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Maritime spatial planning *(Raumordnung)*

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Leibniz Association

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Maritime spatial planning *(Raumordnung)*

Contents

Increasing conflicts related to the usage and protection of coastal waters have resulted in a need for spatial planning in relation to maritime areas. International, European and German law largely take this into account. Under German law, spatial planning is undertaken for both the coastal seas and Germany's exclusive economic zone (EEZ).

1 Starting point

Conflicts related to usage and protection in marine areas, particularly between diverse economic and conservation interests, have given rise to an urgent need for timely and balanced spatial management (Erbguth 2007: 397; Erbguth 2009: 179 et seq.). Given the need for coordination at sea, which has increased considerably due to the expansion of offshore wind power, the importance of maritime spatial planning has grown significantly at both the national and European levels. This was reflected first in the relevant ▷ *Spatial planning law (Raumordnungsrecht)*, which now includes specific marine spatial planning regulations. Moreover, there are corresponding plans for both the coastal waters and the exclusive economic zone (EEZ) of the North Sea and Baltic Sea waters under German jurisdiction.

2 Spatial planning and international maritime law

The legal framework for areas subject to maritime spatial planning is largely shaped by international treaty, namely the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS), which divides the sea into zones (cf. Erbguth 2011a: 374 et seq.; *BGBl*. [Federal Law Gazette] 1994 II, 1798). Of primary relevance for spatial planning are the coastal waters (the so-called 12-nautical mile zone, cf. article 3 UNCLOS) and the exclusive economic zone (EEZ) with a maximum extent of 200 nautical miles measured from the baseline (cf. article 57 UNCLOS).

Normative restrictions for spatial planning by coastal states apply in the EEZ (which is not part of a state's territory) since UNCLOS only grants coastal states certain exclusive and functionally limited sovereign rights and powers there (Proelß 2006: 233 et seq.). Though these positions cover all relevant uses of the sea and the protection of its environment (cf. article 56(1) UNCLOS), UNCLOS does not explicitly allocate any responsibilities for spatial planning (Erbguth 2011a: 374). However, coastal states are recognised as having the authority under public international law to exercise the individual planning powers granted to them; this can be inferred from UNCLOS using special interpretation rules under public international law (the principle of effectiveness and the so-called *necessary implication*) or general teleological interpretation (Erbguth/Müller 2003: 628 et seq.; Kment 2007: 61; Schubert 2009: 836). It should be noted, however, that UNCLOS restricts those powers to safeguard third-state rights (freedom of communication for shipping, the laying of pipelines and cables, and overflight; cf. article 58(1), article 87 UNCLOS) to varying degrees (Erbguth 2011a: 375; Schubert 2015: 47 et seq.). However, since UNCLOS calls for mutual consideration of the conflicting legal positions (article 56(2) and article 58(3) UNCLOS), the regular and spatially-relevant (▷ *Spatial impact*) exercise of third-country freedoms is subject to spatial planning coordination by the coastal states and thus to the required weighing of interests (Erbguth 2011a: 375). When weighing interests (▷ *Weighing of interests*) in the absence of general precedence (Proelß 2006: 260 differs, advocating in case of doubt the primacy of the coastal state's legal position), in each particular case and in accordance with general principles, the weight of the interests in question is what matters (Erbguth 2011a: 375; Schubert 2015: 52).

3 Maritime spatial planning and European law

The EU has addressed maritime spatial planning in its integrated maritime policy, with the aim of establishing it as an instrument with a uniform level of regulation and enforcement in the coastal member states. Following a series of policy initiatives by the European Commission (cf. Erbguth 2009: 185 et seq.; Schubert 2015: 130 et seq.) aimed at promoting and mediating (Wickel 2009: 43) a developing process, the European Union ultimately enacted a binding legal act, Directive 2014/89/EU of 23 July 2014, establishing a framework for maritime spatial planning (OJ EU L 257/135, referred to below as MSPD). However, there are concerns about the legal powers of the EU to do this, as it has no original powers over spatial planning matters (Erbguth/ Schubert 2012: 74 et seq.) and cannot establish or justify such powers through a mix of powers arising from individual sectors (Schubert 2015:100; Spannowsky 2013: 75 differs).

The MSPD puts maritime spatial planning at the service of sustainable development while obliging member states to apply an ecosystem approach in line with the Marine Strategy Framework Directive 2008/56/EC (cf. article 5(1) MSPD). The two can be reconciled with each other and with the German concept of spatial planning (Erbguth 2011a: 376; Schubert 2015:135 et seq.). In terms of its regulatory content, the directive is limited to obliging member states to draft and implement maritime spatial plans (article 4 MSPD), whereby the member states must observe certain minimum requirements (article 6 et seq. MSPD). In particular, they must take into account the interactions between land and sea, enable public participation, use and share the best available data, and engage in cross-border cooperation. The MSPD establishes no further material or organisational requirements. Indeed, it explicitly does not interfere with the 'Member States' competence to design and determine, within their marine waters, the extent and coverage of their maritime spatial plans' (article 2(3) sentence 1 MSPD). The same applies to 'town and country planning' (article 2(3) sentence 2 MSPD), and if a member state has already applied such terrestrial spatial planning instruments to its coastal waters, the MSPD does not apply (article 2(1) sentence 2 MSPD). Thus, overall, the MSPD's impact on or contribution to member states' spatial planning activities has been very restrained (see Erbguth 2012: 85 et seq. for further proposals). In any event, from a pan-European perspective it is to be welcomed as an important initial step towards the coordinated application of comprehensive spatial planning at sea on a widespread, cross-border scale (Schubert 2015: 147).

