

THE IMPACT OF THE DECISION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN CASE C-461/13 REGARDING THE NOTION OF “DETERIORATION OF THE STATUS” OF A BODY OF SURFACE WATER

Ph.D. student **Cristiana MIC-SOARE**¹

Abstract

The necessity of this analysis results following the recent decision passed by the Court of Justice of the European Union interpreting a fundamental provision of the Water Framework Directive 2000/60/CE, art. 4 para. (1) lit. (a) pt. (i)-(iii). The decision's importance arises mainly due to the foreseen impact on projects developed on bodies of surface water. Thus, one of the potentially affected areas is that of micro-hydropower plants, since the fall by one class of any quality element, even if this does not determine a fall in classification of the body of surface water as a whole, breaches the obligation not to deteriorate the status of a body of surface water. If the affected quality element is already in the lowest class, any degradation breaches the said obligation. This interpretation's impact is even higher, as the Court concluded that the analyzed provisions imply the states' obligation to refuse authorizing projects that could cause the deterioration of the status of a body of surface water or that impact on the attainment of good surface water status or of good ecological potential and good surface water chemical status. The main scientific research methods used are the comparative, logical, historical and sociological methods.

Keywords: *deterioration of the status of a body of surface water, protection of surface waters, Case C-461/13, Court of Justice of the European Union*

JEL Classification: K33, K41

1. Introductory aspects regarding Case C-461/13 and its relevance

The Court of Justice of the European Union (hereinafter "CJEU") passed on 1 July 2015 a decision (hereinafter the "Decision") regarding one of the fundamental provisions of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (hereinafter the "Water Framework Directive"), respectively in relation to the provisions of article 4 paragraph (1) letter (a) points (i)-(iii) of the Water Framework Directive. These provisions regulate the environmental objectives that have to be reached by the European Union Member States regarding surface waters.

The subject matter of case *Bund für Umwelt und Naturschutz Deutschland eV C-461/13* (hereinafter "Case C-461/13") was generated by the request for issuing a preliminary decision formulated by Bundesverwaltungsgericht from Germany on the basis of article 267 of the Treaty for the Functioning of the European Union, by which the German court asked the CJEU a number of four questions on the interpretation of article 4 paragraph (1) letter (a) points (i)-(iii) of the Water Framework Directive,² respectively:

- a. If article 4 paragraph (1) letter (a) point (i) of the Water Framework Directive must be interpreted in the sense that (i) Member States must refuse the authorization of a project when such project could cause the deterioration of the status of a body of surface water, except for the case when a derogation is granted, or (ii) this provision represents only the statement of an objective for water management planning;
- b. If the term "deterioration of status" provided for in article 4 paragraph (1) letter (a) point (i) of the Water Framework Directive must be interpreted in the sense that it refers only to detrimental changes leading to the classification of a body of surface water in a lower class according to Annex V of this Directive;
- c. If the term "deterioration of status" does not only refer to the detrimental changes leading to the classification of a body of surface water in a lower class according to Annex V of the

¹ Cristiana Mic-Soare - Faculty of Law, Bucharest University, c.mic-soare@schoenherr.eu .

² Court of Justice of the European Union, Decision *Bund für Umwelt und Naturschutz Deutschland eV, C-461/13*, ECLI:EU:C:2015:433, para. 28.

Water Framework Directive, what are the conditions under which a "deterioration of the status" is considered to arise;

- d. If Member States, by interpreting article 4 paragraph (1) letter (a) points (ii) and (iii) of the Water Framework Directive (i) must refuse to authorize a project when it jeopardizes the attainment of good surface water status or of good ecological potential and good surface water chemical status for the surface waters by the deadline laid down by the Directive, unless a derogation is granted, or (ii) must consider that those provisions merely represent the statement of an objective for water management planning.

As it can be noticed from the mere formulation of the preliminary questions, as well as from their contents, the first and the fourth question, respectively the second and the third question have an inner link and have therefore been analyzed together by CJEU.

The project for the development of the river Weser that constituted the basis of the litigation between Bund für Umwelt und Naturschutz Deutschland eV (the German federation for environment and nature protection), on one side, and the Federal Republic of Germany, on the other side, is related to the increase of the depth of certain parts of the river Weser from north Germany, in order to ensure the prospect of certain large container vessels to pass in the Bremerhaven, Brake and Bremen ports. Thus, even though the Waterways and Navigation Directorate for the North-West Region (Wasser- und Schifffahrtsdirektion Nordwest) approved three projects for the development of the river Weser in this sense, the referring court considered that the projects may cause certain negative consequences to the river Weser, such as (i) the effects of dredging and of discharging the dredged material, (ii) the increase of current speeds on a rising tide and on an ebb tide, (iii) the salinity increase in some parts of the lower Weser, (iv) the rise of water levels on a rising tide and their fall on an ebb tide, etc.

The main conclusions reached by the Court after analysing the preliminary questions were the following:

- on one hand, CJEU clearly stated the obligation of Member States to ensure that certain provisions of the Water Framework Directive (among which article 4 paragraph (1) letter (a) points (i)-(iii)) are mandatory as to the authorization of this kind of projects; and
- on the other hand, with certain exceptions, the "deterioration of the status" of a body of surface water is forbidden, even if it does not determine the inclusion of said body of water in an inferior class according to Annex V of the Water Framework Directive, whereas in the case of bodies of surface water which are already included in the lowest quality class, no degradation of any quality element is allowed.

