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# Comparing European Instruments for Marine Conservation

## 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

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### Summary

*This article performs a comparative analysis of five major legal instruments for (marine) nature conservation in Europe, namely the 1979 Bern Convention on the Conservation of European Wildlife and Natural Habitats, the 1979 EU Wild Birds Directive, the 1992 EU Habitats Directive, the 1992 OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic, and the 2008 EU Marine Strategy Framework Directive (MSFD). Through this analysis, an answer is provided to the question what the recently added MSFD contributes to the pre-existing legal framework in the field of marine nature conservation. To provide the necessary focus, the analysis is carried out from the perspective of one marine subregion, the North Sea, although many elements of it are ostensibly of wider relevance. The article systematically explores the potential added value of the MSFD with regard to marine protected areas (MPAs) and other types of nature conservation measures. It concludes that the MSFD apparently contributes both substance and legal teeth to the legal framework for the protection, management and restoration of marine species, habitats and ecosystems in Europe.*

### I. Introduction

The Marine Strategy Framework Directive (MSFD) was launched in 2008 as a leading instrument for the protection of the marine environment and its associated ecosystems and biological diversity in the European Union (EU).<sup>1</sup> The potential significance of the Directive for marine environmental protection in

the EU is reflected, *inter alia*, by a growing academic literature.<sup>2</sup> The main objective of the MSFD is to achieve or maintain “good environmental status” in the marine environment by 2020, which comprises protecting species and habitats, preventing and reversing human-induced decline of biodiversity and ensuring that “diverse biological components function in balance.”<sup>3</sup> The MSFD thus embraces issues that were already the subject of a variety of pre-existing international and EU instruments addressing marine environmental protection. What is more, the adoption of the MSFD evidently suggests that this pre-existing legal framework by itself falls short of providing the desired level of protection. This, in turn, raises the question what, in legal terms, the presumed added value of the Directive consists of precisely.

This is the question which prompted the current article. As a comprehensive treatment of this question is not possible in a single paper, the article zooms in on the crucial field of nature conservation law, which addresses the protection, management and/or restoration of species, habitats and ecosystems. Further focus

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<sup>1</sup> 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, OJ 25.6.2008 L164/19.

<sup>2</sup> See, *inter alia*, R. Barnes and D. Metcalfe, “Current Legal Developments – The European Union: The Marine Strategy Framework Directive” [2010] 25 *International Journal of Marine and Coastal Law* 81; A. Borja, “The New European Marine Strategy Directive: Difficulties, Opportunities, and Challenges” [2006] 52 *Marine Pollution Bulletin* 239; S. Fletcher, “Converting Science to Policy through Stakeholder Involvement: An Analysis of the European Marine Strategy Directive” [2007] 54 *Marine Pollution Bulletin* 1881; E. Hey, “Multi-Dimensional Public Governance Arrangements for the Protection of the Transboundary Aquatic Environment in the European Union: The Changing Interplay between European and Public International Law” [2009] 6 *International Organizations Law Review* 191; W. Howarth, “The Marine Strategy Framework Directive” [2008] 19 *Journal of Water Law* 95; L. Juda, “The European Union and Ocean Use Management: The Marine Strategy and the Maritime Policy” [2007] 38 *Ocean Development & International Law* 259; L. Juda, “The European Union and the Marine Strategy Framework Directive: Continuing the Development of European Ocean Use Management” [2010] 41 *Ocean Development & International Law* 34; T. Markus, S. Schlacke and N. Maier, “Legal Implementation of Integrated Ocean Policies: The EU’s Marine Strategy Framework Directive” [2011] 26 *International Journal of Marine and Coastal Law* 59; M. Salomon, “Recent European Initiatives in Marine Protection Policy: Towards Lasting Protection for Europe’s Seas?” [2009] 12 *Environmental Science & Policy* 359; N. Westaway, “The New European Marine Strategy Directive” [2008] 10 *Environmental Law Review* 218.

<sup>3</sup> Art. 3(5)(a) of the MSFD.

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is achieved by choosing the perspective of one particular marine subregion, the North Sea. This is not only helpful for illustrative purposes, but also renders an appealing mix of applicable legal instruments. The latter both include major instruments of general application to nature conservation in Europe, as well as one significant regional seas agreement, namely the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention).<sup>4</sup> The other instruments selected for analysis in this article are the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention)<sup>5</sup> and the EU Birds<sup>6</sup> and Habitats<sup>7</sup> Directives. The Bern Convention and the two “Nature Directives” represent the principal instruments of relevance to nature conservation in Europe at large, whereas the OSPAR Convention constitutes the main framework for *marine* conservation in the North-East Atlantic region, including the North Sea.

The central research question of the article, which has hitherto not been addressed in any detail in the scientific literature, is therefore as follows: What is the added value of the MSFD in the field of nature conservation, in comparison to the OSPAR Convention, the Bern Convention, and the Birds and Habitats Directives? This question is addressed through the inventory, analysis and comparison of the legal regimes provided by these instruments in the area of marine nature conservation. The potential and purported contribution of the article to scientific understanding is twofold. Besides attempting to determine the added value of the MSFD in the field of nature conservation, it is hoped that the comparative analysis of five major legal instruments for (marine) nature conservation in Europe, provided in the process, will have a certain utility of its own.

Two things should be borne in mind with regard to the analysis undertaken below. First, although the article focuses specifically on the North Sea, ostensibly many aspects of it are of wider application. Second, it should not be forgotten that alongside the instruments selected above, several other instruments exist which are applicable to nature conservation in Europe and the North Sea. These include the United Nations Convention on the Law of the Sea (UNCLOS),<sup>8</sup> the Convention on Biological Diversity (CBD),<sup>9</sup> the Ramsar Wetlands Convention,<sup>10</sup> the World Heritage Convention,<sup>11</sup> the Bonn Convention on Migratory Species (CMS),<sup>12</sup> the CMS Agreement on the Conservation of Seals in the Wadden Sea (WSSA),<sup>13</sup> the CMS Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (ASCOBANS),<sup>14</sup> and the CMS Agreement on the Conservation of African-Eurasian Waterbirds (AEWA).<sup>15</sup>

The article is structured as follows. First, the key features of the MSFD, being the most recent and least familiar instrument, are introduced (section II). This is

followed by a comparison of the OSPAR Convention, Bern Convention, Birds and Habitats Directives, and MSFD in relation to their scope (section III), prescribed nature conservation measures generally (section IV), and marine protected areas specifically (section V). From each of these perspectives the added value of the MSFD is established. The chief outcomes of these comparative analyses are summed up in a concluding section (section VI).

## II. Introducing the Marine Strategy Framework Directive

The MSFD was developed as a legal follow-up to the Thematic Strategy on the Protection and Conservation of the Marine Environment that was presented by the European Commission in 2005.<sup>16</sup> The objective of this strategy is “to protect and restore Europe’s oceans and seas and ensure that human activities are carried out in a sustainable manner so that current and future generations enjoy and benefit from biologically diverse and dynamic oceans and seas that are safe, clean, healthy and productive.”<sup>17</sup> The MSFD, which entered into force on 15 July 2008, serves as the legal

<sup>4</sup> 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic, [1992] 32 ILM 1069.

<sup>5</sup> 1979 Convention on the Conservation of European Wildlife and Natural Habitats, ETS 104.

<sup>6</sup> Directive 2009/147/EG of the European Parliament and the Council of 30 November 2009 on the conservation of wild birds, OJ 26.1.2010 L20/7; this is the codified version of Council Directive 79/409/EEC of 2 April 1979 as subsequently modified.

<sup>7</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ 22.7.1992 L206/7.

<sup>8</sup> 1982 United Nations Convention on the Law of the Sea, [1982] 21 ILM 1261.

<sup>9</sup> 1992 Convention on Biological Diversity, [1992] 31 ILM 818.

<sup>10</sup> 1971 Convention on Wetlands of International Importance Especially as Waterfowl Habitat, [1972] 11 ILM 963.

<sup>11</sup> 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, [1972] 11 ILM 1358.

<sup>12</sup> 1979 Convention on the Conservation of Migratory Species of Wild Animals. [1980] 19 ILM 15.

<sup>13</sup> 1990 Agreement on the Conservation of Seals in the Wadden Sea, available at: <www.cms.int> and <www.waddensea-secretariat.org>.

<sup>14</sup> 1992 Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas, available at: <www.cms.int> and <www.ascobans.org>.

<sup>15</sup> 1995 Agreement on the Conservation of African-Eurasian Migratory Waterbirds, available at: <www.cms.int> and <http://www.unep-aewa.org>.

<sup>16</sup> COM(2005) 504 final of 25 October 2005.

<sup>17</sup> *Ibid.*, paragraph 5.1.

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framework to achieve this objective and as the environmental pillar of the EU's broader maritime policy.<sup>18</sup>

The MSFD 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".<sup>19</sup> Good environmental status, or GES, is defined in Article 3 of the Directive as follows:

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

- (a) the structure, functions and processes of the constituent marine ecosystems, together with the associated physiographic, geographic, geological and climatic factors, allow those ecosystems to function fully and to maintain their resilience to human-induced environmental change. Marine species and habitats are protected, human-induced decline of biodiversity is prevented and diverse biological components function in balance;
- (b) hydro-morphological, physical and chemical properties of the ecosystems, including those properties which result from human activities in the area concerned, support the ecosystems as described above. Anthropogenic inputs of substances and energy, including noise, into the marine environment do not cause pollution effects.<sup>20</sup>

This status is to be achieved for each region and subregion identified in the Directive, which includes the North Sea as a subregion of the North-East Atlantic region.<sup>21</sup> The core of the MSFD consists of the marine strategies that have to be developed and implemented by member states for their marine waters in close cooperation with neighbouring states in the respective regions and subregions.<sup>22</sup> The MSFD identifies the procedural and substantive elements of the marine strategies in terms of a six step action plan. They consist of the following procedural and substantive elements that are formulated as hard obligations to be met by the member states within the specified timeframe:

- initial assessment of the current environmental status of the waters concerned and the environmental impact of human activities thereon (by 15 July 2012);<sup>23</sup>
- determination of good environmental status for the waters concerned (by 15 July 2012);<sup>24</sup>
- establishment of a series of environmental targets and associated indicators (by 15 July 2012);<sup>25</sup>
- establishment and implementation of a monitoring programme for ongoing assessment and associated regular updating of targets (by 15 July 2014);<sup>26</sup>

- development of a programme of measures designed to achieve or maintain good environmental status (at the latest by 2015);<sup>27</sup> and
- entry into operation of the programme of measures designed to achieve or maintain good environmental status (at the latest by 2016).<sup>28</sup>

The general contours of each of these elements are defined in the MSFD, followed by rules containing general and specific exceptions, recommendations for Community action, reporting obligations, updating of marine strategies, public consultation, and information.<sup>29</sup> The European Commission is to assess, and advise on, the actions taken by the member states to implement the Directive, and is endowed with several related specific tasks and duties.<sup>30</sup> The Commission has issued a Decision in September 2010 containing criteria and methodological standards on GES of marine waters in accordance with Article 9(3) of the MSFD.<sup>31</sup>

Member states are required to apply several general principles in their marine strategies. This includes first of all the ecosystem-based approach to the management of human activities. Although it does not define the ecosystem approach, the Directive does provide that it has to be applied in a manner that ensures that "the collective pressure of such activities is kept within levels compatible with the achievement of good environmental status and that the capacity of marine ecosystems to respond to human-induced changes is not compromised, while enabling the sustainable use of marine goods and services by present and future generations."<sup>32</sup> Sustainable use of the marine environment is therefore also promoted by the MSFD. According to the European Commission, the general boundaries of the ecosystem approach are to be defined by identifying good environmental status through the implementation of the Directive.<sup>33</sup>

<sup>18</sup> Preamble, paragraph 3. See for the maritime policy COM(2006) 275 final of 7 June 2006.

