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## REVIEW

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Nanomaterials as priority substances under the  
Water Framework Directive

*Catherine Ganzleben / Steffen Foss Hansen*

The Marine Strategy Framework Directive and its  
implementation in Spain

*Ana Barreira*

Hong Kong Convention and EU Ship Recycling Regulation: Can  
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Water services and why a broad definition under the  
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The outcome of the UN Conference on  
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Greening the Constitution. The principle of sustainable  
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*Peter De Smedt / Hendrik Schoukens / Tania Van Laer*

Law and innovation in the context of nanomaterials:  
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## Editorial

Water is a precondition for human, animal and plant life as well as an indispensable resource for the economy. Thus, according to the *European Commission* the protection of water resources, of fresh and salt water ecosystems and of the water we drink and bathe in is therefore one of the cornerstones of environmental protection in Europe. Against this background the present issue of *elni Review* focuses on the legal framework for (the protection of) water in Europe and explains, among other things, how far it can cope with possible threats from emerging technologies and to what extent some of the legislation has been implemented in specific member States of the EU. Moreover, insights are provided into some new political or scientific initiatives to further develop the legal framework for protecting water.

First off, *Catherine Ganzleben* and *Steffen Foss Hansen* examine whether Directive 2000/60/EC ('Water Framework Directive', WFD), which aims to reduce and minimise the concentrations of dangerous chemicals in European waters, and related legal requirements include the right instruments to capture nanomaterials. They also consider whether techniques are available to allow for monitoring nanomaterials in surface waters and review data from modelling exercises that estimate concentrations of nanomaterials in EU waters.

Subsequently, *Ana Barreira* provides an overview of the main elements of the Union's Marine Strategy Framework Directive (MSFD) and analyses how Spain, as an EU country with 8000 km of coastal fringe, is complying with the directive and will review its marine governance framework.

The third article is by *Thomas Ormond* and takes another perspective, evaluating how far international and European legal instruments for the regulation of ship dismantling (potentially) ensure the safe and environmentally sound recycling of European ships in regions like South Asia.

*Sarolta Tripolszky* explains the concept of the term 'water services' in her contribution and outlines the economic and legal consequences of a narrow and broad definition. In this context and with specific reference to a collective complaint started by the NGOs EEB and WWF in 2006 against 11 EU member states to enforce the correct implementation of the WFD, she also describes the development of this legal instrument.

The final article with a focus on water is by *Marga Robesin* and describes current discussions on the question of how to achieve substantial water footprint reduction, focusing in particular on certification and labelling.

A second series of contributions to this issue of the *elni Review* covers a variety of other up-to-date legal issues, including the advancement and legal implementation of the concept of 'sustainable development'. To this end, *Eckard Reh binder*, who attended the United Nations Conference on Sustainable Development (Rio+20) in Rio de Janeiro in June 2012, shares some critical comments on the summit outcome.

The following contribution by *Peter de Smedt*, *Hendrik Schoukens* and *Tania Van Laer* examines the anchoring of sustainable development in the Belgian Constitution, discusses the concept's juridical enforceability and subsequently analyses the consequences of this qualification for the application in the jurisprudence.

In a further article *Julian Schenten* and *Martin Führ* present empirical data obtained by several survey methods focusing on companies which manufacture and/or use nanomaterials. They analyse the findings under the perspective of the degree to which REACH (Regulation EC 1907/2006) promotes innovations for sustainability in the field of nanomaterials.

In June 2012 the EU General Court adopted long awaited decisions in two cases in which it interprets for the first time Regulation 1367/2006 ('Aarhus Regulation') – *Anais Berthier* examines what real added value these two decisions have with regards to access to justice.

Finally, in a statement by *Almut Gaude* from BUND, the German branch of Friends of the Earth (FoE), the NGO expresses its perspective on the Rio+20 conference outcome.

We hope you enjoy reading the current journal. Contributions for the next issue of the *elni Review* are very welcome and may be sent to the editors by mid-February 2013.

*Julian Schenten/Martin Führ*

## The legal protection of the marine environment: The Marine Strategy Framework Directive and its implementation in Spain

Ana Barreira

### 1 Introduction

Marine ecosystems are open systems with complex interactions within and among them. Impacts on or alterations to one ecosystem in one site of the marine environment will influence other sites, i.e: human activities conducted in the coastal zone can have significant impacts on the offshore environment, and vice-versa<sup>1</sup>. In fact the so-called constitution of the oceans, the United Nations Convention on the Law of the Sea (UNCLOS) provides the following in its preamble: “conscious that the problems of ocean space are closely interrelated and need to be considered as a whole”. However, until recently the approach to dealing with oceans affairs was divergent and sector-specific. To attain sustainability an integrated approach is necessary.

