

Review of International Legal Instruments, Policies and Management in respect of the Wadden Sea Region

EXECUTIVE SUMMARY

Introduction

This report sets out the findings of an independent study into the implementation and operation of key legislation and policies of relevance to the Wadden Sea region. The report also examines the implications for the management of the Wadden Sea of international policy and legislative initiatives. The Wadden Sea is one of Europe's most significant habitats and wildlife sites. It is protected by a number of international and European designations, including the Birds and Habitats Directives. In recognition of its importance, both internationally and regionally the three countries of the Wadden Sea – Germany, Netherlands and Denmark - have entered into a trilateral policy agreement to manage the area as a single ecological entity. This agreement is set out in the Stade Declaration and the Trilateral Wadden Sea Plan. The purpose of this study is to examine the implementation of key legal and policy instruments as they operate within and across the national and sub-national authorities within the region. In addition, the study examines the implications for the region of emerging and planned policy and legislative initiatives and the challenges facing the area from developments in policies for agriculture, fishing, tourism and other economic and commercial activities. The context of the review is that the Wadden Sea is a single ecological system that cannot be understood or examined on the basis of national or regional boundaries. To that end, and in the spirit of the trilateral agreement, the review will seek to identify a specific 'Wadden Sea perspective' in the approach used for the implementation of policy and legislative instruments. That 'perspective' is defined by decision-makers commencing their decision making processes with the Stade Declaration and the Wadden Sea Plan as the prime consideration. The review examines the implementation of legislative and policy instruments within that context and seeks to identify any barriers that may exist to the coherent and consistent implementation of legislation and policy across the Wadden Sea as a whole.

The study has been commissioned by the Wadden Sea Forum and was conducted by the Impacts Assessment Unit (IAU) of Oxford Brookes University. The IAU is a multi-disciplinary independent research and consultancy team within the University's Department of Planning and School of Biological and Molecular Sciences. The key tasks to be undertaken to complete the review were:

1. To review the Habitats Directive, the Birds Directive, the Water Framework Directive and the Environmental Impact Assessment Directive with regard to the Wadden Sea region;

2. To review other relevant European Community instruments and policies in particular, the Common European Agricultural, the Common European Fisheries Policy, policies relating to the industry and transport sector, tourism and social development with regard to their implications for the Wadden Sea region;

3. To review the concept of Integrated Coastal Zone Management, as recommended by the European Parliament, and its implications for the Wadden Sea region;

4. To review other relevant international legal instruments, policies and strategies relevant for the Wadden Sea region; and

5. To draw conclusions from the above and make recommendations for actions that strengthen the implementation and operation of environmental policy instruments in the region as a whole.

The study was primarily based upon a literature and documentary review, but the information from this review needed to be supplemented by a short email questionnaire to competent authorities and others involved in the implementation process. Further information has been gathered through discussions with the officers of the Common Wadden Sea Secretariat (CWSS) and others.

The Stade Declaration and the Wadden Sea Plan

The academic literature on policy and implementation theory identifies the following as key factors in successful policy implementation:

- the policy or legal instrument being implemented must have enforceable legitimate authority;
- the legitimate authority of regimes must be based on inclusive negotiation;
- there must be horizontal and vertical co-operation and co-ordination between implementation agencies;
- there must be consistency of decision-making; and
- agreements on implementation must have 'teeth' and be more than 'paper thin' to ensure compliance.

The overarching policy that is of prime consideration here is the Stade Declaration and the Trilateral Wadden Sea Plan (WSP). The Guiding Principle of the Trilateral Wadden Sea Plan is **'to achieve, as far as possible, a natural and sustainable ecosystem in which natural processes proceed in an undisturbed way'**. The trilateral agreement has at its heart a commitment to treat the Wadden Sea as a single ecosystem and the recognition that activities outside of the designated protection areas can have implications for the sites themselves. Yet the area covered by the declaration and the WSP is limited, in the most part, to the protected areas. There would appear to be little if any policy commitment to consider the Wadden Sea ecosystem within a wider regional social and economic context and this research has found little evidence to suggest that there is a definitive geographical area of a Wadden Sea 'region'. Furthermore, the Stade Declaration provides no legally binding instruments for the implementation of the WSP and it therefore lacks the enforceable legitimate authority necessary to be capable of fully integrated compliance.

