the recognition of good environmental status. | | |
| 9. Establishment of environmental targets | MS shall establish environmental targets and associated indicators for their European marine waters. When devising these targets and indicators, MS shall take into account other national, regional, or international targets. | | |
| 10. Establishment of monitoring programmes | MS shall establish and implement coordinated monitoring programmes for the ongoing assessment of their marine waters. These shall build on provisions for assessment and monitoring laid down by relevant Community legislation or under international agreements. | | |
| 11. Approval | The Commission will assess the MS frameworks developed under Articles 7-10, and may request additional information or reject the frameworks proposed if they do not comply with the Directive. | The opportunity for Commission assessment of the frameworks should provide improved consistency between MS. However, it could also lead to delays and disagreements with Member States. | +/? |
| 12. Programmes of measures | MS shall identify measures needed to achieve good environmental status, and shall draw up a programme of such measures which shall be notified to the Commission. | MS must ensure that measures are cost-effective, technically feasible, and shall carry out impact assessments prior to the introduction of new measures. This implies that if measures to achieve good environmental status are considered too expensive, MS will not be required to pursue them. Absence of any reference to EU environmental policy guiding principles eg precautionary approach, ecosystem-based approach or polluter/user pays principle. | ? |
| 13. Special areas | MS can identify areas where environmental targets will not be met, including areas where this is due to modifications or alterations to the physical characteristics of marine environments made 'for reasons of overriding public interest which outweighed the negative impacts on the environment'. | Makes the Directive flexible and pragmatic on the one hand. Whether it is used excessively to justify inaction will depend on interpretation and application of the Article by MS. | ? |
| 14. Information | If MS identify issues that impact on environmental status of European marine waters and cannot be tackled by national-level measures, they shall inform the Commission and provide evidence. | Improved information and communication of information is necessary for sounds policy development. However, the Commission is not required to respond to MS evidence. | ? |
| 15. Approval | The Commission shall assess whether the programmes of measures notified under Article 12 are appropriate means of achieving good environmental status. | As with the requirement for approval of the assessments, Commission approval may improve consistency. However, it could also lead to delays and disagreements with MS. The value of this approval process will also be dependent upon what is expected of MSs i.e. definition of GES. | +/? |

| | | | |
|---|--|--|-----|
| 16. Updating | Strategies shall be reviewed every 6 years after establishment. | Will ensure strategies are kept up-to-date. | + |
| 17. Interim reports | Within three years of publication of programmes, MS shall provide an interim report to the Commission on progress in implementation. | Will enable the Commission to monitor implementation, but quality of reporting will determine value. | +/? |
| 18. Public consultation and information | Member States shall involve all interested parties, and make their strategies available for public comment. Data must be made available for the Commission. | Should improve the quality of the strategies produced, and ensure views of all stakeholders are considered. However, specific requirements with respect to consultation and public participation are not defined, as is the case in other EU legislation, notably the water framework Directive which requires involvement of the public in general, and not just of 'interested parties' Article 18 of the proposed Directive also contrasts with, for example, the Partnership Article of the European Agricultural Fund for Rural Development (EAFRD) Regulation (1698/2005), which includes 'non-governmental organisations, including environmental organisations' (Article 6(1)(c)). Limiting public participation to 'interested parties' seems inconsistent with the Community's obligations under the Aarhus Convention. Requirement for MS to share data with the Commission will strengthen information sharing and consistency and support the Commission's work. | + |
| 19. Commission reports | The Commission shall publish a first evaluation report on implementation within two years of receiving programmes of measures and by 2021 at the latest, and further reports every six years thereafter. | | |
| 20. Review of this Directive | The Commission shall review this Directive by [15 years after entry into force] | This is similar to the water framework Directive – a review after initial implementation. | |

4 A COMPARISON WITH THE EARLIER DG ENV PROPOSAL NOT ACCEPTED BY THE COMMISSION AS A WHOLE

The proposal was widely circulated in draft form in June 2005. This was different to the published version in a number of respects which illustrate the thinking of the Commission and the pressures that it has been under in formulating the proposal. This section highlights some of the main differences between the draft and final versions, which could be considered by MEPs as they analyse the relevant issues.

Subject matter of the proposal

Article 1 sets out the ‘subject-matter’ of the proposed Directive, which is, in effect, its purpose. This is to establish a framework for the development of Marine Strategies designed to achieve good environmental status by 2021 and ensure the continued protection of the marine environment and the prevention of deterioration.

