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The enforcement of the European Union environmental law in the mirror of the
judicial practice of the Court of Justice of the European Union

Abstract

In the framework of the present study, the author has concentrated on the judicial practice in relation to the Water Framework Directive, though – due to the relatively short ‘history’ of the Directive and presumably the Member States’ awareness of its significant importance – there are not too many relevant cases. The author has focused on two of the available cases in detail. One of them is Case C-525/12 initiated by the European Commission against the Federal Republic of Germany and in which quite a few Member States intervened in support of the form of order sought by the Federal Republic of Germany. The other case, C-664/15 was a request for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) in the legal proceedings between Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation and Bezirkshauptmannschaft Gmünd. In both cases, there are well-grounded interpretations of the provisions of the Water Framework Directive beneficial for legal practice.

Keywords: Water Framework Directive, Court of Justice of the EU, water law, cost recovery principle

1. Introduction

There is no life on Earth without water. Clean and fresh water is vital for the survival of mankind. Due to global processes on Earth, such as climate change and population growth, the importance of the sustainability of water is increasing dramatically. More and more international conventions reflect the processes, such as the Sustainable Development Goals adopted by the UN member states in September 2015, which devotes one of its seventeen goals that shall be achieved by 2030 to water.¹

To assure the sustainability of water makes it necessary to improve the legal and institutional framework for water management both at national² and international³ levels. One of the particularly problematic areas of water legislation is cross-border water management and protection because of the difficulties in achieving cooperation and comparability in different countries due to differences in legal concepts and

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¹ Revision of the Drinking Water Directive.

² See Szilágyi, Dobos & Szűcs 2020, 41–43, Csák 2019.

³ See Raisz 2012, 371–380.; Kecskés 2015, 55–79.; Bányai 2016, 181–200.; Bujdos Á 2016, 151–165; Bujdos 2017; Marinkás 2019, 96–112.; Raisz & Szilágyi 2017, 79–98.



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calculation methods of water management and protection. Therefore, the regulation of Member States' cross-border water protection and water management relations and the solution of conflicts arising therefrom are the major elements of the cooperation among the Member States.

Present study deals with two water-related directives of the EU law:⁴ Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption ('Drinking Water Directive')⁵ and Directive of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy ('Water Framework Directive').

2. Drinking Water Directive in a nutshell

The European Union has a history of over 30 years of drinking water policy in order to protect EU citizens' health because the Community acknowledged the importance of the quality of water intended for human consumption as concerns human health and also the necessity of laying down the essential quality standards at Community level with which water intended for that purpose must comply in the beginnings.⁶

As a result of this acknowledgment, one of the milestones of the European Union's water policy was the Drinking Water Directive, which was first adopted in 1980⁷ and after its revision in 1998 it was issued in its present form. The Drinking Water Directive contains community level regulations concerning the quality of water intended for human consumption for its sustainability. Its main objective is to protect drinking water from contamination and to ensure its cleanness for human consumption.⁸ To ensure its main objectives, the Drinking Water Directive includes the following: (a) it sets standards and parameters of water quality based on the latest scientific evidence to ensure basis for water quality control; (b) it obliges member states to ensure efficient water monitoring systems within their own authority though by not weakening the rules of the Directive; (c) it obliges the member state to provide the consumers with adequate, timely information; and (d) regulations ensuring the contribution to the broader EU water and health policy.⁹ Since the main objective of Drinking Water Directive is to ensure that water intended for human consumption should be safe, it requires that drinking water should be free of any microorganisms, parasites or substances that could potentially endanger human health. Therefore, it set standards for the most common, potentially harmful organisms and substances that can be found in drinking water.

⁴ See erről Baranyai 2020; Belényesi 2013; Jans & Vedder 2012, 391–413; Szilágyi, Baranyai & Szűcs 2017, 14–23.; Szilágyi 2019, 255–275.; Szilágyi 2010.

⁵ Drinking Water Directive.

⁶ Drinking Water Directive Recital (6).

⁷ Council Directive 80/778/EEC of July 15, 1980 on the quality of water intended for human consumption.

⁸ Drinking Water Directive Recital (5).

⁹ Drinking Water Directive.

Accordingly, the Drinking Water Directive requires Member States to monitor and regularly test 48 microbiological, chemical and indicator parameters. The two microbiological parameters, *Escherichia coli* (*E. coli*) and enterococci must be totally absent from samples. 26 chemical parameters, (such as arsenic, nickel, lead and pesticides), are set because of their impact on human health: therefore, exceedances of the values set for them requires Member States to take remedial action. Most of the 20 indicator parameters listed in the Directive, (such as chloride, sodium, taste, odour and turbidity), do not mean a direct threat to human health; nonetheless, they have indirect relevance for water quality.

The Drinking Water Directive is applicable to all water intended for human consumption, with the exception of mineral waters and waters that are medicinal products. It applies to all distribution systems serving more than 50 people. The Directive also requires regular provision of information to consumers and drinking water quality has to be reported to the European Commission every three years.¹⁰ The Drinking Water Directive provides Member States with a wide scope for exemptions, i.e. derogations from certain provisions of the Directive.¹¹ Such provisions are contained in Article 3 sections (2)–(3), Article 9 and Article 15 of the Drinking Water Directive. The European Court of Justice (ECJ) has ruled against Luxembourg in Case C-458/10 *Commission v Grand Duchy of Luxembourg*¹² due to inadequate transposition of the derogating rules.

