

TECHNICAL AND ADMINISTRATIVE SUPPORT FOR THE JOINT IMPLEMENTATION OF THE MARINE STRATEGY FRAMEWORK DIRECTIVE (MSFD) IN BG & RO – PHASE II

Under Framework contract for services related to coordination between the different marine regions in implementing the ecosystem approach.



Joint interpretation Articles 14 & 15 Article 13 (5)

Article 14 – Exceptions (1/3) ARCADIS Design & Consultancy for natural and built assets

1. A Member State may identify instances within its marine waters where, for any of the reasons listed under points (a) to (d), the environmental targets or good environmental status **cannot be achieved** in every aspect through measures taken by that Member State, or, for **reasons referred to under point** (e), they cannot be achieved **within the time schedule** concerned:
 - (a) action or inaction for which the Member State concerned is not responsible
 - (b) natural causes
 - (c) force majeure
 - (d) modifications or alterations to the physical characteristics of marine waters brought about by actions taken for reasons of overriding public interest which outweigh the negative impact on the environment, including any transboundary impact;
 - (e) natural conditions which do not allow timely improvement in the status of the marine waters concerned.

The Member State concerned shall **identify such instances clearly** in its programme of measures and shall substantiate its view to the Commission. In identifying instances a Member State shall **consider the consequences** for Member States in the marine region or subregion concerned .

However, the Member State concerned shall take **appropriate ad-hoc measures** aiming to continue pursuing the environmental targets, to prevent further deterioration in the status of the marine waters affected for reasons identified under points (b), (c) or (d) and to mitigate the adverse impact at the level of the marine region or subregion concerned or in the marine waters of other Member States.

Article 14 – Exceptions (2/3)

2. In the situation covered by paragraph 1(d), Member States shall ensure that the modifications or alterations do **not permanently preclude or compromise the achievement of good environmental status** at the level of the marine region or subregion concerned or in the marine waters of other Member States.
3. The **ad-hoc measures** referred to in the third subparagraph of paragraph 1 shall be integrated as far as practicable **into the programmes of measures**.
4. Member States shall develop and implement all the elements of marine strategies referred to in Article 5(2), but shall not be required, **except** in respect of the initial assessment described in Article 8, to take specific steps where there is **no significant risk** to the marine environment, or where the **costs would be disproportionate** taking account of the risks to the marine environment, and provided that there is no further deterioration.

Where, for either of these reasons, a Member State does not take any steps, it shall provide the Commission with the **necessary justification to substantiate its decision, while avoiding that the achievement of good environmental status be permanently compromised**.

Article 14 – Exceptions (3/3)

To be reported for exception (conf. WG DIKE)

- a) Exception code
- b) Exception name
- c) Exception type (according to options under Art. 14) and justification
- d) Mitigation – consequences for other Member States, ad-hoc measures taken and mitigation
- e) Relevant targets
- f) Relevant GES Descriptors
- g) Relevant Annex III elements
- h) Spatial coverage of the exception ((sub)regions, assessment areas, geographic zones)
- i) Further information, if available (URL link)

All exceptions should be supported with a justification, using the **template provided** (conf. WG Dike Table 7.)

Article 15 - Recommendations for Community action

1. Where a Member State identifies an issue which has an impact on the environmental status of its marine waters and which **cannot be tackled by measures adopted at national level, or which is linked to another Community policy or international agreement**, it shall inform the Commission accordingly and provide a justification to substantiate its view. The Commission shall respond within a period of six months.
2. **Where action by Community institutions is needed**, Member States shall make **appropriate recommendations** to the Commission and the Council for measures regarding the issues referred to in paragraph 1. Unless otherwise specified in relevant Community legislation, the Commission shall respond to any such recommendation within a period of six months and, as appropriate, reflect the recommendations when presenting related proposals to the European Parliament and to the Council.

