

Legitimacy and EU Marine Governance

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14.1 INTRODUCTION

Great expectations are pinned on marine governance,¹ including protecting the marine environment while promoting sustainable growth in ‘blue sectors’.² At the same time, marine governance is widely recognised as being complex and characterised by fragmentation.³ Many of the challenges associated with the marine environment and marine space have been described as ‘wicked’, implying that science does not provide clear answers and that addressing them is liable to generate winners and losers.⁴

It is well established that measures taken in pursuit of marine policy objectives can have significant implications for the social, economic and cultural interests and identities of individuals as well as groups of people. This applies, for example, to the establishment of marine protected areas (MPAs),⁵ measures taken to combat

¹ United Nations General Assembly (UNGA). Our ocean, our future: call for action. Resolution A/RES/71/312, July 6, 2017; L. Schønning, ‘More or Less Integrated Ocean Management: Multiple Integrated Approaches and Two Norms’ (2020) 51:2 *Ocean Development & International Law* 95–115.

² P. Ehlers, ‘Blue Growth and Ocean Governance: How to Balance the Use and the Protection of the Seas’ (2016) 15 *WMU Journal of Maritime Affairs* 187–203.

³ S. J. Boyes and M. Elliott, ‘Marine Legislation: The Ultimate “Horrendogram”’: International Law, European Directives & National Implementation’ (2014) 86 *Marine Pollution Bulletin* 39–47; K. Scott, ‘Integrated Oceans Management: A New Frontier in Marine Environmental Protection’, in D. Rothwell, A. G. Oude Elferink, K. N. Scott and T. Stephens (eds.), *The Oxford Handbook of the Law of the Sea* (Oxford: Oxford University Press, 2015) 463–490, 464.

⁴ L. Mee, P. Cooper, A. Kannen, A. Gilbert and T. O’Higgins, ‘Sustaining Europe’s Seas as Coupled Social Ecological Systems’ (2015) 20 *Ecology and Society* 1–10, 1.

⁵ A. Charles and L. Wilson, ‘Human Dimensions of Marine Protected Areas’ (2008) 66 *ICES Journal of Marine Science* 6–15.

invasive marine species⁶ or regulation of marine aquaculture.⁷ Not surprisingly, recent years have seen increasing calls for paying more attention to the political dimensions and societal implications of marine policy and management processes in addition to the predominately natural science perspectives traditionally applied.⁸

In an EU context, the last two decades have seen the development of a comprehensive legal framework that aims to protect the marine environment, promote sustainable growth of maritime economies and ensure efficient use of marine space. The main elements of this framework are three directives: the Water Framework Directive (WFD) adopted in 2000,⁹ the 2008 Marine Strategy Framework Directive (MSFD)¹⁰ and the Maritime Spatial Planning Directive (MSPD) of 2014.¹¹ The immediate implications of some marine environmental objectives were also strengthened by the 2015 ruling of the Court of Justice of the EU (CJEU) in the so-called *Weser* case.¹² In this case, the CJEU established that the core environmental objectives of the WFD are binding in relation to individual projects, including many industries, infrastructure facilities and public utilities.

Against this background, it is important to pose questions about the legitimacy of the EU's marine law and governance, not least as a fundamental element of an effective and rule of law-based legal regime for the marine realm. There are numerous ways of approaching issues of legitimacy. The approach here is one focusing on legal texts, inquiring in particular as to what extent and how they address aspects of legitimacy as well as on any guidance provided for dealing with legitimacy in the implementation or operationalisation of legal requirements. Legitimacy of EU marine law and governance is a multidimensional issue. In addition to more generic aspects, it raises questions that are particular to the EU as a unique form of regional legal and policy integration, as well as issues that are more or less specific to activities in the marine domain. Before engaging with

⁶ A. Novoa, K. Dehnen-Schmutz, J. Fried and G. Vimercati, 'Does Public Awareness Increase Support for Invasive Species Management? Promising Evidence across Taxa and Landscape Types' (2017) 19 *Biological Invasions* 3691–3705.

⁷ G. Krause and others, 'Visualizing the Social in Aquaculture: How Social Dimension Components Illustrate the Effects of Aquaculture across Geo-Graphic Scales' (2020) 118 *Marine Policy* 103985.

⁸ S. Linke, M. Gilek, M. Karlsson and O. Udovyk, 'Unravelling Science-Policy Interactions in Environmental Risk Governance of the Baltic Sea: Comparing Fisheries and Eutrophication' (2014) 17 *Journal of Risk Research* 505–523, 517.

