COUNTRY REPORT: GERMANY

The Non-Regression Principle under EU and German Water Law 'On the Ground': A Landmark Decision of the European Court of Justice

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Introduction

For quite some time, non-regression of environmental law has been propagated as a principle of international, European and national environmental law.[1] While the emphasis of the 'non-regression movement' has been laid on legislation in the sense that environmental legislation should not back-track, the non-regression principle (or, if one denies its recognition as a principle: the non-regression approach) also applies to environmental quality as such. This appears plausible, since non-regression of environmental law is not an objective in itself, but serves to maintain and improve the quality of the environment. Therefore, the non-regression principle also mandates a shaping and application of environmental law to the extent that existing good environmental quality should not be deteriorated and existing bad environmental quality should at least not be further deteriorated. At this level, one often speaks of a non-deterioration principle.

An expression of the non-regression principle can be found in the European Water Framework Directive of 2000 (WFD).[2] The Directive introduced a framework of water management for river basin districts in the European Union which has to be implemented by the Member States, *inter alia*, by enacting new legislation or amending existing provisions. The WFD is based on the ambitious aim of reaching both good ecological and good chemical water quality in the whole Union within certain time-limits (by 2015, to be

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[1] See M. Prieur, Non-regression in environmental law, S.A.P.I.EN.S 5 (2012), no. 2; *id*., De l'urgente nécessité de reconnaitre le principe de non regression en droit de l'environnement, IUCN Academy of Environmental Law, e-journal 2011; M. Prieur & G. Sozzo (eds.), La non regression en droit de l'environnement, Brussels, 2012 ; Draft International Covenant on Environment and Development – Implementing Sustainability, IUCN & ICEL, 5th ed. 2015, Art. 10 and accompanying commentary, pp. 57-58.

[2] Directive 2000/60/EC, as last amended by Commission Directive 14/101/EU.

prolonged, if necessary, twice up to 2021 and 2027). It entails a prohibition of deterioration of water quality as well as an obligation to protect, enhance and restore all bodies of water (with respect to surface waters: Article 4[1] [a] [i] and [ii]), subject to an exception in case of overriding public interest and/or benefit (Article 4[7]). There is a special, less stringent regime for artificial and heavily modified waters which, however, also contains a non-deterioration obligation. Moreover, the WFD requires the Member States to establish, for each river basin district, a programme of measures to achieve the objectives set forth in Article 4. The programme of measures forms a separate part of the water management plans (Articles 11 and 13).

Germany has implemented the WFD by establishing, in the Water Resources Management Act,[3] new provisions on water quality objectives (with respect to surface waters: Sections 27, 30 and 31[1], [2]) and on water management planning (Sections 82 and 83) and adopting the Surface Waters Regulation.[4] Moreover, the Federal Waterways Act[5] has been amended so as to implement the WFD (Section 12[7], 3rd sentence).

History of the Case

From the very beginning, the interpretation of the non-deterioration obligation as regards its binding nature and content has given rise to much controversy, which highlights the difficulties one is confronting when leaving the sphere of an abstract principle for the practical application on the ground. Apart from an extensive and controversial discussion in the legal literature, there have also been some court cases regarding physical alterations of water courses and the construction and operation of coal- or lignite-fired power plants which interpreted the prohibition of deterioration in a rather strict way.

One of these cases concerned the deepening of three segments of the lower Weser for making the river navigable for very large sea-going vessels up to the ports of Bremerhaven, Brake and Bremen. The competent planning authority had granted planning consent under the Federal Waterways Act on the grounds that the expected deterioration of the ecological quality of the Weser river due to the deepening and subsequent periodical dredging would not result in a lower classification of the ecological status of the river and in any case the prerequisites of the exception under Section 14[1], second sentence of the Act (implementing Article 4[7] WFD), were fulfilled. The legality of this planning permission was challenged by an environmental association before the Federal Administrative Court (which was competent as a court of first instance because of the federal interest at stake). The

[3] Law of 31 July 2009, *Federal Gazette* 2009 (Part 1), p. 2585.

[4] Regulation of 20 July 2011, *Federal Gazette* 2011 (Part 1), p. 1429.

[5] Consolidated Version of 23 May 2007, *Federal Gazette* 2007 (Part 1), p. 962.

Federal Administrative Court,[6] assuming that the legislature had intended to implement the WFD without rendering German law more severe than the Directive ('one by one' or 'copy and paste' implementation), referred the case for a preliminary ruling on the interpretation of the non-deterioration obligation under Article 267 of the Treaty on the Functioning of the European Union (TFEU) to the European Court of Justice. On the 1st of July 2014, a Grand Chamber of the Court (composed of 15 judges)[7] rendered its judgement on the case which can rightly be denoted as a landmark decision in EU water law.

