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OPINION OF THE LEGAL SERVICE¹

From:	Legal Service
To:	WP Environment
Subject:	Directive of the European Parliament and of the Council on the conservation and sustainable use of marine biological diversity of areas beyond national: legal necessity and competence

I. INTRODUCTION

1. On 24 April 2025, the Commission submitted a proposal based on Article 192(1) TFEU for a Directive of the European Parliament and of the Council of the European Union on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (hereinafter 'the Proposal' or 'the proposed Directive')²

¹ This document contains legal advice protected under Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and not released by the Council of the European Union to the public. The Council reserves all its rights in law as regards any unauthorised publication.

² 2025/0090 (COD), ST 8410/25.

2. Article 1 (subject matter) of the Proposal provides that the Directive “*establishes minimum rules regarding implementation within the European Union of the Agreement (‘the BBNJ Agreement’ or ‘the Agreement’) under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*”.
3. During several meetings of the Working Party on Environment, over the course of 2025, several legal questions were addressed to the Legal Service on the Proposal. These included whether it is necessary to adopt the proposed Directive, to what extent the implementation of the BBNJ Agreement falls within Union competence, and what would be the consequences of the adoption of the proposed Directive on the competences of the Union and its Member States.
4. This opinion confirms and expands on the replies provided orally to these questions.

II. LEGAL FRAMEWORK

5. The BBNJ Agreement³ is an implementing agreement under the United Nations Convention on the Law of the Sea (UNCLOS)⁴ and regulates the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction⁵, including marine genetic resources, *inter alia* through area-based management tools, environmental impact assessments, and capacity-building.

³ The text of the Agreement is published in OJ L, 2024/1831, 19.7.2024.

⁴ Council Decision 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI, OJ L 179, 23.6.1998, pp. 1-2. The text of UNCLOS is published in OJ L 179, 23.6.1998, pp. 3-134 and that of the Agreement relating to the implementation of Part XI in OJ L 215, 20.8.1994, pp. 10–20.

⁵ The BBNJ agreement covers both the water column above the seabed (the ‘high seas’) and living resources associated with the seabed.

6. The BBNJ Agreement was adopted on 19 June 2023 in New York by the Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction convened under the auspices of the United Nations. On 18 September 2023, the Council adopted Decision (EU) 2023/1974 on the signing of this Agreement.⁶ The Union and all its Member States have signed the Agreement. On 17 June 2024, the Council adopted Decision (EU) 2024/1830 on the conclusion of the Agreement ('Conclusion Decision').⁷ That decision clarifies that the BBNJ Agreement is a mixed agreement, and it approved a Declaration of Competence to reflect this.⁸ The Union notified its approval of the BBNJ Agreement on 28 May 2025. To date, a majority⁹ but not all Member States have ratified it. Both the decisions on signing and conclusion were adopted pursuant to the environment legal basis (Article 192(1) TFEU).
7. The BBNJ Agreement is therefore a mixed agreement, as is UNCLOS, which is the legal framework governing all activities in the oceans and seas (and to which the Union and all its Member States are parties).
8. On 19 September 2025, the BBNJ Agreement reached 60 ratifications, triggering its entry into force on 17 January 2026 (120 days after the 60th ratification).¹⁰ It will apply to all parties which have ratified the Agreement.

⁶ Council Decision (EU) 2023/1974 of 18 September 2023 on the signing, on behalf of the European Union, of the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, OJ L 235, 25.9.2023, p.1.

⁷ Council Decision (EU) 2024/1830 of 17 June 2024 on the conclusion, on behalf of the European Union, of the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, OJ L, 2024/1830, 19.7.2024.

⁸ The text of that Declaration is published in OJ L, 2024/1832, 19.7.2024.

⁹ According to the United Nations Treaties Collection, as of 7 November 2025, it was ratified by 16 EU Member States.

¹⁰ See the depository notification C.N.447. 2025.TREATIES-XXI.10, available at <https://treaties.un.org/doc/Publication/CN/2025/CN.447.2025-Eng.pdf>.

