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REVIEW

'Better Regulation' with 'Make it Work': An assessment of the Make it Work's Drafting Principles on Compliance Assurance

Lorenzo Squintani

Environmental modernization and administrative simplification in Portugal

Alexandra Aragão

The Non-Regression Principle under EU and German Water Law 'on the Ground'

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Evidence based legislation? Adequate protection of EU citizens against aircraft noise

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Statement on the Circular Economy concept

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Editorial

The aim of simplifying environmental law persists; it rekindled with the European Commission 2015 update of the Better Regulation Strategy and the related ‘Regulatory Fitness and Performance programme’ (REFIT) striving for “making EU law lighter, simpler and less costly”. At the same time, the ‘Make it Work’ initiative launched by several EU Member States adds some dynamics to the debate by providing first implementation experiences.

Against this background, *elni Review 1/2016* throws a spotlight on the simplification of environmental law. *Lorenzo Squintani* analyses the first ‘Make it Work’ Drafting Principles on compliance assurance with particular attention given to simplification matters, but also taking into account regulatory burdens and the EU’s objective of a high level of environmental protection. Subsequently, *Alexandra Aragão* reports on environmental modernization and administrative simplification experiences in Portugal and gives critical analysis of recent legal changes that took place in 2015.

Besides, *Eckard Rehlinger* assesses the landmark 1st July 2015 decision of the European Court of Justice on the Non-Regression Principle and specifically addresses remaining open questions not answered by the court. *Franziska Heß* and *Martin Führ* discuss the current body of scientific knowledge on aircraft and based on this evidence derive legal implications with respect to EU legislation aiming at adequate protection of EU citizens against aircraft noise.

Furthermore, in a *Statement* contribution *Franz Fiala* and *Michela Vuerich* articulate *ANEC*’s perspective on the circular economy concept presented by the European Commission in December 2015. Finally, in the recent developments section *Miriam Dross* sums up highlights from a recent statement by the *German Advisory Council on the Environment* as regards the impacts that the planned TTIP agreement could have on German and European environmental protection standards.

We hope you enjoy reading of *elni Review 1/2016*.

Contributions for the next issue, in particular with respect to CETA’s impact on environmental law (see the ELNI Forum announcement), are very welcome. Please send contributions to the editors by mid-September 2016.

Julian Schenten/ Martin Führ

June 2016

ELNI Forum:

8 September 2016

Brussels, Belgium

“Assessing CETA’s Impact on Environmental Law”

ELNI in cooperation with the Centre d’Etude du Droit de l’Environnement (CEDRE) is organising the 2016 ELNI Forum on “Assessing CETA’s impact on Environmental Law”. The Forum will take place at the **Saint-Louis University** in Brussels, Belgium between 2pm and 5.30pm.

The following topics, among others, will be discussed between law scholars and practitioners as well as representatives from the NGO and political/administrative scenes:

- The nature (a mixed agreement?) and validity of CETA
- The impact of CETA on existing environmental legislation and application
- The impact of CETA on future environmental legislation

Further details will soon be available on www.elni.org and on <http://www.usaintlouis.be> (CEDRE)

The Non-Regression Principle under EU and German Water Law 'on the Ground': A landmark decision of the European Court of Justice that leaves many questions open

Eckard Rehbinder

1 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 emphasis has been placed on the 'non-regression movement' in a legal context in the sense that environmental legislation should not back-trap, 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 in this latter sense has been established in the European Water Framework Directive of 2000 (WFD).²

The Directive introduced a framework of quality-oriented water management of river basin districts in the European Union. In contrast to previous EU law, the Directive does not only regulate water pollution but also the ecological quality of water bodies. This 'ecologization' of water law constitutes a major achievement but is also the source of considerable difficulties of legal interpretation and application on the ground. Another characteristic feature of the WFD is the introduction of integrative planning and programming. However, as the Directive also contains command-and-control regulation, there may be conflicts between planning and regulation that need to be

addressed. The legal framework set out by the WFD has to be implemented by the member states by enacting new legislation or amending existing one as well as applying the relevant rules on the ground. The WFD leaves the member states a major degree of flexibility and exercise of political discretion as to the selection of implementation focuses, strategies and instruments. This, of course, also means that there is no harmonisation of the relevant implementation strategies and that the effectiveness of application of law may diverge.