The June 2005 draft proposal had a more explicit statement of objectives, such that it would establish a framework which:

- (a) Prevents further deterioration, protects and restores the status of marine ecosystems;
- (b) Establishes the environmental objectives to be achieved as well as the mechanisms for achieving these objectives;
- (c) Promotes and encourages the further development of coherent monitoring regimes, assessment procedures and information systems thereby improving the knowledge-base upon which policy decisions relating to the marine environment are taken;
- (d) Ensures greater coherence and integration within and between the different policies and legislative measures which impact upon the marine environment.

It is unclear why these more explicit objectives were removed as the proposal as it stands is still intended to contribute to their achievement.

Definitions

Article 1 also contains the only definition in the proposal. Thus ‘*environmental status*’ means the overall expression of the state of the environment in a Marine Region taking account of the structure, function and processes of the constituent marine ecosystems, together with natural physiographic, geographic and climatic factors, as well as physical and chemical conditions including those resulting from human activities in the area concerned. This is similar to that for ‘ecological status’ in the water framework Directive. The June 2005 draft proposal contained further definitions, but these were largely self-explanatory from the text itself. Thus their loss might not be particularly problematic.

The proposal does not provide guidance on what ‘good environmental status’ might be, even though this is a major driver for action under the proposal. It is unclear why detailed criteria are not included given their importance. The draft proposal did

contain them (similar to those for ‘good ecological status’ under the water framework Directive (Annex V)) and it is not certain why they were removed from the published proposal and whether it is appropriate that such an important part of a Directive be adopted by comitology.

Scope of the proposal

The proposed Directive would apply to all European waters on the seaward side of the baseline from which the extent of territorial waters is measured extending to the outmost reach of the area covered by the sovereignty or jurisdiction of the Member States, including the bed and sub-soils.

The June 2005 draft proposal contained the following definition of ‘marine waters’ (no longer explicitly defined) as waters on the seaward side of the baseline from which the extent of territorial waters is measured extending to the outmost reach of the area covered by sovereignty or jurisdiction. Those waters covered by the water framework Directive were not included.

It should be noted that the water framework Directive applies to marine waters up to one nautical mile from the coast and some Member States have applied its provisions further than this (such as three nautical miles in Scotland). The proposed Directive does not exclude waters already included within the water framework Directive and some authorities are unclear as to what this would mean.

The interaction with the water framework Directive in this regard, therefore, requires clarification.

Regional seas

The proposal states that its provisions shall be applied at a regional scale in Marine Regions. This identifies three Marine Regions (Baltic, NE Atlantic and Mediterranean Seas). The June 2005 draft proposal also included reference to the Black Sea. While this is not currently part of the EU area, it is likely, with the accession of Bulgaria and Romania, soon partly to come under the jurisdiction of EU Member States. Indeed, this could occur before adoption of the proposal, depending on the speed of the adoption process.

Transboundary co-operation

Article 5 of the proposal requires that, in meeting environmental objectives and developing Regional Marine Strategies, Member States shall co-ordinate their activities and are encouraged to use existing structures of international agreements. Member States are also encouraged to co-operate with non-Member States.

The June 2005 draft proposal, however, also included the statement that co-operation could result in the production of a single Regional Marine Strategy for each Region or sub-region. The current proposal does not even suggest a joint strategy. However, such joint strategies would have significant benefits.

This provision is similar to Articles 3 and 13 of the water framework Directive where international co-operation is encouraged in river basin management. However, this Directive (Article 13) strongly encourages Member States to produce single River Basin Management Plans for transboundary rivers. Thus there would seem to be a greater obligation on co-operation in coastal waters subject to the water framework Directive than wider marine waters if the proposal is adopted in its present form.

5 ASSESSMENT OF HOW ENDOCRINE DISRUPTORS WERE TAKEN INTO ACCOUNT IN THE THEMATIC STRATEGY AND INTEGRATED ASSESSMENT

Endocrine disruptors are acknowledged as important in the IA, being included briefly in a discussion on hazardous substances in the marine environment (p12). The importance of these pollutants is stressed further in the discussion on costs of inaction (p 21) where concern is expressed on their effect on the reproductive capacity of fish. Beyond this there is no further explicit consideration of the issue.

