



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
JÄÄSKINEN  
delivered on 23 October 2014<sup>1</sup>

**Case C-461/13**

**Bund für Umwelt und Naturschutz Deutschland e.V.**  
v  
**Bundesrepublik Deutschland**

(Request for a preliminary ruling from the Bundesverwaltungsgericht (Germany))

(Environment — Article 4 of Directive 2000/60/EC — EU action in the field of water policy — Environmental objectives relating to surface waters — Deterioration of the status of a body of surface water — Project for the development of a navigable waterway — Whether Member States are under an obligation to prohibit any project which has or may have an adverse impact on the status of bodies of surface water)

### I – Introduction

1. The questions referred for a preliminary ruling in the present case by the Bundesverwaltungsgericht (Federal Administrative Court, Germany) arise from a dispute concerning the development of the river Weser, one of Germany's major rivers. The dispute brought before the national court is between Bund für Umwelt und Naturschutz Deutschland e.V. (federation for the environment and the conservation of nature; 'the BUND'), a non-profit-making organisation, and Bundesrepublik Deutschland (Federal Republic of Germany), in its capacity as developer for a project to deepen the Weser in order to enable larger container vessels to call at the ports of Bremerhaven (Germany), Brake (Germany) and Bremen (Germany). In the framework of that dispute, the issue of the significant physical modifications and that of the harmful hydrological and morphological consequences which the project would entail for the Weser's ecosystem have been raised.

2. In that context, the Court is asked to determine the scope of the concepts of 'environmental objectives' and of 'deterioration' of the status of the bodies of water referred to in Article 4(1)(a)(i) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy<sup>2</sup> ('the WFD').

3. However, the interpretation of those concepts requires the Court to address several challenges, principally the following.

<sup>1</sup> — Original language: French.

<sup>2</sup> — OJ 2000 L 327, p. 1. Directive as amended by Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 (OJ 2009 L 140, p. 114). It should be pointed out that the WFD was supplemented by Directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006 on the protection of groundwater against pollution and deterioration (OJ 2006 L 372, p. 19).

4. First, even though the WFD sought to establish a fundamental common basis to coordinate the patchwork of Community and national legislation in force, the fact remains that the WFD is a complex and particularly elaborate measure which is unusually difficult to understand.<sup>3</sup> In particular, many difficulties are raised by the legislative drafting technique of making numerous references from one provision to another and to other measures and of laying down several derogations the scope of which cannot be clearly identified.<sup>4</sup> In that regard, it is symptomatic that the water management system stemming from the WFD has led to the adoption of a great number of explanatory measures,<sup>5</sup> to the creation of specialised databases<sup>6</sup> and to water research in the context of the European Union's Seventh Research Framework Programme.<sup>7</sup>

5. Secondly, in conjunction with the abovementioned difficulties, the present case reveals a confrontation between two entirely opposed visions of the WFD. The first approach could be classified as minimalist since the WFD would be reduced to a tool for large-scale water management planning. By contrast, under the second approach, with which I concur, the WFD represents a new methodology for water management covering not only the level of planning but also the level of implementation of the binding environmental objectives, which results in the adoption of specific measures to ensure good water status and avoid a deterioration of water status. Therefore, the answer to the questions referred requires an in-depth analysis of the purely technical, or even scientific, terms, methods and parameters that form the basis of the system enabling water status to be identified.

6. Lastly, it should be pointed out that the WFD complies with the principle of sustainable development according to which 'the needs of the present generation should be met without compromising the ability of future generations to meet their own needs'. That is a fundamental objective of the European Union, laid down in the Treaty and applicable to all EU activities and policies.<sup>8</sup> Interpretation of the WFD, which must comply with the fundamental right to environmental protection laid down in Article 37 of the Charter of Fundamental Rights of the European Union, therefore requires an analysis at several levels, having regard to the directive's ultimate objective of protecting water as a shared asset, which takes the form of maintaining, improving and prohibiting the deterioration of the aquatic environment in the European Union.<sup>9</sup>

## II – Legal context

7. In the light of the complexity of the system established by the WFD, it is essential to set out its key concepts.

3 — See, for a detailed examination: Josefsson, H., and Baaner, L., 'The Water Framework Directive: A Directive for the Twenty-First Century?', *Journal of Environmental Law*, Vol. 23, 2011, No 3, p. 463; Irvine, K., 'Classifying ecological status under the European Water Framework Directive: the need for monitoring to account for natural variability', *Aquatic Conservation: Marine and Freshwater Ecosystems*, Vol. 14, No 2, 2004, p. 107; Thieffry, P., 'Le nouveau cadre de la politique communautaire de l'eau', *Europe*, No 2, 2001, p. 4; and Leprince, S., 'La directive cadre 2000/60/CE "eau": exposé général et premières considérations relatives à sa mise en œuvre', in Neuray, J.F., (ed.), *La directive 2000/60/CE du 23 octobre 2000 établissant un cadre pour une politique communautaire dans le domaine de l'eau*, Bruylant, 2005.

4 — By way of illustration, Article 2 of the WFD includes 41 different definitions, covering both geographical concepts and technical concepts relating to water status. The purpose of the WFD is described by half a dozen characteristics listed in Article 1. Furthermore, the environmental objectives are set out in Article 4 of the WFD in a body of rules which includes several levels of derogations.

5 — See the Commission's guidance documents listed at the following address:  
<http://www.waterframeworkdirective.wdd.moa.gov.cy/guidance.html>.

6 — Such as Water Information System for Europe (WISE), Infrastructure for Spatial Information in the European Community (Inspire), Shared Environmental Information System (SEIS) and European Earth Monitoring Programme (GMES).

7 — See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions entitled 'A Blueprint to Safeguard Europe's Water Resources' (COM(2012) 673 final, p. 15).

