CrossGov

Coherent & Cross-compliant Ocean Governance for Delivering the EU Green Deal for European Seas

Deliverable 2.3

Analysing the vertical coherence between national policies and EU frameworks

Funded by the European Union under the Grant Agreement Grant agreement ID 101060958. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union. Neither the European Union nor the granting authority can be held responsible for them.

Funded by the European Union

CrossGov

Grant Agreement number	101060958
Project title	CrossGov - Coherent and Cross-compliant Ocean Governance for Delivering the EU Green Deal for European Seas
Deliverable title	D2.3. Analysing the vertical coherence between national policies and EU frameworks
Deliverable number	D2.3
Deliverable version	First draft - 21 June 2024
Contractual date of de-livery	31 July 2024
Actual date of delivery	8 October 2024
Document status	Final
Document version	1
Online access	Yes
Diffusion	Public
Nature of deliverable	Report
Work Package	2
Partner responsible	UU
Contributing Partners	RIFS, UEF
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Abstract	The analysis of vertical coherence between national policies and the regulatory frameworks set forth by European law aims at understanding what choices countries make in the transposition of EU policies and how this affects the vertical coherence between EU and national law and in turn the coherent delivery of the European Green Deal. The analysis focusses on the transposition of selected EU policies into the Member States' legal order. The zooms in on transposition approaches concerning the Marine Strategy Framework Directive, the Water Framework Directive, Habitats and Birds

	Directives, Renewable Energy Directive II, and the Nitrates Directive in Germany, the Netherlands and Finland. The analysis commences by unpacking the incoherences uncovered at the horizontal EU level in relation to the interlinkages between different policies, and highlights how transposition often replicates those incoherences at the national level. Some attempts to address these incoherences at the domestic level are also flagged out, but the analysed practice (primarily the literal transposition of the EU policies) has mainly proven unsuccessful in this regard.
Keywords	EU directives; transposition in member states; vertical coherence; policy instruments; alignment of policy objectives

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Acronyms and abbreviations

AbwV	German Wastewater Ordinance
BD	Birds Directive 2009/147/EC
BfN	German Federal Agency for Nature Conservation
BHD	Birds and Habitats Directive
BImSchV	German Federal Emissions Control Act
BMUV	German Federal Ministry for the Environment, Nature Conservation, Nuclear Safety and Consumer Protection
CAP	Common Agricultural Policy
CEMP	Coordinated Environmental Monitoring Programme
CFP	Common Fisheries Policy
CJEU	Court of Justice of the European Union
ECJ	European Court of Justice
EEC	European Economic Community
EEG	German Renewable Energy Sources Act
EGD	European Green Deal
EIA	Environmental Impact Assessment
ELY	Centre for Economic Development, Transport and the Environment
EPA	Environmental Protection Act
EU	European Union
EEZ	Exclusive Economic Zone
FCS	Favourable Conservation Status
GES	Good Environmental Status
GHG	Greenhouse gasses
GO	Guarantee of Origin
GrwV	German Groundwater Ordinance
HD	Habitats Directive 92/43/EEC
HELCOM	Baltic Marine Environment Protection Commission
IDON	Dutch Interdepartmental Directors North Sea Consultative Body
IMO	International Maritime Organisation
LANA	Länderarbeitsgemeinschaft Naturschutz
MGES	Marine Good Environmental Status
MS	Member States
MSFD	Marine Strategy Framework Directive 2008/56/EC

MSPD	Maritime Spatial Planning Directive 2014/89/EU
NCA	Dutch Environmental Conservation Act
ND	Nitrate Directive 91/676/EEC
NREAP	National Renewable Energy Action Plan
NVZ	Nitrate Vulnerable Zones
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic
OGewV	German Surface Waters Ordinance
PoM	Programme of Measures
RED	Renewable Energy Directive 2001/42/EC
RED	Renewable Energy Directive 2009/28/EC
REDII	Renewable Energy Directive 2018/2001/EU
REDIII	Renewable Energy Directive 2023/2413/EU
SAC	Special Areas of Conservation under the Habitats Directive
SEA	Strategic Environmental Assessment Directive
SPA	Special Protection Areas under the Birds Directive
UWWTD	Urban Waste Water Treatment Directive 91/271/EEC
UNCLOS	United Nations Convention on the Law of the Sea
WHG	German Federal Water Act
WFD	Water Framework Directive 2000/60/EC
WP	Work Package

Executive Summary

The CrossGov project aims to improve the coherence of multi-level and multi-sectoral marine policies and their environmental and social cross-compliance to better manage biodiversity decline and enhance the protection and restoration of marine ecosystems undergoing rapid change. Work Package 2 (WP2) aims to apply the methodological approach developed under CrossGov to analyse and evaluate the coherence of the multi-level policy landscape (EU, international, national) relevant to the implementation of the EGD in the marine domain. Task 2.2 focuses on the coherence between the relevant policies in five identified policy clusters at the horizontal level of the EU (Table 1).

Table 2. Overview of policy clusters identified in Task 2.2

Clusters	**Included policies**
EGD Biodiversity	HD, BD, MSFD, WFD, NRL
EGD Zero Pollution	MSFD, WFD, ND
Common Agriculture Policy (CAP) and zero pollution	CAP, WFD, HD, BD
Fisheries and biodiversity	MSFD, WFD, HD
Renewable energy – offshore wind power	RED II and III, MSFD, HD, BD

Task 2.3 analyses the vertical coherence between national policies and the policies set forth by European law. It aims at understanding what choices countries make in the transposition of EU policies and how this affects coherent implementation at the national level. The assessment framework for Task 2.3 centres then on two levels of governance: the EU and the national levels. Its geographic scope encompasses **three** CrossGov countries: Finland, Germany, and the Netherlands, aligning with the partners involved in the task. Based on the scope of the WP3 case studies for each involved country, Task 2.3 concentrates on two policy clusters comprising of 6 policies, with one policy common across both clusters – namely the Marine Strategy Framework Directive. The remaining policies vary, comprising the Renewable Energy Directive II and the Nature Directives (Habitats Directive and Birds Directive) for Germany and the Netherlands, and the Water Framework Directive as well as the Nitrates Directive (ND) for Finland (Table 2).

Table 2. Overview of policy policies evaluated in Germany, the Netherlands and Finland

Country	**Cluster of studied policies**
Germany	MSFD, RED II, HD, BD
Finland	MSFD, WFD, ND
The Netherlands	MSFD, RED II, HD, BD

Transposition is here considered as a crucial first step to ensuring effective implementation of EU law at the domestic level. The choices made at this stage by the national legislator can significantly contribute to achieving or frustrating the objectives of the EU Directives if efforts are made to remedy the EU level incoherences. More often than not, however, MS transpose EU directives close to verbatim which has a tendency of duplicating the coherence tensions found at the Crossgov D2.2 EU horizontal analysis.

The country analysis has in particular made emerge the following issues that hinder coherence between the EU and the national levels: lack of national-level goals; unclear legal linkages between different environmental laws, challenges in coordinating spatial scales, lack of provisions for review and update of rules, and insufficient temporal scales for incentivizing and monitoring progress in enforcing the goal. Moreover, the choice, identified in all three analysised countries, of delegating the further fleshing out of the rules and standards instead of

adopting nationally application rules at the transposition level seems to futher hinder coherence. The transposition stage then clearly emerged like a lost opportunity for states to address some of the coherence challenges at the EU level, to not replicate those challenges at the national level and to prevent the emerges of new challenges at the national and sub-national levels.

1. Introduction

1.1 The European Grean Deal

The EGD is a comprehensive set of policy initiatives launched by the European Commission (EC) in December 2019 to make Europe the first climate-neutral continent by 2050 (European Commission, 2019). The EGD sets a clear and ambitious long-term vision for a transition towards a climate-neutral, sustainable and inclusive European economy by 2050.[1] This sends a strong signal and provides incentives to the Member States (MS) to create a solid and stable framework for the necessary investments and innovation and gives all the involved stakeholders a mission and a sense of direction. The EGD is perceived as one of the most significant and all-encompassing sustainability policies ever designed by the EU, covering a wide range of areas of the EU economy, including energy, transport, agriculture, and biodiversity.

Three streams of policies shape the EGD: Zero Pollution, Climate Ambition and Biodiversity. The streams aim to promote sustainability in a holistic and integrated manner, recognizing the interdependencies and synergies between biodiversity, climate change, and pollution.[2]

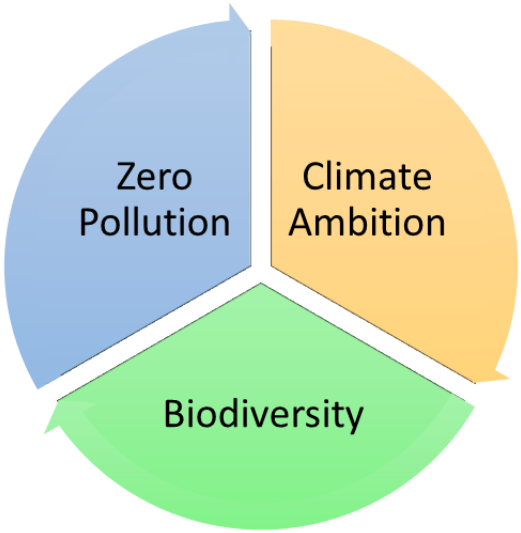

Figure 1: Representation of the three main policy streams

All three policy streams are crucial for sustainability and relate to and address different aspects of the sustainability conundrum. The indivisibility of the EGD policy objectives can create trade-offs and lead to goal conflicts, as policies designed to achieve one goal may have unintended consequences and hinder the achievement of others.[3] Policymakers at the EU and national levels need to carefully consider potential trade-offs alongside synergies in order to improve cross-compliance. The EGD policies and their implementation must be designed to, not only consider impacts on all three interrelated streams to avoid friction, but also to maximize synergies, taking into account other potential policies that might be triggered by the policy streams.

[1] Commission, 'Communication from the Commission (…) on The European Green Deal, COM(2019) 640 final, 11 December 2019, p. 2.
[2] For a more in-depth analysis of the EGD objectives and streams, see the D.1.1.
[3] Ibid.

1.2 The context and the aims of the analysis

The CrossGov project aims to improve the coherence of multi-level and multi-sectoral marine policies and their environmental and social cross-compliance to better manage biodiversity decline and enhance the protection and restoration of marine ecosystems undergoing rapid change. Work Package 2 (WP2) aims to apply the methodological approach developed under CrossGov to analyse and evaluate the coherence of the multi-level policy landscape (EU, international, national) relevant to the implementation of the EGD in the marine domain. Task 2.2 focuses on the coherence between the relevant policies in five selected policy clusters at the horizontal level of the EU.

The analysis of Task 2.2 reveals that there is a risk for internal contradictions within the EGD, as an objective that is set out in one policy may hinder the achievement of objectives of other policies. This may in turn cause incoherence between objectives for different policies of the EGD. One cause may be that legal instruments differ in design, as some are designed to effectively support the objectives of the EGD at a European level (for example policies on fisheries), while others are designed in way that relies more heavily on an effective national implementation (for example agriculture). Overall, the policies that have been analysed generally lack the forcefulness, bindingness, effectiveness, and efficiency to properly and timely reach the set objectives. Possible explanations for this EU-level incoherence may be the different EU constitutional and administrative law structures governing the EU's competences. Furthermore, incoherence may be caused at the EU level by the different governmental organisational structures, science-policy-interfaces and stakeholder participation, and a lack of scientific knowledge on the marine environment and a varying scope of impact assessment.

In a dialectic effort with Task 2.2, Task 2.3 has been designated to delve into the analysis of vertical coherence between national policies and the policies set forth by European law. Applying the method devised under WP1, especially Deliverable 1.3 (The CrossGov Policy Coherence Evaluation Framework - A methodological framework to assess policy coherence and cross-compliance with the European Green Deal), the overarching aim of Task 2.3 is '[t]o understand what choices countries make in the transposition of EU policies and how this affects coherent implementation at the national level and vertical contribution to coherent delivery of the EGD' (D 1.3, p. 43).

1.3 The scope of the analysis

The assessment framework for Task 2.3 centres on two levels of governance: the EU and the national levels, while direct engagement with the overarching international legal framework is not envisaged. The latter might be referred to in the analysis when particularly relevant for elucidating the regulatory choices at the EU and/or national level. The geographic scope of 2.3 encompasses **three** CrossGov countries: Finland, Germany, and the Netherlands, aligning with the partners involved in this task. While we recognize that the limited number of MS covered might limit the reach of the assessment, we consider that the designed methodology and the outcome of the analysis are transferable to other MS with similar legal geography and thus can foster further research.

Building on the foundations laid in WP1, a predetermined core set of EU policies are cross-cutting WP2 and WP3. This strategic decision ensures comparability and complementarity in findings related to EU policy transposition (WP2) and implementation (WP3). The core ten EU policies earmarked for coherence assessments across WP2 and WP3 comprise:

1. Water Framework Directive (WFD)
2. Marine Strategy Framework Directive (MSFD)
3. Maritime Spatial Planning Directive (MSPD)
4. Habitats Directive
5. Birds Directive
6. Strategic Environmental Assessment Directive (SEA Directive)
7. Environmental Impact Assessment Directive (EIA Directive)
8. Renewable Energy Directive
9. Common Agricultural Policy (CAP, focusing on relevant parts for the selected EGD objectives in the marine sphere)
10. Common Fisheries Policy (CFP, concentrating on pertinent sections for the selected EGD objectives)

To capture the intricacies of the interaction among these instruments, Task 2.2, assessed the horizontal coherence among them (see Deliverable 2.2) within five clusters of policies. In particular, Task 2.2. frames the coherence analysis on the basis of five clusters of policies that are triggered by the EGD and its application (Table 1).[4]

First, the EGD Biodiversity stream encompasses the Habitat Directive (HD), the Birds Directive (BD), the Marine Strategic Framework Directive (MSFD), the Water Framework Directive (WFD) and the Nature Restoration Law (NRL). Second, the EGD Zero Pollution stream is composed of the MSFD, the WFD and the Nitrates Directive (ND). Third, a cluster on Common Agriculture Policy (CAP) and zero pollution groups the CAP with the WFD, the HD and the BD, and highlights the coherence challenges raised by the environmental consequence of the CAP. Fourth, the Fisheries and biodiversity cluster examines the Common Fisheries Policy (CFP) against the background of instruments with a clearer environmental dimension, namely the MSFD, the WFD and the HD. Fifth and last, the Renewable energy – offshore wind power cluster aims at flagging the coherence challenges raised by the intereaction between the EGD climate stream, on the one hand, and the biodiversity and zero pollution streams, on the other hand. To that end, it specifically encompasses the Renewable Energy Directive (RED II and III), the MSFD and the Nature Directives (HD and BD).

Table 3. Overview of policy clusters identified in Task 2.2

Clusters	**Included policies**
EGD Biodiversity	HD, BD, MSFD, WFD, NRL
EGD Zero Pollution	MSFD, WFD, ND
Common Agriculture Policy (CAP) and zero pollution	CAP, WFD, HD, BD
Fisheries and biodiversity	MSFD, WFD, HD
Renewable energy – offshore wind power	RED II and III, MSFD, HD, BD

To facilitate the complementarity with the horizontal coherence analysis carried out under Task 2.2 and the coherence analysis at the implementation stage within WP3, the selected national transposition instruments in Task 2.3 are linked to some of the policy clusters identified in Task 2.2 and a number of legal instruments relevant for the case studies in WP3. The strategic selection of instruments enables us to examine the role of national transposition in enhancing coherence or perpetuating incoherence among the policies that are key for delivering the

[4] See Deliverable 2.2.

numerous EGD objectives at European seas. In other words, it allows us to explore to what extent inconsistencies created among sectoral policies within these five clusters at the EU level are further reflected, accentuated or mitigated at the stage of national transposition. The findings then pave the way for the WP3 case studies to examine whether the domestic, local and sub-local implementation instruments manage to address any remaining inconsistencies.

Pursuant to the clustering in Task 2.2, the country-analyses of Germany and the Netherlands focus on the policies that are triggered by the interaction between the Biodiversity stream (HD and BD) and the Climate stream (RED II) of the EGD. This interaction is at the same particularly relevant for the examination of the coherent implementation of the EGD objectives in those two countries as the case-studies developed in WP3 focus on the expansion of offshore wind farms in the German and Dutch parts of the North Sea. The Finnish case-study focuses on the Baltic Sea and, among others, zero nutrient pollution in the Finnish Archipelago Sea. For that reason, the country-specific vertical coherence analysis focuses on the policies triggered by the Zero Pollution stream (WFD and ND).[5]

Zooming in on the transposition stage, Task 2.3 concentrates on two policy clusters comprising of 6 policies, with one policy common across both clusters – namely the MSFD. The remaining policies vary, comprising the RED II and the Nature Directives (HD and BD) for Germany and the Netherlands, and the WFD as well as the Nitrates Directive ND for Finland (Table 2).

Table 2. Overview of policy policies evaluated in Germany, the Netherlands and Finland

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1.4 The methodological approach

This **focused approach** aims to enable a comparative assessment, fostering the development of pointers that may be extrapolated for other instruments and sectors of activity, thereby enhancing the project's overall impact. We have also strategically chosen to exclusively examine EU directives rather than regulations. This choice stems from the distinctive characteristic of directives, which necessitate their transposition into domestic legislation before taking effect at the national level. By focusing on directives, our assessment in WP2 remains centered on the 'design' phase of the legislative process. We aim to understand how MS translate EU directives into their legal systems, focusing on their transposition and emphasizing the importance of this phase in shaping the path for the subsequent implementation. In addition, we have chosen to direct our attention towards the broader transposition measures, including legislative instruments and institutional arrangements.

The comparative analysis mainly focusses on the **vertical coherence** between the texts of the European instruments and their national transposition into MS. To this end, the analysis does not specifically address the horizontal interaction among the instruments at the transposition stage, but rather focusses on the transposition and implementation into the MS' legal order and then, as part of the coherence assessment, investigates the relationship with other relevant

[5] For more information about the case studies, please refer to the CrossGov website, crossgov.eu.

instruments. Moreover, the comparative analysis of the transposition instruments across different MS is comprised of a legal analysis of the text of the transposition, as well as a review of the implementation of the EU policy instruments in the MS. Hence, for example, the assessment of the Dutch implementation of the Nature Directives consists of a textual analysis of the Dutch legislation, as well as a review of monitoring requirements and the implementation of programmes of measures. On top of that, the overarching guiding questions on the coherence of policy instruments and the coherence of spatial and temporal scales ensure that the analysis has both a legal and governance nature.