The Key European Environmental Directives

The literature on implementation theory is also useful for the analysis of the implementation of the EUs key environmental Directives in the Wadden Sea region. Firstly, the basis of the Trilateral Wadden Sea Co-operation (TWSC) is the need to consider and manage the Wadden Sea region as a single

ecosystem and habitat. This requires consistency of decision making across the region as a whole and this consistency can only be achieved through close co-operation and communication at the relevant level of decision making. Secondly, the EU environmental Directives should be seen as an integrated whole package of measure that have the single aim of implementing EU wide environmental policy. To achieve this it is necessary to have in place co-operative measures that ensure co-ordination between the agencies responsible for implementing the separate legislative requirements. Thus, an agency, or section within an agency, responsible for implementing the EIA Directive should consult with those responsible for implementing the Birds, Habitat and Water Framework Directives when making screening decisions. The review has discovered evidence that the required level of vertical and horizontal integration and co-operation necessary for the successful implementation of the three key Directives, in line with the spirit of the Stade Declaration, is not in place.

The WSP recognises the need for a common approach to the establishment of the areas to be covered by the Birds and Habitats Directives. In the Stade Declaration it states that the Ministers 'agree to work further towards a more coherent Natura 2000 area for the Wadden Sea' (para. 19). From the evidence of this review there is still much to be done in this respect. There is evidence that certain areas have been excluded from listing as candidate SACs for other than ecological reasons. This is likely to prove to be a mistake in the long run as such areas still enjoy protection under Article 6(3) and 6(4) of the Habitats Directive and any activities that are likely to cause significant adverse effects to such areas will undoubtedly find their way to the European Court of Justice (ECJ). However, for the Wadden Sea area to be managed as a single ecosystem it is essential for consistency in decision-making that there is consistency in the delimitation of Natura 2000 habitats. In terms of policy and legislative implementation, it makes more administrative sense for there to be a single identifiable geographical area that covers all of the relevant designations than very many areas covered by different designations. It also needs to be recognised that projects beyond the boundaries of the SPAs and candidate SACs, that are not within sensitive ecological areas themselves, can still result in significant adverse effects to the Natura 2000 sites. This is a point that is again recognised by the Stade Declaration (e.g. at paragraph 13). Yet there appear to be instances where this point is not being acted upon in practice by competent authorities. The Ems River dam would appear to be such an example (EUCC Coastal News No 7, 23 June 2003).

The Habitats Directive makes non-mandatory provision for the development of a management plan for Natura 2000 sites. Such a plan would be of particular value in the trilateral circumstances of the Wadden Sea where the area is to be managed as a single ecosystem. The purpose of the management plan is to provide conservation measures that ensure the 'favourable conservation status' of the sites. Where 'existing or foreseen activities' are not conducive to the maintenance or enhancement of the conservation status, the management plan should include measures to reduce or remove the impact of those activities. In the context of the Wadden Sea, this would mean that a Natura 2000 management plan would have to consider the impact of all existing and foreseen activities including fishing, shipping, agriculture and other socio-economic activities that are likely to have an adverse impact on the protected areas and set targets for the removal of the adverse effects.

For the WSP to develop into a Natura 2000 management plan, that was capable of removing the adverse impacts of existing or foreseen activities, it would be necessary for it to have the enforceable legitimate authority discussed at Section 1.3 of this report.

