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# Implementation of the EU environmental law in the context of cross-border damage to marine environment: case study of the Baltic Sea

BACHELOR THESIS

Author: Karlina Jansone  
BA 2013/2014 year student  
student number B013049

SUPERVISOR: *BAIBA BEBRE*  
*LL.M*

## DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed) .....

RIGA, 2018

**ABSTRACT**

The purpose of this thesis is to analyse the applicability and implementation of the European Union (EU) environmental law to cross-border damage to marine environment, also assessing their applicability to the Baltic Sea as well as progress on implementation, and additionally to review the relationship between the EU law and HELCOM – intergovernmental body responsible for carrying out the obligations under the Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea.

For the purposes of the research, the core EU environmental law instruments will be analysed in order to identify their applicability to cases of cross-border damage to marine environment. A particular attention will be paid to the possible and already identified issues with implementation in the reviewed context, while the question of public participation and access to environmental justice also will be reviewed, since these aspects are worth consideration in the light of pursuing a holistic environmental policy that benefits all the stakeholders concerned.

**TABLE OF ABBREVIATIONS**

CFP – Common Fisheries Policy

ECJ – European Court of Justice

EEA – European Environment Agency

EEZ – Exclusive Economic Zone

EL Directive – Environmental Liability Directive

EU – European Union

EUSBSR - EU Strategy for the Baltic Sea Region

IMP – Integrated Maritime Policy

MS – Member State(s)

MSFD – Marine Strategic Framework Directive

PAI Directive - Directive on public access to environmental information

PECL Directive - Directive on the Protection of the Environment through Criminal Law

PP Directive - Directive providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment

RCS – Regional Sea Convention

TEU – Treaty on the European Union

TFEU – Treaty on the Functioning of the European Union

WFD – Water Framework Directive

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## INTRODUCTION

Mitigating environmental damage that is not confined within a territory of one single state and its exclusive economic zone, when marine pollution occurs, is a particular challenge to address in the context of environmental protection - a cause to which many states worldwide are committed. Moreover, if the damage is not an isolated case, i.e., oil spill, sudden pollution, but rather a long-term and complex issue, it should require not merely cooperation and immediate action from the States, in territory of which the damage is identified, but also some cooperation mechanism that could monitor and respond with legal measures and action plan.

European Union with its policies and law applicable to cross-border environmental damages sets an apparent hallmark to other international organisations. This, however, is definitely due to the fact that the EU is a supranational organisation with a relatively more competence to develop law and policies regarding environmental matters, to which its Member States are bound to comply. Plus, environmental protection is among the EU priorities, which explains the comparatively greater activity in the field of environmental law. As a result, one should expect more and clearer rules on how cross-border environmental damages should be responded to.

Baltic Sea has been selected as the case study because of its long-lasting and complex environmental issues – widespread eutrophication, threatened biodiversity and comparatively large human activity impacting this marine area. In addition, this problematic case is also managed by another regional mechanism, namely, the Helsinki Commission - Baltic Marine Environment Protection Commission -, which is the governing body of the Convention on the Protection of the Marine Environment of the Baltic Sea Area <sup>1</sup> (hereinafter, the Helsinki Convention). Having been established in 1974, the Helsinki Commission (hereinafter, HELCOM), as Jouanneau and Raakjær note, is perceived as the “forerunner in the development of environmental policies” <sup>2</sup>. Therefore, conducting a comparative analysis between this well-developed and experienced regional sea convention body and the EU activity towards remedying the dire environmental situation of the Baltic Sea is of great relevance, especially in the light of the second holistic environmental assessment that HELCOM has conducted in the recent years and will be finalised in the upcoming months.

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<sup>1</sup> Convention on the Protection of the Marine Environment of the Baltic Sea (adopted 22 March 1974, entered into force 3 May 1980), as replaced with the Convention on the Protection of the Marine Environment of the Baltic Sea, opened for signature 9 April 1992, entered into force 17 January 2000, 105 UNTS 167.

<sup>2</sup> Charlène Jouanneau, Jesper Raakjær, “‘The Hare and the Tortoise’: Lessons from Baltic Sea and Mediterranean Sea governance”. *Marine Policy* 50, part B (2014): pp. 331

The purpose of this thesis is to, firstly, review whether the core EU environmental law instruments contain measures that are applicable to cross-border environmental damages, and whether the geographical scope of the regulations and directives considered by the research also cover marine environment. In addition, it will be assessed to what extent the cooperation between the Member States is endorsed by these legal instruments. Special attention will be paid to issues related to a harmonised implementation of these EU law instruments in the national laws of MS, which can adversely impact pursuit of environmental protection objectives in a cross-border scenario.

In the second part, which is the case study of the Baltic Sea, it will be initially analysed how EU law is applied both via regulations and directives as well as policies, to which Member States must comply – this part will consider regulations and directives reviewed in Chapter 1 as well as additional legal instruments that are either directly addressed to the environmental problems of the Baltic Sea or provide solutions to them, by imposing measures upon the MS.

The third question posed by the research is whether HELCOM can be considered as an effective tool for implementing the EU environmental law within the Baltic Sea area.

Therefore, the activities of HELCOM - the intergovernmental body with the authority to monitor and address the environmental issues of the Baltic Sea granted by the Helsinki Convention - for mitigating the environmental damages in its area or responsibility will be reviewed, by paying attention to how HELCOM adheres to the EU environmental law instruments.

For the purposes of evaluating the effectiveness of both approaches – EU direct action and HELCOM operations - and their capacity to protect the Baltic Sea, since stating a direct causality between a measure put forward either by the EU or HELCOM and subsequent changes in the environmental status requires a very detailed in-depth analysis of the implementation of each legal measure and changes in the environment over time, this research will take the proactivity and stringency of measures taken by each organisation as the core criteria of effectiveness instead.

The hypothesis proposed by the author is such as follows: although the EU environmental law instruments contain few provisions applicable to cross-border damage to marine environment, the EU direct involvement in the situation of the Baltic Sea via both main environmental law instruments and those relative to specific Baltic Sea environmental issues is with larger substantial effect than the operations of HELCOM, due to the higher enforceability of the EU law. Nonetheless, HELCOM is an indispensable regional actor in sense of conducting the

required environmental assessments, thus also implementing EU environmental law provisions in the marine region.

## **1. EU LAW APPLICABLE TO CROSS-BORDER DAMAGE TO MARINE ENVIRONMENT**

Within its vast array of regulations and directives, EU environmental law does not have a single document that deals with exclusively cross-border environmental damage. Since the harm to environment and natural resources can occur in many ways, e.g., harm to species and their habitats, unsustainable economic practice, pollution due to an accident or continuous release of harmful substances, reaching the objective of protecting the environment is a complex task, also when it comes to developing an all-encompassing and functional environmental law. As a result, the numerous EU environmental law documents contain separate provisions on how to proceed when the environmental harm addressed by the respective legal measure becomes of a cross-border character.

The first aspect that must be considered when assessing the effectiveness of the EU law instruments dealing with environmental protection, is competences – whether they are shared or exclusively of the EU, when it comes to environmental protection and adopting law in this area. According to the Art. 4(2) TFEU, environmental protection is a matter of shared competence between the EU and the MS,<sup>3</sup> with common fisheries policy being an exception. This area falls under exclusive competence,<sup>4</sup> thus enabling the EU to adopt measures that have a significant impact on marine biodiversity.

As also observed by Krämer, directives are the type of legal instrument that is most often used in EU environmental policy, while regulations are adopted in exceptional cases.<sup>5</sup> This is a clear result of the delegation of competences under the Treaties, since the majority of prominent EU environmental law instruments are directives, whereas several regulations that in practice aim at preserving biodiversity have originated from the fisheries policy. Some of the regulations will be reviewed in Chapter 2, as they have a direct applicability or relevance to the Baltic Sea. Apart from annexes of certain directives that list, for instance, protected species or prohibited chemicals, the overall character of EU environmental law directives is general, unlike many other directives that contain many technical details even in operational clauses. Krämer points out that the general nature of these directives is a result of a long-term debate on subsidiarity and certain deregulation in the field of environmental law.<sup>6</sup> If the principle of subsidiarity enables the EU to act out of the remit of its exclusive competence for

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<sup>3</sup> Treaty on the Functioning of the European Union, *OJ C 326/47*, 26 October 2012, pp. 47–390

<sup>4</sup> TFEU, Article 3(1)

<sup>5</sup> Ludvig Krämer, *EU Environmental Law* (Sweet and Maxwell, 2011), pp. 49-51

<sup>6</sup> *Ibid*



achieving objectives that cannot be sufficiently met by MS only (art.5(3) TEU),<sup>7</sup> there has been a certain disagreement on the extent to which these environmental law measures should be detailed and thus imposing stricter obligations on the MS. As a result, directives instead of the relatively more stringent regulations are the most frequent tool, and clear provisions on emission limit values, testing methods etc. are very rare. The directives set out general rules, objectives to be attained as well as some framework (Art.288 TFEU),<sup>8</sup> yet the effectiveness of this approach, according to Krämer, can be contested, since:

“such general provisions do not increase the added value of EU environmental law provisions and, furthermore, perpetuate differences in the level of protection among Member States: they allow to apply the EU provisions, if the political will to do so exists, but also to avoid full application of such rules, if such a political will does not exist.”<sup>9</sup>

Similarly, Hedemann-Robinson emphasises the insufficient adequacy of implementation, which is a frequent problem with EU environmental law directives – apart from often missing the deadlines for transposition, MS also tend to implement soft measures, thus introducing the environmental law directives into national legislation rather in form, not substance and thus to some extent deviating from the objectives of directives.<sup>10</sup>

Taking this rather fragile regime of *de minimis* directives into account, the aforementioned risks within the context of cross-border marine environment damage might be even more serious. Nonetheless, resorting to regulations is a risk from both political and legal perspective, considering the distribution of competences under the TFEU. As Craig and de Burca point out, an excessive expansion of EU exclusive competences results in that the MS have lost their autonomous legislative competence and are unable to adopt any legal instruments, which is why only a few areas should remain under the exclusive competence of the EU.<sup>11</sup> It could however be argued whether this rule should be applied to the environmental sphere and whether the expansion of the EU competence over it is only a matter of time. As van Hoof and van Tatenhove observe, the adoption of the Marine Strategic Framework Directive already indicates the increasing competence of the EU over environmental matters, since the Directive “has characteristics of an imposed, state driven

<sup>7</sup> Treaty on European Union, *OJ C 326/12*, 26 October 2012, pp. 13–390