As highlighted in Task 2.2, identifying the legal basis for the adoption of the selected EU Directives is crucial, because it determines whether the goal of the EU instrument is to ensure **minimum or maximum harmonization**. Thiscan influence the vertical coherence between the national transposition instruments and the selected EU rules. For example, the minimum harmonization objective of EU directives adopted under the shared competence on environmental protection (article 192 TFEU) is aimed at establishing a common baseline of environmental standards across MS while allowing them some flexibility in their transposition to take into account their national circumstances (within the framework of the EU primary rules). One then needs to keep in mind that MS have discretion to adopt more stringent environmental rules (known as gold-plating[6]) to enhance environmental protection at the national level so long as they do not conflict with the EU treaties. A relevant concern is that minimum harmonization measures prescribed under these directives may not be sufficient to achieve the environmental objectives of these directives in specific MS. At the same time, the decision of MS to go beyond minimum requirements may affect vertical coherence, because it has the potential to alter key elements of the EU Directives.

Transposition is here considered as a crucial first step to ensuring effective implementation of EU law at the domestic level. MS have a duty to transpose them into domestic law in line with the requirements of EU legislation and to communicate the domestic measures transposing a directive to the European Commission.[7] The choices made at this stage by the national legislator can significantly contribute to achieving or frustrating the objectives of the EU Directive. Given the discretion granted to MS, there is a considerable risk that the domestic transposition measure is not (completely) in line with the requirements of EU legislation. Although the complexity and lack of coherence of EU Directives (examined in Task 2.2) may be one factor influencing the effective and coherent transposition, there are numerous other factors that can equally play a crucial role and impact the correct transposition of EU Directives. Among others, the institutional decision-making capacity of national parliaments, whether the directive already fits well in the existing domestic legal framework or whether the directive addresses an issue that requires substantial adjustments in the domestic legal framework and may meet political contestation have been highlighted as potential factors

[6] Gold-plating in EU law refers to the process whereby the powers of an EU directive are extended when being transposed into the national laws of a member state. It involves additional rules and regulatory obligations that go beyond the requirements of the directive. Gold-plating is often discussed in relation to the EU single market and is assumed to lead to increased costs and unnecessary regulations. This practice can be controversial as it may hinder the harmonization of laws across EU member states, potentially creating barriers to trade and investment. Among others, see L. Squintani, *Beyond minimum harmonisation: gold-plating and green-plating of European environmental law*, Cambridge University Press, 2009.

[7] See Arts 260.3 and 288 TFEU.

influencing the faithful transposition of EU rules. Literal transposition, gold-plating, the lack of correlation tables or explanatory instruments that shed light on the way in which the transposition measures operate in the existing legal framework, delays in the transposition could further accentuate any potential incoherence / complexity created at the EU legislative stage. These elements and phases of the transposition process are reflected in the guiding questions for the analysis listed in the table below.[8]

Once transposition has taken place, **implementation** refers to the stage where decision makers, administrations and domestic courts apply the law on the ground. It is worth stressing at this point that, while regulations do not require transposition, they still require implementation by actors beneath the level of the national (or sub-national) legislator. Implementation encompasses the stages of practical implementation and delivery of the set policy objectives. This more intricate aspects of local implementation and the use of delegating instruments is explored in greater detail in the context of the case studies (WP3). The examination of the implementation measures and rules is complementing the analysis under Task 2.3, since it adds another layer of decisions and policy choices that may again influence coherence and effective EU law implementation: a variety of actors beyond national legislators ultimately affect the way in which EU law is applied in practice. It becomes apparent that there are multiple opportunities for drifting away from the original objectives of the EU legislator as the implementation process travels through the layers of MS administration. The successive layers of interpretation and discretion of all the involved actors can create the opportunity for accentuating any incoherence and hindering the cross-compliance of EU rules. At the analytical level, the division between transposition and implementation allows us to maintain a distinction between the legislative design and the practical implementation phases. It is, noteworthy that the distinction between transposition and implementation can be rather nuanced. For instance, at times, the national legislator may opt for a literal transposition which does not spell out detailed and directly operational rules but delegates their further elaboration to administrative bodies. In such cases, to point at the domestic legislator's choice of not extensively elaborating on detailed regulations in the national transposition instruments, in favor of delegating the further adoption of local implementation measures consists of a noteworthy aspect. This decision may in fact offer insights into potential (in-)coherence in the overall EU legislative and implementation framework at the national level and will thus be included in our analysis.

Against this background, each research team proceeded to conduct a **three-step analysis**. First, the pertinent transposition measures, which have been officially notified to the EU Commission, were identified. It is important to acknowledge that, in certain instances, these instruments may have undergone substantial revisions (as exemplified by the Omgevingswet in the Netherlands, replacing numerous original transposition instruments). In such cases, the assessment covered the currently pertinent applicable national rules. Second, after identifying the pertinent domestic instruments, the vertical coherence analysis concentrates on assessing two primary attributes recognized as crucial in measuring coherence: policy objectives and policy instruments. The aim is to gauge the degree of consistency between the goals outlined

[8] A rich literature exists concerning the many factors that influence the transposition of directives at the domestic level. See, among others, T. Vandamme, 'Democracy and Direct Effect: EU and National Perceptions of Discretion' in S. Prechal and B. van Roermund, *The Coherence of EU Law, The Search for Unity in Divergent Concepts*, Oxford University Press, 2008, 271 ff.; H. Lindahl, 'Discretion and Public Policy: Timing the Unity and Divergence of Legal orders' in S. Prechal and B. van Roermund (eds) *The Coherence of EU Law, The Search for Unity in Divergent Concepts*, Oxford University Press, 2008, 291 ff.

by the EU legislator and those articulated in the transposition instruments. This involves, among others, scrutinizing the uniform usage of terms and definitions, and verifying the coherence between the instruments chosen at the national level to attain the objectives of the designated EU directives. Third, particular attention is given to the temporal and geographical dimension of the national transposition instruments in order to assess to what extent they adhere to the timeline and geographical scope envisaged by the directives.

The table below comprises suggested questions intended to steer the vertical coherence analysis. These questions are based on the methodology established in Task 1.2 of the project (see table 2 '*Guiding questions to support assessment of policy design and implementation against the eight coherence attributes*,' D. 1.2, p. 22). It is important to emphasize that this list of questions is indicative and serves as a source of inspiration for the qualitative analysis of the chosen transposition instruments.

Table 2. *Guiding questions for the evaluation of vertical coherence against three coherence attributes*

Attributes	**Guiding questions for policy coherence assessments**	**Overarching questions for assessing vertical coherence**	**Suggested questions for the evaluation of vertical coherence under T 2.3**
Policy objectives the outcomes the policy sets out to achieve (general objectives, specific objectives, targets, commitments). This includes the outcomes specified in the articles of the policy instrument as well as broader objectives referred to in the preamble.	1. Is the policy cross-referencing to the policy objectives of another policy? 2. Are the policy objectives aligned between policies (substance as well as spatial and temporal scales such as deadlines for achievement, and geographical application) 3. Are the EGD objectives mainstreamed into the policy?	Are the national objectives and goals outlined in the transposition instruments consistent with the overarching objectives of the EU Green Deal?	-To what extent do the national transposition measures align with the overarching goals and objectives of the selected EU instruments? -To what extent do the national objectives and targets mirror / complement the specific targets set in the selected EU instruments? -Are the key concepts and definitions used in the national transposition measures consistent with those in the relevant EU instruments?
Policy instruments The mechanisms and instruments that are put in place by the policy to achieve its objectives. Focus on legal instruments: legally binding rules that determine the behaviour required of organisations or individuals, including licensing, permitting, prescriptions, prohibitions, bans, litigation, non-compliance procedures. Legal instruments here also include enforcement and compliance mechanisms	1. To what extent are spatial and temporal scales aligned between instruments of the different policies (ex. spatial plans, planning, reporting)? 2. Do the policy instruments provide negative/positive incentives for the achievement of other policy objectives (including also EGD objectives) or the implementation of other policies' instruments (mainstreaming) 3. Does the instrument support the cross-fertilization of information and knowledge across policies with similar instruments? 4. Do the policy instruments provide mechanisms to deal with conflicting objectives, incentives, etc.	Do the substantive measures adopted at the national level mirror the key policy instruments of the EU Directives implementing the EU Green Deal, or have significant deviations occurred? Have Member States properly justified any exceptions or derogations, and do these align with the permitted flexibility set by EU law?	-What is the selected type of transposition? (literal / substantial) -What policy instruments and measures are proposed in the national transposition and how do they compare with the requirements specified in the EU instruments? -Are there any carve-outs in the national transposition measures (e.g., exceptions, derogations) to accommodate the objectives of other relevant legal instruments at the national level (think in the context of selected policy clusters)? To what extent do they facilitate cross-sectoral integration? -What (if any) balancing mechanism are incorporated in the national transposition measures to reconcile competing legal interests (such as economic concerns vs environmental sustainability)? -What exceptions are included in the national transposition measures, and how do they align with the exceptions specified in the relevant EU instruments?

			-Do the national measures establish a compliance framework that aligns with the ones outlined in the EU instruments? -Are licensing and permitting procedures consistent with the requirements under EU instruments? -How are the monitoring / reporting mechanisms structured in the national transposition and do they correspond to the ones mandated by EU instruments? -How consistent are the national transposition measures across Member States? Are there variations in the chosen measures?
Spatial and temporal scales the geographic and jurisdictional area to which a policy applies and the timelines and deadlines for the policy objectives, instruments and steering mechanisms	To what extent are spatial scope and timeframes aligned between the assessed policies? 1. How aligned are the policies in terms of jurisdictional scales? 2. How aligned are spatial plans, planning periods, reporting cycles, policy objectives? 3. Do objectives and/or other key considerations within the different policies apply to the same geographic area as those in related policies? 4. Do objectives and/or other key considerations within the different policies have the same timelines as those in related policies? 5. Do objectives and/or other key considerations within the different policies have the same timelines as the EGD strategies?	Are the spatial and temporal dimensions specified in the transposition instruments aligned with the geographic and temporal scope set out in the EU directives implementing the EU Green Deal?	-What is the geographic? scope of application of the national transposition measure? -How well does the timeline set out in the national transposition measures correspond to the ones specified in the EU legislative instruments? -Are there any significant disparities in the temporal scale of the EU and national rules? -Are there provisions for phased implementation to meet milestones set in EU instruments? -Are the review/ revision periods in the national transposition aligned with the one in the EU instruments? -How well coordinated are the timelines across different national instruments considering the cross-sectoral nature of the EU GD?

1.5 Structure of the report

The report is structured as follows. In this introduction, we have described the aims, scope and methodology of the report, including the guiding questions that were used to evaluate the vertical coherence of policy instruments. In chapter two, we will give an overview of the analysis for three policies, being the Marine Strategy Framework Directive; the Renewable Energy Directive and Nature Directives; and the Water Framework Directive and Nitrate Directive. Section two wraps up the analysis with some concluding remarks. In the Annex we provide a more in-depth analysis for every country and the chosen policy cluster. The country analyses in the annex have been carried out based on the same assessment steps in the assessment, namely coherence of policy objectives, coherence of policy instruments, and coherence of spatial and temporal scales.

2. Assessing the vertical coherence

2.1 Marine Strategy Framework Directive

The three country-studies[9] show an overall coherence between the MSFD and the transposition acts adopted at the domestic level. This is in particular guaranteed through the many textual references to the relevant EU instruments and strategies in the national instruments. Country-studies show attempts to address -at the transposition level- the incoherences spotted at the horizontal EU level in relation to the interlinkages between different policies, in particular between the MSFD and the WFD.[10] In recognition of the intrinsic linkages, all three states initially transposed the MSFD through incorporation in their water legislation. The interactions between marine and water instruments emerge then as a common issue in the three analysed countries because of the unclear legal linkage of marine management and water protection law.This interlinkage is also manifest in the domestic institutional machinery responsible for the transposition. For instance, in Germany, the transposition and implementation of the MSFD has been mainly managed by the Ministry of Environment but has raised some tension with the Ministry of Transport because of the impact of the MSFD on matters falling within the responsibilities of the latter ministry. This required a readjustment of the governance structure, including forms of collaborative decision-making between the involved authorities.[11] A tendency to reduce piece-meal regulation at the domestic level by integrating difference sources of environmental rules is also noticeable in the Netherlands where the legislator has recently adopted the 2024 Environment and Planning Act (*Omgewingswet*). This new legislation aims at giving a reference framework to all environmental measures and foster coherence of objectives and instruments. It is of course too early to assess whether this approach is able to solve the tensions arising from the fragmented environmental regulation if the different activities, but it certainly has the potential to do so.

One other similarity in the transposition of the MSFD among Germany, Finland, and the Netherlands is the focus on achieving Good Environmental Status (GES) in marine waters and establishing the relevant environmental targets, pursuant to the obligations contained in the

[9] See Annex 1.
[10] See D 2.2. See all the Finnish country study available in Annex 1.
[11] See Annex 1, section 1.1.2.

MSFD and following the letter of the directive. This 'one-size fits all' appraoch in the transposition of the MSFD raises specific concerns and challenges in Germany, Finland, and the Netherlands. Germany emphasizes the importance of achieving GES in EU marine waters by 2020, with a focus on sustainability and resource management. Finland highlights the MSFD as a key instrument for marine biodiversity objectives and utilizes area-based protection and species protection regimes. The Netherlands, on the other hand, faces challenges concerning the policy or legally binding instruments that can be used to achieve the GES goals, in particular due to the lack of clear and binding temporal scales and policy instruments, despite coherent transposition with the European framework. In Finland it is also noted that spatial scales of the transposing instruments do not fully match those of the MSFD; especially the geographical scope of the GES objective is unclear. In that sense, some of the weaknesses of the MSFD itself are 'inherited' by the domestic transposition instruments in all three countries and that is most likely due to the fact that they sticked to a literal transposition and do not make choices that were necessary to properly achieve a GES at the national level.

Local authorities play a role in coordinating policies and decisions regarding the MSFD in Germany, Finland, and the Netherlands through interdepartmental bodies like the Interdepartmental Directors North Sea Consultative Body which coordinates the policies and decisions regarding the North Sea in the Netherlands at the local and sub-local levels.

2.2 Renewable Energy Directive and Nature Directives

In Germany, policies and regulations related to renewable energy are defined by the Federal Government and implemented by the Federal Ministry for Economic Affairs and Climate Action. The transposition of the Renewable Energy Directive in Germany has been slow and incomplete because, in particular, of this fragmented institutional arrangement as highlighted in the country-study. An infringement procedure concerning renewable energy was brought against the Netherlands in 2021 for not implementing the directive on time.[12] Germany's approach seems to be more decentralized, with coordination challenges among the many institutions involved at the sub-federal level, while the Netherlands' approach has faced legal action for delays in implementation.

Germany is facing challenges in the practical implementation of the Nature Directives, leading to variations across states in light of its federal structure. The lack of national-level goals may indicate a misalignment of spatial and temporal scales, and coordination challenges have been highlighted by recent rulings from the ECJ regarding insufficient conservation measures.[13]

The main identified difficulties concerning the quantitative requirement and connection with water protection law in the transposition of environmental directives in Germany and the Netherlands relate to coherence challenges, lack of provisions for review and update of rules, and ambiguous legal weight of water management objectives and river basin management plans. The tensions highlighted above in relation to the MSFD persist in relation to the Nature Directives and the RED II. Concerning the coherence challenges, the cross-sectoral nature of the RED II raises challenges at the national level that are not as evident at the EU level.[14] Germany has followed a 'silos' approach in transposing the RED II in one piece of legislation (the Renewable Energy Sources Act) that then federal and local authorities are competent to

[12] INFR(2021)0310.
[13] ECJ, Judgment of 21 September 2023, Case C-116/22, available here.
[14] See D.2.2, section 7.5.

apply. Implementation difficulties however persist in Germany, as highlighted in the country-study below. The Netherlands has adopted a more 'diffused' approach by transposing the RED II in three pieces of legislation, including the Environment Conservation Act. The three pieces of legislation are now under revision to adapt to the above mentioned 2024 Environment and Planning Act. This 'diffused' approach seems to guarantee a better coherence between policy objectives and instruments that are triggered by the expansion of offshore renewable energy, at least on paper. This approach could address the challenges raised by the cumulative impact of wind power projects.[15]

2.3 Water Framework Directive and Nitrates Directive

The transposition of the WFD and the ND in Finland highlights several difficulties and challenges as far as vertical coherence with the EU law instruments' objectives and implementation tools. The main difficulties and challenges include the weak and vague link between the programme of measures and relevant water policy instruments, the lack of clear legal linkage between water management and water protection laws/instruments, and the ambiguity surrounding the legal weight of water management objectives. This mirrors the insufficient rigor in implementation that is not only seen in Finland but in most, if not all, MS(D2.2, p. 73). This mismatch indicates that the objectives pursued by the transposition instruments may not fully align with the objectives of the EU law instruments.

The Finnish transposition of the ND, the Nitrates Decree,[16] increases some of the coherence challenges already present at the level of EU law, particularly the policies different geographical scales and the spectrum of management perspectives capable of addressing different aspects of the challenge it provides (D2.2, p. 70). The Finnish entire territory approach invites problems in linking the ND sufficiently to the WFD's river basin management and undermines the effectiveness of the instrument's capacity to reduce agricultural nutrient pollution. Another key coherence issue is the lack of provisions mandating a review and update of the generally binding rules and restrictions imposed in the Nitrates Decree, which undermines the implementation of the ND and its utility as a water management instrument, of which stringency could be assessed and adapted based on the WFD's objectives and planning. Lastly, the Nitrates Decree lacks references to the national Water Management legislation transposing the WFD and the ambiguity related to the legal weight of the water management objectives and river basin management plans under that legislation. Recent developments in case law by the CJEU indicates that the ND may be the primary source of legally forceful obligations to de facto effectively address agricultural nitrates pollution and achieve sufficient improvements in the aquatic environment, thus forcing MS to make sufficient improvements in the implementation and be legally obliged to achieve set results (D2.2, p. 67-69).