Endocrine disruptors are not specifically mentioned in the TS itself. Indeed the TS does not generally focus attention on specific threats to the marine environment. However, the following points can be highlighted:

- section 2 does present a list of the principal threats to the marine environment. This is a mixture of direct threats and their sources. There is no explicit mention of endocrine disruptors;
- section 6.2 discusses synergies of the Marine TS with other EU policies. This does not include a mention of the Community Strategy for Endocrine Disruptors (COM(1999)706); and
- section 6.2.3 highlights the importance of international co-operation and includes reference to the International Convention on the Control of Harmful Anti-Fouling Systems on Ships (one source of endocrine disruptors).

The IA and TS could have made greater cross-reference to Community action on endocrine disruptors. However, it is important to note that:

- there is great uncertainty about the specific impacts of many endocrine disrupting substances on marine organisms; and
- the proposed Directive would establish a framework that requires greater examination of the potential consequences of the presence of endocrine disruptors in the marine environment.

Thus, apart from highlighting that endocrine disruptors are an important factor to be taken into account, detailing precise action (and hence assessing costs and benefits in an IA) would require a more in depth analysis and investigation. However, we can recall that detailed research on 'Endocrine Disruption in Marine waters (EDMAR)' was funded by³ the Department for Environment, Food and Rural Affairs (DEFRA), the Scotland and Northern Ireland Forum for Environmental Research (SNIFFER), the Environment Agency (EA) and the European Chemical Industry Association (CEFIC), but limited to the UK marine environment.

³ See report on "Endocrine Disruption in the Marine environment (EDMAR)": http://www.defra.gov.uk/environment/chemicals/hormone/pdf/edmar_final.pdf

6 THE IMPLICATIONS OF THE COMITOLGY ELEMENT OF THE PROPOSED DIRECTIVE

The Commission's proposal for a Directive contains several provisions which, if adopted by the legislator, would delegate implementing powers to the Commission in accordance with a standard regulatory committee ('comitology') procedure.

Article 8(3) would mandate the Commission to lay down, through the comitology procedure, what it describes as 'generic qualitative descriptors, detailed criteria and standards for the recognition of good environmental status' (GES). These descriptors, criteria and standards would have to be taken as a basis by Member States when determining, pursuant to Article 8(1), the GES characteristics for the European marine waters under their jurisdiction.

Article 10(3) would allow the Commission to adopt, 'where appropriate', through the same comitology procedure, 'specifications and standardised methods for monitoring and assessment' which would have to be applied by Member States for the purpose of their monitoring programmes under Article 10, in addition to the requirements already spelled out in Annex IV of the proposed Directive itself.

Finally, Article 21 of the proposal would authorize the Commission, again by applying the regulatory committee procedure, to amend Annexes II, III and IV of the Directive, which lay down, respectively, specifications for the initial assessments of marine waters which are to be performed under Article 7 (Annex II), a 'non-exhaustive list of characteristics' for the environmental targets and indicators to be established by Member States pursuant to Article 9 (Annex III), and lists of elements to be covered by the monitoring programmes required under Article 10 (Annex IV). These powers would be granted for the purpose of adapting these annexes to scientific and technical progress. Moreover, under Article 21(2), the Commission would also have the power, 'where necessary', to adopt, under the same procedure, 'standards for the application of' all three annexes, as well as technical formats for the transmission and processing of data.

The procedure to be followed in the exercise of all the above-mentioned delegated powers is the standard regulatory committee procedure laid down in Article 5 of Decision 1999/468/EC (the general comitology Decision). The competent committee would be the existing committee established by Article 21(1) of the water framework Directive (Directive 2000/60/EC).

Since the proposed Directive is largely inspired by the water framework Directive, it is interesting to compare the proposal's scheme of delegated powers with that of Directive 2000/60/EC. It is striking that the delegated powers under the water framework Directive are considerably less far-reaching than those under the proposed marine Directive. First, the criteria for the definition of 'good surface water status' – which fulfil the same crucial function in the scheme of the Directive as those for 'good environmental status' under the current proposal – were laid down by the legislator in an annex to the Directive, without delegation of powers to the Commission. In fact, the Commission does not even have the power to use

comitology to adapt these criteria to scientific and technical progress, except on a minor point (reference to CEN and ISO standards for sampling and monitoring methods). Of the water framework Directive's eleven annexes, only two can be adapted to scientific and technical progress through a comitology procedure. Any other amendments to annexes require recourse to the standard legislative procedure (co-decision). As regards the adoption of additional technical implementing measures, the Commission only has the power to lay down technical specifications and standardised methods for analysis and monitoring of water status, technical formats for transmission and processing of data and non-binding 'guidelines' on the implementation of the provisions of the annexes relating to assessment, characterisation, and definition of water status and environmental targets.