III. LEGAL ANALYSIS

A. FIRST QUESTION: UNION COMPETENCE

9. The first question that will be addressed is to what extent the implementation of the BBNJ Agreement falls within Union competence.
10. Article 67 of the BBNJ Agreement addresses the division of competence of regional economic integration organizations and their member States. Its first paragraph provides that whereas “*Any regional economic integration organization that becomes a Party to this Agreement without any of its member States being a Party shall be bound by all the obligations under this Agreement*”, by contrast, “*In the case of such organizations, one or more of whose member States is a Party to this Agreement, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under this Agreement. In such cases, the organization and the member States shall not be entitled to exercise rights under this Agreement concurrently.*” The second paragraph of this Article adds that “*In its instrument of ratification, approval, acceptance or accession, a regional economic integration organization shall declare the extent of its competence in respect of the matters governed by this Agreement [...]*”. This is in line with similar provisions in other multilateral agreements to which the Union is a party.¹¹
11. This is also similar to the Court’s finding that “[...] *it goes without saying that the extent of the respective powers of the [Union] and the Member States with regard to the matters governed by the [agreement in question] determines the extent of their respective responsibilities in relation to performance of the obligations under the [agreement in question].*”¹²

¹¹ See e.g. Article 305 UNCLOS in conjunction with Annex IX UNCLOS, and especially Article 4, paragraphs 1-3 thereof on the “*Extent of participation and rights and obligations*”, which state that an international organisation is only a Party to the extent that it has declared its competence and “*shall exercise the rights and perform the obligations which its member States which are Parties would otherwise have under this Convention, on matters relating to which competence has been transferred to it by those member States*”, whereas “*The member States of that international organisation shall not exercise competence which they have transferred to it*”.

¹² Opinion 2/00, Cartagena Protocol, EU:C:2001:664, point 16.

12. Therefore, the Union can only be responsible for the performance of the obligations following from the BBNJ, with regard to the provisions thereof falling within its competence. To determine the extent to which the Union is responsible for the performance of the obligations in question, it must therefore be assessed to what extent the Union has chosen to exercise its competence through its adherence to the BBNJ agreement.¹³ The extent of those competences is addressed in the Conclusion Decision, which is based on Article 192(1) TFEU,¹⁴ and the Declaration of Competence.¹⁵
13. In particular, Article 1(2) of the Conclusion Decision (also reflected in its recital 9) provides that “*The conclusion of the Agreement by the Union shall be without prejudice to the Member States’ competence as regards the ratification, acceptance or approval of the Agreement*” and the recitals *inter alia* explain that “*The Agreement is in line with the environmental objectives of the Union as referred to in Article 191 [TFEU]*” (recital 7); that “*This Decision should not be interpreted as making use of the possibility for the Union to exercise its external competence with regard to areas covered by the Agreement falling within shared competence. In the area of shared competences, the Member States retain their competence insofar as the Agreement does not affect common rules or alter the scope thereof, including their foreseeable future development*” (recital 8); and that “*In accordance with Article 67(2) of the Agreement, the Union is to declare in its instrument of approval the extent of its competence in respect of the matters governed by the Agreement (‘the Declaration of Competence’)*” (recital 11). In addition, recital 10 *inter alia* explains that “*a code of conduct laying down internal arrangements between the Union and its Member States reflecting their respective responsibilities for the performance of their obligations and the exercise of rights under the Agreement has been drawn up between the Council, the Member States and the Commission*”.

¹³ See, more generally, *Opinion 1/19* of the Court of 6 October 2021 (*Istanbul Convention*), paragraphs 258-262, 273, 279-283 and 291-294.

¹⁴ The decision authorising the opening of negotiation was also based on that legal basis, in line with what the CLS had advised (see the CLS Opinion in doc. ST 6813/16, paragraphs 14-16 and 25(b)), as was the Council Decision (EU) 2023/1974 on the signing of the BBNJ Agreement.

¹⁵ It can be noted that the extent to which the Union must be considered responsible can evolve through the internal exercise of competences following the Conclusion Decision, as addressed below.