There are clear differences in the operation of the EIA Directive across the Wadden Sea region. Screening thresholds have been set at very different levels, the areas established as 'sensitive areas' for screening purposes have been based on different criteria in each of the three countries. There appears to be no common approach to scoping or public consultation. There would also appear to be a difference in the level of EIA activity between the three countries. Within the context of the trilateral co-operation to treat the Wadden Sea as a single ecosystem, it is necessary for there to be consistency in the approach to the application of the EIA Directive. This can only be achieved if decision making on key stages of the process is consistent. For this to be achieved there needs to be a common approach to the establishment of geographical areas where common screening and scoping 'rules' apply. Furthermore, the geographical coverage of screening and scoping 'rules' must reflect the fact that projects located outside of the trilateral co-operation conservation area may have wider effects that have impacts on that area. The discretion permitted by the EIA Directive would allow for the use of the 'sensitive area' concept to be used to define such geographical areas and thus allow for greater consistency of decision making. The Common Wadden Sea Secretariat and the IRWC could also contribute to greater consistency of decision making by involving them in the screening and scoping process. Yet, and this is a major surprise to the research team, CWSS and the IRWC play only a peripheral role in the implementation of this key Directive. The requirement to amend EIA legislation to transpose the terms of the Aarhus Convention will offer the Member States of the Wadden Sea an opportunity to increase the role of the Secretariat and the IRWC in EIA procedures.

The implementation of the Water Framework Directive is at the early stages in the three countries of the Wadden Sea and is largely confined to the establishment of working groups, the development of guidance and establishing responsibilities. As with the other key Directives, implementation is largely a top-down process with the competent authorities largely led in their actions by national and regional tiers of government. There is a good deal of confidence within the authorities of the three countries of the Wadden Sea region that the WFD will be successfully implemented within the time-scale provided. There is widespread recognition that a harmonised and co-ordinated approach will be necessary and that this will need to be at all levels of government – horizontal and well as vertical - and across international boundaries. Yet, the implementation of the Directive remains largely based upon a national and regional approach and there is little evidence that a clearly defined Wadden Sea regional perspective is being used. The real success in implementing the WFD in the Wadden Sea region will come when it is seen by all parties as an opportunity to use the guiding principles of the State Declaration and the Wadden Sea Plan – that the Wadden Sea should be considered and managed as a single ecosystem – as the starting point for implementation, rather than something to be considered after adherence to national legislation.

The requirements of the WFD to integrate river basin management with the requirements of the Birds and Habitats Directives illustrates the need to see these key Directives as a whole package of measures intended to implement wider EU environmental policy. They should not be seen as individual pieces of legislation to be operated and considered separately. The EU Directives, particularly the Habitats and the WFD, include provisions for the development of management plans. There appears to be a real danger that management plans for the area will be largely limited to national and sub-national boundaries. This would represent a missed opportunity. The trilateral co-operation on the Wadden Sea provides an opportunity not available in almost any other area of Europe to ensure that these management plans are developed within a framework of a Wadden Sea perspective, rather than based on national priorities. Through the integration of the requirements of the key Directives it would be possible to produce a clearly identifiable geographically defined Wadden Sea region that would be based upon the same criteria in each of the three countries. In administrative terms alone, it would seem appropriate in these circumstances, to widen and strengthen the role of the CWSS to co-ordinate such an approach.

Integrated Coastal Zone Management

European work involving institutions, studies and demonstration programmes for ICZM has accelerated since the mid-1990s, leading to recommendations for ICZM and a Coastal Code of Conduct, as well as guidance notes for the sectors involved. Internationally and in Europe, best practice principles have been developed and research into ICZM cases within the EU have led to maps of coastal systems, guidance, an analysis of policy instruments and some thoughts on public participation in ICZM. The trilateral agreements on the Wadden Sea provides a firm basis for the development of an ICZM strategy, but as can be seen from the best practice checklist, at 3.3.2 in the main report, many of the elements necessary to create such a strategy are not yet in place. One key requirement is that a definitive geographical area, that links the socio-economic and the conservation and other resources of the area, needs to be identified. The development of a Wadden Sea ICZM strategy, that covers the whole of the region, would face many challenges, not least of which would be the need for any strategy to have real teeth and the force of enforceable legitimate authority for its success. However, an ICZM for the Wadden Sea would also present many opportunities, including the close integration of the operation of the Birds, Habitats, EIA and WFD Directives, with other areas of European Environmental Policy, the principles of sustainable development and the key areas of commercial and economic activity in the area.