Within the European Union, bathed by two oceans (the Atlantic and the Arctic) and four seas (the Baltic, Black, Mediterranean and North seas) and with 22 coastal states, the Sixth Environmental Action Programme of the European Community<sup>2</sup> set the process to establish an Integrated Maritime Policy (IMP) when it proposed the development of a strategy for marine protection identifying marine protection as one of its priority areas.

The IMP was adopted in 2007<sup>3</sup>. The environmental dimension of the IMP is the Marine Strategy Framework Directive<sup>4</sup> (MSFD). Its aim is to protect more effectively the marine environment across Europe through the achievement of good environmental status<sup>5</sup> of the EU's marine waters by

2020 and to protect the resource base upon which marine-related economic and social activities depend. The purpose of this article is to analyse the main elements of the MSFD and to examine how Spain, as an EU country with 8000 km of coastal fringe, is complying with it and will review its marine governance framework.

### 2 The Marine Strategy Framework Directive

From the end of the 1970s and with the adoption of the Convention on the Conservation of European Wildlife and Natural Habitats<sup>6</sup> (Bern Convention) and the Birds Directive<sup>7</sup>, the Law in Europe started to recognize the need to adopt legal measures to protect nature. The increasing concern to protect the marine biodiversity in the last 30 years and the gradual development of legally binding obligations for that protection led to the adoption of the MSFD. This Directive foresees the obligation of Member States to protect and restore the marine environment and divides this into stages to be reached by 2020.

As mentioned the MSFD constitutes the vital environmental component of the Union's maritime policy, designed to achieve the full economic potential of oceans and seas in harmony with the marine environment.

The MSFD requires the application of the ecosystem approach to the management of human activities, covering all sectors having an impact on the marine environment. It was adopted on 17 June 2008 and came into force on 15 June 2008. It was due to be transposed into national legislation by 15 July 2010.

This Directive applies to all marine waters which includes waters, the seabed and subsoil on the seaward

<sup>1</sup> Intergovernmental Oceanographic Commission, *National Ocean Policy. The Basic Texts from: Australia, Brazil, Canada, China, Colombia, Japan, Norway, Portugal, Russian Federation, United States of America*. Paris. UNESCO 2007. 280pp (IOC Technical Series, 75, Law of the Sea Dossier 1).

<sup>2</sup> Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme of 10 September 2002.

<sup>3</sup> COM (2007) 575 final. Brussels 10.10.2007. For further information on the IMP visit [ec.europa.eu/maritimeaffairs/policy/index\\_en.htm](http://ec.europa.eu/maritimeaffairs/policy/index_en.htm).

<sup>4</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 L 164, 25.06.2008).

<sup>5</sup> Art. 3.5. of the MSFD defines good environmental status as 5. “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;  
Good environmental status shall be determined at the level of the marine region or subregion as referred to in Article 4, on the basis of the qualitative descriptors [...]”

<sup>6</sup> Council Decision 82/72/EEC of 3 December 1981 concerning the conclusion of the Convention on the conservation of European wildlife and natural habitats (Bern Convention) (OJ L of 10.02.1982).

<sup>7</sup> Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 20, of 26.01.2010) (this is the codified version of Directive 79/409/EEC as amended).

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 UNCLOS<sup>8</sup>. In addition, it applies to coastal waters as defined by the Water Framework Directive<sup>9</sup> (WFD, 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 EU legislation<sup>10</sup>. It is important to recall that the aim of the WFD is to achieve a good status of waters by 2015. In the case of surface waters which include coastal waters, that status refers to its chemical and ecological status<sup>11</sup>.

The Directive allows the division of Europe's seas into four regions, with possible subregions: the Baltic Sea, the North-East Atlantic, the Mediterranean and the Black Sea. In each region and possibly in the subregions to which they belong, the Member States concerned must coordinate their actions with each other and with the third countries involved. To this end they can benefit from the experience and capabilities of existing regional organizations established under seas conventions.

### 2.1 Marine strategies at regional level

For each region or subregion concerned each Member State must develop a marine strategy for its marine waters. The objective of the marine strategies is a two-fold:

- a) *“protect and preserve the marine environment, prevent its deterioration or, where practicable, restore marine ecosystems in areas where they have been adversely affected, and*
- b) *prevent and reduce inputs in the marine environment, with a view to phasing out pollution [...]”<sup>12</sup>, so as to ensure that there*

*are no significant impacts on or risks to marine biodiversity, marine ecosystems, human health or legitimate uses of the sea”<sup>13</sup>.*

Member States must firstly assess the ecological status of their waters and the impact of human activities. This assessment covers<sup>14</sup>:

- an analysis of the essential characteristics of these waters (physical and chemical features, types of habitat, animal and plant populations, etc.);
- an analysis of the main impacts and pressures, particularly as a result of human activities which affect the characteristics of these waters (contamination by toxic products, eutrophication, smothering or sealing of habitats by construction work, introduction of non-indigenous species, physical damage caused by ship anchors, etc.); and
- an economic and social analysis of the use of these waters and the cost of the degradation of the marine environment.

