Multi-Dimensional Public Governance Arrangements for the Protection of the Transboundary Aquatic Environment in the European Union: The Changing Interplay between European and Public International Law

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1. Introduction

The public governance arrangements applicable to the protection of the transboundary aquatic environment in the European Union are undergoing systemic change. The main thrust of this change is a redefinition of the relationships between the member States, the Community and international organizations established to manage transboundary rivers, such as the Rhine, and (sub)regional seas, such as the North Sea. In the parlance of European policy, these international organizations are referred to, respectively, as international river commissions and regional seas commissions. In practice

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they increasingly are taking on the role of bodies that implement European policy and law, instead of bodies that develop international policy and law that are to be implemented through the law of the member States and European law. The legal structure for this development is provided by two European directives that together offer a comprehensive framework for developing more integrated approaches to managing sweet water and the marine environment in the European Union. The relevant directives are the Water Framework Directive (WFD)\(^1\) and the Marine Strategy Framework Directive (MFD).\(^2\)

The WFD entered into force on 22 December 2000 and the waters in the European Union must meet the conditions set out in the directive by 2015, at the latest.\(^3\) The MFD entered into force on 15 July 2008 and the marine environment must meet the conditions set out in the directive by 2020, at the latest.\(^4\) These directives, however, are part of wider European policy initiatives. They are, amongst other things, part of initiatives that seek to foster cooperation at the inter-regional level. The so-called Interreg water

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\(^3\) Art. 4(1)(a)(ii) and (1)(b)(ii), WFD.

\(^4\) Art. 1(1), MFD.
related projects, financed by the European Fund for Regional Development, provide relevant examples.5

In this essay public governance arrangements are understood as the legal and policy framework that determines the manner in which power is exercised for purposes of pursuing common (or public) interests. This essay contends that the public governance arrangements established by the WFD and MFD are of a multi-dimensional character, with the WFD and the MFD, and thus the member States and the Community, inter-acting in a variety of ways with international river commissions, such as the International Commission for the Protection of the Rhine (Rhine Commission)6 and regional seas commissions, such as the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Commission).7 In addition, the member States and the Community on the basis of these directives also interact with international institutions, such as the International Maritime Organization (IMO)8 and the bodies operating under the auspices of the United Nations Economic Commission for Europe’s Helsinki Convention on Protection and Use of Transboundary Watercourses and International Lakes (UNECE Helsinki Convention).9

The hypothesis explored in this essay is that the public governance arrangements for international rivers and regional seas as introduced by the WFD and MFD are of a multi-dimensional, as opposed to multi-layered, character,10 with international river and regional seas commissions in practice increasingly serving to implement the two directives. I use the

5) See section 5 below.
8) For further information, see <www.imo.org/>, visited on 13 May 2009.
10) See further section 6 below.
term multi-dimensional, as opposed to multi-layered, because there are no distinct layers of governance impacting on each other in a hierarchical manner. Instead, European law seems to drive the system, even if formally public international law if generated in these commissions will bind the European Community and its member States when they are parties to relevant conventions. Moreover, as reflected in the texts of the directives, the directives seek both to implement and seek implementation by way of the conventions. Finally European institutions, the Commission in particular, directly engages with international river and regional seas commissions and sub-national actors in developing policies to implement the directives.

The above mentioned hypothesis will be explored by way of three dimensions. First, the consequences of the fact that the WFD and MFD use “natural units”, i.e. river basin districts and the marine (sub)regions, as the focus of regulation will be explored. Secondly, the relationship between the WFD and the MFD and international organizations, established by way of public international law – international river and regional seas commissions, in particular – will be considered. Thirdly, attention will be devoted to the position of the individual member State as the relevant unit for determining compliance with the WFD and the MFD. Fourthly, these developments will be placed in the wider context of European Union policies related to the stimulation of inter-regional cooperation. Finally, conclusions will be drawn about the nature of the public governance arrangements that are developing to protect the aquatic environment of the European Union.

2. River Basin Districts and Marine (Sub)Regions as Units of Management

The WFD and the MFD establish a comprehensive framework for the protection of the aquatic environment in the European Union. The directives do so both geographically, in the sense that all waters are covered, and qua activities, in the sense that it is difficult to imagine an activity impacting sweet water or the marine environment that cannot be regulated in view of the objectives of the WFD and MFD. Within this framework the WFD aims to protect both sweet water and the marine environment, the latter

11) See section 3 below.
12) See section 5 below.
primarily through the protection of that environment from land-based sources of marine pollution.\(^{13}\) In addition, the WFD applies to so-called coastal waters, which are defined as surface waters located one mile seaward from the baselines from which the territorial sea is measured.\(^{14}\) The MFD also applies to coastal waters, albeit only for those activities not governed by the WFD or other Community legislation.\(^{15}\) Beyond coastal waters, the MFD applies.

The regulatory system that the WFD and the MFD seek to establish uses natural units as the focus of regulation. For the WFD this unit is the river basin and the river basin district; for the MFD it is the marine region or sub-region. Beyond the focus on river basin districts and marine (sub) regions the focus on natural units is also reflected in the ecosystem-based approach, which is an integral part of both directives. In the WFD this approach is reflected indirectly by the aims of the directive\(^{16}\) and by the “good ecological status” and “good chemical status”, which represent the environmental quality objectives to be attained for surface waters.\(^{17}\) The MFD expressly refers to the ecosystem-based approach as the basis for managing human activities and the means to attain good environmental status.\(^{18}\) Moreover, the central position of environmental quality objectives, as opposed to emission standards,\(^{19}\) also implies that natural units are to be the primary focus of regulation. A closer look at each of the two directives reveals how they define the foci of regulation.

\(^{13}\) See art. 1(e), fourth indent, WFD.
\(^{14}\) Art. 2(7), WFD.
\(^{15}\) Art. 3(1)(b), MFD. It is unclear which activities in coastal waters would be governed by the MFD and not the WFD, since the latter together with other Community legislation, such as the Common Fisheries Policy (CFP), would seem to cover all relevant activities that might have an effect on the quality of surface waters and their ecosystems.
\(^{16}\) Art. 1(a), WFD.
\(^{17}\) Art. 2(18) and (21) \textit{juncto} art. 4(1)(a), WFD. See also section 4 below.
\(^{18}\) Respectively arts 1(3) and 3(5), MFD.
\(^{19}\) Emission standards instead are best regarded as tools to attain the environmental quality objectives and targets established on the basis of the WFD and MFD. See art. 10, WFD.
2.1. The WFD: River Basins and River Basin Districts