8 — Council Document 10917/06 of 26 June 2006, entitled 'Review of the EU Sustainable Development Strategy (EU SDS) — New strategy'.

9 — See recital 19 of the preamble to the WFD.

8. Article 1 of the WFD provides:

‘The purpose of this Directive is to establish a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater which:

- (a) prevents further deterioration and protects and enhances the status of aquatic ecosystems and, with regard to their water needs, terrestrial ecosystems and wetlands directly depending on the aquatic ecosystems;

...’

9. For that purpose, all waters covered by the scope of the WFD<sup>10</sup> belong to one of the units provided for by the WFD, namely *a river basin, a river basin district and a body of water*. The concept of *river basin* is defined in Article 2(13) of the WFD and refers to the area of land from which all surface run-off flows into the sea. The concept of *river basin district*, in Article 2(15) of the directive, refers to an area made up of several basins and which constitutes a main unit for the purposes of their management.

10. By contrast, the concept of a body of water has the purpose of identifying all the characteristics and determining the present status of waters. Thus, under Article 2(10) of the WFD, *a body of surface water*<sup>11</sup> is a discrete and significant element of surface water such as a lake, a reservoir, a stream, river or canal, part of a stream, river or canal, a transitional water or a stretch of coastal water. The WFD also refers to the concept of *heavily modified water body*, which, under Article 2(9), means any body which as a result of physical alterations by human activity is substantially changed in character.

11. The bodies of surface water found in a river basin district must therefore, first, fall into one of the categories (rivers, lakes, transitional waters, coastal water and groundwater).<sup>12</sup> Secondly, for each surface water category, the bodies within the district are differentiated into types, in accordance with one of the two systems, A or B, defined in point 1.2 of Annex II to the WFD. System A, which is fixed, is based on ‘ecoregions’ and on required parameters, whereas System B is flexible, with several optional parameters.

12. The concept of *surface water status* is defined in Article 2(17) of the WFD as referring to the status of a body of water, determined by the poorer of its ecological status and its chemical status. In Article 2(18) the WFD defines a body as having good surface water status when the ecological status and the chemical status of that body are at least good. The concepts of *ecological status*, *good ecological status* and *good chemical status* are defined, respectively, in Article 2(21), (22) and (24) of the WFD.<sup>13</sup>

13. Article 4(1)(a) of the WFD, entitled ‘Environmental objectives’, provides:

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

- (a) for surface waters

10 — The WFD applies, in the light of Article 1 thereof, to all inland surface waters, transitional waters, coastal waters and groundwater.

11 — A separate definition is laid down for a groundwater body.

12 — See point 1.1 of Annex II to the WFD.

13 — Article 2(21), relating to ecological status, refers to Annex V to the WFD, which enables the status of bodies of water to be classified and, accordingly, the results to be achieved in terms of water quality to be determined. Article 2(24) of the WFD, relating to good chemical status, refers to Annex IX to the WFD. The chemical status of a body of surface water is determined by reference to compliance with environmental quality standards (EQS), by means of threshold values. Two classes are defined, namely good (compliance) and not good (non-compliance) and 41 substances are monitored, of which 8 are ‘dangerous’ substances (Annex IX to the WFD) and 33 are priority substances (Annex X to the WFD).

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

...'

14. Article 4(4), (5), (6) and (7) of the WFD establishes a series of derogations from the objectives thus defined. In particular, Article 4(7) of the WFD sets out the conditions for a derogation in the event of new modifications to the physical characteristics of a body of surface water, alterations to the level of bodies of groundwater or new sustainable human development activities.

15. Article 11(1) of the WFD concerns the establishment of *programmes of measures*, which constitute a basic planning tool for each river basin district, or for the part of an international river basin district within the territory of a Member State. The programmes must take account of the results of the analyses required under Article 5 of the WFD, in order to achieve the objectives established under Article 4.

16. Article 13 of the WFD concerns river basin *management plans* established in accordance with Annex VII to the directive. It is clear from that annex, in particular, that such a management plan is to contain a list of the environmental objectives established under Article 4 of the WFD and to identify instances where use has been made of Article 4(4) to (7). The management plan is to include a summary of the programme or programmes of measures adopted under Article 11 of the WFD, including the ways in which the objectives established under Article 4 of the directive are thereby to be achieved.

### **III – The facts giving rise to the dispute in the main proceedings, the questions referred and the procedure before the Court**

17. By a planning decision of 15 July 2011 ('the planning approval'), the Wasser- und Schifffahrtsdirektion Nordwest (Waterways and Navigation Directorate for the North-West Region), a federal administrative authority, gave consent for three projects concerning the development of the river Weser, a federal waterway.

18. The first project seeks to develop the outer Weser from the high sea to Bremerhaven. The navigable channel of the Weser is to be deepened by up to 1.16 metres (m) so that large container vessels with a loaded draught of up to 13.5 m can call at the port of Bremerhaven irrespective of the tide.

19. The second project concerns the development of the lower Weser from Bremerhaven upstream to Brake by deepening the navigable channel by up to 1 m so that vessels with a loaded draught not exceeding 12.8 m can call at that port, depending on the tide.

20. The third project seeks to develop the lower Weser from Brake upstream to Bremen. The navigable channel in this section of the river is to be deepened so that vessels with a loaded draught of up to 11.1 m can call at the port of Bremen, depending on the tide. At present the port of Bremen can be called at, depending on the tide, by vessels with a loaded draught of up to 10.7 m.

21. Implementation of the projects involves dredging the river bed in the channels. After the initial excavation to the depth planned in the development, regular dredging for maintenance purposes will be necessary. Most of the dredged material from the development and from maintenance work is proposed to be discharged in the outer and the lower Weser at locations that have already been used for that purpose.