Member States must then determine the ‘good ecological status’ of the waters on the basis of criteria such as biodiversity, the presence of non-indigenous species, stock health, the food chain, eutrophication, changes in hydrographic conditions and concentrations of contaminants, the amount of waste and noise pollution<sup>15</sup>.

On the basis of the evaluation of waters, the Member States must define the objectives and indicators to achieve this good ecological status<sup>16</sup>. These objectives must be measurable, consistent within a particular maritime region or subregion and tied to a definite timetable.

Member States draw up a programme of specific measures to achieve these objectives<sup>17</sup>. These measures must give due consideration to their economic and social consequences. Member States must specify the reasons preventing successful completion of any of these measures (action or inaction of another State, force majeure, etc.). In fact, the MSFD provides certain and limited exceptions to the achievement of the good status in Article 14. The measures should be devised on the basis of the precautionary principle<sup>18</sup> and must be developed under a public consultation procedure<sup>19</sup>.

Member States must also establish coordinated monitoring programmes in order to evaluate on a

<sup>8</sup> Arts. 2(1) and 3.1 (a), MSFD.

<sup>9</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 L327, 22.12.2000). “Coastal water” means surface water on the landward side of a line, every point of which is at a distance of one nautical mile on the seaward side from the nearest point of the baseline from which the breadth of territorial waters is measured, extending where appropriate up to the outer limit of transitional waters” (Art. 2.7 WFD).

<sup>10</sup> Arts. 2(1) and 3.1 (b), MSFD.

<sup>11</sup> The quality indicators for the classification of the ecological status of coastal waters are biological indicators, hydromorphological indicators affecting biological indicators, chemicals and physico-chemical indicators affecting biological indicators and specific pollutants (Annex V, 1.1.4, WFD).

<sup>12</sup> This Directive defines pollution in a broad manner as “the direct or indirect introduction into the marine environment, as a result of human activity, of substances or energy, including human-induced marine underwater noise, which results or is likely to result in deleterious effects such as harm to living resources and marine ecosystems, including loss of biodiversity, hazards to human health, the hindering of marine activities, including fishing, tourism and recreation and other legitimate uses of the sea, impairment of the quality for use of sea water and reduction of amenities or, in general, impairment of the sustainable use of marine goods and services” (Art. 3.8).

<sup>13</sup> Art. 1(2) MSFD.

<sup>14</sup> Art. 8 MSFD.

<sup>15</sup> Art. 9 MSFD.

<sup>16</sup> Art. 10 MSFD. Commission Decision 2010/477/EU of 1 September established criteria and methodological standards on good environmental status of marine waters.

<sup>17</sup> Art. 13 MSFD.

<sup>18</sup> Preamble para. 27.

<sup>19</sup> Art. 19 MSFD.

regular basis the status of the waters for which they are responsible and progress with regard to the objectives they have set<sup>20</sup>.

Key elements of the strategies are reviewed every six years and interim reports are drawn up every three years (see Table 1).

1. Strategy Development	Deadline
<ul style="list-style-type: none"> <li>· Initial assessment of the current environmental status of the waters concerned and the environmental impact of human activities thereon (Art. 5(2) (a)).</li> </ul> <p>Elements of the initial assessment (Art. 8):</p> <ul style="list-style-type: none"> <li>a) an analysis of the essential features and characteristics, and current environmental status of those waters;</li> <li>b) an analysis of the predominant pressures and impacts, including human activity, on the environmental status of those waters; and</li> <li>c) an economic and social analysis of the use of those waters and of the cost of degradation of the marine environment.</li> </ul>	15 July 2012
<ul style="list-style-type: none"> <li>· Review of the initial assessment (Art. 17(2) (a))</li> </ul>	15 July 2018
<ul style="list-style-type: none"> <li>· Determination of good environmental status (Arts. 5(2) (a) ii) and 9 and Annex I)</li> </ul>	15 July 2012
<ul style="list-style-type: none"> <li>· Notification to the Commission of that determination</li> </ul>	15 Oct. 2012
<ul style="list-style-type: none"> <li>· Review of the good environmental status of those waters (Art. 17(2) a))</li> </ul>	15 July 2018
<ul style="list-style-type: none"> <li>· Establishment of a series of environmental targets and associated indicators, in respect of each marine region or subregion, so as to guide progress towards achieving good environmental status in the marine environment (Arts. 5(2) (a) iii), 10(1) and Annex III-table 2 and Annex IV)</li> </ul>	15 July 2012
<ul style="list-style-type: none"> <li>· Notification the Commission on the environmental targets</li> </ul>	15 Oct. 2012
<ul style="list-style-type: none"> <li>· Review of the environmental targets (Art. 17(2) (b))</li> </ul>	15 July 2018
<ul style="list-style-type: none"> <li>· Establishment and implementation of a monitoring programme for ongoing assessment and regular updating of target</li> </ul>	15 July 2014

<sup>20</sup> Art. 11 MSFD.