As a general remark, we note that the five quality classes according to which the classification of the ecological status of a body of water is performed, are: (i) very good, (ii) good, (iii) average, (iv) weak and respectively (v) poor.

The Decision's impact has therefore multiple effects, with significant implications on the authorization of certain projects developed on bodies of surface water. We consider that, in light of the Court's determinations, especially the projects developed on bodies of surface water that are already classified in the lowest class will be affected, whereas any action thereon that could generate their degradation is forbidden. Moreover, the projects developed on bodies of surface water included in the classes very good, good or average could also be significantly affected, if the status of at least one of the quality elements is downgraded one class, even if the downgrade does not determine the amendment of the entire classification of the body of water. The Decision's effects are even more important as the provisions of the Water Framework Directive interpreted by the Court are qualified as mandatory, the Member States being thus obliged to refuse the authorization of projects that could breach these European legal provisions.

Consequently, taking into account the effects of this Decision mainly on future projects impacting on bodies of surface water, this analysis envisages to determine and detail: (i) the European legal framework relevant for the preliminary questions addressed in the Decision (in Section 2 below); (ii) the arguments and conclusions of CJEU mentioned in the Decision (in Section 3 below); (iii) the main differences between the Decision and the Advocate General's conclusions in this Case

C-461/13 (in Section **Error! Reference source not found.** below); and respectively (iv) the Decision's impact and the potential implications thereof, especially at a national level (in Section 5). The conclusions of this analysis will be presented in Section 6 below.

In order to prepare the present analysis, the applicable European legal provisions were systematically and comparatively interpreted, being also evaluated as to the prior provisions applicable for this area that were repealed by the Water Framework Directive. Moreover, the relevant official European documents and the specialized doctrine were also assessed. Thus, the main scientific research methods used are the comparative, the logical, the historical and the sociological methods.

2. The relevant European legal framework analysed by the Court in Case C-461/13

Article 4 paragraph (1) letter (a) points (i)-(iii)³ represents one of the key provisions of the Water Framework Directive in relation to the protection of surface waters, expressing, especially in point (i), an essential principle of environmental law that is extensively applied also in the case of water protection, respectively the preventive action principle (also named the prevention principle).

The main objective of the principle of preventive action is the limitation and decrease of the prejudices caused to the environment, whereas the states have the possibility to take the necessary administrative, regulatory and other measures in order to ensure such purposes.⁴ Thus, in order to apply this principle, both the regulation of duties with a preventive character and the support and promotion of activities able to avoid causing negative changes on the quality of the environment, are necessary.⁵ The noted principle, incorporated also in the Water Framework Directive, represents, for that matter, an international customary law requirement compelling Member States to take the necessary measures to prevent or minimize the effects of water deteriorations (e.g. by pollution or by causing other transboundary damages).⁶

Moreover, the prevention, control and reduction of any adverse effects on watercourses are main obligations provided also by the Convention on the Protection and Use of Transboundary Watercourses and International Lakes adopted in Helsinki on 17 March 1992 (hereinafter "Watercourses Convention from 1992"), which was also approved by the European Union on 14 September 1995. Its approach is however considered to be predominantly from the perspective of industrially developed states, wishing to mitigate or eliminate the negative consequences of such industrialisation of watercourses.⁷

³ Article 4 paragraph (1) of the Water Framework Directive:

"In making operational the programmes of measures specified in the river basin management plans:

(a) for surface waters

(i) Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8;

(ii) Member States shall protect, enhance and restore all bodies of surface water, subject to the application of subparagraph (iii) for artificial and heavily modified bodies of water, with the aim of achieving good surface water status at the latest 15 years after the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8;

(iii) Member States shall protect and enhance all artificial and heavily modified bodies of water, with the aim of achieving good ecological potential and good surface water chemical status at the latest 15 years from the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8;

[...] without prejudice to the relevant international agreements referred to in Article 1 for the parties concerned".

⁴ Philippe Sands, *Principles of International Environmental Law*, 2nd Ed. (New York: Cambridge University Press, 2003), p. 246.

⁵ Daniela Marinescu and Maria Cristina Petre, *Tratat de dreptul mediului*, Fifth Ed. revised and amended (Bucharest: University Press, 2014), p. 70.

⁶ Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law & the Environment*, 3rd Ed. (Oxford: Oxford University Press, 2009), p. 554.

⁷ Salman M. A. Salman, *Chapter 45 – „The Future of International Water Law: Regional Approaches to Shared Watercourses?"*, in Mahnoush Arsanjani et al. (editors), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Leiden: Koninklijke Brill nv., 2011), pp. 922-923.

In its analysis, the Court took into consideration several provisions of the Water Framework Directive in order to ensure the corroborated interpretation of the provisions relevant for understanding the real purpose and meaning of article 4 paragraph (1) letter (a) points (i)-(iii). Thus, for a better understanding of the Court's argumentation in interpreting this article, we believe it is important to identify the reasoning based on which the Court considered that it has to perform a corroborated analysis of these provisions with other norms from the Water Framework Directive taken into account in the Decision, of which we mention the following:

