

Introducing Maritime Spatial Planning Legislation in the EU: Fishing in Troubled Waters?

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Abstract

Maritime spatial planning (MSP) is a process that enhances comprehensive management of marine space in line with the ecosystem-based approach. Initially introduced as a tool for environmental protection and conservation at the national level, it is nowadays associated with the expansion and intensification of human activities, mainly of an economic nature, in offshore waters and the first attempts for cross-border coordination and cooperation. This expansion in MSP objectives has brought to the forefront the need to introduce institutional mechanisms that would enhance uniformity in states' practice and the conditions required for cross-border cooperation, taking into account the lack of universally agreed upon rules in this domain. The adoption of the 2014 EU Directive establishing a framework for maritime spatial planning constitutes the first attempt to regulate MSP regionally. This article discusses the content of the new act, its position in relation to the European *acquis* and the international law of the sea and its implications on Member States' management of the marine space falling under their jurisdiction.

Keywords

maritime spatial planning, EU maritime policy, maritime governance, ocean governance, ecosystem-based management

1. Introduction

Maritime spatial planning (MSP) is considered to be one of the cutting edge practices in ecosystem-based management due to its comprehensive perception of marine space. Introduced as a horizontal policy tool in the EU integrated maritime policy in 2007, it seemed to facilitate the implementation of the ambitious EU maritime governance model, by enhancing Member States' capacity to administer in a comprehensive manner the various sectoral policies implemented or having an impact on marine space. Although the European Commission's contribution was initially restricted to policy guidelines, MSP soon gained momentum in the EU; the prioritisation of MSP in the Euro-

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pean Commission's agenda coincided with the institution's efforts to reverse the impact of the global financial crisis on the European economy. Thus, although initially introduced as a tool for the conservation of marine sustainability, the growing interest vested in offshore activities, as well as the prime concern in economic dimensions of maritime affairs, contributed to the Commission's reappraisal of MSP both in relation to its content as well as in terms of its legal form.

In this context, the launching of a legislative procedure on behalf of the Commission in March 2013 catering for integrated coastal zone management (ICZM) and MSP constituted a very ambitious venture, being the first attempt to introduce an international legal framework for MSP. This shift from soft law to legally binding rules, however, has become a highly contentious issue within EU institutions and among Member States. The criticism received was mainly due to the confusion created in relation to the proposed act's contested conformity with EU fundamental principles, Member States' reluctance to adopt MSP legislation at the EU level since their practice in this domain was far from uniform and the institutional ambiguity derived from the lack of universally agreed rules on MSP. A Directive catering solely for to MSP was finally adopted in July 2014, having undergone several changes both in terms of its substantive as well as its procedural provisions.

This article discusses the EU's approach to MSP within the broader context of MSP evolution and practice, by analysing the content of the new MSP Directive as well as its position vis-à-vis the European *acquis* and international law of the sea. These issues will be examined in light of the obligations introduced for Member States and the challenges that go hand in hand with the Directive's implementation in the different European maritime regions.

2. MSP: an evolving concept and practice

2.1 The emergence and evolution of MSP

Spatial planning of the marine environment emerged in the early 1980s as an environmental conservation management process used by national authorities in order to address the challenges arising from stress exposure of marine protected or sensitive areas due to anthropogenic activity and/or natural processes. Australia is considered to be a pioneer in this domain since it was the first to introduce MSP at the Great Barrier Reef Marine Park² management scheme in 1981.³ MSP proliferated around the globe in the 1990s and 2000s; several countries have adopted legislative measures and

² Based on a multiple zoning system, established by the Great Barrier Reef Marine Park Act (AU) 1975 applying to an area of 344,400 km².

³ Jon Day, 'The need and practice of Monitoring, Evaluating and Adapting Marine Planning and Management – Lessons from the Great Barrier Reef' (2008) 32 Mar Policy 823. For an elaborate account of the MSP profile and its evolution, see Richard Kenchington and Jonathan Day, 'Zoning, a fundamental cornerstone of effective Marine Spatial Planning: lessons learnt from the Great Barrier Reef, Australia' (2011) 15 J Coast Conservat 271.



institutional mechanisms for the design and implementation of spatial plans in the marine waters under their jurisdiction.⁴ These projects were conducted depending on the spatial scale of their application, namely:

(a) in large marine areas, based on the philosophy of large marine ecosystems,⁵ as in the cases of the Eastern Scotian Shelf Integrated Ocean Management Plan⁶ under Canada's Oceans Act of 1997⁷ or Great Britain's English territorial sea and Exclusive Economic Zone (EEZ) MSP under the 2009 Marine and Coastal Access Act;⁸ and

(b) in marine areas of a smaller scale, as in the cases of the Florida Keys National Marine Sanctuary in the USA,⁹ China's functional zoning system¹⁰ and most of the European countries (Belgium,¹¹

4 For a comprehensive account of national MSPs, see Steven Jay and others, 'International Progress in Marine Spatial Planning' (2013) 27 OCYB 171; Nicole Schaefer, Vittorio Barale, 'Maritime spatial planning: opportunities & challenges in the framework of the EU integrated maritime policy' (2011) 15 J Coast Conservat 237, 244; UNESCO, 'MSP around the world' <www.unesco-ioc-marinesp.be/msp_around_the_world> accessed 10 June 2015.

5 The concept of large marine ecosystems first appeared in the 1995 Global Environment Facility Operational Strategy. See Global Environment Facility, 'GEF Revised Operational Guidelines' (1995) GEF/C.6/3, 57, 68. The term refers to maritime regions of about 200,000km² or greater, defined not by administrative criteria but by bathymetry, hydrography, productivity and trophic interaction. However, it should be taken into account that states' maritime jurisdiction is a prerequisite for MSP implementation, thus reference to the concept of large marine ecosystems is made in terms of the size of the area falling into the scope of a management plan, which lies within the jurisdictional limits of coastal states but still, due to its breadth, constitutes an ecological entity. At the regional or international level, the perception of marine space as large marine ecosystems is anticipated to foster 'harmonization of law [among states], participation in regional institutions and efforts, creation of treaty regimes, and provision for dispute settlement'. See Lawrence Juda, Timothy Hennesey, 'Governance Profiles and the Management of the Uses of Large Marine Ecosystems' (2001) *Ocean Dev & Int'l L* 43, 57.

6 This integrated ocean management plan, completed in 2008, covers an area of 325,000km². UNESCO, 'Marine Spatial Planning Initiative – Canada (ESSIM)' <www.unesco-ioc-marinesp.be/msp_practice/canada_essim> accessed 8 June 2015.

7 Ocean Act (Canada) 1996, enacted in 1997.

8 Marine and Coastal Access Act (UK) 2009. Section 55 of the Act delegated the Marine Management Organization to conduct MSP for the territorial sea and EEZ of England, corresponding to a total of 253,000 km². See UNESCO, 'Marine Spatial Planning Initiative – United Kingdom (England)' <www.unesco-ioc-marinesp.be/msp_around_the_world/united_kingdom_england> accessed 6 June 2015.

9 Introduced in 1997, MSP for Florida Keys National Marine Sanctuary covers an area of 9,600 km². UNESCO, 'Marine Spatial Planning Initiative – United States (Florida Keys)' <www.unesco-ioc-marinesp.be/spatial_management_practice/unit-ed_states_florida_keys> accessed 5 June 2015.