⁹ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ 2000 No. L327/1.

¹⁰ Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), OJ 2008 No. L164/19.

¹¹ Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 establishing a framework for maritime spatial planning, OJ 2014 No. L257/1.

¹² Case C-461/13, *Bund für Umwelt und Naturschutz Deutschland* ECLI:EU:C:2015:433.

legitimacy in this particular context, some reflection is needed on legitimacy, as such, and how it may be understood.

14.2 ON LEGITIMACY

Much like ‘rule of law’, legitimacy is a challenging concept since it can be defined in many ways and used in various contexts. When talking about legitimacy in relation to law and governance it tends to relate broadly to ‘the justification and acceptance of political authority’,¹³ thus indicating a close connection to rule of law as a form of protection against capricious and unjustified exercise of power. Legitimate law-making and wider exercise of public authority is closely linked to ideas about democracy.¹⁴ Effective democratic governance arguably requires that the governing organs are widely perceived as legitimate.¹⁵ Legitimacy is also associated with more instrumental values. It is widely accepted that rules and decisions meet with higher acceptance and are better complied with if they are seen as legitimate.¹⁶ This in turn should decrease the need for and thus the cost of monitoring, control and enforcement.¹⁷ In this sense, legitimacy is a means of increasing compliance while reducing costs.

Discussions about legitimacy tend to approach the subject either from a theoretical perspective, often grounded in philosophy or political science, or a more sociological one. Whereas theoretical approaches are generally concerned with defining and testing various criteria for what may constitute legitimacy, the sociological ones rather aim to determine to what extent institutions, laws and decisions are de facto perceived as legitimate by those affected.¹⁸

Many attempts have been made at defining or classifying different forms or versions of legitimacy. A common division is that between output legitimacy and input legitimacy.¹⁹ Simply put, input legitimacy relates to participation and

¹³ D. Bodansky, ‘The Concept of Legitimacy in International Law’, in R. Wolfrum and V. Röben (eds.), *Legitimacy in International Law. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, vol. 194 (Berlin, Heidelberg, New York: Springer, 2008) 309–317, 310.

¹⁴ G. Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ (2015) 21:1 *European Law Journal* 2–22; V. A. Schmidt, ‘Democracy and Legitimacy in the European Union’, in E. Jones, A. Menon and S. Weatherill (eds.), *The Handbook on the European Union* (Oxford: Oxford University Press, 2012) 661–672; W. Voermans, J. M. R. Hartmann and M. Kaeding, ‘The Quest for Legitimacy in EU Secondary Legislation’ (2014) 2:1 *The Theory and Practice of Legislation* 5–32.

¹⁵ T. R. Tyler, ‘Psychological Perspectives on Legitimacy and Legitimation’ (2006) 57:1 *Annual Review of Psychology* 375–400, 380.

¹⁶ Bodansky (n 13) 310; Voermans, Hartmann and Kaeding (n 14) 7.

¹⁷ J. Raakjær Nielsen, ‘An Analytical Framework for Studying: Compliance and Legitimacy in Fisheries Management’ (2003) 27:5 *Marine Policy* 425–432, 428.

¹⁸ Bodansky (n 13) 313.

¹⁹ F. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: Oxford University Press, 1999).

representation in decision-making and the reflection of citizens' concerns and values in adopted laws and policies. Output legitimacy relates to the performance and effective delivery of laws and policies.²⁰ In the words of Lord and Magnette, in a democracy, 'elections provide input legitimacy and the delivery of voter preferences secures output legitimacy'.²¹

A related concept is 'throughput' legitimacy, which is used to refer to the openness, accountability, transparency and efficacy of decision-making processes. Whereas this dimension is important – since, for example, incompetent or corrupt governance practices can undermine legitimacy – throughput legitimacy is no substitute for missing input or output legitimacy.²² In practice, however, the perceived fairness of relevant institutions and procedures seems to have a strong impact on the extent to which the rules and decisions produced are in fact deemed legitimate and on the propensity of people to voluntarily defer to them.²³

In relation to EU law-making, input legitimacy is associated with a major discussion on the 'democratic deficit' associated with, among other things, the partial bypassing of national parliaments and the strong position of the unelected European Commission in law-making, as well as the general lack of a 'collective political identity' underpinning EU law.²⁴ These aspects of legitimacy are largely generic to EU law in general and will not be the focus here,²⁵ although they should be borne in mind when engaging with legitimacy in relation to more specific measures or policy areas.