- a. Recitals (16), (25) and (32) of the Water Framework Directive encompass and define the very purposes of article 4 paragraph (1) letter (a) points (i)-(iii) of the Water Framework Directive, as being some of the reasons behind the adoption of the European regulation. Thus, Recital (16) points to the European legislator's intention to ensure a holistic approach towards water protection, integrated between various areas, by creating a link between the protection policies in the area of water law with those in "*policy areas [...] energy, transport, agriculture, fisheries, regional policy and tourism*". In fact, we notice that this link offers a preliminary clue on the potential effects of interpreting certain provisions from the field of water protection in the energy field (respectively renewable energy) and in the field of transportation. Recitals (25) and (32) make an introduction regarding the object of regulation from article 4 paragraph (1) letter (a) points (i)-(iii) of the Water Framework Directive, reminding of the necessity to evaluate the status of waters from a qualitative and quantitative perspective, on one hand, and on the other hand to set ecological objectives so as to obtain a good status for surface waters and groundwaters, and respectively to prevent the deterioration of the status of waters in general;
- b. Article 1 letter (a) of the Water Framework Directive includes on a general basis as object of the Directive the obligation to prevent the deterioration of waters, respectively to improve their status at ecosystem level, obligations that are further restated and detailed within article 4 paragraph (1) letter (a) points (i)-(iii) analysed by the Court. Setting duties to protect waters at ecosystem level is not very widespread in international and national conventions in this specific field. Important examples in which the obligation of protection and prevention of damages are also established at ecosystem level can also be found in the Watercourses Convention from 1992,⁸ and respectively in the United Nations Convention on the Law of the Non-navigational Uses of International Watercourses, adopted in New York on 21 May 1997 (named in the following the "Watercourses Convention from 1997"), which entered into force on 17 August 2014, over 17 years after its adoption;⁹
- c. The Court also took into account the provisions of article 2 of the Water Framework Directive, which encompasses the applicable definitions of the Directive, respectively points 9, 17 and 21-23. From these we consider that it is important to note the definition of the term "surface water status", which is determined by the poorer of the ecological status and the chemical status of a surface water, not by the status that could potentially predominate ("one out all out" rule). Consequently, even if, for example, only one element of the ecological status or chemical status is inferior to the other elements, the classification will be performed according to it;
- d. Article 4 paragraph (6) of the Water Framework Directive was taken into account by CJEU in order to interpret paragraph (1) letter (a) points (i)-(iii) of the same article. This provides certain exceptions from the rule forbidding the deterioration of bodies of water, conditioning the temporary deterioration on certain criteria that have to be cumulatively, not alternatively fulfilled;

⁸ Article 2 paragraph (2) letter (d) of Watercourses Convention from 1992 refers to the obligation to ensure the conservation and, if necessary, the restoration of ecosystems.

⁹ Article 20 of the Watercourses Convention from 1997 refers to the "*protect(ion) and preserv(ation of) the ecosystems of international watercourses*".

- e. Furthermore, article 4 paragraph (7) of the Water Framework Directive was analysed in order to lay down answers to the preliminary questions, since it also provides for certain waivers based on which the EU Member States' obligations to improve and not deteriorate waters would not be considered as being breached, subject to the fulfillment of the cumulative requirements expressly determined within this legal provision.

The importance of the Decision and of the interpretation of the provisions of article 4 paragraph (1) letter (a) points (i)-(iii) of the Water Framework Directive are even more significant as the previous European legislation in the field of water protection was extremely fragmented and did not comprise a clear obligation not to deteriorate waters, similar to the current obligation.

Thus, article 4 of the Council Directive of 16 June 1975 concerning the quality required of surface water intended for the abstraction of drinking water in the Member States (75/440/EEC) provides for the obligation of the states to improve the quality of waters, this obligation being circumstantiated depending on the potential technical and economic constraints.

Moreover, the same Directive also provided in article 7 the obligation not to cause the deterioration of the current quality of surface water. A double limitation of this obligation can be noted in this case: on one hand as to the current situation of the surface water, and on the other hand only as to its qualitative, and not also as to its quantitative features.

Similar obligations to the one provided in article 7 of Directive 75/440/EEC can also be found in the directives that complete the European regulatory legal framework for water protection, respectively:

- (i) in article 9 of Council Directive of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (76/464/EEC), provided for the obligation that the measures adopted by the Member States do not lead to an increase of pollution of inland surface waters, territorial waters, internal coastal waters and ground waters, either directly or indirectly;
- (ii) in article 8 the Council Directive of 18 July 1978 on the quality of fresh waters needing protection or improvement in order to support fish life (78/659/EEC), provided for a similar obligation as regards the fresh waters indicated by the Member States as requiring protection or improvements in order to support fish life;
- (iii) in article 18 of Council Directive of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances (80/68/EEC), provided for similar obligations as regards ground waters with substances belonging to families and groups of substances from the lists I and II from the annex to the Directive.

However, we notice that the previous directives imposed more limited obligations, although, similar to a certain extent, compared to the ones currently regulated through the Water Framework Directive. Thus, whereas the older provisions forbade pollution, and in the case of Directive 75/440/EEC they forbade the decrease of the quality of surface waters, the current Directive establishes more comprehensive obligations for the Member States by constraining them not to “deteriorate” surface waters.

An evolution in time can thus be noticed which led to a better acknowledgement of (i) the importance of waters – respectively especially of surface watercourses, lakes and ground waters, taking into account that these constitute the primary source of drinking water¹⁰ - for the development and the very existence of humanity, on one hand, and on another (ii) of the current and future risks over water resources (such as increase of use, increase of population globally, pollution from more varied sources, climate changes, etc.¹¹), risks that are constantly rising and consequently adequate measures for limiting, mitigating and, as much as possible eliminating them must be adopted.

¹⁰ Philippe Sands, *Principles of International Environmental Law*, 2nd Ed. (New York: Cambridge University Press, 2003), p. 460.