<sup>19</sup> Art. 1(1).

<sup>20</sup> Art. 3(5).

<sup>21</sup> Arts 3(5) and 4.

<sup>22</sup> Art. 5(1).

<sup>23</sup> Arts 5(2)(a)(i) and 8.

<sup>24</sup> Arts 5(2)(a)(ii) and 9.

<sup>25</sup> Arts 5(2)(a)(iii) and 10.

<sup>26</sup> Arts 5(2)(a)(iv) and 11.

<sup>27</sup> Arts 5(2)(b)(i) and 13.

<sup>28</sup> Arts 5(2)(b)(ii) and 13.

<sup>29</sup> Arts 14 to 19.

<sup>30</sup> Arts 12, 16, 20 and 21.

<sup>31</sup> Commission Decision 2010/477/EU of 1 September 2010 on criteria and methodological standards on good environmental status of marine waters, OJ 2.9.2010 L232/14.

<sup>32</sup> Art. 1(3).

<sup>33</sup> See Communication of the Commission to the Council and the European Parliament: The role of the CFP in implementing an ecosystem approach to marine management, COM(2008) 187 of 11 April 2008, p. 7.

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As part of the ecosystem approach, member states are required to apply adaptive management to attain good environmental status.<sup>34</sup> The preamble clarifies what this implies:

In view of the dynamic nature of marine ecosystems and their natural variability, and given that the pressures and impacts on them may vary with the evolvement of different patterns of human activity and the impact of climate change, it is essential to recognise that the determination of good environmental status may have to be adapted over time. Accordingly, it is appropriate that programmes of measures for the protection and management of the marine environment be flexible and adaptive and take account of scientific and technological developments. Provision should therefore be made for the updating of marine strategies on a regular basis.<sup>35</sup>

In addition to these principles, the MSFD recalls in the preamble the general principles of EU environmental law that have to be taken into account in the programmes of measures and subsequent action, in particular the precautionary principle.<sup>36</sup>

The MSFD specifically promotes cooperation between member states and coordination with third countries in order to ensure that the measures required achieve the objectives of the Directive and the different elements of the marine strategies are coherent and coordinated across the marine region or subregion concerned.<sup>37</sup> Such cooperation is essential, in view of the fact that GES has to be achieved at the regional and subregional level. The required regional cooperation is to proceed “where practical and appropriate” through existing regional institutional cooperation structures and regional seas conventions, i.e. the OSPAR Convention in the case of the North-East Atlantic and the North Sea.<sup>38</sup> The EU member states that are contracting parties to the OSPAR Convention have agreed that the OSPAR Commission should be the main platform through which they coordinate their work to implement the MSFD in the region.<sup>39</sup> The OSPAR Commission has indicated it will facilitate the coordinated and coherent implementation of the regional components of the Directive ensuring “maximum synergy wherever possible”.<sup>40</sup>

The MSFD contains various provisions that aim to ensure consistency with relevant international agreements, but it has a particularly complex dual relationship with the OSPAR Convention (and regional seas conventions in general).<sup>41</sup> The Convention is used by member states to implement the cooperation and coordination requirements under the MSFD, but at the same time the Directive serves to implement the OSPAR Convention to which the EU is a party.<sup>42</sup> The MSFD states that it should “contribute to the fulfilment of the obligations and important commitments of the Community and the Member States” under the OSPAR Convention and other regional seas agreements.<sup>43</sup> It also provides that member states

shall, “as far as possible”, build upon relevant existing programmes and activities developed in the framework of such agreements. This implies as a minimum that relevant measures adopted within the framework of the OSPAR Convention are fully taken into account by the member states when implementing their obligations under the Directive. The MSFD reinforces the OSPAR Convention, because it brings relevant (binding and non-binding) measures adopted by the OSPAR Commission within the direct scrutiny of the European Commission and the EU Court of Justice. This will be illustrated below.

The relationship between the MSFD and relevant EU legislation is not addressed in detail, but it is clear that the Directive is intended to supplement these instruments and not replace them. Relevant measures adopted under the Birds and Habitats Directives will be part and parcel of the programmes of measures that need to be adopted by the member states under the MSFD.<sup>44</sup> Measures adopted under other relevant EU legislation such as the Water Framework Directive<sup>45</sup> are simply to be taken into account in the required programmes of measures.<sup>46</sup> The MSFD generally provides that it is intended to contribute to “coherence between, and aim to ensure the integration of

<sup>34</sup> Art. 3(5).

<sup>35</sup> Preamble, paragraph 34.

<sup>36</sup> Preamble, paragraphs 27 and 44.

<sup>37</sup> Arts 5(2) and 6(2).

<sup>38</sup> Art. 6(1). Art. 3(9) contains a definition of “regional cooperation” and Art. 3(10) defines “regional sea convention”.

<sup>39</sup> The North-East Atlantic Environment Strategy, Strategy of the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic 2010–2020 (OSPAR Agreement 2010-3), Part I, paragraph 1.3. See also OSPAR Commission, *OSPAR Regional Implementation Framework for the EU Marine Strategy Framework Directive – MSFD Road Map* (2010, as updated) that outlines coordination activities for the period 2010-2020.

<sup>40</sup> Preamble to the OSPAR North-East Atlantic Strategy, paragraph 3.

<sup>41</sup> The MSFD refers specifically to the United Nations Convention on the Law of the Sea (paragraph 17 of the preamble and Art. 3(1)), the Convention on Biological Diversity (paragraph 18 of the preamble), and the OSPAR Convention (paragraph 19 of the preamble and Art. 3(10)), as well as several other regional seas conventions. General references to relevant agreements are contained in paragraphs 6, 9, 16, 31, 41 of the preamble; Arts 1(4), 6(2), 11(1), 13(2), 13(4) and 15(1); and Annexes III and IV.

<sup>42</sup> See Hey at p. 200-210.

<sup>43</sup> Preamble, paragraph 19.

<sup>44</sup> Preamble, paragraphs 6 and 18 and Art. 13(4).

<sup>45</sup> Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ 22.12.2000 L327/1.

<sup>46</sup> Art. 13(2).

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environmental concerns into, the different policies, agreements and legislative measures which have an impact on the marine environment.”<sup>47</sup> This includes the Common Fisheries Policy (CFP) where the Community has exclusive competence. The relationship between the MSFD and CFP is addressed to some extent in the preamble.<sup>48</sup> Directly relevant in this respect is Article 15 that requires member states to inform the Commission about an issue which has an impact on the environmental status of its marine waters and which cannot be tackled by measures adopted at national level, or which is linked to another Community policy or international agreement. Member states are also required to make appropriate recommendations to the Commission and the Council for measures. The Commission has the duty to act in response when such a request is made and, as appropriate, present a related proposal to the European Parliament and the Council.<sup>49</sup> The relationship between the MSFD and the CFP is also addressed in more detail below.

### III. Geographical and personal scope

This section contains a comparison of the geographical scope (the maritime areas to which the instruments apply) and the personal scope (states and other entities to which the instruments apply) of the selected instruments, with specific reference to the North Sea. Their material scopes, including species and habitats covered, are treated in sections IV and V.

The OSPAR Convention applies to the OSPAR “maritime area”, which is defined to cover the North-East Atlantic including the entire North Sea (Region II).<sup>50</sup> It extends to all waters under the jurisdiction of the contracting parties, including their internal waters (in the case of watercourses up to the freshwater limit), territorial seas, exclusive economic zones (EEZs) or other zones under the jurisdiction of the coastal state. The Convention also extends to the high seas, but that is irrelevant for the North Sea as it falls entirely within the jurisdiction of the coastal states. The OSPAR Convention has sixteen contracting parties, including all eight North Sea coastal states (Belgium, Denmark, France, Germany, the Netherlands, Norway, Sweden and the United Kingdom) and the EU. The other parties are Finland, Iceland, Ireland, Luxembourg, Portugal, Spain and Switzerland.

The Bern Convention applies to European wildlife and natural habitats without geographical limitations.<sup>51</sup> The text only refers to the territory of contracting parties, which certainly includes their internal waters and territorial seas. The convention can be interpreted to extend also to other marine areas under the jurisdiction of the coastal states in view of its broad objectives and substantive provisions. The Bern Convention applies to fifty contracting parties that include the eight North Sea coastal states and the EU.

The geographical scope of the Birds and Habitats Directives extends to all maritime areas under the jurisdiction of EU member states, including their EEZs. This has been confirmed by the EU Court of Justice.<sup>52</sup> As all EU directives, the Birds and Habitats Directives are “binding, as to the result to be achieved, upon each Member State to which it is addressed”.<sup>53</sup> All North Sea coastal states except Norway are EU member states. Norway is a party to the Agreement on the European Economic Area (EEA) that comprises a range of environmental issues, but it currently does not include the Birds and Habitats Directives.<sup>54</sup> The Directives are primarily directed towards the member states, but they also set out certain powers and duties for the European Commission.

The geographical scope of the MSFD extends to all “marine waters” as defined in Article 3(1). It defines marine waters as:

- (a) 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 [United Nations Convention on the Law of the Sea] . . . ; and
- (b) coastal waters as defined by Directive 2000/60/EC, their seabed and their subsoil, in so far as particular aspects of the environmental status of the marine environment are not already addressed through that Directive or other Community legislation.

<sup>47</sup> Art. 1(4). See also paragraph 9 of the preamble.

<sup>48</sup> Preamble, paragraphs 9 and 39-40.

<sup>49</sup> Art. 15(2).

<sup>50</sup> Art. 1(a) of the OSPAR Convention.

<sup>51</sup> Explanatory Report concerning the Convention on the Conservation of European Wildlife and Natural Habitats (Council of Europe, 1979), as updated, paragraph 17: “The convention urges the conservation of all flora and fauna species and their habitats, regardless of their scarcity. Although it is clear that the convention in principle aims at protecting European indigenous wildlife, it was decided to leave out in paragraph 1 the words “in Europe” or “European” for two reasons: i. not to restrict the geographical coverage of the convention to the European continent, with a view to the fact that many species of flora and fauna of Europe are found outside Europe; ii. to include visiting migratory animals that are not confined to Europe.”

<sup>52</sup> Case C-6/04 *Commission v UK* [2005] ECR I-9017, paragraph 117.

<sup>53</sup> Art. 288 of the Treaty on the Functioning of the European Union.

<sup>54</sup> Arts 1(2)(f) and 73-75 of the EEA Agreement deal with environmental protection. Annex XX contains a list of Community legislation that is applicable in the European Free Trade Association (EFTA) states that are parties to the EEA Agreement. Art. 3 of Protocol 31 to the EEA Agreement covers further cooperation in the field of environmental protection.