Although the present chapter will not, for reasons of space, attempt a systematic assessment of EU marine law and governance according to the different forms of legitimacy outlined in this section, they still constitute a useful backdrop for discussing issues of legitimacy in the more specific context of the EU's marine legal frameworks.

14.3 LEGAL FRAMEWORKS FOR EU MARINE GOVERNANCE

Questions of legitimacy can be pertinently posed in relation to virtually any law or policy affecting the interests of groups or individuals or somehow arbitrating between competing objectives or values. Legal aspects of EU marine governance can in principle cover areas such as chemicals law, rules on species and habitats protection, as well as regulation of specific activities such as fishing or water

²⁰ Schmid (n 14) 662; Voermans, Hartmann and Kaeding (n 14), 12.

²¹ C. Lord and P. Magnette, 'E Pluribus Unum? Creative Disagreement about Legitimacy in the EU' (2004) 42:1 *Journal of Common Market Studies* 183–202, 187.

²² Schmidt (n 14) 662.

²³ Tyler (n 15) 394.

²⁴ Voermans, Hartmann and Kaeding (n 14) 6.

²⁵ See instead e.g., Schmidt (n 14); Voermans, Hartmann and Kaeding (n 14).

treatment plants. In order to enable a more focused discussion, the analysis here deals with legitimacy in relation to EU legal acts that have a comprehensive aim in that they potentially apply to all or most activities in a particular marine area or those that affect the marine environment or marine space generally. This entails a focus on the three framework directives presented in the introduction, that is, the WFD, the MSFD and the MSPD. In the following, the three directives are briefly described with a focus on features that are particularly pertinent from the perspective of legitimacy. In addition to looking for provisions that explicitly address issues of legitimacy and fairness, those that have a clear potential to affect people's (perceived) rights and interests, including trade-offs between rights or interests, are highly pertinent. The same goes for rules on participation and decision-making. That is followed by a more comparative analysis that also tries to point out how legitimacy may be enhanced where needed.

14.3.1 *The Water Framework Directive*

The WFD has several purposes, among which is to prevent further deterioration and protect and enhance the status of aquatic ecosystems and to promote sustainable water use.²⁶ The Directive is relevant for marine areas not only because it aims to regulate the quality of water in the rivers, streams as well as groundwater that feed into the sea, but also because it is applicable to coastal waters.²⁷

Under the Directive, all river basins within the territory of a Member State, together with their associated groundwaters and coastal waters, must be assigned to river basin districts. For each such district a river basin management plan must be adopted,²⁸ and programmes of measures need to be drawn up for all basins.²⁹ These programmes, which are central to the governance model of the WFD, should include measures necessary to achieve at least good water status as measured at the level of individual bodies of surface water such as a stream or discrete stretch of coastal water.³⁰ Good surface water status requires that both the ecological status and chemical status of the particular water body are at least 'good' on a scale from high to bad.³¹ As regards ecological status, 'good' signifies that relevant biological quality elements for the specific surface water body type show low levels of distortion resulting from human activity and deviate only slightly from those normally associated with undisturbed conditions.³²

²⁶ Directive 2000/60/EC, Art. 1.

²⁷ *Ibid.*, Art. 2.

²⁸ *Ibid.*, Art. 13.1.

²⁹ *Ibid.*, Arts. 4 and 11(1).

³⁰ *Ibid.*, Arts. 4 and 2, point 10.

³¹ *Ibid.*, Art. 2, point 18.

³² *Ibid.*, Annex V, Section 1.2.

However, since the CJEU decision in the *Weser* case, it is clear that the Member States cannot just implement the measures set out in programmes of measures. There is also a binding obligation to refuse authorisation for any project that will result in deterioration of the status of a water body or even jeopardise attainment of good surface water status, unless the project is covered by a derogation recognised by the WFD.³³ While logical from an environmental perspective, the strict application of objectives in individual cases rather than within broader programmes of measures can decrease the potential for designing protective measures in ways that are cognizant of social and cultural effects as well as broader environmental or climate concerns. While broad programmes of measures allow for some spatial and temporal variation in the way that objectives are pursued, that possibility tends to be lost or at least decreased when a specific standard or objective has to be met in each individual case. This also limits the ability to give extra weight to a competing interest in a particular situation or context, even if the effect of that can be compensated through other measures covered by the programme of measures.

The WFD itself does not use terms such as legitimacy, fairness or justice, nor does it apparently deal with many distributional, social or cultural effects of water governance.³⁴ Instead it is strongly focused on natural science concepts, while governance structures and processes are described in a technical, ostensibly value free manner. There are, however, some elements of a ‘social dimension’ in the WFD that may more clearly relate to different forms of legitimacy.