¹¹ *Id.*; Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law & the Environment*, 3rd Ed. (Oxford: Oxford University Press, 2009), pp. 535-536.

3. Conclusions of the Court

As anticipated above, CJEU was entrusted to rule in the Decision on two main aspects, namely: (i) whether the provisions of article 4 paragraph (1) letter (a) points (i)-(iii) are binding with regard to authorization of projects that could damage the status of a body of surface water, unless an exemption is granted in this respect; and (ii) with respect to the contents of the notion of "damage to the status" under article 4 paragraph (1) letter (a) point (i) of the Water Framework Directive.

We believe that, for a better understanding of the Court's reasoning and the significance of the provisions of the Water Framework Directive subject to interpretation, an initial presentation must be offered regarding the analysis of the content of the obligation of non-deterioration of the status of waters, and secondly one related to the binding nature of article 4 paragraph (1) letter (a) points (i)-(iii). Therefore, we will further pursue this structure instead of the opposing one addressed by the Court.

a. Conclusions related to the content of the concept "deterioration of status" provided by article 4 paragraph (1) letter (a) point (i) of the Water Framework Directive

The notion of "deterioration of status" is not expressly defined within the Water Framework Directive,¹² as opposed to other key concepts encompassed, such as "pollution" which is defined as *"the direct or indirect introduction, as a result of human activity, of substances or heat into the air, water or land which may be harmful to human health or the quality of aquatic ecosystems or terrestrial ecosystems directly depending on aquatic ecosystems, which result in damage to material property, or which impair or interfere with amenities and other legitimate uses of the environment"*.¹³ Consequently, in the transposition process of this European norm in their national legislation, Member States have interpreted it differently. Through the Decision, the obligation not to deteriorate the status of surface waters is granted an even more comprehensive meaning than was the case before in certain Member States, such as Austria, Germany or Romania.

At the outset, it is interesting to note that the definition of "pollution" from the Water Framework Directive directly refers to that of "deterioration" – with reference, this time, to material goods, recreational or other legitimate uses of the environment. It follows the close relationship between the two concepts, pollution being actually one of the ways in which the deterioration of bodies of surface waters can be caused.

In determining the content of the notion of "deterioration of status", the Court appeals primarily to the literal interpretation of article 4 paragraph (1) letter (a) point (i) of the Water Framework Directive. Thus, the definition of surface water status is taken into account, definition which is determined by the poorer of its ecological status and its chemical status values (rule *"one out all out"*). This is corroborated by the wording of article 4 paragraph (1) letter (a), which is interpreted to refer to *"deterioration which does not result in classification of that body of water in a lower class"*.¹⁴ Therefore, since the framing in a lower class occurs even in the event of a change of a single element which determines the ecological and chemical status under Annex V of the Water Framework Directive, and not necessarily in the event of a modification of all these elements, it appears that the degradation of one element of ecological or chemical status is sufficient for the existence of a deterioration of the body of surface water within the meaning of article 4 paragraph (1) letter (a) point (i).

Secondly, the CJEU construes systematically the "deterioration of status" of a body of surface water as to the objectives of the Water Framework Directive and as to the means of evaluation of the status of the surface waters compared to the ecological status which is split in the five classes.¹⁵ Thus, the quality class in which the ecological status of a surface water is included can be modified

¹² In this regard, CJEU, Decision Bund für Umwelt und Naturschutz Deutschland eV, C-461/13, ECLI:EU:C:2015:433, para. 53.

¹³ Article 2 point 33 of the Water Framework Directive.

¹⁴ CJEU, Decision Bund für Umwelt und Naturschutz Deutschland eV, C-461/13, ECLI:EU:C:2015:433, para. 55.

¹⁵ CJEU, Decision Bund für Umwelt und Naturschutz Deutschland eV, C-461/13, ECLI:EU:C:2015:433, para. 56-57.

according to the limit values of the quality elements of the biological status.¹⁶ Therefore, it follows that if a quality element becomes lower than the limit value level for the class in which the respective body of surface water is at that moment encompassed, its classification will fall in the following quality class.

As examples of quality elements mentioned by the Water Framework Directive and which can influence the ecological status of surface waters are given a number of (i) biological elements (such as composition and abundance of aquatic flora), (ii) hydromorphological elements supporting biological elements (related for example to the hydrological regime or the river continuity), (iii) chemical and physico-chemical elements supporting the biological elements, (iv) general (such as thermal conditions, oxygenation conditions or salinity), respectively (v) specific pollutants (such as pollution with priority substances identified as being discharged into the respective body of water).¹⁷

At the same time, although the “deterioration of status” of the bodies of water must be interpreted in relation to the quality classes, as indicated above, the Court emphasised the fact that the limit values between classes merely represent “*an instrument which limits the discretion of the Member States when determining the quality elements which reflect the actual status of a specific body of water*”.¹⁸ Proof of this statement is the very fact that article 4 paragraph (1) letter (a) point (i) does not expressly refer to Annex V of the Water Framework Directive, representing, on the contrary, rather “*a concept of general scope*”.¹⁹

Thirdly, in order to ensure the fulfillment of the object of the Water Framework Directive to improve the status of bodies of surface water and not to deteriorate them, the Court considered that the separate clarification of the situation of bodies of surface water that are already encompassed in the lowest quality class is necessary. Thus, in this regard, should it be considered that only the fall in a lower class causes a “deterioration of status”, the obligation expressly provided for the Member States to protect waters would be breached, since these are already in the lowest class and could not fall any lower than that. Consequently, it is mandatory that, in the case of these waters, the notion of “deterioration of status” be understood as to any of the quality elements or substances, so that the possibility to fulfill the main objective of the Water Framework Directive is not affected.²⁰