<sup>8</sup> TFEU, Article 288

<sup>9</sup> Krämer, *EU Environmental Law*, p. 51

<sup>10</sup> Martin Hedemann-Robinson, *Enforcement of European Union Environmental Law*, Routledge, 2007, pp. 96–97

<sup>11</sup> Paul Craig, Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2015, pp. 78

instrumental arrangement with a low number of actors involved”<sup>12</sup> and demonstrates an etatist approach – with a centralised state institution, which on this occasion is the EU in relation to the MS - dominating the policy-making process.<sup>13</sup> Moreover, as Fritz and Hanus note, with the European Commission developing the Integrated Marine Policy (hereinafter, the IMP), one may expect a more direct involvement of the EU in the protection of marine environment and more coherence in policies and activities relative to the maritime sphere. On the other hand, they also emphasise that a strategy-making process that includes more stakeholders and is not confined merely to the EU and MS institutions, would greatly benefit the IMP.<sup>14</sup> Furthermore, Wakefield argues that the IMP, if uncarefully merged with the Common Fisheries Policy, would subject the aims of the former to the economic rationale of the latter and thus the IMP would fail to achieve its environmental protection objectives, which therefore highlights the need for other non-governmental stakeholders to be involved in the policy-making process.<sup>15</sup>

### **1.1. Habitats and Birds Directives**

The Habitats Directive<sup>16</sup> and Birds Directive<sup>17</sup> are considered to be among the core instruments of EU environmental law. Therefore, it is of relevance to assess whether and how they respond to the damage of habitats and loss of biodiversity in a cross-border context.

As regards to the territorial applicability of the Habitats Directive, it also covers marine and coastal areas, since certain types of them are included in the Annex I that lists the types of habitats classified as “natural habitat types of Community interest”<sup>18</sup>. Whereas, although the loss of biodiversity and threat to habitats is acknowledged as a common problem,<sup>19</sup> there are no proposed obligation or explicit recommendations for MS to cooperate, except for taking into account the experience of other MS when studying the desirability of reintroducing of

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<sup>12</sup> Luc van Hoof, Jan van Tatenhove, “EU marine policy on the move: The tension between fisheries and maritime policy”, in *Marine Policy* 30, no. 4 (2009): p. 729

<sup>13</sup> *Ibid*, pp.727-729

<sup>14</sup> Jan-Stefan Fritz, John Hanus, “The European Integrated Maritime Policy: The next five years”, in *Marine Policy* 53 (2015): pp.1-3

<sup>15</sup> Jill Wakefield, “Undermining the Integrated Maritime Policy”, in *Marine Pollution Bulletin* 60, no. 3 (2010): pp. 323-325

<sup>16</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 July 1992, p. 7–50

<sup>17</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 January 2010, pp. 7–25

<sup>18</sup> Habitats Directive, Article 1(c)

<sup>19</sup> *Ibid*, Preamble paragraphs 4-7

specific species.<sup>20</sup> The implementation framework is vertical, with MS being obliged to designate protected areas under the Natura 2000 framework and to establish protective measures. The lack of any mutual cooperation clause, when certain habitats are located in territories of two or more MS, is odd when the objective of Natura 2000 framework is to be coherent<sup>21</sup> and when reference is made to geographic regions<sup>22</sup> that may cover territories of several MS.

Regarding the pertinence of the Birds Directive in the context of research, Thieffry emphasises by referring to ECJ judgments<sup>23</sup> and to the Birds Directive itself,<sup>24</sup> wild birds are considered as a natural heritage for the community of Europe, hence MS have an obligation to protect them for a common good.<sup>25</sup> In addition, the Birds Directive gains relevance when considering that the objective of environmental protection also implies ensuring biodiversity by protecting birds and their habitats in the marine and coastal areas, which is an objective stipulated in the preamble.<sup>26</sup>

While acknowledging that the issue of loss of biodiversity and danger to wild birds already is of cross-border character and MS have a shared responsibility over effective bird protection,<sup>27</sup> the directive however does not contain specific instructions on how to proceed, if, for instance, a certain habitat is in the land or sea territory of two or more MS. The issue with a lack of such provisions is likely to arise, if the MS sharing the habitat area do not transpose the Birds Directive into national law in a harmonised manner. Moreover, the directive does not clearly spell out obligation for MS to cooperate on such occasions, but rather to act independently. Thus, it can be doubted whether environmental protection obligations conferred upon MS, for instance, creating and maintaining protected areas and biotopes for wild birds,<sup>28</sup> designating special protection areas for bird species that are vulnerable or under threat of extinction in the in the geographical sea and land area,<sup>29</sup> are implemented in a

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<sup>20</sup> Habitats Directive, Article 22(1)(a)

<sup>21</sup> Ibid, Article 3(1)

<sup>22</sup> Ibid, Article 1(k)

<sup>23</sup> Judgment in *Commission v. Italy*, C-262/85, EU:C:1987:340, paragraph 9, and Judgment in *Commission v. Belgium*, C-247/85, EU:C:1987:339, paragraph 9

<sup>24</sup> Birds Directive, Preamble paragraphs 4 and 7

<sup>25</sup> Patrick Thieffry, *Droit de l'Environnement de l'Union européenne* (Environmental Law of the European Union), Brussels: Bruylant, 2011, p. 344

<sup>26</sup> Birds Directive, Preamble paragraphs 2 and 8

<sup>27</sup> Ibid, Preamble paragraph 4

<sup>28</sup> Ibid, Article 3(1) and (2)

<sup>29</sup> Ibid, Article 4(1)

mutually consistent way, if a bird habitat, migratory route or wetland – a biotope that enjoys a special status under the Birds Directive -<sup>30</sup> spans across the territories of several MS. In terms of limiting the hunt of wild birds, the directive is an effective tool, since these provisions are clearer and more detailed,<sup>31</sup> hence the path to reaching the objective is clearer, unlike with provisions that call for designating and protecting bird habitats – while leaving MS to their own devices with this general provision can result in an inadequate level of protection in certain MS.

## 1.2 Environmental Liability Directive

The Environmental Liability Directive<sup>32</sup> (hereinafter, the EL Directive) is another cornerstone of EU environmental law, primarily due to its objective to implement the “polluter pays” principle whenever a damage to natural resources or habitat occurs.<sup>33</sup> Another noteworthy feature of the EL Directive, as Hedeman puts it, is the strict emphasis on remedying harm exactly to the environment, given that the EL Directive in Article 3(3) excludes the opportunity for private persons to receive compensation caused by the environmental damage.<sup>34</sup> In the EL Directive, the question of cross-border environmental harm is addressed in the Article 15, obliging the MS to cooperate when there is an environmental damage already affecting or likely to affect several MS, “with a view to ensuring that preventive action and, where necessary, remedial action is taken in respect of any such environmental damage”<sup>35</sup>

Moreover, whenever an ecological damage originating in one MS has a potential of a cross-border character, it is obliged to provide sufficient information to other MS that may be affected by this damage later.<sup>36</sup> Apart from this provision, as Hedemann-Robinson mentions, the EL Directive indicates generally vertical relationship between the EU and the MS with the former obliging the latter to transpose the directive into national law and to designate the competent authorities with duty to ascertain the origin of environmental damage or threat of it. The EL Directive, according to Hedemann-Robinson, has certain shortcomings that deters

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<sup>30</sup> Birds Directive, Article 4(2)

<sup>31</sup> Birds Directive, Article 5 and 6(1) and Annexes containing lists of protected species

<sup>32</sup> Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, *OJ L* 143, 30 April 2004, pp. 56-75

<sup>33</sup> EL Directive, Preamble paragraph 2

<sup>34</sup> Hedemann-Robinson, *Enforcement of European Union Environmental Law*, pp. 512-513

<sup>35</sup> EL Directive, Article 15(1)

<sup>36</sup> *Ibid*, Article 15(2)

private individuals from raising a claim. Apart from previously mentioned exclusion of the right of compensation to persons, when the environmental damage has an adverse impact also to their property or has caused personal injury, they might have the burden of proof to clearly state the operator that has caused environmental damage due to fault and negligence, which would be easier for the competent authority of the State to handle with its powers to conduct investigation. These shortcomings leave the action of establishing environmental liability largely in the hands of authorities designated by the MS,<sup>37</sup> as natural or legal persons are also entitled to request the competent authority to proceed with action in case of environmental damage under the Article 12.<sup>38</sup>

The geographic scope is clearly defined with reference to the Water Framework Directive.<sup>39</sup> As a result, the case of “environmental damage” applies primarily to inland and coastal waters.<sup>40</sup> Nonetheless, as Bergkamp and Goldsmith note, the MS may apply the EL Directive even to the extent of their exclusive economic zone in accordance with the Article 56(1)(b)(iii) of the United Nations Convention on the Law of the Sea,<sup>41</sup> thus enabling the pursuit of mitigating environmental damages in the all the EU territory.<sup>42</sup>

Therefore, in conjunction with the obligation for MS to cooperate in case of cross-border harm to the environment and the potential applicability of the EL Directive also to EEZ of MS in question provides an opportunity to establish environmental liability, when a cross-border damage to marine environment occurs.

On the other hand, as Hinteregger states, the EL Directive covers comparatively broader range of environmentally harmful activities, whereas in terms of defining environmental damage, it is more restrictive and applies damage only to specific types, e.g. to protected species and habitats, water and land damage.<sup>43</sup> Another relevant issue is that the question of tanker pollution is not addressed – instead, the EU prefers to adhere to the international remedies

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<sup>37</sup> Hedemann-Robinson, *Enforcement of European Union Environmental Law*, pp. 489-492

<sup>38</sup> EL Directive, Article 12(1)

<sup>39</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 L 327*, 22 December 2000, pp. 1–73

<sup>40</sup> WFD, Article 1(1)

<sup>41</sup> United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, entered into force 15 November 1994, 1833 UNTS 397.

<sup>42</sup> Lucas Bergkamp, Barbara Goldman, *The EU Environmental Liability Directive: A Commentary*, Oxford: Oxford University Press, 2013, pp. 67-68

<sup>43</sup> Monika Hinteregger, “Systems of environmental liability in Europe” in *Environmental Liability and Ecological Damage in European Law*, ed. Monika Hinteregger (Cambridge: Cambridge University Press, 2008), pp. 13-17

provided by the International Oil Pollution Conventions.<sup>44</sup> Given that transboundary pollution was a major impetus for the enactment of the EL Directive, the exclusion of tanker pollution from the scope of directive is a matter of concern.<sup>45</sup> Hinteregger also highlights the lack of retroactive effect, which in accumulation with the other restrictions indicates the EL Directive as a minimum-standards directive.<sup>46</sup>

Moreover, leaving a greater margin of discretion to the MS individually in, for example, defining such terms as “sufficient interest” and “impairment of a right” that entitles a person to initiate the process of establishing environmental liability by submitting a request to the competent authority,<sup>47</sup> implies risk of insufficient harmonisation and subsequent legal hurdles in a cross-border context.