The Legal Nature of the Prohibition of Deterioration

One of the controversial questions regarding the prohibition of deterioration of water quality under Article 4 of the WFD concerned its legal nature. The question is whether the non-deterioration obligation is only a principle for water management planning or is a rule in the form of a prohibition or permit prerequisite which is applicable to any individual alteration of, or discharge into, a body of water.

As evidenced by the reference of Article 11[1] of the WFD, (one of its planning provisions), to the 'objectives established under Article 4', the non-deterioration obligation constitutes without any doubt an objective for long-term water management planning. However, the Court held that Article 4[1] of the WFD is a bi-functional norm which – subject to the possibility of an exception under Article 4[7] – also governs any individual alteration of, or discharge into, a body of water and therefore has to be strictly applied in the permit procedure.

The most important arguments of the Court[8] in favour of this interpretation are the following:

> *(1) Article 4[1] of the WFD explicitly refers to "making operational" the programmes of measures, which means that it cannot only apply to their establishment but must apply after they have been established; (2) the WFD requires the Member States "to implement the necessary measures to prevent deterioration" of the relevant bodies of water; (3) in contrast to the improvement obligation the non-deterioration obligation is unconditional; and (4) the exception set forth under Article 4[7] of the WFD clearly concerns individual cases.*

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[6] Decision of 11 July 2013, 7 A 20.11, available at www.bverwg.de/Entscheidungen, 2013 Deutsches Verwaltungsblatt, p. 1450.

[7] Judgement of 1 July 2015, Case C-461/13, Bund für Umwelt- und Naturschutz Deutschland v. Bundesrepublik Deutschland, ECLI:EU:C:2015:433, available at:
www.curia.europa.eu.

[8] Above (n. 7, ns. 29-51).

By and large, these arguments appear to be convincing. Although the decision in this case contributes to making the non-deterioration obligation more stringent, one cannot say that it has a 'teleological bias', over-emphasising the principle of effectiveness of EU law without a basis in the Directive itself. However, there are also some flaws in the argumentation the Court. It somewhat neglects the language of Article 11 of the WFD which denotes the prohibition of deterioration as a mere 'objective.' It does not reflect on the practical meaning the measures programme can retain at all if the major role of the non-deterioration obligation lies in the permit procedure. Finally, the assumption of the Court that non-deterioration, if understood as a mere planning principle, would not be legally binding is contrary to the common understanding of legal principles. The question is not bindingness but the distinction between a principle which is subject to some balancing with conflicting concerns and a rule which is strictly applicable.

In the result, the judgment of the European Court of Justice confirms the opinion of the German courts[9] which – in contrast to the authorities at federal and state levels – have unanimously considered the non-deterioration obligation as a permit prerequisite under Section 12[1] no.1 or no. 2 of the Water Resources Management Act (no adverse alterations of waters, compliance with other statutory requirements) as well as Section 14 of the Federal Waterways Act.

The Meaning of Deterioration

Deterioration 'Theories'

As regards the meaning of the notion of deterioration, in administrative practice, court decisions and legal literature two 'theories' have been followed – the 'status class theory' and the 'status quo theory'[10]. The status class theory which has been applied in the practice of German water authorities considers as a (relevant) deterioration only an alteration of, or discharge into, a body of water which leads to a fall of the classification of the body of water into a lower status class. By contrast, under the status quo theory which has been followed by the more recent German court decisions[11] any deterioration of the existing ecological

[9] Federal Administrative Court, above (n. 6, ns. 27-32); Administrative Court of Appeals Hamburg, judgement of 18 January 2013, 5 E 11/08, 2013 Natur und Recht 2013, 727 at 734-737; Administrative Court Cottbus, Judgement of 23 October 2012, 4 K 321/10, 2013 Zeitschrift für Umweltrecht, p. 734, at p. 735.

[10] See European Court of Justice, above (ns. 7, 52).

[11] Federal Administrative Court, above (n. 6, ns. 47-50); Administrative Court of Appeals Hamburg, above (n. 9) at 737-740; Administrative Court Cottbus, above (n. 9) at 375-376.

and/or chemical water quality due to an alteration or discharge would be a relevant deterioration, at best attenuated by the recognition of a *de minimis* rule.

Relationship to the Classification of Bodies of Water

In order to understand this controversy, one must have a closer look at the system of classification of bodies of water under the WFD. The Directive distinguishes between two quality categories of fresh bodies of water, that is, ecological status and chemical status. The ecological status is composed of three quality elements (biological elements, hydro-morphological elements, chemical and physico-chemical elements including pollution by specific pollutants). The chemical status refers to various water quality standards. The ecological status has five status classes, that is 'high', 'good', 'moderate', 'poor' and 'bad', the chemical status only has two status classes, that is 'good' and 'failing to achieve good'. Classification of a body of water is governed by the 'one out, all out' rule under which a body of water will already be classified into a poorer status class where only one quality element has to be classified into that status class or one chemical pollutant does not meet the applicable quality standard (Article 2 no. 17, Annex V nos. 1.4.2 and 1.42 WFD).