Guidance document

Already guidance on Article 14 as part of the Recommendation on PoMs – Need to also have guidance on Article 15

Developed by MSCG since November 2014

1st version presented to MSCG in February 2015

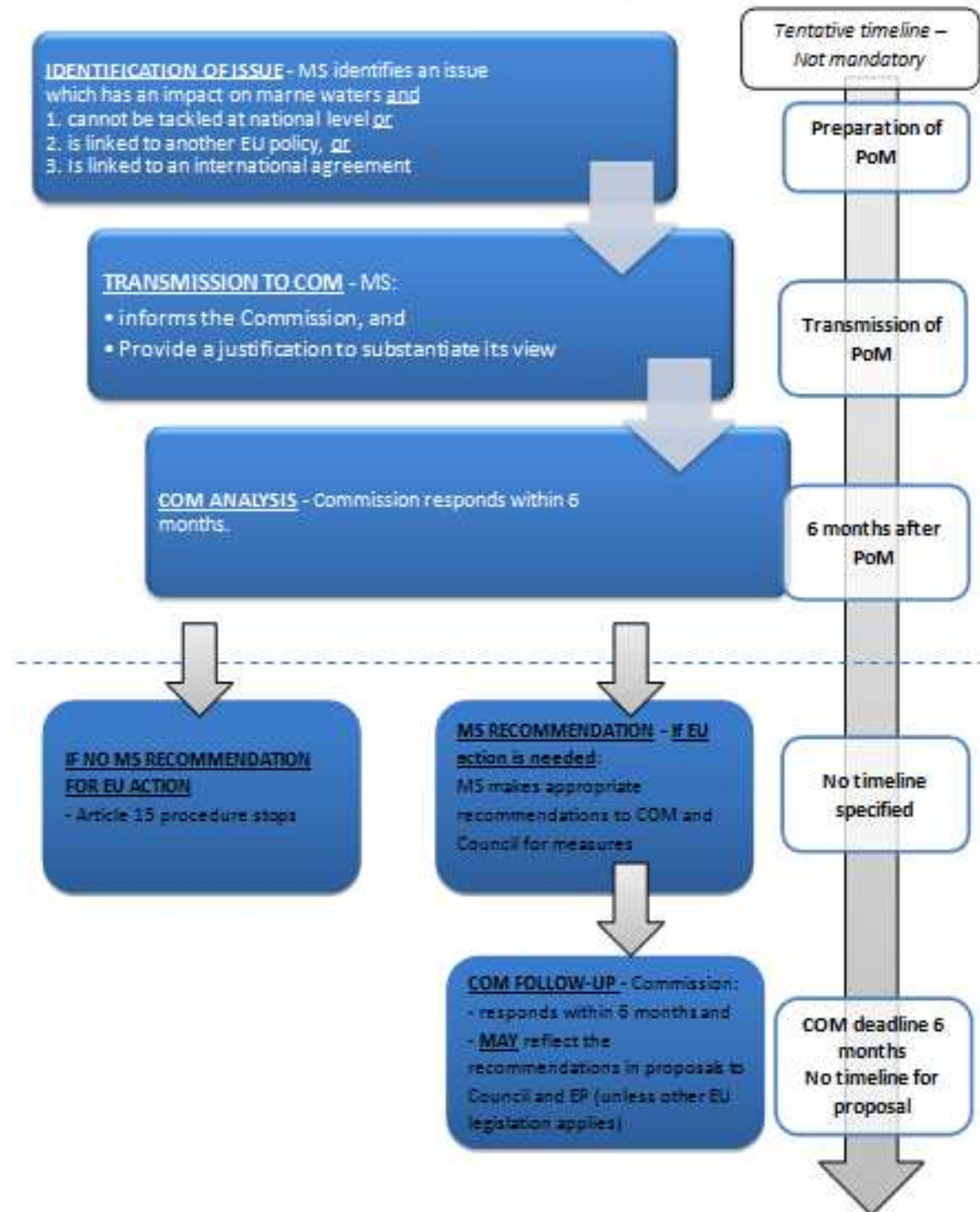
Endorsed on 4 May 2015 by MSCG (few modifications adopted)

Presented for information to the Marine Directors on 26-27 May

Guidance document on Article 15 of the MSFD

Illustrative flowchart of main procedural steps

The timeline is based on the assumption that Article 15 transmission will be done along with the PoMs, which is however not a mandatory requirement



IDENTIFICATION OF ISSUE - MS identifies an issue which has an impact on marine waters and
1. cannot be tackled at national level or
2. is linked to another EU policy, or
3. Is linked to an international agreement



TRANSMISSION TO COM - MS:

- informs the Commission, and
 - Provide a justification to substantiate its view
- 

COM ANALYSIS - Commission responds within 6 months.