The WFD pursues the ambitious aim of achieving both a good ecological and a good chemical water quality in the whole European Union within certain time limits, that is, by 2015, if necessary to be prolonged twice up to 2021 and 2027. The legal expression of this aim is the obligation of member states to protect, enhance and restore all bodies of water (with respect to surface waters: Article 4[1] [a] [ii]). The WFD also contains a prohibition of deterioration of water quality (with respect to surface waters: Article 4[1] [a] [i]). The stringency of both obligations is mitigated by an exception in the case of overriding public interest and/or benefit (Article 4[7]). In terms of fulfilling these obligations, the WFD requires the member states to establish, for each river basin district, a water management plan and a programme of measures that forms a separate part of the water management plan (Articles 11 and 13). A major tool for steering and adjusting the implementation behaviour of the member states is their obligation to analyse the properties of river basins and monitor the effects of human activities on the status of water bodies according to specifications and time cycles set out in the WFD (Article 5). There is a special, less stringent regime for artificial and heavily modified waters which, however, also contains a non-deterioration obligation.

Experience gained with the implementation of the WFD shows that it has been overambitious. The Directive has failed to achieve, as envisaged, a good water quality for most EU bodies of water by 2015. The percentage of water bodies in the EU that are classified as having a good quality has only increased

* A shorter version of the article has been published in the e-journal 2016 of the IUCN Academy on Environmental Law.

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 reconnaître 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 & ICCEL, 5th ed. 2015, Article 10 and accompanying commentary at pp. 57-58.

2 Directive 2000/60/EC, as last amended by Commission Directive 14/101/EU; as to its characteristic features see, e.g., M. Lee, Law and Governance of Water Protection Policy, in: J. Scott (ed.), Environmental Protection, European Law and Governance, 2009, chapter 2; H. Blöck, European Water Policy and the Water Framework Directive: An Overview, Journal for European Environmental and Planning Law (JEEPL) 1 (2004), pp. 170-178.

from 43 to 53 percent.³ One can even not rule out a failure to achieve the quality objectives by 2021 or at least by 2027, which would then raise the question of a fundamental reform of the Directive.

Germany has implemented the WFD by inserting in the Water Resources Management Act⁴ 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 promulgating the Surface Waters Regulation.⁵ Moreover, the Federal Waterways Act⁶ has been amended so as to implement the WFD (Section 12[7], 3rd sentence).

2 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, highlighting the difficulties confronted when leaving the sphere of an abstract principle for practical application on the ground. Apart from an extensive and controversial discussion in the legal literature,⁷ there have also been some court cases concerning the 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 in north-western Germany to make 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 of Germany (the highest administrative court in the country, which normally only deals with appeals on a point of law but which was competent here as a court of first instance

because of the federal interest at stake). The Federal Administrative Court⁸ assumed 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). Therefore, it referred the case to the European Court of Justice 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). On the 1st July 2015, the Court rendered its judgement on the case.⁹ The decision can quite rightly be denominated as a landmark decision on EU water policy. The fact that the judgement was rendered by a Grand Chamber of the Court (composed of 15 judges), highlights the importance the Court has attributed to the legal questions that were at issue. There has already been an extensive discussion of the judgement in Germany,¹⁰ but much less so in other member states of the Union.¹¹

3 The legal nature of the prohibition of deterioration

One of the controversial questions regarding the prohibition of deterioration of water quality, which had to be addressed by the European Court of Justice, concerned its legal nature. The question is whether this prohibition is only a principle for water management planning or is a rule in the form of a permit prerequisite or prohibition applicable to any individual alteration of, or discharge into, a body of water. In Germany, the views on the legal nature of the prohibition of deterioration have been varied. The water authorities at federal and state levels applied the non-deterioration obligation as a mere planning principle.

3 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, SWD (2012) 379 final, COM (2012) 670 final.

4 Law of 31 July 2009, Federal Gazette 2009 (Part 1), p. 2585.

5 Regulation of 20 July 2011, Federal Gazette 2011 (Part 1), p. 1429.

6 Consolidated Version of 23 May 2007, Federal Gazette 2007 (Part 1), p. 962.

7 See, e.g., K. Faßbender, Zur aktuellen Diskussion um das Verschlechterungsverbot der Wasserrahmenrichtlinie, *Zeitschrift für Europäisches Umwelt- und Planungsrecht* (EurUP) 2014, pp. 70-84, with further references.