4 Spatial planning of German coastal waters

Spatial planning principles and objectives (▷ *Objectives, principles and other requirements of spatial planning*) can be defined for Germany's coastal waters just they can be for land because those waters became the territory of the German state after the proclamation of the 12-nautical mile zone (Erbguth 2011a: 378). According to sections 8 et seq. of the Federal Spatial Planning Act *(Raumordnungsgesetz, ROG)*, the coastal federal states are obliged to draw up spatial development plans for the coastal waters belonging to their territories, in both their state-wide spatial development plans (section 8(1) sentence 1 no. 1) and in regional plans (section 8(1) sentence 1 no. 2). Moreover, the ocean as a planning area is not so different from the mainland as to require

a fundamental reorientation of spatial planning instruments (Schubert 2015:190 et seq.). Though the three-dimensionality of maritime space may increase the potential for conflict and thus the complexity of planning, this does not entail any substantive difference between maritime and terrestrial spatial planning; the same applies to freedom of access and the lack of human settlements (Erbguth 2011a: 379 et seq.). The broad range of regulatory options available to spatial planners ensures effective coordination and conflict management, for example by designating how space is to be used and structured (e.g. with regard to the locations and routes to be secured for infrastructure (▷ *Infrastructure*); cf. section 8(5) sentence 1 no. 3 of the Federal Spatial Planning Act) or for the desired structuring of open space (section 8(5) sentence 1 no. 2). The ▷ *Territorial categories* (▷ *Priority area, reserve area and suitable area for development*) named in section 8(7) of the Federal Spatial Planning Act are available for all these purposes without any discernible maritime peculiarities from a legal perspective (Schubert 2015: 192). Furthermore, the spatial impact assessment procedure (▷ *Spatial impact assessment procedure*) pursuant to section 15 of the Federal Spatial Planning Act also applies to coastal waters. However, this is not the case within the material scope of the Grid Expansion Acceleration Act *(Netzausbaubeschleunigungsgesetz Übertragungsnetz, NABEG)*, insofar as routing corridors have been designated in federal sectoral planning for the extra-high voltage lines covered by that law (cf. section 28 sentence 1 Grid Expansion Acceleration Act).

5 Spatial planning of Germany's exclusive economic zone

Pursuant to section 1(4) of the Federal Spatial Planning Act, spatial planning is also undertaken for Germany's exclusive economic zone within the framework of UNCLOS provisions. Specifics can be found in the third part of the Federal Spatial Planning Act and thus in the context of ▷ *Federal spatial planning (Bundesraumordnung)*.

Section 17(3) sentence 1 of the Federal Spatial Planning Act assigns to the federal government, specifically the Federal Ministry of Transport, the task of drawing up a spatial development plan for the EEZ in the form of a statutory ordinance. The Federal Maritime and Hydrographic Agency *(Bundesamt für Seeschifffahrt und Hydrografie, BSH)* has been tasked with implementing the preparatory procedural steps (section 17(3) sentence 3 Federal Spatial Planning Act). The general material stipulations of sections 1-7 of the Federal Spatial Planning Act apply initially – subject to legal amendments – to spatial planning of the EEZ. Specific substantive requirements follow from section 17(3) sentence 2 of the Federal Spatial Planning Act; pursuant to subsentence 1, the plan must include provisions on economic and scientific use, on ensuring safe and easy transport (▷ *Maritime traffic*), and on protecting the marine environment. For these uses and functions, section 17(3) sentence 2 subsentence 2 of the Act enables the designation of areas pursuant to section 8(7) without restriction. Restrictions on the permitted content of plans are a reflection of limitations imposed by maritime law on the activities of coastal states in the EEZ; they do not affect the character of EEZ plans as typical spatial development plans for supra-local spatial coordination (Erbguth 2011a: 379). In contrast, the use of spatial impact assessment procedures is not possible for the EEZ due to the lack of an extension clause; from a legal policy perspective, this appears to be in need of correction (Erbguth 2011a: 381 et seq.).

Based on the regulations outlined above, separate spatial development plans for the exclusive economic zones of the North Sea and the Baltic Sea were introduced in 2009: the ordinance on spatial planning in the German exclusive economic zone in the North Sea (*AWZ Nordsee-ROV*) of 21 September 2009 (*BGBl*. I, 3107) and the ordinance on spatial planning in the German exclusive economic zone in the Baltic Sea (AWZ Ostsee-ROV) of 10 December 2009 (*BGBl*. I, 3861). (For information about their preparation by the BSH, see Nolte 2010: 79; for a discussion of their content and a legal assessment, see Erbguth 2011b: 207.)

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