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The MSFD therefore applies to all maritime areas under the jurisdiction of EU member states, except internal waters. The geographical scope is more limited than the OSPAR Convention, the Bern Convention and the EU Birds and Habitats Directives in view of the fact that these three instruments apply also to internal waters. It should be noted that Denmark and Germany nevertheless appear to apply the MSFD to the entire Wadden Sea that largely falls within internal waters.

The personal scope of the MSFD comprises all EU member states, including all North Sea coastal states except Norway. The MSFD has not yet been included in the EEA Agreement, but Norway has indicated it will cooperate with member states to implement the Directive. The Directive considers areas beyond the waters of EU member states by requiring that “transboundary effects on the quality of the marine environment of third States in the same region or subregion” are taken into account.<sup>55</sup> As noted earlier, the Directive takes a regional approach and requires member states to cooperate and coordinate with third states in the respective regions and subregions identified in the Directive. The MSFD is mostly directed towards member states, but it includes certain powers and duties for the European Commission and also requires involvement of other “interested parties”.<sup>56</sup>

Thus, as it does not cover internal waters, the MSFD has a somewhat more restricted geographical scope than the other instruments. It has the same personal scope as the Birds and Habitats Directives, but it has a more limited personal scope than the OSPAR Convention and the Bern Convention that include Norway and many other states as contracting parties. It is questionable whether that matters much since the MSFD includes provisions that are intended to ensure coordination with non-EU member states – which, in the case of the North Sea, means Norway. Norway has already indicated that it is willing to cooperate with the other North Sea coastal states to ensure that a coordinated approach is applied for the implementation of the Directive in the region. The MSFD appears to have added value in this respect in comparison to the Birds and Habitats Directives, because the latter do not include specific provisions that promote cooperation among member states and non-member states for transboundary features and impacts.

### IV. Nature conservation measures

This section reviews and compares the most relevant obligations regarding nature conservation measures under the OSPAR Convention, the Bern Convention, the Birds and Habitats Directives and the MSFD. It focuses on general provisions as well as provisions concerning the generic protection of species. Provi-

sions specifically related to (marine) protected areas are dealt with in the next section.

#### OSPAR Convention

Parties to the OSPAR Convention “shall take the necessary measures to protect the maritime area against the adverse effects of human activities so as to safeguard human health and to conserve marine ecosystems and, when practicable, restore marine areas which have been adversely affected.”<sup>57</sup> In order to fulfil this obligation in the sphere of nature conservation, Annex V to the Convention specifies that parties “shall take the necessary measures to protect and conserve the ecosystems and the biological diversity of the maritime area, and to restore, where practicable, marine areas which have been adversely affected.”<sup>58</sup> As such, this obligation appears to grant states parties considerable discretion in determining what the “necessary” measures are. This discretion is, however, gradually being delimited by pertinent recommendations and other agreements adopted by the OSPAR Commission. The latter is called upon, *inter alia*, to develop means for “instituting protective, conservation, restorative or precautionary measures related to specific areas or sites or related to particular species or habitats.”<sup>59</sup> Relevant guidance adopted hitherto by the Commission, although not legally binding by itself, clearly does inform the interpretation of the parties’ binding commitment to take the “necessary” nature conservation measures.

Special importance should in this respect be accorded to the OSPAR “List of Threatened and/or Declining Species and Habitats” which was established in 2004 and revised in 2008.<sup>60</sup> The OSPAR List is the result of efforts to identify, on the basis of purely ecological criteria, those species and habitats which are most in need of conservation measures.<sup>61</sup> This approach, in combination with the List’s marine focus and recent origin, sets the OSPAR List apart from species and habitats lists under other instruments such as the Habitats Directive. Of the 42 species on the OSPAR List, 29 are stated as occurring in the North Sea (see Table 1). Following a period in which attention was paid predominantly to the establishment of a network of protected areas (discussed in the next section), the OSPAR Commission recently started investigating and recommending generic protection measures for listed species. In 2010 a set of such

<sup>55</sup> Art. 2(1).

<sup>56</sup> Art. 19.

<sup>57</sup> Art. 2(1)(a) of the OSPAR Convention.

<sup>58</sup> Art. 2(a) of Annex V.

<sup>59</sup> Annex V, Art. 3(1)(b)(ii).

<sup>60</sup> For the latest version, see OSPAR Agreement 2008-06.

<sup>61</sup> See OSPAR Agreement 2003-13 on Criteria for the Identification of Species and Habitats in Need of Protection and their Method of Application (Texel-Faial Criteria).

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**Table 1: OSPAR List of Threatened and/or Declining Species and Habitats (North Sea)**

Species	Invertebrates	Birds	Fish	Reptiles	Mammals
	Ocean quahog	Balearic shearwater	Sturgeon	Leatherback turtle	Blue whale
	Dog whelk	Black-legged kittiwake	Allis shad		Northern right whale
	Flat oyster	Roseate tern	European eel		Harbour porpoise
			Portuguese dogfish		
			Leafscale gulper shark		
			Basking shark		
			Houting		
			Common skate		
			Spotted ray		
			Cod		
			Long-snouted seahorse		
			Short-snouted seahorse		
			Porbeagle shark		
			Sea lamprey		
			Thornback skate/ray		
			White skate		
			Salmon		
			(Northeast Atlantic)		
			Spurdog		
			Angel shark		

**Habitats** Coral gardens  
 Intertidal *mytilus edulis* beds on mixed and sandy sediments  
 Intertidal mudflats  
 Littoral chalk communities  
*Lophelia pertusa* reefs  
 Maerl beds  
*Modiolus modiolus* beds  
*Ostrea edulis* beds  
*Sabellaria spinulosa* reefs  
 Sea-pen and burrowing megafauna communities  
*Zostera* beds

species-specific measures was established for certain skate and shark species occurring on the OSPAR List.<sup>62</sup>

## Bern Convention

The broad and ambitious aims of the Bern Convention<sup>63</sup> are “to conserve wild flora and fauna and their natural habitats,” with special – but not exclusive – attention for “those species and habitats whose conservation requires the co-operation of several States,” and also “to promote such co-operation,” with a particular emphasis on endangered and vulnerable species, including migratory ones.<sup>64</sup> In order to achieve these aims, Article 2 of the Convention stipulates with respect to *all* wildlife that parties “shall take requisite measures to maintain the population of wild flora and fauna at, or adapt it to, a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements and the sub-species, varieties or forms at risk locally.” What this level amounts to precisely will depend on the circumstances and the positions taken by states

parties in each case, although it is probably safe to assume that species should at a minimum be kept clear of a threatened status on the IUCN Red List.<sup>65</sup> Additionally, Article 3 commits parties to “undertake” to “have regard to the conservation of wild flora and fauna” in their “planning and development

<sup>62</sup> OSPAR Recommendation 2010/6 on Furthering the Protection and Restoration of the Common Skate Species Complex, the White Skate, the Angel Shark and the Basking Shark in the OSPAR Maritime Area.

<sup>63</sup> Recent analyses of the Bern Convention can be found in C. Lasén Díaz, “The Bern Convention: 30 Years of Nature Conservation in Europe”, [2010] 19 *Review of European Community and International Environmental Law* 185; M. Bowman, P. Davies and C. Redgwell, *Lyster’s International Wildlife Law* (2nd ed., 2010) at p. 297-345; and A. Trouwborst, “Conserving European Biodiversity in a Changing Climate: The Bern Convention, the EU Birds and Habitats Directives and the Adaptation of Nature to Climate Change”, [2011] 20 *Review of European Community and International Environmental Law* (forthcoming).

<sup>64</sup> Art. 1 of the Bern Convention.

<sup>65</sup> See also Bowman *et al.* at p. 300.

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policies” and when taking “measures against pollution.”<sup>66</sup>

These general duties are accompanied by specific obligations regarding habitat and species protection. For *all* “wild flora and fauna species” each party “shall take appropriate and necessary legislative and administrative measures to ensure the conservation” of their habitats, and “especially those specified in Appendices I and II, and the conservation of endangered natural habitats.”<sup>67</sup> Parties are to give “special attention to the protection of areas that are of importance for the migratory species specified in Appendices II and III,”<sup>68</sup> and “to co-ordinate as appropriate” their efforts to protect habitats “when these are situated in frontier areas.”<sup>69</sup> Regarding species protection, each party “shall take appropriate and necessary legislative and administrative measures to ensure the special protection of the wild flora species specified in Appendix I”<sup>70</sup> and “the wild fauna species specified in Appendix II,”<sup>71</sup> and similar measures to “ensure the protection” (without the adjective “special”) of species mentioned in Appendix III.<sup>72</sup> Specific prescriptions are added for each of these three groups of species, for example to prohibit capturing or killing specimens save when strictly formulated conditions are met. It follows from the formulation of the provisions concerned that these so-called “passive” species protection requirements do not necessarily exhaust the obligation to take appropriate and necessary measures quoted above. In any event, parties are to “strictly control the introduction of non-native species.”<sup>73</sup> Finally, parties are to “co-operate whenever appropriate and in particular where this would enhance the effectiveness of measures taken under other articles of this Convention.”<sup>74</sup> The obligations discussed are informed by numerous (non-legally binding) decisions by the Standing Committee, the Bern Convention’s main treaty body in which all parties are represented. The appendices to the Convention list a number of marine species, including several North Sea species.

### Birds and Habitats Directives

The Birds and Habitats Directives form the main instruments for implementing the Bern Convention by the EU and its member states. The Directives aim for a “favourable conservation status” for the animal and plant species and habitat types covered by them through area and species protection.<sup>75</sup> The Habitats Directive stipulates in general terms that all measures taken by EU member states pursuant to the directive “shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.”<sup>76</sup> Such a status is to be achieved at least at the national level, and perhaps even also at the level of individual protected areas.<sup>77</sup> The conservation status of a habitat is deemed “favourable” when, *inter alia*, its range is “stable or increasing” and the “structure and func-

tions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future.”<sup>78</sup> The status of a species qualifies as favourable when, among other things, the species “is maintaining itself on a long-term basis as a viable component of its natural habitats” and “there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.”<sup>79</sup>

Avian species mentioned in Annex I of the Birds Directive and (other) migratory bird species, to the extent that these occur regularly in areas within member states” jurisdiction, “shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution,” *inter alia* through the establishment and protection of Special Protection Areas (SPAs, see the next section).<sup>80</sup> For *all* wild bird species, the Directive sets out a general, supplementary duty to “take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats,” whether in or outside SPAs, including through “upkeep and management in accordance with the ecological needs of habitats inside and outside the protected zones,” the “re-establishment of destroyed biotopes” and the “creation of biotopes.”<sup>81</sup>

Articles 12 and 13 of the Habitats Directive commit member states to “take the requisite measures to establish a system of strict protection” for the animal and plant species listed in Appendix IV of the Directive.<sup>82</sup> Article 12 requires the establishment of prohibitions on, *inter alia*, the killing, capturing and disturbing of individual animals belonging to species

<sup>66</sup> Art. 3(2).

<sup>67</sup> Art. 4(1).

<sup>68</sup> Art. 4(3).

<sup>69</sup> Art. 4(4).

<sup>70</sup> Art. 5.

<sup>71</sup> Art. 6.

<sup>72</sup> Art. 7.

<sup>73</sup> Art. 11(2)(b).

<sup>74</sup> Art. 11(1)(a).

<sup>75</sup> See Habitats Directive, Art. 2; Birds Directive, Arts 1 and 2. The latter do not contain the words “favourable conservation status” but are generally understood to imply this purpose for wild birds.