### **1.3 Directive on the Protection of the Environment through Criminal Law**

Directive on Criminal Protection of the Environment through Criminal Law (hereinafter, the PECL Directive)<sup>48</sup> is a noteworthy legal instrument, since it enables the harmonisation of certain criminal measures within the national law of MS, when it concerns environmental policy. Hedemann-Robinson also emphasises the significance of the PECL in terms of extending the EU competence to introduce measures approximating the national criminal law of the MS, and attributes this success to the ECJ judgment confirming the competence of the EU institutions in this regard,<sup>49</sup> thus providing the PECL Directive the opportunity to be adopted.<sup>50</sup>

Although the PECL Directive emphasises the concern on the rise in occasions of cross-border environmental damage,<sup>51</sup> there are no explicit provisions applicable to cross-border cases, as the primary objective is to harmonise national criminal law. This lacuna, according to Posch, at least in terms of the applicable law is responded to by the Article 7 of the Rome II Regulation, allowing the claimant to base the claim on the law of the country from which the

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<sup>44</sup> EL Directive, Article 4(2)

<sup>45</sup> Hinteregger, “Systems of environmental liability in Europe”, pp. 22-23

<sup>46</sup> Ibid, pp.16-17

<sup>47</sup> EL Directive, Article 12(1)

<sup>48</sup> Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, *OJ L* 328, 6 December 2008, pp. 28–37

<sup>49</sup> Judgment in *Commission v. Council*, C-176/03, EU:C:2005:542, paras. 41-42, 47-48, 51-53

<sup>50</sup> Hedemann-Robinson, *Enforcement of European Union Environmental Law*, p.520

<sup>51</sup> PECL Directive, Preamble paragraph 2

environmental damage originates,<sup>52</sup> if they do not apply the general rule of *lex loci damni*,<sup>53</sup> and this provision, as Posch asserts, is an “acknowledgment of a “favour principle” to the victim”<sup>54</sup> Moreover, the very process of approximating European criminal law, as professor Weyembergh asserts, is with an auxiliary rationale to facilitate judicial cooperation in transfrontier crime.<sup>55</sup>

Meanwhile, the geographical applicability can be determined in conjunction with the Birds and Habitats Directives as well as Water Framework Directive, and the Regulation No. 1013/2006 on shipments of waste (hereinafter, the Waste Shipments Regulation), since “unlawful” conduct constituting criminal offence and covered by the PECL Directive is violating certain directives and regulations, including the aforementioned ones.<sup>56</sup> As a result, the damage inflicted to marine environment also can fall under the scope of the Directive, if a species or habitat within a site protected by any of these Directives has sustained damage<sup>57</sup> or if the Waste Shipments Regulation is infringed upon in a marine area that is under the national jurisdiction of an MS, thus extending the protection of the PECL even to the EEZ of MS.<sup>58</sup>

Nonetheless, the pursuit of environmental justice under the PECL Directive is impeded by variations in criminal procedure laws in the MS, which result in an ineffective implementation of the Directive. A notable example highlighted by Pereira is that in some EU states, such as Germany and Portugal, individuals may not bring prosecution, whereas the opportunity principle prevalent in the Netherlands, the United Kingdom, and Belgium can result in prosecution to be more lenient towards minor technical breaches of environmental law or not to bring prosecution at all, if chances of securing a conviction is low.<sup>59</sup> Moreover, the lack of explicitly prescribed types and levels of penalties as well as measures regulating the

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<sup>52</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), *OJ L* 199, 31 July 2007, Article 7

<sup>53</sup> *Ibid*, Article 4(1)

<sup>54</sup> Willibald Posch, “Some observations on the law applicable to transfrontier environmental damage” in *Environmental Liability and Ecological Damage in European Law*, ed. Monika Hinteregger (Cambridge: Cambridge University Press, 2008), pp. 49-51

<sup>55</sup> Anne Weyembergh, “Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme”, *42 Common Market Law Review* (2005), p. 1567

<sup>56</sup> PECL Directive, Articles 2(a)(i) and 3

<sup>57</sup> *Ibid*, Articles 2(b), (c)

<sup>58</sup> Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, *OJ L* 190, 12 July 2006, Article 1(25)

<sup>59</sup> Ricardo M. Pereira, *Environmental Criminal Liability and Enforcement in European and International Law*, Leiden: Brill Nijhof, 2015, 302-304

operations of the prosecution may fail to foster police and judicial cooperation in the context of cross-border crimes. In the meantime, Pereira admits that the “harmonisation of offences under the directive could lead to a certain improvement in the levels of police and judicial cooperation”,<sup>60</sup> which in turn may facilitate the pursuit of environmental justice in a cross-border context within the EU.

## 1.4 Water Framework Directive

The Water Framework Directive (hereinafter, the WFD) is an EU environmental law instrument of great significance, since it aims to an improvement of European aquatic habitats – groundwaters, river basins etc. – to “good ecologic status” by 2015 and to prevent any further deterioration, by establishing a specific framework.<sup>61</sup> Obligations stipulated by the WFD also include the need for the MS to establish river basin management plans.<sup>62</sup>

Despite the generally vertical relationship between the EU and MS that the WFD embodies, there is a special instance when the WFD explicitly calls upon cooperation of the MS, when a river basin covers a territory of more than one MS, hence posing a need to designate an international river basin and a “single international management plan for this basin, whether it may be in the territories of MS only, or also when the basin territory is also in a non-MS.”<sup>63</sup> Nevertheless, the WFD acknowledges the need for a further EU action in the field of water protection within Article 16(1), namely, that the “European Parliament and the Council shall adopt specific measures against pollution of water by individual pollutants or groups of pollutants presenting a significant risk to or via the aquatic environment”<sup>64</sup>, thus already signalling the advent of new legal instruments that might help to address issues caused by insufficient harmonisation of national laws.

As regards to the applicability of the WFD to the marine environment, it is largely excluded from the geographical scope of the WFD, meaning that only coastal waters are to be associated with river basins and their respective management plans.<sup>65</sup> However, the WFD is relevant to the context of marine environment protection, since, as put by Osborn, an overwhelming majority of marine pollution originates from human activities on the ground and a proper and sustainable management of river basins is crucial for preserving the marine

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<sup>60</sup> Pereira, *Environmental Criminal Liability and Enforcement in European and International Law*, p.342

<sup>61</sup> WFD, Articles 1 and 4(1)(a)

<sup>62</sup> *Ibid*, Article 3(1)

<sup>63</sup> *Ibid*, Article 13(2) and (3)

<sup>64</sup> *Ibid*, Article 16

<sup>65</sup> *Ibid*, Articles 1 and 2(7)



environment.<sup>66</sup> Moreover, the auxiliary purpose of the WFD, as stated in the Article 1(e), is to establish a framework for protecting inland surface waters and coastal waters, thus contributing to “the protection of territorial and marine waters”.<sup>67</sup> In addition, the necessity to protect the marine environment, while implementing measures relative to water protection or use, is pointed out in Article 11(6).<sup>68</sup>

The ambition to protect marine environment, however, cannot be fully achieved in case of incomplete implementation of measures set forward by the WFD. For instance, Moss has raised a concern for the MS practice to manipulate with typologies used for determining ecological status and several other deviations. As Moss stated, the “current approach will lead to some improvement in water quality but not to the fundamental change in ecological quality intended by the Directive and has partly been encouraged by lack of definition and contradictions within the Directive itself.”<sup>69</sup> Whereas, Howarth raises attention to several other flaws – permission to avoid realisation of good status due to the broad and general wording of the provisions of permissible derogations. Thus, “incongruities between the ideals underlying public engagement and the realities of applying complex environmental legislation are evident.”<sup>70</sup> Similarly, Newig, Pahl-Wostl, and Sigel stress the necessity of enhancing public participation within the frameworks of the WFD in order to mitigate the negative effects arising from the uncertainty of the wording of the Directive.<sup>71</sup>

## 1.5 Marine Strategic Framework Directive

The Marine Strategic Framework Directive (hereinafter, the MSFD)<sup>72</sup> is a legal instrument aiming at protection of specifically marine environment, and another noteworthy aspect, according to Osborn, is that the MSFD is “the first European Directive based on an ecosystem-based approach to management”.<sup>73</sup> With close links to Birds and Habitats

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<sup>66</sup> David Osborn, “Land-based pollution and the marine environment”, in *Research Handbook on international marine environmental law*, ed. Rosemary Rayfuse, (Edward Elgar Publishing, 2015), pp. 81-83

<sup>67</sup> WFD, Article 1

<sup>68</sup> *Ibid*, Article 11(6)

<sup>69</sup> Brian Moss, “The Water Framework Directive: Total environment or political compromise?”, in *Science of The Total Environment* 400, No. 1-3 (2008): pp.

<sup>70</sup> William Howarth, “Aspirations and Realities under the Water Framework Directive: Proceduralisation, Participation and Practicalities”, in *Journal of Environmental Law* 21, no.3 (2009): pp. 414-417

<sup>71</sup> Jens Newig, Claudia Pahl-Wostl, Katja Sigel, „The role of public participation in managing uncertainty in the implementation of the Water Framework Directive“, in *Environmental Policy and Governance* 15, no. 6 (2005): pp. 334-336

<sup>72</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 (Marine Strategy Framework Directive), *OJ L* 164, 25 June 2008,

<sup>73</sup> Osborn, “Land-based pollution and the marine environment”, p. 91

Directives, the MSFD serves as a tool implementing the IMP that was on its early development stage in 2008.<sup>74</sup> The primary objective of the MSFD is to ensure that the marine waters within the territories of MS are in an environmentally healthy status, by conducting assessments, determining what can be considered as “good environmental status” as well as for the MS to conduct monitoring and establish measures to improve the environmental situation in marine regions by 2020.<sup>75</sup> Due to its subject matter, the MSFD logically has a geographical scope that covers the territorial waters, as well as the EEZ of the MS.<sup>76</sup>

Whereas the responsibility of developing a marine strategy is delegated in two ways: firstly, to each of the MS in which territory a marine region or subregion is located, and secondly, to all the MS “sharing a marine region or subregion” with an explicit obligation to cooperate.<sup>77</sup> Unlike in the previously reviewed Directives, where a few general provisions on cooperation between MS have been provided, regional cooperation has a particular importance under the MSFD. The Article 6 emphasises the requirement to utilise the “existing regional institutional cooperation structures, including those under Regional Sea Conventions”<sup>78</sup> applicable to the relevant marine region. However, as van Tatenhove et al. point out, the MSFD itself does not provide any specific legal framework nor specifies governing structures to ensure cooperation and coordination at the regional sea level between MSs. Subsequently, each MS can define its own GES without full coordination and collaboration with neighbouring countries.<sup>79</sup> The first issue may not be relevant on occasion when there already is a mechanism in place, and it is a problematic aspect when there is a need to establish a new one,<sup>80</sup> however the large discretion awarded to the MS to define their own GES raises doubt on the ultimate effectiveness of the MSFD.