A 2017 study carried out in the framework of the revision of the EU Drinking Water Directive concluded that the Directive had been effective: the study mentions the reduction of lead in drinking water as an example of significant improvement. However, it also highlights a number of weaknesses, including: (a) water quality in small water supply zones is poorer than in large supply zones; (b) national approval systems for materials and substances in contact with drinking water have not been harmonised at EU level; and (c) consumer satisfaction with the information provided on water quality is low. The study also points out that sampling water at the tap is not always possible, due to national legislation that prohibits water suppliers from entering private premises.¹³

3. The Birth of Water Framework Directive and its significance

A significant legislative means in order to assure the sustainability of water supplies in the European Union is the Water Framework Directive,¹⁴ which was a radically innovative step since it was the first EU act, which defined a framework for Community water management and protection, based on hydrographic formations, i.e. river basins, taking into account sustainable development rather than national boundaries or policies.

¹⁰ Revision of the Drinking Water Directive.

¹¹ Szilágyi 2013, 127.

¹² Judgment of the General Court 2020.

¹³ Engloner, Vargha, Báldi & Józsa 2019.

¹⁴ Directive of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy ('Water Framework Directive').

The Water Framework Directive was created with the aim to bring in a new era for European water management, focusing on understanding and integrating all aspects of the water environment to be effective and sustainable.¹⁵ In its Preamble the Directive gives the following definition of water as a value: "(1) Water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such."¹⁶

Recital (11) enumerates the objectives of the Community policy on the environment: preserving, protecting and improving the quality of the environment, in prudent and rational utilisation of natural resources. This section also lists the principles the environmental policy of the Community shall be based on: the precautionary principle, the principles that preventive action should be taken and the polluter should pay, and the environmental damage should, as a priority, be rectified at source.¹⁷ Recital (19) gives the aim the Directive came into being: "maintaining and improving the aquatic environment in the Community."¹⁸ Defining the objective's more precise meaning, the Directive says: "This purpose is primarily concerned with the quality of the waters concerned."¹⁹ This section also mentions the importance of measures on quantity, as an ancillary element in securing good water quality.²⁰

Besides the attempt to unify the water policy in the member states, the main purpose of Water Framework Directive was to reach 'good status' objectives for water bodies throughout the territory of the European Union by regulating water quality in order to assure sustainable use of water. The necessary measures to be taken in order to reach the set goals are comprised in the so-called Action Program, one the most relevant parts of which is the River Basin Management Plan. The Water Framework Directive's environmental objectives were to be achieved by 2015 by the Member States, provided that no deadline extension or exception was invoked. Member States that avail themselves of an extension beyond 2015 are required to achieve all Water Framework Directive's environmental objectives by the end of the second and third management cycles, which extend from 2015 to 2021 and 2021 to 2027.²¹

In order to achieve the above described objectives, the Water Framework Directive introduced the following provisions in the field of water policy: – the water quality measures apply not only to 'more significant' but also to all kinds of water bodies; – a new qualification system was introduced by Water Framework Directive focusing on the protection of the whole water ecosystem instead of state evaluation of individual chemical components; and – Water Framework Directive includes compulsory measures to be taken in order to improve the quality, i.e. to reach the 'good status' of water bodies as a long-term objective.²²

¹⁵ Engloner, Vargha, Báldi & Józsa 2019.

¹⁶ Water Framework Directive Recital (1).

¹⁷ Water Framework Directive Recital (11).

¹⁸ Water Framework Directive Recital (19).

¹⁹ Water Framework Directive Recital (19).

²⁰ Water Framework Directive Recital (19).

²¹ European Commission 2012.

²² Somlyódy 2011.

Szilágyi (2013) summarized the main features of the Water Framework Directive as follows: (a) An integrative approach covering many elements of the hydrological cycle; (b) The river basin districts are the basis of the regulation and not the administrative units of the Member States; (c) A combination of its regulatory approach, which incorporates the tools of both the regulatory model for individual discharges (emissions) and the regulatory model for water quality standards (immission); and (d) In addition to quality water protection, quantitative water protection is also an important element of regulation, due to the recognition that there is a strong correlation between the quantitative and qualitative aspects of water protection.²³

The Water Framework Directive, as it follows from its regulatory framework, gives priority to the so-called ‘transboundary water problems’, i.e. transboundary water issues.²⁴ Regarding its effect, it covers inland surface waters, transitional waters, coastal seawater and groundwater.²⁵ We must say that it is still a challenge to achieve the main objectives of the Water Framework Directive. By 2015, the end of the first Water Framework Directive cycle, 47% of EU surface waters did not reach the ‘good status’ it yet. Furthermore, the Water Framework Directive does not regulate what happens if ‘good status’ of water as an objective is not achieved by 2027.²⁶ Besides, many other uncertainties around the Water Framework Directive have contributed to a number of problems arising in practice during the implementation of the Water Framework Directive, in particular as regards the respect of deadlines by the Member States.²⁷