[15] See D.2.2, section 7.5.
[16] Finnish Government Decree on Limiting Certain Emissions from Agriculture and Horticulture (1250/2014), available here.

3. Overall concluding remarks

The transposition measures adopted in the three considered MS seem to guarantee a certain general level of vertical coherence with the relevant EU instruments. This coherent overall picture changes when the analysis zooms in on the specific attributes used to frame the evaluation. Lack of coherence, mismatches and gaps then emerge in all three countries and in relation to all the selected EU instruments.

The lack of alignment between the EU legislator's goals and those articulated in the transposition instruments in Finland, Germany, and the Netherlands may be due to issues such as unclear legal linkages between different environmental laws, challenges in coordinating spatial scales, lack of provisions for review and update of rules, and insufficient temporal scales for incentivizing and monitoring progress in enforcing the goal.

Vertical incoherence in the transposition of environmental directives in Germany and the Netherlands can be seen in the lack of national-level goals, indicating a potential misalignment of spatial and temporal scales in the implementation of the directives. Additionally, the recent ruling from the ECJ regarding insufficient conservation measures in Germany shows challenges in coordination at a national level. The choice of delegating the further fleshing out of the rules and standards instead of adopting nationally application rules at the transposition level seems then to hinder coherence. Collaborative decisions making processes put in place in relation to the implementation of the MSFD are an interesting attempt to address those challenges.[17] In the Netherlands, there are challenges in GES goals due to a lack of clear and legally binding temporal scales and policy instruments. The entry into force of the 2024 Environment and Planning Act imposed a revision of the licensing procedures, and monitoring and reporting requirements. This could be an opportunity for the Netherlands to those challenges and enhance the coherence between the different pieces of environmental legislation applying in the North Sea.

The main difference is that Germany's decentralized approach ('silos' approach) allows for flexibility but presents coordination challenges, while Finland's water management legislation sets out the WFD's objectives in national law but only regulates river basin management in relation to procedural planning aspects. Additionally, the Dutch implementation of the MSFD is overall coherent with the European framework, but there are still challenges in achieving GES goals. Therefore, although some progress has been made towards enhancing the coherence of EGD goals at the transposition stage, there is still a lot of room for improvement in terms of coherence.

[17] The actual potential of this processes in resolving the chaleeneges created by the transposition instruments are further analysed in the case studies in WP3 of the CrossGov project.

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Annex - National vertical analyses

1. Germany

1.1 Transposition of the Marine Strategy Framework Directive (MSFD) in Germany

1.1.1 Introduction of the Marine Strategy Framework Directive

The Marine Strategy Framework Directive (MSFD), adopted by the EU in 2008, is the main legislation aimed at protecting and conserving marine environments across the EU. Its primary goal is to achieve Good Environmental Status (GES) in EU marine waters by 2020, thereby sustaining the resource base vital for marine-related economic and social activities. GES of marine waters is defined in the MSFD as "the environmental status of marine waters where these provide ecologically diverse and dynamic oceans and seas which are clean, healthy and productive within their intrinsic conditions, and the use of the marine environment is at a level that is sustainable, thus safeguarding the potential for uses and activities by current and future generations".[18]The MSFD applies 11descriptors to describe the GES of the marine environment.

Germany transposed the MSFD into national legislation through the articles §§ 45a to 45l of the Federal Water Act (WHG), while §§ 44 dictates management objectives for coastal waters [19]. Marine territorial waters in Germany extend to 12 nautical miles and are managed under federal state authorities, which oversee the implementation of the MSFD in territorial waters while the EEZ waters extend up to 200 nautical miles and are governed at the federal level. The Federal and State Committee on the North Sea and Baltic Sea (BLANO) was established to coordinate and liaise MSFD-related measures.[20]

The WHG, since its inception in 1957 and its revision in 2010, incorporates various EU directives including the MSFD. The WHG is governed by key ordinances including the Waste Water Ordinance (AbwV), Surface Waters Ordinance (OGewV), and Groundwater Ordinance (GrwV), which integrate critical EU instruments. For instance, the AbwV enforces the EU Urban Waste Water Directive and "best available technology" standards for wastewater, the GrwV adheres to the EU Groundwater Directive, and the OGewV applies EU quality standards for water bodiesD.[21]

While these ordinances regulate water quality and pollution broadly, Germany's coastal federal states also play a key role in implementing the MSFD within their respective coastal zones (up to 12 nautical miles). Each coastal state is responsible for integrating MSFD requirements into local legislation, including biodiversity protection, eutrophication control, and seabed integrity. National coordination for implementing the MSFD is organized through BLANO. This includes the development of environmental monitoring programs and programs of measures to achieve the GES, as mandated by the MSFD. Moreover, the Länder of Bremen, Hamburg, Mecklenburg-Western Pomerania, Lower Saxony and Schleswig-Holstein and the Federal Government, represented by the Ministry for the Environment, Nature Conservation, Nuclear Safety and Consumer Protection (BMUV)(leading ministry), Ministry for Food and Agriculture (BMEL) and Ministry for Digital and Transport (BMDV) developed a joint

[18] EC 2008, The Marine Strategy Framework Directive. https://eur-lex.europa.eu/eli/dir/2008/56/oj

[19] German name: Wasserhaushaltsgesetz (WHG)

[20] BMUV 2022, English Summary MSFD Programme of Measures for Marine Protection in the German Parts of the North Sea and the Baltic Sea 9including environmental report) – Updated for 2022-2027. https://www.meeresschutz.info/berichte-art13.html?file=files/meeresschutz/berichte/art13-massnahmen/zyklus22/MSFD_Art13_Updated_PoM_Summary_2022.pdf

[21] BMUV no date, Water protection policy in Germany. https://www.bmuv.de/en/topics/water-management/overview-water-management/policy-goals-and-instruments/water-protection-policy-in-germany#:~:text=Regulatory%20law&text=Citizens%20and%20authorities%20are%20obliged,into%20force%20in%20March%202010

programme of measures for 2016-2021 to achieve GES of Germany's coastal and marine waters as required by the MSFD.[22]

Additionally, federal authorities are responsible for the implementation of the MSFD in the EEZ beyond the 12-mile limit. The Federal Maritime and Hydrographic Agency (BSH), along with the Federal Agency for Nature Protection (BfN), work on monitoring and ensuring compliance with the directive in these waters. The BLANO Marine Conservation Office coordinates reporting to the EU Commission, ensuring a unified approach across both federal and state levels.[23]

Following the MSFD's prescribed timeline, Germany undertook the following steps:

- 2012: Completed an initial assessment of the environmental status of German marine waters, defined GES based on eleven qualitative descriptors and established environmental targets and indicators.
- 2014: Implemented a monitoring program to track progress toward the established targets.
- 2015: Developed a comprehensive programme of measures aimed at achieving GES.
- 2016: Commenced practical application of these measures for the management of marine waters.[24]

The MSFD emphasises immediate action when marine regions are in poor condition, which may include earlier implementation of measures and potentially stricter protective actions. To reinforce the Directive's goals, Germany gave the public the opportunity to submit written comments on the draft reports on the initial assessment of the marine waters and on the establishment of marine targets.[25]

1.1.2 Coherence of policy objectives

In Germany, the transposition of the MSFD has been shaped by its federal structure, necessitating a collaborative approach between the federal and state levels. Changes in water and nature protection law facilitated the MSFD's transposition, requiring close cooperation among federal ministries, their agencies, and coastal state ministries to manage marine subregions.[26] The German Federal Ministry for the Environment, Nature Conservation, Nuclear Safety and Consumer Protection (BMUV) leads national MSFD implementation, coordinating reports and compliance with the European Commission. It also oversees negotiations for the MSFD, working with the coastal states, and is tasked with monitoring the EEZ and coordinating with neighbouring countries.

Furthermore, a working structure was discussed to formalise the requirements of the MSFD but it led to complexities, as states and the federal government debated task distribution[27]. Additionally, disputes emerged between the Ministry of the Environment and the Ministry of Transport due to difficulties in allocating responsibilities for designating assessment indicators, such as emission limit values and

[22] BMUV 2022, English Summary MSFD Programme of Measures for Marine Protection in the German Parts of the North Sea and the Baltic Sea 9including environmental report) – Updated for 2022-2027. https://www.meeresschutz.info/berichte-art13.html?file=files/meeresschutz/berichte/art13-massnahmen/zyklus22/MSFD_Art13_Updated_PoM_Summary_2022.pdf

[23] BFN 2024, Richtlinie 2008/56/EG zur Schaffung eines Ordnungsrahmens für Maßnahmen der Gemeinschaft im Bereich der Meeresumwelt/Meeresstrategie-Rahmenrichtlinie (MSRL). https://www.bfn.de/abkommen-richtlinie/richtlinie-200856eg-zur-schaffung-eines-ordnungsrahmens-fuer-massnahmen-der

[24] German Advisory Council on the Environment. (2012). Environmental Report 2012 Responsibility in a finite world. Chapter 8: Cross-sectoral marine protection

[25] BMUV 2012, MSFD Programme of Measures for Marine Protection in the German Parts of the North Sea and the Baltic Sea Report pursuant to Article 45h(1) of the Federal Water Act. https://www.meeresschutz.info/berichte-art13.html?file=files/meeresschutz/berichte/art13-massnahmen/MSFD_Art13_Programme_of_Measures_English-Summary.pdf

[26] Thiel, A. 2013, Scalar reorganisation of marine governance in Europe? The implementation of the marine strategy framework directive in Spain, Portugal and Germany. Marine Policy, 39, pp.322-332. https://www.sciencedirect.com/science/article/pii/S0308597X12002217

[27] Ibid

biological status. Beyond legal adjustments, governance structures were adapted to fulfil the needs to implement the MSFD, such as establishing new mechanisms for collaborative decision-making.[28]

In compliance with the MSFD, Germany has committed to integrating spatial protection initiatives within its measures program of the MSFD. These initiatives are pivotal for the development of networks of marine protected areas, which include those designated under the Habitats and Birds Directives. They also include marine regions established through international or regional accords, particularly under the OSPAR and HELCOM Conventions.[29]

1.1.3 Coherence of policy instruments

Germany's enactment of the MSFD through the WHG is multifaceted, delineating specific responsibilities and actions for both coastal and marine waters management.[30] The WHG details the management of marine waters through its provisions in line with the MSFD, which address goals for marine waters (§45a), the status of marine waters (§45b), and the necessity of an initial assessment (§45c), the description of the good status of marine waters (§45d), setting goals (§45e), monitoring programs (§45f), deadline extensions (§45g), action programmes (§45h), public participation (§45i), review and update (§45j), coordination (§45k), and jurisdiction in German's EEZ and continental shelf (§45l). These paragraphs are designed to ensure that marine ecosystems are managed to avoid further deterioration and to maintain or achieve GES by 2020. Key to this legislative framework is the involvement of public stakeholders in the decision-making process (§45i). Additionally, the WHG mandates a review and update of environmental status descriptions every six years (§45j), aiming towards adaptive management and continuous improvement. The updated program also expands upon first-cycle measures, particularly addressing marine litter and integrating more specific details through subcomponents.[31]

The German approach to the MSFD includes a two-step assessment process of the Programme of Measures, consisting of a socio-economic pre-assessment and a detailed impact assessment with cost-benefit analysis of policy instruments. In addition, Germany employs legal instruments to operationalise the objectives of the MSFD. These include the Waste Water Charges Act (AbwAG)[32], and specific ordinances that cover aspects of water quality and management.

Germany also provides mechanisms such as the updated programme of measures that require a detailed impact assessment, including a cost-benefit analysis before finalising the measures. The updated program introduces 21 additional measures to enhance the protection of marine biodiversity.[33] While the German transposition of the MSFD does not currently foresee additional marine protected areas beyond those required by MSFD Article 13(4), it reflects a level of ambition consistent with EU instruments such as the EU Biodiversity Strategy for 2030, particularly in terms of establishing and managing a network of protected areas.[34]

[28] Ibid
[29] BMUV 2012, MSFD Programme of Measures for Marine Protection in the German Parts of the North Sea and the Baltic Sea Report pursuant to Article 45h(1) of the Federal Water Act. https://www.meeresschutz.info/berichte-art13.html?file=files/meeresschutz/berichte/art13-massnahmen/MSFD_Art13_Programme_of_Measures_English-Summary.pdf
[30] BMUV 2022, English Summary MSFD Programme of Measures for Marine Protection in the German Parts of the North Sea and the Baltic Sea 9including environmental report) – Updated for 2022-2027. https://www.meeresschutz.info/berichte-art13.html?file=files/meeresschutz/berichte/art13-massnahmen/zyklus22/MSFD_Art13_Updated_PoM_Summary_2022.pdf
[31] Ibid
[32] German name: Abwasserabgabengesetz
[33] BMUV 2022, English Summary MSFD Programme of Measures for Marine Protection in the German Parts of the North Sea and the Baltic Sea 9including environmental report) – Updated for 2022-2027. https://www.meeresschutz.info/berichte-art13.html?file=files/meeresschutz/berichte/art13-massnahmen/zyklus22/MSFD_Art13_Updated_PoM_Summary_2022.pdf
[34] Ibid

1.1.4 Coherence of spatial and temporal scales

The implementation of the MSFD in Germany involves both spatial and temporal dimensions to enhance marine biodiversity protection. Spatially, the North Sea and Baltic Sea waters of Germany are managed separately, which results in two different programmes of measures for each of the two seas.[35]

Germany has committed a significant portion of its marine waters to the EU's Natura 2000 network of protected areas, with 43 percent of the North Sea and 51 percent of the Baltic Sea waters designated as such. These areas include Special Areas of Conservation (SACs) under the EU Habitats Directive and Special Protection Areas (SPAs) under the EU Birds Directive, integrated into national law with comprehensive management plans. Additionally, Germany has adopted marine spatial planning measures to prioritise conservation efforts, such as designating specific zones within its EEZ for species like loons and creating seasonal reserves for harbour porpoises. Legal frameworks have also been established to include further species and habitats as protected assets across Germany's marine areas.[36]

Temporally, Germany's approach includes ongoing assessments and potential expansion of protected areas. Management measures under the MSFD, like creating refuge and resting areas for various marine species and habitats, are designed to have long-term positive effects, with outcomes possibly manifesting after several years. These measures are continuously evaluated and adapted to ensure effective conservation and compliance with international and regional agreements, including the OSPAR and HELCOM conventions, and the Trilateral Wadden Sea Cooperation.[37]

1.1.5 Conclusion

Germany's transposition of the MSFD suggests an effort to ensure coherence across policy objectives and instruments. While Germany does not foresee additional marine protected areas beyond MSFD requirements, its measures reflect EU ambitions, particularly in establishing and managing a network of protected areas. The country's structured approach includes periodic updates and stakeholder engagement, aimed at adaptive management and continuous improvement of the marine environment.

1.2 Transposition of the Birds and Habitats directives (BHD) in Germany

1.2.1 Introduction of the Birds and Habitats directives

The Birds and Habitats directives (BHD) are often considered the basis of EU biodiversity policy. They establish the legislative framework for EU MS to protect threatened biodiversity, primarily through the establishment of a network of protected sites – the Natura 2000 network – which is now the largest coordinated network of protected areas in the world.[38]

The Birds Directive (Directive 79/409/EEC) adopted in 1979 and amended in 2009 (Directive 2009/147/EC) relates to the conservation of all species of naturally occurring birds in the European

[35] BMUV 2012, MSFD Programme of Measures for Marine Protection in the German Parts of the North Sea and the Baltic Sea Report pursuant to Article 45h(1) of the Federal Water Act. https://www.meeresschutz.info/berichte-art13.html?file=files/meeresschutz/berichte/art13-massnahmen/MSFD_Art13_Programme_of_Measures_English-Summary.pdf

[36] BMUV 2022, English Summary MSFD Programme of Measures for Marine Protection in the German Parts of the North Sea and the Baltic Sea 9including environmental report) – Updated for 2022-2027. https://www.meeresschutz.info/berichte-art13.html?file=files/meeresschutz/berichte/art13-massnahmen/zyklus22/MSFD_Art13_Updated_PoM_Summary_2022.pdf

[37] Ibid

[38] EC 2024, The Habitats Directive https://environment.ec.europa.eu/topics/nature-and-biodiversity/habitats-directive_en#:~:text=the%20long%2Dterm.-,Law,and%20outside%20Natura%202000%20sites.

territory of the MS. It covers the protection, management and control of these species and lays down rules for their exploitation. It applies to birds, their eggs, nests, and habitats.[39]

The Habitats Directive (Council Directive 92/43/EEC) was adopted in 1992 and aims to protect over a thousand species, including mammals, reptiles, amphibians, fish invertebrates, and plants, and 230 characteristic habitat types. Its primarily aim is to ensure that these species and habitat types are maintained, or restored, to a favourable conservation status as well as enabling them to recover and thrive over the long term.[40]

The BHD introduced changes in conservation approach (biogeographic, cross-border species and habitats protection) and a higher standard of site protection than existed previously in Germany. It took almost 20 years to fully transpose them into national law, suggesting that German authorities may have been resistant towards the directives and that they would not have introduced such protection targets without legal requirements from the EU.[41] As of 2016, Natura2000 sites make up about 45 percent of the marine environment in Germany, a level in protection coverage that would likely not have occurred without the BHD.[42]

The German Federal Ministry for the Environment, Nature Conservation, Nuclear Safety and Consumer Protection (BMUV) is responsible for the implementation of the HBD, coordinating Germany's efforts and reporting to the European Commission. Within the Ministry, the Federal Agency for Nature Conservation (BfN), coordinates the national process with state (Länder) governments through nationwide working groups (Länderarbeitsgemeinschaft Naturschutz (LANA)). In Germany, it is the states that are responsible for selecting and proposing sites for protection.[43]

1.2.2 Coherence of policy objectives

The transposition of the Birds Directive and Habitats Directive in Germany was a complex and contested process, with delays and conflicts at local and regional levels.[44] This has led to varying practices in their implementation (particularly in forest policy).[45] Overall, while Germany's transposition of the directives aligns with the EU legislation in principle, the practical implementation has been challenging and varies across states (e.g. conservation priorities, objectives, selected measures, and enforcement). This decentralized approach allows for some flexibility to address local needs and circumstances while still ensuring compliance with EU regulations. At the same time, coordinated implementation strategies could be helpful to balance EU policy requirements with local interests.[46]

The primary legal framework for Germany's transposition of the BHD consists of both federal and state regulations. The Federal Nature Conservation Act (Bundesnaturschutzgesetz) provides the legal basis for nature conservation in Germany and establishes the link to the BHD in its introductory provisions. It was last amended in 2017 and incorporates provisions to implement both the Birds and the Habitats directives. It outlines measures for the protection of habitats and species, including the designation of protected areas, conservation objectives, and regulatory mechanisms for ensuring compliance with EU

[39] EC 2024, The Birds Directive https://environment.ec.europa.eu/topics/nature-and-biodiversity/birds-directive_en
[40] EC 2024, The Habitats Directive
[41] Milieu, IEEP and ICF, Evaluation Study to support the Fitness Check of the Birds and Habitats Directives, March 2016. https://awsassets.panda.org/downloads/study_evaluation_to_support_fitness_check_of_nature_directives__final.pdf
[42] Milieu et al 2016
[43] Apeldoorn, R.C. 2007 Working with biodiversity goals in European directives. A comparison of the implementation of the Birds and Habitats Directives and the Water Framework Directive in the Netherlands, Belgium, France and Germany. Werkdocument 77. Wettelijke Onderzoeks taken Natuur & Milieu. Wageningen, November 2007 https://library.wur.nl/WebQuery/wurpubs/fulltext/32810
[44] Chilla, T. (2005). EU-Richtlinie Fauna-Flora-Habitat: Umsetzungsprobleme und Erklärungsansätze. disP - The Planning Review, 41, 28 - 35.
[45] Borrass, L., Sotirov, M., & Winkel, G. (2015). Policy change and Europeanization: Implementing the European Union's Habitats Directive in Germany and the United Kingdom. Environmental Politics, 24, 788 - 809.
[46] Sauer, A. (2005). European nature conservation policy: challenges for local implementation in Germany.

directives. In addition, each of Germany's 16 federal states (Bundesländer) have their own, different but often similar, conservation laws. These laws complement the federal framework and may include provisions for implementing EU directives at the regional and local levels. They often address specific conservation needs and priorities within each state, including the designation and management of protected areas.