Community and International Legal Instruments, Policies and Strategies

From the review of developments in European and international policy and legislation, it is possible to conclude that the trend is towards increasing controls and for greater recognition of the need for international co-operation and action. This trend is taking place within a framework of structural changes in traditional industries such as farming and fishing and the reduction in European subsidies for these industries. These economic changes will undoubtedly produce pressure for action to regenerate the local economy, especially in the tourist and shipping industries. Both activities have the potential for negative impacts upon the conservation value of the Wadden Sea and will need to be

carefully managed and monitored. The economic pressures on the Wadden Sea area will require the current co-operative agreements on its conservation and management to be substantially strengthened to ensure consistency of decision making, and to share benefits to conservation and economic interests. As will be noted from the review of EU and international policy and legislation, the IAU is of the opinion that the most effective way of dealing with all of these issues is through the development of a ICZM strategy for the Wadden Sea and its wider region.

Conclusions and Recommendations

This review has highlighted the very many challenges to the operation of international and European policy and legislation in the Wadden Sea region. The review of the key areas of EU legislation highlighted the difficulties that already exist due to the complex web of competent authorities involved and the seemingly lack of a real sense that they have a specific 'Wadden Sea perspective' when applying the legislation. For the policies and legislation to have real effect they must be implemented consistently. This research has established that there are areas where the key EU Directives are not being applied in the same way across the Wadden Sea region as a whole. This is partly because of the 'top-down' approach to implementation and the apparent lack of cross authority co-operation at the local level, partly because of the discretion allowed by the Directives themselves, and partly because the Stade Declaration lacks sufficient enforceable legitimate authority. This lack of consistency in implementation does contradict the spirit of the Stade Declaration and the trilateral co-operation commitment to treat the Wadden Sea as a single ecosystem. The research team was particularly surprised, given the context of the Stade Declaration, that the Wadden Sea Secretariat are not, as a matter of course, consulted on all Habitats Directive Article 6 appropriate assessments and EIA projects that effect the area. The team was also surprised to learn that the development of the ICZM for Schleswig-Holstein did not involve the Wadden Sea Secretariat in anything other than a very peripheral role.

There appears to be little common approach to the designation of candidate sites under the Habitats Directive. This not only displays a lack of a specific 'Wadden Sea perspective' but also questions the commitment to the concept of Natura 2000 and the treatment of the Wadden Sea as a single ecosystem. The designation of the candidate SACs should be solely on ecological criteria and, from the maps at Appendix 1, this would appear not to have been the case in the Wadden Sea. This is an extremely short sighted strategy, as areas that meet the ecological criteria for designation remain protected under Articles 6(3) and 6(4) of the Directive. The Member States and competent authorities of the region should take the opportunities offered by the implementation of the WFD to more fully embrace the principles and spirit of the Stade Declaration. There should be a co-ordinated effort to see the three key Directives as part of a single package and ensure that they are implemented within the overall spirit of EU environmental policy.