10 China has introduced a system of Marine Functional Zoning Plans (MFZP) with the Law of the People's Republic of China on the Use of Sea Areas, adopted in 2002. This system allocates human activities using a zoning system designed according to the ecological and geographical specificities of each maritime subregion. MFZP is currently applied on China's territorial sea, covering an estimated area of 174,000 km². UNESCO, 'Marine Spatial Planning Initiative – China' <www.unesco-ioc-marinesp.be/spatial_management_practice/china> accessed 5 June 2015.

11 Covering an area of 3,600 km², UNESCO, 'Marine Spatial Planning Initiative – Belgium' <www.unesco-ioc-marinesp.be/spatial_management_practice/belgium> accessed 5 June 2015. A Royal Decree was adopted in Belgium in March 2014 on MSP for the Belgian part of the North Sea, covering the territorial sea, the continental shelf and the EEZ. See also Erik Olsen and others, 'Integration at the Round Table: *Marine Spatial Planning in Multi-Stakeholder Settings*' (2014) 9 PLoS ONE e109964.



Germany,¹² the Netherlands,¹³ etc.).

In the European seas, however, due to the proximity of adjacent or opposite states and the jurisdictional fragmentation of the marine space thereof, it soon became evident that small-scale MSP projects confined the effectiveness of MSP processes. In this context, the first transboundary project was realised in the Wadden Sea region by Germany, Denmark and the Netherlands,¹⁴ while a number of pilot projects followed, sponsored by the European Commission, such as the Plan Bothnia in the Baltic Sea,¹⁵ the Maspnose Plan in the North Sea¹⁶ or the most recently launched Adriplan in the Adriatic-Ionian Sea.¹⁷

2.2 MSP conceptual and normative premises

What is evident from the above-mentioned state and regional practice is that MSP implementation,

- (a) while taking into account local needs and specificities, is related to a comprehensive perception of the marine space, which transcends administrative boundaries and focuses on the biophysical and geographical features of larger maritime areas;
- (b) whether conducted and implemented at the national level or regionally, has been consistent with international law allocating states' rights and obligations at sea;¹⁸
- (c) encompasses a gradual shift from conducting MSP strictly for environmental management to a more comprehensive perception of spatial allocation of human activities and natural

12 MSP in Germany covers an area of 33,100 km² (approximately 28,600 km² in the North Sea and about 4,500 km² in the Baltic Sea), UNESCO, 'Marine Spatial Planning Initiative – North/Baltic Seas' <www.unesco-ioc-marinesp.be/msp_practice/germany_north_baltic_seas> accessed 5 June 2015. MSP jurisdiction is shared by German federal authorities for the EEZ and German federal states for the territorial sea.

13 In the Dutch part of the North Sea, covering both territorial waters and the EEZ in an area of about 58,000 km², UNESCO, 'Marine Spatial Planning Initiative – The Netherlands' <www.unesco-ioc-marinesp.be/spatial_management_practice/the_netherlands> accessed 5 June 2015.

14 Within the framework of the tripartite cooperation for the protection of the marine environment launched in the 1970s, inaugurated with the adoption of the Joint Declaration on the Protection of the Wadden Sea in 1982; the Declaration was updated in 2010 making explicit reference to ICZM and MSP activities. See Joint Declaration on the Protection of the Wadden Sea, 9 December 1982 and Sylt Declaration and 2010 Joint Declaration, 11th Trilateral Governmental Conference on the Protection of the Wadden Sea, Westerland/Sylt 18 March 2010 <www.waddensea-secretariat.org/trilateral-cooperation/organisational-structure> accessed 14 May 2015.

15 Project Plan Bothnia – A Maritime Spatial Planning Process in the Baltic Sea (2010-2012) <<http://planbothnia.org/about/>> accessed 6 June 2015.

16 Project MASPNOSE – Maritime Spatial Planning in the North Sea (2010-2012) <www.wageningenur.nl/en/show/Maspnose-Maritime-spatial-planning-in-the-North-Sea.htm> accessed 6 June 2015.

17 Project ADRIPLAN - Adriatic Ionian Maritime Spatial Planning (2013-2015) <<http://adriplan.eu/index.php/project/objectives>> accessed 5 June 2015.

18 For a comprehensive analysis of the international legal regime on maritime spatial planning, see Frank Maes, 'The International Legal Framework for Marine Spatial Planning' (2008) 32 Mar Policy 797; MRAG, 'Legal Aspects of Maritime Spatial Planning', Final Report to DG Maritime Affairs and Fisheries, Framework Service Contract, No. FISH/2006/09-LOT-2, October 2008; and HELCOM, 'Joint HELCOM-VASAB Maritime Spatial Planning Working Group Report 2010-2013' (2013).



processes on the marine space.

The latter were confirmed by UNESCO's¹⁹ first attempt to provide a definition and codify the main principles for MSP development and implementation. According to UNESCO, MSP constitutes

a [public] process of analyzing and allocating parts of three dimensional marine spaces to specific uses, to achieve ecological, economic and social objectives that are usually specified through the political process; [the latter] usually results in a comprehensive plan or vision for a marine region. MSP is an element of [ecosystem-based] sea use management.²⁰

Thus, the MSP objective is the delivery of a comprehensive spatial plan (CSP) for a specific marine area or ecosystem. A CSP is discerned by its three-dimensional character since it addresses activities taking place on the seabed and subsoil, the water column and the surface of the sea. According to the European Commission, '[t]ime should also be taken into account as a fourth dimension, as the compatibility of uses and the "management need" of a particular maritime region might vary over time.'²¹ Maritime spatial plans contain the general vision as well as the operational objectives to be realised in a certain time span, describe the management, assessment and review procedures and make use of existing or introduce new - where necessary - institutional provisions for the management of competing human activities in specific marine areas, usually through the introduction of zoning methodology and/or a permit system.²²

The most significant MSP components could be codified as follows.

2.2.1 Ecosystem-based approach to the marine space

In spite of the fact that the concept of ecosystem-based approach is lacking a 'universally agreed

19 UNESCO's Intergovernmental Oceanographic Commission (IOC) and the Man and the Biosphere Programme organised the first international workshop on the use of MSP as a tool to implement ecosystem-based, sea use management in 2006. See UNESCO, 'Marine Spatial Planning Initiative – MSP Workshop 2006' <www.unesco-ioc-marinesp.be/msp_workshop_2006> accessed 2 June 2015. It should be mentioned that the Man and the Biosphere Programme, introduced in 1971, was the first attempt by the international community to implement a zoning system for the preservation of natural and cultural resources. See UNESCO, 'Man and the Biosphere Programme' <www.unesco.org/new/en/natural-sciences/environment/ecological-sciences/man-and-biosphere-programme/> accessed 5 June 2015.