<sup>21</sup> "Monitoring programmes shall be compatible within marine regions or subregions and shall build upon, and be compatible with, relevant provisions for assessment and monitoring laid down by Community legislation,

(Arts. 5(2) (a) iv) and 11(1)) <sup>21</sup>	
· Notification to the Commission on the monitoring programme	15 Oct. 2014
· Review of the monitoring programme (Art. 17(2) (c))	15 July 2020
<b>2. Programme of Measures (PoM)</b>	
· Development of a PoM (Arts. 5(2) b) i) and 13(1) (2) and 3 and Annex VI ) <sup>22</sup>	In 2015 the latest
· Entry into operation of the PoM (Art. 5(2) (b) and 13)	In 2016 at the latest
· Presentation to the Commission of a brief interim report describing progress in the implementation of the programme	In 2018 at the latest
· Review of the PoM (Art. 17(2) (d))	In 2021 at the latest

**Table 1:** Calendar and key requirements for the development of marine strategies<sup>23</sup>

Other obligations for MS consist of the designation and notification of competent authorities (CA) (see Table 2).

· Designation of CAs in each region or subregion concerned	15 July 2010
· Notification to the Commission of the designated CAs and of a list of their competent authorities as regards those international bodies in which they participate relevant for the implementation of the MSFD	15 Jan. 2011

**Table 2:** Competent Authorities

### 2.2 A common framework for cooperation

Member States who are in the same marine region are required to coordinate their action. To this end the strategy recommends use of the cooperation mechanisms set up by existing international conventions. The international organisations established by these conventions provide their scientific and technical know-how and allow cooperation to be extended to third countries that are parties.

### 2.3 The protection of the marine biodiversity

As mentioned above the MSFD is a legal instrument aimed at the protection of the marine biodiversity. As

including the Habitats and Birds Directives, or under international agreements" (Art. 11(1) second para).

<sup>22</sup> Before they are implemented, the measures decided by the Member States must be the subject of impact assessments and cost/benefit analyses.

<sup>23</sup> Source: Barreira. A., *et aliter*, "Gobernanza para la protección del medio marino en España: Guía Práctica", Madrid: Instituto Internacional de Derecho y Medio Ambiente (IIDMA), 2009. <http://www.iidma.org/ingles/privado/Archivos/GobernanzaproteccionC3%B3nmediomarinoweb.pdf>.

a result, the development and implementation of the thematic strategy should be aimed at the conservation of the marine ecosystems. This approach should include protected areas and should address all human activities that have an impact on the marine environment<sup>24</sup>.

The establishment of marine protected areas, including areas already designated or to be designated under the Habitats Directive<sup>25</sup>, the Birds Directive<sup>26</sup>, and under international or regional agreements to which the European Union or Member States concerned are Parties, is an important contribution to the achievement of good environmental status under this Directive.

The definition of environmental status of the marine waters includes references to the protection of species and habitats (Article 3(5)). Among the qualitative descriptors for determining good environmental status listed in Annex I the maintenance of biodiversity is included, which means the quality and occurrence of habitats and the distribution and abundance of species are in line with prevailing physiographic, geographic and climatic conditions.

Its Annex III contains an indicative list of the characteristics, pressures and impacts which includes, among the characteristics to take into consideration, the types of habitats and the biological characteristics (i.e: identification and mapping of special habitat types, especially those recognized or identified under Community legislation [the Habitats Directive and the Birds Directive] or international conventions as being of special scientific or biodiversity interest; a description of the biological communities associated with the predominant seabed and water column habitats and a description of the population dynamics, among others).

The PoM must include spatial protection measures contributing to coherent and representative networks of marine protected areas (MPAs), adequately covering the diversity of the constituent ecosystems, including Specially Protected Areas (SPAs) and Special Conservation Areas (SCAs) and MPAs as agreed by the Community or Member States concerned in the framework of international or regional agreements to which they are parties. If a human activity is likely to have a significant impact on the marine environment Member States shall 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. In 2013 Member States shall publish information on the MPAs and in 2014 the Commission shall present a report on the progress in the establishment of MPAs.