While the intricacies of the WFD's classification system are irrelevant for the status quo theory because it refers to the factual quality of a body of water, they are of crucial importance for the status class theory. For once a body of water has been classified into a poorer status class (e.g. 'moderate' or 'failing to achieve good') because one quality element has that poorer quality, or one pollutant does not meet the relevant quality standard, a deterioration with respect to another quality element previously having a higher quality status (e.g. 'good') would not count as long as the deterioration does not exceed the class limits of the whole body of water (e.g. 'moderate') or would not count at all where a further pollutant exceeds the relevant quality standard however serious this exceedance may be.

The Court Holding

The European Court of Justice[12] neither follows the status class theory nor the status quo theory but adopts a middle course. In the absence of a clear meaning of the notion of 'status' under the various linguistic versions of the Directive, the Court primarily relies on teleological arguments. The Court rejects the status class theory on the grounds that, as a consequence of the 'one out, all out' rule, it would allow, contrary to the very objectives of the WFD, to 'fill up' the respective status class through deterioration of further quality elements or through the discharge of further substances in exceedance of the relevant water quality standards. The theory favoured by the Court could be called a 'modified status class' theory or a 'quality

[12] Above (n. 7, ns. 55-70).

elements theory'. In the opinion of the Court, it is not necessary for assuming a relevant deterioration that the whole body of water has to be declassified as a consequence of an alteration. It shall be sufficient that a single quality element of the relevant quality category exceeds the class limits of its previous classification even if this does not lead to a declassification of the whole body of water. Deteriorations which remain within the previous class limits of the applicable quality element are considered to be irrelevant. However, as regards deteriorations of quality elements which are already within the lowest status class the Court applies the status quo theory.

As a result, the reasoning of the Court appears convincing. A 'filling up' of a status class which would be possible under the status class theory could only insufficiently be counteracted by applying the improvement obligation set forth by Article 4[1] [ii] WFD because this obligation is not unconditional but is subject to time-limits which can even be prolonged. Moreover, if under the classification system of the WFD the poorest value of a quality element leads to a declassification of the whole body of water, it appears consistent that the fall of a further quality component by one class should also constitute a relevant deterioration. Adherents of the status class theory who would denote this as formalistic and point to the different weight of the relevant quality elements for water management and their lacking normative applicability, ignore that these asserted flaws also apply to their theory because, when applying the 'one out, all out' rule, this theory has to face the same kind of problems. Apart from that, the classification under the WFD does not allow for an overall weighing between all quality elements (see annex V no. 1.1.2, 1.4.2). Such weighing is only permissible within a particular quality element and beyond that, at best, insofar as all relevant quality elements do not exceed the applicable class limits.

A certain flaw of the judgment however is that the Court cannot explain why the more demanding status quo theory should not be applicable as a rule. One cannot deny that the middle course followed by the Court reflects an implicit balancing of the requirements of protection of waters with the legitimate interest in using the waters, which rules it out to treat waters in the same way as protected areas under nature conservation law. Certain deteriorations of bodies of water with respect to particular quality elements are now considered to be irrelevant and therefore permissible without the need to secure an exception. This is all the more important since the exception clause of Article 4[7] of the WFD is limited to physical alterations of bodies of water or, under more limited conditions, to changes of the hydro-morphological properties of bodies of water and does not cover discharges. One should also consider that the classification system of the WFD already operates with highly differentiated quality elements and classes. In particular, the differences between the various ecological status classes ('high', 'good', 'moderate', 'poor' and 'bad')

are very subtle. There is in principle no cogent need to take recourse to the status quo theory.

Insofar as the European Court of Justice decided in favour of the status quo theory, that is, as regards alterations within the lowest status class, this is justified on teleological grounds. Such alterations, are to a particularly high degree, liable to jeopardize the achievement of the objectives of the WFD. Moreover, for lack of a sufficient normative framing of the classification in this status class, there are no sufficient normative criteria to justify the application of any other theory. However it should be noted that under the Court holding even in the lowest status class, a deterioration of quality elements of a body of water which are still in a higher status class remains admissible if the relevant class limits are not exceeded.

Thresholds of Irrelevance

In order to mitigate the rigour of the non-deterioration requirement, the recognition of thresholds of irrelevance has been proposed, or at least considered. However, the relevant formulations for deteriorations which should be considered as irrelevant - such as 'considerable', 'significant' or 'slight' - do not in themselves convey a precise idea about what the respective courts or authors mean.[13] Under the modified status class theory, thresholds of irrelevance would only play a role in the lowest status class. They are primarily relevant under the status quo theory.