Transmission to COM

MS' initiative

Ideally with PoMs communication (i.e. 31 March 2016)

In any case: formal communication from MS to Commission

Early notice if possible since Commission has 6 months to reply

Information substantiating request

COM has only 6 months to analyse the issue:

- As much info as possible please!
- Aim not to make the procedure heavier, but to make it work well

No mandatory list of information, but e.g.:

- In-depth description of the issue
- Impact assessments
- Cost benefit analysis
- Measures already undertaken
- Recommendation proposals

Commission's analysis

Link with other legislations

Preliminary assessment of what the EU can do

Action by EU institution needed?

Recommendations from MS

- *Recommendation to Council + Com*
- *Com replies within 6 months*
- *May reflect it in proposals to Council and Com*

Concrete examples

Theoretical guidance => Concrete examples & practical implementation

Early notice of upcoming Art 15 requests via MSCG

For instance already several subjects:

- Microplastics
- NIS
- Underwater noise
- Black Sea-specific issues
- Bottom-trawling ban
- Etc...

Article 13 (5) – PoMs

Where Member States consider that the **management of a human activity at Community or international level** is likely to have a significant impact on the marine environment, particularly in the areas addressed in paragraph 4, they shall, individually or jointly, address the competent authority or international organisation concerned with a view to the consideration and possible adoption of measures that may be necessary in order to achieve the objectives of this Directive, so as to enable the integrity, structure and functioning of ecosystems to be maintained or, where appropriate, restored.

*(note: paragraph 4: Shall include **spatial protection measures**....)*

Article 14

| Exceptions | Questions raised by EU MS | Reply by EC (C. Leroy) |
|---|--|--|
| 1. A Member State may identify instances within its marine waters where, for any of the reasons listed under points (a) to (d), the environmental targets or good environmental status cannot be achieved in every aspect through measures taken by that Member State, or, for reasons referred to under point (e), they cannot be achieved within the time schedule concerned: | What if no GES have been defined for certain descriptors, may Art. 14 then be applied? | The conditions to use an exception are laid down in Article 14, if the conditions are met, MS can request an exception, even if GES has not been defined yet. |
| (a) action or inaction for which the Member State concerned is not responsible | Does this also apply to non-EU MS / third countries of the Barcelona convention? | Yes |
| (b) natural causes; | | |
| (c) force majeure; | | |
| (d) modifications or alterations to the physical characteristics of marine waters brought about by actions taken for reasons of overriding public interest which | | |
| (e) natural conditions which do not allow timely improvement in the status of the marine waters concerned. | | |
| The Member State concerned shall identify such instances clearly in its programme of measures and shall substantiate its view to the Commission. | | No illustrative examples available on detail of information. |
| However, the Member State concerned shall take appropriate ad-hoc measures aiming to continue pursuing the environmental targets, to prevent further deterioration in the status of the marine waters affected.... | | In case GES is not reached due to causes the MS is not responsible for, MS have to evaluate the possibility to define ad hoc measures targeting the issue, even if they will not get the objective. |

Article 15

| Recommendations for Community action | Questions raised by EU MED MS | Reply by EC (C. Leroy) |
|--------------------------------------|-------------------------------|---|
| Application of Art. 15. | | Articles 13 and 14 are linked to the PoM, art. 15 is something in addition. |
| | | Art. 15 represents an open possibility that can be raised at any time, not only during PoM preparation or within PoM context . To apply under art. 15, the issue must have an impact on the marine waters of the MS: this is quite an open phrasing which leaves room for different types of impact. The evidence of an environmental impact in a more general way is sufficient to apply for art. 15. So, art. 15 might or might not be linked to GES and targets. |
| | | Art 15 should be used if MS wants to raise an issue at a higher level , due to its great importance. Regarding Art 14, MS will have to assess if the conditions are met and substantiate it when reporting to the Commission. |
| | | It is for MS to decide whether they consider that the appropriate conditions are gathered to trigger an Article 15 request, not for the Commission . The conditions to use an exception are laid down in Article 14, if the conditions are met, MS can request an exception. Art. 14 and art. 15 can be applied in parallel, but this is up for MS to decide depending on the situation at stake and on whether the appropriate conditions are met. |