8 Decision of 11 July 2013, 7 A 20.11, *Deutsches Verwaltungsblatt* (DVBl.) 2013, p. 1450, available at www.bverwg.de/Entscheidungen.

9 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.

10 See, e.g., W. Durner, Anmerkung zu EuGH, Urt. v. 1.7.2015 – C-461/13 – Weservertiefung, DVBl. 2015, p. 1049-1053; K. Fülser and M. Lau, Wasserrechtliches Verschlechterungsverbot und Verbesserungsverbot nach dem Urteil des EuGH zur Weservertiefung, *Natur und Recht* (NuR) 2015, p. 589-595; C. Franzius, „Die Mutter aller Wasserrechtsfälle“. Das Urteil des EuGH zur Weservertiefung und die Folgen, *Zeitschrift für Umweltrecht* (ZUR) 2015, p. 643-652; H. Ginzky, Die Entscheidung des EuGH zum Verschlechterungsverbot – Alle Fragen geklärt?, *NuR* 2015, p. 624-628; S. R. Laskowski, Das Verschlechterungsverbot im europäischen Wasserrecht nach dem EuGH-Urteil vom 1. Juli 2015 (Rs. C-461/13), *ZUR* 2015, p. 542-546; E. Rehlinger, Der EuGH und das Verschlechterungsverbot, *Neue Zeitschrift für Verwaltungsrecht* (NVwZ) 2015, p. 1506-1508; M. Reinhardt, Das Verschlechterungsverbot der Wasserrahmenrichtlinie in der Rechtsprechung des Europäischen Gerichtshofs, *Umwelt- und Planungsrecht* (UPR) 2015, pp. 321-329.

11 See, e.g., H.F.M.W. van Rijswijk and C.W. Backes, Ground Breaking Landmark Case on Environmental Quality Standards? The Consequences of the CJEU "Weser-judgement" (C-461/13) for Water Policy and Law and Quality Standards in EU Environmental Law, *JEEPL* 12 (2015), pp. 363-377.

By contrast, the courts¹² unanimously considered it 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. If one looks at other member states, one also can discover similar divergences of qualification of the non-deterioration obligation. For example, the Netherlands applied the non-deterioration obligation as a planning principle unless specified by a programme of measures, whereas the United Kingdom considered it as a permit prerequisite.¹³

As evidenced by the reference of Article 11[1] WFD, one of its planning provisions, to the “*objectives established under Article 4*”, the non-deterioration obligation constitutes, without a doubt, an objective for long-term water management planning. However, the Court held that Article 4[1] 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 Court¹⁴ in favour of this qualification are the following: Firstly, Article 4[1] 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. Secondly, the WFD requires the member states “*to implement the necessary measures to prevent deterioration*” of the relevant bodies of water; this means, in the opinion of the Court, that the prohibition of deterioration is mandatory. Thirdly, in contrast to the improvement obligation, the non-deterioration obligation is couched in unconditional terms and therefore must be qualified as a rule. Fourthly, the exception set forth by Article 4[7] WFD concerns individual cases that need to be dealt with in the permit procedure.

The holding contributes to making the non-deterioration obligation more stringent and less flexible than advocated by many member states. This may be welcomed for the sake of an effective environmental protection. Especially the adjustment mechanism established by Article 11(5) WFD will gain an in-

creased relevance as a consequence of the holding.¹⁵ However, it cannot be said that the judgement has a ‘teleological bias’, overemphasising the principle of effectiveness of EU law without a basis in the Directive itself. In arriving at its conclusion, the Court relied on a combination of the normal interpretation methods, that is, literal, systematic and teleological interpretation. Many of the Court’s arguments appear to be convincing. An indication is that, in Germany, the commentators of the decision¹⁶ almost unanimously share the Court’s opinion on this point. Nevertheless, there are also some flaws in the Court’s argumentation.¹⁷