<sup>76</sup> Art. 2(2).

<sup>77</sup> For a discussion of this and other questions concerning the level at which a favourable conservation status ought to be achieved, see A. Trouwborst, “Managing the Carnivore Comeback: International and EU Species Protection Law and the Return of Lynx, Wolf and Bear to Western Europe”, [2010] 22 *Journal of Environmental Law* 347 at p. 355-357.

<sup>78</sup> Habitats Directive, Art. 1(e).

<sup>79</sup> Art. 1(i).

<sup>80</sup> Birds Directive, Art. 4.

<sup>81</sup> Art. 3.

<sup>82</sup> *Ibid.*, Arts 12(1) and 13(1).

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from Annex IV, and on the “deterioration or destruction of breeding sites or resting places.”<sup>83</sup> The jurisprudence of the EU Court of Justice makes clear that member states must not only prohibit the acts in question but also take all measures necessary to ensure that the prohibitions in question are not violated in practice.<sup>84</sup> Exemptions from these prohibitions may only be granted when three cumulative conditions are met.<sup>85</sup> Firstly, satisfactory alternatives must be absent. Secondly, an exemption may not hinder the ultimate achievement of a favourable conservation status. Thirdly, derogations may only be permitted:

- (a) in the interest of protecting wild fauna and flora and conserving wild habitats;
- (b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;
- (c) in the interest of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;
- (d) for the purpose of research and education, of repopulating and re-introducing these species [...];
- (e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.<sup>86</sup>

Article 12(1) of the Habitats Directive requires more than the imposition and enforcement of a number of prohibitions. According to the EU Court, this provision “requires the Member States not only to adopt a comprehensive legislative framework but also to implement concrete and specific protection measures.”<sup>87</sup> Besides, the prescribed “system of strict protection” of Annex IV species presupposes the “adoption of coherent and coordinated measures of a preventive nature.”<sup>88</sup> Both Court and Commission recommend species action plans, “on condition that they are correctly established and applied,” as effective means of implementing the requirements of Article 12.<sup>89</sup> Without such plans or similarly comprehensive and species-specific measures, “the system of strict protection contains gaps” amounting to a violation of the Habitats Directive.<sup>90</sup> A comprehensive and focused set of measures for each strictly protected species is thus required under EU law, and species protection plans recommended to give this shape. Furthermore, Article 11 obliges member states to guarantee that surveillance of the conservation status of Annex IV species “is undertaken systematically and on a permanent basis.”<sup>91</sup> Such surveillance is considered a necessary ingredient of the strict protection system of Article 12.<sup>92</sup> After all, effective conservation is, to cite Advocate-General Léger, only possible with “detailed

knowledge of each species, its breeding sites and resting places, and the potential threats it may face.”<sup>93</sup> A specific duty to monitor “incidental capture and killing” – for example bycatch in fishing gear – of Annex IV animals is laid down in Article 12(4). Member states are to take the conservation measures necessary to ensure that such killing does not have a “significant negative impact” on the species involved.<sup>94</sup>

Roughly comparable species protection duties are set forth in the Birds Directive. The latter apply in respect of *all* wild bird species, including therefore all marine and coastal birds of the North Sea.<sup>95</sup> By contrast, the coverage of marine species in Annex IV of the Habitats Directive portrays significant gaps. Whereas all cetaceans and marine turtles are covered, seal species are not, only two North Sea fish species (houting and sturgeon) are included, and invertebrates are altogether lacking.

### Marine Strategy Framework Directive

The MSFD 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.”<sup>96</sup> After identifying what the necessary measures are – “on the basis of the initial assessment made pursuant to Article 8(1) and by reference to the environmental targets established pursuant to Article 10(1), and taking into consideration the types of measures listed in Annex VI”<sup>97</sup> – member states must integrate these into a “programme of measures.”<sup>98</sup> The latter “shall apply an ecosystem-based approach to the management of

<sup>83</sup> Art. 12(1).

<sup>84</sup> See Case C-103/00 *Commission v Greece* [2002] ECR I-1147; Case C-518/04 *Commission v Greece* [2006] ECR I-42; and Case C-221/04 *Commission v Spain* [2006] ECR I-4515.

<sup>85</sup> Art. 16.

<sup>86</sup> Art. 16(1).

<sup>87</sup> Case C-183/05 *Commission v Ireland* [2007] ECR I-137, paragraph 29.

<sup>88</sup> *Ibid.*, paragraph 30.

<sup>89</sup> *Ibid.*, paragraph 14.

<sup>90</sup> *Ibid.*, paragraphs 14 and 18. Further clarification of the implications of Art. 12 can be expected when the Court delivers its judgment in the proceedings concerning the protection of the common hamster in France, instigated on 25 September 2009: Case C-383/09 *Commission v France*, OJ 19.12.2009 C312/16; see the Opinion of Advocate-General Kokott of 20 January 2011, n.y.r.

<sup>91</sup> Case C-6/04, paragraph 68.

<sup>92</sup> Case C-183/05, paragraph 13.

<sup>93</sup> Opinion of Advocate-General P. Léger of 21 September 2006, Case C-183/05, paragraph 28.

<sup>94</sup> Art. 12(4).

<sup>95</sup> See, in particular, Arts 5 and 9 of the Birds Directive.

<sup>96</sup> Art. 1(1); emphasis added.

<sup>97</sup> Art. 13(1).

<sup>98</sup> Art. 13(2).

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human activities, ensuring that the collective pressure of [...] activities is kept within levels compatible with the achievement of good environmental status.”<sup>99</sup> Furthermore, the programmes of measures “should be devised on the basis of the precautionary principle and the principles that preventive action should be taken, that environmental damage should, as a priority, be rectified at source and that the polluter should pay.”<sup>100</sup> Finally, throughout the process, states are to cooperate with each other at the (sub)regional level.<sup>101</sup>

As described above, generally speaking the ultimate goal of good environmental status is achieved when, *inter alia*, ecosystems “function fully,” are resilient to “human-induced environmental change,” and “[m]arine species and habitats are protected, human-induced decline of biodiversity is prevented and diverse biological components function in balance.”<sup>102</sup> What GES implies more specifically can be inferred from the eleven so-called “qualitative descriptors for determining good environmental status” enumerated in Annex I to the MSFD:

- 1) Biological diversity is maintained. The quality and occurrence of habitats and the distribution and abundance of species are in line with prevailing physiographic, geographic and climatic conditions.
- 2) Non-indigenous species introduced by human activities are at levels that do not adversely alter the ecosystems.
- 3) Populations of all commercially exploited fish and shellfish are within safe biological limits, exhibiting a population age and size distribution that is indicative of a healthy stock.
- 4) All elements of the marine food webs, to the extent that they are known, occur at normal abundance and diversity and levels capable of ensuring the long-term abundance of the species and the retention of their full reproductive capacity.
- 5) Human-induced eutrophication is minimised, especially adverse effects thereof, such as losses in biodiversity, ecosystem degradation, harmful algae blooms and oxygen deficiency in bottom waters.
- 6) Sea-floor integrity is at a level that ensures that the structure and functions of the ecosystems are safeguarded and benthic ecosystems, in particular, are not adversely affected.
- 7) Permanent alteration of hydrographical conditions does not adversely affect marine ecosystems.
- 8) Concentrations of contaminants are at levels not giving rise to pollution effects.
- 9) Contaminants in fish and other seafood for human consumption do not exceed levels established by Community legislation or other relevant standards.
- 10) Properties and quantities of marine litter do not cause harm to the coastal and marine environment.
- 11) Introduction of energy, including underwater noise, is at levels that do not adversely affect the marine environment.

These qualitative descriptors are indicative for determining the characteristics of GES at (sub)regional levels.<sup>103</sup> Yet another level of detail was added when the European Commission fleshed out the various descriptors in its 2010 Decision on criteria and methodological standards on GES.<sup>104</sup>

With a view to the current poor state of many species, habitats and ecosystems in the North Sea, it is abundantly clear that in this subregion the “necessary measures” in the prescribed “programme of measures” will need to include myriad nature conservation measures in order to achieve in 2020 the situation described in the Annex I descriptors. These may relate to countless economic and other activities, bearing in mind that the MSFD purports to “address all human activities that have an impact on the marine environment”.<sup>105</sup> The required conservation measures themselves may be of all sorts. Annex VI mentions the following broad categories, which are to be taken into consideration by member states when devising the measures needed:

- 1) Input controls: management measures that influence the amount of a human activity that is permitted.
- 2) Output controls: management measures that influence the degree of perturbation of an ecosystem component that is permitted.
- 3) Spatial and temporal distribution controls: management measures that influence where and when an activity is allowed to occur.
- 4) Management coordination measures: tools to ensure that management is coordinated.
- 5) Measures to improve the traceability, where feasible, of marine pollution.
- 6) Economic incentives: management measures which make it in the economic interest of those using the marine ecosystems to act in ways which help to achieve the good environmental status objective.
- 7) Mitigation and remediation tools: management tools which guide human activities to restore damaged components of marine ecosystems.
- 8) Communication, stakeholder involvement and raising public awareness.

What specific measures are called for will plainly depend on what is needed for the achievement of GES in respect of different species, habitats, locations, the

<sup>99</sup> Art. 1(3).

<sup>100</sup> Preamble, paragraph 27.

<sup>101</sup> Arts 5 and 6.

<sup>102</sup> Art. 3(5)(a).

<sup>103</sup> See Arts 3(5), 9(1) and 9(3).

<sup>104</sup> Commission Decision 2010/477/EU.

<sup>105</sup> Preamble, paragraph 5.

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particular activities involved, and so on. A few examples can illustrate the sheer breadth of the spectrum of conservation measures that may be required in order to achieve GES in the North Sea. The formulation of qualitative descriptors 1 and 4 from MSFD Annex I, cited previously, would appear to imply that when a particular marine species displays a worrying trend as a consequence of a particular human activity, member states are to take the necessary measures in respect of that activity in order to reverse the trend. One example is the sorry conservation status of several skate species in the North Sea, which is predominantly attributed to (by)catch in trawl fisheries.<sup>106</sup> Another example is the adverse impact of lights on offshore production platforms on birds.<sup>107</sup> Besides the apparent relevance to the latter issue of qualitative descriptors 1 and 4 from Annex I, the aforementioned Commission Decision on GES criteria and methodological standards cites “light” as a form of energy with potentially adverse impacts on components of marine ecosystems within the context of descriptor 11.<sup>108</sup> Yet another example is constituted by the wide-ranging measures necessary to ensure that “[p]roperties and quantities of marine litter do not cause harm” to marine ecosystems (descriptor 10).<sup>109</sup>