The implementation of the MSFD represents a challenge due to the diversity of sectors involved to guarantee the achievement of its goals. The under review Common Fisheries Policy is a very important policy which up to now has hardly taken into consideration its impacts in marine life. The very same EU environmental policy is showing difficulties to contribute to the protection of the marine biodiversity. An example of this is the deadline to designate SCAs of the Mediterranean bioregion. In 2006 the Commission adopted the list of sites of Community importance (LICs) for the Mediterranean region<sup>27</sup> which includes marine sites. However, on 21 September 2012, the six years deadline provided by Article 4(4) of the Habitat Directive, only a few LICs in that list were designated as SCA since the mediterranean Member States have not established the necessary conservation measures as required by Article 6(1) of that Directive<sup>28</sup>. As a consequence there is a delay already in the steps necessary to comply with the MSFD.

### 3 The implementation of the MSFD in Spain

Spain is in a peninsula and has two archipelagos. The Spanish marine environment is subject to important pressures from land-based activities and sea-based activities and maritime transportation, exploration and exploitation of oil and gas and fisheries. At the same time, it has a very rich marine biodiversity.

The seas and the ocean bathing Spain are governed by a complex system of law and regulations adopted and implemented by different levels of government. The powers for maritime and coastal affairs are mainly shared between the State Administration (national level) and the CC.AA administrations (regional level) in accordance with the 1978 Spanish Constitution. The MSFD underlines the need to count with a transparent and coherent legislative framework to achieve its objective. This framework must contribute to coherence between different policies and foster the integration of environmental concerns in other policies, such as the Common Agricultural Policy

<sup>24</sup> Para 5., Preamble MSFD.

<sup>25</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.07.1992).

<sup>26</sup> Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ L 20, 26.01.2009).

<sup>27</sup> Commission decision 2006/613/EC of 19 July 2006 adopting, pursuant to Council Directive 92/43/EEC, the list of sites of Community importance for the Mediterranean biogeographical region (OJ L 259, 21.09.2006).

<sup>28</sup> This article provides: "For special areas of conservation, Member States shall establish the necessary measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites."

(CAP), the Fisheries Common Policy and other relevant policies.<sup>29</sup>

The MSFD was transposed to the Spanish legal order through Law 41/2010, of 29 December, on the protection of the marine environment<sup>30</sup> (LPME). Thus, Spain transposed it after a delay. This Law also establishes the Spanish Network of Marine Protected Areas and regulates discharges to the sea from land-based sources and dumping. The implementation obligations until the end of 2012 mainly concerns the appointment and notification of CAs in addition to the initial assessment of the environmental status, the determination of good environmental status and the establishment of environmental status targets and indicators.

### 3.1 The Spanish marine sub-regions and marine districts

Spain is located within two marine regions: the North-East Atlantic Ocean where we find the following sub-regions: the Bay of Biscay and the Iberian Coast and the Macaronesian biogeographic region; and the Mediterranean Sea specifically within the Western Mediterranean Sea sub-region. Within the limits of these regions and sub-regions the LPME has established the following marine districts to facilitate the implementation of the Law. These are the North-Atlantic, the South-Atlantic, the Gibraltar Strait and Alboran Sea, the Levantine-Balearic and the Canary marine districts. The marine districts constitute the spatial scope where marine strategies will be developed.

Each of these marine districts is independent of the rest when applying its respective marine strategies. Nevertheless, LPME allows the government to adopt common guidelines to all marine strategies with the aim of guaranteeing the coherence of their objectives. The common guidelines may cover the following issues:

- The Spanish Network of Protected Areas.
- Discharges to the Sea
- Energy exploitation in the marine environment
- Marine research and access to marine data

- Assessment and monitoring of environmental quality of the marine environment
- Planning of activities carried out in the marine environment or which can affect it.
- Mitigation of the effects of and adaptation to climate change.

### 3.2 The distribution of competences for the protection of the marine environment

It is important to have in mind that in Spain there are ten coastal Autonomous Communities (CC.AA-regions): Andalucía, Asturias, Baleares, Canarias, Cantabria, Cataluña, Galicia, Murcia, País Vasco and Valencia. These hold powers which affect the marine environment.

Regarding the competent authorities it is important to take into consideration that the marine strategies shall apply while enabling the sustainable use of marine goods and services. For this reason the MSFD not only has an environmental protection dimension but that it also affects the different sectors using the marine environment. In Spain the competences for maritime and coastal issues are also shared between the General State Administration at a national level and the CC.AA. There are competences focusing on the subject matter (**sector-specific competences**) of the different Administrations and **territorial competences** which establish the spatial limit where the State, CC.AA and local Administrations can act.

For the areas of relevance for this Directive see Chart 1.