22. In addition to the direct effects of dredging and of discharging the dredged material, the projects have, according to the national court, further hydrological and morphological consequences for the sections of river concerned. In particular, current speeds will increase on a rising tide and on an ebb tide, tidal high water levels will rise, tidal low water levels will fall, salinity will increase in parts of the lower Weser and the brackish water limit in the lower Weser will move upstream and, finally, silting-up of the river bed will increase outside the navigable channel.

23. Of the bodies of water concerned, the 'Weser transitional waters' and the 'tidal area above Brake' are classified as 'heavily modified' within the meaning of Article 2(9) of the WFD. The outer Weser area is classified as a natural body of water in so far as it forms part of the coastal waters. Also, a number of bodies of water falling within tributaries are concerned, some of which are classified as natural and some as 'heavily modified'.

24. As part of the examination of those projects, the competent authority concluded that deterioration within the meaning of the WFD was not to be expected in the coastal waters. On the other hand, it considered that the present status of the bodies of water known as 'Weser/tidal area above Brake type 22.3' and 'transitional waters type T1' would tend to be adversely modified by the effects of the development projects, without that resulting in a change in the status class under Annex V to the WFD. According to the competent authority, such deterioration within a status class is not to be regarded as a deterioration of ecological potential or of status. In the alternative, the competent authority considered that the conditions for a derogation from the prohibition of deterioration under Paragraph 31(2) of the Federal Law on the management of water resources (Wasserhaushaltsgesetz; 'the WHG')<sup>14</sup> and under Article 4(7) of the WFD were met.

25. The BUND contested the planning approval, relying on many infringements of the legislation relating to planning consent, environmental impact assessment and environmental protection as well as on failure to comply with provisions for the protection of waters transposing the WFD.

14 — The first sentence of Paragraph 31(2) of the WHG provides: 'If good ecological status of surface water is not achieved or if its status deteriorates, that shall not be contrary to the management objectives under Paragraphs 27 and 30 provided that: 1. it is the result of a new modification to the physical characteristics of the water or to the groundwater level; 2. the reasons for the modification are of overriding public interest or the benefits of the new modification for human health or safety or for sustainable development outweigh the benefits for the environment and the community of achieving the management objectives; 3. the objectives pursued by the modification to the water cannot be achieved using other appropriate measures which have a significantly less adverse impact on the environment, which are technically achievable and the cost of which is not disproportionately high; and 4. all measures appropriate in practice are taken to reduce the adverse impact on water status'.

26. Against that background, the Bundesverwaltungsgericht referred the following questions to the Court for a preliminary ruling:

1. Is Article 4(1)(a)(i) of [the WFD] to be interpreted as meaning that the Member States must — unless a derogation is granted — refuse to authorise a project if it may cause a deterioration in the status of a body of surface water, or is that provision merely a statement of an objective for management planning?
2. Is the term “deterioration of the status” in Article 4(1)(a)(i) of [the WFD] to be interpreted as covering only detrimental changes which lead to classification in a lower class in accordance with Annex V to [the WFD]?
3. If the second question is to be answered in the negative: under what circumstances does “deterioration of the status” within the meaning of Article 4(1)(a)(i) of [the WFD] arise?
4. Are the provisions of Article 4(1)(a)(ii) and (iii) of [the WFD] to be interpreted as meaning that the Member States must — unless a derogation is granted — refuse to authorise a project if it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by [the WFD], or are those provisions merely a statement of an objective for management planning?

27. The reference for a preliminary ruling was registered at the Court Registry on 22 August 2013. Written observations were submitted by the BUND, Bundesrepublik Deutschland, the Kingdom of the Netherlands, the Republic of Poland, the United Kingdom of Great Britain and Northern Ireland and the European Commission. The BUND, Bundesrepublik Deutschland, Freie Hansestadt Bremen, the Czech Republic, the French Republic and the Commission presented oral argument at the hearing which took place on 8 July 2014.

#### IV – Analysis

##### A – *The treatment of the questions referred for a preliminary ruling*

28. Although the national court has referred four questions to the Court for a preliminary ruling, it appears clear to me that they cluster around two main topics relating to the interpretation of Article 4(1)(a) of the WFD.

29. Thus, first of all, the first topic, raised in the first and fourth questions, is that of whether Article 4 of the WFD merely lays down a general objective in regard to water management planning or whether that provision must be interpreted as prohibiting any deterioration of the status of bodies of water connected with implementation of various projects, with the exception of situations which may fall within the derogations laid down in the WFD. That topic also encompasses the issue of the scope of the requirement for improvement under the WFD.

30. The second topic, raised by the national court in its second and third questions,<sup>15</sup> is that of the interpretation of the concept of ‘deterioration of the status’, referred to in Article 4(1)(a)(i) of the WFD.

31. Consequently, I propose that the questions be regrouped according to those issues.

<sup>15</sup> — For an analysis of the relationship between those two questions, see point 85 of this Opinion.

B – *The objective laid down by the WFD of preventing any further deterioration (first and fourth questions referred)*

1. Observations of the parties

32. By its questions, the national court seeks, in essence, to ascertain whether the WFD lays down a general rule prohibiting deterioration of the status of all bodies of surface water, subject to derogations under the WFD.

33. The parties to the proceedings take diametrically opposed views in that regard. The BUND, the Polish and United Kingdom Governments and the Commission concur with the analysis of the national court according to which Article 4(1)(a)(i) to (iii) of the WFD is to be interpreted as meaning that the Member States must — unless a derogation is granted — refuse to authorise a project if it may cause a deterioration of the status of a body of surface water or if it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status. Thus, both the wording and the scheme and purpose of the WFD support the interpretation that the prohibition of deterioration laid down imposes on Member States, in the context of the authorisation of projects, an independent obligation unrelated to management planning. Similarly, the French Government stated at the hearing that, in its view, Article 4 of the WFD entails not only an objective but also an obligation to adopt specific measures.