One such area is rules on recovery of costs for water services. While requiring Member States to put in place water-pricing policies that provide adequate incentives for users to use water resources efficiently, the Directive allows regard to be had to ‘the social, environmental and economic effects of the recovery’ when doing so.³⁵ There should also be an economic analysis of water use for each river basin district.³⁶ While the WFD itself says little about the purpose or nature of such analyses, a short annex on economic analysis clearly places the emphasis on cost-effectiveness and calculation of costs of water services so as to enable cost recovery.³⁷ However, non-binding guidance documents developed as part of the so-called Common Implementation Strategy (CIS), set up by the Member States, the European Commission and Norway, convey a partly different message. A guidance document on ‘Economics and the Environment’ talks about the need for understanding the trade-offs at stake, for identifying ‘the losers’ and ‘the gainers’ when assessing the economic impact of proposed programmes, and potentially

³³ Case C-461/13, para. 50.

³⁴ ‘Legitimate’ occurs once in the Directive, but then only in the definition of pollution, and in a way that is of little relevance to the present discussion. Directive 2000/60/EC, Art. 2, point 33.

³⁵ *Ibid.*, Art. 9.1.

³⁶ *Ibid.*, Art. 5.

³⁷ *Ibid.*, Annex III.

addressing the need for specific measures to compensate losers.³⁸ However, the economic principles, approaches and tools highlighted in the document are strongly focused on cost-effectiveness and water pricing, without much explicit concern for social dimensions, equity or legitimacy.

The CIS guidance document on the planning process of the WFD talks about planning as having the capacity to increase the legitimacy of decisions. This is to be achieved by enabling 'open and wide dialogue between the public, interest groups and authorities'.³⁹ This is in line with the general conclusion that in EU water and marine governance the 'social dimension' is predominantly seen as a matter of consultation and dialogue.⁴⁰ Although public participation is not explicitly referred to in the WFD, the Directive requires the Member States to 'encourage the active involvement of all interested parties' in its implementation.⁴¹ Referring to this, the CIS guidance on participation mentions the prospect of making the management of natural resources more sustainable and socially acceptable by involving the people that depend on them for their livelihood.⁴² However, this is not much elaborated. It is also emphasised, however, in the guidance document on the planning process that, among other things, equity, redistribution and social welfare can be issues equally important as economic efficiency and that water planning processes should involve reasonable alternatives and evaluate their economic, environmental, political and social impacts.⁴³

According to the Directive, socioeconomic needs can in some instances play a role in the justification of achieving less stringent environmental objectives than would normally be required.⁴⁴ Probably most important for the current discussion is the possibility to justify failure to achieve 'good' status or to prevent deterioration of a body of surface water when it results from new modifications to the physical characteristics of the water body, or if, in the case of failure to prevent deterioration from 'high' status to 'good' status, it is the result of new sustainable human development activities. The reasons for making the modifications or alterations must be of overriding public interest and/or the benefits to the environment and to society of achieving the environmental objectives must be outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human

³⁸ Common Implementation Strategy for the Water Framework Directive (2000/60/EC), Guidance Document No 1, 'Economics and the Environment', European Communities, 2003, 8.

³⁹ Common Implementation Strategy for the Water Framework Directive (2000/60/EC), Guidance Document No 11, 'Planning Process', European Commission, 2003, 11.

⁴⁰ D. Langlet and A. Westholm, 'Realizing the Social Dimension of EU Coastal Water Management' (2021) 13 *Sustainability* 2261.

⁴¹ Directive 2000/60/EC, Art. 14.

⁴² Common Implementation Strategy for the Water Framework Directive (2000/60/EC), Guidance Document No 8, 'Public Participation in relation to the Water Framework Directive', European Communities, 2003, 52.

⁴³ Guidance Document No 11, 'Planning Process' (n 39) 12.

⁴⁴ Directive 2000/60/EC, Art. 4 (5).

safety or to sustainable development. With respect to water bodies that have a ‘high’ status, this introduces some flexibility to accept new activities that are deemed sustainable, as long as they do not result in a fall of status below ‘good’. For bodies of water that are currently below ‘high’ status, it is only modifications to the physical characteristics of the water body, for example, through dredging or construction of port infrastructure, that can be justified in this way.

While these exceptions can invite excessive and unjustified use, they also enable, when applied in good faith, social needs broadly construed to be given priority in specific cases so as to avoid extensive and seemingly unfair consequences of the WFD in a particular location or for a particular group of people.