1.2.3 Coherence of policy instruments

Germany, unlike other MS, has not set national-level goals related to the directives. The responsibility to implement the HBD falls within the jurisdiction of the 16 German states in cooperation with local authorities. National authorities therefore do not determine Favorable Conservation Status (FCS) of species and because of this, no description of FCS by national authorities is provided. Instead, general guidelines are given to state and local authorities, who interpret and apply the guidelines accordingly.[47] Ecological goals and objectives are formulated in general terms for FCS at the state level and made more specific at the local (e.g., project, site) level. These goals are aggregated (status, distribution, range) when reported to the European Commission. Implementation of ecological goals is done using 'voluntarily contract-based management' which establishes minimum standards and requirements. In Germany, national law does not require management plans for protected sites, however, such plans are required under some state laws.[48]

Germany takes joint measures to implement the Water Framework Directive (WFD) and BHD, such as to conserve habitats and improves passes for migratory fish. These efforts lead to potential improvements for the conservation status of some fish species.[49]

Germany, unlike most MS, includes compulsory compensatory measures for impacts on biodiversity, assuming that they cannot be avoided[50], however, some industries, including fisheries are excluded from offsetting.[51]

A study of the application of Habitats Directive Article 12 measures Identified that in Germany (and some other MS) (due to various interpretations of the Article), individual species are not necessarily protected, provided it can be demonstrated that local and national conservation status will not be adversely affected. [52]

In terms of stakeholder participation and consultation processes, no overall picture can be obtained because of the decentralized (state driven) approach to the implementation of the HBD. Nevertheless, the agricultural and forestry sectors in Germany have demonstrated resistance at the national level [53] and campaigns against Natura2000 protected sites were launched in the 1990s due to concerns of how they would affect livelihoods.[54]

In 2023, the European Court of Justice (ECJ) ruled that Germany failed to meet the obligations under the BHD and establish special conservation areas or create plans to maintain the protected habitats. The EC, which began the legal proceedings in 2021, claimed that Germany failed to establish a sufficient number of conservation targets to meet its legal obligations in time. The ECJ agreed that Germany had

[47] Apeldoorn 2007
[48] Apeldoorn 2007
[49] Milieu et al 2016
[50] Tucker, GM, Allen, B, Conway, M, Dickie, I, Hart, K, Rayment, M, and Schulp, CJE. 2014. Policy Options for an EU No Net Loss Initiative (Report to the European Commission (with Annexes), Institute for European Environmental Policy, London/Brussels).
[51] Albrecht, J, Schumacher, J, and Wende, W. 2014. 'The German Impact Mitigation Regulation: A role model for a no net loss strategy and biodiversity offsets for halting the loss of biodiversity in the European Union?' Environmental Policy and Law, Vol. 44, Issue 3: 317-325.
[52] Milieu et al 2016
[53] Apeldoorn 2007
[54] Sundseth, K. 2004. LIFE-Nature: communicating with stakeholders and the general public. Best practice examples for Natura 2000 (LIFE Focus, Publications Office of the European Union, Luxembourg).

failed to designate 88 out of 4,606 sites as special conservation areas while 707 sites lacked conservation targets.[55]

1.2.4 Coherence of spatial and temporal scales

The lack of national-level goals in Germany may indicate a misalignment of spatial and temporal scales in the implementation of the directives. However, further research is needed.

1.2.5 Conclusion

The transposition of the Birds and Habitats directives in Germany has been a multifaceted process, highlighting both achievements and challenges. While the legal framework aligns with EU legislation, practical implementation has encountered complexities, leading to variations across states. Germany's decentralised approach allows for flexibility but also presents coordination challenges, as evidenced by the recent ruling from the ECJ regarding insufficient conservation measures.

1.3 Transposition of the Renewable Energy Directive in Germany

1.3.1 Introduction of the Renewable Energy Directive

The Renewable Energy Directive (RED), established by the EU with Directive 2009/28/EC and further amended by Directive 2018/2001/EU (RED II) and Directive 2023/2413 (RED III) is the legal framework for the development of renewable energy across MS.

The Directive aims to support a transition to clean energy as well as reduce Europe's dependency on external energy suppliers, thus reinforcing energy security and sustainability. The Directive has seen several updates, reflecting rising ambitions and technological advancements in the sector. For instance, the 2018 revision set a new target of at least 32 percent renewable energy by 2030 and in 2023 to speed up the EU's clean energy transition in response to global and regional challenges. The Directive was further amended increasing the overall EU renewable energy target to 42.5 percent by 2030, with an aspirational aim of reaching 45 percent. These targets are part of a broader strategy to achieve climate neutrality by 2050 and to bolster the EU's role as a global leader in renewable energy.[56]

In Germany, policies and regulations related to renewable energy are defined by the Federal Government and implemented by the Federal Ministry for Economic Affairs and Climate Action (BMWK).[57] [58]

The transposition of the RED, including its subsequent updates, has been largely carried out through amendments to national laws, specifically the German Federal Emissions Control Act[59] and its accompanying ordinance.[60] This legal framework has been in place since 2009 and has been adapted

[55] DW 2023, Germany violated nature conservation law, rules EU top court https://www.dw.com/en/germany-violated-nature-conservation-Tlaw-rules-eu-top-court/a-66882782
[56] EC 2023, Directive (EU) 2023/2413 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32023L2413&qid=1699364355105
[57] German name: Bundesministerium für Wirtschaft und Klimaschutz
[58] ICLG 2023, Renewable Energy Laws and Regulations Germany 2024. https://iclg.com/practice-areas/renewable-energy-laws-and-regulations/germany
[59] German name: Bundes-Immissionsschutzgesetz (BImSchG)
[60] German name: Verordnung zur Durchführung des Bundes-Immissionsschutzgesetzes (BImSchV)

over time to align with the evolving directives from the European Union.[61] However, the transposition of the RED provisions in Germany has been considered slow and incomplete.[62]

More recently, The German Renewable Energy Sources Act[63] (EEG 2023) was introduced which defines specific national targets for the share of electricity from renewable sources. Effective from January 1, 2023, this act is expected to increase the proportion of renewable energy in Germany's electricity consumption to at least 80% by 2030. This target is more ambitious than the EU's overall target of 42.5% renewable energy in the total energy mix by 2030. However, the EU's target encompasses the entire energy sector (including heating, transport, etc.).

1.3.2 Coherence of policy objectives

The German approach to implementing the RED has focused on setting specific targets for greenhouse gas reduction rather than mandating direct quotas for renewable energy consumption by fuel distributors. Under the current regulations, fuel distributors are required to meet a greenhouse gas reduction quota, which is set at 6 percent until 2025, increasing to 7.25 percent starting in 2026. At the same time, the legislation seeks to reduce the allowable percentage of conventional biofuels that count toward this quota, with a planned reduction to 2.7 percent by 2026.[64]

However, Germany's compliance with the RED has faced challenges. In May 2022, the European Commission issued a formal communication to Germany for not fully transposing the Directive, pointing out the absence of a complete correlation table or explanatory document detailing the transposition of the directive's provisions. Despite subsequent explanations from Germany, the Commission found the transposition efforts insufficient and issued an additional reasoned opinion in March 2024. Germany now has a two-month period to respond and implement the necessary measures to complete the Directive's transposition.[65]

1.3.3 Coherence of policy instruments

In Germany, the RED and its updates has been transposed into national law through amendments to the German Federal Emissions Control Act[66] and the accompanying ordinance (Verordnung zur Durchführung des Bundes-Immissionsschutzgesetzes, BImSchV)[67], and more recently through the EEG.[68] Under these instruments, rather than mandating a specific quota for renewable energy use, fuel distributors are required to meet greenhouse gas reduction quotas. The legislation stipulates a phased

[61] Nationaler Wasserstoffrat 2022, Transposition of RED II into national law (amending BlmSchG/BlmSchV). Position paper. https://www.wasserstoffrat.de/fileadmin/wasserstoffrat/media/Dokumente/EN/2020-11-06_NWR_position_paper_RED_II.pdf
[62] Krug, M., Di Nucci, M.R., Caldera, M., and De Luca, M. 2022, Maistreaming Community Energy: Is the Renewable Energy Directive a Driver for Renewable Energy Communities in Germany and Italy?. Sustainability MDPI, 14 (12). https://www.mdpi.com/2071-1050/14/12/7181
[63] German name: Erneuerbare-Energien-Gesetz (EEG)
[64] Nationaler Wasserstoffrat 2022, Transposition of RED II into national law (amending BlmSchG/BlmSchV). Position paper. https://www.wasserstoffrat.de/fileadmin/wasserstoffrat/media/Dokumente/EN/2020-11-06_NWR_position_paper_RED_II.pdf
[65] EC 2024, March infringement package – key decisions on energy. https://energy.ec.europa.eu/news/march-infringement-package-key-decisions-energy-2024-03-13_en
[66] German name: Bundes-Immissionsschutzgesetz (BImSchG)
[67] Nationaler Wasserstoffrat 2022, Transposition of RED II into national law (amending BlmSchG/BlmSchV). Position paper. https://www.wasserstoffrat.de/fileadmin/wasserstoffrat/media/Dokumente/EN/2020-11-06_NWR_position_paper_RED_II.pdf
[68] Die Bundesregierung 2022, EEG 2023 "We're tripling the speed of the expansion of renewable energies" https://www.bundesregierung.de/breg-de/schwerpunkte/klimaschutz/amendment-of-the-renewables-act-2060448#:~:text=The%20EEG%202023%20is%20the,least%2080%20percent%20by%202030

approach with a 6 percent reduction quota maintained until 2025, increasing to 7.25 percent from 2026.[69]

The Renewable Energy Sources Act (EEG), which functions as Germany's primary legislative tool for transposing the RED, mandates key actions and sets forth a framework for both organizations and individuals, including licensing, permitting, and detailed compliance procedures.[70] The implementation of the legislative and regulatory measures that have put in place to transpose the RED into German law is subject to review and oversight. As these regulations evolve, Germany is responsible for reporting aggregated data on the progress of renewable energy adoption and ecological impact to the European Commission.

1.3.4 Coherence of spatial and temporal scales

In transposing the RED, Germany's spatial scope encompasses the whole nation, ensuring that renewable energy targets are uniformly applied across all Federal States, aligning with the geographical breadth of EU directives. Temporally, the German instruments, particularly the Federal Emissions Control Act[71] and its ordinances, set deadlines and review periods that correspond with EU milestones, aiming for a cohesive transition by 2030.

Furthermore, the introduction of the EEG in 2023 served as a major amendment to the Federal Emissions Control Act; it sets deadlines for Germany, such as the target to supply at least 80 percent of electricity consumption from renewables by 2030. These timeframes are in line with the temporal scales of EU objectives, fostering a synchronized progression towards the overarching

2030 climate and energy framework.[72]

1.3.5 Conclusion

Germany's efforts to transpose the RED into national policy appear to have been marked by a commitment to align with EU objectives, as seen through legislative amendments and the introduction of the EEG. Despite facing challenges in complete transposition and compliance, Germany's spatial and temporal approaches mirror EU directives, emphasising a synchronised transition towards renewable energy and climate goals by 2030.

[69] Nationaler Wasserstoffrat 2022, Transposition of RED II into national law (amending BlmSchG/BlmSchV). Position paper. https://www.wasserstoffrat.de/fileadmin/wasserstoffrat/media/Dokumente/EN/2020-11-06_NWR_position_paper_RED_II.pdf

[70] BMWi 2019, Renewable energy sources in figures. https://www.bmwk.de/Redaktion/EN/Publikationen/renewable-energy-sources-in-figures-2018.pdf?__blob=publicationFile&v=1

[71] German name: Bundes-Immissionsschutzgesetz (BlmSchG)

[72] Die Bundesregierung 2022, EEG 2023 "We're tripling the speed of the expansion of renewable energies". https://www.bundesregierung.de/breg-de/schwerpunkte/klimaschutz/amendment-of-the-renewables-act-2060448#:~:text=The%20EEG%202023%20is%20the,least%2080%20percent%20by%202030

2. Finland

2.1 Transposition of the Marine Strategy Framework Directive in Finland

2.1.1 Introduction

This analysis looks into the transposition of the EU Marine Strategy Framework Directive in Finland, with a particular focus on the aspects of the Directive contributing to the EU Green Deal's objectives, as elaborated in Crossgov task 2.2. Based on this analysis, the MSFD is a key instrument in the marine environment with regards to all GD objectives addressed therein. First, the MSFD is the predominant legal instrument for the marine biodiversity objectives, as its objectives for good marine environmental status encompass marine nature protection aspects comprehensively. Furthermore, the MSFD creates a regime utilising area-based protection, species-protection regimes and managing the ecosystem conditions holistically to support biodiversity. Secondly, the MSFD establishes objectives and management regime for eutrophication in the sea space, thus complementing the WFD in managing e.g. agricultural nutrient pollution; nevertheless, the WFD is the predominant instrument in this regard, as agricultural pollution mostly enters the marine environment via inland surface waters. Thirdly, the MSFD should be interpreted as putting forward rules that affect renewable energy construction in the marine areas. This includes requirements for sea-floor integrity and protection of marine habitats that may necessitate directing energy infrastructure away from vulnerable areas, as well as rules on permitting of new projects that are liable of causing adverse impacts on the marine environmental status, such as authorising individual wind turbines. Against this background, this analysis will investigate the transposition of the MSFD in Finland focusing on the interlinkages within water and marine management law in controlling agricultural pollution. The analysis also notes certain more general aspects of the MSFD's transposition, referring to, where relevant, biodiversity protection considerations.

In Finland, the MSFD is predominantly transposed in the national legislation with the amendments to the Act on the Organisation of River Basin Management and the Marine Strategies (1299/2004, Water Management Act) in 2011.[73] With those amendments the name of the statute was changed to include marine strategies and relevant provisions on preparing the marine strategies were added to the statute, one which was originally adopted in 2004 to transpose the WFD into national law. The transposition also included adopting Government Decree on the Organisation of the Development and Implementation of the Marine Strategy (980/2011, Marine Strategy Decree). The marine strategy - related provisions of the Water Management Act and the Decree will be referred to as marine management legislation.

What is important to note here is that – similarly to the transposition of the WFD – the Finnish marine management legislation sets out the MSFD's marine environmental status objectives and regulates marine management *only in relation to the procedural planning aspects*. National transposing regulation concerning the MSFD's substantive legal implications on different sectors – such as towards nature conservation, controlling water use activities, or managing diffuse pollution including agriculture – is provided in separate sectoral laws. These sectoral laws either contain or do not contain provisions referring to the marine environmental status and marine strategies. The relevant sectoral legislation for agricultural pollution comprises particularly the Nitrates Decree, which has been analysed on its own in the template on the transposition of the ND and in the template on the transposition of the WFD. For this reason, the analysis here will only focus on the transposition of the MSFD's measures and linkages with the WFD relevant to agricultural pollution. Moreover, since Task 2.2 indicated the MSFD as a particularly relevant instrument for complementing the EU nature protection legislation in the marine environment, the analyses will consider some marine biodiversity protection aspects of the Directive too.

[73] Act on amending the Act 1299/2004 on the Organisation of River Basin Management (272/2011).

2.1.2 Coherence of policy objectives

Section 1(1) of the Water Management Act states that the "act lays down provisions on the (…) development and implementation of the marine strategy (…). The general objective of the (…) work on the marine strategy is to protect, improve and restore (…) the Baltic Sea in a way that (…) the Baltic Sea does not deteriorate and is at least 'good'." Accordingly, the Act stipulates a general marine environmental policy objective that corresponds the overarching objective of the MSFD (Art 1(1)). However, one should note a difference in the formulation of the objectives; Art 1 MSFD refers establishing a framework within which the necessary measures are taken to (*de facto*) achieve good marine environmental status, whereas the Finnish Water Management Act sets itself out to merely aim towards such an objective. There is also a different related to spatial scale of the objectives, which is explained in section 3 below.