20 This is a consolidated definition from Charles Ehler and Fanny Douvere, *Visions for a Sea Change. Report of the First International Workshop on Marine Spatial Planning. Intergovernmental Oceanographic Commission and Man and the Biosphere Programme*, IOC Manual and Guides No 46, ICAM Dossier No 3 (UNESCO 2007) 13; and Charles Ehler and Fanny Douvere, *Marine Spatial Planning: a step by step approach toward ecosystem-based management. Intergovernmental Oceanographic Commission and Man and the Biosphere Programme*, IOC Manual and Guides No 53, ICAM Dossier No 6 (UNESCO 2009) 7, 10, 18.

21 Commission of the European Communities 'A Roadmap for Maritime Spatial Planning: Achieving Common Principles in the EU' (Communication) COM (2008) 791 final, 9.

22 Ehler and Douvere, *Marine Spatial Planning: a step by step approach toward ecosystem-based management. Intergovernmental Oceanographic Commission and Man and the Biosphere Programme* (n 20) 22. See also Hermanni Backer, 'Transboundary Maritime Spatial Planning: A Baltic Sea Perspective' (2011) 15 J Coast Conservat 279, 280.



definition,²³ there is a minimum consensus on its main features²⁴ at the international level,²⁵ namely (a) its comprehensive character, encompassing both ecosystemic and biological features and processes as well as political and socio-economic parameters;²⁶ (b) the perception of marine space as an ecological unity²⁷ often requiring intergovernmental cooperation; (c) the threefold approach to the marine environment encompassing application of the precautionary principle, the sustainable use of marine resources and the restoration of marine ecosystems; (d) the participatory decision-making processes, involving stakeholders and local communities' involvement in the design, implementation and assessment of management plans; (e) the adoption of institutional processes that allow for the integration of different sectoral policies in strategic and management planning; and (f) the decisive role of marine knowledge both in terms of the output of scientific research and traditional/indigenous experience and practice.

In this context, the main parameters for ecosystem-based MSP²⁸ may be discerned into *institutional*: ranging from the adoption of national legislation and institutional mechanisms for the effective implementation of relevant international and regional legal instruments; *managerial*: such as the adoption of 'high level' and 'operational goals' or the use of systematic monitoring, assessment and the adoption of adaptive management processes; and *knowledge-oriented*: marine knowledge is not restricted to the findings of conventional marine scientific research, that is the study of the marine environment and its processes; marine knowledge for MSP purposes entails the broadening of the scientific spectrum in order to consider the findings of other disciplines, mainly social sciences, such

23 Report on the Work of the United Nations Open-Ended Informal Consultative Process on Oceans and the Law of the Sea at its Seventh Meeting, UN Doc A/61/156 (17 July 2006) 2.

24 Although this consensus seems to be contested in practice when ecosystem-based principles are further specialized. See Rachel D Long and others, 'Key principles of marine ecosystem-based management' (2015) 57 Mar Policy 53.

25 According to the United Nations Open-Ended Informal Consultative Process on Oceans and the Law of the Sea, an ecosystem-based approach should, *inter alia*, '(a) Emphasize conservation of ecosystem structures and their functioning and key processes in order to maintain ecosystem goods and services; (b) Be applied within geographically specific areas based on ecological criteria; (c) Emphasize the interactions between human activities and the ecosystem and among the components of the ecosystem and among ecosystems; (d) Take into account factors originating outside the boundaries of the defined management area that may influence marine ecosystems in the management area; (e) Strive to balance diverse societal objectives; (f) Be inclusive, with stakeholder and local communities' participation in planning, implementation and management; (g) Be based on best available knowledge, including traditional, indigenous and scientific information and be adaptable to new knowledge and experience; (h) Assess risks and apply the precautionary approach; (i) Use integrated decision-making processes and management related to multiple activities and sectors; (j) Seek to restore degraded marine ecosystems where possible; (k) Assess the cumulative impacts of multiple human activities on marine ecosystems; (l) Take into account ecological, social, cultural, economic, legal and technical perspectives; (m) Seek the appropriate balance between, and integration of, conservation and sustainable use of marine biological diversity; and (n) Seek to minimize adverse impacts of human activities on marine ecosystems and biodiversity, in particular rare and fragile marine ecosystems', *ibid* 2-3.

26 Howard I Browman and Konstantinos I Stergiou (coord), 'Politics and socio-economics of ecosystem-based management of marine resources' (2005) 300 Mar Ecol Prog Ser 241.

27 In line with the reference of the Preamble of the United Nations Convention on the Law of the Sea that 'the problems of ocean space are closely interrelated and need to be considered as a whole'. United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

28 Based on the elaborate discussion of ecosystem-based MSP in Stelios Katsanevakis and others, 'Ecosystem-based marine spatial management: review of concepts, policies, tools and critical issues' (2011) 54 Ocean Coast Manag 807.



as economics, law and politics. Apart from the scientific input to MSP, the latter benefits from traditional knowledge as a basis for the sustainable use of marine resources. Last but not least, activities related to marine knowledge are not confined to research but also include the use of best practices for the organisation of data as well as their availability (both in terms of interoperability and open access).²⁹

It should be mentioned that the relationship between the institutional and managerial dimensions of ecosystem-based MSP is Janus-faced: on the one hand, these two processes seem to be complementary; on the other hand, given the lack of international regulation in this domain, they reflect the normative-functionalist divide in international law theory since MSP prioritises the attainment of given project-based objectives and not the ‘normative questions about the ends of the action.’³⁰

2.2.2 Governance principles underlying MSP

According to the UNESCO best practices³¹ on the administrative and institutional organisation of the MSP process, the following principles should prevail:

- (i) The integration principle: MSP, being an inter-sectoral venture, should integrate different policies falling under the competence of different authorities (e.g. different ministries) or levels of state organisation (depending on the degree of decentralisation of power in a state).
- (ii) The transparency principle: MSP decisions should be open to public scrutiny, while the right of access to relevant information should be ensured.
- (iii) The public trust principle, relating to the development of local communities’ or societal confidence in the objectives and final outcome of the MSP process.

As far as the political process of MSP is concerned, according to UNESCO’s definition, MSP constitutes a public process. This means that public engagement, defined as ‘the practice of involving members of the public in the agenda-setting, decision-making, and policy-forming activities of organisations/institutions responsible for policy development,’³² should be ensured. Political science theory discerns three types of public participation:³³

29 Andrus Meiner, ‘Integrated Maritime Policy for the European Union. Consolidating Coastal and Marine Information to Support Maritime Spatial Planning’ (2010) 14 J Coast Conservat 1.

30 According to Koskenniemi’s critique on international law’s managerial approach. See Martti Koskenniemi, ‘The Politics of International Law: 20 Years Later’ (2009) 20 EJIL 7, 15.

31 See Ehler and Douvère, *Marine Spatial Planning: a step by step approach toward ecosystem-based management. Intergovernmental Oceanographic Commission and Man and the Biosphere Programme* (n 20) 40.

32 Tyler D Knowlton, ‘Public Engagement: Building Institutional Capacity’, Institute of Public Policy, OP 1 (University of Central Asia 2013); Gene Rowe, Lynn J Frewer, ‘A Typology of Public Engagement Mechanisms’ (2005) 30 Sci Technol Hum Val 251, 253.

33 *ibid* 254-56.



