The Weser Case: Case C-461/13 BUND V GERMANY

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ABSTRACT

This analysis piece deals with a landmark case C-461/13, or the Weser case, in which the European Court of Justice settled a years-long dispute over the legal status of the environmental objectives laid down in the Water Framework Directive (2000/60/EC). The Court ruled that the objectives are legally binding: the Member States are for example obliged to refuse authorisation from individual projects estimated to compromise the objectives. The Court also took a strong stance on the so-called non-deterioration principle, ruling that it binds the Member States to such an extent that decline of the quality of the surface waters is no longer allowed. Being so, the Court did acknowledge the possibility of exemption from the now constituted norms, putting the derogation regime created in the Directive in the spotlight. Thus the alleged management planning instrument has turned into a more traditional, formalistic legal tool, affecting individual permitting procedures all across the Union.

During the drafting process of the Water Framework Directive (hereafter ‘the WFD’ or ‘the Directive’), and after its implementation, perpetual uncertainty has dogged the Directive.1 Is it merely a policy-making act, outlining the Union’s water policy in an aspirational manner—or is it a planning instrument, creating a planning and allocation system for water areas and uses, expanding the scope of the land use planning tradition familiar (and sovereign) to many Member States?2

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What is the relation between proceduralisation and the substantive obligations laid down in the Directive? Might the meticulously catalogued technical details in the annexes of the WFD imply that it is only a piece of technical guidance? And, most fundamental of all: are the Member States under a legal obligation to achieve and maintain certain levels of water quality or not?

In Case C-461/13 Bund v Germany (The Weser Case), the Court of Justice of the European Union (hereafter ‘the CJEU’ or ‘the Court’) finally had its say on this challenging piece of environmental legislation. This analysis of the landmark case is divided into four parts. First, section 1 sets out the background to the litigation, concerning both the main procedure between the German environmental non-governmental organisation (NGO) and the German Federal Government, and the request for a preliminary ruling. Two key concepts of the Directive, the good status objective and the non-deterioration principle, are then examined in the following sections. Finally, the ruling’s likely consequences for Member States are outlined, as are the unresolved questions—even though in giving its reasons the Court was clear and unequivocal, naturally some questions remain.

1. THE REQUEST AND THE CASE

Since the Directive was introduced, the scholarly discourse around it has concentrated on the concept of good quality status, defined in Article 2 and Annex V for both surface water and groundwater. This case focused particularly on the obligation on Member States to achieve ‘good surface water status’ in Article 4(1)(a)(ii), which all bodies of water in the European Union territories ought have achieved by 2015. According to the Directive, all watersheds must be divided into river basin districts and their quality must be analysed and categorised as ‘poor’, ‘moderate’, ‘good’ or ‘excellent’. The available categories vary, though, according to whether the ecological or chemical status is at issue or whether the water body in question is defined as an artificial and highly modified one. In relation to artificial and highly modified surface waters, good ecological ‘potential’ rather than status is required: ‘there should at least be movement towards good ecological potential and good chemical status’.

Thus the good ecological status obligation concerns natural surface waters only: river basins categorised as such ought to meet the ‘good status’ by the stipulated time. The Directive includes also another quality standard, known as the non-deterioration

4 Howarth, ‘Accommodation without Resolution’ (n 1) 17.
6 Case C-461/13 Bund v Germany [2015] ECR I-433 (‘Bund’).
7 Depending on the type of the water body, good surface water status is comprised of either good ecological status or good ecological potential, and good chemical status: WFD, art 2(22)-2(24). Groundwaters must also attain good status, consisting of good quantitative status and good chemical status: WFD, art 2(20).
principle. For surface waters, the non-deterioration obligation is found in Article 4(1)(a)(i), reflecting the aim in Article 1(a) to prevent further deterioration and protect and enhance the status of aquatic ecosystems in the European Union.

There have been various attempts to construe the Directive’s ‘good status’ objective. Implementation of the WFD in Member States has been analysed in terms of the dualism often found in the Court’s rulings: the distinction between objectives of result and objectives of best effort. However, since Member States have employed both approaches in implementing the ‘good status’ objective, Member State implementation has not clarified the Directive’s requirements.9 Other studies have used the dichotomy between technical provision and legal norm to illustrate the dilemma of the ‘good status’ objective.10 Still other scholars have emphasised how the ‘good status’ concept is not an abstract concept at all, but is inherently coupled with the individual river basin in relation to which the obligation should be met.11

