

MARINE STRATEGY FRAMEWORK DIRECTIVE MSFD Workshop

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Exemptions under MSFD and WFD



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Structure of the presentation

- Exemptions requirements under the WFD
- Exemptions requirements under the MSFD
- MSFD exemptions provisions
- MSFD exemptions clarification



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WFD exemptions requirements (1)

- **Article 4: the core article - of the Water Framework Directive**
!
- CIS Guidance Document no. 20
- **Environmental objectives and exemptions**
- The environmental objectives are defined in Article 4
- The aim is long-term sustainable water management based on a high level of protection of the aquatic environment.



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WFD exemptions requirements (2)

- Article 4.1 defines the **WFD general objective** to be achieved in all surface and groundwater bodies, i.e. good status by 2015, and introduces the principle of preventing any further deterioration of status.
- The **exemptions** to the general objectives that allow for less stringent objectives, extension of deadline beyond 2015, or the implementation of new projects, provided a set of conditions are fulfilled.
- The key element in making the general environmental objective operational in a harmonized way throughout the EU is the intercalibration exercise.



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MSFD Basic principles on exemptions

- MSFD Article 14 - provisions on exemptions
- Several MSFD recitals provide clarifications on the flexibility included in the MSFD, and clarify Article 14.



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Recital 11

- Each Member State should develop a marine strategy for its marine waters which will reflect the overall perspective of the marine region or subregion concerned.
- The key component, as for the WFD is the Programmes of measures designed to achieve or maintain GES.
- If there is no significant risk to the marine environment, or the costs would be disproportionate, no specific actions for the MS are required.



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Recital 29 (1)

Member States should take the necessary measures to achieve or maintain good environmental status in the marine environment.

Achieving or maintaining GES may not be possible in all marine waters by 2020.

Therefore, **appropriate provisions are needed** for cases where it would be impossible for a MS to achieve the level of ambition of the environmental targets set or to achieve or maintain GES.



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Recital 29 clarification (2)

Recital 29 states that exemptions are possible in cases when “achieving GES in every aspect” is not possible by 2020.

Exemptions are appropriate “for cases where it would be impossible for a MS to achieve the level of ambition of the environmental targets set or to achieve or maintain good environmental status”, therefore clearly defining exemptions as exemptions to reaching environmental targets or GES, as set by MS.

In cases where the GES definitions of MS, or the environmental targets set are inadequate, it will therefore be difficult in the first MSFD cycle to justify exemptions!!



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Recital 30 clarification

Recital 30 relates to Article 14(1), points (a) to (e) and describes three concepts:

- exemptions are limited to specific instances (Art 14(1) + 14(4))
- an **exemption must be justified** by the MS - identifying the area concerned and the reasons for claiming the exemption
- even in cases covered by an exemption, the MS concerned has a responsibility to take **ad-hoc measures** (Art 14(1)). Ad-hoc measures aim to prevent further deterioration in the area affected, and to mitigate any adverse impacts.



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Recital 32 clarification (1)

Recital 32 relates to the directive's provisions for flexibility, detailing control mechanisms for EC:

- For exemptions under Article 14(1), points (a) to (e), this control should in particular assess whether ad-hoc measures taken are effective towards reaching the environmental targets or GES
- The Commission provides guidance on possible modifications to the ad-hoc measures, if it considers these are not sufficient or suitable, in line with Article 16.



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Recital 32 clarification (2)

In the case of exemptions due to overriding public interest (Article 14(1)(d)), the Commission shall assess whether the modifications or alterations made to the environment do not permanently preclude or compromise achieving GES in the subregion or in other Member States (Article 14(2) and Article 16, 3rd paragraph).



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Other exemptions (1)

- Article 14 includes two broad categories of exemptions, under Article 14(1) and 14(4), with different obligations:

Article 14(1)

- Article 14(1) covers exemptions to reaching GES or environmental targets fully, or for point (e), on time, including distinct sub- categories:

a) action or inaction for which the MS is not responsible

Ex: as a result of environmental damage caused by a third party, or where GES can only be achieved through action at international or Community level.



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Other exemptions (2)

- In cases where the issue cannot be tackled by national measures or where it is linked to another community policy or international agreement, the MS shall inform the EC and make appropriate recommendations for actions at international or Community level (Article 15 MSFD).

Examples:

- Noise from international shipping affects GES in a marine region, but can only be reduced through an International Maritime Organization decision,
- Measures to protect biodiversity in an area from fisheries-related pressures must be agreed under the Common Fisheries Policy



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Natural causes

'Natural causes' refer to uncontrolled, random natural events such as floods, hurricanes, which, prevent reaching environmental targets and good environmental status in all its aspects.