14. The Declaration of Competence *inter alia* recalls that the Union has different kinds of competences and then specifically mentions three types of competences.
15. First, it mentions the shared competence in the area of the environment. It then explains that:
“As regards matters for which Union rules have been adopted, the Union has exclusive competence in respect of matters governed by the Agreement only to the extent that provisions of the Agreement or decisions of the Conference of the Parties to the Agreement may affect common rules or alter their scope within the meaning of Article 3(2) TFEU. In this regard, the conclusion of the Agreement, on behalf of the Union, does not affect the attribution of competences between the Union and its Member States according to the Treaties. In particular, this Declaration should not be interpreted as making use of the possibility for the Union to exercise its external competence with regard to areas covered by the Agreement falling within shared competence to the extent that such competence has not yet been exercised internally by the Union. In the area of shared competences, the Member States retain their competence insofar as the Agreement does not affect common rules or alter the scope thereof, including their foreseeable future development.
- Accordingly, the extent of the Union’s competence must be assessed on the basis of a comprehensive and detailed analysis of the relationship between the Agreement and the precise provisions of each measure of Union law, on a case-by-case basis. The scope and the exercise of such Union competences are, by their nature, subject to continuous development”.*
16. Second, the Declaration of Competence mentions the Union’s parallel competence with regard to research and technological development as well as concerning development cooperation, adding that *“the exercise of the Union’s parallel competence is not to result in Member States being prevented from exercising their competences”*.
17. Third, the Declaration of Competence indicates that *“the Union declares that it has exclusive competence as regards the conservation of marine biological resources under the common fisheries policy, in accordance with Article 3(1), point (d), TFEU”*.

18. Moreover, the Declaration of Competence explains that:

“As regards measures to be adopted under the Agreement, the area of competence of the Union within which the measure falls, will depend on an internal assessment of the main purpose or component of the measure to be adopted under the Agreement as well as the objectives and components more specific to the position to be established by the Union. Accordingly, the Union and its Member States have decided on their respective responsibilities for the performance of their obligations under the Agreement, in accordance with Article 67(1) of the Agreement”.

19. Therefore, the Conclusion Decision and the Declaration of Competence make it clear that, for areas falling under the Union’s environment competence, the Union relied only on its exclusive competences when acceding to the BBNJ Agreement and can only be considered responsible for the implementation thereof in relation to matters for which it has exclusive competence. Specifically, this concerns matters that may affect common rules or alter their scope within the meaning of Article 3(2) TFEU.

20. Consequently, the Union is only responsible for, and thus obliged to implement, those provisions of the BBNJ Agreement that fall within its exclusive competence.

21. The explanatory memorandum accompanying the Proposal indicates that *“The aim of this legislative proposal is to implement the provisions of the BBNJ Agreement concerning environmental protection and marine genetic resources”* (p. 2; emphasis added). It states that the BBNJ Agreement *“is in line with EU rules and policies in the area of the common fisheries policy”* (p. 3) and *“is fully consistent with EU rules and policies in related areas, such as maritime transport policy, maritime security, energy policy, internal market policy, common commercial policy, research and technological development policy, climate policy and others”* (p. 4).

22. It is the understanding of the Legal Service that the question raised with regard to the extent of the Union's obligations to implement the BBNJ Agreement only concern the competences in the area of the environment and marine genetic resources outside the scope of the common fisheries policy. The analysis below will thus be limited to these matters.
23. As regards marine genetic resources, the explanatory memorandum states that "*The rules and obligations concerning benefit sharing from marine genetic resources and digital sequence information derived from marine genetic resources set by the BBNJ Agreement apply to genetic resources collected in areas beyond national jurisdiction. They do not overlap with the benefit sharing obligations and rules deriving from the Nagoya Protocol on the fair and equitable sharing of benefits from the use of genetic resources and the Convention on Biological Diversity, as these two instruments apply to genetic resources within national jurisdiction. This implies that there will be no duplication of obligations between the EU measures needed to implement the benefit sharing provisions of the BBNJ Agreement and Regulation (EU) No 511/2014 on measures of compliance for users of genetic resources in the EU (which implements the Nagoya Protocol)*" (p. 3; emphasis added).
24. Due to the different geographical scope of application, the BBNJ Agreement's rules on marine genetic resources do not affect the above-mentioned *Union acquis* on such resources. As a result, these rules of the BBNJ Agreement do not fall within the Union's exclusive competence.
25. Similarly, because most environmental provisions of the BBNJ Agreement have a different geographical scope, they do not overlap with any *Union acquis* in the environment field that does not apply in areas beyond national jurisdiction.¹⁶

¹⁶ See the similar conclusion of the Legal Service with regard to a proposal for a Council decision on the position to be taken on behalf of the European Union at the meetings of the International Seabed Authority Council and Assembly concerning the future regulations on exploitation of mineral resources in the Area, in doc. ST 11056/21, paragraphs 18-20.