34. By contrast, the German and Netherlands Governments consider that the environmental objectives set out in Article 4(1)(a)(i) to (iii) of the WFD relate to river basin management plans and the Member States' programmes of measures for surface water. They are not, therefore, in the view of those governments, criteria for the approval of individual projects. Furthermore, the Netherlands Government submits that the WFD lays down a 'programmatic' approach in that it gives the Member States wide flexibility as regards its implementation.<sup>16</sup>

35. The German Government submits, furthermore, that the wording of Article 4(1)(a)(i) of the WFD does not prohibit deterioration, but requires the adoption of measures to prevent deterioration. The wording of that provision is not drafted in the form of a prohibition. Rather it calls for positive action. It follows that only positive planning measures are subject to an obligation to prevent deterioration.

2. The nature of the WFD and the integration of Article 4 into the WFD system

36. In the light of the complexity of the issues raised, I propose to take a stepwise approach and to analyse, first, the key concepts of the WFD, in order to set out, secondly, the stages involved in the determination of the environmental objectives within the meaning of Article 4 of the WFD, while also dwelling on the characteristics of the directive at issue. That analysis will lead to a conclusion relating to the nature of the prohibition of deterioration which will subsequently have to be substantiated by a series of justifications.

a) The architecture of the key concepts of the WFD

37. By way of introduction, I would point out that the WFD is a framework directive adopted on the basis of Article 175(1) EC (now Article 192 TFEU). It establishes the common principles and an overall framework for action in relation to water protection and coordinates, integrates and, in a longer perspective, develops the overall principles and the structures for protection and sustainable use of water in the European Union. The common principles and overall framework for action which it lays

<sup>16</sup> — Judgment in *Stichting Natuur en Milieu and Others* (C-165/09 to C-167/09, EU:C:2011:348, paragraph 75).

down are to be developed subsequently by the Member States, which are to adopt a series of individual measures in accordance with the timescales laid down in the directive. However, the directive does not seek to achieve complete harmonisation of the rules of the Member States concerning water.<sup>17</sup>

38. Under Article 1(a) of the WFD, the *purpose* of that directive is to establish a framework for the protection of waters which prevents further deterioration and protects and enhances the status of aquatic ecosystems. It is therefore from the perspective of such coordinated action concerning inland surface waters, transitional waters, coastal waters and groundwater that the legislature defines the principal aim of the WFD.

39. It is common ground that the WFD sets the *ultimate goal* of achieving a ‘good status’ for all of the European Union’s surface waters and groundwater by 2015.<sup>18</sup>

40. In that regard, it is clear from recital 25 of the preamble to the WFD that ‘[e]nvironmental objectives should be set to ensure that good status of surface water and groundwater is achieved throughout the Community and that deterioration in the status of waters is prevented at Community level’.

41. Article 4(1) of the WFD constitutes the fundamental provision in that it lays down the *environmental objectives* that Member States are required to achieve. For that purpose, it imposes two different, albeit intrinsically linked, objectives. On the one hand, in accordance with Article 4(1)(a)(i) of the WFD, Member States are to implement the necessary measures to prevent deterioration of the status of all bodies of water. On the other hand, in accordance with Article 4(1)(a)(ii) and (iii), Member States are to protect, enhance and restore all bodies of water with the aim of achieving good status by the end of 2015 at the latest. Under Article 4(1)(a) of the directive, it is in making operational the programmes of measures specified in the management plans that Member States adopt the necessary measures to achieve the objectives of non-deterioration, preservation and enhancement of the status of bodies of water. At the same time, Article 4 of the directive regards as environmental objectives the aims pursued by the legislature, such as good surface water status, good ecological potential or good surface water chemical status.

42. The conceptual difficulty inherent in the WFD system thus lies in the legislature’s conflation of static concepts (such as good surface water status to be achieved by 2015) and dynamic concepts (such as the pursuit of environmental objectives within the meaning of Article 4 of the WFD, which is a continuous process).

b) The stages leading to the determination of environmental objectives within the meaning of Article 4 of the WFD

43. In order to be able to achieve the environmental objectives, Member States must have a comprehensive overview of the characteristics of the bodies of water concerned.

44. In accordance with Article 3 of the WFD, Member States are therefore to identify the individual river basins, assign them to districts and identify the competent authorities.

17 — Judgments in *Commission v Luxembourg* (C-32/05, EU:C:2006:749, paragraph 41) and *Commission v Germany* (C-525/12, EU:C:2014:2202, paragraph 50).

18 — As regards artificial and heavily modified bodies of water, there should at least be movement towards good ecological potential and good chemical status.

45. Next, they are to characterise the bodies of water as provided for in Article 5 of the WFD, in conjunction with Annex II thereto. To that end, for each river basin district they must carry out an analysis of its specific features, including a review of the impact of human activity.<sup>19</sup> An important stage from the point of view of any future determination of the environmental objectives concerns identifying the anthropogenic pressure to which the bodies of water may be subject<sup>20</sup> and assessing the likelihood of the bodies of water failing to comply with the environmental quality objectives laid down in Article 4 of the WFD.<sup>21</sup>

46. In parallel, Member States are required, in accordance with Article 8 of the WFD, to establish the necessary monitoring system,<sup>22</sup> which, by way of a continuing obligation, constitutes the principal tool for determining the status of each body of water.<sup>23</sup> That system must be designed so as to provide a coherent and comprehensive overview of ecological and chemical status within each district.<sup>24</sup> In that regard, I therefore agree with the analysis of the German Government, which points out that the obligation to analyse the trend and reverse it is applicable before the prohibition of deterioration comes into play.

