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COMMUNICATION FROM THE COMMISSION

**Commission Notice on the threshold values set under the Marine Strategy Framework
Directive 2008/56/EC and Commission Decision (EU) 2017/848**

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I. Introduction

The aim of this notice is to clarify issues related to the legal status and use of the threshold values for good environmental status set through EU, regional or subregional cooperation, in line with the Marine Strategy Framework Directive ⁽¹⁾ (Directive 2008/56/EC, hereafter ‘the Directive’) and 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 ⁽²⁾ (hereafter ‘the Decision’).

II. Legal context

The Directive requires Member States to take the measures needed to achieve or maintain good environmental status in the marine environment by 2020 at the latest (Article 1(1)). To achieve this objective, they must develop and implement marine strategies as set out in Article 5. One aspect of the marine strategies is to ascertain whether marine waters are in good environmental status (Article 5(2)(a)(ii)).

‘Good Environmental Status’ (GES) is defined under Article 3(5) of the Directive 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’*.

In line with Article 9(1) of the Directive and based on the initial assessment made under Article 8(1), Member States must assess a set of GES characteristics for the marine waters of each region or subregion. In doing so, they must take account of the eleven qualitative descriptors listed in Annex I to the Directive. The criteria and methodology standards on GES of marine waters to be used by Member States are set out in the Decision. Article 9(3) of the Directive states that they were set by the Commission *‘in such a way as to ensure consistency and to allow for comparison between marine regions or subregions of the extent to which good environmental status is being achieved’*.

Under recital 8 of the Decision, *‘For each of the qualitative descriptors listed in Annex I to Directive 2008/56/EC, and on the basis of the indicative lists in Annex III to that Directive, it is necessary to define the criteria, including the criteria elements and, where appropriate, the threshold values, to be used. Threshold values are intended to contribute to Member States’ determination of a set of characteristics for good environmental status and inform their assessment of the extent to which good environmental status is being achieved.’* Article 2, second subparagraph, point (5) of the Decision specifies that *‘“threshold value” means a value or range of values that allows for an assessment of the*

⁽¹⁾ OJ L 164, 25.6.2008, p. 19.

⁽²⁾ OJ L 125, 18.5.2017, p. 43.

quality level achieved for a particular criterion, thereby contributing to the assessment of the extent to which good environmental status is being achieved.'

The Decision states that the Annex sets out two types of criteria for defining GES: primary⁽³⁾ and secondary criteria⁽⁴⁾. Member States are in principle obliged to use the primary criteria, unless – based on the initial assessment of the status of their marine waters or subsequent updates carried out in line with Articles 8 and 17(2)(a) of the Directive – they duly explain why a primary criterion does not apply. However, under Article 3(2) of the Decision, Member States have a degree of flexibility in deciding whether to use secondary criteria (unless otherwise specified in the Annex). Member States can decide to use a secondary criterion, where necessary, to complement a primary criterion or when, for a particular criterion, the marine environment is at risk of not achieving or not maintaining GES.

The purpose of threshold values is to assess the quality level achieved for each (primary or secondary) criteria which, in turn, are used to assess the achievement of qualitative descriptors listed in Annex I to that Directive. Those descriptors are used to determine, achieve or maintain GES, which is the main objective of the Directive.

A number of threshold values are already established in the Annex to the Decision, they derived from existing legislation and are therefore already applicable. For the other threshold values that need to be set under the Decision, Article 5(1) of the Decision requires Member States to establish these by 15 July 2018⁽⁵⁾. If Member States are not able to set threshold values within that period, they must set them '*as soon as possible thereafter*'⁽⁶⁾, provided that they provide reasons for the delay to the Commission in the notification made under Article 17(3) of the Directive.

To date, a number of threshold values⁽⁷⁾ have been set for different descriptor criteria through EU-level and regional or subregional cooperation.

III. The status of threshold values for good environmental status

(1) Threshold values that differ from those set at EU, regional or subregional level

The first issue to clarify is whether Member States can use, for the same criterion, national threshold values that are different to those set at EU, regional or subregional level.

Article 9(3) of the Directive is the legal basis for the Decision. The Decision requires that threshold values are designed to '*ensure consistency and to allow for comparison between marine regions or subregions of the extent to which good environmental status is being achieved*'. If Member States were allowed to continue using their own national threshold values once threshold values are set at EU, regional or subregional level, it would

⁽³⁾ See Annex to the Decision: D1C1, D1C2, D1C3, D1C4, D1C5, D1C6, D2C1, D3C1, D3C2, D3C3, D4C1, D4C2, D5C1, D5C2, D5C5, D6C1, D6C2, D6C3, D6C4, D6C5, D8C1, D8C3, D9C1, D10C1, D10C2, D11C1, D11C2.