The WFD establishes “a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater”.\(^{20}\) It requires the adoption of measures at the level of river basin district,\(^{21}\) which is defined as “the area of land and sea, made up of one or more neighbouring river basins together with their associated groundwaters and coastal waters …”.\(^{22}\) A river basin is defined as “the area of land from which all surface run-off flows through a sequence of streams, rivers and, possibly, lakes into the sea at a single river mouth, estuary or delta”.\(^{23}\)

For purposes of the WFD member States are to identify the river basins located in their territory and assign them to individual river basin districts, whereby small river basins may be incorporated into one river basin district or combined with a larger river basin into one district.\(^{24}\) Groundwater is to be assigned to the nearest or most appropriate river basin district and coastal waters are to be “assigned to nearest or most appropriate river basin district or districts”.\(^{25}\) Member States shall designate a competent authority for each river basin located within their territory.\(^{26}\)

River basins located in the territory of more than one member State are to be assigned to international river basin districts.\(^{27}\) This provision involves just under 40 per cent of the river basins in the European Union and more than 60 per cent of its territory.\(^{28}\) Member States may use “existing structures stemming from international agreements” to coordinate their activities towards implementation of the directive and may designate bodies established

\(^{20}\) Art. 1(1), WFD.
\(^{21}\) Art. 3, WFD.
\(^{22}\) Art. 2(15), WFD.
\(^{23}\) Art. 2(13), WFD.
\(^{24}\) Art. 3(1), WFD.
\(^{25}\) Art. 3(1), WFD.
\(^{26}\) Art. 3(2), WFD.
\(^{27}\) Art. 3(3), WFD.
by such agreements as a competent authority for purpose of the directive.\textsuperscript{29} Where river basins extend beyond the territory of the Community, member States shall endeavour to coordinate their policies with third States with the aim of attaining the objectives of the WFD.\textsuperscript{30} To date, international bodies have not been designated as competent authorities, even if member States have charged such bodies with coordinating tasks, both amongst member States and with third States.\textsuperscript{31}

The provisions of the WFD entail that all of the land territory and all coastal waters in the European Union are part of a river basin district or international river basin district. In terms of public governance arrangements this means that, based on the WFD all of European land territory and coastal waters have been allocated to public governance units – (international) river basin districts – based on European law. European law, furthermore, in the case of international rivers, points to international organizations established by treaties under public international law as appropriate coordinating bodies that member States may use to implement the directive and offers member States the possibility of designating these organizations as competent authorities. These organizations thus perform public governance tasks within the framework of European law.

2.2. \textit{The MFD: Marine Regions and Sub-Regions}

The MFD establishes a framework for the protection of the marine environment. Geographically, the MFD applies to all marine waters, the seabed and subsoil, seaward of the baselines from which the territorial sea is measures up to the outmost reach of the area where a member State exercises jurisdiction.\textsuperscript{32} This means that the MFD applies to the territorial seas and the exclusive economic zones of the member States, and not to marine internal waters such as the Wadden Sea, to which the WFD only applies. In addition, as mentioned above, the MFD applies to coastal waters only to the extent that activities are not covered by the WFD or other Community legislation.\textsuperscript{33}

\textsuperscript{29) } Art. 3(4) and (6), WFD.
\textsuperscript{30) } Art. 3(5), WFD.
\textsuperscript{31) } \textit{Towards Sustainable Water Management in the EU}, supra note 28, p. 17 and Annex 4.
\textsuperscript{32) } Art. 3(1)(a), MFD.
\textsuperscript{33) } See text and note 15, supra.
In implementing the obligations flowing from the MFD member States are to take due account of the various marine regions or sub-regions located within the European Union.\textsuperscript{34} These regions and sub-regions accord with those employed in relevant regional sea conventions. For purposes of the MFD the Baltic Sea, the North East-Atlantic Ocean, the Mediterranean Sea and the Black Sea are defined as marine regions.\textsuperscript{35} The North East Atlantic Ocean and the Mediterranean Sea are further divided into sub-regions. For the North East Atlantic Ocean the sub-regions are the Greater North Sea, including the Kattegat and the English Channel, the Celtic Sea, the Bay of Biscay and the Iberian Coast and in the Atlantic Ocean the waters surrounding the Azores, Madeira and the Canary Islands.\textsuperscript{36} The Mediterranean Sea is subdivided into the Western Mediterranean Sea, the Adriatic Sea, the Ionian Sea and the Central Mediterranean and the Aegean-Levantine Sea.\textsuperscript{37} Member States may inform the European Commission of subdivisions in other marine regions.\textsuperscript{38} All marine regions and sub-regions are shared by two or more member States or with third States.

The MFD provides that “Member States shall, where practical and appropriate, use existing regional institutional cooperation structures, including those under Regional Sea Conventions” to coordinate activities at the level of the marine region or sub-region both among member States and with third States.\textsuperscript{39} “Regional Sea Convention” is defined as “any of the international conventions or international agreements together with their governing bodies established for the purposes of protecting the marine environment of the Marine Regions” as defined in the MFD.\textsuperscript{40} The MFD explicitly mentions the Convention on the Protection of the Marine Environment of the Baltic Sea (Helsinki Convention),\textsuperscript{41} the Convention

\textsuperscript{34} Art. 4(1), MFD.
\textsuperscript{35} Art. 4(1), MFD.
\textsuperscript{36} Art. 4(2)(a), MFD.
\textsuperscript{37} Art. 2(2)(b), MFD.
\textsuperscript{38} Art. 3(2), MFD.
\textsuperscript{39} Art. 6(1) and (2), MFD.
\textsuperscript{40} Art. 3(11), MFD.
\textsuperscript{41} The Helsinki Convention was adopted on 9 April 1992 and entered into force on 7 January 2000, replacing and earlier convention for the Baltic Seas. For further information, see <www.helcom.fi/>, visited on 13 May 2009.
on the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention)\[^{42}\] and the Convention for the Protection of the Marine Environment and the Coastal Regions of the Mediterranean Sea (Barcelona Convention) as examples of such regional sea conventions.\[^{43}\] The MFD, contrary to the WFD however, does not envisage the possibility that regional sea commissions would be appointed as competent authorities.\[^{44}\]

The MFD, similar to the WFD, allocates all marine waters subject to the sovereignty, sovereign rights or jurisdiction of member States to public governance units – marine (sub)regions – based on European law. European law furthermore, also in this case, points to international organizations, established by way of treaties under public international law, as coordinating bodies that member States may use to implement the directive. Such bodies thus, as international river commissions, perform public governance tasks within the framework of European law.

### 2.3 Natural Units as the Foci of Regulation

What the above illustrates is that both the WFD and the MFD employ natural units as the foci of regulation. This focus on natural units is also reflected in the fact that, for example, environmental objectives and targets,\[^{45}\] programmes of measures,\[^{46}\] marine strategies\[^{47}\] and river basin management plans\[^{48}\] are to be coordinated among member States which share a river basin district or a marine (sub)region.