14.3.2 *Marine Strategy Framework Directive*

The MSFD aims broadly to ensure the integration of environmental concerns into policies, agreements and legislative measures that have an impact on the marine environment.⁴⁵ It is intended to deliver the ‘environmental pillar’ of the EU’s wider Integrated Maritime Policy,⁴⁶ which also aims to stimulate, inter alia, increased marine research, better use of marine space and blue growth.⁴⁷ The MSFD applies to all marine waters of the EU Member States,⁴⁸ but coastal waters are only covered to the extent that a particular aspect of the environmental status is not already addressed through the WFD or other EU legislation.⁴⁹

Under the MSFD, the Member States are required, subject to some exceptions,⁵⁰ to take the necessary measures to achieve or maintain good environmental status (GES) in the marine environment.⁵¹ The Directive contains a lengthy and rather vague definition of GES.⁵² In practice, what constitutes GES is determined on the basis of eleven qualitative descriptors set out in an annex.⁵³ All of these relate to the status of the natural environment, and make no direct reference to social aspects. Rather than assessing the status of individual water bodies as under the WFD, the MSFD is concerned with achieving GES at the level of so-called marine regions or sub-regions. These are large areas such as the Baltic Sea, the Black Sea or the Western Mediterranean.⁵⁴

⁴⁵ Directive 2008/56/EC, Art. 1.

⁴⁶ *Ibid.*, preambular para. 3.

⁴⁷ Communication from the Commission – An Integrated Maritime Policy for the European Union, COM (2007) 574 Final.

⁴⁸ Directive 2008/56/EC, Art. 2.

⁴⁹ *Ibid.*, Art. 3, point 1.

⁵⁰ *Ibid.*, Art. 14.

⁵¹ *Ibid.*, Art. 3.

⁵² For this definition, see *ibid.*, Art. 3.

⁵³ *Ibid.*, Art. 9.

⁵⁴ *Ibid.*, Art. 4.

The method for achieving GES is the development and implementation of marine strategies by each Member State.⁵⁵ In many respects, the MSFD takes a similar approach to environmental management as the WFD but does so on a larger scale and in a partly less detailed manner. Like the WFD, it is based on an implementation cycle comprising assessment, defining a desired state of the environment, implementing measures and monitoring.⁵⁶

Concepts such as legitimacy and justice are hardly used in the MSFD. It does, however, refer to ‘fairness and feasibility’ as reasons to make provision for cases where it would be impossible for a Member State to achieve the level of ambition of the environmental targets set or to achieve or maintain GES.⁵⁷ In this vein, and similar to the WFD, the MSFD allows for modifications or alterations to the physical characteristics of marine waters brought about by actions taken for reasons of overriding public interest that outweigh the negative impact on the environment, even if they result in the environmental targets or GES not being achieved.⁵⁸

Social dimensions potentially relevant for legitimacy are more explicitly addressed in the MSFD compared to the WFD. Assessments of the environmental status of marine waters are to include ‘an economic and social analysis of the use of those waters and of the cost of degradation of the marine environment’.⁵⁹ In a similar vein, programmes of measures drawn up to achieve or maintain GES must give due consideration to sustainable development and, ‘in particular, to the social and economic impacts of the measures envisaged’.⁶⁰ Additionally, in setting targets and associated indicators due consideration should be taken of social and economic concerns.⁶¹ The guidance developed on economic and social analysis for initial assessment for the MSFD is largely focused on economic aspects, and the methods proposed relate to costs valuation and distribution of the economic effects of measures.⁶² While opening up for criticism for not including other social dimensions,⁶³ this is at least a clear recognition of the fact that the marine governance measures have social and economic impacts that need a cognizant approach.

As for participation, the MSFD obliges the Member States to ensure that all interested parties are given early and effective opportunities to participate in implementation. How this is to be done is not further specified beyond the fact that it is to

⁵⁵ *Ibid.*, Art. 1.

⁵⁶ M. Cavallo, Á. Borja, M. Elliott, V. Quintino and J. Touza, ‘Impediments to Achieving Integrated Marine Management across Borders: The Case of the EU Marine Strategy Framework Directive’ (2019) 103 *Marine Policy* 68–73.

⁵⁷ Directive 2008/56/EC, preamble para. 29.

⁵⁸ *Ibid.*, Art. 14.

⁵⁹ *Ibid.*, Art. 8.

⁶⁰ *Ibid.*, Art. 13.

⁶¹ *Ibid.*, Annex 4.