These implementation-related concerns are highlighted by the study conducted by Cavallo et al., in which it was concluded that this margin of MS discretion in defining GES and indicators used for the environmental assessment as well as targets has resulted in mutually

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<sup>74</sup> Ronán Long, “The Marine Strategy Framework Directive: A New European Approach to the Regulation of the Marine Environment, Marine Natural Resources and Marine Ecological Services”, in *Journal of Energy & Natural Resources Law* 29, no.1 (2011): pp. 4-5

<sup>75</sup> Judith van Leeuwen, Luc van Hoof, Jan van Tatenhove, “Institutional ambiguity in implementing the European Union Marine Strategy Framework Directive”, in *Marine Policy* 36 (2012): p. 636

<sup>76</sup> MSFD, Articles 2 and 3(1)

<sup>77</sup> Ibid, Article 5(1) and (2)

<sup>78</sup> Ibid, Article 6(1)

<sup>79</sup> Jan van Tatenhove, Jesper Raakjær, et al. “Regional cooperation for European seas: Governance models in support of the implementation of the MSFD”, in *Marine Policy* 50, part B (2014): p. 364

<sup>80</sup> Judith van Leeuwen, Jesper Raakjær, et al. “Implementing the Marine Strategy Framework Directive: A policy perspective on regulatory, institutional and stakeholder impediments to effective implementation”, in *Marine Policy* 50, part B (2014): p. 327

inconsistent measures between the MS even in the same marine region,<sup>81</sup> although the Article 4 of the MSFD obliges MS to determine GES at the level of marine region.<sup>82</sup> This, however, is not due to flawed Common Implementation Strategy structures that should have enabled inclusive stakeholder involvement from numerous MS and fostered a harmonised implementation on the MSFD. Instead, the lack of political commitment from the MS was indicated as the core reason for this outcome.<sup>83</sup> Whereas, the social and political complexity of the process and the need to coordinate at various levels, could be an additional cause for the hampered implementation of the MSFD, according to van Leeuwen.<sup>84</sup>

However, the most striking deficiency of the MSFD, as Osborn states, is the permission to avoid introduction of measures intended to conservation of marine environment with disproportionately high costs.<sup>85 86</sup> Considering the liberty of the MS to define the GES and how it has resulted, this obviously general provision may hinder the adoption of certain environmentally beneficial and effective measures, for the threshold above which the costs would be deemed disproportionate is subject to the interpretation of the MS responsible authorities and brought lower, whenever the opportunity allows.

To sum up, the MSFD being ambitious in its objectives, has several shortcomings that may hinder the securing of GES in as much European marine areas as possible. Moreover, the hierarchy put forward by the Directive is ambivalent – while vesting responsibility in the MS to cooperate under the Regional Sea Conventions or any intergovernmental bodies designated to implement the MSFD in a marine region, the vertical relationship between the EU and the MS is prevalent, as well as the increase of the EU competence due to adopting the Directive and thus developing the IMP. Van Leeuwen et al. strongly emphasise that the presence of multiple institutional settings – EU, Regional Sea Conventions, and MS – without sufficiently clearly defined competences for each of these setups causes institutional ambiguity in implementing the MSFD. The geographical scope extending to the EEZ of the MS – comparatively greater than in the WFD – is nonetheless laudable and contributing to the objective of marine environment protection. On the other hand, the non-inclusion of such

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<sup>81</sup> Marianna Cavallo, Michael Elliott, et al., “Benefits and impediments for the integrated and coordinated management of European seas”, *Marine Policy* 86 (2017): p.210-211

<sup>82</sup> MSFD, Article 4

<sup>83</sup> Cavallo, Elliott, et al., “Benefits and impediments for the integrated and coordinated management of European seas”: pp. 210-212

<sup>84</sup> Van Leeuwen, Raakjær, et al. “Implementing the Marine Strategy Framework Directive”, p. 329

<sup>85</sup> MSFD, Article 14(4)

<sup>86</sup> Osborn, “Land-based pollution and the marine environment”, p.91

pollution as oil spills due to reference to the WFD<sup>87</sup> is disheartening, when considering the overarching goal of the MSFD to restore marine areas to a healthy state. Regarding the involvement of multiple stakeholders in the process of implementing the provisions of the MSFD, scholarly opinions are divided: while the need for a greater inclusion is expressed, the subsequently increased complexity of the processes also may be a hindrance to an efficient implementation of the MSFD.

## **1.6 Regulation and Directives implementing provisions of the Aarhus Convention**

Having touched upon the inclusion of other actors than the EU and MS institutions in implementing EU environmental policy, three important EU law instruments come in the equation - Regulation on the application of the provisions of the Aarhus Convention (hereinafter, the Aarhus Regulation)<sup>88</sup>, Directive on public access to environmental information (hereinafter, the PAI Directive),<sup>89</sup> and Directive providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment (hereinafter, the PP Directive).<sup>90</sup> With the objective to implement the Aarhus Convention<sup>91</sup> they subsequently enable public participation in environmental plans and initiatives that EU and MS institutions and bodies implement, as well as oblige the institutions to distribute the information on their initiatives impacting the environment, and provide access to justice.<sup>92</sup> It must be noted that the Aarhus Regulation imposes obligations upon the “Community institutions” – any “public institution, body, office or agency established by, or on the basis of, the Treaty except when acting in a judicial or legislative capacity”.<sup>93</sup> Whereas, the PAI and

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<sup>87</sup> MSFD, Article 13(2)

<sup>88</sup> Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 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, *OJ L* 264, 25 September 2006, pp. 13–19

<sup>89</sup> Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, *OJ L* 41/26, 14 February 2003, pp. 26–32

<sup>90</sup> Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, *OJ L* 156/7, 25 June 2003, pp. 17–25

<sup>91</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), 28 June 1998, entered into force 30 October 2001, 2161 UNTS 447

<sup>92</sup> Aarhus Regulation, Article 9

<sup>93</sup> *Ibid*, Article 3 and 2(1)(c)

PP Directives are expressly addressed to the MS and oblige them to introduce the provisions of the Aarhus Convention in their national legal systems.

The question of public participation and access to justice is very relevant to the environmental law context. As Ebbesson asserts, the involvement of all individuals in environmental decision-making is desirable, emphasising that an “alternative, a more cosmopolitan conception of justice, is to place members of the public at the centre also in transboundary justice deliberations”.<sup>94</sup> He rejects the Rawlsian doctrine that focus on the individuals, not on states, in transboundary cases is too demanding even for liberal democracies,<sup>95</sup> because:

“[w]hile territorial borders constitute the dominant, formal delimitations of societies in international law, state borders do not mark correctly who is concerned or affected by decisions, acts and omissions with regard to health or the environment. Nor should they prevent us from taking individuals as the measure in justice deliberations, for instance when examining international law and international institutions.”<sup>96</sup>

Nevertheless, as institutions can be a more effective tool in achieving environmental justice due to their larger expertise or authority vested in them, a solid compromise is to enable the NGOs to participate in decision-making and to facilitate the individuals’ pursuit for environmental justice.<sup>97</sup>

Returning to the EU law instruments implementing the Aarhus Convention and whether the marine environment is also in their scope, it must be pointed out that, although these Directives and the Regulation do not contain any substantial measures of environmental protection, it is nonetheless important that marine areas are within their scope in order to enable NGOs or individuals to exercise the rights conferred upon them, when they have a legitimate interest in marine environment protection. Both Aarhus Regulation and PAI Directive in Articles 2(1)(d)(i) and 2(1)(a) respectively, stipulate that the environmental information to which public should have access must be provided also about marine areas.<sup>98</sup>

Even though these instruments deal mostly with procedural aspects, and not directly with environmental protection, after examining whether these instruments contain any rules

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<sup>94</sup> Jonas Ebbesson, “Piercing the state veil in pursuit of environmental justice”, in *Environmental Law and Justice in Context*, edited by Jonas Ebbesson, Phoebe Okowa (Cambridge: Cambridge University Press, 2009), pp. 272-275

<sup>95</sup> John Rawls, *The Law of Peoples*, (Cambridge, MA: Harvard University Press, 1999), pp.82-83, cited in Ebbesson, “Piercing the state veil in pursuit of environmental justice”, p. 372

<sup>96</sup> *Ibid*, 273

<sup>97</sup> *Ibid*, 274-275

<sup>98</sup> Aarhus Regulation, Article 2(1)(d)(i) and Public Access to Information Directive, Article 2(1)(a)

relative to cross-border damage scenarios, it was nonetheless discovered that the PP Directive obliges the MS in case of a project carried out in its territory that has a potential effect on the environment of another MS to, firstly, inform the latter on the project scope and its “possible transboundary impact”<sup>99</sup> and to enable the MS and the public that already is or is likely to be affected by the project to participate in environmental decision-making procedures.<sup>100</sup>

The Aarhus Regulation, as it obliges the institutions and bodies established pursuant to the EU Treaties, in principle provides the opportunity for non-governmental actors to be involved in EU environmental policy-making to a certain extent, and within the EU context cross-border environmental matters are rather general rule than exception. Nonetheless, there are some constraints that raise concern on the eventual effectiveness of Aarhus Regulation. For instance, the option for internal review of Union administrative acts is open only for those environmental NGOs that have operated in the field not less than two years and in its activities, deals with the subject matter covered by the administrative act in question.<sup>101</sup>