- (i) Public communication/information: the public is informed about an initiative proposed by the competent authorities. Here, the information follows one direction, since feedback on the public's reaction is not pursued in this type of initiative.
- (ii) Public consultation: in this case the aim of the competent authorities is to receive the public's reaction and contributions in relation to a proposed initiative.
- (iii) Public participation: it ranges from the organisation of interactive workshops to participatory decision-making processes (using a referendum, or in participatory management schemes often used in the domain of areas where environmental conservation schemes are applied).

The type of public involvement, as well as the degree of institutionalisation of the relevant MSP processes, depends on the constitutional and administrative system as well as the political culture of different countries. During the last several decades, however, there has been a proliferation of regional instruments and legislation that have contributed to the establishment of common standards for public engagement, especially in the domain of environmental protection with the Aarhus Convention³⁴ and the EU legislation on Environmental Assessment³⁵ featuring as the most illustrative examples.

3. MSP in the EU: the challenges of institutionalisation

3.1 The route to Ithaca: from standard-setting to secondary legislation

MSP was initially conceived as a policy tool that would support decision-making in the different policy domains of EU maritime policy, which constituted the organisation's first attempt to adopt

34 United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention). The Aarhus Convention caters for the obligation of public authorities to disseminate information related to the environment, the right of access of the public to environmental information held by public authorities, the participation of the public in environmental decision-making and the access to justice for environmental issues.

35 Council Directive (EU) 2011/92 on the assessment of the effects of certain public and private projects on the environment (Environmental Impact Assessment - EIA Directive) [2011] OJ L 26/1 as amended by Council Directive (EU) 2014/52 on the assessment of the effects of certain public and private projects on the environment [2014] OJ L 124/1 and the Council Directive (EC) 2001/42 on the assessment of the effects of certain plans and programmes on the environment (Strategic Environmental Assessment - SEA Directive) [2001] OJ L 197/30.



an integrated approach vis-à-vis maritime affairs.³⁶ Spatial planning had a strong environmental element at the time, since it was perceived as ‘a fundamental tool for the sustainable development of marine areas and coastal regions, and for the restoration of Europe’s seas to environmental health,³⁷ through the management of competing uses of the seas. Since European institutions were lacking decision-making competence in this area, the European Commission decided to codify common principles and guidelines through soft law documents in order to reinforce Member States’ commitment to their implementation.³⁸

In this context, and within the timeline set by the Action Plan accompanying the Blue Paper on Integrated Maritime Policy,³⁹ the European Commission published a Roadmap for MSP in 2008 defining MSP as ‘a tool for improved decision-making’ that would function as ‘a framework for arbitrating between competing human activities and managing their impact on the marine environment’ with an ‘objective ... to balance sectoral interests and achieve sustainable use of marine resources in line with the EU Sustainable Development Strategy.’⁴⁰ While in the 2008 Roadmap, environmental primacy is still preserved, two conceptual elements prevail: first of all, MSP is presented as purely managerial in character since it is perceived as a governance tool, and not a process as defined by UNESCO, to be used in order to support existing sectoral policies; secondly, the MSP concept transcends its environmental functional character being associated to the ‘competitiveness of the EU’s maritime economy’, perceived as a ‘framework providing legal certainty and predictability’ and promoting ‘investment in such sectors, which include offshore energy development, shipping and maritime transport, ports development, oil and gas exploitation and aquaculture, boosting Europe’s capacity to attract foreign investment.’⁴¹

36 Commission of the European Communities, ‘An Integrated Maritime Policy for the European Union’ (Communication COM (2007) 575). See also Sylvain Gambert, ‘The Integrated Maritime Policy of the European Union’ in Bilian Cicin-Sain and others (eds), *Routledge Handbook of National and Regional Maritime Policies* (Routledge 2015) 495; Yves Auffret, ‘Les perspectives de l’Union Européenne en matière d’affaires maritimes et en particulier les développements de la politique maritime de l’Union Européenne’ in Institut du Droit Economique de la Mer (eds), *Droit international de la mer et droit de l’union Européenne. Cohabitation, confrontation, coopération?* (Pedone 2014) 25; and Timo Koivurova, ‘A Note on the European Union’s Integrated Maritime Policy’ (2009) 40 *Ocean Dev & Int’l L* 171.

37 Commission, ‘An Integrated Maritime Policy for the European Union’ (n 36) 6.

38 According to the 2007 Communication, ‘[d]ecision-making competence in this area lies with the Member States. What is needed at European level is a commitment to common principles and guidelines to facilitate the process in a flexible manner and to ensure that regional marine ecosystems that transcend national maritime boundaries are respected’, *ibid*.

39 In line with the Action Plan accompanying the 2007 Communication, the Commission ‘[b]uilding on existing EU initiatives with a strong maritime spatial planning dimension, including the ICZM Recommendation and the proposed Marine Strategy Directive, which introduces elements of maritime spatial planning, ... will propose a road map in 2008 to facilitate and encourage the further development of maritime spatial planning in the Member States. In 2008, it will examine the needs and different options, including for zoning, to making compatible different maritime activities, including the maintenance and strengthening of biodiversity’. See Commission of the European Communities, ‘Accompanying document to the Communication - An Integrated Maritime Policy for the European Union’ (Commission staff working document) SEC (2007) 1278 final, 9.

40 Commission, ‘A Roadmap for Maritime Spatial Planning’ (n 21) 2.

41 *ibid* 3.



In this context, the 2008 Roadmap identifies ten key principles⁴² for MSP implementation in the EU. These principles could be classified according to their function in the MSP process, as follows:

- (a) management principles: detailed objective-setting, including arbitration mechanisms in cases of conflicts of sectoral interests; functional approach to management plans according to the area and type of activity; integration of monitoring and evaluation procedures;
- (b) governance principles: stakeholder participation (including cross-border consultation) and transparency; adoption of legislative and administrative measures at the national level, including the creation of an administrative body for MSP coordination; consistency with terrestrial spatial planning; cross-border cooperation;
- (c) horizontal principles: organisation of data and scientific knowledge activities in order to promote effective MSP.

However, the 2008 Roadmap did not have the homogenising effect anticipated by the Commission; according to its 2010 Communication, some Member States have followed diverse approaches, while in other cases no significant progress has been achieved.⁴³ Taking into account the fragmented legal and institutional landscape in the EU Member States, as well as the intensification and diversification of human activities at sea, the European Commission decided to launch a legislative initiative in this domain.

The proposal on a Directive establishing a framework for MSP and ICZM was published in March 2013.⁴⁴ The proposed legislative act became a highly contentious issue among EU institutions and Member States. The main criticism was related to the legal basis of the MSP legislative venture, since the Lisbon Treaty does not make any references to spatial planning,⁴⁵ and its contested conformity

42 *ibid* 10-11; see also Schaefer and Barale, 'Maritime spatial planning: opportunities & challenges in the framework of the EU integrated maritime policy' (n 4).

43 European Commission, 'Maritime Spatial Planning in the EU – Achievements and Future Development' (Communication) COM (2010) 771 final, 6.

44 European Commission, 'Proposal for a Directive of the European Parliament and of the Council establishing a framework for maritime spatial planning and integrated coastal zone management' COM (2013) 133 final. On the analysis of the Commission's proposal, see Antonia Zervaki, 'Regional Approaches to Maritime Spatial Planning: the case of the Mediterranean Sea' in Eva Vázquez Gómez and Claudia Cinelli (eds), *Regional Strategies to Maritime Security. A Comparative Perspective* (Tirant lo Blanch 2014) 133, 147-53.