⁶² Marine Strategy Framework Directive (MSFD), Common Implementation Strategy, ‘Economic and Social Analysis for the Initial Assessment for the Marine Strategy Framework Directive’, MSFD Guidance Document 1, European Commission, 2018.

⁶³ Langlet and Westholm (n 40).

be in accordance with other relevant EU legislation.⁶⁴ This becomes particularly important in view of the fact that the MSFD, to a large extent, is a mechanism for the integration of environmental concerns into existing policies, agreements and legislative measures that have an impact on the marine environment.⁶⁵ In this sense, the MSFD is layered on existing regulation at national, EU and international levels,⁶⁶ which often means that the legitimacy aspects of the MSFD get mixed with similar aspects of those other legal measures.

14.3.3 *Maritime Spatial Planning Directive*

Compared to both the WFD and the MSFD, the MSPD is intended to take a more comprehensive approach to marine activities and resources by establishing a framework for maritime spatial planning (MSP), which aims to promote the sustainable growth of maritime economies, sustainable development of marine areas and sustainable use of marine resources.⁶⁷ It requires Member States to set up maritime spatial plans identifying the spatial and temporal distribution of relevant existing and future activities and uses.⁶⁸ Through these plans, the Member States are to aim to contribute to a number of objectives, including sustainable development of energy sectors at sea, maritime transport and the fisheries and aquaculture sectors, as well as preservation, protection and improvement of the environment. They may also pursue additional objectives, such as sustainable tourism and sustainable extraction of raw materials.⁶⁹

When pursuing these objectives through planning processes, the Member States must, *inter alia*, take into account environmental, economic and social aspects as well as ensuring involvement of stakeholders.⁷⁰ As for public participation, the only specific requirements in the MSPD are that means of public participation must be established by informing all interested parties and by consulting the relevant stakeholders and authorities, and the public concerned, at an early stage in the development of maritime spatial plans and in accordance with relevant provisions of EU legislation.⁷¹ The word legitimacy does not feature in the Directive, nor do equity or fairness.

In its 'Roadmap for MSP', published in 2008, the European Commission refers to MSP as a tool for achieving sustainable use of marine resources and as providing

⁶⁴ Directive 2008/ 56/ EC, Art. 19.

⁶⁵ *Ibid.*, Art. 1.

⁶⁶ J. van Leeuwen and others, 'Implementing the Marine Strategy Framework Directive: A Policy Perspective on Regulatory, Institutional and Stakeholder Impediments to Effective Implementation' (2014) 50 *Marine Policy* 325–330, 327.

⁶⁷ Directive 2014/89/EU, Art. 1.

⁶⁸ *Ibid.*, Art. 8.

⁶⁹ *Ibid.*, Art. 5.

⁷⁰ *Ibid.*, Art. 6.

⁷¹ *Ibid.*, Art. 9.

legal certainty and predictability.⁷² However, the strong framework character and very general obligations of the MSPD as eventually adopted leave the attainment of such effects almost entirely to the individual Member States. The Directive is explicitly 'without prejudice to the competence of Member States to determine how the different objectives are reflected and weighted' in their plans,⁷³ and its implementation should also to the greatest extent possible build on existing rules and mechanisms.⁷⁴ Not surprisingly, it has been questioned whether the MSPD has the ability to steer relevant spatial planning practices in a sustainable direction.⁷⁵

A further important limitation of the effect of the Directive is that coastal waters that are subject to a Member State's town and country planning are exempted from its purview, provided that this is communicated in the relevant national maritime spatial plans.⁷⁶ Since coastal waters are where most maritime activities occur, this can significantly limit the effect of the Directive. However, if MSP is to be ecosystem based and consider land–sea interactions, as required by the MSPD, close coordination between existing town and country planning processes and planning undertaken according to the Directive is evidently needed.⁷⁷

While MSP in principle has the potential to help reconcile different spatial demands and democratise marine governance, warnings have increasingly been raised that it can also be used to entrench pre-existing power imbalances, cloak the interests of elite actors in ostensibly democratic processes and potentially even be an instrument for so-called ocean grabbing.⁷⁸ Due to the nature of the MSPD, the extent to which such effects will materialise in an EU context depends on the ways in which Member States chose to implement the Directive and the nature of their planning processes and traditions.

The EU legislator could be accused of not seriously engaging with the legitimacy aspects of MSP, but instead leaving all hard choices and trade-offs to the Member States. However, if the Member States are regarded as generally better suited to

⁷² Communication from the Commission, 'Roadmap for Maritime Spatial Planning: Achieving Common Principles in the EU', COM (2008) 791 final, 2 and 3.