Particularly noteworthy is the fact that together the WFD and the MFD for the first time in the history of the European Union divide all of the areas in which member States exercise sovereignty, sovereign rights or jurisdiction

\[^{42}\] See *supra* note 7.\[^{43}\] The Barcelona Convention was adopted on 10 June 1995 and entered into force on 9 July 2004, replacing an earlier convention for the Mediterranean Sea. For further information, see <http://www.unep.org/regionalseas/programmes/unpro/mediterranean/default.asp>, visited on 13 May 2009.\[^{44}\] Art. 7, MFD.\[^{45}\] Art. 3(4), WFD and art. 10, MFD.\[^{46}\] Art. 3(4) and art. 11(1), WFD and art. 5(2) and art. 13, MFD.\[^{47}\] Art. 5, MFD.\[^{48}\] Art. 13(2), WFD.
into territorially based public governance units based on European law: river basin districts and marine (sub)regions. Moreover, in the case of transboundary rivers and marine (sub)regions, the directives point to the institutional structures established on the basis of public international law as the appropriate bodies through which member States are to coordinate implementation, and in the case of the WFD it also points to these structures as potential competent authorities. The directives thereby endow the bodies with public governance tasks. 49 The next section of this essay explores the role of these bodies and their relationship to the WFD and MFD.

3. The Position of International River and Regional Seas Commissions

As discussed in section 2, international river and regional seas commissions established by international treaties have been endowed with coordinating functions on the basis of the WFD and the MFD. It is therefore worth exploring how the WFD and the MFD relate to the work of these commissions.

A preliminary point to note is that both the WFD and the MFD have a dual relationship to international treaties applicable to the protection of the aquatic environment in Europe, and thus the commissions established by those treaties. On the one hand, the directives seek to implement certain treaties; on the other hand, they seek implementation through certain treaties. Moreover, to further complicate matters, some treaties have a dual relationship with the WFD and the MFD, i.e. they both seek to implement and are implemented by the WFD and the MFD. This complicating factor is related to the fact that under European law, the Community and the

49) Comparable arrangements can be found in Directive 2006/87/EC of the European Parliament and Council of 12 December 2006 as amended 18 December 2006 laying down technical requirements for inland waterway vessels, resp. O.J. L 389/1 and O.J. L 389/261. Article 20 of the amended regulation provides that the technical annexes to the regulation may be amended based on amongst other things developments “arising from the work of international organisations, in particular that of the Central Commission for Navigation on the Rhine (CCNR)”, also by a so-called urgency procedure provided for in article 5a(6) of Council Decision 1999/468/EC, as amended by Council Decision 2006/512/EC, resp. O.J. L 184/23 and O.J. L 200/11. Article 5a(6) allows for the immediate implementation of measures if a Commission proposal is in accordance with the opinion of a regulatory committee. As a result of this arrangement, public governance powers, even of not giving final authority to, is delegated to the CCNR.
member States share competences in matters regarding the protection of the environment.50

3.1. International Treaties that the WFD and MFD Seek to Implement

Both the WFD and the MFD refer to a number of treaties in their preambles; these are treaties that the directives seek to implement. That is, the WFD and the MFD seek to contribute to the fulfilment of the obligations and commitments under public international law that the member States and the Community have undertaken on the basis of these treaties.

The WFD in its preamble refers to UNECE Helsinki Convention51 and regional seas conventions,52 including the Helsinki Convention, the OSPAR Convention, and the Barcelona Convention and its Protocol on Land-Based Sources of Marine Pollution (Athens Protocol).53 However, the list is not limitative, implying that the Convention on the Protection of the Black Sea Against Pollution54 (Bucharest Convention) would also fall in this category. The UNECE Helsinki Convention is relevant because it addresses the protection of transboundary rivers and international lakes; the regional seas conventions because they, among other things, address land-based sources of marine pollution. Both the Community and the member States are parties to these treaties, except for the Bucharest Convention to which only member States are parties while the Community has observer status. The WFD, moreover, refers to “achieving the objectives of relevant international agreements, including those which aim to prevent and eliminate pollution of the marine environment” from priority substances as one of its purposes.55 This provision would include most international agreements related to the protection of the aquatic environment, but leaves ambiguous,

51) Preamble, para. 35, WFD.
52) Preamble, para. 21, WFD.
54) For further information, see <www.blacksea-commission.org/main.htm>, visited on 13 May 2009.
55) Art. 1(e), fourth indent, WFD.
whether the directive seeks to implement, or seeks implementation by way of, these agreements.

The MFD in its preamble refers to the Convention on Biological Diversity\(^ {56}\) (CBD), the United Nations Convention on the Law of the Sea\(^ {57}\) (LOS Convention) and regional seas conventions, including the Helsinki Convention, the OSPAR Convention, the Barcelona Convention and its Athens Protocol, and the Bucharest Convention.\(^ {58}\) Reference to the CBD and LOS Convention can be explained by the fact that these conventions provide part of the overall global legal framework within which member States and the European Union are to shape their policies regarding the protection of the marine environment. It is, however, noteworthy that neither the Marpol Convention\(^ {59}\) nor the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol\(^ {60}\) are mentioned in the preamble of the MFD, as these conventions are part of the same global framework. The omission of the former can be explained with reference to the fact that the Community is not a party to it; the omission of the latter is more striking, as both the Community and the member States are parties to these instruments and problems associated with climate change are mentioned in the preamble of the MFD.\(^ {61}\) The references to the regional seas conventions can be explained by the fact that it is within these conventions that historically the member States and the Community, together with third States, have developed regional policies to protect the marine environment.

\(^ {56}\) Preamble, paras 7, 18, MFD.

\(^ {57}\) Preamble, para. 17, MFD.

\(^ {58}\) Preamble, para. 19, MFD.


\(^ {60}\) The UNFCCC was adopted on 9 May 1992 and entered into force 21 March 1994; the Kyoto Protocol was adopted on 11 December 1997 and entered into force on 16 February 2005. For further information, see <unfccc.int/2860.php>, visited on 13 May 2009.

\(^ {61}\) Preamble paras 34 and 42, MFD.
3.2. International Treaties through which the WFD and MFD Seek Implementation

Both the WFD and the MFD, implicitly or explicitly, refer to a number of treaties that may be used to attain their objectives. That is treaties, and the international organizations established by those treaties, that may be used by member States to institutionalize cooperation required by the directives.

The WFD, in its article 3, identifies two types of situations in which member States may use international organizations to implement the obligations resting upon them by virtue of the directive. These situations are for purposes of cooperating among themselves with respect to river basin districts lying within their territories and for purposes of cooperating with third States with respect to river basin districts extending beyond the territory of the European Union. In the first situation the WFD places on member States an obligation of result to coordinate the attainment of the environmental quality standards pursuant to article 4 of the directive and the programme of measures to be adopted pursuant to article 11. In the second situation, the WFD imposes an obligation of effort on member States to “endeavour to establish appropriate coordination with the relevant non-Member States, with the aim of achieving the objectives of” the WFD “throughout the river basin district”.