26. However, Article 28(2) of the BBNJ Agreement requires the Parties to conduct environmental impact assessments in areas *within* national jurisdiction that may harm the marine environment in areas beyond national jurisdiction. That Article allows the Parties to the BBNJ Agreement to either (i) ensure that an environmental impact assessment of the activity is conducted in accordance with Part IV of the BBNJ Agreement (on environmental impact assessments) (option 1) or (ii) to conduct it under the Party's national process and making available relevant information through the Clearing-House Mechanism (CHM), ensuring monitoring of the activity as well as making sure environmental impact assessment and monitoring reports are available through the CHM (option 2).
27. There is already Union *acquis* on environmental impact assessments which applies in areas within national jurisdiction, including the Exclusive Economic Zone. This includes in particular Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (the "EIA Directive").¹⁷
28. Therefore, the above-mentioned option 2 under Article 28(2) of the BBNJ Agreement would entail following the rules on conducting environmental impact assessments under the EIA Directive. In addition to the rules on conducting environmental impact assessments, Parties to the Agreement are required to:
- make available relevant information through the CHM;
 - ensure monitoring of the activity in accordance with requirements at national level; and
 - make sure environmental impact assessment and monitoring reports are available through the CHM.

¹⁷ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26, 28.1.2012, pp. 1–21.

29. While the EIA Directive provides for the transmission of relevant available information from authorities to developers (Article 5(4)) and to the public (Article 6(2) and (3)), the preparation of environmental impact assessment reports by the developer (Article 5(1)), and the establishment of monitoring measures (Article 8a), it does not require that such information be made available by Member States through the CHM. The latter obligation, however, is explicitly imposed on Parties under the BBNJ Agreement under option 2.
30. Therefore, the EIA Directive gives effect to the provisions of option 2, except with regard to the obligation to make information or reports available through the CHM.
31. The above-mentioned option 1 under Article 28(2) of the BBNJ Agreement would entail the adoption of a separate set of rules on impact assessments conducted in accordance with Part IV of the BBNJ Agreement. This would require carving out those rules from those laid down in the EIA Directive.
32. Under both options, Article 28(2) of the BBNJ Agreement affects the common rules which the Union has adopted on environmental impact assessments and/or alters their scope within the meaning of Article 3(2) TFEU. It therefore falls within the Union's exclusive competence.
33. The Legal Service has not identified any other provisions of the BBNJ Agreement that apply to areas within national jurisdiction, nor any relevant provisions of Union law which apply to areas beyond national jurisdiction in environmental matters. Consequently, it has not identified any other provisions of the BBNJ Agreement on environmental matters falling within the Union's exclusive competence.
34. Consequently, the Union must take the necessary measures to implement Article 28(2) of the BBNJ Agreement but is not required to implement any other provision of the BBNJ Agreement on environmental matters.

B. SECOND QUESTION: NECESSITY TO ADOPT THE PROPOSED DIRECTIVE

35. The second question to be addressed is whether it is necessary to adopt the proposed Directive.
36. As indicated above, the EIA Directive already provides for most of the measures necessary to fulfil that obligation. The only additional measures which are required relate to the obligation to make information or reports available through the CHM. If this obligation is not implemented through the proposed Directive, it would need to be implemented elsewhere, taking into account the duty of Member States in accordance with Article 4(3) TEU to take any appropriate measure to ensure the fulfilment of their obligations resulting from Union law.
37. The conclusion that it is not *legally necessary* for the Union to adopt the proposed Directive¹⁸ to fulfil its obligations under the BBNJ Agreement does not imply that it is not *possible* to adopt it. In the area of the environment, the Union can decide to exercise its (shared) competence. This is a political choice, which could be made by means of the proposed Directive, in whole or in part.