⁷³ Directive 2014/89/EU, Art. 5.

⁷⁴ *Ibid.*, preambular para. 12.

⁷⁵ N. Soininen and F. M. Platjouw, 'Resilience and Adaptive Capacity of Aquatic Environmental Law in the EU: An Evaluation and Comparison of the WFD, MSFD, and MSPD', in D. Langlet and R. Rayfuse (eds.), *The Ecosystem Approach in Ocean Planning and Governance* (Leiden: Brill Nijhoff, 2019) 17–79, 43.

⁷⁶ Directive 2014/89/EU, Arts. 1 and 2.

⁷⁷ Langlet and Westholm (n 40) 12.

⁷⁸ W. Flannery, N. Healy and M. Luna, 'Exclusion and Non-Participation in Marine Spatial Planning' (2018) 88 *Marine Policy* 32–40, 39; B. Queffelec and others, 'Marine Spatial Planning and the Risk of Ocean Grabbing in the Tropical Atlantic' (2021) *ICES Journal of Marine Science* fsab006, no page; J. Behagel and E. Tumhout, 'Democratic Legitimacy in the Implementation of the Water Framework Directive in the Netherlands: Towards Participatory and Deliberative Norms?' (2011) 13:3 *Journal of Environmental Policy & Planning* 297–316, 299.

make such decisions, both in terms of subsidiarity – being closer to the relevant trade-offs and potential synergies – and due to their overall greater democratic legitimacy, this may not be negative for legitimacy. It does, however, make it hard to evaluate the MSPD as such from the perspective of legitimacy.

14.4 CONCLUDING DISCUSSION

Legitimacy is not a notion that is explicitly addressed by core EU marine legislation, although the potential of planning and participatory processes to enhance legitimacy is highlighted in some guidance documents. Interestingly, the WFD, which is likely to have the most tangible effects on the economic and social conditions of individuals, is least clear on how to deal with these dimensions of marine and water governance.

An important aspect of so-called output legitimacy is the extent to which politically agreed results are actually delivered. The WFD sets out substantive requirements that are – at least for those capable of comprehending the details – reasonably precise and liable to have a direct impact on what environmental quality to expect. It also enables individuals to rely on the quality standards of the Directive and to challenge individual authorisations that are inconsistent with their achievement.⁷⁹ The *Weser* case increased the effects of the Directive's environmental objectives in relation to individual projects. Still, there are challenges with complexity, making it hard to understand what rights or duties actually follow from the WFD, as well as insufficient implementation by Member States. The MSFD is in this regard similar to the WFD but vaguer in its requirements, not least due to the larger spatial scales of application and higher level of aggregation, making it harder to know at a local level what to expect from the Directive and to judge if it has delivered. This problem also tends to be exacerbated by time lags between measures and effects in many natural systems.

The binding nature and partly direct applicability of environmental objectives decided at EU level could also pose a challenge to legitimacy by decreasing the ability to balance different interests and consider 'the bigger picture'.⁸⁰ Overall, both the WFD and the MSFD have a strong focus on the environmental dimension of sustainability, and other aspects are mostly possible to accommodate through specific exemptions or the flexibility that is inherent to national implementation processes. This has the advantage of clarity; these legal acts primarily aim to protect the environment while other considerations require specific justifications or must be pursued without infringing on the environmental objectives. On the other hand, it

⁷⁹ L. Squintani and H. van Rijswijk, 'Improving Legal Certainty and Adaptability in the Programmatic Approach' (2016) 28 *Journal of Environmental Law* 443–470, 461.

⁸⁰ Davies (n 14) 2–22, 2.

may invite the criticism that prioritisation and decisions on trade-offs have already been made at EU level, leaving only technical details to the (hopefully) more transparent and participatory national implementation processes. In practice, however, there tends to be rather significant room for decisions on trade-offs at the national level, in particular beyond the situations covered by the *Weser* decision.

The need for legal frameworks dealing with ecosystems to be flexible and adaptive has itself the potential to decrease legitimacy by undermining legal certainty and foreseeability.⁸¹ All three marine directives apply the programmatic approach which entails flexibility that can be used for adaptation and enables a fair allocation of economic development and costs for environmental protection but at the same time makes it harder to know what will be required in the longer term. Indeed, there is a considerable literature debating the challenges of reconciling traditional legal virtues such as rule of law and legal certainty with the flexibility required by adaptive governance models.⁸² In practice, however, law is not static and is always subject to interpretation. Hence, intentionally adaptive legal structures are not inherently different from more traditional legal arrangements.⁸³ They can even make the inevitable adjustments to changing circumstances more transparent and easier to anticipate.