Wenneras highlights this restriction of personal scope as one of the main shortcomings of the Regulation, as well as several other procedural limits that diminish its effectiveness. For instance, six weeks’ time limit for the eligible entities to submit a request for an internal review of a recently adopted an administrative act<sup>102</sup>, according to Wenneras, may conflict with the objectives of Aarhus Convention.<sup>103</sup> There can also be an opposite of very specific restrictions – too general provisions that the MS can subject to their own interpretation and to potentially restrict the environmental rights of general public stipulated by the Public Participation Directive. For instance, there is necessity to streamline the requirements for interest groups in order to be eligible for a consultation and access to justice standards in all the MS, also in order to facilitate the transboundary participation of the eligible environmental NGOs, since the large margin of discretion that the Article 3(2)<sup>104</sup> gives to the MS to identify the entities eligible for participation in environmental decision-making. However, Obradovic proposes that the rarity of transboundary actions is rather due to the fact that these consultations do not take place at an early stage of developing public plans and programmes

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<sup>99</sup> PP Directive, Article 3(5)(a)

<sup>100</sup> Ibid, Article 3(5)

<sup>101</sup> Aarhus Regulation, Articles 10 and 11

<sup>102</sup> Ibid, Article 10(1)

<sup>103</sup> Pal Wenneras, *The enforcement of EC Environmental Law*, (Oxford: Oxford University Press, 2007) pp. 316-318

<sup>104</sup> PP Directive, Article 3(3)

impacting the environment,<sup>105</sup> and this is an apparent result of MS being allowed by the Article 3(7) of the PP Directive to determine at what stage the “decisions, acts or omissions may be challenged”

As a result, in their objectives the Aarhus Regulation and the PP and PAI Directives are ambitious tools for ensuring public participation in EU and MS environmental decision-making processes, access to information and justice in environmental matters. Yet the effectiveness of these instruments, Directives in particular, depends on how diligently, with a genuine commitment to protect the nature, and coherently the MS transpose them into their national laws, as the general provisions give room for a subjective and opportunistic interpretation, and significant variations in how the MS secure the environmental rights of general public under the Aarhus Convention.

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<sup>105</sup> Daniela Obradovic, “EU Rules on Public Participation in Environmental Decision-making Operating at the European and National Levels”, in *The Aarhus Convention at Ten*, Marc Pallemarts, ed., (Groningen: Europa Law Publishing, 2011), pp. 183

## 2 CASE STUDY OF THE BALTIC SEA

The Baltic Sea, due to its geographical characteristics, is undeniably a marine area that requires due care to the environment to be observed in human activities. Being a relatively shallow and semi-enclosed water body with the only connection to the Atlantic Ocean being the Sound, and Danish Straits, full water exchange in it happens in approximately 30 years' time.<sup>106</sup> Having said that, the human impact over the Baltic Area is tremendous, with nine countries having an economic activity both in the marine area, as well as in its drainage area, which is four times the size of the Baltic Sea itself. Hence, there are numerous anthropogenic pressures exerted upon the Baltic Sea that result in many environmental problems, most significant of them being the loss of biodiversity, pollution, and eutrophication.<sup>107</sup>

The latter problem is a very serious environmental issue in the Baltic Sea context – the excessive input of nutrients, phosphates and nitrates in particular, results not merely in less transparent water and pollution as such, but also in prolific growth of cyan algae, further leading to loss of oxygen in the water, and even in dead zones within the sea, and this unfortunately, as Andersen et al. emphasise in their research, is the case of the Baltic Sea.<sup>108</sup> As per the latest HELCOM Holistic Assessment 2017 (hereinafter, HOLAS II) conducted in time period 2011-2015, 97% of the region was affected by eutrophication. A positive remark, however, must be made regarding the fact that the input of phosphorus and nitrogen has decreased by 19% and 13%, respectively, since both HELCOM and the EU have adopted measures in this regard.<sup>109</sup> The task of reducing eutrophication is nonetheless an immense and still unresolved challenge, as the sediments can release the nutrients in the water and the input of them is reduced only to some extent over the last two decades.

Hence, a solid implementation of environmental law and carrying out protection initiatives within the Baltic Sea area is crucial – whether these instruments be legal and policy provisions adopted by the EU or HELCOM. While the first subchapter will review the EU direct measures applicable to the case of the Baltic Sea, the second will focus on HELCOM

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<sup>106</sup> Anders Stigebrandt, “Physical oceanography of the Baltic Sea” in *Systems Analysis of the Baltic Sea*, edited by Fredrik V. Wulff, Lars A. Rahm, and Per Larsson, (Berlin Heidelberg: Springer, 2001), cited in HELCOM, *State of the Baltic Sea Holistic Assessment: First version*. (2017) Download available on: <http://www.helcom.fi/Lists/Publications/State%20of%20the%20Baltic%20Sea%20-%20First%20version%202017.pdf> Accessed May 16, 2018

<sup>107</sup> HELCOM. *State of the Baltic Sea Holistic Assessment: First version*. (2017) Download available on: <http://www.helcom.fi/Lists/Publications/State%20of%20the%20Baltic%20Sea%20-%20First%20version%202017.pdf> Accessed May 16, 2018

<sup>108</sup> Jesper H. Andersen, Jacob Carstensen, et al. “Long-term temporal and spatial trends in eutrophication status of the Baltic Sea”, in *Biological Reviews* 92 (2017): pp. 135-136

<sup>109</sup> Supra 107



initiatives and recommendations to assess whether and how they are linked with the EU law provisions, in order to determine if HELCOM can be considered as a platform, moreover, an effective one, for implementing the EU environmental law in the Baltic Sea region.

## **2.1 The applicability of EU law and policy mechanisms relevant to the Baltic Sea environmental situation**

While Chapter 1 was focused on the EU law provisions governing cross-border marine environmental damages in general, in the following section it will be analysed whether these provisions are applicable exactly to the case of the Baltic Sea. In addition, considering the situation of the Baltic Sea described above, this subchapter will include certain EU law documents and policy instruments that either deal specifically with mitigating the problems of Baltic Sea environment or address them in practice, i.e., by controlling fisheries, reducing use of harmful chemicals, etc.

### **2.1.1 The applicability of Regulations and Directives reviewed in Chapter 1**

The application of Habitats Directive in the Baltic Sea region primarily manifests in designating areas under the protection of Natura 2000 framework, which is a responsibility delegated to the MS, while the EU has the authority to ensure compliance with the Habitats Directive and to assess the progress of designating the sites. As mentioned in Chapter 1.1, the geographical scope covers also coastal and marine areas. According to the assessment conducted by the Commission, the Baltic Sea can be considered as a success story in Natura 2000 context, for 12% of the Baltic Sea coastal and marine areas are covered by the framework provided for by the Habitats Directive. In this respect, the MS in the area have been compliant and even set an example to other coastal MS.<sup>110</sup>

Regarding the concerns of a coherent management of the Natura 2000 sites, the Commission admits them to be addressed by the cooperation under the RSCs – Helsinki Convention in this particular case. HELCOM has actively fulfilled the task of designating Marine Protected Areas, the sites of which greatly overlap with the Natura 2000 sites. Also, the Commission emphasises the role of HELCOM in “defining assessment criteria for MPA network coherence”.<sup>111</sup> Nonetheless, although there is progress made, the objective of a coherent

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<sup>110</sup> European Commission. Report from the Commission to the European Parliament and the Council on the progress in establishing marine protected areas. Available on: [http://ec.europa.eu/environment/marine/eu-coast-and-marine-policy/implementation/pdf/marine\\_protected\\_areas.pdf](http://ec.europa.eu/environment/marine/eu-coast-and-marine-policy/implementation/pdf/marine_protected_areas.pdf) Accessed May 16, 2018

<sup>111</sup> Ibid

management is yet to be reached, as HELCOM points out in its latest HOLAS.<sup>112</sup> Similarly, the EEA stresses the problem of insufficient assessment of marine habitats and species as a general trend – within the 2015 report covering assessment period from 2007 to 2012, 25% of marine habitats were classified as with “unknown” status, while as for marine species the percentage is 66%. Considering the additional proportion of habitats and species in “bad/inadequate” status, the situation with implementing the Habitats Directive in marine context is obviously dire.<sup>113</sup>

The applicability of the Birds Directive, in contrast, should be reviewed from the species standpoint, since the protected species and their habitats are primary point of reference for the Directive. Among the species listed in the Annex I of the Birds Directive, which are entitled to protection,<sup>114</sup> numerous of them are breeding and wintering in the Baltic Sea and on its coasts, for instance, whooper swan, black-throated and red-throated divers, etc.<sup>115</sup> Similarly as with the Habitats Directive, the monitoring of waterbirds is greatly contributed to by HELCOM that integrates the species covered by the Birds Directive in its own HOLAS. The extent of HOLAS adherence to the Directive will be reviewed in Chapter 2.2.1.

Regarding the implementation of the Birds Directive on the MS level by establishing special protection areas and important bird and biodiversity areas, the process in the Baltic Sea region has been comparatively more efficient than in other European marine regions, at least from the perspective of the ECJ experience in dealing with the violations of the Birds Directive, for majority of case law related to the Birds Directive has happened in Mediterranean context. The sole exception in this context has been an early ECJ case, in which the Court concluded that Finland had violated the provisions of the Birds Directive by designating special protection areas in an insufficient number and spatial coverage, by omitting some important bird habitats from the list.<sup>116</sup> However, the latest status of implementing the Birds Directive provisions indicates that the Baltic Sea states are forerunners in this regard. As Ramirez et al. emphasise, the “Scandinavian and Baltic countries present the most developed networks in

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<sup>112</sup> Supra 105

<sup>113</sup> European Environment Agency. *Marine environment – SOER 2015*. Download available on: <https://www.eea.europa.eu/soer-2015/europe/marine-and-coastal> Accessed May 16, 2018

<sup>114</sup> Birds Directive, Article 4(1)

<sup>115</sup> Ibid, Annex I

<sup>116</sup> Judgment in *Commission v Finland*, C-240/00, EU:C:2003:126, paras. 3-4 and 28-33

terms of coverage of their EEZ,”<sup>117</sup> with Germany being the leader among MS by designating 34.6% of its EEZ as special protection areas.<sup>118</sup>

Considering the applicability of the EL Directive, it is crucial to determine whether the status of the Baltic Sea can be classified as affected by an “environmental damage”, namely, damage to species and habitats covered by Birds and Habitats Directives and damage to waters covered by the WFD.<sup>119</sup> As previously stated in Chapter 1.4, the WFD, although applicable to only to inland and coastal areas, is nonetheless an influential tool for protecting marine environment. In addition, as expressed in the Preamble, the WFD aims to contribute “towards enabling the Community and Member States to meet” the obligations of RSCs, including the Helsinki Convention 1992.<sup>120</sup> Hence, the EL Directive is undeniably relevant to the Baltic Sea context. On the other hand, the usefulness of the EL Directive is limited by its temporal scope – environmental liability cannot be established for damage occurring before the implementation deadline of 30 April 2007,<sup>121</sup> and this lack of retroactive effect would have been a hindrance, if an entity, for instance, had littered the marine environment before this date. In contrast, as Hinteregger points out, the US legislation on waste has a retroactive effect in order to better enforce liability and pursue environmental protection objectives.<sup>122</sup> Moreover, oil spills or damage resulting from nuclear material transportation are explicitly excluded from the scope of the EL Directive by its Articles 4(2) and (4), respectively.<sup>123</sup> In conclusion and taking the most poignant Baltic Sea environmental problem – eutrophication - into account, it must be noted that the very intention of the EL Directive is to respond and mitigate damage that can be directly linked to environmentally harmful operations of a person.<sup>124</sup> Certainly, the EL Directive may be applied on isolated environmental damage cases for which it is possible to establish a cause, and this is very positive from the perspective of implementing “polluter-pays” principle, however, this legal instrument cannot help in terms of the eutrophication in the Baltic Sea. Hence practical measures, such as restrictions on use of chemicals, are, although a reactive measure, the logical solution for combatting the widespread eutrophication.