In the Weser case, a German federal administrative court requested the CJEU’s preliminary ruling on whether Articles 4(1)(a)(i) to (iii) provide only general management planning aims or whether they should hinder a Member State from granting environmental permits for a project endangering their objectives of achieving or maintaining good surface water status, and preventing deterioration of water status. The German court also wished to know how broadly the concept of non-deterioration in Article 4(1)(a)(i) ought to be applied: does it cover only those changes that affect the classification of the river basin—that is, is it applicable only between classes of water status, such as a deterioration from ‘good’ to ‘moderate’? Or does deterioration taking place within a class also count? Or has the principle perhaps some other meaning not apprehended by the referring court?12 Confusion over the role of status classes is rooted in the technocratic manner in which the Directive has been drafted. The status of a water body is determined by various parameters indicative of quality status, such as specific flora and fauna existing in different types of surface waters. To ensure comparability of surface water quality across the European Union, the value of these quality parameters is transformed into a ratio expressed as a numerical value. A consequence of this numerical formula is that the quality of a single parameter can deteriorate without lowering the water quality status overall.13

The main proceedings giving rise to the request for a preliminary ruling concerned a planning proposal, consisting of three separate parts, aiming to deepen parts of the river Weser by dredging the riverbed in order to allow bigger container vessels to make their way to some inland harbour cities in Northern Germany.14 The water bodies in question were classified either as artificial and heavily modified or natural.15

9 van Kempen (n 5) 520ff.
12 See the request for a preliminary ruling in Bund (n 2).
13 WFD (n 1), Annex V, ss 1.3. and 1.4.1.
14 Bund (n 6), paras 2, 16, and 2.
15 ibid, para 22.
It had been estimated that the planned works would have a detrimental effect on the quality of parts of the water bodies affected but that the deterioration would take place only within a status class, that is, it would not result in a change in the class of water quality overall. The responsible administrative authority had also investigated whether the conditions for derogation from the WFD’s quality objectives were met—as provided for in Article 4(7) of the WFD—and it had found that, if relevant, the project would fall within the scope of Article 4(7).16

2. WATER STATUS OBJECTIVES MUST NOT BE JEOPARDISED

In the Court’s understanding, the Directive consists of two water quality obligations binding on Member States, which are separate but intrinsically linked: the obligation to prevent deterioration (‘the non-deterioration principle’) and the obligation to enhance (the duty to achieve and maintain good water quality status).17 In the Weser case, they examined both these obligations together in relation to projects that might undermine their attainment. In particular, the Court examined the normative influence of the WFD’s good status objectives in Article 4(1)(a)(i)-(iii): must the objectives there set out be interpreted to mean that permits must not be granted to undertakings that are in contradiction with them? Such an interpretation would mean favouring an objective of result interpretation of the Directive’s water status objectives. It would mean that no project ought to be allowed to impede the acquisition or maintenance of good surface water status, or to cause deterioration of water status, if no exemption has been granted under Article 4(7).18

The Court ruled in favour of this interpretation. It took a strong and clear stance in favour of the normativity of the water status objectives in Article 4, rejecting interpretations that the Directive is a mere policy instrument or that the obligations are binding only as to the Member States’ best effort. Accordingly, Member States are obliged to refuse authorisation for a project that might adversely affect the attainment or maintenance of the good surface water status objective, or cause deterioration of water status, providing that no exemption has been granted. The Court further clarified that the obligation covers all types of surface waters: since the main proceedings included both natural and artificial water bodies, the Court could determine this issue.19 The Court also held that the obligation remains at all stages of the Directive’s implementation and is irrespective of any negligence on the Member State’s part in failing to compile programmes of measures, including the means to reach the good status objectives.20

The Court’s reasoning had three dimensions.21 First, it referred to the drafting procedure during which the European Parliament actively opposed the view according to which deterioration in and above good status class would be allowed.

16 ibid, paras 23–25.
17 ibid, para 39.
18 ibid, para 29. The method of the Court’s enquiry was traditional and familiar from previous case law: see para 30.
19 ibid, paras 22, 50–51.
20 WFD (n 1), art 11 and ibid, para 50. AG Jääskinen elaborated on the issue: Opinion of AG Jääskinen, para 72.
21 Bund, (n 6) para 43.
dismissing the Commission’s stance on the issue. Second, the Court referred to the Directive itself, citing numerous articles and an extensive Annex on how the attainment and sustainment of the Directive’s status objectives could be secured. Third, the Court paid due attention to the saying ‘the exception proves the rule’. Since the derogation clauses in Article 4(7) are extensive—and applicable only if all the appropriate steps are taken to mitigate detrimental effects—this provides evidence that there must have been a rule from which an exemption could be granted in the first place. The Court also depended on structural argumentation, finding that the categorisation of the derogation clauses implied that the Article 4(1)(a) status objectives are not to be applied merely in relation to development planning but also to individual projects. The stance is a natural continuum of the earlier case law ruling that the WFD may be engaged by individual projects, at least ones that have a significant impact on water quality.