An example of an international organization which member States use to implement the obligation of result that article 3(4) imposes upon them is the International Commission of the Protection of the Meuse established by the Treaty on the Meuse. Belgium, the Flemish Region, the Walloon Region, the Brussels Region, France, Germany, Luxembourg and the Netherlands are parties to this treaty and the European Community may be invited as an observer. The Treaty on the Meuse explicitly establishes that its objective is, among other things, the implementation of the WFD and the Meuse Commission has been assigned coordinating responsibilities in relation to

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62) Art. 3(4), WFD.
63) Art. 3(4), WFD.
64) For further information, see <www.cipm-icbm.be/page.asp?id=35&langue=NL>, visited on 13 May 2009.
65) Art. 6(1)(a), Treaty on the Meuse.
the WFD. The Meuse Commission, however, has not been designated as the competent authority under the WFD. The Treaty on the Scheldt to which Belgium, the Flemish Region, the Walloon Region, the Brussels Region, France and the Netherlands are parties takes a similar approach. These treaties, as well as for example the International Commission for the Protection of the River Elbe Agreement, establish cooperation amongst member States for purposes of implementing the WFD, even if the history of the relevant commissions dates back to before the adoption of the WFD. The fact that European law, until recently, did not provide a legal instrument through which member States could regulate cooperation amongst themselves for purposes of implementing Community law goes some way towards explaining the use of public international law to regulate such cooperation. However, it may also be relevant that by using public international law instruments member States are able to assert their role as the holders of public governance power within the European Union. The Ministerial Declaration of Liege is of interest in this respect. In this Declaration the Ministers responsible for the Meuse and Scheldt rivers “emphasize that the EU-member states themselves are responsible for the implementation of the Water Framework Directive, but consider a coordinated approach in the river basins of the Meuse and Scheldt to be necessary”. This statement can be interpreted as pointing to the factual necessity of cooperation and the concomitant need for appropriate governance structures, while leaving existing legal structures of government in place.

Conventions such as the Rhine Convention, which establishes the Rhine Commission, also serve to facilitate cooperation amongst member States.

68) For further information, see <www.isc-cie.com/index_nl.php>, visited on 13 May 2009.
69) Germany and the Czech Republic are parties to the agreement, while Austria and Poland, the other riparian states, are observers. The European Community also acts as an observer. Interestingly the European Community was an original signatory and party to the agreement, but in 2004 when the Czech Republic became a member of the European Union it chose to become an observer. See <www.ikse-mkol.org/index.php?id=35&L=2>, visited on 13 May 2009.
70) See text and note 145, supra.
Moreover, they also facilitate cooperation with third States.\footnote{See \url{www.iksr.org/index.php?id=33&L=3}, visited on 13 May 2009.} Parties to the Rhine Convention are Germany, France, Luxemburg, the Netherlands, Switzerland and the European Community, while Austria, Lichtenstein and Belgium, representing Walloon Region, are observers to the convention. For purposes of implementing the WFD, those member States that are linked to the Rhine – that is States parties and States observers to the Rhine Convention and Italy, not a party or observer to the Rhine Convention – have established the Coordinating Committee for the Rhine. This Committee is serviced by the secretariat of the Rhine Commission.\footnote{See \url{No Frontiers for Rhine, Inventory 2004 in the Rhine River Basin}, available at \url{www.iksr.org/fileadmin/user_upload/Dokumente_en/wrrl_iksr_engl_eBook.pdf} (accessed 13 May 2009).} A similar role is played by cooperation within the Convention on Cooperation for the Protection and Sustainable use of the Danube River (Danube Convention), which established the International Commission for the Protection of the Danube River (ICPDR).\footnote{See \url{www.icpdr.org/icpdr-pages/home.htm}, visited on 13 May 2009.} Parties to the Danube Convention are Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Germany, Hungary, Moldova, Romania, Slovakia, Slovenia, Serbia, Ukraine and the European Community, while Montenegro is considering ratification. In addition, Italy, Switzerland, Poland, Albania and the Former Yugoslav Republic of Macedonia, which are not parties to the Danube Convention, cooperate within the framework of the ICPDR for purposes of implementing the WFD.\footnote{See \url{www.icpdr.org/icpdr-pages/contracting_parties.htm}, visited on 3 May 2009.} The ICDPR, furthermore, has been nominated as the coordinating body for the implementation of the WFD in respect of the Danube, both among member States and with third States.\footnote{See \url{www.icpdr.org/icpdr-pages/river_basin_management.htm}, visited on 13 May 2009.}

Besides implementing the obligations to cooperate among member States and with third States, pursuant to article 3 of the WFD, treaties such as the Rhine and Danube conventions might also be regarded from a different perspective. That is as international agreements by way of which member States, third States and the Community cooperate and that impose obligations on member States and the Community and thus ultimately as treaties that the WFD seeks to implement. That, however, is not the predominant
perspective reflected in the WFD nor is it a perspective that the relevant commissions convey, instead they emphasize the importance of the WFD and the role of these treaties and the international organizations established by these treaties in implementing the directive.

The various roles that certain treaties play in relation to the WFD are also evident in the MFD. The MFD, besides referring to regional sea conventions in its preamble as conventions that it seeks to implement,\(^77\) refers to these same conventions as “existing regional institutional cooperation structures” that member States are to use, “where practical and appropriate”, to coordinate their efforts to develop marine strategies, including programmes of measures.\(^78\) In addition, these same conventions are referred to as “relevant international fora” that member States shall use to coordinate their activities with third States.\(^79\) In case of the MFD, as in the WFD, the obligation to cooperate amongst member States is an obligation of result and the obligation to cooperate with non-member States is an obligation of effort.\(^80\)

3.3. **International Bodies as the Foci of Coordination**

From the perspective of public international law, international treaties that aim to protect certain rivers or marine (sub)regions thus may be regarded as treaties that the directives seek to implement. In case of the MFD that point of view is also reflected in paragraph 19 of its preamble, which refers to relevant regional seas conventions precisely in this manner. In addition, the directives address, respectively, international river treaties and regional seas conventions as instruments through which the WFD and the MFD seek implementation, both through cooperation among member States and between member States and third States.

The practice of the international river commissions, however, predominantly reflects the latter perspective: commissions that serve the implementation of the WFD. Commissions such as the Commission on the

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\(^{77}\) See text and note 58, supra.

\(^{78}\) Art. 6(1) *juncto* 5(2), MFD.

\(^{79}\) Art. 6(2), MFD.