45 The Lisbon Treaty caters for spatial development and territorial cohesion (article 174 TFEU) and not for land or maritime space uses in the sense of terrestrial or maritime spatial planning. See A Faludi, 'Beyond Lisbon: Soft European Spatial Planning' (2010) 46 *Plan Rev* 14.



to the subsidiarity⁴⁶ and proportionality⁴⁷ principles. Other concerns were related to the reservations expressed by Member States due to the differentiated MSP national policies and the subsequent cost of their harmonisation with the prospect of a common EU MSP legal framework. Leaving aside the administrative and economic burden of applying common standards to MSP development, the Directive proposal raised significant concerns due to the promotion of cross-border cooperation: the idea of pursuing coordination with other Member States, as well as bordering third states, was not appreciated by most national authorities, due to the differentiated legal and administrative frameworks applying in different countries and the existence of pending maritime disputes that would undermine the coordination of joint MSP ventures.

3.2 Objectives and content of MSP in the EU

The institutional and political turmoil that followed the Commission's launching of the legislative initiative finally led to a political compromise that has limited the latter's scope of application; the 2014 Directive⁴⁸ is limited to spatial planning of the marine environment excluding ICZM,⁴⁹ since Member States did not reach an agreement on adopting legislative measures in this domain,⁵⁰ due to the impact such an act would have had on the decision-making processes of national planning authorities.⁵¹

The Directive defines MSP as a 'process by which the relevant member state's authorities analyze

46 Eight national parliaments have submitted negative reasoned opinions, questioning the conformity of the proposed act with the subsidiarity principle in line with the new procedure introduced by the Treaty of Lisbon (Art 12 TEU and Protocol 1 TEU) <www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2013/0074%28COD%29&l=en#tab-0> accessed 12 June 2015. Conformity with subsidiarity principle was also raised in the European Parliament, among European Political Parties as well as in the form of Parliamentary Question to the Commissioner. See <www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc53dbcb6ed013e7f0b51a27709.do> accessed 12 June 2015 and Question for written answer to the Commission, Rule 117, Patricia van der Kammen (NI) [Parliamentary Question] E-010797-13, 23 September 2013. Commissioner Damanaki's reply argued that the draft Directive is in line with the subsidiarity principle since it consists of provisions of procedural nature and does not prescribe Member States' options in terms of the content of the MSP process. See Answer given by Ms Damanaki on behalf of the Commission [Parliamentary Question] E-01078, 25 November 2013.

47 In its opinion, the Committee of the Regions openly questioned (a) the EU's competence in this domain, making reference to a breach of the proportionality principle, and (b) the legislative procedure to be followed, whether the proposed act should be adopted according to the ordinary legislative procedure or according to Art 352 TFEU requiring unanimity on behalf of the Council. See Committee of the Regions, Proposed Directive for Maritime Spatial Planning and Integrated Coastal Zone Management (Opinion) NAT-V-030, 103rd Plenary Session, 7-9 October 2013.

48 Council Directive (EU) 2014/89 establishing a framework for maritime spatial planning [2014] OJ L 257/135.

49 The Directive mentions that it will not 'interfere with member states' competence for town and country planning' and that it does not apply in cases member states 'apply terrestrial planning to coastal waters or parts thereof'. Preamble clause (17).

50 EU decision-making concerning town and country planning and land use (with the exception of waste management) is exempted from the ordinary legislative procedure and requires unanimity (unless the Council decides unanimously to follow the ordinary legislative procedure). See Art 192 TFEU.

51 It should be mentioned that, with the exception of the 2002 Recommendation on ICZM and the ratification of the Protocol on Integrated Coastal Zone Management in the Mediterranean in 2010, there is no secondary legislation in this domain. See (n 50); Council Recommendation concerning the implementation of Integrated Coastal Zone Management in Europe [2002] OJ L 148/24 and Protocol on Integrated Coastal Zone Management [2010] OJ L 34/19.



and organize human activities in marine areas to achieve ecological, economic and social objectives.⁵² It is evident that this definition is founded on three premises: first of all, MSP is considered as a process; secondly, Member States remain the protagonists in maritime spatial planning design and implementation; and thirdly, the MSP concept is founded on the pursuit of environmental, economic and societal welfare. However, these premises seem to be partially deconstructed by other provisions of the Directive, as indicated in the analysis provided below.

3.2.1 The MSP process and Member States' room for manoeuvre

The purpose of defining MSP as a process in the Directive's text was twofold. First of all, it was related to the institutional and legal concerns raised during the legislative procedure concerning the lack of EU competence in establishing measures in this domain following the ordinary legislative procedure as well as the act's contested conformity with subsidiarity and proportionality principles; the argument of the European Commission that the proposed act would not create a new policy, but a process to support existing policies finally prevailed. In this context, the Directive's legal basis was finally founded on the provisions of the Treaty of Lisbon concerning existing policies,⁵³ falling under the category of shared⁵⁴ or exclusive⁵⁵ competences of the organisation: article 43(2) TFEU concerning the pursuit of the objectives of the common fisheries policy, article 100(2) TFEU on sea transport, article 192(1) TFEU on the organisation's environmental policy and article 194(2) TFEU on the Union's energy policy.

Secondly, reference to a 'process' connotes that Member States' obligations are confined to procedural issues. In this context, the Directive further stipulates that maritime spatial plans will build on existing national policies and governance structures and that it 'shall not interfere with member states' competence to design and determine [their] format and content';⁵⁶ so far, states' decision-making autonomy is confirmed, to be conditioned, however, by the obligation set for policy and institutional conformity with certain requirements set out in the Directive⁵⁷ concerning:

(a) the general framework for the realisation of MSP in the EU marine waters: plans should be founded on an 'enhanced' ecosystem-based approach, taking into account not only 'environmental, economic and social aspects', but 'safety aspects' as well⁵⁸ (the latter being a new addition in the 2014

52 Art 3(2).

53 A practice also used in other acts adopted within the framework of the integrated maritime policy, such as the Regulation establishing a programme for the support of the integrated maritime policy adopted in 2011. See Regulation (EU) 1255/2011 establishing a programme to support the further development of an Integrated Maritime Policy [2011] OJ L 321/1.

54 According to Art 4 TFEU.

55 The conservation of marine biological resources under the common fisheries policy constitutes the only exclusive competence of the organization in the domain of maritime spatial planning according to Art 3 TFEU.

56 Art 4(3).

57 Art 4(6).

58 Art 6(b).



text also taking into consideration the proliferation of legislation on the safety of offshore economic activities);⁵⁹

(b) land-sea interaction:⁶⁰ the Directive, although excluding ICZM from its scope of application, aims to promote coherence between MSP and existing states' practice in integrated coastal management or equivalent formal or informal practice;

(c) MSP transboundary cooperation: Member States bordering marine waters are obliged to cooperate⁶¹ while, in the case of Member States bordering third states, there is a more tempered reference to cooperation since Member States 'shall endeavor, where possible, to cooperate with third countries.'⁶²

The Directive also provides for the involvement of the public in decision-making processes. Although their participation in the final decision is not foreseen, interested parties should be informed 'at an early stage',⁶³ while consultation processes should involve relevant stakeholders as well as authorities and the public concerned.⁶⁴ Last but not least, access to information on the plans once finalised is ensured.⁶⁵ According to the Directive's provisions, public participation in MSP information and decision-making seems to remain modest, leaving to the discretion of states the option of a more enhanced public involvement.