The definitions of 'marine environmental status' and 'good marine environmental status' are included in Section 2(11) and (13) almost word-to-word compared to Art 3(4) and (5) MSFD. Moreover, Section 26c (2) states that "(g)ood environmental status of the marine environment and its characteristics shall be determined on the basis of the initial assessment of the status of the marine environment using qualitative descriptors". Section 8 of the Marine Management Act, together with Annex 3 of the Decree transposing the list of qualitative descriptors in Annex I to the MSFD, specifies the tasks of different authorities related to determining good environmental status. Together these provisions transpose the requirement provided in Art 9 MSFD that MGES is specifically determined as part of the compilation of marine strategies. The descriptor-specific, general normative definitions of MGES are included in Annex 3 of the Marine Management Decree; yet, the Decree does not state that those definitions would be normative but merely states that those definitions are to be taken into account in defining the MGES. Moreover, the requirements established in Art 10 MSFD related to setting environmental targets on key pressures and impacts to guide the progress towards meeting GES are transposed in Sections 2(12) and 26 d (1) of the Water Management Act and the more specific Section 9 of the Marine Management Decree. Here, the national provisions highlight that the environmental targets "are to be presented" in the marine strategy; accordingly, the national law regards environmental targets rather as a planning phase than recognises any normativity in them.

It should be noted that in general the Finnish marine management legislation includes no provision that would stipulate that marine strategies are compiled and implemented to achieve good status in the marine waters, nor does the legislation set out any authority responsible for ensuring the achievement of the MSFD's objectives or in any other way indicate that good status of the marine environment would be any kind of a norm bearing legal implications. Section 26 b (1) states that the marine strategy document is to present measures for protecting and preserving the marine environment, for preventing the deterioration of its status and for safeguarding and restoring marine ecosystems in a way that good environmental status of the marine environment can be maintained or achieved by 2020. Accordingly, in the national transposition of the MSFD a similar position to that of the transposition of the WFD was adopted; the marine environmental status objectives merely guide the compilation of plans and programmes, and they would not create any direct obligations towards authorities, let alone individual operators.[74] Furthermore, in the Finnish legal systems the legal weight of plans and strategies themselves is quite small. Material legal regulation and other policy steering of different sectors, pressures and activities is contained in sectoral environmental laws, and the marine environmental status objectives only have implications in the requirements and decisions set under those statutes, if those statutes refer to the objectives or marine strategies. This will be investigated briefly below with regard to key sectoral legislation.

2.1.3 Coherence of instruments

Analogously to the WFD, the predominant instrument for achieving the objectives for marine environmental status in the MSFD are the programs of measures (PoM, MSFD Art 13). Under the MSFD, the PoM should constitute a compilation of measures making use of a variety of instruments established in other EU legislation (particularly the WFD, Urban Waste Water Treatment Directive and

[74] Government Bill 323/2010, p. 9.

the Bathing Water Directive) and national law that are relevant and appropriate in controlling anthropogenic pressures identified to adversely affect the marine environment in accordance with the environmental targets set to guide the progress towards GES (MSFD Art 13(1) and (2)). Accordingly, to appropriately transpose the ratio legis of the MSFD's in relation to the PoMs, MS should include in their national legislation provisions that, first, establish that relevant instruments under sectoral laws form a part of the measures included in the PoMs and second, provide that the environmental targets and the GES objective have legal impacts on the application of those instruments, allowing them to be utilised as marine management measures.

Article 13 of the MSFD is transposed into Finnish legislation with Section 26 f of the Water Management Act, specified with Section 11 of the Marine Management Decree. Section 26 f (1) and (2) of the Water Management Act merely provide that the responsible authorities for compiling the PoM are the regional administrative agencies, ELY centres and that the PoM should identify the measures required to achieve and maintain good environmental status of the marine environment. Section 11 of the Marine Management Decree merely specifies the division of the tasks between ELY centres; the only substantive legal addition is a statement that the PoMs should contain an explanation on how the measures contribute towards meeting the environmental targets (Section 11(4)). Furthermore, Section 12 of the Marine Management Decree transposes the indicative list of measures provided in Annex III of the MSFD: it stipulates that "in selecting the measures to be included PoM, authorities should take into account, where relevant", input controls, output controls, spatial and temporal distribution controls and the other types of measures included in Annex III of the MSFD. One should note here that the provision does not indicate, in which legislation in Finland's legal system such measures would be found, and which national sectoral statutes and the specific provisions and instruments therein constitute marine management measures. Hence, the national legislation and policies governing for instance controls of agricultural nutrient pollution – the Nitrates Decree (1250) and the Environmental Protection Act (527/2014) – are not identified as instruments for marine strategies and their application is not linked to the compilation of PoMs pursuant to realising environmental targets. Indeed, in the context of transposing the MSFD into national law, it was highlighted that the water protection measures in the agricultural sector should consist of the requirements of EU CAP, and no reference was made to relevant national legislation or linking its instruments to the implementation of the MSFD.[75]

Moreover, the Finnish transposing legislation makes no reference that the measures required under the UWWTD and BWD, or the legislation transposing them into national legislation, would form a basis for marine management measures. Accordingly, in the Finnish transposing legislation the link between the MSFD's PoMs and the relevant water policy instruments provided in sectoral legislation is even weaker than that of the WFD's transposition. The competent marine management authorities' duties in considering the appropriateness of existing measures already taken under sectoral legislation or initiating the taking of new measures (such as establishing protection areas, applying for permit reviews, influencing marine spatial plans) are completely unregulated. This has the effect that marine management authorities appear to only have the competence to describe the existing requirements and instruments under national law, but do not have the legal authority to influence decision-making under sectoral laws or craft measures for marine management purposes, a situation very similar to that of the river basin management authorities in implementing the WFD.

The legal situation pertaining to the legal implications of the MSFD's objectives and marine strategies in decision-making under sectoral laws is also identical to the WFD. Section 28 of the Water Management Act provides that state and municipal authorities should "give due consideration in their activities, as appropriate, to (…) the marine strategy document". In the Finnish law, this is only a vague requirement. The Finnish legal system adheres to a strict meaning of the principle of legality, which means that in making legally binding decisions, the authorities' discretion is duly bound to the precise conditions laid down in the sectoral law. For this reason, despite the general consideration clause in Section 28 of the Water Management Act, the authorities may only base their decisions on marine management considerations if that is explicitly stipulated in the sectoral law governing the decision-

[75] Government Bill 323/2010, p. 6.

making on a given instrument. In transposing the MSFD, only the provisions related to permit controls in the EPA, the Water Act and the Marine Protection Act (1415/1994) were amended to include any reference to the marine strategies in their material regulation. The permitting authorities are specifically required to *consider* what is established in the marine strategy document when they assess the fulfilment of the conditions for granting a permit under those acts. Yet, as was the case also for the WFD prior to the Weser judgement, the chosen way of reference is based on the notion that the national legislator refused the idea of marine management objectives entailing any binding legal implications on projects; for this reason, the transposition did not directly link the GES objective or environmental targets to permit deliberations but opted for the vague requirement to consider marine strategies. Thus, in the Finnish legal system, it is not possible to refuse granting a permit based on the activity's incompatibility with the GES objective or environmental targets, and it is also unlikely that those objectives and targets could have a notable impact on the scope of mitigation measures and other permit conditions imposed in the permit.

In relation to marine biodiversity protection, Section 26 f (3) of the Water Management Act states that the PoM is to contain spatial protection measures that contribute to coherent and representative networks of marine protected areas. This general statement is specified in Section 13 (1) of the Marine Management Decree, which provides that "the PoM presents regional conservation measures that promote uniform and representative networks of marine protected areas *formed on the basis of other legislation* (…)." Accordingly, the Marine Management legislation does not provide any requirements or a legal basis for establishing new marine protected areas in addition to those that have already been established pursuant to the implementation of the EU HD and BD for instance. Even among the existing Natura 2000 areas only a minority has been established as protected areas under national Nature Conservation legislation thus, the only legal conservation measure applied in the area are the direct requirements stemming from Article 6 of the HD that mostly concern authorising new projects, transposed in chapter 5 of the Nature Conservation Act (9/2023).[76] Accordingly, the national transposition completely undermines the intended coherence and interaction of the MSFD and the Nature Directives, which presupposes that the MSFD would strengthen and compliment the somewhat shallow requirements of the Nature Directives in the marine environment.

While the above analysis shows that the national transposition contains significant coherence challenges regarding the legal weight of the MSFD's material requirements and steering sectoral policies, the Finnish transposition also contains one aspect, where the policy coherence is strengthened compared to the EU directives'; close coordination of the WFD's river basin management planning and the MSFD's marine strategies. Section 1(1) of the Water Management Act notes a general intention in the Act to have the river basin management and work on the marine strategy "carried out and implemented in a coordinated manner and with coherent objectives". Moreover, throughout the provisions of the Act that concern different phases of river basin management planning and compilation of marine strategies, specific requirements on the coordination of the two planning systems are stipulated. For instance, the regional tasks related to compiling marine strategies are assigned to ELY centres that are also responsible authorities for river basin management planning (Section 5 (1) and (2)). Section 26 a (3) specifically states that these authorities' tasks include coordination of the work on the marine strategy and river basin management. River basin management plans are to be taken into account in the determination of the MGES (Section 8(2) Marine Management Decree) and the measures in those plans should be taken into account in compiling the PoM for the marine strategy (Section 11(4) of the Marine Management Decree). Moreover, Section 11(2) of the Water Management Act makes a reverse link to the marine strategies in regulating the compilation of river basin management plans, which goes beyond to what EU law requires as the WFD does not require taking into account marine strategies in preparing river basin management plans.

2.1.4 Coherence of spatial and temporal scales

As was noted in section 2, there is a mismatch of spatial scales between the MSFD's objectives and in the transposing legislation's general aim in Section 1(1) of the Water Management Act. The MSFD's

[76] Pappila – Puharinen 2022, p. 84–89.

objective is to achieve good status in the marine regions – such as the Baltic Sea – but the obligations related to achieving MGES focus on MS in the geographical scale of their national marine waters; in practice, the internal waters (Art 3(1)(b) MSFD) as well as territorial waters and EEZ (Art 3(1)(a) MSFD). The national transposing legislation is missing the national marine waters scale; the general aim for marine management indicated in Section 1(1) only refers to good status of the Baltic Sea. However, Section 2(9) of the Water Management Act defines 'marine waters' like they are defined in Article 3(1) of the MSFD, that is, encompassing the area situated on the seaward side of the baseline up until the outer limit of the EEZ, as well as the coastal waters under WFD in a supplementary manner. 'Marine environmental status' is defined in Section 2(11) as meaning the environmental state in the *marine waters*, that is, the national marine waters according to the MSFD. However, the definition of 'good marine environmental status' does not refer to (national) marine waters, but instead, refers to the state of the sea or the state of the 'marine environment' whose spatial scale is not defined in the Act. In sum, the national transposing legislation completely lacks objectives, targets or requirements that good status should be reached in the national marine waters by Finland.[77]

With regard to the general spatial scope of application, all Finnish legislation applies automatically in Finland's internal waters and territorial sea; this applies also to the marine management legislation as well as all sectoral legislation in which the marine management measures are based (yet see the insufficient link between that legislation and the marine management law in the previous section). The only exception are the internal waters and territorial sea of the Åland province. As noted in relation to the WFD, Åland province has the legislative competence in the field of environmental policy and water law in the province's area.[78] The legislation of the mainland Finland is thus not applicable in the Åland territory; for instance, EU environmental directives, including the MSFD, need to be transposed both into mainland Finland's legislation and Åland's provincial legislation. Åland's marine management legislation is however not assessed at this point. Yet, the MSFD's marine waters also extend beyond internal and territorial waters, as they also reach up to the outer limit of the MS' EEZs. Section 3(1) of the Act on Finland's Exclusive Economic Zone (1058/2004) stipulates that the Water Management Act, and from sectoral laws the Water Act and EPA, apply in the Finnish EEZ. Thus, the procedural planning provisions in the marine management legislation as well as the permitting provisions in the two sectoral laws transposing the MSFD are applied in a spatial scale that matches that of the MSFD. Yet, nature protection legislation – which solely governs marine biodiversity protection due to the lack of material, additional regulation on this aspect in marine management legislation – is at the outset not applicable in the EEZ.[79]

Regarding the temporal scale, the MSFD's deadline of achieving GES in the marine environment by 2020 is not incorporated in Article 1(1) of the Water Management Act that sets out the general ambition for marine management. As noted above in section 2, Finnish legislation also does not include any other provision that would explicitly state that GES should be achieved in the national marine waters by 2020. The deadline of 2020 is however included in Section 26 b (1) of the Water Management Act, which concerns the preparation of the marine strategy document. The provision states that the "marine strategy document shall present measures for protecting and preserving the marine environment, for preventing the deterioration of its status and for safeguarding and restoring marine ecosystems in a way that good environmental status of the marine environment can be maintained or achieved by 2020". As such, similarly to the situation with the WFD, the GES objective and the deadline of 2020 for reaching it are provided as legally ambivalent aims that guide the preparation of the plans but is not established as a material legal requirement that would entail binding obligations for relevant authorities to de facto

[77] The logic of the MSFD appears to be that it contains a general ambition that good status would be reached through the joint effort by Member States in the entire marine region or subregions, but the more tangible legal requirements related to achieving GES are targeted to each Member State individually with regard to their national marine waters. Puharinen 2023. The Finnish transposition thus only recognises the general ambition of the MSFD but does not transpose the legal requirement directed to Finland individually in relation to improving the state of its own marine waters to meet GES.

[78] Act on the Autonomy of Åland (1144/1991), Section 18(1), point 10.

[79] Section 4 of the EEZ Act provides that nature conservation legislation applies in the EEZ if that is explicitly provided in the relevant statute. The Nature Conservation Act (9/2023) does not provide that it would be applicable in the EEZ.

ensure their achievement. Moreover, Section 26 e of the Water Management Act transposed – almost word-to-word – the exemptions of Article 14 of the MSFD; here, Section 26 e (2) provides that the deadline for achieving good status or the environmental targets may be extended based on natural condition.

2.1.5 Conclusions

1. In the Finnish transposition of the MSFD, some coherence issues already present at the level of EU law are worsened; this relates in particular to the unclear legal linkage of marine management and water protection law and the instruments therein. This challenge is increased by the ambiguity pertaining the legal weight of the marine management objectives, which hampers the effective implementation of the Directive.
2. Spatial scales of the transposing instruments do not fully match those of the MSFD; especially the geographical scope of the GES objective is unclear.
3. In the national transposition, coherence is however strengthened in relation to coordination of the WFD's river basin management planning and the MSFD's marine strategies.

2.2 Transposition of the Nitrates Directive in Finland

2.2.1 Introduction

This analysis looks into the transposition of the EU Nitrates Directive in Finland, with a particular focus on the aspects of the Directive contributing to the EU Green Deal's objectives, as elaborated in Crossgov task 2.2. As noted there, controlling agricultural nutrient pollution is crucial for realising the GD's Zero Pollution ambitions in the marine environment, as eutrophication constitutes a key challenge in many regions, especially the Baltic Sea. The WFD and the MSFD contribute to realising the zero-pollution ambition for aquatic ecosystems. Furthermore, for controlling the inputs of pollution from various sources, the WFD and the MSFD are substantiated by sectoral pollution policies. For agricultural nutrient emissions, the key sectoral policy is the Nitrates Directive. Against this background, the analysis here will assess the Finnish transposition of the ND, paying particular attention to the interlinkages with the national legislation transposing WFD's objectives and river basin management and the MSFD's objectives and marine strategies.

In Finland, the ND is predominantly transposed in the national legislation with the Government Decree on Limiting Certain Emissions from Agriculture and Horticulture (1250/2014, hereinafter Nitrates Decree), as pronounced in Section 1(1) of that Decree. In the Finnish legal system, Government Decrees constitute secondary legal statutes: they are generally binding legislation, but their content is restricted to what is provided in the legal basis based on which they have been adopted, which must be found in primary statutes, that is, statutory Acts. In the case of the Nitrates Decree, the legal basis for its adoption is found in Section 10 of the Environmental Protection Act (527/2014, EPA). That provision provides a mandate for the government to adopt secondary statutes regarding for instance agriculture, which impose rules on environmental protection requirements, conditions for the siting of activities in different areas and the distance requirements necessary for preventing adverse impacts from the activities (Section 10(1)(1) and (2)(6) EPA).

It should be noted here that Finland has utilised the option provided in Art 3(5) of the ND to be exempted from the requirement to designate specific nitrates vulnerable zones by establishing the nitrates action program – and the required measures therein provided in Annex III ND – throughout their entire territory. In this vein, the requirements and measures put forward in Annex III of the ND have been transposed as generally binding rules, established in the Nitrates Decree, which apply to all agricultural activities throughout Finland's territory.

2.2.2 Coherence of policy objectives

The general objective of the ND is to reduce water pollution caused or induced by nitrates from agricultural sources and to prevent further such pollution (Art 1). Furthermore, the Directive establishes thresholds for triggering action to establish nitrates vulnerable zones and draft action plans; accordingly, these thresholds have been seen to constitute targets that specify the general objectives. The threshold for taking action, established in Annex I, part A of the ND; is exceedance of 50 mg/l nitrate in groundwater and of 50 mg/l nitrate in surface water, or that freshwaters, coastal waters or marine waters are found to be eutrophic or that they may in the near future become eutrophic. The recent case law by the CJEU has elaborated that the ND's objectives constitute substantive legal obligations that structure the scope of the required efforts and measures by the MS; Art 5(5) of the ND requires MS to take additional measures if the primary measures are not enough to achieve the reduction in nitrate pollution and prevention of further pollution, objectives specified by the above mentioned thresholds for nitrate concentrations and eutrophication impacts. Accordingly, it should be interpreted that if the primary measures included in the action programs drawn up for areas where the waters exceed Annex I, part A thresholds for eutrophication are not enough to ensure improvement of the state of the waters below those thresholds, an obligation to take additional measures exists.