The above plainly sustains the characterizations of the duty to design and implement a programme of measures to achieve GES as the “core substantive provision”<sup>110</sup> of the Directive and the “most onerous obligation imposed on Member States.”<sup>111</sup> To conclude that the MSFD imposes on member states an unconditional obligation of result to achieve GES as defined above by 2020 would, however, appear to be off the mark. An important question in this regard is to what extent the Directive actually obliges member states to *restore* threatened marine species, habitats and ecosystems to healthy levels, rather than merely preventing their further deterioration. It is difficult at present to supply a precise answer to this question. On the one hand, the MSFD requires member states “to *achieve* or maintain good environmental status.”<sup>112</sup> In the North Sea and most other regions covered by the Directive, GES has not yet been (fully) achieved, and cannot be achieved by merely preserving present conditions and ensuring that further “human-induced decline of biodiversity is prevented.”<sup>113</sup> The intensively used Netherlands part of the North Sea is a case in point. The Netherlands Environmental Assessment Agency has rated the current quality of nature in this area at approximately 50 per cent of what it used to be.<sup>114</sup> In short, in many (sub)regions GES cannot be attained without considerable restoration efforts by member states. In line with this, the MSFD expressly cites restoration as part of its objectives.<sup>115</sup> On the other hand, where restoration is mentioned it is accompanied by the qualification “where practicable” – whereas the objectives of “protection”, “preservation” and “prevention of deterioration” are not.<sup>116</sup>

Other pertinent provisions relate to cost-effectiveness, technical feasibility and the various exemption clauses available to member states. When designing programmes of measures pursuant to Article 13, member states “shall give due consideration to sustainable development and, in particular, to the social and economic impacts of the measures envisaged.”<sup>117</sup> Also, they “shall ensure that measures are cost-effective and technically feasible, and shall carry out impact assessments, including cost-benefit analyses, prior to the introduction of any new measure.”<sup>118</sup> Furthermore, not all qualitative descriptors in Annex I must necessarily be employed in the determination of GES for a (sub)region.<sup>119</sup> Finally, due account is to be taken of the various, and at first sight rather generous, exception options provided for in Article 14. Due to its potential significance, the text of this provision is reproduced here in its entirety:

1. A Member State may identify instances within its marine waters where, for any of the reasons listed under points (a) to (d), the environmental targets or good environmental status cannot be achieved in every aspect through measures taken by that Member State, or, for reasons referred to under

<sup>106</sup> See, in this respect, qualitative descriptors 1, 3 and 4 of MSFD Annex I; as well as Commission Decision 2010/477/EU, Annex, Part B, e.g. paragraph 3.3 (referring to a “high proportion of old, large individuals”) and paragraph 4.3 (referring to “groups/species that are targeted by human activities or that are indirectly affected by them (in particular, by-catch and discards”).

<sup>107</sup> See, e.g., L.W. Bruinzeel, J. Van Belle & L. Davids, *The Impact of Conventional Illumination of Offshore Platforms in the North Sea on Migratory Bird Populations* (Altenburg & Wymenga report nr. 1227, 2009).

<sup>108</sup> Decision 2010/477/EU, Annex, Part B, Descriptor 11.

<sup>109</sup> On marine litter and the MSFD, see A. Trouwborst, “Managing Marine Litter: Exploring the Evolving Role of International and European Law in Confronting a Persistent Environmental Problem” [2011] Merkourios: Utrecht Journal of International and European Law (forthcoming).

<sup>110</sup> Westaway at p. 220.

<sup>111</sup> Barnes and Metcalfe, at p. 84.

<sup>112</sup> Preamble, paragraphs 11, 27 and 29, and Arts 1(1) and 13(1); emphasis added.

<sup>113</sup> Art. 3(5)(a).

<sup>114</sup> Netherlands Environmental Assessment Agency, *Nature Balance 2008: Summary* (2008) at p. 10.

<sup>115</sup> Preamble, paragraphs 3 and 43.

<sup>116</sup> Preamble, paragraph 3: “The marine environment is a precious heritage that must be protected, preserved and, *where practicable*, restored” (emphasis added); Preamble, paragraph 43: “the objectives of this Directive, namely protection and preservation of the marine environment, the prevention of its deterioration and *where practicable* the restoration of that environment in areas where it has been adversely affected” (emphasis added).

<sup>117</sup> Art. 13(3).

<sup>118</sup> *Ibid.*

<sup>119</sup> See last phrase of Annex I.

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point (e), they cannot be achieved within the time schedule concerned:

- a) action or inaction for which the Member State concerned is not responsible;
- b) natural causes;
- c) force majeure;
- d) modifications or alterations to the physical characteristics of marine waters brought about by actions taken for reasons of overriding public interest which outweigh the negative impact on the environment, including any transboundary impact;
- e) natural conditions which do not allow timely improvement in the status of the marine waters concerned.

The Member State concerned shall identify such instances clearly in its programme of measures and shall substantiate its view to the Commission. In identifying instances a Member State shall consider the consequences for Member States in the marine region or subregion concerned. However, the Member State concerned shall take appropriate ad-hoc measures aiming to continue pursuing the environmental targets, to prevent further deterioration in the status of the marine waters affected for reasons identified under points (b), (c) or (d) and to mitigate the adverse impact at the level of the marine region or subregion concerned or in the marine waters of other Member States.

2. In the situation covered by paragraph 1(d), 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.
3. The ad-hoc measures referred to in the third subparagraph of paragraph 1 shall be integrated as far as practicable into the programmes of measures.
4. Member States shall develop and implement all the elements of marine strategies referred to in Article 5(2), but shall not be required, except in respect of the initial assessment described in Article 8, 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. Where, for either of these reasons, 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.<sup>120</sup>

The application and interpretation of the provisions and terms just reviewed are crucial to the subject matter of this analysis. Evidently, a liberal interpreta-

tion and application of the exceptions in Article 14 would substantially diminish the added value of the MSFD in the field of marine nature conservation. According to one author, for instance, Article 14(4) could leave the “door open to Member States to refuse to undertake expensive protective measures in cases where environmental risks are under valued or poorly understood.”<sup>121</sup> Similar considerations apply to qualifications like “where practicable”, “technically feasible” and “cost-effective”. At this early stage of the Directive’s implementation, and with no specific guidance available from the European Court of Justice, it is impossible to establish with certainty what the correct understanding is in any of these cases.

Broadly speaking, however, it would appear that the MSFD falls in with the approach taken in the Bern Convention and the Habitats Directive. In the implementation of the latter instruments, socio-economic factors are also to be taken into account and exceptions to species and habitat protection are also possible, but never to a degree that could impair the achievement of the instruments’ ultimate nature conservation objectives.<sup>122</sup> Likewise, the MSFD contains numerous indicators suggesting that the achievement of GES is paramount. These indicators include the various preconditions Article 14 attaches to the use of exceptions, requiring that member states “shall take appropriate ad-hoc measures aiming to continue pursuing the environmental targets;”<sup>123</sup> “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;”<sup>124</sup> “while avoiding that the achievement of good environmental status be permanently compromised.”<sup>125</sup> Besides, the formulation of the exceptions themselves implies that they are to be used on a limited scale only. Article 14(1), for example, speaks of instances where GES “cannot be achieved in *every* aspect.”<sup>126</sup>

The preamble evokes a similarly restrained perspective when motivating the possibility of exceptions through the statement that “achieving or maintaining good environmental status in *every* aspect may not be possible in *all* marine waters by 2020.”<sup>127</sup> In addition, “reasons of overriding public interest” may only be invoked when they “outweigh the negative impact” of

<sup>120</sup> Art. 14.

<sup>121</sup> Westaway, at p. 221; also Barnes and Metcalfe, at p. 85; Markus *et al.*, at p. 84.

<sup>122</sup> Regarding the Bern Convention, see for instance Arts 2 and 9(1), and Bowman *et al.*, at p. 298-299; regarding the Habitats Directive, see for instance Arts 2(3), 6(4) and 16(1).

<sup>123</sup> Art. 14(1); see also Preamble, paragraph 30.

<sup>124</sup> Art. 14(2); see also Preamble, paragraph 32.

<sup>125</sup> Art. 14(4).

<sup>126</sup> Emphasis added.

<sup>127</sup> Preamble, paragraph 29; emphasis added.

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the actions concerned on the environment.<sup>128</sup> The approach taken in the MSFD can thus be described as one that takes account of socio-economic factors and “allows for sustainable use of marine goods and services but, very notably, gives priority to maintaining or achieving “good environmental status” of the marine environment.”<sup>129</sup>

On a general note – and at a slight risk of stating the obvious – it can safely be assumed that the MSFD was not intended to perpetuate the status quo in respect of environmentally harmful human activities. If continuing business as usual were the objective, the MSFD would not have been created in the first place. Instead, as the MSFD itself acknowledges: “It is evident that current pressures on natural marine resources and the demand for marine ecological services are often too high and that the Community needs to reduce its impact on marine waters.”<sup>130</sup>

As regards the relationship and added value of the MSFD *vis-à-vis* other instruments of relevance to marine nature conservation, member states are clearly expected to build on relevant pre-existing nature conservation commitments under other instruments, and to incorporate these into their programmes of measures. The OSPAR Convention and the Birds and Habitats Directives are mentioned in so many words in this context. For instance, the MSFD preamble states that the Directive is to “contribute to the fulfilment of the obligations and important commitments of the Community and the Member States under several relevant international agreements relating to the protection of the marine environment from pollution: [...] the Convention for the Protection of the Marine Environment of the North-East Atlantic [...], including its new Annex V on the Protection and Conservation of the Ecosystems and Biological Diversity of the Maritime Area.”<sup>131</sup> The non-exhaustive formulations used in relevant MSFD provisions suggest that similar considerations apply to relevant instruments which are not specifically named, such as the Bern Convention and the ASCOBANS Agreement.<sup>132</sup> An example is the statement that member states are to “establish and implement programmes of measures which are designed to achieve or maintain good environmental status in the waters concerned, while accommodating existing Community and international requirements.”<sup>133</sup>

It is rather apparent that in respect of marine species and habitats of Community interest” listed under the Habitats Directive the achievement or maintenance of GES entails the achievement or maintenance of a “favourable conservation status” for those species and habitats as defined in Article 1 of the Habitats Directive.<sup>134</sup> Comparable considerations apply to birds in relation to the Birds Directive’s aims. The MSFD thus reinforces member states’ obligations to that end under the Birds and Habitats Directives. Moreover, a very significant contribution of the MSFD consists of its deadlines, which are lacking in

the Birds and Habitats Directives themselves. Hence, measures designed to ensure a “favourable conservation status” for the marine species and habitats involved must be operational as part of the programmes of measures in 2016, and such a status must be realized in 2020 at the latest. Another obvious and important way in which the MSFD complements existing obligations under the Habitats Directive concerns its broad scope, encompassing *all* marine species, habitats and ecosystems. In this fashion, the MSFD fills the conspicuous gaps in the present coverage of marine habitats and species under the Habitats Directive. Currently, for instance, the latter’s Annexes list no marine invertebrates whatsoever, and hardly any marine fish species.

The scope of nature conservation obligations under the OSPAR and Bern Conventions, discussed above, is already very comprehensive. As with the Birds and Habitats Directives, the MSFD reinforces these obligations in respect of the marine areas and species involved. Speaking strictly in terms of substance, therefore, the MSFD may not seem to add much to the two Conventions. Its added value in terms of procedural requirements and compliance, nevertheless, should probably not be underestimated. First, member states are to incorporate their legal duties under the OSPAR and Bern Conventions – and all other relevant instruments – in a single and coherent programme of measures focused on (in this case) the North Sea. Second, it is to be expected that, to significant degrees, adherence to OSPAR Recommendations in the field of nature conservation will be necessary for the achievement of GES, and the same could well apply to relevant decisions by the Bern Convention Standing Committee. Therefore, the actions recommended in such – by themselves non-binding – decisions adopted within the frameworks of the OSPAR and Bern Conventions will, as the case may be, have to be assimilated in the programmes of measures prescribed in the MSFD. Needless to say, the same applies to recommended action within the framework of other nature conservation instruments, one example being the ASCOBANS Conservation Plan for Harbour Porpoises in the North Sea.<sup>135</sup> Third, the MSFD is likely to boost states’ compliance with

<sup>128</sup> Art. 14(1)(d).