However, the Directive is anticipated to trigger lobbying and deliberation processes at the national and local levels, as well as among the different levels and branches of the national administrations, moderating competent authorities' power to fully determine the outcome of the process. Additionally, reference is made to the fact that relevant provisions of the EU legislation shall be applied; there is a significant amount of EU legislation concerning stakeholder participation and information related to

59 Reference is made to the Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil (adopted 14 October 1994, entered into force 24 March 2011) UN Reg No I 48454 (Offshore Protocol) <www.unepmap.org/index.php?module=content2&catid=001001001> accessed 10 June 2015, Annex III (2007) to the Convention on the Prevention and Elimination of Pollution from Offshore Installations (adopted 22 September 1992, entered into force 25 March 1998) 2354 UNTS 67 (OSPAR Convention) <www.ospar.org/html_documents/ospar/html/ospar_convention_e_updated_text_2007.pdf> accessed 10 June 2015, and the Council Directive 2013/30 (EU) on safety of offshore oil and gas operations [2013] OJ L 178/66. See Maria Gavouneli, 'Energy installations in the Marine Environment' in Jill Barrett, Richard Barnes (eds), *UNCLOS – A Living Instrument* (BIICL & Hart 2015).

60 Arts 7 and 6(a).

61 The wording of Art 11 leaves little room for doubt: 'as part of the planning and management process, member states bordering marine waters shall cooperate with the aim of ensuring that maritime spatial plans are coherent and coordinated across the marine region concerned'.

62 Art 12.

63 Art 9(1).

64 Art 9(1).

65 Art 9(2).



MSP, mainly derived from the environmental policy⁶⁶ or the spatial planning information domains.⁶⁷ What is interesting though is that environmental legislation to be applied in the domain of MSP consultation also provides for institutionalised consultation on issues of a transboundary character.⁶⁸ Thus, public participation processes in certain MSP dimensions will transcend national borders, a prospect that will enhance scrutiny of national decisions (or even intentions) at the regional level.

3.2.2 MSP environmental, economic and social dimensions: a delicate (im)balance

The Directive constantly refers to the ecosystem-based approach,⁶⁹ which combines natural and biological features and processes with socio-economic parameters, as an intrinsic component of MSP. However, the prioritisation of economic activities is evident in the wording of the Directive's subject matter: establishing a framework for MSP under the overall objective of promoting 'sustainable growth of maritime economies, the sustainable development of marine areas and the sustainable use of marine resources'.⁷⁰ Reference to the sectoral objectives to be pursued by Member States through MSP confirms the emphasis on economic activities: the development of energy sectors at sea, maritime transport, fisheries and aquaculture sectors, tourism and raw materials extraction; these activities constitute the core policy goals to be promoted in MSP.⁷¹ The Directive aims at ensuring the conditions of 'certainty and predictability' for economic activities at sea. The latter will be ensured by the adoption of a legal framework on MSP.⁷² Moving one step further, the Directive aims at the reduction of administrative and coordination costs (e.g. the creation of a one-stop shop for

66 Comprising the implementation of the relevant provisions of Aarhus Convention, through Council Regulation (EC) 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L 264/13 and Council Directive (EC) 2003/35 providing for public participation in respect of the drawing up of certain plans and programs relating to the environment [2003] OJ L 156/17; also relevant provisions from the Council Directive (EU) 2014/52 amending Council Directive (EU) 2011/92 on the assessment of the effects of certain public and private projects on the environment (Environmental Impact Assessment) [2014] OJ L 124/1 and the Council Directive (EC) 2001/42 on the assessment of the effects of certain plans and programmes on the environment (Strategic Environmental Assessment) [2001] OJ L 197/30.

67 Council Directive (EC) 2007/2 establishing an Infrastructure for Spatial Information in the European Community (INSPIRE) [2007] OJ L 108/1.

68 The Strategic Environmental Assessment Directive provides for transboundary consultations among Member States (Art 7) in case of potential transboundary effects of a plan or programme prepared to be applied on the territory of one state will have an impact on the environment of another Member State. Accordingly, Art 7(4) of the Environmental Impact Assessment Directive stipulates that '[t]he Member States concerned shall enter into consultations regarding, inter alia, the potential transboundary effects of the project and the measures envisaged to reduce or eliminate such effects and shall agree on a reasonable time-frame for the duration of the consultation period. Such consultations may be conducted through an appropriate joint body'.

69 Art 5(1), preambular clause (14).

70 Art 1(1).

71 Art 5(2).

72 See Policy Research Corporation, *Study on the Economic Effects of Maritime Spatial Planning, Report carried out on behalf of the European Corporation* (European Commission, Brussels 2010).



investment,⁷³ the avoidance of duplicate assessments,⁷⁴ etc.). Hence, it is evident that MSP legislation mainly constitutes an instrument for the realisation of the Blue Economy agenda of the European Commission,⁷⁵ mostly through the creation of a stable environment in order to attract investors for offshore activities.⁷⁶

3.2.3 MSP implementation in practice

The main challenges for Member States in implementing the Directive range from purely procedural issues to the association of the new act with the European *acquis*, regional institutions and MSP processes within the broader international geopolitical context.

According to the timeframe set by the Directive, Member States should designate the competent authority or authorities for MSP implementation by September 2016, transpose the Directive into their national legal order by the same time and furnish maritime spatial plans by March 2021.⁷⁷ Almost seven years may seem like a reasonable period for the preparation of national authorities to implement the Directive, yet the success of this process depends on a number of parameters. First of all, the lack of uniformity in Member States' MSP legislation and practice: some states already have relevant legislation and have proceeded to MSP implementation as mentioned above, while other states are still in the process of designating the competent authorities.⁷⁸ Taking into account the fact that the construction of the required legal, institutional and political MSP apparatus is a laborious multilevel and complex process, seven years may not suffice in certain cases.⁷⁹ Secondly, the Directive provides an orientation concerning Member States' options in relation to the activities to be incorporated in MSP at the national level; however, simply transferring the text of the Directive into national law may not meet the needs of the MSP process, especially in countries with no experience in MSP. Each state will have to adjust and specify the framework provided by the Directive according to its strategy and operational objectives concerning the marine space under its jurisdiction. This requires a comprehensive approach that entangles different levels of government and various authorities sharing competences. In this case, apart from the administrative burden and the time-consuming consensual political processes, there is always the risk of undermining the MSP process due to existing or new

73 *ibid* 16.

74 In the case of wind farm installation projects in Germany, both cost and time required for their realization is confined since the authorities have conducted a strategic environmental assessment for MSP providing for areas dedicated for that purpose. Gregor Erbach, 'Spatial Planning for the Blue Economy', Library Briefing, European Parliament Library (2013) 6.