According to Section 1(2) of the Nitrates Decree, the general purpose of the Decree is to prevent and to reduce emissions into surface water, groundwater, soil and air caused by the use, storage and processing of manure and other fertilisers and by livestock production. This is in line with the general objective put forward in Art 1 of the ND. Yet, the ND's thresholds used for assessing the need to take measures – primarily establishment of the NVZs and action programmes and subsequently whether additional measures are needed – are not incorporated in the national legislation. This is because Finland made the choice to implement the ND's measures in their entire territory, which allows Finland to omit the designation of NVZs; for this reason, the thresholds in Annex I, part A of the ND have not been included in the national legislation. This is logical, as those thresholds primarily apply to designation of the NVZs, and thus, they are not needed if specific NVZs are not designated in the national implementation. However, as established above, the interpretations of the ND have evolved towards understanding these standards as legal objectives forming material obligations to MS. In the Finnish transposing legislation, the thresholds of Annex I, part A of the ND are not outlined as legal objectives the achievement of which should be ascertained. They are also not included as thresholds that would trigger legal requirements to take additional measures, if the primary measures – transposed as general binding statutory norms in the Nitrates Decree – are not enough to deliver the ND's objectives. Furthermore, the general objective of the Decree (Section 1(1)) does not make any reference to the WFD's objectives, which does not promote the realisation of the *ratio legis* of the joint regime put forward by the two Directives, as analysed in Task 2.2, in the national transposing legislation.

2.2.3 Coherence of instruments

The ND includes concrete mandatory measures that the MS need to include and operationalise in the context of the action programs to reduce agricultural nitrates pollution (Article 5(4)(a)). These measures are listed in Annex III of the Directive and they include putting in place rules that, for instance, prohibit the land application of certain types of fertilizer during certain periods, restrict the maximum amount of livestock manure applied to the land each year to 170 kg N per hectare, and lay down requirements for the capacity of storage vessels for livestock manure. Furthermore, the ND's requirement to establish codes of good agricultural applies generally in the territory of MS to establish a general level of protection against pollution (Art 4(1)). These codes should include, if deemed relevant, provisions on periods when the land application of fertilizer is inappropriate, land application of fertilizer to steeply sloping ground, the conditions for land application of fertiliser near water courses, and the capacity and construction of storage vessels for livestock manures (Annex II, section A), among others. Moreover, MS may choose to include additionally provisions related to for instance provisions on land use management, including the use of crop rotation systems and the proportion of the land area devoted to permanent crops, the maintenance of a minimum quantity of vegetation cover during (rainy) periods

and establishment of fertilizer plans on a farm-by-farm basis and the keeping of records on fertilizer use (Annex II, section B).

Since Finland has chosen to apply the requirements for action programs in their entire territory instead of designating specific NVZs and compiling measures relevant to each zone into action programs drawn up for the zones, Finland has had to transpose the measures required to be included in action programs in Annex III of the ND as general requirements applied to all farms. Thus, Finland opted for enacting a statutory decree that transposes those requirements into generally binding norms on all farms. Section 1(3) of the Nitrates Decree pronounces that Section 5, section 7(1) and (5) to (8), section 8, section 10(1) to (3), (5) to (8) and (10), and sections 11 to 13 of the Decree implement Articles 4 and 5 of the Nitrates Directive. Thus, these provisions of the Nitrates Decree not only transpose the measures required for action programs but also the requirement of Art 4 of the ND to establish codes of good agricultural practices, which already in the text of the ND should apply to all farms in the MSterritory.

Accordingly, the measures required for action programs under Article 5(4) and Annex III, including imposing limitations on manure spreading and requirements for manure storage and rules, and the codes good agricultural practices required under Article 4 and Annex II of the ND, including conditions for application of fertilizer to water-saturated, flooded, frozen or snow-covered ground or for land application of fertilizer near water courses, have been set by the Decree in a form that is thought to suffice in limiting agricultural pollution all areas in Finland according to the general objective of the Decree. However, one should note the requirement imposed in Article 5(5) that MS take such additional measures or reinforced actions as they consider necessary if the experience gained in implementing the action programmes shows that the original measures are will not be sufficient for achieving the objectives specified in Article 1. Furthermore, Article 5(7) of the ND requires MSto review and if necessary revise their action programmes, including any additional measures, at least every four years. These provisions are not transposed in the Nitrates Decree and in fact, nowhere in Finnish law is there a requirement to assess the sufficiency of the rules and restrictions enacted in statutory acts in general, or Nitrates Decree in particular. As explained by Paloniitty, the Commission's oversight on the Finnish transposition of the ND has over years triggered several amendments to the Decree, mostly to tighten the requirements.[80] Such amendments have included restricting the timeframes when manure can be spread on the fields in the Autumn; nowadays, Section 10(2) of the Decree forbids the spreading of manure to the fields during the period between the beginning of November and the end of March, while previously spreading was allowed until 15.11. under quite lenient conditions.[81] However, reviewing and amending the Nitrates Decree is not institutionally mandated, structured or required practise; instead, the government has the discretion to initiate or not initiate amendments in the Decree based on their legislative capacity and discretion with regard to decrees.

Furthermore, it is relevant to note that the Nitrates Decree makes no reference to the Water Management Act (1299/2004) transposing the WFD into national law or its water status objectives, let alone to the provisions of the Water Management Act transposing the MSFD or its marine environmental objectives. As the ND is provided as one of the instruments forming part of the mandatory water management measures under the WFD, the implementation of the ND is shaped by the WFD's good water status objectives; for example, the interpretation of the ND's thresholds for establishing nitrates vulnerable zones, drawing up action plans and initiating supplementary measures should take into account the information provided in the river basin management planning, especially if agricultural pollution is found to adversely affect water status and hinder the achievement of the WFD's objectives. The WFD's measures, including those drawn up under the ND, should also be taken into account in the programmes of measures for marine strategies; thus, the marine strategies and the MSFD's objectives should have implicit linkage to the measures under the ND as well. Although the Nitrates Decree is listed as one of the legal instruments in Finnish legal system that contain the mandatory water management measures (see the template on the Finnish transposition of the WFD, Section 24 and Annex 6 of the Water Management Decree), there are no provisions in the Nitrates Decree or anywhere else in the Finnish legislation that would require the rules and restrictions of the Nitrates Decree to be evaluated and

[80] Tiina Paloniitty, Law, Ecology, and the Management of Complex Systems – The Case of Water Governance. Routledge 2022, p. 18–19.
[81] Nitrates Decree 931/2000, Section 5(1).

updated, if the assessments conducted in the river basin management planning process and the measures drafted in the programmes of measures for water management would call for more stringent measures to be implemented.

2.2.4 Coherence of spatial and temporal scales

As has been mentioned several times already, the Finnish transposition of the ND applies on a geographical scale encompassing the entire territory of Finland. The ND Article 3(5) provides this possibility for MS as an exemption from the requirement to designate specific NVZs, where action programs would be applied. One should however note that the Nitrates Decree only applies in the entire territory of mainland Finland; the autonomous Åland province has the legislative competence in the field of environmental policy as well as in governing agricultural practices in the province's area.[82] As the legislation of the mainland Finland is thus not applicable in the Åland territory, EU environmental directives, including the ND, need to be transposed both into mainland Finland's legislation and Åland's provincial legislation. Åland's legislation transposing the ND is however not assessed at this point.

While applying the entire territory approach to controlling agricultural nitrates pollution is justified under the ND, this approach invites some challenges regarding the realization of the *ratio legis* of the ND, especially in connection with the WFD, effectively in national law. As noted in Task 2.2, utilizing the possibilities of the ND to differentiate the scope of required measures through the designation of NVZs and drawing up action programs relevant for each area would enable better coherence between the ND and the WFD, allowing the ND to be better used as a water management instruments. This potential of the ND is diluted if Member States opt for the entire territory approach, like Finland has done.[83] The European Court of Auditors has also found that the Finnish approach entails problems regarding its effectiveness to tackle agricultural pollution. According to the Court, "in extensive farming areas with low application of fertilisers, good status and low risk of pollution of receiving bodies of water, certain action programme requirements are superfluous but the administrative and inspection costs are increased. In intensive farming and animal-rearing areas, on the other hand, the requirements may be insufficient to achieve the nutrient reductions necessary for reaching the good status of inland and Baltic Sea waters. For instance, after having applied the nitrates directive for 20 years, a significant proportion of the water bodies in southern Finland are of a poor status. Also, Finland has not recently reduced its nitrogen inputs into the Baltic Sea."[84] In sum, while the geographical scale in the Finnish transposition is in compliance with the ND, it still invites some coherence challenges with regard to the WFD and challenges related to effectiveness pursuant to the GD's goals.

2.2.5 Conclusion

1. The Finnish transposition of the ND increases some of the coherence challenges already present at the level of EU law. This relates to particularly the geographical scales; the Finnish entire territory approach invites problems in linking the ND sufficiently to the WFD's river basin management and undermines the effectiveness of the instrument's capacity to reduce agricultural nutrient pollution.
2. Another key coherence issue is the lack of provisions mandating a review and update of the generally binding rules and restrictions imposed in the Nitrates Decree, which undermines the implementation of the ND and its utility as a water management instrument, of which stringency could be assessed and adapted based on the WFD's objectives and planning. This challenge is increased by the lack of references in the Nitrates Decree to the national Water Management legislation transposing the WFD and the ambiguity related to the legal weight of the water management objectives and river basin management plans under that legislation.

[82] Act on the Autonomy of Åland (1144/1991), Section 18(1), points 10 and 15.
[83] Tiina Paloniitty, Law, Ecology, and the Management of Complex Systems – The Case of Water Governance. Routledge 2022, p. 15–16.
[84] European Court of Auditors, (2016), Special Report, Combating eutrophication in the Baltic Sea: further and more effective action needed. 2016, p. 32.

2.3 Transposition of the Water Framework Directive in Finland

2.3.1 Introduction

This analysis looks into the transposition of the EU Water Framework Directive in Finland, with a particular focus on the aspects of the Directive contributing to the EU Green Deal's objectives, as elaborated in CrossGov task 2.2. Based on that analysis, the WFD is recognised to bear relevance particularly in relation to the GD's zero pollution objectives in so far as they concern agricultural nutrient pollution; agricultural nutrient pollution enters in the marine environment through inland surface waters, the status and management of which is predominantly addressed by the WFD. Regarding the other GD goals, the WFD has only little relevance regarding marine biodiversity protection, as its objectives do not address biodiversity in itself, but the WFD's objectives and management regime are found to generally support marine biodiversity. Notably, the WFD has no direct regulation related to the climate goals in the marine environment either. Yet, as established in task 2.2, the WFD's water status objectives– prohibition of deterioration of water status and achieving good status – and exemption from those provided in Article 4(7) of the WFD put forward binding rules and preconditions for authorising new projects in coastal waters, including offshore wind projects. These permitting rules thus have on the one hand implicit relevance for biodiversity protection, and explicit relevance for climate goals. Against this background, the analysis on the Finnish transposition of the WFD will focus on the specific aspects of the Directive that relate to controlling agricultural nutrient pollution, as identified in task 2.2, and on the WFD's permitting rules and regulation on the exemption applicable to new projects.

In Finland, the WFD is predominantly transposed in the national legislation with the Act on the Organisation of River Basin Management and the Marine Strategies (1299/2004, Water Management Act), adopted in 2004, and several governmental decrees supplementing the Act. These statutes can be called Finnish water management legislation. The one decree that is relevant for transposing the above-mentioned aspects of the WFD relating to the GD is the Government Decree on Water Resources Management (1040/2006, Water Management Decree). Both the Water Management Act and the Water Management Decree have undergone several updates and amendments to them during the transposition of the WFD.[85]

What is important to note here is that the Finnish water management legislation sets out the WFD's water management objectives in national law and regulates river basin management *only in relation to the procedural planning aspects*. National transposing regulation concerning the WFD's substantive legal implications on controlling environmental impacts of different sectors – such as water use activities, point-source pollution, diffuse pollution including agriculture – is provided in separate sectoral laws. The sectoral laws either contain or do not contain provisions referring to the water management objectives and river basin management plans. For example, water construction projects – including offshore wind projects – are regulated in the Water Act (587/2011), which thus constitutes transposing legislation for the WFD insofar as concerns the legal implications of the WFD on permitting of such projects. For agricultural nutrient pollution, transposing legislation includes the Environmental Protection Act (527/2014) that requires permit controls for the biggest animal shelters and the Government Decree on Limiting Certain Emissions from Agriculture and Horticulture (1250/2014, Nitrates Decree), which however is mainly a transposing instrument for the ND (see the ND template).

2.3.2 Coherence of policy objectives

Section 1(1) of the Water Management Act states that the "act lays down provisions on the organisation of river basin management (…), the related analysis work, cooperation and participation within the river basin districts" and that "(t)he general objective of the organisation of river basin management (…) is

[85] It should be noted that English translations of the statutes, provided in the national Finlex database (https://finlex.fi/en/), have only been updated until 2015 for the Water Management Act and 2008 for the Water Management Decree. Yet all amendments to and the versions of the statutes currently in force are found in the database in Finnish and in Swedish.

to protect, improve and restore waters (…) in a way that the status of surface waters and groundwater (…) does not deteriorate and is at least 'good'." Accordingly, the Act stipulates a general water policy objective that corresponds the overarching objectives of the WFD. However, one should note the slight difference in the formulation of the objectives; Art 1 WFD refers establishing a framework that (de facto) prevents deterioration and protects and enhances water status, whereas the Finnish Water Management Act sets itself out to only generally aims towards such objectives. The water management objectives in Art 4(1) WFD are explicitly transposed in Section 21 of the Water Management Act; Section 21(1) point 1 stipulates that "The objective of the river basin management plan and programme of measures is that (…) the status of bodies of surface water and of groundwater does not deteriorate and their status is at least good". Here, too, it should be noted that these substantive objectives are only provided as aims for the river basin management plans, and they are not set out as standards of which achievement would be legally required.

Good status of surface waters is not defined in the water management legislation, nor does the legislation include any definitions of deterioration or rules on assessing deterioration. However, Section 9 of the Water Management Act and Section 12 of the Water Management Decree transpose the WFD's classification system, providing that the ecological status of surface waters is to be classified according to the five-step system of established in WFD Annex V, which has been transposed in national legislation with Annex 1 of the Water Management Decree. There are thus corresponding national provisions for the WFD's Annex V definitions for the different elements of surface water status in Annex 1 of the Decree. These include i.e. the definitions for good status of biological and physico-chemical factors indicating the level of eutrophication impacts in surface waters (relevant with regards to nutrient runoffs) and the bottom-floor structure and fauna in coastal waters (relevant with regards to offshore energy projects). However, the general definitions of good surface water status provided in Art 2(18) or in Annex V Section 1.2 are not included in transposing legislation.

The missing definitions for good status and deterioration at statutory level are linked to a persistent challenge in the WFD's transposition and implementation in Finland, that is, the ambiguity regarding substantive legal weight of the water management objectives. In the context the original transposition of the WFD in 2004, the preparatory materials for the Water Management Act explicitly highlighted that water management objectives would not bear any legal weight in themselves and there could be no legally binding obligations deduced from directly from the objectives for authorities or operators.[86] In this vein, the water management legislation only contains procedural planning obligations for water management authorities; and there are no provisions stipulating substantive obligations and responsibility to any authorities with regard to promoting and ensuring compliance with water management objectives. This does not correspond the currently prevailing interpretations of the WFD, according to which the no-deterioration prohibition and requirement to achieve good status are binding on the MS.

2.3.3 Coherence of instruments

The WFD's predominant instrument for achieving the water management objectives is the programme of measures (Art 11), a compilation of measures that should make use of a variety of instruments established in other EU legislation and national law that are relevant and appropriate in controlling anthropogenic pressures identified to adversely affect water quality. Art 11 of the WFD is transposed into Finnish law in Section 12 of the Water Management Act and Section 24 of the Water Management Decree. Section 12 of the Act corresponds to the Art 11 in stipulating that the PoMs are to include the basic measures – consisting of the requirements of water and environmental protection law – and supplementary measures. Section 24(1) of the Decree establishes a more specific list of basic measures, corresponding for the most parts to that of Art 11(3) WFD, which includes prior (*ex ante*) controls of diffuse pollution (point 1) and permit controls for water construction projects (point 4). The provision, however, does not actually establish such controls; as noted above, the water management legislation regulates merely the planning, and does not put forward substantive legal obligations, rules or instruments for water protection. Indeed, Annex 6 of the Water Management Decree provides a general

[86] Government Bill 120/2004, p. 52; Statement of the Constitutional Law Committee 45/2004.

list of statutes where the basic measures for water management are included; these include the Water Act, Environmental Protection Act and the national Nitrates Decree. Accordingly, in the Finnish transposing legislation the link between the PoMs and the relevant water policy instruments provided in sectoral legislation is rather weak and vague, which does not fully match the *ratio legis* of the WFD.

Furthermore, the flawed transposition of water management objectives with regard to their legal weight has connotations on the transposition of these provisions. In accordance with Section 28 of the Water Management Act, state and municipal authorities should "give due consideration in their activities, as appropriate, to the river basin management plans." In the Finnish law, this is only a vague requirement.[87] The Finnish legal system adheres to a strict meaning of the principle of legality, which means that in making legally binding decisions, the authorities' discretion is duly bound to the precise conditions laid down in the sectoral law. For this reason, despite the general consideration clause in Section 28 of the Water Management Act, the authorities may only base their decisions on water management considerations if that is explicitly stipulated in the sectoral law governing the decision-making on a given instrument. Accordingly, the legal basis for utilising the instruments contained in the statutes listed in Annex 6 of the Water Management Decree as water management measures depends on whether those statutes themselves make sufficient references to water management objectives.

With regard to water management instruments concerning agricultural nutrient runoffs, the Finnish legislation relies predominantly on the national transposition and implementation of the ND (see the ND template). Only the biggest animal shelters are subjected to the permit controls under the Environmental Protection Act, where the permit can issue conditions, applicable to the individual farm, on e.g. the treatment and spreading of manure.[88] Even there, the transposition of the WFD originally gave only limited legal weight for water management in relation to the permitting under EPA; according to Section 51 EPA, river basin management plans are to be taken into account in assessing the fulfilment of the preconditions for granting a permit.[89] In any case, the big majority of farms are not subjected to any kind of administrative controls, despite the wording of Section 24(1) of the Water Management Decree. These farms only have to abide by the general binding rules established in the Nitrates Decree. Furthermore, the Nitrates Decree makes no reference to water management legislation or water management objectives. Accordingly, the national transposition fails to enact the *effet utile* of the joint framework of the WFD and the ND, where the application of the ND's measures are intended to be subjected to water management considerations and stricter controls should be introduced when the WFD's assessments indicate a need for that (Art 10 WFD).