Last but not least, it was also taken into consideration the fact that the Water Framework Directive expressly lists, limitatively, the cases in which the deterioration of a body of water is allowed. These may not, consequently, be extended by interpretation or by setting a high threshold compared to which to be considered that there is a deterioration of the status of bodies of water.²¹ Moreover, the possibility to establish the cases in which the deterioration of status appears, by comparative evaluation of the negative effects on waters compared to the economic interests corresponding to that water, is specifically excluded, as opposed to the claims of the Federal Republic of Germany.²²

Consequently, taking into account the above, CJEU correctly concluded from our perspective, that in principle (i) the “deterioration of status” of a body of surface water is forbidden, as compared to the quality elements set according to Annex V of the Water Framework Directive, even if this does not determine the classification of the body of water in a lower class, and (ii) in the case of waters which are already included in the lowest quality class, no degradation of any quality element is permitted, except for the cases which are encompassed in the exceptions explicitly provided in article 4 paragraphs (6) and (7) of the Water Framework Directive.

¹⁶ Point 1.4.2 (i) of Annex V of the Water Framework Directive; CJEU, Decision *Bund für Umwelt und Naturschutz Deutschland eV*, C-461/13, ECLI:EU:C:2015:433, para. 59.

¹⁷ Points 1.1.1 and 1.1.2 of Annex V of the Water Framework Directive.

¹⁸ CJEU, Decision *Bund für Umwelt und Naturschutz Deutschland eV*, C-461/13, ECLI:EU:C:2015:433, para. 61.

¹⁹ *Id.*

²⁰ CJEU, Decision *Bund für Umwelt und Naturschutz Deutschland eV*, C-461/13, ECLI:EU:C:2015:433, para. 66.

²¹ CJEU, Decision *Bund für Umwelt und Naturschutz Deutschland eV*, C-461/13, ECLI:EU:C:2015:433, para. 67.

²² CJEU, Decision *Bund für Umwelt und Naturschutz Deutschland eV*, C-461/13, ECLI:EU:C:2015:433, para. 68.

b. Conclusions regarding the obligation to refuse the authorization of certain projects as required by article 4 (1) (a) (i) - (iii) of the Water Framework Directive

Once the significance and content of the obligation not to "deteriorate the status" of bodies of surface water is set, the importance of the Court's assessment regarding the binding character of the provisions of article 4 paragraph (1) letter (a) points (i)-(iii) from the Water Framework Directive related to the authorization of specific projects results more clearly.

Thus, questions in this regard were addressed by CJEU to determine whether these provisions have the character of (i) an obligation of the states to refuse authorization of projects that could damage the status of a body of surface water or affecting the possibility to obtain a good status or a good ecological potential and good chemical status of bodies of surface water, unless an exemption is conferred, or just of (ii) an objective for water management planning.

Also for this case, the Court turned first to a literal interpretation of article 4 paragraph (1) letter (a) point (i) of the Water Framework Directive, showing that the very way of drafting this legal provision indicates that they have a nature of compulsory requirements for Member States.²³ We believe that such an interpretation is fully justified and results with sufficient clarity, given that the Directive requires states to "*implement necessary measures to prevent the deterioration of the status of all bodies of surface water*".²⁴ Thus, creating the necessary background for the authorization of certain projects developed on bodies of surface water or their authorization itself, cannot be more than an "implementation" of such "necessary measures".

We note that, at first glance, some confusion regarding the nature of the obligation in comparison to the character as objective of the analysed provision could be derived from the fact that article 4, referred to in the Water Framework Directive as "Environmental objectives" includes exactly the environmental objectives determined for upholding the object of the Directive referred to in article 1 paragraph (a) – that of establishing the necessary framework for the protection of, inter alia, inland surface water. Nevertheless, article 4 paragraph (1) letter (a) point (i) falls within the definition of "environmental objective" and does not exclude its nature of duty related to the authorization of specific projects.

Moreover, as correctly in our view, the Court noted²⁵ that the environmental objectives contained in article 4 paragraph (1) letter (a) points (i)-(iii) of the Water Framework Directive shape two specific obligations, namely (i) the obligation to prevent deterioration, and (ii) the obligation to improve the status of bodies of surface water. These obligations are autonomous, the first not being a simple objective of the second, as the European Commission considered.²⁶ On the contrary, although distinct, it is necessary that they be addressed together with the purpose of creating the necessary framework to be possible to achieve the qualitative objectives of the Directive, namely (i) achieving good surface water in the terms agreed, and (ii) obtain a good ecological potential and good chemical status for those waters.

Qualification as binding of the provision on no deterioration of the status of bodies of water in relation to the authorization of specific projects is supported by the entire construction of the Water Framework Directive, which complements article 4 paragraph (1) letter (a) point (i) with a number of other provisions designed to achieve the same purposes listed above. Thus, according to the Advocate General, the Court held that the detailed regulation of the process under which Member States may implement the measures necessary to fulfill the object and to attain the objectives of Directive confirms the binding effects of the provisions analysed, being more than "*simple objectives of management planning*".²⁷

Last but not least, another confirmation of the mandatory effects generated by article 4 paragraph (1) letter (a) point (i) of the Water Framework Directive in relation with the authorization

²³ CJEU, Decision Bund für Umwelt und Naturschutz Deutschland eV, C-461/13, ECLI:EU:C:2015:433, para. 31.