4. Significant water related judicial practice of the European Court of Justice

In the framework of the present study, I have concentrated on the judicial practice²⁸ in relation to the Water Framework Directive, though – due to the relatively short ‘history’ of the Directive and presumably the Member States’ awareness of its significant importance – there are not too many relevant cases. I have focused on two of the available cases which I consider important and described them in detail. One of them is Case C-525/12 initiated by the European Commission against the Federal Republic of Germany and in which quite a few Member States intervened in support of the form of order sought by the Federal Republic of Germany.²⁹ The other case, C-664/15 was a request for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) in the legal proceedings between Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation and Bezirkshauptmannschaft Gmünd.³⁰ In both cases, there are well-grounded

²³ Szilágyi 2013, 133–134

²⁴ Water Framework Directive Recitals (23) and (35), Article 3, sections (3)–(6), Article 12.

²⁵ Szilágyi 2013, 134.

²⁶ Krämer 2012, 256.; Szilágyi 2013, 140.

²⁷ Szilágyi 2013, 140.

²⁸ See Baranyai 2019; Baranyai 2020.

²⁹ Case C-525/12 (ECLI:EU:C:2014:2202).

³⁰ Case C-664/15 (ECLI:EU:C:2017:987).

interpretations of the provisions of the Water Framework Directive beneficial for legal practice.

4.1. Case No. C-525/12

On September 11, 2014 in case C-525/12 the European Court of Justice ('ECJ') passed a decision in the proceedings initiated due to failure of a Member State to fulfil obligations. The action was brought against the Federal Republic of Germany by the European Commission because in its opinion the Federal Republic of Germany failed to fulfil its obligations arising from the Water Framework Directive, especially from its Article 2 (38) and Article 9 by excluding certain services (inter alia, impoundment for the purposes of hydroelectric power generation, navigation and flood protection, abstraction for irrigation and industrial purposes and personal consumption) from the concept of 'water services'.³¹

The pre-litigation procedure started with a complaint submitted to the European Commission in August 2006 according to which the Federal Republic of Germany interpreted the definition of 'water services' referred to in Article 2 (38) of Water Framework Directive as meaning that the services in question were restricted to the supply of water and the collection, treatment and elimination of waste water, thereby narrowing the scope of Article 9 of the Water Framework Directive, relating to the recovery of the costs of water services.³² According to the Federal Republic of Germany's view, impoundments for the purposes of hydroelectric power generation, navigation and flood protection, do not fall under the scope of water services. Therefore, these activities are not taken into account for the application of the principle of recovery of costs under Article 9 and Annex III(a) of the Water Framework Directive.³³

Although as a result of reconciliation process between the European Commission and the Federal Republic of Germany and Germany's notification of the Commission in July 2012 that Germany transposed Article 2 (38) and (39) and Article 9 of the Water Framework Directive into its national law, the European Commission took the view that the issue of the differing interpretation of the definition of 'water services' and, therefore, of the – in its view – incomplete application of Article 9 of the Water Framework Directive still persisted. Therefore, the European Commission decided to bring action to the ECJ on November 19, 2012 – and intended the bring similar actions against other member states including Hungary – whereas – in its view – Germany implemented the cost recovery principle of Article 9 of the Water Framework Directive only in relation to a limited number of water services. Had the ECJ been right on the EU Commission, it would have been a huge expense to the societies of the other Member States, so several Member States, Had the ECJ decided on behalf of the Commission, it would have been a huge expense to other member states, as well, therefore the Republic of Austria, the Kingdom of Sweden, the Republic

³¹ Case C-525/12.

³² Case C-525/12, para. 9.

³³ Case C-525/12, para. 10.

of Finland, Hungary, the United Kingdom and Northern Ireland, and the Kingdom of Denmark intervened on behalf of Germany.³⁴

The provisions of the Water Framework Directive essential regarding the court procedure were as follows. Recital (13) acknowledges that there are diverse conditions and needs in the Community which require different and specific solutions. The same Recital also states that this diversity should be taken into account in the planning and execution of measures in order to ensure protection and sustainable use of water in the framework of the river basin. The Water Framework Directive hereby emphasizes that decisions should be taken as close as possible to the locations where water is affected or used. The directive also states "Priority should be given to action within the responsibility of Member States through the drawing-up of programmes of measures adjusted to regional and local conditions."³⁵

In the course of its decision making, the Court started with the analysis of the main objectives of the Water Framework Directive, which I have discussed earlier. It considered the provisions set in Recital (20) significant, which says: "The quantitative status of a body of groundwater may have an impact on the ecological quality of surface waters and terrestrial ecosystems associated with that groundwater body."³⁶ The ECJ emphasized that Recital (33) provides the obligation that in order to achieve the good water status of a river basin, the measures in respect of surface water and groundwaters belonging to the same ecological, hydrological and hydrogeological system shall be coordinated.³⁷