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<sup>117</sup> Ivan Ramirez, et al. “How well is the EU protecting its seabirds? Progress in implementing the Birds Directive at sea”, in *Marine Policy* 81 (2017): pp.180

<sup>118</sup> Ibid

<sup>119</sup> EL Directive, Article 2.1

<sup>120</sup> WFD, Preamble para. 21

<sup>121</sup> EL Directive, Articles 17 and 19(1)

<sup>122</sup> Hinteregger, “Systems of environmental liability in Europe”, pp.12-13

<sup>123</sup> EL Directive, Articles 3(2) and (4)

<sup>124</sup> Ibid, Article 4(5)

Returning to the WFD, the applicability of which to the Baltic Sea was examined in the paragraph above, some scholarly findings on its implementation ought to be considered. Alongside the conclusions of the Commission, they validate previously expressed concerns that the large margin of discretion within the WFD can result in flawed implementation. Hence it is unsurprising that the Commission has resorted to litigation with the MS due to the failure of the latter to transpose the provisions, even definitions from the WFD in their national laws.<sup>125</sup> Firstly, as Voulvoulis et al. claim, the basic tasks such as designating river basins appeared to be a great challenge for the MS, not mentioning the introduction of environmentally beneficial initiatives endorsed by the WFD. Instead, there has even been a wide application of exemptions and avoidance. Voulvoulis highlights the flexibility given to the MS in applying WFD provisions, which has conflicted with the overarching objective to improve ecological status of waters.<sup>126</sup>

Another important aspect is public participation that the WFD claims to endorse<sup>127</sup> and is the subject matter of the EU law instruments introducing the provisions of the Aarhus Convention (see Chapter 1.5). According to the findings of De Stefano, the process of public consultation is usually postponed to the point when an administrative measure is almost adopted, giving the NGOs practically no authority over decision-making in environmental matters – a major flaw from the perspective of introducing the Aarhus Convention in the EU law. De Stefano emphasises that, at least in water policy making process in the MS, transparency and early involvement of the general public and environmental NGOs in particular, for the authorities themselves include the representatives of the economic sector in these processes, must be a general rule. Ensuring public participation has not been done in a uniform manner, since there are huge discrepancies between the MS even in the Baltic Sea region. While in terms of early involvement in decision-making, public consultation, and active involvement Finland and Scandinavian MS, and Estonia receives a good score, the results for Latvia and Poland indicate mostly “poor” or “very poor” public involvement in environmental decision-making in the context of the WFD.<sup>128</sup>

As regards to the MSFD, its applicability to the Baltic Sea cannot be disputed due to its subject matter. The Baltic Sea and Helsinki Convention has great significance under the

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<sup>125</sup> See Judgment in *Commission v Poland*, C-648/13, EU:C:2016:490, paras. 95, 135 and 162 and Judgment in *Commission v Spain*, C-151/12, EU:C:2013:690, paras. 41-42 and 54

<sup>126</sup> Nikolaos Voulvoulis, et al. “The EU Water Framework Directive: From great expectations to problems with implementation”. *Science of the Total Environment* 575 (2017): pp. 362-363

<sup>127</sup> WFD, Preamble 14

<sup>128</sup> Lucia De Stefano, “Facing the water framework directive challenges: A baseline of stakeholder participation in the European Union”, in *Journal of Environmental Management* 91 (2010): 1336-1338

MSFD, since its aim is to “contribute to the fulfilment of the obligations and important commitments” stipulated by the Convention.<sup>129</sup> Long emphasises that pursuant to the MSFD Article 5(2) the use of institutional arrangements stemming from the RSCs for the purpose of carrying out the rules of the MSFD in order to achieve good environmental status in the marine areas is endorsed.<sup>130</sup>

The inclusion of the RSC framework is of a great benefit in the MSFD context, since there are variances in the implementation of the MSFD measures among the MS. According to the Commission report focusing on the appropriateness and mutual coherence of MS monitoring programmes, there are discrepancies on the MS level – none of the MS, as Commission evaluates, has fully appropriate monitoring programmes – most of them are only “partially appropriate”. Moreover, some MS have admitted that monitoring activities would not be fully commenced by 2020, when the marine areas under the MSFD scope should be in a healthy environmental state. A note should be made that the implementation of operational measures still requires proper assessment and evaluation, as the Article 5(2) of the MSFD sets the end of 2016 as a target for establishing them. Having discovered implementation issues on the MS level, the Commission nonetheless concludes that the provision of employing the RSC institutions and mechanisms has resulted in a high level of coherence of monitoring programmes, especially in the Baltic Sea region.<sup>131</sup> In contrast, Jouanneau and Raakjær doubt whether the RSC mechanism in the Baltic Sea context is of great importance in terms of implementing the MSFD provisions, since HELCOM is perceived by national coordinators of the MSFD rather as an environmental, not a strategic platform. Additionally, the lack of public participation is emphasised, as well as that the presence of an already established and rigid mechanism to some extent halts launching environmentally beneficial out-of-the-box initiatives.<sup>132</sup>

To summarise on the applicability of the main EU environmental law instruments to the Baltic Sea, the provisions of them are relevant, even despite the lack of clearly stipulated rules for cross-border cases (Birds and Habitats Directives). The main vector of implementing these instruments is primarily via the MS national measures, although the MSFD with its emphasis

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<sup>129</sup> MSFD, Preamble paragraph 19

<sup>130</sup> Ronàn Long, “Legal Aspects of Ecosystem-Based Marine Management in Europe”, in *Ocean Yearbook* 26 (2012): p. 440

<sup>131</sup> European Commission. *Report from the Commission to the European Parliament and the Council assessing Member States' monitoring programmes under the Marine Strategy Framework Directive* ( 16 January 2017). Available on: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1526501590501&uri=CELEX:52017DC0003> Accessed :May 17, 2018

<sup>132</sup> Jouanneau, Raakjær, “‘The Hare and the Tortoise’”, pp. 334 and 336

on employing the RSC institutional mechanisms is a notable exception. Nonetheless, the assumption of too general provisions resulting in inconsistent implementation by the MS is to a great extent confirmed by the Commission findings and scholarly analysis, which is why the RSC bodies are states as a crucial coordination platform for introducing coherent measures in order to protect marine areas shared by multiple MS. Although the ECJ cases related to MS failure to transpose EU environmental law directives into the national law are comparatively less in the Baltic Sea region than in, for instance, Mediterranean region, the very existence of case law indicates that the MS tend to exploit the margin of discretion provided by the directives.

### **2.1.2 Additional Regulations relevant to the Baltic Sea**

Having observed certain deficiencies in the core EU environmental law directives as well as difficulties in their implementation, it can be concluded that the EU requires more stringent and specific legal instruments to effectively address the environmental issues, including those of the Baltic Sea. Targeted regulations are the obvious tool, and there are several dealing with minimising the chemical contamination of marine areas, as well as fisheries. The CFP, undergoing reform process with environmental objectives gaining more importance in it, is an important driver of fish resources conservation. As Markus and Salomon point out, the CFP reform proposal explicitly states the necessity to preserve marine biological resources.<sup>133</sup> For instance, there have been major legislative achievement such as the ban on driftnets in the Baltic Sea,<sup>134</sup> and the Commission impact assessment proposing an EU-wide ban of driftnets mentions that this fishing technique, harmful to the marine environment, is effectively prohibited in the MS surrounding the Baltic Sea, although Poland wanted to introduce some reservations.<sup>135</sup>

Another significant development regarding the conservation of marine resources can be expected by the Baltic multiannual plan introduced by the Regulation 2016/1139.<sup>136</sup> It aims to

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<sup>133</sup> Till Markus, Markus Salomon, “The Law and Policy Behind the Upcoming Reform of the Common Fisheries Policy”, in *Journal for European Environmental Planning Law* 9 (2012): pp: 268-269

<sup>134</sup> Council Regulation (EC) No 2187/2005 of 21 December 2005 for the conservation of fishery resources through technical measures in the Baltic Sea, the Belts and the Sound, amending Regulation (EC) No 1434/98 and repealing Regulation (EC) No 88/98. *OJ L* 349, 31 December 2005, p. 1–23

<sup>135</sup> European Commission. *Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council laying down a prohibition on driftnet fisheries*. (14 May 2014) Available on: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014SC0153&qid=1526540186142> Accessed May 17, 2018

<sup>136</sup> Regulation (EU) 2016/1139 of the European Parliament and of the Council of 6 July 2016 establishing a multiannual plan for the stocks of cod, herring and sprat in the Baltic Sea and the fisheries exploiting those stocks, amending Council Regulation (EC) No 2187/2005 and repealing Council Regulation (EC) No 1098/2007. *OJ L* 191, 15 July 2016, pp. 1-15

apply precautionary principle to fisheries of cod, sprat, and herring, as well as to eliminate accidental by-catch of other species that were not the target of the fisheries and subsequent discard of them (Articles 3(2) and (3)). Moreover, an emphasis is set on that Commission may introduce further measures prohibiting or limiting fisheries in certain areas “to protect spawning and juvenile fish or fish below the minimum conservation reference size or non-target fish species”. (Article 6(1)(c))<sup>137</sup> The abovementioned restrictions are crucial from the perspective of ensuring the biodiversity and recovery of fish stocks in the Baltic Sea.