⁽⁴⁾ See Annex to the Decision: D2C2, D2C3, D4C3, D4C4, D5C3, D5C4, D5C6, D5C7, D5C8, D7C1, D7C2, D8C2, D8C4, D10C3, D10C4.

⁽⁵⁾ In accordance with paragraph 2(a) of Article 17 of the Directive.

⁽⁶⁾ Article 5, paragraph 2, of the Decision.

⁽⁷⁾ See the annex to this Communication.

undermine the objective of Article 9(3), which also aims to ensure that the authorities act in a coherent and coordinated manner across the EU.

It would also go against the provisions of the Decision. As indicated before, Article 4(2)(a) of the Decision only allows Member States to use national threshold values until threshold values have been established through Union, regional or subregional cooperation. This implies that, once the threshold values are set at supranational level, Member States may no longer use their own national threshold values. The wording of recital 12 supports this conclusion. Under that recital, *'until such threshold values are established through Union, regional or subregional cooperation, Member States should be able to use national threshold values, directional trends or pressure-based threshold values as proxies'*.

Therefore, **Member States are no longer allowed to use different national threshold values, once such threshold values are set at EU, regional or subregional level.**

(2) Existence of a discretion for the Member States not to make use of threshold values set through EU, regional or subregional cooperation in the context of the Article 17 updates of marine strategies

The second issue to clarify is whether Member States are allowed not to apply the threshold values set through an EU-level, regional or subregional process when updating their marine strategies. Specifically, whether this is allowed when determining the environmental status of their marine waters under Article 17 of the Directive.

Under Article 2, second subparagraph, point (5) of the Decision, threshold values *'allow for an assessment of the quality level achieved for a particular criterion'*. This means that, when Member States choose to apply a given descriptor or criterion and the corresponding threshold values have been set at EU, regional or subregional cooperation level, they must use the latter threshold values.

However, in line with Article 3(1) or (2) of the Decision, Member States are allowed not to use the threshold values set at EU, regional or subregional level when those values cover a criterion that is not applied by that Member State. The same applies to threshold values that cover descriptors that a Member State considers as 'not appropriate', in line with Annex I to the Directive.

The 'decision' ⁽⁸⁾ by a Member State not to apply a given descriptor or criterion 'automatically' extends to the elements, threshold values and methodological standards corresponding to the given descriptor or/and criterion. In other words, when a Member State decides not to use a given descriptor or criterion, by extension it decides not to use the threshold values related to that descriptor and/or criterion.

In conclusion, **when updating their marine strategies in line with Article 17 of the Directive, Member States are allowed not to use the threshold values set at EU, regional or subregional level only in so far as the threshold values relate to descriptors**

⁽⁸⁾ Since Member States are authorised, under certain conditions, not to use certain descriptors or primary criteria, and to decide (unless otherwise provided by the Annex to the Decision) whether to apply the secondary criteria, the use of the word 'decide' in Article 6 of the Decision should be understood as the Member States' choice as to which descriptors and criteria to apply.

or criteria that they have chosen not to apply in compliance with the conditions set by the Directive and the Decision.

IV. Using threshold values to assess environmental status

The Decision requires Member States to set threshold values, as well as other criteria and methodological standards related to the determination and assessment of GES, by 2018 or *'as soon as possible thereafter'*, under the condition that they have provided justification to the Commission (Article 5).

Given the Directive's objective to achieve or maintain the good environmental status of the sea by 2020 at the latest, Member States should have set threshold values during the second cycle of implementation of the Directive ⁽⁹⁾.

Under Article 6 of the Decision, once these threshold values are set, Member States should inform the Commission, when updating their marine strategies, on the use of such values and other methodological standards for assessing GES.

It is therefore expected that, within the next updates carried out in accordance with Article 17(2)(a) and (b) of the Directive of (i) the initial assessment and determination of GES as provided for in Articles 8(1) and 9(1), and of (ii) the environmental targets set under Article 10(1), Member States will apply the threshold values set through Union, regional or subregional cooperation, as well as threshold values deriving from existing legislations already established in the Annex to the Decision for the criteria that they will use to assess environmental status.

When Member States are not able to use these threshold values, notably when updating the initial assessment pursuant to Article 8(1), this should be duly justified. For example, there may be instances where a Member State uses the set threshold values as part of the updated reporting on GES under Article 9(1) but has not been able to use the same thresholds to update the initial assessment under Article 8(1), as the values had not yet been set at the time the assessment of their marine waters was prepared.

Thus, when evaluating the Member States' updated marine strategies, notably the assessment of the state of their marine waters and progress towards achieving GES, the Commission will check whether Member States have used threshold values to determine GES in their updates of the marine strategies.

⁽⁹⁾ Articles 5(1) and 5(2) of the Decision.