Thus the Court ruled that the obligation to enhance (the obligation to achieve and maintain good status) and the obligation to prevent non-deterioration are binding requirements laid down by the EU legislature. The Court also elaborated the precise meaning of the non-deterioration principle in the second part of its judgment.

3. SURFACE WATER QUALITY MUST NOT DETERIORATE FROM THE STATUS QUO

The non-deterioration principle is significant when fulfilling the obligation to enhance surface water quality. The Court gave the principle an independent and significant status, moving on from scholarly writings that have focused on the good status obligation in Article 4(1)(a).

Since ‘deterioration of status’ is not defined in Article 2 of the Directive, the Court used contextual and linguistic interpretation to determine its meaning. Its options were basically 2-fold: ‘the status class theory’ would indicate that the non-deterioration principle is applicable only when detrimental changes would relegate the classification of the water body to a lower class; or ‘the status quo theory’ would suggest that all detrimental changes are to be prevented. The literal reading of

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22 ibid, paras 41 and 49, see also Opinion of AG Jääskinen, paras 60–61, 63–64, and legislative work cited in fn 37.
23 Bund (n 6), para 42.
24 ibid, paras 44–46.
25 ibid, para 47 and Opinion of AG Jääskinen, paras 78 and also 71, in which AG Jääskinen saw the concept ‘[i]n making operational’ the link between general management goals and their fulfilment in specific water bodies.
27 Advocate-General Jääskinen expanded on this, referring to the Commission’s stance on the issue: Opinion of AG Jääskinen, para 67.
28 The non-deterioration principle has been noted but often not further elaborated since it has usually been interpreted as applying only between statuses or to the most severe cases, such as agricultural run-offs. See for example van Kempen (n 5) 527–28; Keessen and others (n 5) 210–12.
29 Bund (n 6), paras 53–55.
30 ibid, para 52 and, in more detail, Opinion of AG Jääskinen, para 90 (text at fn 13 explains the reasons for this dichotomy).
Article 4(1)(a)(i) favoured the latter interpretation.\textsuperscript{31} The contextual reading led to the same conclusion, leading the Court to rule in favour of the ‘one out, all out’ principle. Thus, as soon as the status of one quality element—by which the statuses are determined—deteriorates by one class, an infringement of the non-deterioration principle is deemed to have occurred.\textsuperscript{32}

The Court justified its stance by finding that an opposite interpretation would not encourage Member States to maintain water quality within classes—the interpretation it adopted was the most certain way of retaining all the practical effect of the obligation of non-deterioration.\textsuperscript{33} The Court reasoned that the classification system is an instrument with broad scope. The classes have been established as an overall control on the detailed and technical, even meticulous, work that Member States must undertake in determining the quality of the water bodies.\textsuperscript{34} As Advocate General Jääskinen argued, the concept of deterioration is a well-established concept of water law, having a general, rather than technical or detailed, scope. Thus, since the WFD refers to this undefined and familiar concept instead of the detailed Annex V, the Union legislature must be assumed to have acted deliberately, favouring a broad understanding of non-deterioration instead of a specific and narrow one.\textsuperscript{35} In order to gain ‘the most balanced and coherent’ interpretation of Article 4(1)(a)(i), the CJEU found that it must be understood as having a broad scope, in line with ‘the status quo theory’.\textsuperscript{36} This interpretation also makes it possible to include waters from the less-than-good classes within the scope of non-deterioration as well as discouraging Member States from allowing the waters in higher classes from deteriorating.\textsuperscript{37}

4. LOOKING AHEAD

The Court’s judgment in this milestone case was remarkably clear. As far as surface waters are concerned, the environmental objectives in Article 4(1)(a) are now legally binding. The adaptive water management regime created by the WFD effectively has a veto over other European Union environmental regulation: even when undertakings have gained permits based on other legislation, such as the Industrial Emissions Directive or the Habitats Directive, deterioration of water bodies will obstruct the endeavour—providing that no derogation from the WFD’s requirements applies.\textsuperscript{38}