The Court somewhat neglects the language of Article 2 no. 34 and Article 11 (1) WFD which denominate the prohibition of deterioration as a mere “*objective*” rather than a rule or a standard. In a systematic perspective, it is striking that the Court does not look at the system of the WFD as a whole.¹⁸ It does not consider the potentially disruptive effect of an isolated application of the non-deterioration obligation on the entire water planning system. In particular, it does not reflect on the practical meaning the measures programme can retain at all with regard to non-deterioration if the major role of the non-deterioration obligation lies in the permit procedure. However, in this respect, one could argue that the measures programme focuses on degradations and discharges that originate from existing activities and/or non-point sources, especially those arising outside the scope of the water regime, whereas the permit procedure deals with new activities directly subject to the water regime. Moreover, there is no discussion of the relevance of the “*combined approach*” set out in Article 10(3) WFD.¹⁹ This provision refers to quality objectives and quality standards as permit requirements, which may give rise to doubts as to why the Directive, if the environmental objectives established in Article 4 really are to be permit prerequisites, did not include them. It is true that the Directive does not define the term of quality objectives. However, it appears plausible that these are quantified targets which are more specific than the environmental objectives under Article 4 WFD. If this is correct, it could be justifiably

12 Federal Administrative Court, *supra* note 8, nos. 27-32; Administrative Court of Appeals Hamburg, judgement of 18 January 2013 – 5 E 11/08, NuR 2013, 727, at 734-737; Administrative Court of Appeals Bremen, judgement of 4 June 2009 – OVG 1 A 1/09, ZUR 2010, p. 151, at 152; Administrative Court Cottbus, judgement of 23 October 2012 – 4 K 321/10, ZUR 2013, p. 734, at 735.

13 See Opinion of Advocate General Niilo Jääskinen delivered on 23 October 2014, Case C-461/13 – Bund für Umwelt- und Naturschutz Deutschland v. Bundesrepublik Deutschland, ECLI:EU:2014:2324, nos. 33-34, available at www.curia.europa.eu; van Rijswijk and Backes, JEEPL 12 (2015), p. 363, at 369.

14 *Supra* note 9, nos. 29-51.

15 van Rijswijk and Backes, JEEPL 12 (2015), p. 363, at 375.

16 See, e.g., Franzius, ZUR 2015, p. 643, at 646-647; Ginzky, NuR 2015, p. 624, at 626; Laskowski, ZUR 2015, p. 542, at 544; Rehlinger, NVwZ 2015, p. 1506, at 1507; Reinhardt, UPR 2015, p. 321, at 325; critical Durner, DVBl. 2015, p. 1049, at 1052.

17 See also the criticism by van Rijswijk and Backes, JEEPL 12 (2015), p. 363, at 370-373, which partially goes in the same direction.

18 To the same extent van Rijswijk and Backes, JEEPL 12 (2015), p. 363, at 366; Franzius, ZUR 2015, p. 643, at 646-647; Durner, DVBl. 2015, 1049, at 1051 and 1053.

19 An explanation for this omission may be that the chemical status of water bodies was not at stake in the case before the Court.

concluded that the prohibition of deterioration is a mere planning principle. 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 about the binding nature but the distinction between a principle and a rule. A principle is subject to some balancing with conflicting concerns whereas a rule is strictly applicable. Conceptually, it is difficult to see that, depending on the legal context within the same law, a norm could be both a principle and a rule.

4 The meaning of deterioration

4.1 Deterioration ‘theories’

The second question put forward to the European Court of Justice was the meaning of the notion of deterioration. In German administrative practice, court decisions and legal literature, two ‘theories’ have been followed – the ‘status classes theory’ and the ‘status quo theory’²⁰. The status classes theory applied in the practice of German water authorities considers as a (relevant) deterioration only an alteration of, or discharge into, a body of water that leads to a fall of the classification of the body of water into a lower status class. By contrast, under the status quo theory that was followed by the more recent German court decisions²¹ any deterioration of the existing ecological 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. This divide between status classes and status quo theory also characterises the practice in other EU member states. Most member states, for example France, the United Kingdom, the Netherlands and Poland, in principle followed the former theory.²² However, in France and the United Kingdom the status classes theory was applied in an attenuated form in order to also protect the quality elements within a particular status class against deterioration and provide special protection to water bodies having a bad quality.²³

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.²⁴ 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 categories of quality elements. These categories are the biological elements and in support of these the hydro-morphological elements and chemical and physico-chemical elements including pollution by water body-specific pollutants. The supporting elements play a limited role insofar as they are often congruent with the biological quality elements. 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 this rule, a body of water has already to 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 water body-specific quality standard (Article 2 no. 17, Annex V no. 1.4.2 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 classes theory. To understand this, let us assume that 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 a relevant water body-specific quality standard. In this case, 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”). In the same way, a further deterioration would not count at all if another specific pollutant exceeds the relevant quality standard however serious this exceedance may be.