47. The ecological status of a body of surface water is derived from assessment of the structure and functioning of aquatic ecosystems associated with that body of water. It is determined using a scientific mechanism based on quality elements, namely biological (plant and animal species), hydromorphological and physico-chemical elements, which are assessed on the basis of indicators (for example the presence of invertebrates or fish in a water course). For each type of body of water, the ecological status is expressed in the system of classes laid down in Annex V to the WFD, to which I will return in detail as part of the analysis of the second and third questions.

48. After having established the classes in accordance with Annex V to the WFD, the Member States have the task of determining how to achieve good status or, at the very least, good ecological potential, and of preventing deterioration, in accordance with Article 4 of the WFD, for the bodies of water concerned.

49. For that purpose, in accordance with Article 11 of the WFD, the Member States must establish *programmes of measures*, drawn up for each river basin district or for part of the district. The programme is a tool for responding to the identified pressures, thus enabling the river basin or body of water to reach good status.<sup>25</sup> Such programmes of measures may make reference to measures following from legislation adopted at national level and covering the whole of the territory of a Member State.<sup>26</sup> Those programmes include 'basic measures', as minimum requirements to be complied with, and, where necessary, 'supplementary measures'.<sup>27</sup> The basic measures include, in

19 — The specifications set out in Annex II to the WFD enable establishment of an initial classification of all the bodies of water concerned and their division into categories (rivers, lakes, transitional waters or coastal waters, artificial surface water bodies or heavily modified surface water bodies) and then into types (A or B). Furthermore, an economic analysis is also required in accordance with Annex III to the WFD.

20 — See Annex II to the WFD.

21 — For those types of bodies, the WFD requires further analysis in order to optimise the design of the monitoring programmes within the meaning of Article 8 of the WFD and the programmes of measures within the meaning of Article 11. See the end of point 1.5 of Annex II to the WFD.

22 — See Article 8 of the WFD, read in conjunction with points 1.3 and 1.4 of Annex V to the directive.

23 — For a detailed description of the types of monitoring, see WISE Guidance Document, Note No 6, <http://ec.europa.eu/environment/water/participation/pdf/waternotes/WATER%20INFO%20NOTES%206%20-%20FR.pdf>.

24 — The results of the surveillance monitoring serve, in particular, in the light of point 1.3.1. of Annex V to the WFD, to determine requirements for monitoring programmes in the current and subsequent river basin management plans.

25 — See Report from the Commission on the implementation of the WFD (COM(2012) 670 final, p. 3).

26 — Thus, it has been noted in the legal literature that, although the programmes of measures are established for a given river basin district, their content is generally laid down by means of legislative measures applicable throughout the territory of the Member State in question and not by decisions adopted solely at the level of the river basin district concerned. See Hollo, E., *Vertaileva Vesioikeus*, p. 119 (*Droit comparé des eaux*), Suomen Ympäristöoikeustieteen Seura ry, Helsinki 2003.

27 — Defined in Part B of Annex VI to the WFD.

particular, the measures adopted under specific directives for the purposes of Article 11(3)(a) of the WFD,<sup>28</sup> as well as, in the event of a significant adverse impact on the water status, the measures referred to in Article 11(3)(i) of that directive, which seek to ensure that the hydromorphological conditions of the body of water allow the required ecological status to be achieved.

50. For any adverse impact, controls may take the form of *a requirement for prior authorisation or registration*, which seems to me to be crucial from the point of view of the scope of Article 4(1)(a)(i) of the WFD. As is clear from Article 11(3)(c) of that directive, the basic measures include measures promoting water use such as to avoid compromising the achievement of the objectives as provided for in Article 4. The supplementary measures also include those designed with the aim of achieving the environmental objectives, as laid down in Article 11(4) of the WFD.

51. The programmes of measures are drawn up by the Member States in several stages. Thus, those States are required to identify the pressures and the impacts<sup>29</sup> in such a way as to define the major problems of the river basin district concerned. Under Article 11(5) of the WFD, the Member States must also specifically determine the cases in which there is a risk that the environmental quality objectives may not be achieved. In that connection, they also take into account heavily modified bodies and the necessity or the probability of applying derogations within the meaning of Article 4 of the WFD. The first version of a programme of measures is subject to an economic analysis, in accordance with the conditions laid down in Annex III to the WFD, on the basis of which the Member States must determine the costs and timescales for their implementation. The economically adapted plans of measures are then subject to the requirement for public information and consultation in accordance with Article 14 of the WFD.

52. Next, the programmes of measures are incorporated into *the management plans* within the meaning of Article 13 of the WFD. The management plans include the elements laid down in Annex VII thereto. The WFD provides that the programmes of measures and management plans are to be regularly reviewed and updated.<sup>30</sup> The management plan is both *a descriptive document* of the status of the river basin district and *an action plan* in so far as it refers to new measures designed to achieve the objectives of the WFD. On the basis of the estimation of all existing impacts and the outlook for change, a Member State determines the *necessary measures for achieving the environmental objectives* laid down under Article 4 of the WFD. That is clear from points 5 and 7 of Annex VII to that directive, which state that a management plan is to include a list of environmental objectives and also a summary of the programmes of measures, including the way in which those objectives are thereby to be achieved. At the end of that laborious process, Member States are required to implement the measures laid down.

53. In the present case, it is clear from the documents in the main proceedings that a management plan covering a programme of measures was adopted for the Weser river basin district.<sup>31</sup> Consequently, the Court is not called upon to determine the effects of Article 4(1) of the WFD with regard to a body of water in respect of which the assessment and planning measures required by Article 4 of the WFD have not been adopted.

28 — See list contained in Part A of Annex VI to the WFD.

29 — As provided for in points 1.4 and 1.5 of Annex II to the WFD.

30 — The management plans (Article 13(6) and (7)) and the programmes of measures (Article 11(7)) are subject to the same schedule: having been established by 22 December 2009 at the latest, they are to be reviewed before 22 December 2015 and then every six years. The measures themselves must be operational by 22 December 2012.