By contrast, under the proposed marine strategy Directive, the Commission would be empowered to lay down binding criteria for the definition of GES, a central concept which will effectively determine the actual environmental results to be achieved through the implementation of the Directive. It would also have the power to amend other important provisions of annexes, many of which are not of a scientific or technical nature. Under the general provisions of the regulatory committee procedure as laid down in the comitology Decision, the Commission would of course have to obtain the opinion of the committee composed of Member State representatives established under the water framework Directive on any draft implementing measures it proposes to adopt pursuant to the marine Directive. If there is no qualified majority within the committee in support of such proposed measures, they are referred to the Council, which only has a three-month period to either adopt them or indicate its opposition by a qualified majority vote. But if no qualified majority can be reached within the Council either way, the Commission can proceed formally to adopt the measures it proposed of its own authority. The European Parliament's powers of scrutiny under the comitology Decision are extremely limited and time-constrained.

As appears from the Commission's latest annual report on the working of committees (COM(2005) 554 final), environmental policy is the sector in which differences of opinion between the Commission and the Member States on proposed implementing measures, and the resulting referrals of such measures to the Council, are most frequent (12 out of 17 referrals in 2004). As the Commission itself acknowledges, 'the sensitive nature of implementing measures in the environment field' is a likely explanation. In these circumstances, one may wonder whether the broad delegations of power envisaged in the draft marine Directive are justified.

7 AN ASSESSMENT OF WHETHER THE RIGHT PROPOSAL WAS BROUGHT FORWARD GIVEN THE IMPACT ASSESSMENT

The Thematic Strategy and proposed Directive are accompanied by an impact assessment. This examines the impacts of two options. The first is a strictly voluntary approach through non-binding recommendations and the second is a flexible legal instrument, ie the framework Directive. The assessment concludes that, *inter alia*:

- there would be administrative costs from a Directive during set-up and operation, which it estimates at €90 million start-up and about €70 million annually;
- a Directive will impose significant implementation costs, but uncertainties prevent these being quantified now (although impact assessment will take place as the programmes of measures are developed);
- impacts and costs on key sectors remain largely theoretical at this stage, but that there are likely to be important social and economic costs in areas such as fisheries, dredging, etc;
- a Directive would provide effective marine protection and sustain the future of marine industries by protecting their resource base; and
- there would be reduced health costs from pollution of bathing areas and fish products.

The impact assessment, therefore, concludes that the Commission should adopt a legislative instrument.

Section 11 of the IA provides a justification for the Commission's choice. The rejection of a voluntary approach to future marine protection is simply that this would fail to deliver the necessary outcomes required to deal with the costs of inaction detailed in the IA. The Commission, therefore, concludes that a legislative approach is required. Unfortunately, the costs and benefits of this approach (other than administrative) cannot be quantified with certainty, given that specific actions would only be developed as individual marine strategies are produced by the Member States. The IA states that it provides 'indications' as to the impacts and costs on key sectors and that these 'remain to a large extent theoretical at this stage'. As a result the IA highlights the requirement in the proposal for further impact assessments and cost-benefit analyses within the programmes of measures of the individual strategies.

Was the right proposal brought forward given the impact assessment? In simple terms, the answer is yes. The IA clearly shows that voluntary action will be insufficient. However, the IA also cannot be used to justify the details in the proposed Directive. The IA demonstrates the need for action, but also the uncertainties underlying that action. The delegation of specific action to the individual Member States also means that interpretation of the IA is problematic. The question for policy makers, therefore, is whether the proposed Directive is sufficiently robust that Member States will adopt measures that tackle marine protection sufficiently that overcome the costs of inaction identified in the IA. This is a question of legal analysis (what is an appropriate legal instrument), rather than a conclusion that can be drawn from the IA itself.