4.2 The Court holding

The European Court of Justice²⁵ neither follows the status classes theory nor the status quo theory but – in opposition to the opinion of the Advocate General²⁶ – adopts a middle course. The Court’s concept of non-

²⁰ See European Court of Justice, *supra* note 9, no. 52.

²¹ Federal Administrative Court, *supra* note 8, nos. 47-50; Administrative Court of Appeals Hamburg, *supra* note 12, pp. 737-740; Administrative Court Cottbus, *supra* note 12, pp. 375-376.

²² See Conclusions of the Advocate General, *supra* note 12, no. 89; A.M. Keessen et al., European River Basins: Are They Swimming in the Same Implementation Pool?, *Journal for Environmental Law (JEL)* 22 (2010), p. 197, at 210-213.

²³ See E. Reh binder, Das Verschlechterungsverbot im Wasserrecht, in: E. Hofmann (ed.), *Wasserrecht in Europa*, 2015, p. 34, at 52-53; Keessen et al., *supra* note 22, both with further references.

²⁴ For a criticism of the classification system see H. Josefsson, Ecological Status as a Legal Construct – Determining its Legal and Ecological Meaning, *JEL* 27 (2015), p. 231-258; H. Josefsson and L. Baaner, The Water Framework Directive: A Directive for the Twenty-First Century?, *JEL* 23 (2011), pp. 463-486.

²⁵ *Supra* note 9, nos. 55-70.

²⁶ *Supra* note 13, nos. 100, 105, 108, 109.

deterioration can be denominated as a ‘modified status classes theory’. In the absence of a clear meaning of the term of ‘status’ under the various linguistic versions of the Directive, the Court primarily relies on systematic and teleological arguments. The Court rejects the status classes theory on the grounds that, as a consequence of the ‘one out, all out’ rule, it would allow a ‘filling up’ of the respective status class through deterioration of further quality elements or through the discharge of further substances in exceedance of the relevant specific water quality standards. Moreover, the Court argues that the system of classification under Annex V is not applicable to the non-deterioration obligation, which, however, does not keep the Court from relying on the key elements of this system. In the opinion of the Court, considering the very objectives of the WFD, it is not necessary for assuming a relevant deterioration that the whole body of water has to be declassified as a response to an alteration. It shall be sufficient that a single quality element of the relevant group of quality elements and hence of the 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 that remain within the previous class limits of the applicable quality element are deemed to be irrelevant.

However, as regards deteriorations of quality elements that are already within the lowest status class, the Court applies the status quo theory. In this context, it should be underlined that according to the Court, even in the lowest status class a deterioration of quality elements of a water body that are still in a higher status class remains admissible if the relevant class limits are not exceeded.

In the result, the court holding appears convincing although its reasoning is less.²⁷ ‘Filling up’ a status class which would be possible under the status classes 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 be prolonged by 6 or even 12 years. Moreover, the improvement obligation does not protect waters that are in the highest class, that is, above “good status”. Another argument is the following: 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 systematically consistent and

in conformity with the objectives of the WFD that the fall of a further quality component by one class should also constitute a relevant deterioration. Adherents of the status classes theory would regard this as formalistic and point to the different weight of the relevant quality elements for water management²⁸ and their lacking normative applicability as well a possible distortion of implementation activities towards the disputed quality elements.²⁹ However, these asserted flaws also affect their theory because, when applying the ‘one out, all out’ rule, this theory has to face the same kind of problems, albeit less frequently. In essence, the criticism is directed at the entire classification system of the WFD, which may be justified as a matter of environmental policy,³⁰ but cannot serve as an argument against its application *de lege lata*. Besides, the classification under the WFD does not allow for an overall weighing between all quality elements (see annex V no. 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 flaw of the reasoning of the Court is that it does not 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 all waters in the same way as protected habitats under the EU Habitats Directive.³¹ Certain deteriorations of bodies of water with respect to particular quality elements are now deemed to be irrelevant, in other words: they are considered not to constitute a deterioration, and therefore permissible without the need to secure an exception. This is all the more important since the exemption clause of Article 4[7] WFD, at least by its wording, 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. It should also be considered that the classification system of the WFD already operates with highly differentiated quality elements