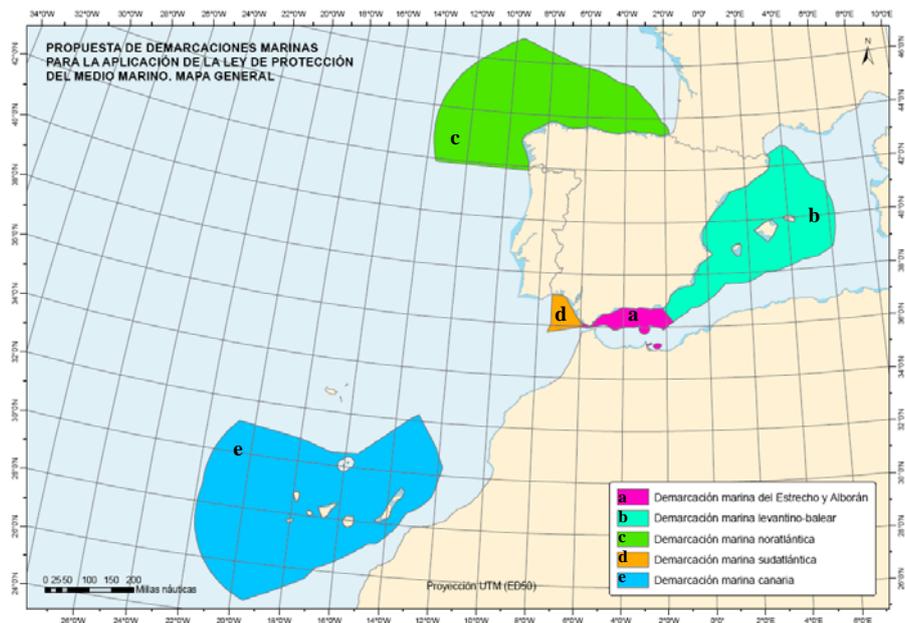


Chart 1: Map of the Spanish marine districts<sup>31</sup>

<sup>29</sup> Para 9 of its preamble and Art. 1.4.

<sup>30</sup> BOE (OJ) núm. 317, of 30.12.2010.

<sup>31</sup> Source: Ministry of Agriculture, Food and the Environment.

### 3.2.1 Marine biodiversity protection

The protection of marine biodiversity involves the establishment of MPA and the protection of marine species. It is an environmental competence provided for in Article 149.1.23 of the CE. It is important to take into consideration that according to Article 36.1. of Ley 42/2007, de 13 de diciembre, del Patrimonio Natural y de la Biodiversidad<sup>32</sup> (Law 22/2007, on Natural Heritage and Biodiversity) CC.AA are competent for declaring and determining the management system for MPA when the best available scientific evidence shows the ecological connectivity between the marine ecosystem and the terrestrial natural space protected. This distribution of competence is representing a hindrance for the establishment of Mediterranean SCAs since still no agreement has been reached between the national administration and the regional administrations on ecological connectivity. As a result no conservation measures are being in place as required by the Habitat Directive. This problem is very similar to the internal administrative obstacles Spain faced to comply with the WFD given that the Committee of Competent Authorities for river basin districts is comprised of national and regional administration officials. In fact, recently the Court of the European Union judged against the Kingdom of Spain for its failure to adopt the water management plans by 22 December 2009<sup>33</sup>.

According to Law 22/2007, a MPA can be designated through this specific category or through any other of the existing categories for the protection of natural areas<sup>34</sup>. Article 32 of Law 22/2007 provided the possibility to include MPAs in the Network of MPAs. The legal requirements and specifications for this Network have been established by Title III on 'The MPAs Network and the conservation of marine species and habitats' of Law 41/2010.

In the case of the protection of marine species, Law 42/2007 established the distribution of competences on this matter (see Table 3)<sup>35</sup>.

### 3.2.2 Pollution from vessels

The protection of the marine environment from pollution from ships and the prevention against and response to marine pollution from ships is a subject matter related to merchant marine in accordance with

Article 6.1. f)<sup>36</sup> of Ley 27/1992, de 24 de noviembre, de Puertos del Estado y de la Marina Mercante<sup>37</sup> (Law 27/1992, of 24 November, on State Ports and Merchant Marine). Merchant marine is an exclusive competence of the General Administration of the State as provided by Article 149.1.20 de la CE<sup>38</sup>.

### 3.2.3 Pollution from land-based sources

This aspect refers to water discharges from sources located in coastal areas (direct discharges) as well as indirect discharges from river basins. Water discharges according to the TC Ruling 149/1991 on Ley 22/1988, de 28 de julio, de Costas (Law 22/1988, of 28 July, on Coastal Zones), is an expression of the competence related to environmental protection as provided by Article 149. 1.23 of the CE. For **direct discharges** to the coastal and transitional waters the CC.AA hold the competence to issue the permits. For **indirect discharges** Article 149.1.22 establishes that the State shall have exclusive competence over the "legislation, regulation and concession of hydraulic resources and development where the water-streams flow through more than one CCAA" (intercommunity river basins). The CCAA therefore can assume exclusive competence over hydraulic resources which are in their integrity within the territory of one CCAA. In addition, according to Article 148.1.10, the CCAA can assume competence in the area of planning, construction and exploitation of hydraulic projects, canals and irrigation of interest to the CCAA as well as mineral and thermal waters. Therefore, in the case of inland waters and the planning of water use, the CE differentiates between those bodies of water running through or shared by two or more CCAA, and those exclusively located within one CCAA. In the first case regarding intercommunity river basins, the competence for management is in the hands of the Central administration; in the second case, intracommunity river basins are under the competence of the CCAA if they assume exclusive competence.