The requirements of the WFD on the permitting (and potentially exemptions from the water management objectives) of construction projects are transposed with the Water Act. The Act applies to "water resources management projects" (Section 1:2.1 and Section 1:3.1, points 1 and 9), which covers a wide range of activities entailing physical modifications to waters, including offshore wind projects. More than minor projects require a water permit according to Section 3:2 of the Act. The permit consideration usually takes place in a process called interest comparison established in Section 3:4.1(2); a permit is granted if "the benefit gained from the project to public or private interests is considerable in comparison to the losses incurred for public or private interests." In the context of transposing the WFD into national legislation in 2004, a provision was incorporated in the Water Act stipulating that, in considering the public benefits and losses in the interest comparison, the river basin management plans are to be *taken into account* (nowadays included in Section 3:6.2). As mentioned above, the national legislator refused the idea of water management objectives entailing any binding legal implications on water use projects; for this reason, the transposition did not directly link the water management objectives to permit deliberations but opted for such a vague requirement. This is of course does not match the rules established by the CJEU in its Weser ruling stipulating that an authorisation is to be refused if the project causes deterioration of water status, even in relation to individual quality

[87] As elaborated in Jussi Kauppila, Vesienhoitosuunnitelman oikeudellisen vaikuttavuuden rakentuminen. Doctoral dissertation. Publications of the University of Eastern Finland. Dissertations in Social Sciences and Business Studies No 138. University of Eastern Finland 2016.

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elements, or jeopardises the achievement of good status, unless an exemption under Art 4(7) of the WFD is applied.

After the Weser ruling, the Supreme Administrative Court of Finland has followed the principle of consistent interpretation and established that the permitting rules in the Water Act need to be interpreted consistently with the Weser ruling. This means that the authorities may not consider the preconditions for permit being met, if the project is assessed to cause deterioration or jeopardise the achievement of good status.[90] Nevertheless, the Weser rules have still not been explicitly included (or transposed) in the national legislation. Moreover, the legal situation pertaining to the relationship of permitting under Water Act and the exemptions from water management projects is completely unregulated. The WFD's exemptions are transposed in the Water Management Act, where Section 23 of the Act transposes Art 4(7), exemption from the objectives due to new projects. That provision stipulates that exemptions may be included in the river basin management plans, for whose compilation is the responsibility of regional environmental agencies, ELY centers. However, the competent authorities for permitting under Water Act are the state administrative agencies, AVIs, which thus means that a same authority does not hold competence to grant an exemption and authorize the project. Furthermore, as the procedural aspects of applying the exemptions are not regulated at all, the status quo is that the exemptions can be only granted in the river basin management plans, which are adopted every six years. In practice, if a project, like an offshore wind facility, necessitates exempting from the WFD's no-deterioration rule, the permitting process for the project would need to be seized until the next river basin management plan is adopted and an exemption is granted as part of it.

In the Autumn of 2023, a committee working under the Ministry of Environment prepared a proposal for a legislative bill to amend the Water Management Act, Water Act and EPA so that they would contain explicit provisions on the legal implications of water status objectives on permitting and link the granting of exemptions to new projects into the permit procedures. After a public consultation arranged that Autumn, the matter was directed to follow-up legislative preparation in the ministry. To date, no news about the process has been made public and it remains to be seen whether a Government Bill will eventually be drafted and given to the Parliament.

The other exemptions of the WFD are transposed in Sections 21(3) (temporary deterioration Art 4(6)), Section 24 (less stringent objectives Art 4(5)) and Section 25 (extension of deadlines Art 4(4)) of the Water Management Act. These provisions correspond to the WFD almost word-to-word. The application of exemptions takes place by including them in the river basin management plans; thus, the competent authorities with regard to exemption are the ELY centres. The authorities' discretion in applying the exemptions has not been specified in the national level any more than it is in the Directive.

2.3.4 Coherence of spatial and temporal scales

In the marine environment, the WFD's spatial scope of application is determined based on the scope of 'coastal waters'. The WFD applies to Member State's coastal waters, which are defined "surface water on the landward side of a line, every point of which is at a distance of one nautical mile on the seaward side from the nearest point of the baseline from which the breadth of territorial waters is measured, extending where appropriate up to the outer limit of transitional waters" (Art 2(7)). Accordingly, the WFD applies on the internal waters (landward side of the baseline) and one nautical mile beyond the 'baseline' under UNCLOS on territorial waters; areas both of which are under purely national jurisdiction according to UNCLOS. In the Finnish legal system, legislative statutes apply in the entire territory of sovereign jurisdiction, including inland w. Accordingly, water management legislation and the permitting legislation referred to above apply in the spatial scale of coastal waters as established in the WFD. Yet, some special arrangements relate to the self-governing province of the Åland Islands which lies off the southwest coast of Finland. In the field of environmental policy and water law, Åland province has the legislative competence in the province's area.[91] The environmental and water legislation of the mainland Finland is thus not applicable in the Åland territory; for instance, EU environmental directives, including the WFD, need to be transposed both into mainland Finland's

[90] Supreme Administrative Court ruling 2017:87.
[91] Act on the Autonomy of Åland (1144/1991), Section 18(1), point 10.

legislation and Åland's provincial legislation. Åland's water management legislation is however not assessed at this point.

With regard to temporal scales, the Water Management Act sets out, in accordance with the WFD, that good water status is to be reached by 2015, a deadline which may have been extended with two subsequent river basin management planning cycles up to 2027 based on technical (in)feasibility or disproportionate costs of the required measures (Section 21(1) point 3 and Section 25). What this means that the national water management legislation prescribes that the required water management measures, including the basic measures such as controlling agricultural runoffs and permit controls, should be included in the river basin management plans in line of meeting the water management objectives in the WFD's timeframes. However, as established above, the application of the sectoral legislation and thus, implementation of the water policy instruments as water management measures, is not legally linked to water management in a binding fashion. Thus, the timeframes provided for water management objectives in the Water Management Act do not bind legally the competent authorities' activities under sectoral legislation, such as require them to issue new requirements on agriculture under national nitrates legislation. What this means is that river basin management plans may or may not motivate the authorities to apply instruments, such as issuing new generally binding rules or initiate permit reviews but cannot force them to do so in the WFD's timeframes. In case the necessary measures have not been taken to in compliance with the water management timeframes, the water management authorities have no other choice than to accept the situation and aim to justify lack of progress in water management through the application of the exemptions in water management legislation. Nevertheless, in line with Art 4(4) of the WFD, the national legislation does not allow the deadlines for achieving good status to be extended beyond 2027 due to technical or cost aspects related to measures. After that deadline, the water management authorities may apply less stringent environmental objectives to the water bodies that are still not in good status (Art 4(5) of the WFD, Section 24 of the Water Management Act).

2.3.5 Conclusion

In the case of the WFD's transposition in Finland, the conclusion would be that coherence issues are worsened due to the unclear legal linkage of water management and water protection law / instruments, and furthermore, the ambiguity pertaining the legal weight of the water management objectives hampers the effective implementation of the Directive.

3. Netherlands

3.1 Transposition of the Marine Strategy Framework Directive (MSFD) in the Netherlands

3.1.1 Introduction

The Marine Strategy Framework Directive 2008/56/EC (MSFD)[92] is a measure with the purpose of comprehensively protecting the marine ecosystems and biodiversity in the European Union. To this end, the MSFD defines a good environmental status (GES) of marine waters based on eleven qualitative descriptors of GES. These descriptors have been further elaborated in Commission Decision 2017/848.[93] The MSFD sets targets and lists necessary measures necessary to restore and maintain GES. On the basis of the directive, MS have to establish environmental targets to achieve a GES. To this end, MS are required to draft a monitoring program to observe marine environmental developments and the effect of the measures taken. The MFSD applies a cyclic approach to these targets and monitoring; every six years, MS need to update their marine strategies.

This analysis investigates the transposition of the targets and requirements following from the MSFD into national legislation in the Netherlands, and the fulfilment of the reporting requirements that follow from the directive.

The Netherlands has implemented the directive in 2010 into the Water Decree,[94] pursuant to the Water Act.[95] In 2024, the Water Act was incorporated into the public planning and environmental law reform, and the rules related to water management and the MSFD are now laid down in the Environment and Planning Act,[96] and delegated decrees.[97] Materially, not much has changed under this new regime regarding marine strategy, as the new act continues to refer to definitions and measures laid down in the Directive.

The Netherlands has adopted a Marine Strategy for the Dutch Part of the North Sea in three parts with an assessment of the environmental status of the North Sea (Part 1),[98] a monitoring program (Part 2),[99] and a programme of measures (Part 3).[100] All three instruments have been updated once, and Part 1 of the North Sea Strategy is up for renewal in 2024.[101]

The Minister of Infrastructure and Water Management (I&W) is the responsible authority for the implementation of the MSFD and to prepare the Dutch Marine Strategy. Pursuant to the Water Act, the Minister of I&W has a shared competence on the policy areas of biodiversity, nature and fisheries with the Minister of Agriculture, Nature and Food Quality. For certain policy areas, the Minister of Economic Affairs and Climate Policy as well as the Minister of Defence are included in the marine strategy as well. To this end, in the Interdepartmental Directors North Sea Consultative Body (IDON) the ministries coordinate a common view related to the management of the North Sea. The IDON coordinates the management tasks of the different departments related to marine strategy, marine spatial planning, and ecological protection.

[92] Directive 2008/56/EC establishing a framework for community action in the field of marine environmental policy.
[93] Commission Decision (EU) 2017/848 laying down criteria and methodological standards on good environmental status of marine waters and specifications and standardised methods for monitoring and assessment.
[94] Dutch name: Waterbesluit.
[95] Dutch name: Waterwet.
[96] Dutch name: Omgevingswet.
[97] Besluit kwaliteit leefomgeving and Omgevingsbesluit.
[98] Marine Strategy for the Dutch Part of the North Sea, Part 1, 2018-2024.
[99] Marine Strategy for the Dutch Part of the North Sea, Part 2, 2020-2026.
[100] Marine Strategy for the Dutch Part of the North Sea, Part 3, 2022-2027; Appendix to the North Sea Programme 2022-2027.
[101] For the Dutch updating timetable, see the MSFD Timetable, 12 June 2014.

3.1.2 Coherence of policy objectives

The text of the Dutch transposition of the MSFD in the Water Act and the Environment and Planning Act is regularly directly referencing the MSFD. For instance, the provision defining GES is directly referring to article 9(1) and 3(4) and (5) of the MSFD.[102] On top of that, the Decree is stating that the programme of measures of the marine strategy should fulfill all requirements laid down in articles 13 and 14 of the MSFD.[103]

The environmental status and the good environmental status which is aimed for in the Netherlands has been defined in Part 1 of the Marine Strategy. This strategy document directly refers to and is based on the relevant articles of the MSFD as well. On top of that, the document also incorporates other EU legislation, for instance the WFD and the Nature Directives. The strategy also takes into account international regulations, such as the IMO Convention and the OSPAR Convention/CEMP Agreement.[104]

When assessing and monitoring the different ecological descriptors for the current environmental status, the requirements following from these other legislative instruments are considered as well. For instance, when determining the biodiversity of fish, this is assessed in line with the favourable reference value for population range of the Habitats Directive. And when determining the inputs of nutrients and organic matter, the good status of algal biomass is based on the requirements from the WFD and OSPAR Convention.

The Dutch assessment of a good environmental status uses a normative approach in line with the MSFD and other instruments. The Dutch legislation and policy instruments are directly linked to the MSFD, and the Netherlands follows the system and requirements thereof. The objectives of the relevant Dutch legislation and policies therefore is in coherence with the European framework.

3.1.3 Coherence of policy instruments

As described above, the assessment and monitoring of the environmental status of the North Sea in the Netherlands is carried out in line with other European and international legislative instruments. To this end, in three separate programmes the Minister carries out an environmental assessment, monitors the environmental status of the North Sea, and establishes a programme of measures. This programme of measures contains an array of instruments to improve the environmental status of the North Sea with, among others: collection of information; issuing sustainability certificates; policy rules; permit restrictions; designation of MSFD protected area's; and fishing bans.

Although the programme of measures refers to permit restrictions, these restrictions are always pursuant to other legislation, for example the Nature Directives or the sector-specific Electric pulse fishing ban Regulation.[105] Within the Dutch transposition, the requirement to adopt a programme of measures has been implemented in line with the framework of programmes in the Environment and Planning Act.[106] These are binding legal programmes, binding *governmental* bodies to achieve a certain environmental status. These instruments however are not directly binding towards permit applicants. Thus, in the Dutch legal system, it is not possible to refuse a permit application based on incompatibility with the GES targets from the programme of measures based on the MSFD.

Similarly, the Dutch transposition of the MSFD and the programme of measures does not legally bind any authorities to take concrete steps, but merely sets out policy objectives and measures that have been taken or should be taken. Therefore, it is unlikely that authorities will take into account the GES targets stemming from the North Sea Program and the MSFD when taking legal decisions. This however appears to be vertically coherent.

[102] Artikel 3.1 sub b Besluit kwaliteit leefomgeving.
[103] Artikel 4.8 Besluit kwaliteit leefomgeving; See also artikel 1.1 Bijlage I.A Besluit kwaliteit leefomgeving.
[104] Marine Strategy for the Dutch Part of the North Sea, Part 1, 2018-2024, p. 22.
[105] Regulation (EU) 2019/1241 on the conservation of fisheries resources and the protection of marine ecosystems through technical measures.
[106] Artikel 3.9(2)(c) jo. 3.4 Omgevingswet.

3.1.4 Coherence of spatial and temporal scales

Unlike some other MS, the Netherlands only has one marine area that falls within the scope of article 3 of the MSFD, which is the Dutch part of the North Sea. The North Sea Program is solely focused on the Dutch part of the North Sea, with some measures having cross-border effects and coordination with other MSwith jurisdiction over parts of the North Sea, for instance Germany. Furthermore, the Dutch transposition measure, the Environment and Planning Act, refers to all 'Dutch marine waters'.[107] Therefore the spatial scale of the transposition in the Dutch legal system is in line with the MSFD.

Regarding the temporal scale, the deadline of 2020 laid down in the MSFD is not incorporated in any legislative instrument.[108] The deadline has been mentioned of earlier versions of the North Sea Program, for instance in the environmental assessment of the Marine Strategy Part One,[109] but the deadline has been let go in the versions adopted in 2020 and after.

3.1.5 Conclusion

The Dutch transposition of the MSFD is overall quite coherent with the European framework, since the Dutch legislation is often referring towards the European texts. However, there are still challenges concerning the policy or legally binding instruments that can be used to achieve the GES goals. On top of that, there is no clear and legally binding temporal scale which incentivizes the achievement of GES. On the other hand, a good practice of a national coherent approach in policy among ministries and local governments is the Interdepartmental Directors North Sea Consultative Body which coordinates the policies and decisions regarding the North Sea.

3.2 Transposition of the Birds and Habitats Directives in the Netherlands

3.2.1 Introduction

This analysis investigates the transposition of the Birds Directive 2009/147/EC,[110] and the Habitats Directive 92/43/EEC,[111] in the Netherlands, and the vertical coherence between the national legislation and the objectives of the European Green Deal set out in work package 2.2 of the CrossGov project.

The Birds and Habitats Directives ("the Nature Directives") both have the principal objective to ensure biodiversity through the conservation of the natural habitats of animals and/or plants.[112] The Birds Directive was adopted for the purpose of conservation of all naturally occurring birds in the European territory of the MS of the European Union. The Directive contains rules on the protection and management of these species including their eggs, nests and habitats, and rules on the exploitation of these birds. The Habitat Directive was adopted more than a decade later, and aims to protect of endangered animal and plant species. The primary aim of the Directive is to protect the habitats of these species by requiring MS to maintain and restore the environmental status of these areas.

These Nature Directives designate special areas of conservation and special protection areas ("Natura 2000 areas"). Further, the Directives list specific endangered species with related restrictions about killing or disturbing them.[113]

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[107] Artikel 4.8(1) Besluit kwaliteit leefomgeving; Article 3(1)(a) Marine Strategy Framework Directive.
[108] Article 1(1) Marine Strategy Framework Directive.
[109] Marine Strategy (part 1) 2018-2024.
[110] Directive 2009/147/EC on the conservation of wild birds; Successor of Directive 1979/409/EEC.
[111] Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.
[112] Article 1 Directive 2009/147/EC and article 2 Directive 92/43/EEC.
[113] In the Netherlands specifically, this involves 52 habitat types and 168 individual Natura 2000 areas, and 81 protected species under the Habitat directive and all 200 breeding bird and 233 non-breeding bird species under the Birds directive; See: R. Pouwels and R.J.H.G. Henkens, 2020. *Naar een hoger doelbereik van de Vogel- en Habitatrichtlijn in Nederland; Een analyse van de resterende opgave na 2027 voor het bereiken van een gunstige staat van instandhouding van alle habitattypen en VHR-soorten.* Wageningen, Wageningen Environmental Research, Rapport 2989.

As set out in work package 2.2, the directives are important instruments within the scope of marine environmental law. Many of the Natura 2000 areas are seas and oceans. Further, certain endangered bird species are present at sea, relating to the biodiversity objectives of marine environmental regulation.