27 To this extent in Germany Franzius, ZUR 2015, p. 643, at 644-645; Ginzky, NuR 2015, 624, at 626; Rehbindler, NVwZ 2015, p. 1506, 1508, as to the Netherlands van Rijswijk and Backes, JEEPL 12 (2015), p. 363, at 374; contra: Reinhardt, UPR 2015, p. 321, at 327-328.

28 This argument relates to the supportive quality elements. However, according to Annex V point 1.4.2 WFD, at least the physico-chemical quality elements that only have a supportive function for the biological quality elements are equivalent to the latter with respect to classification and the ‘one out, all out’ rule. Their relevance is confirmed by the second indent of Article 4[7].

29 Reinhardt, UPR 2015, p. 521, at 527-528; also Dumer, DVBl. 2015, p. 1050, at 1051. The fact that the competent authority may dispose of a margin of appreciation (Administrative Court of Appeals Bremen, *supra* note 12) is no argument against normative applicability.

30 See, e.g., Josefsson, JEL 27 (2015), p. 231-258; Josefsson and L. Baaner, JEL 23 (2011), pp. 463-486.

31 Directive 92/43/EEC on the conservation of habitats and wild fauna and flora, as amended.

and classes. Especially the differences between the various ecological status classes (“*high*”, “*good*”, “*moderate*”, “*poor*” and “*bad*”) are very subtle. For this reason, there is in principle no compelling need to take recourse to the status quo theory.³²

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 in principle 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 normative criteria to justify the application of any other theory. However, even in this status class there might be a need to recognise a threshold of irrelevance.

5 Thresholds of irrelevance

In order to mitigate the rigour of non-deterioration requirement, the recognition of thresholds of irrelevance has been proposed or at least considered although the relevant formulations for deteriorations which should be considered as irrelevant such as ‘serious’, ‘considerable’, ‘significant’ or ‘slight’ do not in themselves convey a precise idea about what the respective courts or authors mean. The legal basis for recognising such a threshold is the principle of proportionality as set out in Article 11(1) and (4) TEU. Under the modified status classes theory, thresholds of irrelevance would clearly play a role in the lowest status class. They might also affect the classification of a particular quality element within the status class, but in this respect, they are a normal component of applying the definitions of the quality element to the facts established in the monitoring process. Thresholds of irrelevance are primarily relevant under the status quo theory. In Germany, in the framework of the status quo theory, the administrative courts³³ only accepted a low threshold of irrelevance in the sense of a ‘slight’ deterioration. In other EU member states, the use of higher thresholds of irrelevance has been widespread.³⁴

The European Court³⁵ explicitly rejected a threshold of “*serious*” deterioration, apparently based on the wrong assumption that the German term ‘*erheblich*’ is

to be translated as ‘serious’³⁶ and that it implies an element of weighting. In any case, the Court’s own solution, that is, the modified status classes theory, contains an element of a threshold of insignificance reflecting proportionality 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 classes theory or as an additional requirement for the application of the status quo theory with respect to the lowest status class and how the term ‘slight’ has to be understood.³⁷ In this respect, the answer of the European Court of Justice to the Federal Administrative Court’s reference question is highly unsatisfactory.³⁸

6 The Obligation to improve 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. It addresses the improvement obligation in particular in comparison with the non-deterioration obligation in order to support its interpretation of the latter obligation. Apart from this, little emphasis is placed on 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 when 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 holding.³⁹ One can only speculate about the reasons for this reserve, the more so since one of the reference questions posed by the Federal Administrative Court related to the improvement obligation and this court⁴⁰ had explicitly qualified the improvement obligation by referring to a “*serious jeopardy*” to attaining the targets of the WFD. An explanation may lie in the evident failure of the WFD to achieve, as envisaged, a good water quality for most EU bodies of water by 2015. In any case, against this backdrop a demanding interpretation of the non-deterioration obligation may appear all the

32 Similarly van Rijswijk and Backes, JEEPL 12 (2015), p. 363, at 374.

33 See Federal Administrative Court, *supra* note 8, nos. 47-50; Administrative Court of Appeals Hamburg, *supra* note 12, p. 739.