C. THIRD QUESTION : CONSEQUENCES ON COMPETENCES

38. The third question addressed here is what the consequences of the adoption of the proposed Directive on the division of competences of the Union and its Member States would be.
39. Should the European Parliament and the Council adopt the proposed Directive, the Union would exercise its competence internally with regard to the matters covered in that act. As a result, Member States would be bound by the proposed Directive and could no longer exercise their competence as regards those matters.

¹⁸ Provided that the obligations with regard to Article 28(2) of the BBNJ Agreement are fulfilled through other measures.

40. This would also affect the external competence of the Union as regards those matters. Article 3(2) TFEU stipulates that the Union has exclusive competence for the conclusion of an international agreement "*in so far as its conclusion may affect common rules or alter their scope*".¹⁹ Hence, matters covered by the proposed Directive would fall within Union competence as regards the BBNJ Agreement. This would mean that all Member States would be bound by those BBNJ obligations as a matter of Union law, and that discussions and decisions within the framework of the BBNJ Agreement on those provisions would have to be conducted by the Union representatives, on the basis of Union positions.
41. By contrast, it is for those Member States who have ratified the BBNJ Agreement to implement the provisions of the agreement which fall outside the scope of the Union's accession to it. Hence, if the proposed Directive is not adopted, Member States that have ratified the Agreement will have to implement their obligations for any environmental provisions other than Article 28(2), *inter alia* as regards impact assessments in areas beyond national jurisdiction.

¹⁹ This provision reflects the so-called 'ERTA' doctrine: see *Opinion I/13* of 14 October 2014, EU:C:2014:2303, paragraph 71 and the case-law cited therein. See also judgment of 4 September 2014 in Case C-114/12, *Commission v Council*, EU:C:2014:2151, paragraph 66; and judgment of 26 November 2014 in Case C-66/13, *Green Network*, paragraph 27, EU:C:2014:2399.

IV. CONCLUSION

42. The BBNJ Agreement is a mixed agreement and as regards areas falling under the Union's environment competence, the Union has only assumed responsibility for the performance of the obligations in the BBNJ Agreement which relate to matters that may affect common rules or alter their scope and hence fall within exclusive Union competence.
43. The Union is therefore only obliged to implement provisions concerning such matters.
44. The only such provision covering environmental matters that the Legal Service has identified is Article 28(2) of the BBNJ Agreement on environmental impact assessments in areas within national jurisdiction that may harm the marine environment in areas beyond national jurisdiction. That provision affects common rules which the Union has adopted on environmental impact assessments and/or alters their scope within the meaning of Article 3(2) TFEU. By contrast, the geographical scope of most provisions of the BBNJ Agreement does not overlap with that of common provisions provided for in Union law and hence those BBNJ provisions do not affect any such common rules.
45. Consequently, the Union must take the necessary measures to implement Article 28(2) of the BBNJ Agreement. The EIA Directive already provides for most of the measures necessary to fulfil that obligation. The only additional measures which are required relate to the obligation to make information or reports available through the CHM. If this obligation is not implemented through the proposed Directive, it would need to be implemented in another manner.
46. While not obliged to do so, it is possible for the Union to exercise broader competence with regard to the BBNJ Agreement, including by adopting the proposed Directive in whole or in part.

47. Should the proposed Directive be adopted, this would constitute an exercise of internal competence that would also give rise to an extension of the Union's exclusive external competence. This would *inter alia* mean that discussions within the framework of the BBNJ Agreement on matters covered by the provisions of the proposed Directive would have to be conducted, and decisions on those matters taken, by the Union based on Union positions.
48. By contrast, it is for those Member States who have ratified the BBNJ Agreement to implement the provisions of the agreement which fall outside the scope of the Union's accession. Hence, if the proposed Directive is not adopted, Member States that have ratified the Agreement will have to implement their obligations for any environmental provisions other than Article 28(2), *inter alia* as regards impact assessments in areas beyond national jurisdiction.