<sup>129</sup> Juda (2010), at p. 37.

<sup>130</sup> Preamble, paragraph 2.

<sup>131</sup> Preamble, paragraph 19.

<sup>132</sup> Preamble, paragraphs 6, 18, 19 and 27, and Arts 6(2) and 13(4).

<sup>133</sup> Preamble, paragraph 27; emphasis added.

<sup>134</sup> Arts 1(e) and 1(i) of the Habitats Directive; see also Commission Decision 2010/477/EU, Preamble, paragraph 5.

<sup>135</sup> ASCOBANS Conservation Plan for Harbour Porpoises (*Phocoena phocoena*) in the North Sea, Annex 2 to Resolution No. 1 of the 6th ASCOBANS Meeting of the Parties, 18 September 2009.



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the OSPAR and Bern Convention (and other) duties in question, as it brings these within the spheres of competence of the European Commission and Court of Justice.

Naturally, the added value of the MSFD will vary from case to case. To revisit one of the examples used above, curbing the adverse impacts of illuminated offshore platforms on birds is already the subject of various general and specific duties under the OSPAR Convention, the Bern Convention and the Birds Directive. The MSFD “merely” reinforces those obligations in the ways just described. In the instance of the skates that was also referred to previously, the added value of the MSFD would seem greater. After all, the radical improvement of the conservation status of North Sea skate populations *prima facie* appears to be an integral component of the achievement of GES in this subregion, and no skate species are covered by the Habitats Directive. As for the other instruments, the MSFD could provide states with extra impetus to fulfill their already existing general conservation obligations under the OSPAR and Bern Conventions in respect of these species, and to actually carry out the specific actions proposed by the OSPAR Commission.<sup>136</sup>

To a substantial degree, the prescribed and recommended actions in the example of the skates involve combating the impact of trawl fisheries on these species. This illustrates a more general concern regarding the MSFD. Given the significant impacts of fisheries on marine species, habitats and ecosystems, the achievement of GES in EU seas – and there is a clear parallel here with the Birds and Habitats Directives – clearly hinges in part on the extent to which biodiversity concerns will influence decision-making within, and the impending reform of, the CFP.<sup>137</sup> Article 1 of the MSFD provides in this regard that 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.”<sup>138</sup> Specifically, its preamble establishes that the “Common Fisheries Policy, including in the future reform, should take into account the environmental impacts of fishing and the objectives of this Directive.”<sup>139</sup> It also states that:

Measures regulating fisheries management can be taken in the context of the Common Fisheries Policy, as set out in Council Regulation (EC) No 2371/2002 [...], based on scientific advice with a view to supporting the achievement of the objectives addressed by this Directive, including the full closure to fisheries of certain areas, to enable the integrity, structure and functioning of ecosystems to be maintained or restored and, where appropriate, in order to safeguard, *inter alia*, spawning, nursery and feeding grounds.<sup>140</sup>

According to the MSFD, when member states deem the taking of fisheries measures necessary for the achievement or maintenance of GES, they are to

submit recommendations for action to the competent EU institutions.<sup>141</sup> The Commission must respond to such requests and “as appropriate” present related proposals to the European Parliament and to the Council.<sup>142</sup> A link is therefore created between the MSFD and the CFP, albeit a rather weak one: it is *possible* that the fisheries measures needed to achieve GES are taken within the context of the CFP, but there is no guarantee whatsoever that this will happen. This situation mirrors the similarly inadequate linkage between the CFP and the Birds and Habitats Directives. In any event, the Commission is required to publish by 2019 at the latest a report containing a summary of the contribution made by relevant Community policies, including the CFP, to the attainment of the objectives of the MSFD.<sup>143</sup>

## V. Marine protected areas

This section reviews and compares the most relevant obligations regarding marine protected areas (MPAs) under the OSPAR Convention, the Bern Convention, the Birds and Habitats Directives and the MSFD.

### OSPAR Convention

The OSPAR Convention plays an important role in the development of an ecologically coherent network of well-managed MPAs in the North Sea (and the North-East Atlantic in general). The legal basis for the establishment of MPAs in the region is provided by Annex V to the OSPAR Convention. It generally requires contracting parties to take the “necessary measures” to protect and conserve the ecosystems and the biodiversity of the maritime area and to restore “where practicable” marine areas which have been adversely affected. The establishment of MPAs is one of the measures that can serve to fulfil this obligation and this is acknowledged in the duties for the OSPAR Commission contained in Article 3 of Annex V. It calls on the OSPAR Commission to “develop means,

<sup>136</sup> See, in particular, OSPAR Recommendation 2010/6 on Furthering the Protection and Restoration of the Common Skate Species Complex, the White Skate, the Angel Shark and the Basking Shark in the OSPAR Maritime Area.

<sup>137</sup> Generally see, *inter alia*, R. Churchill and D. Owen, *The EC Common Fisheries Policy* (2010); and T. Markus, “Making Environmental Principles Work under the Common Fisheries Policy” [2010] 19 *European Energy and Environmental Law Review* 132.

<sup>138</sup> Art. 1(4).

<sup>139</sup> Preamble, paragraph 40; emphasis added.

<sup>140</sup> Preamble, paragraph 39.

<sup>141</sup> Arts 13(5) and 15; see also the related exception in Art. 14(1)(a).

<sup>142</sup> Art. 15(2).

<sup>143</sup> Art. 20.

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consistent with international law, for instituting protective, conservation, restorative or precautionary measures related to *specific areas or sites* or related to particular species or habitats".<sup>144</sup>

The OSPAR Commission has followed up on this by adopting a series of measures that clarify what is expected of the contracting parties in relation to MPAs. This includes first and foremost OSPAR Recommendation 2003/3 on a Network of Marine Protected Areas. The recommendation is supplemented by guidelines on the designation and management of MPAs and further guidance to enhance the ecological coherence of the network.<sup>145</sup> None of these measures is legally binding, but as noted earlier they are relevant for the interpretation of the generally formulated obligations contained in Annex V that they intend to elaborate.

OSPAR Recommendation 2003/3 establishes that the general aim is to establish an ecologically coherent network of well-managed MPAs in the region, which will:

- protect, conserve and restore species, habitats and ecological processes which have been adversely affected by human activities;
- prevent degradation of, and damage to, species, habitats and ecological processes, following the precautionary principle;
- protect and conserve areas that best represent the range of species, habitats and ecological processes in the maritime area.<sup>146</sup>

The OSPAR network was originally scheduled to be ecologically coherent and well-managed by 2010, but that target date was only partially met. Recently, two new target dates were agreed upon. By 2012 the OSPAR network has to be ecologically coherent, include sites representative of all biogeographic regions present, and be consistent with the CBD target for effectively conserved marine and coastal ecological regions. By 2016 the OSPAR network has to be well managed (i.e. coherent management measures have been set up and are being implemented for such MPAs that have been designated up to 2010).<sup>147</sup>

Selection of sites for the MPA network is done by the individual contracting parties. Each coastal state party is required to identify areas within its jurisdiction that justify selection as OSPAR MPAs on the basis of guidelines comprising a set of ecological and practical identification and selection criteria (see Table 2). The ecological criteria are significantly broader than the ones used in the Birds and Habitats Directives discussed below. They cover all possible sites that can, individually or collectively, contribute to the conservation of species, habitats and ecological processes that have been adversely affected by human activities or that are representative for the region.

A criterion for MPA selection is whether the area is important for species, habitats/biomes and ecological processes that appear to be under immediate threat or

subject to rapid decline. The point of reference for this is the OSPAR List of Threatened and/or Declining Species and Habitats (see Table 1). The recently adopted recommendations for several listed species, including skates and sharks, emphasize the need for parties to consider whether any sites within their jurisdiction justify selection as MPAs for the protection of "relict populations of" and "critical habitats for" these species.<sup>148</sup> The fact that an area contains such species or habitats or meets any of the other ecological criteria does not automatically imply that it has to be selected. Coastal states are to prioritize identified sites and use the practical criteria to develop a prioritized list of sites. They have the necessary freedom to decide which areas are ultimately selected for the OSPAR Network. Parties are to report selected areas to the OSPAR Commission, which are then automatically included in the OSPAR Network.<sup>149</sup> Parties are to develop a management plan for each selected area in accordance with the management guidelines,<sup>150</sup> and to determine what management measures are appropriate to achieve the aims for which the area has been selected.<sup>151</sup>

The areas designated as OSPAR MPAs are intended to achieve an "ecologically coherent" network of MPAs in the region. The selection guidelines emphasize that:

The OSPAR network should take into account the linkages between marine ecosystems and the dependence of some species and habitats on processes that occur outside the MPA concerned. [...] The

<sup>144</sup> Annex V, Art. 3(1)(b)(ii); emphasis added.

<sup>145</sup> Guidelines for the Identification and Selection of Marine Protected Areas in the OSPAR Maritime Area (OSPAR Agreement 2003-17); OSPAR Guidelines for the Management of Marine Protected Areas in the OSPAR Maritime Area (OSPAR Agreement 2003-18); Guidance on Developing an Ecologically Coherent Network on Marine Protected Areas (OSPAR Agreement 2006-3).

<sup>146</sup> OSPAR Recommendation 2003/3 on a Network of Marine Protected Areas, paragraph 2.1(c)-(e). An MPA is defined in paragraph 1.1 as "an area within the maritime area for which protective, conservation, restorative or precautionary measures have been instituted for the purpose of protecting and conserving species, habitats, ecosystems or ecological processes of the marine environment."

<sup>147</sup> OSPAR Recommendation 2010/2 on amending Recommendation 2003/3 on a Network of Marine Protected Areas, paragraph 2.2 (revising paragraph 2.1 of Recommendation 2003/3). See also the Strategy of the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic 2010–2020 (OSPAR Agreement 2010-3), Part II, paragraph 1.2(b).

<sup>148</sup> See OSPAR Recommendation 2010/6, paragraph 3.1(d).

<sup>149</sup> OSPAR Recommendation 2003/3, paragraph 3.1(b).

<sup>150</sup> Guidelines for the Management of Marine Protected Areas in the OSPAR Maritime Area (OSPAR Agreement 2003-18).

<sup>151</sup> OSPAR Recommendation 2003/3, paragraph 3.1(b).

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**Table 2: OSPAR criteria for the identification and selection of MPAs**

Ecological criteria:

1. *Threatened or declining species and habitats/biotopes*: the area is important for species, habitats/biotopes and ecological processes that appear to be under immediate threat or subject to rapid decline as identified by the ongoing OSPAR (Texel-Faial) selection process (reference point: OSPAR list of threatened and declining species and habitats).
2. *Important species and habitats/biotopes*: the area is important for other species and habitats/biotopes as identified by the ongoing OSPAR (Texel-Faial) selection process.
3. *Ecological significance*: the area has a high proportion of a habitat/biotope type or a biogeographic population of a species at any stage in its life cycle; important feeding, breeding, moulting, wintering or resting areas; important nursery, juvenile or spawning areas; or a high natural biological productivity of the species or features being represented.
4. *High natural biological diversity*: the area has a naturally high variety of species (in comparison to similar habitat/biotope features elsewhere) or includes a wide variety of habitats/biotopes (in comparison to similar habitat/biotope complexes elsewhere).
5. *Representativity*: the area contains a number of habitat/biotope types, habitat/biotope complexes, species, ecological processes or other natural characteristics that are representative for the OSPAR maritime area as a whole or for its different biogeographic regions and subregions.
6. *Sensitivity*: the area contains a high proportion of very sensitive or sensitive habitats/biotopes or species.
7. *Naturalness*: the area has a high degree of naturalness, with species and habitats/biotope types still in a very natural state as a result of the lack of human-induced disturbance or degradation.