34 See van Riswijk and Backes, JEEPL 12 (2015), p. 363, at 373-374.

35 *Supra* note 9, nos. 67-68.

36 The German word ‘*erheblich*’ is ambiguous. It may simply mean ‘relevant’ or may mean ‘considerable’ or ‘significant’, but it does not mean ‘serious’ (which would be ‘*ernst*’ in German).

37 In favour of a cutting-off threshold which takes the difficulties of monitoring and attributing slight alterations of water quality in the whole water body into account: Fülser and Lau, NuR 2015, p. 589, at 591-592.

38 To the same extent Ginzky, NuR 2015, p. 624, at 626-627; see also Franziskus, ZUR 2015, p. 643, at 645-646.

39 See also Ginzky, NuR 2015, p. 624, at 626.

40 *Supra* note 8, nos. 52-53.

more appropriate even if it is at odds with the planning concept of the WFD.

7 Open questions

7.1 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 an alteration of a water course or a discharge into it that is of a purely local nature can be deemed to be irrelevant and whether it can at least be compensated for by improvements made elsewhere in the body of water. The European Court of Justice did not address this issue. Since the classification system of the WFD is geared to the notion of water body and the monitoring requirements reflect this basic orientation, it cannot be ruled out that the reference to the water body renders certain local deteriorations admissible for purposes of the non-deterioration obligation because they do not affect the classification of a particular quality element.⁴¹ An argument in favour of such an interpretation is that Article 4 of the Environmental Quality Standards Directive of 2008⁴² which specifies the WFD admits “*mixing zones*” in the proximity of a discharge point that are not to be considered in determining whether a relevant water quality standard is met or not. However, this water body-oriented view may conflict with the refusal of the Court to recognise a threshold of irrelevance. Without a clarification of this issue, the real consequences of the judgement of the Court on the administrative practice are bound to remain in the mist of speculation.

7.2 Exemption under Article 4[7] WFD

The rejection of the status classes theory by the European Court of Justice will considerably increase the instances in which a project can only be permitted on the basis of the exception clause of Article 4[7] WFD. However, both its scope of application and the conditions under which an exemption may be granted are narrow.⁴³ Since most member states applied the status classes theory, there has not been much experience gained with the application of Article 4[7] WFD and the national rules enacted for its transposition. The Court referred to Article 4[7] WFD only in order to justify its rejection of the status classes theory.

At least by its wording, Article 4[7] WFD is limited to physical alterations of water bodies. In addition, changes of the hydro-morphological properties of water bodies are encompassed when a sustainable human activity deteriorates the ecological quality from “*high*” to “*good*”, which means that this exemption is bound to be of only very limited relevance. Moreover, it is unclear whether the exemption only refers to the ecological quality, as it does with respect to the improvement obligation, or is applicable to both quality classes, that is, also chemical quality, which is particularly relevant to discharges into the water body. The latter interpretation is suggested by the wording of Article 4[7] WFD but not beyond dispute.⁴⁴ Looking at the German experience, the temptation will be great to follow an extensive interpretation of the relevant terms. Thus, the German administrative courts⁴⁵ considered an abstraction of water from a river for cooling purposes and its later discharge into that river as well as a temporary impoundment of a river for transferring a large vessel to the sea as a “*physical alteration*” because these actions changed the ecological or hydro-morphologic properties of the water body, respectively. This extensive interpretation is doubtful because it would render the additional exemption under the second indent of Article 4[7] WFD meaningless. As regards the substantive prerequisites of the exemption, that is, minimisation, paramount public interest and/or benefit and lack of a reasonable alternative, experience with the exemption set out in Article 6(4) of the Habitats Directive⁴⁶ may provide some guidance. Of course, the practical application of these prerequisites will raise a number of questions specific to water bodies.