The MSPD, which is much more comprehensive in its aim than the two other directives, is also so vague in terms of substantive requirements that it hardly restricts the scope of (legitimate) national or local balancing of objectives. On the other hand, it is prone to criticism for being too thin on substance, making it impossible to know what to expect as a result of its implementation.

While the MSPD most explicitly recognises the need for considering multiple interests and objectives in marine governance, none of the marine directives is particularly clear on how to address the 'wicked' aspects of marine governance. Although the MSFD mandates consideration of social and economic impacts of targets and measures and a non-binding guidance to the WFD makes reference to the need for identifying and possibly compensating 'the losers', there is little clarity as to how this can or should be done and what results to expect. In some ways, this may be positive. The EU legislator may not be best placed to legitimately arbitrate between complex interests, and the WFD and the MSFD are explicitly focused mainly on ecological dimensions. At the same time, one could at least have expected clearer demands on the principles and processes to be used for dealing with such challenges in a transparent and legitimate way. Now, this is almost entirely left to individual Member States, making outcomes as well as processes very different between countries. Reasonably, the legitimacy of EU legal acts can

⁸¹ Squintani and van Rijswijk (n 79) 444.

⁸² See, e.g., J. Ebbesson, 'The Rule of Law in Governance of Complex Socio-Ecological Changes' (2010) 20:3 *Global Environmental Change* 414–422; Sojininen and Platjouw (n 75).

⁸³ Ebbesson (n 82) 415.

suffer if what they are seen to deliver varies considerably across the Union. Both the WFD and the MSFD have also been criticised for being silent on access to justice as they do not ensure that the public have legal means to challenge the validity of an adopted programme of measures.⁸⁴

As noted previously, the perceived fairness of decision processes has clear implications for the extent to which management is deemed legitimate. This lends support to the argument that increased attention to and transparency about actual and perceived trade-offs among users and interests are important, not least in maritime planning.⁸⁵ To better address such aspects, the use of a ‘sociocultural approach’ has been proposed, dealing with issues such as procedural justice, social inclusion and knowledge pluralism.⁸⁶ However, the Member States already have tools they can employ to increase transparency and quality in the way they deal with social dimensions of marine governance. These include social impact assessment and stakeholder perceptions and interest assessment.⁸⁷

All three directives largely rely on participation for dealing with core legitimacy dimensions. While participation can be a way of enhancing both input and throughput legitimacy, participation as a provider of legitimacy is not unproblematic. Challenges pertain inter alia to defining who has a legitimate say in decision-making processes,⁸⁸ and to ensuring that participation can be genuine, with stakeholders understanding what can and cannot be changed through a participatory process as well as seeing that their participation is meaningful and can affect the outcome.⁸⁹ Sufficient time must also be allowed for deliberations and integration of varied interests and different kinds of knowledge.⁹⁰

⁸⁴ Squintani and van Rijswijk (n 79) 459.

⁸⁵ B. S. Halpern, ‘Near-Term Priorities for the Science, Policy and Practice of Coastal and Marine Spatial Planning (CMSP)’ (2012) 36 *Marine Policy* 198–205, 201.

⁸⁶ M. Gilek, F. Saunders and I. Stalmokaitė, ‘The Ecosystem Approach and Sustainable Development in Baltic Sea Marine Spatial Planning: The Social Pillar, a “Slow Train Coming”’, in D. Langlet and R. Rayfuse (eds.), *The Ecosystem Approach in Ocean Planning and Governance* (Leiden: Brill Nijhoff, 2019), 160–194, 186–187.

⁸⁷ F. Vanclay, ‘The Potential Application of Social Impact Assessment in Integrated Coastal Zone Management’ (2012) 68 *Ocean Coastal Management* 149–156; I. Lukic and others, *Stakeholder Profiles*, MUSES Project, Deliverable No. 4.1, 2017.

⁸⁸ K. Soma and C. Hagggett, ‘Enhancing Social Acceptance in Marine Governance in Europe’ (2015) 117 *Ocean & Coastal Management* 61–69, 62.

⁸⁹ Gilek, Saunders and Stalmokaitė (n 86) 165.

⁹⁰ A. Cliquet, F. Kervarec, D. Bogaert, F. Maes and B. Queffelec, ‘Legitimacy Issues in Public Participation in Coastal Decision Making Processes: Case Studies from Belgium and France’ (2010) 53 *Ocean & Coastal Management* 760–768, 768.