²⁴ Article 4 paragraph (1) letter (a) point (i) from the Water Framework Directive.

²⁵ CJEU, Decision Bund für Umwelt und Naturschutz Deutschland eV, C-461/13, ECLI:EU:C:2015:433, para. 39.

²⁶ CJEU, Decision Bund für Umwelt und Naturschutz Deutschland eV, C-461/13, ECLI:EU:C:2015:433, para. 49.

²⁷ CJEU, Decision Bund für Umwelt und Naturschutz Deutschland eV, C-461/13, ECLI:EU:C:2015:433, para. 42-43.

of specific projects, is the very fact that the Directive provides for a series of express waivers, exhaustively determined and not illustrative, under which certain deteriorations would not be deemed to infringe on the analyzed European provisions.

Such exemptions refer to two categories of scenarios. On one hand, there is the case in which there is a temporary deterioration of the status of bodies of water, if the conditions set out in article 4 paragraph (6) of the Water Framework Directive are jointly met. On the other hand, there may be granted an exemption from the obligation to comply with article 4 paragraph (1) letter (a) points (i)-(iii) if (i) there are any new changes to the physical characteristics of the body of water; or (ii) as a result of new activities for sustainable human development such damage cannot be prevented, but only if the requirements expressly provided in article 4 paragraph (7) of the Water Framework Directive are jointly met, among which that of taking all the measures needed to mitigate negative consequences over the body of water and that of the appearance of new changes in the physical properties of the body of surface water which generate negative effects.

The conclusion duly drawn by the Court, is that while the cases in which the deterioration is allowed are expressly and exhaustively set out in the Water Directive Framework, being also directed towards special projects, it is not possible that the European lawmaker's intention has been to award the provisions on non-deterioration of the state of watercourses contained in article 4 paragraph (1) letter (a) point (i) a facultative character, of objective of water management planning, but rather binding character.²⁸

4. Main differences between the Decision and the Opinion of the Advocate General

Following a comparative analysis of the two lines of thought, the one of CJUE in comparison to the one of the Advocate General Niilo Jääskinen we observe that, in most of the cases, the Court has followed a similar argument as the one proposed by the Advocate General. Nevertheless, it is interesting to note the fact that there were also differences of opinion on several substantive matters, mainly in respect of the means to determine the content of the notion of "deterioration of the status" of a surface water.

Thus, the Advocate General concluded that the answer to the second and the third question must be in the sense that, a "deterioration" within the meaning given by the Water Framework Directive is caused also by simply "referring to a substance or a quality element that enters the assessment of the ecological status as defined in Annex V" of the Water Framework Directive.²⁹ Such a concept fits into the "*status quo*" theory, whose supporters say that any change in the status of the bodies of water implies a deterioration thereof.³⁰

It may be considered in this regard that this interpretation is more appropriate than that offered by the "classes" theory, which implies that there is a "deterioration" only if the status of the body of surface water is included in a lower class pursuant to Annex V to the Water Framework Directive.³¹ The class theory calls upon the risk that the waters of the lowest class are, by way of interpretation, excluded from the prohibition of deterioration, while the waters from the upper classes are also less protected, which would violate the foundation of the Directive, respectively its objectives.³² On the other hand, the status-quo theory is considered to be in conjunction with the "*one out all out*" principle which is the specific expression of the precautionary principle.³³

²⁸ CJEU, Decision Bund für Umwelt und Naturschutz Deutschland eV, C-461/13, ECLI:EU:C:2015:433, para. 43, 47.

²⁹ Opinion of the Advocate General Niilo Jääskinen presented on 23 October 2014 in the CJEU case, Bund für Umwelt und Naturschutz Deutschland eV, C-461/13, ECLI:EU:C:2014:2324, para. 109.

³⁰ Opinion of the Advocate General Niilo Jääskinen presented on 23 October 2014 in the CJEU case, Bund für Umwelt und Naturschutz Deutschland eV, C-461/13, ECLI:EU:C:2014:2324, para. 90.

³¹ *Id.*

³² Opinion of the Advocate General Niilo Jääskinen presented on 23 October 2014 in the CJEU case, Bund für Umwelt und Naturschutz Deutschland eV, C-461/13, ECLI:EU:C:2014:2324, para. 102.

³³ Opinion of the Advocate General Niilo Jääskinen presented on 23 October 2014 in the CJEU case, Bund für Umwelt und Naturschutz Deutschland eV, C-461/13, ECLI:EU:C:2014:2324, para. 101.

Nevertheless, although it had not considered the classes theory applicable, the Court held that an interpretation of the notion of "deterioration of status" is necessary in a less strict manner than the one proposed by the Advocate General via the status quo theory by reference to quality elements established according to Annex V of the Water Framework Directive. Thus, the extension to any substance, and not only quality elements, would have established significant barriers to the development of numerous projects on bodies of surface water.

On the contrary, the Court accepted the status quo theory proposed by the Advocate General, for the case of watercourses already included the lowest quality class and in respect to which it has concluded that any degradation of any quality element is forbidden, save for the cases falling within the exceptions set out explicitly in article 4 paragraphs (6) and (7) of the Water Framework Directive.

5. The impact of the Decision in Case C-461/13 and possible consequences thereof

The main effects of the CJEU Decision in Case C-461/13 arise following the Court's interpretation of the notion of "deterioration of status" and the implications of this interpretation towards the content of the obligation not to deteriorate.