\(^{80}\) Compare the terms “shall cooperate” to develop “coherent and coordinated” marine strategies in art. 5(2), MFD with the terms “make every effort” “to coordinate their actions with third countries” employed in art. 6(2), MFD.
Meuse\(^81\) and the Rhine Commission\(^82\) are predominantly concerned with the implementation of the WFD and other water related Community law, such as Directive 2007/60/EC on the assessment and management of flood risks (Floods Directive).\(^83\) Importantly, the institutional structures of these commissions increasingly reflect the structure of the WFD. Relevant in this respect is the fact that the secretariats of commissions in which both member States and third States cooperate serve as secretariats for bodies established to implement the WFD and that most commissions have developed working programs and established working groups that reflect the steps to be taken to implement the WFD.\(^84\) In other words, the governance arrangements within international river commissions have adapted to the structure of the WFD.

The influence of the WFD on the functioning of the river basin commissions also extends to other governance issues, such as for example, public participation, the importance of which is emphasized by both directives.\(^85\) It is in this respect interesting to note that relevant river basin commissions have organized stakeholder or similar events since the entry into force of the WFD.\(^86\)

Given that the MFD has only recently entered into force its impact on the work of the regional seas committees is less apparent. However, during the process of developing the MFD significant reactions emerged from the regional seas bodies. The reactions can be summarized as follows: recognition of the need for action at the European level which should take full account of

\(^81\) See, e.g., Declaration of the Ministers responsible for the Meuse and Scheldt rivers of 30 November 2001 in which the Meuse and Scheldt Commissions are identified as the framework for achieving coordinated implementation of the WFD, available at <www.cipm-icbm.be/page.asp?id=76&langue=NL>, visited on 13 May 2009.


\(^83\) OJ L 288/27, 6-11-07.


\(^85\) Art. 14, WFD and art.19, MFD.

the achievements and capabilities of the regional seas commissions. Given the manner in which the regional seas conventions have been integrated into the MFD – with the MFD explicitly mentioning the regional seas conventions in its operative part – it is likely that a pattern similar to that apparent from efforts to implement the WFD will emerge, with regional seas commissions focusing on coordinating the implementation of the MFD.

The above entails that WFD and MFD are integrating international organizations and regulations derived there from into European law. That is, international river and regional seas treaties and the international organizations established by these treaties are primarily regarded as instruments that serve the directives, instead of instruments that are implemented by way of the directives. What does this entail for the legal nature of the measures adopted within those bodies? Are they international or European law?

From a formal point of view, relevant measures retain the status of public international law. However, from a practical perspective, I suggest, that these measures at least will be relevant in interpreting the obligations that member States have undertaken on the basis of the directives and in fact will be part of European law, as is evidenced by the case law of the Court of Justice. Relevant measures, as it where, will provide the flesh on the bones of the framework provided by the directives and will be an integral part of European law, especially where specific measures have not been adopted at the European level. In terms of the protection of the environment such a development is to be welcomed as the implementation of relevant international measures, including those which are formally not-legally binding.

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88) See, e.g., Case C-239/03, Commission v. France (Étang de Berre), [2004] I-9325. In this case the Court of Justice ruled that provisions in the Athens Protocol to the Barcelona Convention are self-executing and thus to be upheld by member states, despite the fact that the Community itself had not adopted implementing legislation regarding these provisions.

89) See text and note 88, supra.

90) See, e.g., Case C-188/91, Shell [1993] ECR I-363. In this case the Court of Justice ruled that non-binding measures emanating from international commissions such as those discussed in this essay from part of the Community legal order (para. 17). It also determined that “it
will be backed by the scrutiny of a powerful supervisory body – the European Commission – and a court – the Court of Justice. Such entities are few and far between in public international law.

The situation described above, however, is not completely unproblematic, with the European Commission, and ultimately the Court of Justice, assessing the compliance of individual member States with the two directives. This is because third States face the risk that measures agreed in international river of regional seas commissions may have to be renegotiated if the European Commission or the Court of Justice disapprove of them. Such circumstances, however, need not arise given that the Community is a party or observer to almost all international river and regional seas conventions to which third States are also parties. However, at this stage yet another issue arises: it will be difficult to agree on measures in those commissions without the approval of the Community, represented by the European Commission. This in turn gives rise to a further question which generally arises when shared competences are involved: whether the competences that the member States and the Community share in terms of European law can be shared in practice, given the role of the European Commission and the Court of Justice in scrutinizing the implementation of the WFD and MSD by member States and the role of the Community in international river and (sub)regional seas commissions? Problematic as this issue may be in the relationship between member States and the Community, it is unlikely to diminish the role of international river and regional seas commissions in implementing the two directives.

International organizations, then, even if they have not been formally designated as competent authorities under the WFD, by virtue of their entrustment with coordinating tasks, are performing crucial functions in the implementation of the WFD, including the implementation of its provisions on public participation. As a result, the WFD has had significant effects

is settled case-law that the fact that a measure of Community law has no binding effect does not preclude the Court from ruling on its interpretation in proceedings for a preliminary ruling under Article 177 … Although the recommendations of the Joint Committee cannot confer upon individuals rights which they may enforce before national courts, the latter are nevertheless obliged to take them into consideration in order to resolve disputes submitted to them, especially when, as in this case, they are of relevance in interpreting the provisions of the Convention.”

91 See Kroepelien, supra note 2.
on the manner in which these organizations operate, illustrated by among other things their renewed institutional structure and by the stakeholder events that they have been organizing. I suggest that the MFD will have a similar effect on regional seas commissions. The WFD and MFD, thus, not only endow international river and regional seas commissions with public governance powers but also, in practice, determine what it is that needs to be done to exercise those powers as well as the institutional structures required for the exercise of those powers. This is so, even if individual member States remain responsible for the proper implementation of the directives, an aspect of the directives that will be examined in the next section.

4. Individual Member States and Compliance

The WFD and the MFD both use environmental quality objectives as the means to obtain their objectives and for determining member State compliance. However, the roles attributed to these objectives vary from obligations of result in the WFD and targets or obligations of effort in the MFD. In addition, the directives differ considerably when it comes to defining the contours of the relationship between the European Community, the European Commission in particular, and individual member States. The WFD emphasises the European Commission’s role in monitoring compliance and offers a limited process for dialogue between the member States and the Commission on how best to attain its objectives. The MFD, in addition to emphasizing the role of the European Commission in monitoring compliance, provides a more detailed process for facilitating dialogue between the Commission and the member States. A closer look at each of the two directives reveals the obligations that member States will be held to account for as well as how the directives construct the dialogue between member States and the European Commission.