75 European Commission, 'Blue Growth - opportunities for marine and maritime sustainable growth' (Communication COM (2012) 494 final).

76 Explicitly mentioned in preambular clause (5).

77 Art 15.

78 See *Declaration for the Development of MSP in Greece* (11th Panhellenic Symposium of Oceanography and Fisheries, Lesbos, May 2015) <www.symposia.gr/wp-content/uploads/2015/06/MSP_declaration_web.pdf> accessed 15 June 2015.

79 It took five years for the adoption of the UK Marine and Coastal Access Act of 2009, which provides for MSP as well as for the competent authority, the Marine Management Organization, while in the case of Canada's, the elaboration of the Eastern Scotian Shelf Integrated Management Plan was initiated in 1998 and was concluded in 2008. See (n 6) and (n 8).



institutional and political cleavages.

Another challenge for MSP implementation is related to the European *acquis*. In terms of the content of the MSP process at the national level, the Directive provides a non-exhaustive list of uses, activities and interests to be considered and integrated into Member States' spatial plans at sea: aquaculture and fishing areas; installations and infrastructures for the exploration, exploitation and extraction of oil, gas and other energy resources, of minerals and aggregates, and for the production of energy from renewable sources; maritime transport routes and traffic flows; military training areas; nature and species conservation sites and protected areas; raw material extraction areas; scientific research; submarine cable and pipeline routes; tourism and underwater cultural heritage.⁸⁰ It should be mentioned that most of the policies included in this indicative list are regulated by EU secondary legislation. Additionally, the majority of these acts belong to the 'new generation' of EU law which is characterised by quantified objectives and elaborate timeframes,⁸¹ the latter becoming automatically part of Member States' MSP processes. This will certainly render MSP more technocratic in character and will certainly prescribe Member States' options in relation to the uses of marine space.

Last but not least, cross-border cooperation also raises many issues in terms of its applicability in different European maritime regions. Undoubtedly, the multiplicity of established legal, institutional and administrative mechanisms, especially when the unifying effect of EU legislation is missing in relation to third countries, renders cooperation ventures more difficult. Secondly, the fact that there are still many pending disputes and claims being raised among Member States⁸² and between Member States and third states⁸³ is a parameter that should not be neglected, since the MSP process needs clearly defined maritime jurisdiction of the coastal states. This problem is accentuated by the fact that most of these areas are under increasing pressure due to the intensification of human activities in relation to maritime transport, fisheries and the exploitation of natural resources.⁸⁴ Thirdly, the lack of jurisdictional uniformity over maritime space in relation to the nature and the extent of

80 Art 8.

81 Eg, the objective of attaining a 20 per cent share of renewable energy by 2020 set by the Directive for the promotion of renewable energy, see Art 3 of the Council Directive (EC) 2009/29 on the promotion of the use of energy from renewable sources [2009] OJ L 140/63; the objective of good marine environmental status foreseen by the Framework Marine Strategy Directive, see Art 1(1) of the Council Directive (EC) 2008/56 establishing a framework of Community action in the field of marine environmental policy (Marine Strategy Framework Directive) OJ L164/19; the Fisheries' Regulation targets of the progressive restoration and preservation of fishing stocks by 2015 where possible and by 2020 the latest for all stocks, Art 2(2) of the Council Regulation (EU) 1380/2013 on the Common Fisheries Policy [2013] OJ L 354/22.

82 Such as the UK-Spanish dispute over Gibraltar or the pending maritime delimitation between Croatia and Slovenia (the two countries signed an arbitration agreement in 2009). See Gino Naldi, 'The Status of the Disputed Waters Surrounding Gibraltar' (2013) 28 IJMCL 701; Giuseppe Cataldi, 'Prospects for the Judicial Settlement of the Dispute between Croatia and Slovenia over Piran Bay' in N Boschiero and others (eds), *International Courts and the Development of International Law* (Asser Press 2013).

83 Such as the dispute between Greece and Turkey in the Aegean, but also the friction caused in the Eastern Mediterranean region by Turkey's reaction to the declaration of the EEZ of the Republic of Cyprus and the delimitation agreements with Egypt and Israel. For an account of the recent developments, see Haritini Dipla, 'Ressources énergétiques et limites maritimes en méditerranée orientale' (2011) XVI ADM 63.

84 *ibid*; Jesus V Baeza, 'The Law of the Sea and Environmental Problems in the Strait of Gibraltar' (2011) 14 JIWL 51.



Member States' maritime zones should be considered as a decisive factor for effective cross-border cooperation.⁸⁵ Fourthly, the framework of interstate cooperation is not clear. The Directive does not create new coordinating bodies or structures for that purpose; it instead delegates the coordination of regional cooperation mainly to the existing regional seas conventions.⁸⁶ However, the role of these regional institutions is not explicitly defined. This may not be a problem in the Northern marine areas where regional cooperation in MSP is more advanced, but it may prove counterproductive in the Mediterranean or the Black Sea regions, where institutional coherence among coastal states is comparatively low.

3.3 The 2014 Directive and the law of the sea

Pan-European adherence to the UN Convention on the Law of the Sea (UNCLOS) by Member States, as well as at the EU level, has always been considered as an asset for the development and implementation of national, not to mention cross-border, spatial planning activities in the European Union.⁸⁷ However, the relation of MSP to international regulation of maritime affairs was one of the issues that raised much attention during the legislative procedure. In an attempt to reassure Member States that the introduction of secondary rules on spatial planning at sea would not alter their rights and obligations vis-à-vis maritime space, reference to the UNCLOS was reinforced in the 2014 Directive as compared to the previous EU documents related to MSP; according to the latter, the relationship of the UNCLOS to effective MSP implementation unfolds in three levels.

85 Although the existence of EEZ is considered by the Commission as a significant parameter for effective implementation of MSP, not all European coastal states have declared such a zone. Additionally, the existence of partial or derivative EEZs, such as Spain's Fishing Protection Zone or Slovenia's Ecological Protection Zone, makes the situation more complex. As far as the different extent of maritime zones, Greece and Turkey constitute an illustrative example since they have a 6 n.m. territorial sea in the Aegean.

86 Arts 11 and 12.

87 According to the Community's Declaration submitted upon accession to UNCLOS, a distinction is made between the organisation's exclusive competences on the one hand, and shared competences with Member States on the other. In terms of MSP implementation, the following EU competences should be mainly taken into account: (a) the conservation and management of sea fishing resources, which fall into the first category; (b) research and technological development and development cooperation with regard to fisheries which constitutes a shared competence; (c) with regard to maritime transport, in relation to 'safety of shipping and the prevention of the marine pollution contained inter alia in Parts II, III, V, VII and XII of the Convention, the Community has exclusive competence only to the extent that such provisions of the Convention or legal instruments adopted in implementation thereof affect common rules established by the Community. When Community rules exist but are not affected, in particular in cases of Community provisions establishing minimum standards, member states have a competence, without prejudice to the competence of the Community to act in this field. Otherwise, competence rests with the member states'. The Declaration also mentions the case of the organisation's complementary competences in relation to the promotion of cooperation on research and technological development with non-member countries and international organisations, with regard to the provisions of UNCLOS Parts XIII and XIV. Last but not least, the Declaration stipulates the evolving character of the organisation's competences, which is a significant parameter in the relation between EU and UNCLOS vis-à-vis the former's rights and obligations in the marine space in relation to MSP, both in terms of its internal as well as its external policies. See Declaration concerning the competence of the European Community with regard to matters governed by the United Nations Convention on the Law of the Sea of 10 December 1982 and the Agreement of 28 July 1994 relating to the implementation of Part XI of the Convention, <www.un.org/depts/los/convention_agreements/convention_declarations.htm> accessed 3 June 2015.