As regards to the reduction of chemical nutrients causing eutrophication, this objective is intended to be met by several other regulations, which thus are of great relevance to the Baltic Sea. For instance, the Detergents Regulation 648/2004<sup>138</sup> sets out rules for reducing the use of phosphates and restricting surfactants containing – chemical compounds used in detergents – on basis of their biodegradability. (Detergents Regulation Article 1(2)) Although the Regulation permits certain derogations, they however shall not be granted for substances that are biodegradable to less than 80%. (Detergents Regulation Article 4(3), Annex II)

Eventually, after reviewing the impact the of the Detergents Regulation, the Commission concluded that there was a necessity for a restriction of phosphates in detergents due to concerns of eutrophication not being fully combatted. Since this measure addresses “the cross-boundary flow of phosphates [...] more effectively than Member States can do alone or in regional agreements,”<sup>139</sup> the Regulation 259/2012 limiting the use of phosphates in detergents (Hereinafter, the Phosphates Regulation)<sup>140</sup> was adopted. This instrument, complementing the Detergents Regulation, prohibits the placing on market of detergents that contain more phosphates than permitted by limits stipulated within a newly added Annex. (Phosphates Regulation, Article 1(3) and (11))

The Regulations reviewed above are an example on how the EU provides direct measures for addressing marine environmental issues – unlike the Directives providing general rules and frameworks, these instruments are targeted, detailed and leaving little margin for implementation. This situation highlights, as de Santo puts it, the “fundamental bifurcation

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<sup>137</sup> Ibid

<sup>138</sup> Regulation (EC) No 648/2004 of the European Parliament and of the Council of 31 March 2004 on detergents. *OJ L* 104, 8 April 2004, pp. 1–35

<sup>139</sup> European Commission. Impact assessment accompanying document to the Proposal for amending Regulation (EC) No 648/2004 as regards the use of phosphates and other phosphorus compounds in household laundry detergents. (4 November 2010) Available on: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1526544538411&uri=CELEX:52010SC1277> Accessed May 17, 2018

<sup>140</sup> Regulation (EU) No 259/2012 of the European Parliament and of the Council of 14 March 2012 amending Regulation (EC) No 648/2004 as regards the use of phosphates and other phosphorus compounds in consumer laundry detergents and consumer automatic dishwasher detergents. *OJ L* 94, 30 March 2012, pp. 16–21

between fisheries management and nature conservation in Europe”.<sup>141</sup> Yet, with the MS being bound to comply with Regulations, it can be asserted that the EU is capable of using its exclusive competence in fisheries, as well as employing subsidiarity principle, for which the introduction of Phosphates regulation is a clear example.

### 2.1.3 EU Strategy for the Baltic Sea Region

The EU Strategy for the Baltic Sea Region (hereinafter, the EUSBSR) merits attention within the context of the research as a direct EU strategic involvement in the Baltic Sea situation. Introduced in 2009, the EUSBSR is the first macro-regional strategy, and it aims at improving the dire environmental situation in the Baltic Sea by 2020 via action plans and improved coordination of the involved stakeholders.<sup>142</sup>

It is nonetheless debatable whether there is a necessity for reinventing the wheel and having a new strategic framework, instead of improving the existing institutional mechanisms within the region. While Bengtsson mentions EUSBSR as the core strategy mechanism for the Baltic Sea integration,<sup>143</sup> Tynkkynen, in contrast, emphasises the implementation problems – various levels of governance that add complexity to policy alignment, as well as lack of clearly defined responsibilities.<sup>144</sup> Although the EUSBSR tries to address the latter issue within its each action plan by, as it was done in the latest plan, clarifying the roles of involved stakeholders,<sup>145</sup> Tynkkynen persists that this complex structure is a reason why the implementation of the EUSBSR has been stagnant until now, even with the numerous adopted action plans.<sup>146</sup> In the meanwhile, Roggeri concludes that there is a fundamental problem with the effectiveness of the EU macro-regional strategic programmes – despite the huge emphasis “on bottom-up approach, insufficient attention was given to the pivotal role of the governing structures and mechanisms existing at national and sub-national levels,”<sup>147</sup> which results in

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<sup>141</sup> Elizabeth M. De Santo, “‘Whose science?’ Precaution and power-play in European marine environmental decision-making”, in *Marine Policy* 34 (2010): p. 418

<sup>142</sup> European Commission, *Commission Staff Working Document, European Union Strategy for the Baltic Sea Region*. (20 March 2017) Available on: <http://www.balticsea-region-strategy.eu/action-plan?task=document.viewdoc&id=17> Accessed May 17, 2018

<sup>143</sup> Rikard Bengtsson, “Sweden and the Baltic Sea Region”, in *The Oxford Handbook of Swedish Politics*, ed. Jon Pierre (Oxford: Oxford University Press, 2015), p. 12. Available on: Oxford Handbooks Online database. Accessed May 15, 2018

<sup>144</sup> Nina Tynkkynen, “The Baltic Sea environment and the European Union: Analysis of governance barriers”, in *Marine Policy* 81 (2017), p.128

<sup>145</sup> Supra 140

<sup>146</sup> Tynkkynen, “The Baltic Sea environment and the European Union”, p. 127

<sup>147</sup> Alain Roggeri, “Could Macro-Regional Strategies Be More Successful?”, in *European Structural and Investment Funds Journal* 3 (2015): p. 146-147



flawed mobilisation of process stakeholders and launch of separate bottom-up initiatives within programmes.<sup>148</sup>

Certainly, it is too early to state whether the EUSBSR as such is effective or not due to its limited experience. However, the question of necessity is very pertinent, since the issues discovered within the EUSBSR largely correspond with those of EU environmental law implementation processes – lack of full coordination, clarity as well as fully engaging the stakeholders and embracing bottom-up approach. Failure to resolve them would respond to the question with a solid “no” and thus make the EUSBSR as a discouragement for the existing macro-regional strategies and for the EU to develop new ones.

## **2.2 Helsinki Commission and the implementation of EU law**

As previously stated, HELCOM, the intergovernmental body responsible for implementing the provisions of the Helsinki Convention, is a significant actor in the protection of the Baltic Sea environment both on its own and from the EU perspective. With the Parties to the Convention being eight EU MS, the EU itself, as well as Russia, HELCOM is a noteworthy multilateral cooperation platform also from the geopolitical standpoint. As the strategic, policy and legal frameworks provided by the EU do not necessarily involve the participation of Russia, HELCOM addresses this deficiency. According to Tykkynen, the “eastern enlargement of the EU played a dual role in alleviating these differences: on the one hand, it harmonised environmental regulation across the region, but on the other hand, the exclusion of Russia from the sphere of this regulation became a serious challenge”.<sup>149</sup> Therefore, HELCOM is integral for developing environmental agreements and involving all the Baltic Sea states in the process. For instance, a task of HELCOM is to create recommendations that address certain environmental concerns and to ensure that the Parties introduce the Convention provisions via national law. (Helsinki Convention, Article 20(1)(a) and (b)) What makes this regional arrangement more noteworthy is that HELCOM decisions must be taken unanimously, (Helsinki Convention, Article 19(5)) whereas state reservations under the Convention cannot be made. (Helsinki Convention, Article 33(1))

With the significant involvement of the EU in the HELCOM – the EU being a contracting party of the Convention, as well as pursuant to the Article 35(4) being entitled to act entirely on behalf of its MS within its areas of competence, its large influence over HELCOM activities can be presumed. Hence, the following subchapters will look into how the EU law is

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<sup>148</sup> Ibid, p. 147

<sup>149</sup> Tykkynen, “The Baltic Sea environment and the European Union”, p. 124

referred to in HELCOM environmental assessments, also assess the Baltic Sea Action Plan and its links with the EUSBSR, and conclusively touch upon HELCOM recommendations and their effectiveness in terms of environmental protection.

### **2.2.1 Environmental Assessments**

Environmental assessment of the Baltic Sea is a crucial task that is performed under HELCOM, also in the EU context. Jointly developed methods and streamlined efforts between the Baltic Sea states is an undeniable contribution not only to the fulfilment of Helsinki Convention obligations, but also the monitoring and assessment duties put forward by the EU law. Therefore, it is of relevance how the EU law provisions are reflected in HELCOM environmental assessments, and for this purpose, the latest HOLAS from 2017<sup>150</sup> shall be reviewed.

The HOLAS encompasses various aspects of Baltic Sea environmental problems, e.g. biodiversity, pollution and eutrophication, as well as human activities contributing to them. In addition, it assesses the confidence in data that is provided for the assessed marine areas, which is very useful to address reporting problems later on.<sup>151</sup>

As regards to the relation to the EU law, it must be noted that the assessment of waterbirds and their status is indeed closely linked to the Birds Directive – the species under its protection are marked in the assessment results. However, the criteria on whether the species can be considered as endangered within the assessment differ from those of the Birds Directive, as HELCOM uses its own red list of bird species. Moreover, the difference in methods for both assessments may yield different results. (HOLAS, pp. 141-144) Similarly, while referring to the Habitats Directive, the assessment of seal habitats under HOLAS was conducted by basing on seal populations, and not within national borders, which is the method under Habitats Directive, thus implying potential difference between HOLAS and Habitats Directive assessment. (HOLAS, p. 130)<sup>152</sup>

An exceptional reference to the EU law provisions is the fact that evaluation of coastal water is done by using the national indicators developed under the WFD. Nonetheless, HELCOM otherwise uses its own tools and metrics, and it is admitted in HOLAS that many parallel

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<sup>150</sup> Supra 140

<sup>151</sup> Ibid

<sup>152</sup> Ibid

assessment tools that could be more integrated, since both BSAP and MSFD have the same overarching goal to protect the Baltic Sea. (HOLAS, p. 23) <sup>153</sup>

Therefore, it can be concluded that the reference to the EU law in HOLAS does not imply the latter fully being an implementation tool of the former, since there are parallel assessments taking place in the region, both having their own methods, which is a result of Birds and Habitats Directives imposing monitoring and assessment duties on MS as separate, while HELCOM has its own assessment. In addition, HELCOM itself aims to be an actor contributing to environmental protection processes in the EU – its Holistic Eutrophication Assessment Tool, initially developed for the Baltic Sea, has been updated in order for it to be potentially applicable to other marine areas in the EU.