Practical criteria

1. *Size*: the size of the area should be suitable for the particular aim of designating the area, including maintaining its integrity, and should enable the effective management of that area.
2. *Potential for restoration*: the area has a high potential to return to a more natural state under appropriate management.
3. *Degree of acceptance*: the establishment of the MPA has a comparatively high potential level of support from stakeholders and political acceptability.
4. *Potential for success of management measures*: there is a high probability that management measures and the ability to implement them (such as legislation, relevant authorities, funding, and scientific knowledge) will meet the aims for designation.
5. *Potential damage to the area by human activities*: it is an area where significant damage by human activity may happen in the short term.
6. *Scientific value*: the area has a high value for scientific research and monitoring.

OSPAR network should form an ecologically coherent network of well-managed MPAs. This is particularly important for highly mobile species, such as certain birds, mammals and fish, to safeguard the critical stages and areas of their life cycle (such as breeding, nursery and feeding areas).<sup>152</sup>

Relevant in this respect is the OSPAR agreement containing guidance for the Contracting parties with the selection of sites for the OSPAR Network of MPAs in order to ensure that the network as a whole is sufficiently ecologically coherent.<sup>153</sup> According to the guidance document a network is “characterized by a coherence in purpose and by the connections between its constituent parts” and networks “can also be designed to be resilient to changing conditions.”<sup>154</sup> The document identifies the following points as contributing to coherence:

- A network’s constituent parts should firstly be identified on the basis of criteria which aim to support the purpose of the network.
- The development of an ecologically coherent network of MPAs should take account of the relationships and interactions between marine species and their environment both in the establishment of its purpose and in the criteria by which the constituent elements are identified.

- A functioning ecologically coherent network of MPAs should interact with, and support, the wider environment as well as other MPAs although this is dependent on appropriate management to support good ecosystem health and function within and outside the MPAs.<sup>155</sup>

The development of a network of OSPAR MPAs in the North Sea has progressed significantly in recent years, but it is clear that further sites need to be designated to ensure that a truly ecologically coherent and representative network is created in the region. The contracting parties have already selected a significant number of sites for the OSPAR Network for a wide range of species and habitats. All sites in the North Sea that have been nominated by EU member states for the OSPAR Network qualify also under the

<sup>152</sup> OSPAR Agreement 2003-17, paragraph 5.

<sup>153</sup> Guidance on Developing an Ecologically Coherent Network of OSPAR Marine Protected Areas (OSPAR Agreement 2006-3).

<sup>154</sup> *Ibid.*, paragraph 5. See on this issue J. Ardron, “The Challenge of Assessing whether the OSPAR Network of Marine Protected Areas is Ecologically Coherent”, [2008] 606 *Hydrobiologia* 45.

<sup>155</sup> OSPAR Agreement 2006-3, paragraph 5.

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EU Birds and Directives. No sites have thus far been selected by these states that *only* qualify under the broader OSPAR ecological selection criteria.<sup>156</sup> For example, no sites have been specifically designated for species that are found *exclusively* on the OSPAR List such as the ocean quahog. A fuller use of the OSPAR criteria to protect species, habitats and ecological processes that are *not* covered by the Birds and Habitats Directives has been called for in and outside of the framework of the OSPAR Convention.<sup>157</sup>

## Bern Convention

The Bern Convention is also relevant for MPAs in the North Sea, but it has thus far not played a major role in this respect. The general obligations related to habitat protection can be understood to apply equally to the terrestrial and the marine environment and the specific obligation to protect areas that are of importance for the species specified in the appendices are evidently relevant for listed North Sea species.<sup>158</sup> Of particular interest are species in Bern Convention Appendix II that are not on Annex II of the Habitats Directive discussed below. One instance is the white-beaked dolphin, which is a resident of the North Sea.

The general obligations on habitat protection have been elaborated by the Standing Committee through a series of (non-legally binding) decisions.<sup>159</sup> Relevant to mention are the decisions concerning the Network of Areas of Special Conservation Interest (Emerald Network). Contracting parties are requested to designate areas of special conservation interest (ASCI) as part of the Emerald Network and to ensure that necessary and appropriate conservation measures are taken for each area situated within their territory or under their responsibility. Both terrestrial and marine sites can be designated as ASCI and become part of the Emerald Network, if it meets one or several of the following conditions;

- a) it contributes substantially to the survival of threatened species, endemic species, or any species listed in Appendices I and II of the convention;
- b) it supports significant numbers of species in an area of high species diversity or supports important populations of non or more species;
- c) it contains an important and/or representative sample of endangered habitat types;
- d) it contains an outstanding example of a particular habitat type or a mosaic of different habitat types;
- e) it represents an important area for one or more migratory species;
- f) it otherwise contributes substantially to the achievement of the objectives of the convention.<sup>160</sup>

This potentially comprises a wide range of marine features, but for EU member states that are contracting parties to the Bern Convention the sites involved are the same as the ones that have already been

designated under the Birds and Habitats Directives.<sup>161</sup> The ASCI and the Emerald Network have therefore currently limited added significance for area protection in the North Sea, except for contracting parties that are not EU members, such as Norway.

## Birds and Habitats Directives

The Birds and Habitats Directives aim for the development of a network of protected areas known as Natura 2000. The Birds Directive obliges member states to designate Special Protection Areas (SPA) for bird species listed in its Annex I and for (other) migratory species, insofar as these occur regularly in areas within their jurisdiction.<sup>162</sup> In particular, “the most suitable territories in number and size” for all of these species are to be classified as SPAs.<sup>163</sup> Similar measures are to be taken under the Habitats Directive in respect of natural habitat types listed in Annex I and species listed in Annex II of the Directive, in order to achieve or maintain a favourable conservation status of these habitats and species.<sup>164</sup> After a multiple-stage procedure sites of importance for these habitats and species are to be designated as Special Areas of Conservation (SAC). Together, the SPAs and SACs are to form the aforementioned ecologically coherent European network of protected sites, Natura 2000.<sup>165</sup>

Member states are to employ ecological criteria only for the selection and delimitation of sites under the Birds and Habitats Directives.<sup>166</sup> For SACs, site selection is to be based on the criteria provided in Annex III of the Habitats Directive.<sup>167</sup> In light of the jurisprudence of the EU Court of Justice, it is beyond

<sup>156</sup> See on this issue H.M. Dotinga and A. Trouwborst, “The Netherlands and the Designation of Marine Protected Areas in the North Sea: Implementing International and European Law”, [2009] 5 *Utrecht Law Review* 21.

<sup>157</sup> *Ibid.*; see also OSPAR Commission, *Quality Status Report* (2010), p. 137.

<sup>158</sup> Art. 4(3).

<sup>159</sup> See, *inter alia*, Resolution No. 1 (1989) of the Standing Committee on the Provisions Relating to the Conservation of Habitats; Resolution No. 3 (1996) Concerning the Setting Up of a Pan-European Ecological Network; Resolution No. 4 (1996) Listing Endangered Natural Habitats requiring Specific Conservation Measures; Resolution No. 5 (1998) Concerning the Rules for the Network of Areas of Special Conservation Interest (Emerald Network); Resolution No. 6 (1998) Listing the Species Requiring Specific Habitat Conservation Measures.

<sup>160</sup> Recommendation 16 (1989), paragraph 1.

<sup>161</sup> Resolution No. 5 (1998), preamble.

<sup>162</sup> Art. 4(1)-(2).

<sup>163</sup> *Ibid.*

<sup>164</sup> Art. 4.

<sup>165</sup> Habitats Directive, Art. 3.

<sup>166</sup> See Art. 4 of each Directive.

<sup>167</sup> Annex III sets out criteria such as the representativity of habitats, their degree of conservation, and the relative population density of species.

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**Table 3: Marine habitats and species in Annexes I and II of the Habitats Directive (Atlantic region)**

Habitats	
1110	Sandbanks which are slightly covered by sea water all the time
1130	Estuaries
1140	Mudflats and sandflats not covered by seawater at low tide
1150	Coastal lagoons
1160	Large shallow inlets and bays
1170	Reefs
1180	Submarine structures made by leaking gases
8330	Submerged or partially submerged sea caves

  

Species	<i>Fish</i>	<i>Reptiles</i>	<i>Mammals</i>
	River lamprey	Loggerhead sea turtle	Bottlenose dolphin
	Atlantic sturgeon		Harbour porpoise Grey seal
	Allis shad		Harbour/common seal
	Twaite shad		Mediterranean monk seal
	Houting		
	Sea lamprey		
	Spanish toothcarp		

doubt that considerations of an economic nature or concerning expected future management difficulties – for instance relating to the regulation of fisheries – are to play no part.<sup>168</sup>

A substantial number of marine birds, *i.e.* 30, are included in Annex I of the Birds Directive, and the obligation to designate SPAs also applies in respect of migratory marine birds not on the list, raising the total to 66. In contrast to this rather comprehensive coverage of species under the Birds Directive it is generally recognized, including by the European Commission, that the Habitats Directive leaves much to be desired with regard to marine habitats and species. According to the Commission, the Annexes of the Habitats Directive have a “limited focus on marine species and habitat types, especially those that occur in the offshore marine environment.”<sup>169</sup> Only a tiny fraction of the habitat types in Annex I is marine. Of the nine marine habitats in question, eight are relevant to the Atlantic region (see Table 3). As regards marine species, Annex II of the Habitats Directive cannot be deemed representative either. Although it lists some marine mammals, turtles and fish (see Table 3), numerous other vulnerable species are missing, including various marine fish and invertebrates. For the North Sea, the gaps in question become apparent when comparing Annex II of the Habitats Directive with the leading regional inventory, the OSPAR List discussed above. Conspicuous examples include the thornback ray and the ocean quahog. The European Commission is contemplating the possibility of amending the Annexes of the Habitats Directive in order to fill their marine gaps.<sup>170</sup> Until that happens, less than two handfuls of Annex II species inform the obligation of the member states to designate SACs in the North Sea.

For marine sites that fall within the scope of the

Directives, the requirements are strict and subject to few exceptions. As the European Commission put it, under the two Directives there is “no legal difference between marine and terrestrial environments as regards duties of Member States.”<sup>171</sup> This applies both at a general level – the “final obligation of delivering a favourable conservation status for species and habitat types of Community Importance is the same in both environments”<sup>172</sup> – and on the level of the specific obligations concerning the designation and protection of sites.