The ECJ found the provisions of the Directive regulating the recovery of the costs of water services also relevant as regards the case. They are included in Recital (38), according to which the economic tools used by the Member State shall be included in its Action Plan and it shall also take into account the principle of the recovery of the costs. This section highlights that costs including environmental and resource costs associated with damage or negative impact on the aquatic environment should also be taken into account especially in accordance with the polluter-pays principle.³⁸

In making the decision, the Court used the case-law according to which, "the interpretation of a provision of EU law requires that account be taken not only of its wording and the objectives it pursues, but also its context and the provisions of EU law as a whole. The origins of a provision of EU law may also provide information relevant to its interpretation."³⁹ In its reasoning the Court explained that Member States, in accordance with the provisions and environmental objectives of the Water Framework Directive, form their water-pricing policies so that they shall provide adequate incentives for users to use water resources efficiently.⁴⁰

³⁴ Case C-525/12, paras 15–17, Szilagyi 2014b, 215–226.

³⁵ Water Framework Directive Recital (13).

³⁶ Water Framework Directive Recital (20).

³⁷ Water Framework Directive Recital (33).

³⁸ Water Framework Directive Recital (38).

³⁹ Case C-525/12, para. 43. See, *inter alia*, judgment in *Inuit Tapiriit Kanatami and Others v Parliament and Council*, Case C-583/11 P (EU:C:2013:625), para. 50.

⁴⁰ Case C-525/12, para. 44.

The ECJ examined the concept of ‘water services’. Pursuant to Article 2 (38) of the Water Framework Directive ‘water services’ are all services which provide for households, public institutions or any economic activity, both abstraction, impoundment, storage, treatment and distribution of surface water or groundwater, as well as waste-water collection and treatment facilities which subsequently discharge into surface water.⁴¹ However, according to the view of the ECJ, the Water Framework Directive does not give the definition of ‘services’ in general, therefore the provisions of the Directive do not make it clear whether the EU legislature intended to make any service relating to each of the activities listed in Article 2 (38) (a) of the Water Framework Directive, in addition to waste-water treatment activities referred to in Article 2 (38) (b), subject to the principle of recovery of costs, as stated in the Commission’s claim, or only those services associated with the supply of water, as maintained by the Federal Republic of Germany in its counterclaim.⁴²

According to the Court’s opinion, the legislature intended to bring under the scope of the Directive the services which are in connection with water supply “by requiring account to be taken of all the stages of that activity, as listed in Article 2 (38) (a), as well as those associated with waste-water treatment, as referred to in Article 2 (38) b).”⁴³ Therefore, the Court went on analysing the context and overall scheme of the provisions in question in order to decide the question. The Court recited that the EU legislature intended, on the one hand, to allow the Member States to determine, on the basis of an economic analysis, the measures to be adopted for the purposes of the application of the principle of recovery of costs (Article 9 of the Water Framework Directive), while on the other hand it wanted to promote the pricing of those costs, without extending it to all services associated with water use, as practices in the Member States varied widely, in particular regarding the pricing for water supply services and waste-water treatment.⁴⁴ Based on its reasoning, the ECJ came to the conclusion that the relating provisions of the Water Framework Directive do not per se impose a generalised pricing obligation in respect of all activities relating to water use.⁴⁵

As a next step, the Court started to analyse the scope of the relevant provisions in the light of the objectives of the Water Framework Directive but before that it stated that the Water Framework Directive “is a framework directive adopted on the basis of Article 175 (1) EC (now Article 192 TFEU). It establishes the common principles and an overall framework for action in relation to water protection and coordinates, integrates and, in a longer perspective, develops the overall principles and structures for protection and sustainable use of water in the European Union. The common principles and overall framework for action which it lays down are to be developed subsequently by the Member States, which are to adopt a series of individual measures in accordance with the timescales laid down in the directive. However, the directive

⁴¹ Water Framework Directive Article 2 (38); Case C-525/12, para. 9.

⁴² Case C-525/12, para. 45.

⁴³ Case C-525/12, para. 45.

⁴⁴ Case C-525/12, paras 46–47.

⁴⁵ Case C-525/12, para. 48.

does not seek to achieve complete harmonisation of the rules of the Member States concerning water.”⁴⁶

The ECJ pointed out that the principles of the Water Framework Directive such as the management per river basin; the setting of objectives per body of water; plans and programmes; an economic analysis of the detailed arrangements governing water pricing; the taking into account of the social, environmental and economic effects of cost recovery; and measures relating to the recovery of the costs for water services provided under Article 9 of the Water Framework Directive are among the minimum requirements to be included in the action plans of the Member States. It is clear that provisions related to the recovery of the costs for water services are one of the instruments available to the Member States for qualitative management of water in order to achieve rational water use.⁴⁷ The Court found that although the Commission pointed out properly that the various activities listed in Article 2(38) of the Water Framework Directive, such as abstraction or impoundment, may affect the state of bodies of water and therefore may endanger the achievement of the objectives pursued by the Directive, it cannot be concluded therefrom that, in any event, the absence of pricing for such activities will necessarily jeopardise those objectives. In addition, Article 9(4) of the Water Framework Directive says that the Member States may, subject to certain conditions, opt not to apply the recovery of costs for a given water-use activity, in case this does not compromise the purposes and the achievement of the objectives of the Directive. The ECJ came to the conclusion that the objectives of the Water Framework Directive do not necessarily imply that Article 2 (38)(a) thereof must be interpreted as meaning that they all subject all activities to which they refer to the principle of recovery of costs, as claimed by the Commission.⁴⁸ With respect to all the above described considerations, the Court decided that the Federal Republic of Germany did not fail to fulfil its obligations under Articles 2 (38) and 9 of the Water Framework Directive and dismissed the Commission’s action.⁴⁹