## 2.2.2 Baltic Sea Action Plan

HELCOM BSAP is perhaps the most noticeable initiative that the coastal countries as well as the EU is pursuing in order to improve the Baltic Sea environmental situation. Adopted in 2007, the plan has very ambitious objectives to be attained by 2021 – reducing eutrophication to minimum, restoring biodiversity to a favourable status, mitigating the impact of hazardous substances and limiting their further use, and ensuring that maritime activities within the region are environmentally friendly. <sup>154</sup>

In contrast with the ambitious BSAP goals, scholars highlight certain problems within the plan. For instance, as observed by Elofsson, cost-efficiency requirement of the BSAP contradicts the high water clarity targets. Combatting the impact of phosphorus input alone is an already costly action, which demonstrates the BSAP as unrealistic to a certain extent. <sup>155</sup> Whereas, Roggeri points out the lack of strong cooperation mechanisms to ensure coherency in the actions of the Baltic Sea states, <sup>156</sup> and so far, according to Hassler et al., “despite the integrative nature of these concepts and the almost universal call for coordination, national planning policies have up until now developed in quite diverging directions”. <sup>157</sup> Which is an indicator that also the BSAP has drawbacks, and rather similar ones to those of the EUSBSR.

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<sup>153</sup> Ibid

<sup>154</sup> HELCOM. *Baltic Sea Action Plan*. Available on: <http://www.helcom.fi/baltic-sea-action-plan> Accessed May 16, 2018

<sup>155</sup> Katarina Elofsson, “Cost-effectiveness of the Baltic Sea Action Plan”, *Marine Policy* Vol. 34, Issue 5 (2010): p.1050

<sup>156</sup> Alain Roggeri, “Could Macro-Regional Strategies Be More Successful?”, in *European Structural and Investment Funds Journal* 3 (2015): p. 148

<sup>157</sup> Björn Hassler, et al. “Collective action and agency in Baltic Sea marine spatial planning: Transnational policy coordination in the promotion of regional coherence”, in *Marine Policy* 92 (2018): p. 145

Indeed, while the majority of joint actions that are agreed upon under the BSAP and HELCOM Ministerial Declarations is accomplished, only some actions on national level are also completed, most of the remaining being “partially accomplished”.<sup>158</sup>

As regards to the EUSBSR, which is perceived as an EU equivalent to the BSAP, both HELCOM and the EU intend to increase synergy between both strategic initiatives and to foster mutual cooperation under them, thus indicating the ever-increasing connection between HELCOM and EU in their efforts of protecting the Baltic Sea.<sup>159</sup>

### 2.2.3 HELCOM Recommendations

As mentioned before, the HELCOM is authorised under the Helsinki Convention to issue recommendations regarding certain environmental matters and to follow up to their implementation – a practice started already in early 1980s. Currently, more than 260 recommendations are in place.<sup>160</sup>

Before defining HELCOM recommendations as a relatively weak legal instrument, one should bear in mind that within the HELCOM context, the term “recommendation” is not to be understood as under the EU law, where recommendation, pursuant to the TFEU Article 288, is explicitly stated as not binding.<sup>161</sup> Whereas, under the Helsinki Convention, the status of a recommendation is different. Firstly, being unanimously adopted, these measures, as Ebbesson emphasises, specify in detail the general Convention provisions that the Contracting States are obliged to follow.<sup>162</sup>

While the EU environmental law in most of the cases has to be applied to an Union-wide extent, HELCOM recommendations, in contrast, have very strong consideration for the regional situation and are tailored for very specific issues to address. Moreover, in terms of legislative initiatives HELCOM has outrun the EU. For example, as the Commission stated in its Impact Assessment accompanying the proposal for Phosphates Regulation, Baltic Sea states had already proceeded with the ban on phosphates in accordance with the relevant

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<sup>158</sup> HELCOM. *Implementation of the Baltic Sea Action Plan 2018*. Available on: <http://www.helcom.fi/Lists/Publications/Implementation%20of%20the%20BSAP%202018.pdf> Accessed May 16, 2018

<sup>159</sup> Supra 140

<sup>160</sup> HELCOM. *Recommendations*. <http://www.helcom.fi/helcom-at-work/recommendations/> Accessed May 16, 2018

<sup>161</sup> TFEU, Article 288

<sup>162</sup> Jonas Ebbesson, “A Critical Assessment of the 1992 Baltic Sea Convention”, in *German Yearbook of International Law* 38 (2000), p.

HELCOM recommendation, with Latvia having it already introduced.<sup>163</sup> In addition, the recommendations, as Tykkynen states, are in most of the cases more stringent than the corresponding EU law provisions.<sup>164</sup> As a result, the HELCOM recommendations have contributed to the EU law implementation, yet not in a reactive way, which is another significant reason to consider HELCOM as the forerunner of pursuing environmental protection goals also from legal perspective, not as a mere tool for EU law implementation.

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<sup>163</sup> Supra 134

<sup>164</sup> Tykkinen, 127

## CONCLUSION

If the task of applying EU environmental law within the MS already is a challenge, then harm to nature in cross-border context is even harder to address, especially given the relatively few and too general provisions on how cross-border environmental damage ought to be managed, plus, when the safety of marine environment is at stake. As it was concluded in the first part of the research, the first environmental law directives rather insufficiently cover the marine areas, focusing only on protected species or habitats. This is not to state that pivoting on protected species is insufficient in general, yet in the sea situation is different, since water pollution from a distant area may harm marine habitats and bird and animal species under protection.

Having realised the deficient protection of marine environment, especially in transboundary setting, the MSFD has been adopted as a response to this problem. The MSFD can be considered as an appropriate tool, since it applies an eco-system based approach, by focusing on the regional cooperation and endorsing activity under the regional sea conventions, as well as providing guidance on how cooperation should be pursued in absence of any RSC mechanism, such as HELCOM.

Nonetheless, it is worth emphasising that the EU environmental law directives with their general wording give room for MS to interpret provisions upon their own devices, thus leading to either failure to comply with the main objectives or, if the directive is implemented, then national law provisions may be very different from those of other MS, creating a fragmented landscape of environmental law within the EU. Therefore, either more detail and precision is required in the legal instruments themselves, or implementation should be more streamlined among the MS, in order to achieve a better approximation of national measures relative to environmental protection.

Another noteworthy issue with the effectiveness of the EU environmental law instruments in the context of cross-border marine environment damage, is a deliberate exclusion of oil spills from their scope. Joining the scholarly opinions stating this as a serious drawback for EU efforts to protect the marine environment via law, the author considers that at least some regulatory action in this respect is required, instead of mere monitoring and reaction to incidents.

Hence, the response to the first research question on whether there are any EU law provisions applicable to cross-border damage to the marine environment is such as follows: although there is not a specific legal instrument addressed exactly to this context, the main EU

environmental law instruments contain a few rules obliging cooperation, whereas the MSFD is an important tool that introduces eco-system based marine governance in order to address environmental problems. Nevertheless, from the perspective of environmental benefit, the directives fail to ensure a fully effective and mutually consistent protection of the marine environment, which highlights the important role of the RSCs, also emphasised in the MSFD itself, as well as the assessments on implementation, where HELCOM is admitted to have contributed to a relatively better performance form the MS.

The applicability of the core EU environmental law instruments to the case of the Baltic Sea, which was the second research question, corresponds to the general application, except for the fact that the Baltic Sea already has a RSC mechanism in place, therefore there has been no necessity to launch new cooperation platforms. It was nonetheless highlighted that some crucial environmental issues, such as excessive fisheries and high input of chemicals in the sea, need to be specifically addressed. Therefore, the EU has utilised its exclusive competencies and subsidiarity principle to directly tackling some of the most prominent environmental problems.

The Baltic Sea region can be considered as a global leader of environmental protection initiatives, with HELCOM actively developing binding recommendations, monitoring environmental status and being a major actor in the region since 1974.<sup>165</sup> In the meanwhile, the EU itself also becomes more actively involved in the marine strategic planning and protection of the Baltic Sea – alongside its HELCOM participation, it has launched its own strategy mechanism. It can, however, be debated whether this abundance of institutional mechanism is needed in order to properly solve Baltic Sea environmental issues, especially if Russia as non-MS is not fully involved in the strategic processes, too. As Tykkynen claims, the “institutional density and rigidity of the regional arrangements” may both facilitate, yet also hinder the development and fulfilment of EU environmental policies.<sup>166</sup> Moreover, in the light of conclusion that the inclusion of non-governmental actors, environmental NGOs and scientists in particular, is insufficient and that a truly holistic environmental policy taking all the concerned stakeholders into account is not pursued, launch of a new institutional mechanism is questionable, especially if they encounter issues similar to those experienced by the pre-existing ones. Instead, a more targeted improvement of the existing governance structures and better involvement of the general public would be contributory to the improvement of the environmental situation of the Baltic Sea.

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<sup>165</sup> Henrik Ringbom, “Vessel-source pollution”, in *Research Handbook on international marine environmental law*, ed. Rosemary Rayfuse, (Edward Elgar Publishing, 2015), pp. 124-126

<sup>166</sup> Tykkynen

Nonetheless, the immense efforts and benefit generated by the HELCOM are undeniable and it is evident that its operations largely contribute to the implementation of the EU environmental law in the region. The connection between HELCOM and the EU is very prevalent, and there even are some initiatives of mutual coordination of marine protection strategies. However, HELCOM should not be considered as a body that implements the EU law provisions, despite the fact that the EU is a party of the Helsinki Convention and part of the HELCOM, able to totally influence the topics that are under its exclusive competence. On the contrary, HELCOM with its recommendations and targeted actions is a forerunner, even contributing to the EU initiatives, and with its own established practices and strategic mechanisms is a rather independent actor, although strongly cooperating with the EU.

Thus, it can be concluded that the hypothesis is only partially confirmed – there is a limited number of provisions within EU environmental law applicable to cross-border damage to the marine environment, including to the substantial problems that the Baltic Sea encounters, which is why several targeted regulations have been adopted. While regarding the initial assumption about HELCOM, it is correct to some extent – HELCOM definitely contributes to the implementation of the EU law in terms of conducting environmental assessments and streamlining the MS implementation of directives and regulations. Nonetheless, it is not done in a passive manner by HELCOM following the lead of the EU – its legal instruments may be even more stringent, also more tailored to the regional situation, thus indicating that HELCOM is and has been a proactive organisation that diligently operates in order to protect the environment of the Baltic Sea.



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