In order to determine the practical impact of the Decision, we consider that the effects of determining a broader extent of the obligation not to "deteriorate the status" of waters cannot be analysed by themselves, but corroborated with the interpretation and practical implementation of other complementary provisions of the Water Framework Directive.

In this regard, we note that the exceptions determined by article 4 paragraph (7) of the Water Framework Directive impose quite strict conditions in order not to determine that new projects and the modifications to the bodies of water breach the provisions of paragraph (1) letter (a) points (i)-(iii) of the same article. The finality of these exceptions is linked to the possibility to compensate between the interest related to the water protection, on one hand, and to ensure an adequate economic development, but only if a number of conditions are fulfilled, among which the one to include explicit reasons in the sense of derogation within the management plans of the corresponding water districts.

However, the European Commission noticed in its Fourth report presented to the European Parliament and Council on the implementation of the Water Framework Directive from March 2015 (hereinafter the "Fourth Report for Implementation of the Water Framework Directive") the fact that, in the majority of the Member States, the derogations are applied "too widely and without appropriate justification", not being clear in general if, despite the delay in obtaining the "good water status", measures are still taken in order to progress towards reaching this objective with a view to fulfilling the obligations imposed by the Water Framework Directive.³⁴

Also, assessing the implementation status of the Water Framework Directive in the light of plans for river basin management, the European Commission stated in the Third report to the European Parliament and the Council on the implementation of the Water Framework Directive in November 2012 (hereinafter the "Third Report for the Implementation of the Water Framework Directive") that, although it is clear that there are more projects planned or ongoing that could deteriorate the status of bodies of water, these have only been included in part in the management plans.³⁵ It was therefore considered that this approach represents a missed opportunity for the sustainable development of economic activities to take place in a truly integrated water management framework.³⁶

³⁴ European Commission, *Communication from the Commission to the European Parliament and the Council – The Water Framework Directive and the Floods Directive: Actions towards the 'good status' of EU water and to reduce flood risks* (Brussels, 9.3.2015 COM(2015) 120 final), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015DC0120> (accessed on 10 November 2015), p. 5.

³⁵ European Commission, *Report from the Commission to the European Parliament and the Council on the Implementation of the Water Framework Directive (2000/60/EC) – River Basin Management Plans* (Brussels, 14.11.2012, COM(2012) 670 final), available at <http://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:52012DC0670&from=EN> (accessed on 10 November 2015), p. 13.

³⁶ *Id.*

It should also be taken into account that all these issues must be read in conjunction with the (newly outlined) definition of "deterioration of status" of bodies of surface water. This will have to be properly reflected also in the new management plans, since it is attributed a broader content than the one taken into consideration by some Member States in preparing the management plans (among which Romania).

Following the Decision, projects likely to have a negative impact on the ecological or chemical status of a body of surface water could be censored by the Member States, given the Court's interpretation and restrictive conditions for exemption from the obligation of non-deterioration. As examples of projects with potentially significant negative consequences on the status of bodies of water we mention projects (i) for the construction of hydropower plants or micro-hydropower plants, (ii) for the construction of dams, (iii) for planning of irrigation canals for agriculture, (iv) for embankment destined to improve navigation, etc.

The examples of projects mentioned above present significant risks that could cause without too much difficulty, a breach of the duty of non-deterioration of the status of bodies of water. Thus, in such projects were found physical changes in the hydrological cycle that caused the modification of aquatic life, causing damages to the ecosystem.³⁷ It is especially important to evaluate these risks given that the Water Framework Directive regulates the protection at the ecosystem level, similar to other international regulatory instruments such as the Watercourses Convention from 1992 and the Watercourses Convention from 1997, the protection at ecosystem level having a broader content than the one limited to the protection of bodies of water. In this case, the damages to the ecosystem of bodies of water may be, in principle, violations of binding provisions of the Water Framework Directive – as they have been expressly qualified by the CJEU in its Decision – respectively that of article 4 paragraph (1) letter (a) points (i)-(iii).

Regarding the projects for the development of navigation on bodies of surface water, given its importance to the continuous development and sometimes even to the survival of humanity, the integrated approach on planning, respectively on identifying solutions to allow to maintain ecological integrity and to develop navigation projects at the same time is recommended.³⁸ Moreover, the European Commission explicitly states within the Third Report for Implementation of the Water Framework Directive that inland navigation can have negative effects on the aquatic environment, being thus necessary to ensure that the objectives of the Directive and the sustainable development of navigation are fulfilled.³⁹

Other projects with significant impact on bodies of water are hydropower plants and, maybe even more significantly, micro-hydropower plants. There is thus a risk that they cause significant imbalances on aquatic ecosystems, sometimes having an impact also on catchments and estuaries.⁴⁰ Therefore, the European Commission stressed that it is necessary to assess the significant environmental impacts caused by such projects, and the reconditioning and expansion of existing facilities should have priority over new projects, the latter being required to be included in the strategic assessment at basin level so as to be selected optimal locations for power production and to cause the lowest possible environmental impact.⁴¹

At the same time, we believe it is important to corroborate also (i) the interpretation of the CJEU in the Decision on the content of the concept of non-deterioration of status and the character of obligation related to the authorization of specific projects granted to the provisions of article 4 paragraph (1) letter (a) points (i)-(iii), on the one hand, (ii) with the conclusion of the European Commission that Member States should ensure the review and, if necessary, update existing

³⁷ Laurence Boisson de Chazournes, *Fresh Water in International Law* (Oxford: Oxford University Press, 2013), p. 115.