### Marine Strategy Framework Directive

MPAs are one of the few types of conservation measures specifically mentioned in the MSFD. According to the preamble, the development and implementation of the thematic strategy should be aimed at the conservation of the marine ecosystems and “[t]his approach should include protected areas”.<sup>173</sup> It also states that the establishment of MPAs “forms an important contribution to the achievement of good environmental status”.<sup>174</sup> There is no specific provision in the main text explicitly

<sup>168</sup> E.g., Case C-355/90 *Commission v Spain* [1993] ECR I-4221, paragraphs 26-27; Case C-44/95 *Regina v Secretary of State for the Environment* [1996] ECR I-3805, paragraph 26; Case C-3/96 *Commission v Netherlands* [1998] ECR I-3031.

<sup>169</sup> European Commission, *Guidelines for the Establishment of the Natura 2000 Network in the Marine Environment: Application of the Habitats and Birds Directives* (2007), p. 14.

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.*, p. 21.

<sup>172</sup> *Ibid.*

<sup>173</sup> Paragraph 5.

<sup>174</sup> Paragraph 6.

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requiring member states to establish MPAs under the MSFD, but they are mentioned in the provision dealing with programmes of measures.<sup>175</sup> Article 13(4) provides that the programmes of measures shall include:

spatial protection measures, contributing to coherent and representative networks of marine protected areas, adequately covering the diversity of the constituent ecosystems, such as special areas of conservation pursuant to the Habitats Directive, special protection areas pursuant to the Birds Directive, and marine protected areas as agreed by the Community or Member States concerned in the framework of international or regional agreements to which they are parties.

The term “spatial protection measures” is not defined in the Directive, but as the text above indicates it covers areas already designated or to be designated under the Habitats Directive, the Birds Directive and international or regional agreements to which the EU and/or member states are parties.<sup>176</sup> This includes MPAs (to be) established under the OSPAR Convention, as well as other applicable agreements. The Directive does not expressly require the establishment of MPAs *beyond* what is required under the Birds and Habitats Directives and the OSPAR Convention, but neither does it preclude this. “Spatial protection measures” is a broad term that potentially includes all types of area-based measures, including areas that have been designated for specific maritime activities such as shipping (for example particularly sensitive sea areas with associated protective measures), fishing (closed areas) and safety zones around offshore installations such as oil platforms and wind parks that often function as *de facto* nature reserves.<sup>177</sup> The term is also often used in the wider context of maritime spatial planning.<sup>178</sup>

The MSFD provides that the spatial protection measures have to contribute to “coherent and representative networks of marine protected areas, adequately covering the diversity of the constituent ecosystems”. This provides a clear link to the OSPAR network of MPAs and (the marine components of) the Natura 2000 network. As noted earlier, current efforts to develop a network of MPAs in the North Sea are largely based on the Birds and Habitats Directives. On account of the widely acknowledged “marine deficiencies” of the Habitats Directive, it is unlikely that this will be sufficient to achieve a coherent and representative network that adequately covers the diversity of the constituent ecosystems.<sup>179</sup> Full application of the much broader ecological selection criteria developed within the framework of the OSPAR Convention could achieve this, but these criteria have thus far not been applied to their full potential.

The MSFD can act as a catalyst in this respect, because it requires member states to apply a broad approach to biodiversity protection in the marine strategies. This is reflected in the qualitative descrip-

tors contained in Annex I and the Commission Decision that define the criteria in relation to each of the 11 descriptors for determining GES that are to be used by the member states as the starting point for their marine strategies. Descriptor 1 of Annex I requires that “biological diversity is maintained” and that the “quality and occurrence of habitats and the distribution and abundance of species are in line with prevailing physiographic, geographic and climatic conditions”. In relation to this descriptor the Commission Decision provides that member states have to make an assessment at the ecological levels of species, habitats and ecosystems. In that process they have to take into account the indicative list of species, communities and habitats types contained in Table I of Annex III to the MSFD. The required assessments are clearly not to be restricted to the species and habitats on Annexes I and II of the Habitats Directives. One may assume that the spatial protection measures will include MPAs that apply a broad approach, because they have to contribute to “coherent and representative networks” that adequately cover “the diversity of the constituent ecosystems”.

Another question is precisely *when* member states have to take action related to MPAs under the MSFD. The MSFD does not specifically refer to the target date of 2012 for the development of an ecologically coherent network of MPAs that is promoted by the OSPAR Convention. That target date obviously coincides with the deadline under the MSFD for the completion of the initial assessment, the determination of good environmental status and the formulation of environmental targets and associated indicators. The MSFD requires member states to make publicly available, in respect of each marine region or subregion, relevant information on the areas referred to Article 13(4) by 2013 at the latest.<sup>180</sup> On the basis of this information, the Commission will report by 2014 on “progress in the establishment of marine protected areas, having regard to existing obligations under

<sup>175</sup> Inclusion of a specific provision on MPAs in the MSFD was proposed by the European Parliament, but this was rejected by the Commission. See COM(2007) 456 final of 24 July 2007, at p. 3 and 5.

<sup>176</sup> See also paragraphs 6 and 21 of the preamble.

<sup>177</sup> These types of area-based measures may also fall within the category of “spatial and temporal distribution controls: management measures that influence when and where an activity is allowed”, mentioned in paragraph 3 of Annex VI of the MSFD.

<sup>178</sup> See for example Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regio, Maritime Spatial Planning in the EU – Achievements and Future Development, COM(2010) 771 final of 17 December 2010, paragraph 5.2.

<sup>179</sup> See Dotinga and Trouwborst.

<sup>180</sup> Art. 13(6).

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applicable Community law and international commitments of the Community and the Member States.”<sup>181</sup> This will offer the Commission an opportunity to review the action taken by the member states under the MSFD in respect of MPAs, including the development of coherent and representative networks of MPAs. The spatial protection measures have to be included in the programmes of measures to be developed by 2015 and implemented by 2016 at the latest. That coincides with the second target date agreed upon within the framework of the OSPAR Convention in relation to MPAs: by 2016 the OSPAR network needs to be well managed. However, the latter only applies to OSPAR MPAs designated up to 2010.

The MSFD does not contain specific requirements for the management of human activities in MPAs that fall within the scope of the spatial protection measures, but it does contain a general provision related to certain activities. Article 13(5) provides that:

Where member states consider that the management of a human activity at Community or international level is likely to have a significant impact on the marine environment, *particularly in the areas addressed in paragraph 4*, they shall, individually or jointly, address the competent authority or international organisation concerned with a view to the consideration and possible adoption of measures that may be necessary in order to achieve the objectives of this Directive, so as to enable the integrity, structure and functioning of ecosystems to be maintained or, where appropriate, restored.<sup>182</sup>

This is presumably a reference to activities such as shipping and fisheries. For these activities there are also other provisions which are relevant, in particular the exception contained in Article 14 that can be invoked for action or inaction for which the member state concerned is not responsible and Article 15 that requires member states to inform the Commission about issues that cannot be tackled by measures at a national level. The member state is in such situations required to make appropriate recommendations for action by the competent EU institutions. The Commission has to respond to such requests and “as appropriate” present related proposals to the European Parliament and to the Council. The MSFD says little about the management of other human activities. It merely requires member states to ensure that the programmes of measures are operational by 2016 and to indicate in their programmes of measures how the measures are to be implemented and how they will contribute to the achievement of the environmental targets.<sup>183</sup>

In several respects – summed up below – the Directive thus appears to have a clear added value in relation to MPAs in the North Sea when compared to the selected nature conservation instruments.

### V. Conclusions

Generally speaking, the MSFD and the other examined nature conservation instruments seem mutually supportive and complementary. The MSFD is a framework instrument with a core of hard legal procedural and substantive obligations that have to be implemented by EU member states within the specified timeframe to achieve or maintain good environmental status in the marine environment by 2020. Integral parts of this objective are protecting species and habitats, preventing and reversing human-induced decline of biodiversity and ensuring that diverse biological components function in balance. The achievement of these objectives of the MSFD in the North-East Atlantic and the North Sea – and comparable considerations apply in respect of other (sub)regions – will to an important extent rely on the full implementation by states of what is already required of them under the OSPAR Convention, the Bern Convention and the Birds and Habitats Directives. Yet, the MSFD requires member states to do more than that.

In terms of nature conservation measures generally, the Directive appears to have added value to the selected regimes in several respects. In particular, the MSFD:

- strengthens the application to marine nature conservation of environmental principles and concepts such as the ecosystem approach, adaptive management and the precautionary principle;
- strengthens pre-existing obligations regarding the conservation of marine species, habitats and ecosystems under the OSPAR Convention, the Bern Convention, the Birds and Habitats Directives and other relevant instruments;
- contains several procedural requirements for member states that build on those contained in the other instruments;
- requires member states to draw all pertinent conservation measures from the array of applicable instruments together and combine them in a single and coherent programme of measures for each (sub)region (including the North Sea), comprising all species, habitats, ecosystems and human activities;
- promotes compliance with conservation measures prescribed or recommended under non-EU instruments like the OSPAR Convention and the Bern Convention. By incorporating them in MSFD programmes of measures, they are brought within the scrutiny of the European Commission and EU Court of Justice;

<sup>181</sup> Art. 20.

<sup>182</sup> Emphasis added.

<sup>183</sup> Arts 13(7) and 13(10).

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- has a much broader material scope than the Habitats Directive through its comprehensive coverage of species, habitats and ecological processes;
- provides a deadline for the achievement of “favourable conservation status” for marine species and habitats that are covered by the Habitats Directive, by aiming for GES by 2020. Comparable considerations apply in respect of the Birds Directive;
- strengthens regional cooperation in relation to nature conservation in the North Sea through its requirements for member states to cooperate and to coordinate their activities with non-member states (Norway in the case of the North Sea); and
- provides opportunities for improving the presently inadequate linkage between nature conservation goals and duties and the Common Fisheries Policy.

Added value in respect of the other selected nature conservation instruments is also apparent with specific regard to the designation and management of MPAs. In particular, the MSFD:

- has introduced strict deadlines that require national actions by the member states that are directly or indirectly relevant for MPAs.
- strengthens pre-existing requirements for area protection and the development of an ecologically coherent and representative network of MPAs under the OSPAR Convention through their incorporation in the spatial protection measures that have to be established under the MSFD.
- will probably require establishment of MPAs beyond what is required under the Habitats Directive in view of the broad definition of the descriptors of good environmental status and its comprehensive coverage of species, habitats and ecological process.
- places the development of a network of MPAs

within a broader programme of measures aimed at maintaining or achieving GES in the region;

- offers opportunities for the introduction of a wider range of spatial protection measures than those promoted under the nature conservation instrument.
- strengthens regional cooperation in relation to MPAs, including in relation to transboundary features and impacts, by requiring member states to cooperate and coordinate with non-member states through the OSPAR Commission.
- contains a publication requirement for member states and a reporting requirement for the Commission in relation to MPAs.
- brings the development of a network of MPAs within the scrutiny of the European Commission and the EU Court of Justice.
- provides opportunities to improve the link between nature conservation law and fisheries law in respect of MPAs.

The *exact* dimensions of the Directive’s added value are difficult to gauge at present, however, as these depend in part upon the future application and interpretation of exemption options and of qualifying clauses concerning cost-effectiveness, technical feasibility and the like. They also depend on the extent to which the achievement of GES – which in principle presupposes healthy populations of all marine species – will be incorporated as a non-negotiable yardstick against which all fisheries management measures in the future CFP will have to be measured. This reinforces and complements the already existing imperative for such incorporation in respect of species and habitats covered by the Birds and Habitats Directives.

Whichever way, the MSFD 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.