In the Netherlands, the Directives are implemented in environmental and public planning legislation. Although these instruments have been combined into one central Environmental and Planning Act,[114] this analysis will focus on the transposition and implementation before this reform.[115] However, not much seems to have changed with the introduction of the new Environmental Act in relation to the field of nature conversation law, and the case law and practice for the old regime is expected to keep its relevance.[116] The new system does introduce more elaborate and stringent duties of care, for instance on chemical discharge on surface waters, including the general obligation to use the best available methods and take all appropriate measures.[117]

3.2.2 Coherence of policy objectives

Before the introduction of the Environmental Act, the directives were implemented in the Nature Protection Act of 2017.[118] Before, the transposition was laid down in the Nature Protection Act 1998,[119] and the Flora- and Fauna Act.[120] The transposition was carried out in 1998, significantly later than what the directives prescribed. This led to an infringement procedure in which the European Court of Justice ruled that the Netherlands did not fulfil their obligations following from the Directives.[121] On top of that, in the *Kokkelvisserij* ruling, the European Court of Justice ruled that the standing practice of the Dutch government to issue permits for cockle fishing within the protected part of the North Sea without an assessment, unless it would become clear that the permit would have a detrimental effect to nature, was not in line with article 6 of the Habitat directive.[122] The ruling lead to a legislative change to bring the Dutch text in line with this interpretation of the directive.[123]

The late transposition and the fact that it took a court ruling to determine the direct effect of article 6 of the Habitat directive has led to relatively more problems related to the directives than other MS.[124] On the other hand, the Dutch transposition is consistently using the same formulation as the directives do, for instance regarding 'requisite measures', 'significant effects', or 'appropriate assessment'. The transposition is therefore in its current form not regarded as more strict or lenient than other MS.[125]

A more recent development relates to the nitrogen pollution in the Netherlands. In 2019, the Dutch Council of State ruled in line with the ECJ that the Dutch policy on nitrogen pollution in Natura-2000 areas was not in line with the Directives.[126] This has led to a significant impediment to the construction and farming industry, sparking protest and societal unrest. As a response, the Nitrogen Reduction and Nature Improvement Act sets national goals for nitrogen pollution near Natura-2000 designated areas.[127] These developments led to an array of legal proceedings, discussing different elements of the

[114] Dutch name: Omgevingswet.
[115] On the topic of the transtition and differences with the Omgevingswet, see: F. Onrust 6 October 2023, *Kroniek natuurbescherming – Gebiedsbescherming (deel 1)*, BR 2023/74.
[116] F. Onrust, 27 October 2023, 'Kroniek natuurbeschermingsrecht 2023 deel 1', BR 2023/81, p. 2.
[117] Article 2.11 Besluit activiteiten leefomgeving section 1 in conjunction with article 1.8 section 2 Omgevingswet.
[118] Dutch name: Wet natuurbescherming.
[119] Dutch name: Natuurbeschermingswet 1998.
[120] Dutch name: Flora- en Faunawet.
[121] Court of Justice of the European Union, 14 April 2005, C-441/03 (*Commission v. the Netherlands*).
[122] Court of Justice of the European Union, 7 September 2004, C-127/02, (*Kokkelvisserij*); See also Court of Justice of the European Union, 10 November 2022, C-278/21 (*AquaPri*).
[123] *Kamerstukken II* 2001/02, 28 171, nr. 3.
[124] *Kamerstukken II* 2006/07, 30 192, nr. 2, p. 10.
[125] Ch.W.Backes, A.A.Freriks, A.G.A. Nijmeijer, '*Article 6 Habitats Directive – A comparative law study on the implementation of art. 6 Habitats Directive in some Member States'*, March 2006, Centrum voor Omgevingsrecht en Beleid/NILOS; *Kamerstukken II* 2006/07, 30 192, nr. 2, p. 10.
[126] Raad van State 29 mei 2019, ECLI:NL:RVS:2019:1603, (*PAS-uitspraak*).
[127] Dutch name: Wet stikstofreductie en natuurverbetering.

nitrogen pollution regime. For example, a modification of the Nature Protection Act did create an exception of these tight rules for the pollution by construction activity. However, the Council of State ruled this exception was also not in line with the Directives.[128]

3.2.3 Coherence of policy instruments

In the Netherlands, the Nature Directives are implemented into the Environment and Planning Act and subordinate decrees and ordinances.[129] The Dutch transposition and implementation of the Directives has a decentralised nature. The national government is responsible for the designation of Natura-2000 areas.[130] Afterwards, either at the provincial or national level, the authorities compose a management plan, listing the policy and management measures that are required to fulfil the conservation objectives for that specific area.[131] For the marine environment specifically, the Ministry of Infrastructure and Water Management is responsible for conservation and the adoption of management measures. Currently there are seven allocated Natura 2000 areas in the North Sea, six of which have a separate management plan, the seventh being in a preparatory phase.[132] These management plans list the habitat types, species and birds which are present in that area. The plans contain specific measures related to fishery, for instance permit restrictions for fishing activities.[133]

The effect of the Nature Directives culminated in the recent litigation related to nitrogen emissions,[134] which reveals the willingness of the Dutch court to apply the Nature Directives and which obliges the Dutch government to adapt their nature policy to bring it in line with the Nature Directives. After a reference for preliminary questions to the European Court of Justice and a judgement of the national Council of State related to the Habitats Directive and nitrogen pollution, the Dutch government adopted a Nitrogen Reduction and Nature Improvement Act which lists specific maximum nitrogen levels with the purpose of limiting the pollution and deterioration of Natura-2000 areas.[135] Within the context of the new Environment and Planning Act, the national and local governments are legally bound to adopt measures and monitor nitrogen levels to ensure the maximum level of nitrogen is not exceeded.[136]

In the context of nitrogen, farmers or other polluting entities may offset their nitrogen pollution by compensating for their pollution with measures reducing nitrogen emissions. Alternatively, nitrogen emissions may also externally be offset by taking over emission rights from another polluter. However, this external offsetting requires permission in the form a permit.[137]

3.2.4 Coherence of spatial and temporal scales

The Nitrogen Reduction and Nature Improvement Act introduced clear national goals of nitrogen emissions reduction, which will have legally binding effects and most likely will affect permits for polluters as well. However, other factors besides nitrogen which affect biodiversity and protected habitats and species are not as clearly laid down in legislation. On top of that, the Dutch transposition of the Directives contains mostly the same vague language as the Directives themselves, which does not improve the legal certainty of nature conservation law in the Netherlands.

[128] Raad van State 2 November 2020, ECLI:NL:RVS:2022:3159, (*Bouwvrijstelling*).
[129] Omgevingswet; Article 11.46(1).
[130] Article 10a Natuurbeschermingswet 1998; Article 2.44 Omgevingswet.
[131] Article 2.21(5) and 3.9(3) Omgevingswet; Article 3.8(3) Omgevingswet.
[132] Currently, the Natura 2000 areas in the North Sea are the Voordelta, Noordzeekustzone, Vlakte van de Raan, Doggersbank, Klaverbank, Friese Front and Bruine Bank, for more information see noordzeeloket.nl.
[133] See for instance the Natura 2000-beheerplan Noordzeekustzone 2016-2022.
[134] Milieu, IEEP and ICF, Evaluation Study to support the Fitness Check of the Birds and Habitats Directives, March 2016, via:
<https://awsassets.panda.org/downloads/study_evaluation_to_support_fitness_check_of_nature_directives__final.pdf>.
[135] Raad van State 29 mei 2019, ECLI:NL:RVS:2019:1603, (*PAS-uitspraak*).
[136] Artikel 2.15a(1) Omgevingswet.
[137] Raad van State 20 januari 2021, ECLI:NL:RVS:2021:71 (*Logtsebaan*).

3.2.5 Conclusion

Although, after a multitude of legal proceedings and judgements, the Netherlands adopted a strict legal regime related to nitrogen pollution, this is only one factor affecting protected habitats and species. After an infringement procedure and a constant discussion about the designation of Natura 2000-areas, the Dutch transposition and implementation of the Nature Directives is at this stage not regarded as more strict or lenient than other MS. The future of the application of the Directives is however uncertain, as political views are shifting and political unrest about nature conservation restrictions is increasing in the Netherlands.

3.3 Transposition of the Renewable Energy Directive (RED) in the Netherlands

3.3.1 Introduction

The Renewable Energy Directive 2009/28/EC (RED) [138] is the legal framework for the development of clean energy across all sectors of the EU economy, supporting cooperation between EU countries towards this goal. Given the need to speed up the EU's clean energy transition, the recast Renewable Energy Directive EU/2018/2001 (REDII)[139] was revised in 2023. The amending Directive EU/2023/2413 (REDIII) [140] entered into force on 20 November 2023. There will be an 18-month period to transpose most of the directive's provisions into national law, with a shorter deadline of July 2024 for some provisions related to permitting for renewables. It sets an overall renewable energy target of at least 42.5% binding at EU level by 2030 - but aiming for 45%.[141]

As for the transposition of the REDII, it was finalized the end of December 2021. There are three legislative levels: the Environment Conservation Act (NCA),[142] the Decree on energy carriers,[143] and the Ordinance on energy carriers.[144] The renewable energy obligation with the new targets started on 1 January 2022. These three instruments are currently under revision to adapt them to the new Environment and Planning Act.[145] The present analysis will concentrate on the version in force since the adoption of the European Green Deal and will specifically focus on the NCA because of its relevance for the protection of the marine environment.

The Environment and Planning Act is a statute governing spatial planning in the Netherlands. It replaces existing legislation and was signed into law on 23 March 2016. It came into force in 2024 after several postponements resulting from concerns surrounding the law's implementation. The Environment and Planning Act largely consolidated 26 existing laws and dozens of regulations concerning spatial planning and the environment. Because of the very recent nature of this legislation and the ongoing process of implementation, and since the old regime remains relevant for plans and decisions originating before 1 January 2024, the present analysis does not cover it.

3.3.2 Coherence of policy objectives

The NCA focuses on environmental protection and sustainable management of resources within the Netherlands. It encompasses a wide range of environmental issues, including pollution control, waste management, water and air quality, and climate change mitigation. Concerning the coherence of policy

[138] Directive 2009/28 on the promotion of the use of energy from renewable sources (RED).
[139] Directive 2018/2001 on the promotion of the use of energy from renewable sources (recast) (REDII).
[140] Directive 2023/2413 amending Directive 2018/2001 (…) as regards the promotion of energy from renewable sources (REDIII).
[141] Article 1(2)(a) REDIII amending article 3(1) REDII.
[142] Dutch name: Wet Milieubeheer.
[143] Dutch name: Besluit energie vervoer, *Stb. 2018/134*, amended by Besluit tot wijziging van het Besluit energie vervoer, *Stb. 2021/619*.
[144] Dutch name: Regeling energie vervoer, *Stcrt. 2018/34392.*
[145] Dutch name: Omgevingswet, an unofficial English translation of the text is available here.

objectives between RED II and the NCA, four main objectives can be identified: renewable energy promotion; sustainability goals; climate goals; and sectoral integration.

As for renewable energy promotion, REDII directly aims to increase the share of renewable energy in the energy mix, setting clear targets and providing a framework for MS to follow. the NCA supports renewable energy indirectly through broader environmental regulations and policies, including measures to reduce emissions and promote sustainable practices.[146] Both frameworks emphasize the importance of sustainability and reducing greenhouse gas emissions. REDII sets specific criteria for bioenergy sustainability, which aligns with the broader climate objectives under the NCA. The Dutch act includes broader climate policies and measures that contribute to the EU's overall climate and renewable energy goals. As for the sectoral integration, REDII targets multiple sectors, integrating renewable energy use across electricity, heating, cooling, and transportation. The NCA also takes a multi-sectoral approach (differentiating between GHG emissions of energy generation (chapter 16a) and GHG emissions by 'industry' (chapter 16b)), regulating environmental impacts across various industries and promoting integrated environmental management.

Anticipating REDIII, the Minister of Infrastructure and Water Management has amended the Decree on energy carriers with respect to the goal of renewable energy. Adopting a more ambitious method of yearly increasing the mandatory share of renewable energy, the percentages are raised from 19.9% to 28.4% in 2024, and from 21.0% to 29.4% in 2025.[147]

3.3.3 Coherence of policy instruments

RED II provides for five main policy instruments. First, MS must develop and submit National Renewable Energy Action Plans (NREAPs) outlining their strategies and measures to meet their renewable energy targets. Instruments include incentives, subsidies, and regulatory measures to support renewable energy projects. Second, MS should put in place Guarantees of Origin (GOs), a tracking system for renewable energy, ensuring transparency and credibility in renewable energy consumption. It aims to prove to final consumers that a given share or quantity of energy was produced from renewable sources. Third, RED II sets criteria for the sustainability of biofuels and biomass, ensuring they achieve significant greenhouse gas emissions reductions and do not negatively impact biodiversity. Fourth, it encourages the use of financial mechanisms such as feed-in tariffs, feed-in premiums, and auctions to promote investment in renewable energy. MS are free to design their support schemes but must ensure they are aligned with EU state aid rules. Lastly, RED II includes statistical transfers, joint projects, and joint support schemes to allow MS to cooperate and share the burden of meeting renewable energy targets.

The NCA put in place a system of environmental permits in order to regulate emissions, waste management, and resource use through a permitting system for industrial and other polluting activities. Permits include specific conditions to minimize environmental impact and ensure compliance with environmental standards. It then imposes mandatory environmental impact assessments (EIAs) for certain projects to evaluate their potential environmental impacts and identify measures to mitigate adverse effects. EIAs are a critical tool for integrating environmental considerations into planning and decision-making processes. Moreover, the Dutch act includes national measures to reduce greenhouse gas emissions, such as emissions trading schemes, carbon taxes, and energy efficiency standards and it aligns with EU climate policies and targets, contributing to the overall EU goals. It also promotes recycling, waste reduction, and the safe disposal of waste, aiming to minimize environmental harm and support a circular economy, and includes specific requirements for different types of waste, such as hazardous waste, electronic waste, and municipal waste. Finally, the Dutch act includes a comprehensive system for monitoring environmental compliance and enforcing regulations, which involves regular inspections by the emission authority, reporting requirements, and penalties for non-compliance.

[146] See for instance the financial incentive for electrical self-consumption; Article 31c Elektriciteitswet 1998.
[147] Decree of 20 March 2024 amending Decree on energy carriers, *Stb. 2024/81.*

Instruments like guarantees of origin (GOs) under REDII are complemented by the monitoring and reporting requirements of the NCA, ensuring transparency and accountability in renewable energy consumption. Support schemes under REDII, such as subsidies and financial incentives, are mirrored in the NCA through national funding programs and incentives for renewable energy projects. The Dutch government can design specific support mechanisms that align with REDII's requirements, facilitating investment in renewable energy within the national context.

The sustainability criteria for biofuels and biomass in REDII align with the broader environmental protection goals of the NCA, ensuring that renewable energy sources do not negatively impact biodiversity and ecosystems. Environmental permits and EIAs under the NCA ensure that renewable energy projects comply with national and EU environmental standards, reinforcing REDII's sustainability objectives.

Flexibility mechanisms in REDII, such as joint projects and statistical transfers, can be implemented through cooperative agreements facilitated by the NCA's regulatory framework. The Dutch act allows for regional and international cooperation, supporting the flexible implementation of REDII's targets.

Finally, the monitoring and enforcement systems of the NCA ensure compliance with both national and EU regulations, including the renewable energy targets set by REDII. Regular inspections and penalties for non-compliance in the NCA complement REDII's reporting and monitoring requirements, ensuring consistent and effective enforcement.

3.3.4 Coherence spatial and temporal scales

The REDII Temporal Scale consists of long-term goals, namely a binding EU-wide renewable energy target of at least 32% by 2030 and the periodic reviews and potential adjustments to targets and measures every five years. The implementation timeline requires MS to develop NREAPs and submit progress reports every two years and establishes intermediate milestones leading up to the 2030 target, ensuring continuous progress. The NCA temporal scale aligns with long-term EU climate goals, including commitments under the Paris Agreement. It involves multi-year plans and strategies, such as the Dutch Climate Agreement,[148] which outlines targets and measures up to 2030 and beyond. Environmental permits typically have specific durations and require periodic renewal and compliance checks, depending on the sector. Both REDII and the NCA include periodic reviews and reporting mechanisms, ensuring continuous alignment and progress tracking. Both incorporate intermediate milestones and regular progress assessments, fostering a coherent approach to long-term objectives.

As for the spatial scale, REDII sets overarching renewable energy targets for the entire European Union, fostering a unified approach and encourages MS to engage in cross-border renewable energy projects and statistical transfers. It supports regional cooperation and allows for statistical transfers between MS to balance differing capacities and resources. The Dutch act implements regulations and policies that align with EU directives, including REDII, within the Dutch legal framework. It includes adaptation of national policies to regional and local contexts, addressing specific environmental and renewable energy challenges. Local authorities play a key role in issuing permits, monitoring compliance, and enforcing environmental regulations.

The NCA serves as the national transposition vehicle for REDII's EU-wide targets. National action plans and local implementation strategies ensure that EU directives are realized at the national and regional levels. REDII's emphasis on cross-border projects is supported by the NCA's provisions for regional and international cooperation. This ensures that the Netherlands can participate in and benefit from broader EU initiatives. the NCA's focus on local and regional implementation ensures that policies are adapted to specific environmental and socio-economic contexts within the Netherlands, enhancing the effectiveness of REDII's broad directives.

Ensuring that updates to REDII and the NCA are synchronized can be challenging but is essential for maintaining coherence. Regular communication between EU and national authorities is necessary.

[148] Nederlands Klimaatakkoord, 28 June 2019.

While aligning with EU-wide targets, the Netherlands must balance these with national priorities and circumstances. Flexibility mechanisms and adaptive local implementation help address this challenge. Consistent and coordinated monitoring and reporting frameworks are crucial for tracking progress and ensuring compliance with both REDII and the NCA requirements.

3.3.5 Conclusions

In summary, REDII and the NCA share coherent policy objectives aimed at promoting renewable energy and environmental protection. Their effective alignment and implementation are essential for achieving sustainable development goals within the EU and the Netherlands.

The policy instruments of REDII and the NCA exhibit a high degree of coherence, with each framework reinforcing the other's objectives through complementary measures. REDII provides the EU-wide targets and mechanisms for promoting renewable energy, while the NCA implements these objectives within the Dutch context through detailed regulations, permits, and enforcement mechanisms. This alignment ensures that both frameworks work together effectively to promote renewable energy and environmental sustainability in the Netherlands and across the EU.

The coherence of temporal and spatial scales between REDII and the NCA is well-structured, with both frameworks designed to complement and reinforce each other. Temporal alignment is achieved through coordinated targets, timelines, and review mechanisms, while spatial coherence is maintained through integrated national and regional implementation strategies. Challenges remain in synchronization and balancing priorities, but the overall alignment supports effective and coherent policy implementation for promoting renewable energy and environmental sustainability.

An infringement procedure (INFR(2021)0310) concerning renewable energy was brought against the Netherlands in 2021.[149] The Commission thinks the Netherlands has not implemented the 2018 Renewable Energy Directive on time. This infringement procedure has not yet been closed.

[149] From the website of the Netherlands Court of Audit.