### 3.2.4 Off-shore wind farms

The competence in terms of energy is established by Article 149.1.22 of the CE providing for the exclusive competence of the State for authorizing energy facilities when the energy is used in more than one CC.AA or the transportation of energy goes to the territory of a different CC.AA than from where it is produced.

<sup>32</sup> BOE núm. 299, de 14.12.2009.

<sup>33</sup> Judgement of 4 October 2012, C-403/11.

<sup>34</sup> At the State level these categories are: National park, Park, natural reserve, natural monument, protected landscape, natural areas protected under Natura 2000 Network, natural areas protected under international conventions and marine reserves (Art. 26, L 41/2010). As CC.AA also have competences to create MPAs the categories are very diverse under the legislation on nature protection of the CC.AA.

<sup>35</sup> Arts. 52 a 58 Law 42/2007. Source for the table: Barreira, A., *et aliter* 2009, *supra* note 23.

<sup>36</sup> This article considers as 'merchant marine' the prevention of pollution from ships, platforms and another installations in the sea found in areas where Spain exercises its sovereignty and jurisdiction.

<sup>37</sup> BOE núm. 283, of 25.11.1992.

<sup>38</sup> This article attributes the exclusive competence to the State in the field of merchant marine and ships flagging in addition to lighting of coastal areas and ports of general interest.

Scope	Competence
<b>State (national level)</b>	<ol style="list-style-type: none"> <li>1. When the habitats or critical areas of the marine species subject to protection are located in marine areas under the sovereignty or jurisdiction of Spain, if there is no ecological connectivity between the marine ecosystem and the terrestrial nature area to be protected or when the species to be protected are highly migratory species, the State shall adopt the necessary measures to guarantee the conservation of the marine biodiversity taking into consideration the preservation of their habitats and to establish specific protection regimes for those wild species whose situation so requires.</li> <li>2. Preparation of the List of Wild Species under a Special Protection Regime after consulting the CC.AA. Any citizen or organization can request the inclusion of a species, change of category or exclusion from this List.</li> <li>3. Establishment of an incidental catches and deaths control system of marine species under its competence included in that List.</li> <li>4. Within that List, the State shall prepare, on its own initiative or upon request by the CC.AA, the Spanish Catalogue of Threatened Species. Any citizen or organization can request the inclusion of a species, change of category or exclusion from this List.</li> <li>5. Approval of a recovery plan for those marine species under its competence and included in that Catalogue as an endangered species and designation of critical areas, if necessary.</li> <li>6. Approval of a conservation plan for those marine species under its competence and included in that Catalogue as vulnerable species and designation of critical areas, if necessary.</li> </ol>
<b>CC.AA (regions)</b>	<p>Protection of marine species located in areas, habitats or critical areas where there is ecological connectivity between the marine ecosystem and the terrestrial area to be protected, holding in such a case the competence listed for the State in the previous paragraphs 1, 3, 5 and 6 explained in the list of the State's competences.</p> <p>They can include marine species in their lists of wild species under a special protection regime.</p> <p>They can include marine species in their catalogues of threatened species establishing also the 'endangered' and 'vulnerable' categories, and other specific categories, determining prohibitions and supplementary acts considered as necessary for their preservation. In addition, they can increase the protection level of the species included in the Spanish Catalogue of Species.</p>

**Table 3:** Distribution of competences for the protection of marine species

### 3.2.5 Fisheries

Article 149.1.19 attributes to the State the exclusive competence for fisheries without prejudice to the competences of the CC.AA for the planning of the fisheries sector (the profession, markets, fleets, and anything related to the economic aspects of the sector but not with the extraction). Article 148.1.11 of the CE attributes to the CC.AA the competence for fisheries in internal waters (those behind the baseline from which the extent of territorial waters is measured), seafood extraction and aquaculture. Thus the State holds competence in the fisheries sector in external waters (those beyond the baseline from which the extent of territorial waters is measured). These competences must be understood under the framework of the Common Fisheries Policy.

### 3.2.6 Exploration and exploitation of oil in the seabed

In accordance with Article 149.1.13 of the CE, the State holds the exclusive competence for the basis and coordination of the economic activity. In addition, in accordance with paragraph 25 of that Article, it also holds exclusive competence in establishing the basis

of the mining and energy regime. Article 3 of Ley 34/1998, de 7 de octubre, del Sector de Hidrocarburos<sup>39</sup> (Law 34/1998, of 7 October, on the Oil Sector) provides for the distribution of competences in this sector establishing that the State holds the competence to “grant exploration authorizations, research permits and exploitation concessions in the seabed area” when it relates to oil extracted from the subsoil of the sea. In addition, the State has to “grant exploration authorizations and research permits when its scope goes from terrestrial to subsoil areas”.