31 — See the 2009 management plan at the following address: [http://www.fgg-weser.de/Download-Dateien/bwp2009\\_weser\\_091222.pdf](http://www.fgg-weser.de/Download-Dateien/bwp2009_weser_091222.pdf).

3. Conclusion as regards the binding nature of the prohibition of deterioration referred to in Article 4(1)(a)(i) of the WFD

54. In the light of the foregoing analysis, it must be stated that even though the WFD does not bring about full harmonisation, it also does not restrict itself to a solely 'programmatic' approach, a situation which would leave the Member States wide flexibility as regards the choice of the policies and measures to be adopted or envisaged.<sup>32</sup>

55. It is true that the Member States adopt the measures necessary to achieve the environmental objectives on the basis of the specific features and the characteristics of the bodies of water identified in their territories. However, each stage of water management is regulated in detail; this extends to the establishing of scientific criteria, with the help of the exercise known as '*intercalibration*'.<sup>33</sup>

56. That precludes, to my mind, the view that the scope of such a complex and ambitious act could be reduced to a mere invocation of non-binding principles. It is clear from the wording of Article 4 of the WFD that the latter seeks to ensure that the environmental objectives take effect when the management plans, which must be in place for all bodies of water, are implemented. Furthermore, the application of an authorisation procedure in accordance with general legislation seems to me to be an example of implementation of a programme of measures under Article 11(1) of the WFD.

57. Moreover, as I have demonstrated above, environmental objectives within the meaning of Article 4 of the WFD are in fact determined at a very advanced stage of the process, to be undertaken by the Member States, of identifying the status of bodies of water. Their binding effects are not, however, limited to that stage. The pursuit of the environmental objectives applies only in relation to a specific status of bodies of water, which precludes the assumption that Article 4 of the WFD merely lays down a non-binding objective. Thus, the determination of the environmental objectives must *serve* to guarantee good water status and to avoid any deterioration.

58. Consequently, although the structure of Article 4 of the WFD does not allow easy analysis of its provisions,<sup>34</sup> the only interpretation which is consistent with both its wording and its purpose is the interpretation that that article establishes a binding obligation on the Member States to adopt all the measures capable of preventing further deterioration of bodies of water, for which — as in the case of the Weser — a management plan with a programme of measures is established, and to endeavour to use all means in order to protect, restore and enhance the bodies of water to achieve, ultimately, good water status for them.

59. The prohibition of deterioration constitutes both a prohibition and a provision promoting attainment of the results laid down by the WFD as a whole. Thus, the Member States are required not only to prohibit any deterioration, but also to implement that prohibition effectively. The effective implementation of the objective 'of avoiding any deterioration', which is the concrete expression of the general obligation of protection laid down in Article 1 of the WFD, is possible only by means of adopting specific measures designed to avoid deterioration and disturbance liable to have significant effects in the light of the objectives of that directive.<sup>35</sup>

32 — See, by contrary inference, judgment in *Stichting Natuur en Milieu and Others* (EU:C:2011:348) relating to Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants (OJ 2001 L 309, p. 22).

33 — Laid down in point 1.4.1(iv) to (ix) of Annex V to the WFD. For an analysis of that concept, see point 96 of this Opinion.

34 — See Commission explanatory document concerning the Common Implementation Strategy for the Water Framework Directive, Guidance Document No 20 entitled 'Exemptions to the Environmental Objectives'.

35 — It should be noted, furthermore, that Article 4 of the WFD introduces a ranking system for the objectives to be achieved since, according to the legislature, it is conceivable that the same body of water may be subject to different objectives and, therefore, to different measures. It is clear from Article 4(2) of the WFD that, in the event that several objectives of the WFD relate to a given body of water, the strictest objective applies.

4. Justifications supporting the view that the objective laid down in Article 4(1)(a) of the WFD seeking to prevent any further deterioration is binding in nature

a) Conclusions to be drawn from the legislative work for the WFD

60. The proposed interpretation is supported by the history of the WFD, which was intended, in the wording of the explanatory memorandum of its initial draft, ‘to prevent further deterioration and to protect and enhance the quality and quantity of aquatic ecosystems and, with regard to their water needs, terrestrial ecosystems’. Furthermore, ‘[the WFD] confirms and formalises the so-called “combined approach”, with control of pollution at the source combined with the setting of objectives for the environment’.<sup>36</sup> The importance of determining the environmental objectives is confirmed by the number and scope of the legislative amendments which substantially expanded Article 4 of the WFD at all stages of the legislative work.<sup>37</sup>

61. In particular, the preparatory documents made it clear that, in its initial version, the WFD did not require the Member States actually to achieve the objectives laid down with regard to water status. It was pointed out that the obligation imposed on them was rather that of ensuring that plans were drawn up enabling the objectives laid down to be achieved. It was therefore incumbent on them to draw up action plans rather than to achieve results. Accordingly, the European Parliament proposed amendments seeking ‘to make the plan-making process robust and ensure that there are opportunities to hold the River Basin District Management Authorities to account if they do not produce adequate plans’.<sup>38</sup>

62. As regards, in particular, the obligation to prevent the deterioration of surface waters, the preparatory documents demonstrated, in particular, that, in their initial version, the provisions at issue could be interpreted as allowing the status of bodies of water which were above good status to deteriorate to good status when the WFD was adopted. Consequently, the Parliament proposed an amendment enabling a distinction to be drawn between the obligation to achieve ‘good status’ and the obligation to prevent deterioration by inserting the obligation to prevent deterioration as a separate indent of Article 4(1) of the WFD.<sup>39</sup>

63. Furthermore, the intention to implement the environmental objectives at the level of the measures to be adopted by the Member States is clear, in particular, from a comparison of the successive versions of the provisions of Article 4 of the WFD: initial proposal<sup>40</sup> (‘Member States *shall draw up and make operational* ... programmes of measures in order to prevent deterioration ...’), common position (‘Member States *shall aim to achieve* the objectives of ...’),<sup>41</sup> subsequent opinion of the Commission (‘Member States shall ensure that *the programmes of measures* specified in the River Basin Management Plans *are made operational* ...’)<sup>42</sup> and wording finally adopted (‘[i]n making operational the programmes of measures specified in the river basin management plans’).