4.1. The WFD: Obligations of Result and Limited Dialogue

The aim of measures adopted under the WFD is to attain good environmental status of surface and groundwater water by 2015, at the latest.92 Good surface water status is determined by both “good ecological status”

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92) Art. 4, WFD.
(and for heavily modified bodies of water “good ecological potential”\(^{93}\)) and “good chemical status”.\(^{94}\) The former is to be determined by member States, based on conditions laid down in the WFD and criteria contained in Annex V of the WFD;\(^{95}\) the latter by the Community, based on daughter directives concerning priority substances,\(^{96}\) and by member States to the extent not determined at the Community level. The quantitative good status of groundwater is to be determined by member States on the basis of conditions laid down in the WFD and criteria contained in Annex V of the WFD;\(^{97}\) good chemical status of groundwater is determined by the Community, based on daughter directives related to priority substances for groundwater,\(^{98}\) and by member States to the extent not determined at the Community level. Furthermore, other Community directives also stand in direct relation to the WFD and define what “good status” entails.\(^{99}\) Directive 08/778/EEC,\(^{100}\) which sets standards for waters used for the abstraction of drinking water and is specifically mentioned in the WFD, provides an example.\(^{101}\) In Commission v. Luxembourg, the Court of Justice held that such standards determined at the Community level indeed entail obligations of result that are to be met by individual member States.\(^{102}\)
Court, furthermore, held that, at least as far as determined by Community legislation, “good environmental status” requires the determination of binding environmental quality standards that are to be incorporated into national legislation.103

In order to attain “good status” member States, among other things, per river basin district are to prepare a register of protected areas, including waters used for the abstraction of drinking water, which have been designated as such under Community legislation,104 “review the environmental impact of human activity and economic analysis of water use”,105 establish programs for monitoring water status,106 and establish a program of measures107 and a river basin management plan, including summaries of the various measures taken pursuant to the directive.108 Member States in their river basin management plans may provide reasons for not meeting the applicable standards for particular waters. Valid reasons include “for specific bodies of water when they are so affected by human activity, …, or their natural condition is such that achievement of these objectives would be infeasible or disproportionately expensive…”109 “natural cause or force majeur which are exceptional or could not have been foreseen, in particular extreme floods and prolonged draughts, or the result of circumstances due to accidents…”110 and when deterioration is the result of sustainable human activities and for instance reasons of overriding public interest are involved.111 In each case, relevant provisions further condition the exceptions provided, including that member States are to take all practicable steps to mitigate adverse effects.112

The WFD provides that if issues cannot be resolved by a member State, that member State may report such issues to the European Commission.

103) Ibid. para. 76.
104) Arts 6 and 7, WFD. Relevant Community legislation includes the Habitats Directive, the Bird Directive and the Drinking Water Directive.
105) Art. 5, WFD.
106) Art. 8, WFD.
107) Art. 11, WFD.
108) Art. 13, and Annex VII, WFD.
109) Art. 4(5), WFD.
110) Art. 4(6), WFD.
111) Art. 4(7), WFD.
112) See, e.g., Art. 4(6)(d) and (7)(a), WFD.
and any other member State concerned and submit recommendations on how to resolve it.\textsuperscript{113} The European Commission is to respond to such communications within 6 months.\textsuperscript{114}

In addition to other reporting requirements, member States are to send to the European Commission copies of the river basin management plans as well as summaries of the analysis conducted pursuant to article 5 of the WFD and of the monitoring programs established pursuant to article 8 of the WFD.\textsuperscript{115} The Commission reviews the information submitted and uses it to determine whether a member State is in compliance with the WFD.\textsuperscript{116}

Besides dialogue between the European Commission and a member State about whether a member State is in compliance with the environmental quality objectives imposed by the WFD, article 12 of the WFD enables a member State to point to actions that might be taken at the level of the Community, such as for example in the case of the Common Agricultural Policy. Relevant provisions of the WFD require the Commission to respond within 6 months, but do not point to the nature of the actions that might be taken by the European Commission or other Community institutions. These provisions enable member States to exercise public governance powers at the European level, thereby pointing to another dimension of the applicable public governance arrangements. However, in comparison to the more elaborate decision-making process contained in MFD,\textsuperscript{117} the WFD disappoints on this point.

4.2. The MFD: Obligations of Effort and Opportunity for Structured Dialogue

The aim of the MFD is to establish “a framework in which Member States shall take the necessary measures to achieve or maintain good environmental

\textsuperscript{113} Art. 12(1) WFD.
\textsuperscript{114} Art. 12(1), WFD.
\textsuperscript{115} Art. 15, WFD.
\textsuperscript{117} See section 4.2, infra.
status in the marine environment by the year 2020 at the latest”. Member States, at the level of marine (sub)regions, are to determine the characteristics for good environmental status, in accordance with Annex I of the MFD, and define environmental targets and associated indicators “so as to guide progress towards achieving good environmental status”. Marine strategies are to pursue this objective through the protection and preservation and where practicable restoration of marine ecosystems and the prevention and reduction of inputs with a view to phasing out pollution. Marine strategies are to “apply an ecosystem-based approach to the management of human activities”. They are to consist of an initial assessment of the status of marine waters, a determination of good environmental status, environmental targets, a monitoring programme and a programme of measures. The programmes of measures, to be developed by individual member States, shall include the measures required to attain or achieve a good environmental status and shall be based on the initial assessments with reference to the environmental targets set at the level of the marine region or sub-region. Environmental targets, determined by the member States, are to “guide progress towards achieving good environmental status in the marine environment”. The MFD thus by virtue of the role of environmental targets establishes obligations of effort, instead of obligations of result, at least for those parameters under the MFD that are not covered by the WFD. Marine strategies are to be developed by each member State

118) Art. 1(1), MFD.
119) Art. 9(1), MFD.
120) Art. 10(1), MFD.
121) Art. 1(2), MFD.
122) Art. 1(3), MFD.
123) Art. 8, MFD.
124) Art. 9, MFD.
125) Art. 10, MFD.
126) Art. 11, MFD.
127) Art. 13, MFD.
128) Art. 13 juncto article 10, MFD.
129) Art. 10(1), MFD.
130) See text and note 15, supra.
for its waters131 and are to be communicated to the European Commission, which “shall assess whether, in case of each Member State”, the plans and measures meet the requirements of the MFD.132

The MFD, as the WFD, incorporates a system by which a member State may include reasoned deviations from the marine strategies in its programme of measures. The conditions are similar to those contained in the WFD. First, the MFD, in accordance with article 14, enables member States to include exceptions in its programme of measures if certain instances prevent it from meeting its environmental targets or attaining good environmental status. These exceptions relate to: “a) action or inaction for which the Member State concerned is not responsible; b) natural causes; c) force majeur; d) modifications 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 transboundary impact; e) natural conditions which do not allow timely improvement on the status of the marine waters concerned”.133 Such instances are to be incorporated in the programme of measures and substantiated for consideration by the European Commission.134 The member State concerned, however, remains bound to take ad hoc measures in order to continue the pursuit of the environmental targets, prevent further deterioration of the environmental status of the waters and to mitigate adverse impacts at the level of the marine (sub)region. Secondly, the directive clearly states that member States shall not be required to implement measures where there is no significant risk to the environment or “where the cost would be disproportionate taking account of the risks to the marine environment, and provided there is no further deterioration”.135 If a member State for these reasons decides to refrain from taking measures, it shall justify its decisions to the European Commission.