There are a considerable number of issues, trends, policies and legal instruments that have the potential to influence the future of the Wadden Sea region. The main challenges come from the increasing development of and dependence upon tourism, as rural and coastal communities experience a decline in incomes from farming and fishing and other more traditional industries. This

dependence on tourism will bring with it pressures for development that, if not properly managed, will have the potential for adversely affecting the wildlife interests of the Wadden Sea region. The main opportunities for the future of wildlife conservation stem from the increasing policy trend, both internationally and within the EU, for a much more sustainable approach to economic development. The commitment to sustainable forms of development, and the emphasis on strict enforcement of EU environmental legislation within the 6th Environmental Action Programme, should provide some reassurance to those who wish to maintain and enhance the ecological interests of the Wadden Sea. This study suggests that the best way to ensure that environmental and other interests' objectives are met is by the co-ordinated application of all relevant policies through the development and implementation of an Integrated Coastal Zone Management strategy. This strategy could include the management plan requirements of both the Habitats Directive and the WFD and provide clear guidance on the consistent application of the EIA Directive. However, for such an approach to work all the parties involved must be committed to the best practice principles for ICZM, including the need for such plans to have real enforceable legitimate authority.

Recommendations

5.2.1 The recommendations set out below are divided into two sections. The first set of recommendations can be termed general or strategic recommendations and the second set are more specific.

Strategic

1) This research has highlighted the lack of region-wide enforceable legitimate authority for the State Declaration and Wadden Sea Plan. The consistent implementation of EU Directives across the region will continue to be weak so long as that authority is missing and it would be difficult, if not impossible, to fully implement an ICZM strategy without such authority. A key recommendation from this study must therefore be for the trilateral agreement to be amended so that the policies it seeks to be enforced have the 'teeth' to ensure compliance. The establishment of such a regime will undoubtedly be politically sensitive and controversial, but in the long term it will be in the interests of all three Member States to co-operate at that level. An agreement to manage the area within a framework of enforceable legitimate authority will ensure that there is a consistent approach to decision making, that the interests of the Wadden Sea come before the administrative interests of individual authorities and that the needs of the social and economic interest of the region are taken fully into account in an integrated and consistent way. The benefits offered by the integrated long term sustainable planning of ICZM will not be realised in the region unless it has the 'teeth' to ensure compliance. A new international regime for the region must be properly resourced and capable of achieving the following:

- coherence and consistency of approach across the region;
- transparency in decision-making;
- maximise the use of expert knowledge and knowledge of local circumstances;
- capacity to ensure observance of regulations; and
- speed of action.

2) In tandem with the establishment of enforceable legitimate authority there needs to be a geographically coherent area that links the protected sites with their inland hinterland. The basis for this area could be formed through the integration of the management plans required by the Habitats and Water Framework Directives and the use of the sensitive area concept from the EIA Directive. The area would need to be large enough to ensure that projects or plans that are outside of designated areas, but have the potential to cause them harm, can be considered in a consistent manner with those that are within protected areas. This would form the basis for a geographically recognisable Wadden Sea 'region' and would be the area to be subject to an ICZM strategy.

3) As mentioned above, ICZM offers major benefits in securing the long term interests of the people of the Wadden Sea region and the wildlife and their habitats. The Wadden Sea Forum might consider recommending to the three governments that a tri-lateral ICZM strategy be developed in accordance with the EU's recommendations of 2002 on ICZM. The Wadden Sea Secretariat might also consider joint initiatives on the European Spatial Development Plan (ESDP) and ICZM, and to ensure that environmental considerations, broadly interpreted on an ecosystem basis, are integrated into any ESDP programmes. This programme should be based upon the best practice principles requirements provided in Section 3.4.2 of this report and, as referred to above, should be part of the development of a much stronger trilateral agreement. Also in line with the principles discussed at Section 3.2, the ICZM strategy should have policies that cover all sectors of socio-economic activity within the region (including agriculture, fisheries, tourism, service and industrial sectors, transport and construction) and these policies must deal with the interconnections between sectors and the strategy must explain how the policies will contribute to the sustainable social-economic needs of the region as well as the maintenance and enhancement of the ecological integrity and processes of the Wadden Sea. Furthermore, the development of an ICZM strategy will require the implementation of most of the recommendations of this report including: the identification of a coherent geographical area to be covered by the strategy, enforceable legitimate authority, public inclusion in line with the requirements of the Aarhus Convention, and be based upon a clear integrated research strategy

4) The Member States should continue to press for World Heritage Site status for the Wadden Sea. That status will bring with it further responsibilities for close co-operation over the management and development of the area that will more effectively be achieved through an ICZM strategy.