Article 15

| | | |
|--|---|---|
| <p>1. Where a Member State identifies an issue which has an impact on the environmental status of its marine waters and which cannot be tackled by measures adopted at national level, or which is linked to another Community policy or international agreement, it shall inform the Commission accordingly and provide a justification to substantiate its view.</p> | <p>How to interpret community policy? Is there a list available? Can a (unilateral) communication or action plan that has not been adopted by the parliament/council fall under this scope?</p> | <p>Concerning the interpretation of the term "policies" under art. 15, not only directives or regulations should be considered, the suggestion is to interpret it much broader way.</p> <p>(EC: there is no list, but to be seen widely (incl. communication, action plan, non-legally binding documents, etc.); will not be dismissed by reason of scope)</p> |
| <p>2. Where action by Community institutions is needed, Member States shall make appropriate recommendations to the Commission and the Council for measures regarding the issues referred to in paragraph 1. Unless otherwise specified in relevant Community legislation, the Commission shall respond to any such recommendation within a period of six months and, as appropriate, reflect the recommendations when presenting related proposals to the European Parliament and to the Council.</p> | <p>What is meant with term "appropriate"? When may we raise recommendations?</p> | <p>Disregarding if you reach your GES or not, you may raise issues to the EC with recommendations for additional actions to be taken by the EC</p> <p>Concerning the type of recommendations to be addressed through art 15, it could be either technical or legislative. The suggestion is to provide the Commission with ideas on which type of action/process is envisaged by the MS to tackle the issue raised.</p> |

Article 13 (5) – PoMs

| Article under Programmes of measures | Questions raised by EU MED MS | Reply by EC (C. Leroy) |
|---|---|---|
| ... management of human activity | How does this relate to terminology of 'issue' under Art. 15 | |
| | Does "management of a human activity" refer to PoM? | |
| ... significant impact on marine environment... | How does this relate to the definition of GES & targets? How to interpret 'significant'? | Art. 13-5 states "in order to achieve the objectives of this Directive" meaning " reaching GES by 2020 " (~impact on marine environment). With Article 13(5), the link is therefore more clearly established between the PoM, GES and Targets. |
| | How can PoM have a negative impact? Contradiction? | |
| | | |

| Article under Programmes of measures | Questions raised by EU MS | Reply by EC (C. Leroy) |
|--|--|---|
| PROCESS (what to do) | | |
| ... to address competent authority or international organisation concerned | What is difference between Art 15? | <p>Articles 13 and 14 are linked to the PoM, art. 15 is something in addition.</p> <p>Art. 15 represents an open possibility that can be raised at any time, not only during PoM preparation or within PoM context. To apply under art. 15, the issue must have an impact on the marine waters of the MS: this is quite an open phrasing which leaves room for different types of impact. The evidence of an environmental impact in a more general way is sufficient to apply for art. 15. So, art. 15 might or might not be linked to GES and targets.</p> |
| | May a request for action to international organisations be done by a EU MS directly under Art. 13(5) or pass through EC under Art. 15? How to address competent authority? | <p>Concerning the need of addressing issues to international organization (e.g. GFCM), in case of measures needed to achieve GES, this may be more directly done via Art 13(5) than via Art 15. However, Art 13(5) has to be read in light of the Lisbon treaty, meaning that it cannot be seen as a blank check for MS to directly address international organization, such as GFCM. In all cases the "principle of unit in the external representation" and "loyal cooperation" should be respected . This means that the need to approach an international institution concerning a given issue, should ideally be consulted with the relevant EU institutions, depending on the competence at stake.</p> |
| | What if competent authorities is EC? Should we then go through Art. 15? (answer C. Leroy: not necessarily) | |
| | Lisbon treaty after MSFD. How do we know if EC is the competent authority? | |
| ... possible adoption of measures that may be necessary | Very broad scope | |
| ... to achieve the objectives of Directive | What should be considered as objective? Does this mean reaching GES & targets here? | <p>Art. 13-5 states "in order to achieve the objectives of this Directive" meaning "reaching GES by 2020" (~impact on marine environment). With Article 13(5), the link is therefore more clearly established between the PoM, GES and Targets.</p> |

CBE 8 exercise

- 1) Identification of issues considered under Article 13(5), 14 & 15

- 2) Exceptions: information confair template