To sum up Case C-525/12, we can state that the ECJ collected a number of objectives of the Water Framework Directive in its reasoning, such as preventing and reducing pollution; promoting sustainable water use; protecting the environment; improving the status of aquatic ecosystems; and mitigating the effects of floods and droughts; and preserving and restoring the status of surface waters (freshwater and coastal waters) and groundwater.⁵⁰

Pursuant to the Court’s view, the Water Framework Directive establishes a transparent, effective and coherent legal framework in the Community water policy. This framework lays down common principles and a comprehensive framework for action and coordinates, integrates and develops the general principles and institutional frameworks for water protection and the sustainable use of water in the European

⁴⁶ Case C-525/12, para. 50. See also judgment in *Commission v Luxembourg*, Case C-32/05 (EU:C:2006:749), para. 41.

⁴⁷ Case C-525/12, paras 53–55.

⁴⁸ Case C-525/12, paras 56–58.

⁴⁹ Case C-525/12, paras 59–60.

⁵⁰ Opinion of Advocate General Jääskinen (delivered on 22 May 2014), Case C-525/12, para. 86.

Union in accordance with the principle of subsidiarity.⁵¹ According to the Court's interpretation, the Water Framework Directive sets out a comprehensive framework for action which shall henceforth be drawn up by the Member States in compliance with the specific provisions and within the deadlines laid down by the Directive. The ECJ also states that the Water Framework Directive does not require full harmonization of the laws of the Member States in the field of water.⁵² (46) It means that the Water Framework Directive gave Member States a margin of discretion in the course of achieving certain general and non-quantifiable objectives.⁵³ With regard to all the above written, the conclusion can be drawn that "in pursuing the objectives of the Water Framework Directive, Member States should, in particular, adopt measures in terms of effectiveness in relation to their national system, taking into account regional, social, environmental and economic characteristics. They therefore have a wide margin of discretion which cannot be standardized for the purpose of applying an economic approach, as suggested by the Commission, which, moreover, proceeds from the mistaken assumption that water resources are always in the public domain in all Member States for water uses such as self-sufficiency or abstraction of hydroelectricity."⁵⁴

In the above described case, the parties and the ECJ have interpreted provisions of the European Union law which are difficult to interpret. Szilágyi gives a scientific follow-up to the judgment and outlines that certain elements of the case are unique from the point of view of law and it also has well-categorized aspects belonging to a universal set of issues. It is unique in its legal interpretation of the interrelation between environmental services (such as enhancement of value ensured by the environment) and water services (as a more or less closed group of human water uses). In the opinion of Szilágyi, although this legal interpretation can be considered as new in several elements, a closer connection of the two subject areas is expected in the course of legal development.⁵⁵ One of the universal aspects of the case is the issue of the flexibility of environmental directives, that is, the extent to which the environmental directives themselves allow Member States to derogate from EU standards. As regards the Water Framework Directive, several authors⁵⁶ have indicated that the Directive contains too many possibilities for exemptions, which seriously jeopardizes the achievement of its objectives. The present case also supports this view since the ECJ rejected the EU Commission's claim on the basis that the Water Framework Directive allows for a deviation from the legal interpretation advocated by the EU Commission.

⁵¹ Water Framework Directive Recital (18) and Opinion of Advocate General Jääskinen, Case C-525/12, para. 87.

⁵² Opinion of Advocate General Jääskinen, Case C-525/12, para. 88. See also Case C-32/05.

⁵³ With regard to the majority of the provisions of the Water Framework Directive, see *Commission v Italy 'San Rocco'* (C-365/97, EU:C:1999:544, paragraphs 67 and 68), and *Commission v France* (C-60/01, EU:C:2002:383, paragraph 27), both of which are cited in Case C-32/05, paras 39 and 43.

⁵⁴ Opinion of Advocate General Jääskinen, Case C-525/12, para. 88.

⁵⁵ Szilágyi 2014b, 211–213.; Szilágyi 2015, 48.; Szilágyi 2018, 236–237., 254–256.

⁵⁶ Bell & McGillivray 2008, 594–595.; Krämer 2012, 256.; Szilágyi 2013, 139–140.; Szilágyi 2014.

In Szilágyi (2014)'s opinion, one of the cornerstones of the future revision of the Water Framework Directive is exactly the principle of rethinking the provisions related to the cost recovery principle.⁵⁷

4.2. Case C-664/15

In Case C-664/15 (delivered on 12 October 2017) the Court expressed its legal view in relation to the proceedings between Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation versus Bezirkshauptmannschaft Gmünd on the request for a preliminary ruling by the Verwaltungsgerichtshof (Supreme Administrative Court, Austria).