First of all, as far as the concept of integrated management, a constituent part of MSP, is concerned, the Directive is in line with the UNCLOS' comprehensive approach to the 'problems of the ocean space', which 'are closely interrelated and need to be considered as a whole'.⁸⁸

Secondly, as far as Member States' MSP jurisdiction⁸⁹ is concerned, the Directive recognises the UNCLOS' role on the spatial allocation of rights and duties of states at sea, since it stipulates that '[p]lanning of ocean space is the logical advancement and structuring of the use of rights granted under UNCLOS and a practical tool in assisting Member States to comply with their obligations'.⁹⁰ Thus, Member States will have to furnish spatial plans to be applied in the 'marine waters'⁹¹ defined as 'waters, the seabed and subsoil on the seaward side of the baseline from which the extent of territorial waters is measured extending to the outmost reach of the area where a Member State has and/or exercises jurisdictional rights, in accordance with the UNCLOS',⁹² while it is explicitly mentioned that EU MSP legislation 'shall not affect the sovereign rights and jurisdiction of Member States over marine waters which derive from relevant international law, particularly UNCLOS'.⁹³ In this context, reference is also made to the fact that the application of this Directive 'shall not influence the delineation and delimitation of maritime boundaries by the member states in accordance with the relevant provisions of UNCLOS'.⁹⁴

Thirdly, the MSP philosophy of 'enhanced' cross-border cooperation⁹⁵ is in line with the UNCLOS' provisions on bilateral, regional and international cooperation;⁹⁶ this is evident in the conditions stated in the Directive for the cooperation among Member States and between Member States and third states. It should also be mentioned that in the case of cooperation with third states, reference to international law in general (and not strictly to the UNCLOS) implies both conventional and customary law; this stipulation is intentional, taking into account the fragmented institutional landscape due to the non-uniform participation of coastal states in the various international instruments, including the UNCLOS, in the different EU maritime regions.

4. Concluding remarks

88 Preambular clause (3).

89 See (n 18).

90 Preambular clause (7).

91 Art 2(1).

92 With the exception of waters adjacent to the countries and territories mentioned in Annex II to the Treaty and the French Overseas Departments and Collectivities. Art 3(4) of the MSP Directive makes direct reference to the definition of 'marine waters' provided in Art 3(1a) of the Marine Strategy Directive.

93 Art 2(4).

94 *ibid.*

95 Art 1(2).

96 Art 118 on the cooperation of states in the conservation and management of living resources, Art 123 on the cooperation of states bordering enclosed or semi-enclosed seas, Art 129 on the cooperation in the construction and improvement of means of transport, Art 197 on cooperation on a global and regional level constitute illustrative examples.



Making MSP a legal obligation for Member States will definitely enhance uniformity in both the perception and the implementation of sea management in the different European sea basins. Member States will have to furnish spatial plans in a specified timeframe and in a concise form, taking into account the minimum requirements for spatial planning set out by the Directive discussed above. From an institutional standpoint, MSP will become an issue of scrutiny for the EU bureaucratic (on behalf of the Commission), parliamentary (on behalf of the Parliament)⁹⁷ and judicial (on behalf of the EU Court) branches.

Another interesting element is the institutionalisation of public involvement in information and decision-making procedures. Reference to the latter in the Directive's corpus is quite general, allowing states to choose the appropriate channels of communication; it also leaves room for accommodating different information and consultation standards and procedures foreseen in EU legislation. In the second case, stakeholders' involvement may transcend conventional information and consultation processes at the national level and involve cross-border processes, enhancing regional scrutiny, on an ad hoc basis, on MSP development and implementation.

As far as the content of the plans is concerned, the Directive, although prioritising economic activities, introduces a significant novelty, since it builds upon an enlarged perception of the ecosystem-based approach, by linking the traditional environmental-social-economic triptych to safety. However, reference to safety covers only accidental risks, leaving aside security issues that are related to acts committed with criminal intent (terrorism and other crimes at sea); thus, security issues' lacuna in the Directive needs to be filled, taking into account the growing instability and extremism, especially in areas in the broader European neighbourhood.

Additionally, the future prospects of MSP, as well as the role of the EU in the broader context of international initiatives in this domain, should not be undermined. First of all, during the last several decades, we have witnessed a systematic effort of states to expand their jurisdiction in the marine space, with the EEZ declarations in the Mediterranean Sea and the increase of claims submitted to the Commission on the Limits of the Continental Shelf constituting illustrative examples. Since states' competence in relation to MSP depends on the nature and the extent of maritime zones falling under their jurisdiction, MSP implementation is anticipated to continue to expand at least spatially in the years to come.

Secondly, the 2014 Directive constitutes the first international, albeit regional, legal framework for MSP. However, it is expected to have an impact on third states' legislation for the conduct of sea management plans through the accession or association processes as well as the prospects within the framework of the European Neighborhood Policy architecture. Moreover, the international dimension of EU maritime policy and the role of the organisation in shaping future initiatives related to ocean governance tools, such as MSP, should also be considered. The European Commission has recently launched a consultation in order to formulate its future policy on international ocean gov-

97 Art 14(2).



ernance.⁹⁸ In terms of MSP-related issues, the lack of a specialised international legal framework, as well as the expansion of such plans in the high seas⁹⁹ in order to ensure more effective environmental conservation and sustainability, constitute some of the issues to be considered by the stakeholders involved.

The incorporation of MSP in the EU corpus juris has proved to be a difficult task. Member States will now have to move to the implementation phase. Effective implementation will be determined by several parameters, such as the varying levels of state MSP performance and experience, the different institutional and administrative capacities and perceptions concerning the uses of the marine environment, pending or new disputes that may arise and the growing unrest in the surrounding geopolitical milieu. Regardless of the outcome of the process, the Directive's success will be related to its contribution to the shift of focus from the construction of comprehensive policy and legal frameworks at the national, regional and international levels to the implementation of integrated operational plans. The time to move from standard setting to the operational deployment of MSP in the EU seems to be ripe...

98 European Commission, 'Consultation on International Ocean Governance' <http://ec.europa.eu/dgs/maritimeaffairs_fisheries/consultations/ocean-governance/index_en.htm> accessed 22 June 2015.

99 Michelle Portman, 'Marine Spatial Planning: Achieving and Evaluating Integration' (2011) 68 ICES J Mar Sci 2191; Nicole Schäfer, 'Maritime spatial planning: about the sustainable management of the use of our seas and oceans' in Timo Koivurova and others (eds), *Understanding and strengthening European Union-Canada relations in law of the sea and ocean governance* (Lapland Printing Centre 2009) 89, 101-02; Jeff Ardron and others, 'Marine spatial planning in the high seas' (2008) 32 Mar Policy 832.