8 CONCLUSIONS AND RECOMMENDATIONS

An EU marine strategy Directive would provide a major development in EU level protection of the marine environment. The ecosystem approach that it advocates aims to address the major pressures on Europe's seas. It will also act as an important instrument for the integration of EU, regional and national policies affecting marine issues. *We, therefore, recommend that a proposed marine strategy Directive is supported as an important tool in taking forward marine protection.*

Having said this, it is important to note the limitations in the draft proposal. There are issues that the Member States may not be able to address themselves in implementing a Directive, not least in the conservation of fisheries, which are of critical concern in ensuring sustainable marine ecosystems. The draft also provides for exemptions which could lead to major delays in tackling difficult issues. *We, therefore, recommend that policy makers examine in detail the provisions of the proposal to ensure that it contains sufficient obligations on Member States to deliver its environmental objectives.*

If the environmental objectives of the proposed Directive are to be achieved (and by 2021), then considerable efforts will be required by the Member States. These will involve changes in the behaviour of a range of human activities which affect the marine environment. It is likely that some funding from EU sources might be available for this purpose. This could build upon the range of existing measures (such as for fisheries or under pillar II of the CAP) and could mirror developments on funding to help implement the programmes of measures under the water framework Directive. However, only when the initial analyses have been undertaken will the scale of the problem be clearer and funding needs properly determined. *We, therefore, recommend that consideration is given to the scope for EU funding to support marine protection.*

The current institutional framework for marine protection in Europe is inadequate. However, the TS does not seek to replace the work of the conventions, but stresses the utility of building on existing structures. The draft Directive contains a provision that would require Member States to 'as far as possible, build upon existing programmes and activities developed in the framework of structures stemming from international agreements', but omits explicit reference to the substantive obligations resulting from those agreements. Also in contrast with the water framework Directive, the operative provisions of the proposed Marine Strategy Directive do not explicitly refer to the objectives of the regional seas conventions as regards prevention and elimination of marine pollution. However, the proposed Directive could nevertheless provide benefits over and above the existing regional conventions, especially for the Mediterranean where there has been a conspicuous lack of progress in bringing recently agreed Protocols or amendments to existing Protocols into force. *We, therefore, recommend that more explicit reference is made to the commitments Parties have made under the regional conventions to enhance integration of these instruments.*

The contribution of the proposed Directive to Common Fisheries Policy environmental integration is minimal, with fisheries management barely touched upon. EU fisheries management is largely an area of EU exclusive competence. Nonetheless, the habitats Directive requires Member States to avoid deterioration of natural habitats and disturbance of designated species in Natura 2000 sites and does not explicitly single out fisheries in the preamble as an area in which Member States can **not** take action. *We, therefore, recommend that further consideration is given to the interaction with the CFP and how to ensure measures are adopted that tackle unsustainable fisheries.*

The proposed Directive does not add anything to the birds and habitats Directives, which are the principle body of EU legislation on marine protected areas. At a time when the designation of marine Natura 2000 sites is behind schedule, and the process of appropriate assessments and the development of management measures the subject of intense debate, the proposed Directive appears to bring nothing new to the table. The proposal also only encourages co-operation between Member States, rather than obliges it as is the case with the water framework Directive. *We, therefore, recommend that the requirements for transboundary co-operation be strengthened.*

The definition of good environmental status will be central to the weight of the Directive. This is undefined, to be worked out by Member States on the basis of generic descriptors developed by the Commission. By not defining it in the Directive this creates delays. As the European Parliament's powers of scrutiny under the comitology Decision are extremely limited and time-constrained, one may wonder whether the broad delegations of power envisaged in the draft marine Directive are justified. It is unclear why detailed criteria are not included given their importance. The draft proposal did contain them (similar to those for 'good ecological status' under the water framework Directive (Annex V)) and it is not certain why they were removed from the published proposal. *We, therefore, recommend that serious consideration is given to the development of criteria for good environmental status for inclusion in the Directive itself and further thought given to what is appropriately placed within a Committee decision-making procedure.*

The proposal requires that Member States must ensure that measures are cost-effective, technically feasible, and shall carry out impact assessments prior to the introduction of new measures. This implies that if measures to achieve good environmental status are considered too expensive, Member States will not be required to pursue them. This undermines the likely achievement of good environmental status. *We, therefore, recommend that close scrutiny is given to the implications of these requirements on the Member States to determine how easily they could be used to justify no, or reduced, action on marine protection.*