In this case, Protect claimed that it derived its rights to participate in the procedure concerning a request for a permit to abstract water and to seek judicial review from Article 4 of the Water Framework Directive read in compliance with Article 9 of the Aarhus Convention (hereinafter 'the Aarhus Convention').⁵⁸ The abstraction of surface and ground water is subject to permit procedures in the Member States (Article 11 (3) (e) of the Water Framework Directive); granting such a permit is subject to compliance in particular with the prohibition on deterioration of the status of the bodies of water (Article 4 (1) of the Water Framework Directive); and derogations from that prohibition may be granted only under the strict conditions specified by Article 4 (7) of the Water Framework Directive.⁵⁹ However, the Austrian Government claimed that Article 4 of the Water Framework Directive had no direct effect on the case as it does not designate any addressees, while the Dutch Government and Protect argue that recognised environmental organisations should be allowed to rely upon that provision if they experience the 'deterioration' of ground water bodies.⁶⁰

Protect is an environmental organisation which was seeking access to justice based on the Aarhus Convention in Austria. The case connected to an application for a permit to abstract water from a river for the purposes of producing snow for a ski resort in Austria (hereinafter 'the permit procedure').⁶¹ The environmental issues related to the procedure fell within the scope of the Water Framework Directive.

The Verwaltungsgerichtshof (Supreme Administrative Court, Austria) requested for a preliminary ruling from the European Court of Justice in the case. The Supreme Administrative Court of Austria asked for guidance in relation with the following

⁵⁷ Szilágyi 2014a; Szilágyi 2014b; Csibi & Szilágyi 2014; Szilágyi 2015, 41–42., 50.; Szilágyi 2016, 77–79.

⁵⁸ The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was signed in Aarhus on 25 June 1998 and entered into force on 30 October 2001. All Member States are Contracting Parties to that convention. It was approved on behalf of the EU by Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ 2005 L 124, p. 1). As from that date the European Union is also a Party to that convention.

⁵⁹ Opinion of Advocate General Sharpston, Case C-664/15, para. 36.

⁶⁰ Opinion of Advocate General Sharpston, Case C-664/15, para. 52.

⁶¹ 'The project at issue in the main proceedings is known as the 'Aichelberglift project'.

issues: – whether the Water Framework Directive read in conjunction with the Aarhus Convention confers standing on an environmental organisation to challenge administrative decisions in administrative or judicial procedures, in particular where a permit is requested to abstract water for snow production (‘first question’); – if the organisation concerned should be accorded status as a party to the proceedings at the administrative stage or it is enough that it has standing to bring an appeal against the permit granted by the competent authorities (‘second question’); – whether national procedural rules can preclude an environmental organisation from challenging such an administrative decision on appeal where it has not submitted its objections against the permit in ‘good time’ in the course of the administrative proceedings, as required by national law (‘third question’).⁶²

As concerns the first question, the Court began with the analysis of Article 4 of the Water Framework Directive, which lays down the general environmental objectives of the directive. The Court hereby referred to the Court’s judgment in the case of *Bund für Umwelt und Naturschutz Deutschland*⁶³ where the Court stated that Article 4 (1) (a) of the Water Framework Directive “does not simply set out, in programmatic terms, mere management-planning objectives, but has binding effects.”⁶⁴ The wording of Article 4(1)(a)(i), which provides that “Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water’ involves an obligation on the Member States to act to that effect.”⁶⁵ According to the Court’s opinion that obligation must be respected especially when approving individual projects under the national law governing water protection, notably by refusing authorisation for projects which could result in deterioration of the status of the body of water concerned unless those projects are covered by the derogation laid down in Article 4 (7).⁶⁶ Furthermore, the Court interpreted the concept of ‘deterioration of the status’ of a body of surface water according to Article 4 (1)(a)(i) of the Water Framework Directive. Accordingly, there is deterioration as soon as the status of at least one of the quality elements, within the meaning of Annex V to the Water Framework Directive, falls by one class, even if that fall does not result in a fall in classification of the body of surface water as a whole.⁶⁷ The Court stated that according to established case-law, wherever the provisions of a directive appear to be unconditional and sufficiently precise as far as their subject matter is concerned, they may be relied on against any national provision which is incompatible with the regulations of the directive or in case they establish rights which individuals are able to assert against the state.⁶⁸ In accordance with the Court’s view the directive’s measures concerning the prohibition of deterioration is strict, unconditional and sufficiently precise to have direct effect.

⁶² Opinion of Advocate General Sharpston, Case C-664/15, para. 3.

⁶³ Judgment of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland*, C-461/13 (EU:C:2015:433).

⁶⁴ Opinion of Advocate General Sharpston, Case C-664/15, paras 54–55.

⁶⁵ Opinion of Advocate General Sharpston in Case C-664/15, para. 55.

⁶⁶ See C-461/13, para. 50.

⁶⁷ See C-461/13, para. 70. Cited in Opinion of Advocate General Sharpston in Case C-664/15, para. 56.

⁶⁸ See judgment of 19 January 1982, *Becker*, Case 8/81 (EU:C:1982:7), para. 25.