7.3 Transferability to the chemical status of water bodies

The judgement of the Court of Justice is limited to the ecological status of water bodies including its chemical and physico-chemical quality elements. However, for reasons of coherency, one could argue that the holding must also be transferred to the chemical status of water bodies since these have to be classified according to a similar methodology, including the application of the ‘one out, all out’ rule (Article 2 no. 24, Annex V no. 1.4.3 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

41 To this extent Franzius, ZUR 2015, p. 643, at 645; Fülser and Lau, NuR 2015, p. 589, at 591-592.

42 Directive 2008/105/EC on environmental quality standards in the field of water policy, as amended by Directive 2013/39/EU; see K. Kern, New Standards for the Chemical Quality of Water in Europe under the New Directive 2013/39/EU, JEEPL 11 (2014), pp. 31-48.

43 See, e.g., Fülser and Lau, NuR 2015, p. 589, at 592-595.

44 See Reinhardt, UPR 2015, p. 321, at 328.

45 Administrative Court of Appeals Hamburg, *supra* note 12, at 739; Administrative Court Oldenburg, judgement of 30 June 2014 – 5 A 4319/12, DVBl. 2014, p. 1271, no. 171; to the same extent Fülser and Lau, NuR 2015, p. 589, at 593; in favour of a narrow interpretation Ginzky, NuR 2015, p. 624, at 627.

46 For details see Fülser and Lau, NuR 2015, p. 589, at 593-595.

lowest ecological status classes. Where the water body complies with all quality standards and has to be classified as “good”, according to the logic of the Court 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 by additional discharges would not be admissible. As regards all other quality standards, a deterioration within the limits of the applicable quality standards would be possible.

However, in order to assess the appropriateness of this conclusion, one needs to consider the possible lack of any exemption as provided by Article 4[7] WFD. If one followed a narrow interpretation of the term “physical alteration” of the water body, discharges that affect the chemical quality of a water body would not fall under the exemption. Otherwise, Article 4[7] WFD would offer a way of escape and could serve as a justification for transferring the modified status classes theory to the chemical quality of water bodies. Some commentators⁴⁷ consider the lack of an exemption as appropriate in principle since under Article 10(3) WFD any source that is subject to a permit requirement must comply with water quality standards. This strict view is supported by the fact that neither Article 10(3) WFD nor the Environmental Quality Standards Directive contains an exemption. Nevertheless, if a narrow interpretation of the term “physical alteration” is advocated, a threshold of insignificance might be necessary, especially in case of a modification of an existing facility or renewal of an existing permit. Other commentators⁴⁸ would conclude from the lack of an exemption that the modified status classes theory should not be transferred to the chemical quality of water bodies. A future decision of the European Court of Justice will have to deal with this question.

8 Conclusion

The judgement of the European Court of Justice in the case of the deepening of the Weser river is not only relevant to Germany. It will also have a considerable impact on other EU member states that used to consider the non-deterioration obligation as a mere planning principle and/or strictly followed the status classes theory. The extent to which existing laws will have to be amended will differ from country to country. In Germany, the Water Resources Act, as interpreted in

the light of the court holding, is in conformity with the WFD.⁴⁹ Arguably, the modified status classes theory does not need to be set formally out in the Act. However, Section 12(7) of the Federal Waterways Act may need to be amended since it only requires the consideration of the prohibition of deterioration rather than unequivocally declaring that it is paramount to the exercise of planning discretion.

Whatever one thinks of the middle interpretive course taken by the Court, the decision highlights the practical difficulties to be confronted when applying the non-deterioration obligation on the ground. The impression that might be gained at first glance that the court holding has solved all problems of interpretation of the non-deterioration obligation, proves to be premature. We are still quite far from legal certainty in this important field of environmental policy and law. A number of legal questions are still open. They will occupy the administrative practice, the courts and legal literature in the immediate future and there may be quite some surprises ahead.

47 To this extent Ginzky, NuR 2015, p. 624, at 627; more cautious Reh binder, NVwZ 2015, p. 1506, at 1508; Franzius, ZUR 2015, p. 643, at 645 with note 29.

48 Reinhardt, UPR 2015, p. 321, at 328.

49 In particular Section 12(1) nos. 1, Section 13(2) no. 2, point a) and Section 57 of the Water Resources Act.

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Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

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Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

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