The European Court of Justice[14] explicitly rejected a threshold of considerable deterioration, apparently based on the assumption that this threshold implies an element of weighing. However, it should be noted that the Court's own solution, that is, the modified status class theory, contains an element of a threshold of irrelevance insofar as it assumes that certain deteriorations are not to be considered as relevant. Beyond that, the Court explicitly stated that the thresholds under the non-deterioration obligation must be 'slight.' It is not clear whether this was meant as a justification of the Court's modified status class theory or as an additional requirement for the application of the status quo theory with respect to the lowest status class. In this respect, the answer of the European Court to the Federal Administrative Court's reference question is unsatisfactory.

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[13] See Federal Administrative Court, supra note 6, nos. 47-50; Administrative Court of Appeals Hamburg, above (n. 9) at 739.

[14] Above (n. 7, ns. 67-68).

Open Questions

Reference Area

The obligation to prevent a deterioration of waters refers to the body of water. This is a larger segment of a water course which may comprise up to 20 kilometres. It is an open question whether and to what extent a geographically limited alteration of a water course or a local discharge may be considered as irrelevant because it is only of a purely local nature or whether it can at least be compensated for by improvements elsewhere in the body of water. In this context it should also be noted that Article 4 of the Environmental Quality Standards Directive of 2008[15] which specifies the WFD admits 'mixing zones' in the proximity of a discharge point which are not to be considered in determining whether a relevant water quality standard is met or not. Since the classification system of the WFD is geared to the notion of body of water and the monitoring requirements reflect this basic orientation, one cannot rule it out that the reference to the body of water renders certain deteriorations admissible for purposes of the non-deterioration obligation even if one does not recognise a threshold of irrelevance. The European Court did not address this issue.

Transferability to the Chemical Status of Bodies of Water

The judgment of the European Court of Justice is limited to the ecological status of bodies of water including the physico-chemical quality elements. However, for reasons of coherence and consistency, the holding may also be transferred to the chemical status of bodies of water which has to be classified using a similar methodology, including the application of the 'one out, all out' rule (Art. 2 no. 24, Annex V no. 1.4.4 WFD). The mere fact that there only are two status classes does not militate against such a transfer. The situation is similar to the two lowest ecological status classes. Where the body of water complies with all quality standards and has to be classified as 'good', according to the logic of the Court holding a deterioration above the quality standards would be admissible. Where the body of water has been classified as 'failing to achieve good' because of exceeding one quality standard, a further deterioration regarding the relevant pollutant would not be admissible under the non-deterioration obligation. As regards all other quality standards, a deterioration within the limits of the applicable quality standards would be admissible. This result is not ruled out by the Environmental Quality Standards Directive. The possibility that according to this rationale cumulative deteriorations by several, even numerous substances up to the limits of the water quality standards would have to be tolerated might make this conclusion somewhat questionable. However, it must be noted that point sources are controlled under the

[15] Directive 2008/105/EC.

'combined approach' of article 10 WFD whereby beyond meeting the water quality standards point sources must limit their discharges according to best available technology.

Obligation of Improvement of Bodies of Water

The European Court of Justice also deals with the obligation to improve existing water quality as required by Article 4[1] [a] [ii] WFD. However, apart from the discussion of the improvement obligation and the non-deterioration obligation to support the Court's interpretation of the latter obligation, there is hardly any language in the decision that deals with the improvement obligation. The Court only states that, subject to an exception under Article 4[7] WFD, the permission of a project must also be denied where the timely achievement of the good ecological status or (in case of heavily modified waters) good ecological potential and of the good chemical status of a body of freshwater is jeopardized. Any discussion of when this may be the case is missing in the judgment. The reason for this reticence may lie in the failure of the WFD to achieve, as envisaged, good water in the majority of EU bodies of water by 2015 and the not improbable failure to achieve this aim by 2021 and even 2027. In any case, against this backdrop a demanding interpretation of the non-deterioration obligation appears all the more appropriate.

Conclusion

The holding of the European Court of Justice is not only relevant for Germany. It will also have a deep impact on other EU Member States which used to consider the non-deterioration obligation as a mere planning principle and/or followed the status class theory.[16] Whatever one thinks of the middle interpretive course taken by the Court, the decision highlights the practical difficulties one is confronting when applying the non-deterioration obligation on the ground. There certainly is no case for denying the importance of establishing a non-regression principle as a defence against legislative back-tracking. However, application of environmental law on the ground with a view to preventing a deterioration of environmental quality is the level which may count more in the practical result. More empirical research on the existence of statutory non-deterioration obligations, their interpretation and application on the ground would be very useful.

[16] For a short comparative analysis see A. Keessen et al., European River Basin Districts: Are They Swimming in the Same Implementation Pool?, Journal of Environmental Law 22 (2010), p. 197, at pp. 210-212.