\textsuperscript{31} Bund (n 6), para 55.
\textsuperscript{32} In this regard, the Court’s stance was in line with that of the Commission but contradicted the viewpoint of the German Federal Government, giving the Court a chance to educate the latter on the wording of art 4(1)(a)(i): ibid, paras 68–69.
\textsuperscript{33} Bund (n 6), paras 62 and 66.
\textsuperscript{34} ibid, para 61 and Opinion of AG Jääskinen, paras 98–99, stating that ‘[I]t is also undeniable that determination of limit values between the classes results in the adoption of extremely wide ranges. The classes are thus merely an instrument which restricts or limits the Member States’ very detailed action consisting in determining the quality elements which reflect the actual status of a specific body of water’.
\textsuperscript{35} Opinion of AG Jääskinen, para 99.
\textsuperscript{36} ibid para 100; Bund para 70.
\textsuperscript{37} Bund, paras 63 and 65; Opinion of AG Jääskinen, para 102.
This is quite an achievement for a framework directive! The Court recognised the framework nature of the Directive simply by stating the fact that a framework directive does not attempt to harmonise Member States’ water regulation completely.\textsuperscript{39} Advocate General Jääskinen engaged more with this issue, stating that ‘the WFD is a complex and particularly elaborate measure which is unusually difficult to understand’.\textsuperscript{40} Moulding EU environmental law has always been a keen interest of the Court, and here it certainly continued on that path.\textsuperscript{41}

The derogation regime created by Article 4(7) of the Directive is now in the spotlight.\textsuperscript{42} The Court drafted, \textit{obiter dicta}, guidelines for the exemptions.\textsuperscript{43} First, even though no weighing and balancing takes place when determining whether Article 4’s environmental objectives have been met, a decision on whether a derogation should be granted is partly based on a weighing up of interests. The Court considered this when emphasizing that the non-deterioration principle includes no weighing and balancing of interests whatsoever, unlike the derogation regime. The relevant interests are, on the one hand, the attainment or maintenance of the Directive’s water status objectives and the fulfilment of the non-deterioration principle, and on the other hand, the significance of the undertaking requiring exemption. ‘Serious impairment’ in the quality of the water body could possibly be accepted where the interests favouring the endeavour are sufficiently significant.\textsuperscript{44} As noted above, in the main proceeding in the \textit{Weser} case, the referring court had found that Article 4(7) was applicable.\textsuperscript{45}

Even though the CJEU’s decision might have come as a surprise to some, the decision is a reasonable one. Giving normative clout to the environmental status objectives and the non-deterioration principle means that the European Union water quality law now includes clear rules—and as with any rule, there is also the possibility of exemptions. The alleged management planning instrument has turned into a more traditional, formalistic legal tool. The underlying philosophy of adaptive management—cherishing well-managed experiments, uncertainty and learning, and considering fixed rules to be a poor match for adaptive strategy—might not be accommodated by the ruling, but the scientific and legal questions are now more clearly distinguished than before.\textsuperscript{46} The relevant scientific analysis relates to the

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\item \textsuperscript{39} \textit{Bund} (n 6), para 34.
\item \textsuperscript{40} Opinion of AG Jääskinen, para 4.
\item \textsuperscript{41} One of the many nicknames given to the Court is ‘the catalyst for integration’: see Sonia Morano-Foadi and Stelios Andreadakis, ‘Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights’ (2011) 17 Eur L J 595, 596. See also ibid, fn 1–2.
\item \textsuperscript{42} As William Howarth predicted almost a decade ago: ‘Not before time perhaps, the ecological impacts of development projects upon waters will need to be fully evaluated against precise criteria and justified before they are allowed to proceed’. He also noted how the requirements set in the WFD for derogation are rather specific and demanding: Howarth (n 1) 24 and fn 86.
\item \textsuperscript{43} It is debatable whether a CJEU’s preliminary reference can have \textit{obiter dicta} at all. One comprehensive analysis of the CJEU’s role in law-making initiates an ‘alternative model’ to this much discussed theme: Marc Jacob, \textit{Precedents and Case-based Reasoning in the European Court of Justice: Unfinished Business} (CUP 2014).
\item \textsuperscript{44} \textit{Bund} (n 6), para 68. See also n 32 and accompanying text.
\item \textsuperscript{45} See text at n 16.
\item \textsuperscript{46} Crawford Holling (ed), \textit{Adaptive Environmental Assessment and Management} (Wiley-Interscience 1978) 377, 7 and 10; Bradley Karkkainen, ‘Collaborative Ecosystem Governance: Scale, Complexity, and
environmental objectives of the Directive; the legal analysis is more focused on weighing and balancing interests in relation to planned projects.47

The clarified status of the environmental status objectives and non-deterioration principle is expected to usher in revisions to national legislation in some Member States. States who implemented the Directive as a management and planning instrument will need to consider revising their legislation. Incorporating a derogation procedure into environmental legislation would be an interesting undertaking, considering that programmes of measures—including details of the Directive’s water quality objectives—are required by the Directive only every six years (Article 11). Requiring planned projects to wait until the next round of water quality planning is not reasonable, forcing the Member States to create other, more flexible procedures to comply with the Court’s interpretation of the Directive’s core water quality obligations.

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