The Court has already established in many environment-related cases that sufficiently precise provisions concerning the protection of the common natural heritage are directly effective despite the fact that they do not expressly confer rights on individuals.⁶⁹ However, the Court also stated that according to case-law Article 9(3) of the Aarhus Convention does not have a direct effect.⁷⁰ Therefore, "environmental organisations cannot rely directly on that provision to claim *locus standi* to challenge acts of national authorities, such as the permit granted to Aichelberglift."⁷¹

The Court pointed out that there are no EU law provisions adopted to implement Article 9(3) of the Aarhus Convention. In particular, the Water Framework Directive establishes a legislative framework without specifying the detailed procedural rules necessary for its implementation. Article 4 does not give environmental organisations the right to trigger an administrative or judicial review in any Member State.⁷² In the absence of related EU rules, the national legal system of each Member State has to lay down the detailed procedural rules governing actions for safeguarding the rights of EU citizens derived from EU law, which in this case the Water Framework Directive read in conjunction with the Aarhus Convention.⁷³ The procedural autonomy of the Member States, however, must be exercised in compliance with the aims and the objectives of the Aarhus Convention and of the Water Framework Directive, that by analysing the provisions of the Water Framework Directive, the Court came to the conclusion that Member States bear the responsibility for implementing the environmental objectives of the directive, as set out in particular in Articles 1 and 4, and that the success of the directive relies especially on information, consultation and involvement of the public (recital (14) of the Water Framework Directive).⁷⁴ In addition, pursuant to Article 14 (1) Member States have the obligation to encourage the active involvement of all interested parties in the implementation of the Water Framework Directive.⁷⁵

On the basis of such reasoning the Court arrived at the following the interpretation of Article 9 (3) of the Aarhus Convention: "The involvement of the public in the early stages of an administrative procedure in accordance with Article 14(1) of the Water Framework Directive would be, to a large extent, meaningless if it

⁶⁹ The Court held in the context of Article 2(1) of the Environmental Impact Assessment Directive that the fact that the Member State has some degree of discretion does not preclude such direct effect. See judgment of 24 October 1996, *Kraaijeveld and Others*, C-72/95 (EU:C:1996:404), para. 59.

⁷⁰ 'Article 9(3) [of the Aarhus Convention] provides that each Party is to ensure that, where they meet the criteria, if any, laid down in its national law, members of the public (which includes environmental organisations by virtue of Article 2(4)), have access to administrative or judicial procedures to challenge acts or omissions of private persons or public authorities which contravene provisions of its national law relating to the environment. It thus lays down the right, *inter alia*, to challenge acts of administrative authorities adopted in administrative proceedings.' In: Opinion of Advocate General Sharpston, Case C-664/15, para. 63.

⁷¹ Opinion of Advocate General Sharpston, Case C-664/15, para. 65.

⁷² Opinion of Advocate General Sharpston, Case C-664/15, para. 64.

⁷³ Opinion of Advocate General Sharpston, Case C-664/15, para. 66.

⁷⁴ Opinion of Advocate General Sharpston, Case C-664/15, paras 67 and 69.

⁷⁵ Opinion of Advocate General Sharpston, Case C-664/15, para. 69.

were not possible for at least some members of the public to obtain locus standi later in the process, in particular in order to challenge the compliance of decisions adopted in that procedure with that directive.”⁷⁶ The problem arose at this point because the Aarhus Convention ensures the Member States a great deal of flexibility, since the right to administrative or judicial remedy in Article 9 (3) of the convention may be granted only to those members of the public who ”meet the criteria, if any, laid down in its national law.”⁷⁷ However, during the implementation of such a legal provision, the Member States have to consider the aims of the convention that is ”... effective judicial mechanisms [are] accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced.”⁷⁸

In the ECJ’s view ‘the phrase ”where they meet the criteria, if any, laid down in its national law” cannot serve ”as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organisations from challenging acts or omissions that contravene national law relating to the environment”; that phrase ”indicates a self-restraint on the Parties not to set too strict criteria. Access to such procedures should thus be the presumption, not the exception”; and ”any such criteria should be consistent with the objectives of the Convention regarding ensuring access to justice.”⁷⁹ Moreover, the Court finds that the phrase is ”a renvoi to the alternative procedural requirements of ‘having a sufficient interest’ or ”maintaining the impairment of a right’ in Article 9(2).”⁸⁰

Based on all the above described court’s reasoning, the answer of the ECJ to the first question was that ”Article 4 of the Water Framework Directive, read in conjunction with Article 9(3) of the Aarhus Convention and Article 47 of the Charter, must be interpreted as precluding national procedural rules which prevent an environmental organisation duly constituted and operating in accordance with the requirements of national law from having access to administrative or judicial procedures within the meaning of Article 9(3) of the Aarhus Convention to challenge acts of the competent authority adopted in an administrative procedure conducted on the basis of provisions of national law implementing that directive.”⁸¹

As the ECJ interpreted, by the second question of the Austrian referring court wanted to know whether the Aarhus Convention required that an environmental organisation be able to allege a breach of Article 4 of the Water Framework Directive during proceedings before an administrative authority or whether it was sufficient that

⁷⁶ Opinion of Advocate General Sharpston, Case C-664/15, para. 70.