In contrast to the WFD, the MFD also provides for a decision-making mechanism through which member States and the European Commission, in particular, can engage in a dialogue about their respective competences and in a dialogue regarding the competences of international organisations.

131) Art. 5(1), MFD.
132) Art. 12 and 16, MFD.
133) Art. 14(1), MFD.
134) Art. 14(1), MFD.
135) Art. 14(4), MFD.
such as the IMO. The elements of this system are as follows. First, it provides that if 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”, (which refers to nature protection measures in protected areas) “they shall individually or jointly, address the competent authority or international organisation concerned …” in order to consider the possible adoption of measures.\(^{136}\) Secondly, the directive provides that if a member State identifies an issue that has an impact on the environment and that cannot be dealt with by way of national measures, or which is linked to another Community policy or an international agreement, the member State is to provide the European Commission with a justified and substantiated view.\(^ {137}\) If the member State is of the opinion that action by the Community is required, it shall submit recommendations to the European Commission and Council.\(^ {138}\) The European Commission is to respond to such views and recommendations within six months.\(^ {139}\) In those cases where member States submit recommendations, the European Commission is to “as appropriate, reflect the recommendation when presenting related proposals to the European Parliament and Council”.\(^ {140}\)

These elements enable member States and the Community to take into account both the fact that individual member States have limited control over the development of Community policies, such as for example the Common Fisheries Policy, and have limited control over the policies developed within international institutions, with the policies of the IMO with regard to vessel source pollution being of particular relevance. Where Community competences or the competences of an international organization are at stake, article 13 requires member States to take action at the appropriate level and article 15 enables a member State to raise this issue with the European Commission and Council and in so doing can facilitate a dialogue about the best means to tackle implementation of the directive, including the initiation of legislation by the Commission. These provisions on the one hand

\(^{136}\) Art. 13(5), MFD.
\(^{137}\) Art. 15(1), MFD.
\(^{138}\) Art. 15(2), MFD.
\(^{139}\) Art. 15(1) and (2), MFD.
\(^{140}\) Art. 15(2), MFD.
place a responsibility on member States to take action within international organisations and towards the Community, if action is required at those levels. On the other hand, they also place a responsibility on Community institutions, the European Commission in particular, to act if it is within their competence to address a certain issue. I suggest, that these provisions can be important for facilitating a dialogue between member States and the Community, the European Commission in particular, on how, given existing competences, the marine environment may be best protected, instead of the dialogue focusing mainly on (non)compliance. Also important in this respect is that the MFD, contrary to the WFD which focuses on environmental quality objectives, uses environmental targets towards which member States are to work. This in turn implies that marine strategies of individual member States are most likely to be assessed by the European Commission, and possibly the Court of Justice, in terms of their contribution to attaining those targets and good environmental status, instead of on the basis of those targets and good environmental status. Such a system on the one hand entails that the MFD provides less clear cut measures against which to judge (non)compliance. On the other hand it may also entail that the dialogue about (non)compliance between member States and the Commission on the basis of the MFD can be one which more closely resembles a process between partners engaged in exercising powers of public governance, instead of, as is more likely on the basis of the WFD, a process between supervisor and supervised.

4.3. Individual Member States as the Foci of Compliance

As the above account illustrates, the individual member State ultimately remains the entity for measuring compliance with the WFD and MFD, even though natural units are the foci of regulation and, in case of international rivers and regional seas, international bodies coordinate implementation. Thus while implementation of the directives crucially depend on cooperation among member States and between member States and third States at the level of international rivers and regional seas, the WFD and MFD leave in tact the situation in which the member States are held to account for implementing Community legislation. This approach seems inevitable in European law as it stands today. That is a system of law that lacks a legal entity through which powers of public governance for purposes of implementing European law can be exercised jointly by member States or their sub-units in a transboundary context and which, as a legal entity, can
be held accountable at the European level and under European law. The contours of such a type of entity, however, may be emerging.\textsuperscript{141}

An alternative approach in which EU-river basin authorities and EU marine (sub)regional authorities would have been established and in which the European Union would have negotiated with third States arguably would have been a bridge too far, given the intense ongoing discussions about the limits of European competences in the wake of the Treaty of Lisbon and previous thereto the Treaty establishing a Constitution for Europe.\textsuperscript{142} It is in the light of this discussion commendable that the MFD, as opposed to the WFD, contains explicit provisions which enable a member State to address itself to Community institutions in those cases where measures within the framework of common policies are required to attain the objectives of the MFD. A case in point in relation to WFD is the Common Agricultural Policy, where, as is the case in the Common Fisheries Policy, the Community has exclusive powers which may significantly impact on water quality. While article 12 of the WFD entitles member States to make recommendations to the European Commission, it contrary to article 15 of the MFD does not indicate what the content of the recommendations might be nor does it point to the procedural step that the European Commission might take in such an event.

It might be argued that article 15 of the MFD provides member States with a limited right of initiative, a right which in the Community context is attributed to the European Commission.\textsuperscript{143} Article 15 of the MFD encompasses the right of member States, individually or jointly, to propose that measures be taken at the Community level and the duty of the European Commission to respond to the views presented and reflect those views when presenting proposals to the European Parliament and Council. Given the very weak procedure contained in the WFD, consideration should be given to including provisions similar to those contained MFD in the WFD. Such provisions would probably serve the protection of the aquatic

\textsuperscript{141} The Regulation (EC) 1082/2006 on a European grouping of territorial cooperation (EGTS Regulation), O.J. L 2006 210/19, discussed in section 5 below, provides a first step in this direction. It, however, provides for an institution which can be held to account under the law of relevant member states, see article 15, EGTS Regulation.

\textsuperscript{142} See Fabian Amtenbrink, Continuation or Reorientation, What Future for European Integration? (inaugural lecture EUR 2007, The Hague: Boom Juridische uitgevers).

\textsuperscript{143} Article 211 EC.
environment, but might also, and perhaps more importantly, make a small contribution to the revitalization of trust in the European Union. It might achieve this by formally facilitating dialogue among the member States and the European Commission about the exercise of competences that are held by the Community.