### 3.3 The Competent Authorities

LPME appoints the Ministry of Agriculture, Food and the Environment as the responsible authority for the development of the marine strategies. This work is coordinated from the Directorate General for the Sustainability of the Coast and the Sea which is subordinated from the Secretary of State for the Environment.

<sup>39</sup> BOE núm. 241, de 8.10.1998.

To facilitate its implementation Article 22 of the LPME provided for the establishment of the **Interministerial Commission on Marine Strategies** through a regulation. This Commission was established by Real Decreto 715/2012, de 20 de abril, por el que se crea la Comisión Interministerial de Estrategias Marinas<sup>40</sup>. The role of that Commission is to coordinate the elaboration, implementation and monitoring of the marine environment planning, that is the marine strategies to be prepared at the marine district level. This Commission will be comprised of ministerial departments holding competences which relate to the marine environment.

The cooperation among the State and the CC.AA to implement this Law will take place through the **Environmental Sector Conference**<sup>41</sup> comprised of the Minister for ERMA and the Environment Consejeros (Regional Ministers) of each CC.AA.

### 3.4 The development of the marine strategies

The works for the initial assessment of the current environmental status started in 2011. A significant number of public institutions have participated in this process.

The documents containing the initial assessment, the determination of good environmental status and the establishment of environmental for each of the five marine districts were opened to a public consultation procedure from 1 June to 15 July 2012<sup>42</sup>. In addition, a framework document introducing the marine strategies and document on birds prepared for the marine strategies were also subject to public consultation. However, at the time of writing this article, in October 2012, these have not yet been adopted in spite of the deadline provided by the Directive being 15 July 2012.

One of the main challenges found in this initial assessment has been the scarce availability of data.

## 4 Conclusions

The MSFD represents a step forward for the protection of the marine environment at the EU level. However, it is paramount to guarantee its timely implementation to achieve its objectives. It also represents a challenge for coordinating it with other pieces of environmental legislation including horizontal instruments as the Directive on access to

environmental information<sup>43</sup> of the Directive on Environmental Impact Assessment<sup>44</sup>. The future EIA Directive should take into consideration marine projects and its interaction with this Directive. In addition, the future CFP must take into consideration the aim of this Directive. Thus, the requirement of coherence and integration of the MSFD must be put into practice to achieve good environmental status of marine waters, practices which until now were not present in the sector-specific way to deal with the oceans.

At the national levels, it will be interesting to wait and see whether the results of the initial assessments will have any impact on projects to be developed in the marine environment such as oil and gas drilling projects.

Without hesitation, the implementation of the MSFD in Spain represents a great change in its policy on the marine environment. Until now, there has been neither coordination nor integration in Spain among the policies having an impact on the marine environment. The lack of coordination is already posing problems to protect the marine biodiversity in Spain to establish SCAs as explained. In addition, the institutions involved in those policies are not used to integrate other considerations in its day to day work and even less to sharing and providing information to the public, one important requirement for participation as required in the MSFD. However, this Directive also allows progress and improvement in the implementation of marine protection instruments.

<sup>40</sup> Royal Decree 715/2012, of 20 April, establishing the Interministerial Commission on Marine Strategies. BOE núm 113, of 11.05.2012.

<sup>41</sup> The Sectoral Conferences are coordination bodies between the State and the CC.AA. These are provided by Article 5 of the Ley 30/1992, de 26 de noviembre de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (Law 30/1992, of 26 November, on the Legal Regime of Public Administrations and the Common Administrative Procedure).

<sup>42</sup> Available at <http://www.magrama.gob.es/es/costas/participacion-publica/em.aspx>.

<sup>43</sup> Directive 2003/4/EC of the European Parliament and of the Council of 28 January on public access to environmental information and repealing Council Directive 90/313/EEC (OJ L 41, 14.02.2003).

<sup>44</sup> Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ L 26, 28.01.2012).

## Imprint

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The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.

The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

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The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R. carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

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The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.

The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.

The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of homo oeconomicus institutionalis, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

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## elni

*In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.*

*Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.*

*elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.*

### Coordinating Bureau

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

### elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focusing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt).

### elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researchers, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

### Publications series

elni publishes a series of books entitled "Publications of the Environmental Law Network International". Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference.

### elni Website: elni.org

The elni website [www.elni.org](http://www.elni.org) contains news about the network. The members have the opportunity to submit information on interesting events and recent studies on environmental law issues. An index of articles provides an overview of the elni Review publications. Past issues are downloadable online free of charge.

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