⁷⁷ Opinion of Advocate General Sharpston, Case C-664/15, para. 71.

⁷⁸ Opinion of Advocate General Sharpston, Case C-664/15, para. 72, Recital (18) of the Water Framework Directive says: ‘Community water policy requires a transparent, effective and coherent legislative framework. The Community should provide common principles and the overall framework for action. This Directive should provide for such a framework and coordinate and integrate, and, in a longer perspective, further develop the overall principles and structures for protection and sustainable use of water in the Community in accordance with the principles of subsidiarity.’

⁷⁹ Opinion of Advocate General Sharpston, Case C-664/15, Paragraph 73 and See the Aarhus Convention Implementation Guide, 198.

⁸⁰ Opinion of Advocate General Sharpston, Case C-664/15, Paragraph 73.

⁸¹ Opinion of Advocate General Sharpston, Case C-664/15, Paragraph 94.

such an organisation had the possibility of challenging the decision of the administrative authority adopted at the end of that procedure before a court or tribunal.⁸² In the Court's view, it follows from the answer given for the first question that an environmental organisation must be able to challenge a decision of the administrative authority adopted at the end of an administrative procedure conducted on the basis of provisions of national law implementing the Water Framework Directive.⁸³ Therefore, in the ECJ's view, only the question remained whether the Aarhus Convention also requires that an environmental organisation be allowed to invoke Article 4 of the Water Framework Directive during such administrative procedure. To be able to answer this question, the Court examined the issue of 'public participation'. Based on its interpretation, it concluded that unlike some other environmental directives, the Water Framework Directive does not expressly provide for public participation. Nor does it require that a project be agreed only 'if appropriate, after having obtained the opinion of the general public.'⁸⁴ Consequently, the Court inferred that "granting environmental organisations status as a party in administrative procedures in order to rely on directly applicable provisions of EU environmental law, such as Article 4 of the Water Framework Directive, contributes to maintaining and improving the aquatic environment in the EU and, more generally, to attaining the objectives of EU environmental law."⁸⁵ In the absence of EU regulations governing the matter, it is the obligation of the referring court to interpret the national procedural law to the greatest extent possible in order to ensure the effective implementation of the objectives of the Water Framework Directive.⁸⁶

In consideration of all the above, the ECJ answered the following to the second question: "a national court is required to interpret its national procedural law relating to status as a party in an administrative procedure for granting a permit conducted on the basis of national legislation implementing the Water Framework Directive, such as that in the main proceedings, to the greatest extent possible in a way that is consistent with the objectives laid down by the Water Framework Directive (in particular, Articles 4 and 14 (1) thereof) so as to enable environmental organisations to rely on those provisions during administrative proceedings before the national authority. Where the right of an environmental organisation, duly constituted and operating in accordance with the requirements of national law, to challenge acts adopted in an administrative procedure by the competent national authorities on the basis of Article 4 of the Water Framework Directive before an administrative authority or a court is conditional upon prior participation in such a procedure, that article, read in conjunction with Article 9(3) of the Aarhus Convention and Article 47 of the Charter, must be interpreted as precluding national procedural rules which prevent such an organisation from obtaining status as a party in such a procedure."⁸⁷

⁸² Opinion of Advocate General Sharpston, Case C-664/15, para. 96.

⁸³ Opinion of Advocate General Sharpston, Case C-664/15, para. 97.

⁸⁴ Opinion of Advocate General Sharpston, Case C-664/15, paras. 98 and 101.

⁸⁵ Opinion of Advocate General Sharpston, Case C-664/15, para. 106.

⁸⁶ Opinion of Advocate General Sharpston, Case C-664/15, para. 107.

⁸⁷ Opinion of Advocate General Sharpston, Case C-664/15, para. 112.

Regarding the third question, the Court's reasoning was as follows: "Article 4 of the Water Framework Directive, read in conjunction with Article 9 (3) of the Aarhus Convention and Article 47 of the Charter, must be interpreted as precluding national procedural rules which inflict on an environmental organisation the loss of status as a party in an administrative procedure as a consequence of failure to submit objections in good time in that procedure, in so far as those rules fail to meet the criteria of fairness and equity referred to in Article 9(4) of the Aarhus Convention."⁸⁸

5. Closing thoughts

It still seems a long way for people to realize that only together can they meet the environmental challenges and sustain a livable environment. The protection of drinking water within the framework of environmental protection is a must. Without water there is no life on Earth. The time may come, we hope very soon, when the European Union regulates the environment at least within Europe with binding regulations. And maybe mankind realizes that he must be mindful of the sustainability of his environment in every decision he makes without any external rules.

As a final thought, let us recall the statement of the Indian Chief of Seattle written made in his letter in 1854, which may facilitate the change of our attitude to our environment: "We did not inherit the Earth from our parents, but borrowed it from our children."⁸⁹

⁸⁸ Opinion of Advocate General Sharpston, Case C-664/15, para. 123.

⁸⁹ Bandi 2011, 36. Quote from a letter from an Indian chief of Seattle in 1854.

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