36 — Proposal for a Council Directive (COM(97) 49 final, paragraph 1).

37 — See, for example, initial Commission proposal (COM(97) 49 final); amended proposal (COM(1999) 271 final, pp. 16 to 22); Council Common Position No 41/1999, referred to above; and joint text approved by the Conciliation Committee provided for in Article 251(4) of the EC Treaty, PE-CONS 3639/00, ENV 221, CODEC 513.

38 — See amendment No 42 and point 3.1 of the European Parliament report of 8 July 1998 on the proposal and the amended proposals for a Council Directive on establishing a framework for Community action in the field of water policy (COM(97) 0049 — C4-0192/97, COM(97) 0614 — C4-0120/98 and COM(98) 0076 — C4-0121/98 — 97/0067(SYN)), document A4-0261/98.

39 — See point 3.2.1 of the European Parliament report referred to in the preceding footnote.

40 — COM(97) 49 final.

41 — Article 4 in the version resulting from **Common Position (EC) No 41/1999 of 22 October 1999 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community** (OJ 1999 C 343, p. 1).

42 — Article 4 of the WFD in the version of the **Opinion of the Commission pursuant to Article 251(2)(c) of the EC Treaty, on the European Parliament’s amendments to the Council’s common position regarding the proposal for a European Parliament and Council Directive establishing a framework for Community action in the field of water policy** (COM(97) 49 final, COM(97) 614 final, COM(98) 76 final and COM(99) 271 final), amending the proposal of the Commission pursuant to Article 250(2) of the EC Treaty (COM(2000) 0219 final — COD 97/0067).

64. Lastly, it is interesting to note that, at the approval stage of the joint text, the Parliament welcomed the strengthening of the text of the common position for the purposes of clarifying the environmental objectives and making them more binding in nature.<sup>43</sup>

b) The cross-cutting and operational nature of the prohibition of deterioration, in particular in relation to the scope of the requirement for improvement

65. Like the national court, supported by the BUND, I take the view that the prohibition of deterioration referred to in Article 4(1)(a)(i) of the WFD, read in conjunction with Article 1(a) of the WFD, must be regarded as a rule of general application. As the Court has stated,<sup>44</sup> its applicability depends on the adoption of a management plan for the body of water concerned.

66. First, the wording of the legislative documents referred to above demonstrates that the prohibition of deterioration was conceived independently, in order to preserve the status of bodies of water where that status is at least 'good'.

67. Secondly, the cross-cutting nature of the prohibition of deterioration is clear from the comparison with the requirement for improvement referred to in Article 4(1)(a)(ii) of the WFD. I would point out that, according to recital 19 of the preamble thereto, the WFD aims at maintaining and improving the aquatic environment in the European Union. In my view, the requirement for improvement was, nevertheless, given a particular status by the legislature and, contrary to the Commission's submissions, is not merely in a relationship of subordination pursuant to which the prohibition of deterioration is an instrument of the requirement for improvement.

68. Thus, right from Article 1 of the WFD, which describes its purpose, improvement is given secondary importance to the primary responsibility of the Member States with regard to the prevention of deterioration. Similarly, Article 4(1)(a)(i) of the WFD refers, first of all, to the implementation of the necessary measures to prevent deterioration before reference is made, in Article 4(1)(a)(ii), to the protection and enhancement of bodies of surface water. Furthermore, the requirement for improvement is coupled with both an implementation schedule and the possibility of extension, under Article 4(5) and (6) of the WFD. By contrast, the obligation under Article 4(1)(a)(i) of the WFD is not subject to any timescale, from which it may be concluded that the adoption of measures seeking to prohibit any deterioration is to be immediate and general.

69. In the light of the general objective of the WFD of achieving good water status by 2015, it is necessary to interpret the scope of the requirement for improvement in relation to an individual body of water and by means of the effects of the measures to be adopted. Consequently, the starting point should be the current status of the body of water concerned. I consider that, where an individual project or the planning measures are 'neutral', in that they result neither in an improvement nor in a deterioration of the status of a body of water, such an approach is permitted by the legislature only where the current status of the body of water at issue is at least 'good'. By contrast, the requirement for improvement takes full effect where the current status of the body of water concerned is less than 'good'.

70. On the other hand, the prohibition of deterioration is still binding at each stage of implementation of the WFD and applies to each type and status of surface water body.

43 — Report on the joint text approved by the Conciliation Committee for a European Parliament and Council directive establishing a framework for Community action in the field of water policy (C5-0347/2000 — 1997/0067(COD)), document No A5-0214/2000, according to which '[f]or the objectives and their binding nature, the compromise reached follows almost entirely the principles laid down in Parliament's second reading amendments. The wording of different obligations is now "Member States shall". Council attempts to dilute the obligations by adding the words "where practicable" to the different points were successfully resisted by the Parliament delegation'.

44 — However, in accordance with the case-law deriving from the judgment in *Inter-Environnement Wallonie* (C-129/96, EU:C:1997:628, paragraph 45), the prohibition of deterioration applies even during the transposition period before the adoption of management plans. See judgment in *Nomarchiaki Aftodioikisi Aitolokarnanias and Others* (C-43/10, EU:C:2012:560, paragraphs 57 and 58).