³⁸ *Id.*

³⁹ European Commission, *Report from the Commission to the European Parliament and the Council on the Implementation of the Water Framework Directive (2000/60/EC) – River Basin Management Plans* (Brussels, 14.11.2012, COM(2012) 670 final), p. 13.

⁴⁰ Laurence Boisson de Chazournes, *Fresh Water in International Law* (Oxford: Oxford University Press, 2013), p. 115.

⁴¹ European Commission, *Report from the Commission to the European Parliament and the Council on the Implementation of the Water Framework Directive (2000/60/EC) – River Basin Management Plans* (Brussels, 14.11.2012, COM(2012) 670 final), p. 13.

authorizations (for the catchment of water – including water management rights –, evacuation, hydropower, etc.) so as to ensure their compatibility with the objectives of the Water Framework Directive,⁴² on the other hand.

Moreover, the European Commission also indicates the fact that the review and update of the current authorisations is insufficient, being necessary for the Member States to ensure the compliance with them, including by means of inspections meant to remove risks corresponding to breach of norms and to ensure the capacity to apply the applicable legislation.⁴³

Thus, while the Decision has significant effects on the obligations of Member States related to fulfilling the objectives of the Water Framework Directive, we believe it is recommendable to evaluate the need to adapt the relevant Romanian legislation (including the Water Law no. 107/1996 and the Procedure of 28 June 2006 and the powers to issue permits and authorisations for water management, approved by Order no. 662/2006), on the one hand regarding the procedure for issuing, reviewing and updating the water management authorisations, and on the other hand in relation to aspects of control and sanction for breach of these authorisations.

Last but not least, the impact of the Decision should also be reflected in the new water management plans which should be adopted by Romania until 22 December 2015, respectively in the national management plan 2016-2021 and river basin management plans. We believe that the draft National Management Plan afferent to the National Part of the River Basin of the International River Danube of 22 December 2014⁴⁴ does not reflect the conclusions of the Decision of the CJEU in Case 461/13 – being in any case prior to the said Decision – and thus call for review according to the interpretation by the Court in order to avoid infringement of the Water Framework Directive objectives established under article 4 paragraph (1) letter (a) points (i)-(iii). For example, the risks of not achieving the quality improvement obligations and non-deterioration of the status that are not assessed based on quality elements, but (i) in the case of ecological risk, only as to organic pollution, nutrient pollution and the hydromorphological deterioration, and (ii) in the case of chemical risk, as to the pollution from priority substances and other pollutants.⁴⁵

6. Conclusions

The Court's Decision issued in Case C-461/13 may generate significant effects in the Member States, especially from the perspective of the extension of the scope of application of the notion of "deterioration of status" of the bodies of surface waters, as compared to the quality elements included in Annex V, even if a fall in a lower class of the respective body of water is not caused, since in the case of bodies of water already included in the lowest quality class no degradation of any quality element is permitted.

This extension of the notion of "deterioration of status" is completed also by the clear attribution of the mandatory character both of the obligation not to deteriorate and of the obligation to improve the status of bodies of water as regards the authorization of projects developed on them (projects such as the ones for the construction of hydropower plants or micro-hydropower plants, for the construction of dams, for embankment destined to improve navigation, for planning of irrigation canals for agriculture, etc.).

We consider that the Decision's impact will be thus, higher as regards projects which are intended to be developed on bodies of surface water classified in the lowest class, on which any action

⁴² European Commission, *Communication from the Commission to the European Parliament and the Council – The Water Framework Directive and the Floods Directive: Actions towards the 'good status' of EU water and to reduce flood risks* (Brussels, 9.3.2015 COM(2015) 120 final), p. 12.

⁴³ *Id.*

⁴⁴ The draft National Management Plan related the national part of the international hydrographic basin of the Danube River from 22 december 2014 available at <http://www.rowater.ro/Documente%20Consularea%20Publicului/Proiectul%20Planului%20Na%C8%9Bional%20de%20Management%202016-2021/Proiectul%20Planului%20Na%C8%9Bional%20de%20Management%20-%202022%20decembrie%202014.pdf> (accessed on 10 November 2015).

⁴⁵ *Idem*, p. 65

that could trigger their degradation is forbidden. The development of projects on bodies of surface water classified in the very good, good or average classes can also be affected, if the status of at least one of the quality elements is degraded by one class, even if the degradation does not determine the amendment of the entire classification of the water. As a matter of fact, a likely consequence of these restrictions could be the higher costs necessary to be allotted in order to use superior technologies that could limit as much as possible the impact on the bodies of water on which the respective projects are developed.

What is more, by corroborating the Court's conclusions with the ones of the European Commission from the Third and Fourth Report for Implementation of the Water Framework Directive, it results that the water management plans should be revised in the sense of encompassing the distinctions within the Decision regarding the notion of "deterioration of status" of the bodies of water taking into account the quality elements from Annex V of the Water Framework Directive, respectively any quality elements or substances in the case of bodies of water that are already in the lowest quality class, if these aspects are not already included in the proposed management plans.

Last but not least, we consider that the necessity to adapt the Romanian legislation currently in force regarding (i) the issuance, revision and update of the water management authorisations, as well as (ii) the means of inspection, control and sanctioning in the case of breach thereof should be analysed, in order for Romania to achieve the objectives imposed by the Water Framework Directive related to the obligations to improve and not to deteriorate the bodies of water.

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