5. Practice: New Public Governance Arrangements for the Protection of the Aquatic Environment in the European Union

The WFD and the MFD in a formal legal sense, in terms of government, leave the division of competences between the member States, the Community and river basin and regional seas commissions intact. In practice, however, the contours of EU river basin and regional seas authorities might be emerging in the framework of the directives together with so-called Interreg projects,144 financed through the European Fund for Regional Development, and cooperation within the framework of the EGTC Regulation.145

An example of an Interreg project is Scaldi. It is an Interreg project in which the three member States sharing the Scheldt river participated with relevant regional and local authorities, between 2003 and 2008.146 Other examples of relevant Interreg projects are the Baltic Sea Region Programme and in particular its third priority, which focuses on the Baltic Sea as a common resource,147 and the North Sea Region Program, which also in its third priority focus on the environment.148 The Baltic and the North Sea programmes both address issues related to the implementation of the WFD and the MFD.

While Interreg projects stimulate cooperation among member States and regional and local authorities, the EGTC Regulation goes a step further. In accordance with the EGTC Regulation, member States, regional and local authorities as well as other bodies governed by public law may establish a European grouping of territorial cooperation (an EGTC) in order to

144) See <www.interreg4c.net/>, visited on 13 May 2009.
145) See supra note 141.
147) See <eu.baltic.net/Welcome_to.2.html>, visited on 13 May 2009.
strengthen transboundary economic and social cohesion. An EGTC has legal personality under European law and in the law of the member States involved and may be held accountable under the law of relevant member States. However, an EGTC may not exercise “powers conferred by public law” or exercise “duties whose object is to safeguard general interests of the State or other public authorities, such as police and regulatory powers, justice or foreign policy”. While EU river basin and regional seas authorities would probably require some of these powers to function effectively, the EGTC Regulation might well offer a first step in the direction of the development of such authorities, especially at the sub-river basin level. Two advisory committees on water management in the Netherlands, in a joint report, suggested that the EGTC Regulation might provide a proper basis for establishing transboundary European water management authorities, if not at the river basin level, at least for subdivisions of river basins. In addition, in an advisory report prepared for the Dutch province of Limburg, it has been suggested that an EGTS might provide an option for creating a single legal entity for purposes of managing a transboundary sub-river basin of the river Meuse, i.e. the Rode Beek (Red Brook), shared by Germany and the Netherlands. Two advantages of an EGTS mentioned in the report are that it would be able to better serve the joint public interest of the regions involved than current arrangements based on private law, which generally serve market interests, and that it, as opposed to an international organization, would also bind citizens. An additional advantage, I suggest,

149) Arts 1(4) and 3, EGTC Regulation.
150) Art. 1(3) and (4) and 15, EGTC Regulation.
151) Art. 7(4), EGTC Regulation.
155) Ibid., p. 39.
is that an EGTS, contrary to most international organizations, would not benefit from immunity under the national law of the participating States.

Interreg projects may thus provide further impetuses for strengthening the role of international river and regional seas committees, by providing additional financial means to stimulate cooperation at the transboundary level towards the implementation of the WFD and the MFD. EGTC projects in turn may strengthen cooperation at the more local transboundary level, e.g. between water management institutions located in different member States.

6. Conclusion

The emerging transboundary public governance arrangements for the protection of the aquatic environment in the European Union are undergoing a shift from being based primarily on public international law to being grounded in European law. This is not to say that international organizations – international river and regional seas commissions – are no longer relevant. They are, but primarily as bodies that implement European law. This development entails that the interplay between European and public international law is changing. Most importantly, it means that public international law is being integrated into European water law not primarily through a process of transformation or implementation of that public international law into European law, but through a process of implementing European law through public international law. Implementation in this case does not only concern the translation of European measures into public international law; it also concerns the development of cooperative activities (e.g. assessment and monitoring programmes) and specific measures that serve the aims of the WFD and MFD, the latter especially where such specific measures are not foreseen at the European level (e.g. regarding good ecological status or regarding non-prioritised substances in the WFD or other Community legislation). Member States based on European law thus use the relevant international organizations to meet their obligations based on European law. Moreover, the WFD and the MFD point to these bodies as the institutions that member States are to use for this purpose, i.e. the WFD and MFD endow international river and regional seas commissions, that is international organizations, with powers of public governance. This

\[\text{See text and note 95, supra.}\]
development has profoundly affected international river commissions, both in terms of the work they are undertaking and in terms of their institutional structure. I submit that the MFD will have a similar effect on regional seas commissions. European regional funds, administered through Interreg, serve to strengthen the position of international river and (sub)regional seas commissions as holders of public governance powers, also by enabling them to directly interact with sub-national actors.

The emerging picture is one in which numerous loci of public governance power interact across several dimensions: involving sub-national, national, regional, European and international actors and law. These layers of public governance are not interacting in a hierarchical structure with public international law trickling down through European and national law and European law trickling down to national law. In this picture, European law, by way of the WFD and the MFD, provides the legal framework, while international and national law, together with European law, provide the flesh on the bones of that framework. Perhaps most significantly, in terms of law, this system entails that the implementation of measures agreed at the international level are now subject to the scrutiny of a court: the European Court of Justice. The Court of Justice fulfils this role in spite of the fact that the relevant international river and regional seas commissions do not possess legal personality under European law and as such cannot adopt decisions which formally have the status of European law. Moreover, the court will also interpret and take into account relevant legally non-binding decisions adopted by such commissions. The member States of the European Union provide the crucial link between the two bodies of law, since it is they who can be held to account before the Court of Justice.

As mentioned, establishing EU river basin authorities and EU marine regional authorities with legal personality under European law would have arguably been a bridge too far, also given the current mistrust of European institutions. Be this as it may, Interreg projects and the establishment of possible EGTS entities may well be paving the way for such authorities. It is of course also relevant that the WFD and MFD, together for the first time in the history of the European Union, divide all of the areas in which member States exercise sovereignty, sovereign rights or jurisdiction into geographically defined management units and point to entities, in addition to the member States, which are to exercise public governance powers in
those areas. If the history of Dutch water boards is anything to go by, if we may well be witnessing the embryonic emergence of a new type of public governance institution in Europe.

157 J.C.N. Raadschelders and Th.A.J. Toonen (eds), Waterschappen in Nederland: een bestuurskundige verkenning van de institutionele ontwikkeling (Waterboards in the Netherlands: An Policy Science Exploration of the Institutional Developments) (Hilversum:Uitgeverij Verloren, 1993). In the Netherlands water boards were the first (13th century) public governance arrangements to be established with a democratic structure, even if limited to landowners. Today, the members of the governing bodies of water boards are democratically elected, even if the so-called “dijkgraaf”, the chairperson of the governing body, is appointed by the government. On a lighter note, the structure of the Dutch water boards is at the source of the (in)famous “poldermodel” for resolving public issues in the Netherlands.