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Force majeure (1)

‘Force majeure’ refers to circumstances which are exceptional, limited in time, or which could not reasonably be foreseen: an unforeseeable accident or a terrorist attack, and beyond the control of the party claiming force majeure, whose consequence could not have been avoided.



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Force majeure (2)

Several elements must be met in order for an exception to fall within this sub-category:

- 1) The negative impact on the environment of action taken for reasons of overriding public interest must concern the physical characteristics of marine waters
- 2) Public interest must be “overriding”

The issue of overriding public interest is used regularly in EU environmental law, and has also been further defined by the Court of Justice of the European Union.

EC guidance has already been provided on this concept in the context of the Habitats Directive, MSFD, and the WFD.



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Force majeure (3)

The guidance document is useful when assessing an overriding public interest in the context of the MSFD:

- situations where plans or projects envisaged prove to be indispensable and clearly outweigh the negative impacts on the environment, including across borders, and aim at, inter alia:

- protecting values fundamental for the citizens' life (health, safety, environment);
- carrying out policies fundamental for the State and the society; or
- carrying out activities of an economic or social nature, fulfilling specific obligations of public service.

- the public interest is likely to be overriding only if it is a long-term one

Example: Maritime spatial planning offers a framework within which all relevant data relating to a proposal that may have an impact on can be considered.



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Other exemptions (3)

- 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



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Other exemptions (4)

Disproportionate costs (1)

b) disproportionate costs

When assessing whether costs of a measure would be disproportionate, the following elements should be considered:

- The risks to the marine environment; i.e. the risk to permanently jeopardise the achievement of GES or environmental targets set by MS ; and
- There should be no further deterioration, no further degradation of GES
- For an exemption to apply in this case it will be essential to demonstrate the exemption due to disproportionate costs will



not permanently compromise GES

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Other exemptions (5)

Disproportionate costs (2)

- Other environmental legislation offer some clarity on whether costs are disproportionate, in particular, the considerations of the WFD which are also relevant to the MSFD:
- Disproportionality should not begin at the point where measured costs simply exceed quantifiable benefits;
- The assessment of costs and benefits will have to include qualitative costs and benefits as well as quantitative;
- The margin by which costs exceed benefits should be appreciable and have a high level of confidence;
- The ability to pay off those affected by the measures is important.



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Exemptions due to natural conditions which do not allow timely improvements

It covers cases where, because of natural conditions, such as slow recovery of ecosystems or high natural variability, measures taken will only allow to meet environmental targets and reach GES after 2020.

In this case, MS should specify by when they will reach GES. This exception is therefore an exception to the deadline by which GES must be achieved and not to the full achievement of GES at a future point in time.

Example: despite all relevant measures implemented to reduce eutrophication in a sea basin, positive effects on the environmental status will be felt only after 2020.



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Article 14(4) – (1)

MS 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 IA described in Art 8, to take specific steps where there is no significant risk to the marine environment, or where the costs would be disproportionate and provided that there is no further deterioration.

If a MS does not take any steps, it shall provide the EC with the necessary justification to substantiate its decision.



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Article 14(4) – (2)

MS which, following their IA , have assessed that their marine environment is not in GES, face a significant risk to their marine environment in light of the MSFD's objectives.

- Any exception to the application of the MSFD should in any case be interpreted and assessed, in line with EU case-law.
- There are very few areas where MS have assessed their marine environment as being in GES and few instances where environmental targets set have been fully achieved already. It is therefore expected that the use of this category of exemptions will be limited.



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Reporting an exemption

Exemption code/name	Article	Reason	Justification
	Art 14.1 b Natural causes	Floods	Text
		
Consequences for MS			
Ad hoc measures taken			
Mitigation			
Targets			
Relevant descriptors			



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Overview of Member States' obligations under Article 14

Obligations of Member States when applying Article 14(1) to (3)	Obligations of Member States when applying Article 14(4)
Identify exemptions in the programme of measures,	Avoid that the achievement of GES be permanently compromised. Identify exemptions in their programme of measures. Provide the Commission with the necessary justification to substantiate their decision
Consider the consequences for Member States in the marine region or subregion concerned,	
Take appropriate ad-hoc measures aiming to continue pursuing the targets,	
Take appropriate ad-hoc measures aiming to prevent further deterioration (applicable only to points (b), (c) and (d) of Article 14(1)),	
Take appropriate ad-hoc measures aiming to mitigate the adverse impact in the marine waters of other Member States,	
Integrate, as far as practicable, ad-hoc measures into the programme of measures,	
Ensure that the use of exemptions under Article 14(1), point (d), does not permanently preclude or compromise the achievement of GES in the marine waters concerned or	

Thank you!



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