Specific

5) In the absence of an agreement to form a new authority for the area, and as a minimum, the Member States of the Wadden Sea region should take the opportunity provided by the transposition of the Aarhus Convention into European Community law to make the Wadden Sea Secretariat a statutory consultee on all projects likely to have significant environmental effects within the region. This would include consultation on appropriate assessments under the Habitats Directive, screening and scoping under the EIA Directive and full participation in the working groups established to

implement the WFD. This would provide the specific Wadden Sea perspective into decision making that is currently lacking. The Secretariat does not currently have the resources or the expertise to take on this role, however, as part of a changing role for the secretariat these resources should be provided.

6) The Natura 2000 designation should cover all of the areas designated as SPAs and candidate SACs. As the whole of the trilateral co-operation area has been recognised by the three Member States as a single coherent ecosystem, then, at the very least, all of the area covered by the State Declaration should become part of the Natura 2000 site. To achieve this it will be necessary to ensure that the boundaries of the current candidate SACs are widened to include those areas of the co-operation area not currently designated. Not only is this important in terms of the coherency of the ecosystem and consistency of decision making, it also makes much more administrative sense to have a single area covered by the Natura 2000 designations than very many areas with lots of artificial boundaries.

7) In recognition of the very many different types of designations – Ramsar, PSSA, SPA, SAC etc – and the trilateral agreement, there should be a Natura 2000 management plan for the Wadden Sea. The WSP forms an excellent starting point for the development of such a plan, however, in line with recommendation 1 above, the plan would need to have enforceable legitimate authority. To achieve that authority the plan would need to be an inclusive document that takes into consideration all interests in the region and this would be most effectively achieved if the plan forms part of an ICZM strategy.

8) There needs to be firm guidelines for the completion of appropriate assessments Under Article 6 of the Habitats Directive for the region as a whole. These guidelines should be based upon the EC's methodological guide but reflect the specific characteristics of the Wadden Sea. The guidelines would need to be subject to a consultation exercise with the competent authorities, relevant NGOs and other key interests.

9) The operation of the EIA Directive should be based upon a specific Wadden Sea perspective. That will require greater harmonisation of the screening, scoping and public consultation procedures within the region as a whole. There is a need for greater recognition that projects outside of the co-operation area have the potential to have significant impacts on that area. To this end there needs to be a widening of the 'sensitive areas' so that the inland areas are also considered to form an important part of the Wadden Sea. It will be for the authorities of the region to determine how this broadening of the sensitive area concept would be achieved. However, in line with recommendation 2 above, the EIA sensitive area could be harmonised with any used for an ICZM strategy. Once this area is identified, competent authorities could legitimately take the view that all Annex II projects within that area should be subject to EIA.

10) The basis of a Natura 2000 management plan, management plans for the RBDs under the WFD and a ICZM strategy is a full audit and assessment of the current ecological baseline conditions, the social and economic structure of the region and the impacts these activities have on the ecosystem. Currently it would appear that , particularly for the WFD, this work is being carried out separately at a local administrative level. The Member States have agreed through the State Declaration and elsewhere that the Wadden Sea is a single ecosystem. Such an ecosystem cannot be understood by examining its individual parts. Therefore there needs to be a much more integrated research programme that examines the linkages between economic activity and ecological coherence. The three Member States should jointly fund a fully integrated programme of research that will provide a firm basis for the ICZM strategy and the various management plans required by the key Directives.

11) The lack of a clear and specific Wadden Sea perspective on decision making suggests that there is a need for regular training of the competent authority officers who work on the Habitats Directive, EIA, and the WFD. This training should emphasise the ecological coherency of the area, the links between the sea and inland areas and the activities that have the potential to adversely affect the habitats.