71. Similarly, the words '[i]n making operational' the programmes of measures, contained in Article 4(1) of the WFD, clearly indicate that the legislature did not merely lay down an obligation to adopt large-scale plans, but that it sought to impose an obligation to establish *a link* between the situation of specific bodies of water, within a river basin and a river basin district, and the achievement of the objectives laid down in Article 4 of the WFD, with due regard to the purpose of the WFD as set out in Article 1 thereof.

72. The judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (EU:C:2012:560) appears to me to be very instructive in that regard. That case involved the assessment of a project transferring water from one river basin or one river basin district to another, when the management plans had not yet been drawn up. The Court clearly excluded, in such a situation, the application of Article 4 of the WFD and, thus, of a derogation under Article 4(7).<sup>45</sup> However, the Court referred to the obligation to refrain from taking any measure liable to compromise the attainment of the results prescribed by the WFD, which is applicable both during the period of transposition and during the transitional period.<sup>46</sup> That proves, in my view, the extent of the significance which the Court attaches to the attainment of the objectives of Article 4 of the WFD and to the preservation of their binding force. It is difficult to conceive why stricter requirements would apply before the expiry of the period for transposition than after it.

73. Lastly, without ruling directly on the nature of Article 4 of the WFD, the Court has nevertheless stated in its case-law that the WFD 'contains provisions of differing types which impose obligations on Member States (see, for example, Article 4, which requires Member States to implement the necessary measures to prevent deterioration of the status of all bodies of surface water and groundwater)'. The Court has also held that 'Article 2 of the directive, read in conjunction with, for example, Article 4, imposes on Member States precise obligations to be implemented within the prescribed timescales in order to prevent deterioration of the status of all bodies of surface water and groundwater'.<sup>47</sup>

74. Article 4(1)(a) of the WFD has therefore been interpreted as a provision which requires Member States to implement the necessary measures to achieve the objectives laid down therein,<sup>48</sup> namely preventing the deterioration of the status of all bodies of surface water and achieving good status for those bodies of water by the end of 2015 at the latest.<sup>49</sup>

75. All of those factors clearly refute the view of the German Government that the prevention of deterioration is not an expression of the prohibition of deterioration and that such prevention is merely a long-term, non-binding aim of the WFD.

45 — The Court nevertheless pointed out the link between the appropriate measures of conservation which the Member States *are bound to adopt* under Article 4(1) of the WFD and the prior existence of a management plan for the district concerned, see judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (EU:C:2012:560, paragraphs 49 to 62).

46 — Judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (EU:C:2012:560, paragraphs 57 and 58).

47 — Judgment in *Commission v Luxembourg* (EU:C:2006:749, paragraphs 42 and 63).

48 — See Opinion of Advocate General Sharpston in *Commission v Luxembourg* (C-32/05, EU:C:2006:334, point 53).

49 — See Opinion of Advocate General Kokott in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (EU:C:2011:651, point 59).

c) The significance of the derogation laid down in Article 4(7) of the WFD

76. According to recital 32 of the preamble to the WFD, '[t]here may be grounds for exemptions from the requirement to prevent further deterioration [of the status of waters]'. The system of derogations laid down in Article 4 of the WFD thus includes several categories.<sup>50</sup> In particular, under Article 4(7), failure to prevent deterioration in the status of a body of surface water where that deterioration is the result of *new modifications* to the physical characteristics of a surface water body<sup>51</sup> is not considered to be an infringement of the WFD. However, that derogation applies only on condition that all practicable steps have been taken to mitigate the adverse impact on the status of the body of water and that the programmes of measures and management plans have been adapted accordingly. In any event, it should be noted that, according to recital 51 of the preamble, implementation of the WFD must achieve a level of protection of waters at least equivalent to that provided in certain earlier acts of EU law.

77. Article 4(7) of the WFD is crucial for the interpretation of the scope of the *environmental objectives*, for the purpose of Article 4(1), principally for two reasons. First, that derogation confirms that the requirement to prevent any deterioration applies to the authorisation of specific projects which may entail a deterioration of the status of a body of water. Second, its wording unambiguously confirms that the objective of preventing deterioration is binding in nature. The Member State must therefore refuse authorisation of a project where that project jeopardises the attainment of good surface water status, except where the project is considered to be covered by a derogation.

78. As pointed out by Advocate General Kokott in her Opinion in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C-43/10, EU:C:2011:651), Article 4 of the WFD not only contains programmatic obligations, but also concerns specific projects, at least where they affect the status of a body of water significantly.<sup>52</sup> Article 4(7) of that directive permits the status of waters to be adversely affected by new modifications. This may stem from individual projects. It is impossible to consider a project and the implementation of management plans separately, in the same way as any construction permit in an area for which there exists a development plan must be issued in accordance with that plan.

79. Consequently, except for those having almost no impact on the status of bodies of water and therefore on the management of a river basin district, projects are covered by the general prohibition of deterioration of the status of bodies of water, although they may be authorised under the system of derogations laid down in Article 4 of the WFD.

80. On the other hand, the interpretation proposed by the German Government would deprive the WFD of any effect, since it would be possible to adopt purely theoretical management plans which have no link with or impact on individual measures.

81. As is clear from the case-file, the ecological status of the Weser is already considered to be critical. The BUND explained, without being contradicted in this regard, the Weser has been the subject of many developments over the years. Given the gravity and the number of problems related to salinisation by potassium and anthropogenic inputs of nutrients, it is unlikely that the Weser will, in

50 — With the exception of protected areas for the purposes of Article 1(1)(c) of the WFD, Member States may, as laid down in Article 4(5) of the WFD, aim to achieve less stringent environmental quality objectives for specific bodies of water where the bodies of water 'are so affected by human activity' or where 'their natural condition is such that the achievement of these objectives would be infeasible or disproportionately expensive'. In accordance with Article 4(6) of the WFD, temporary deterioration in the status of bodies of water is not in breach of the requirements of the WFD where this is the result of natural circumstances or *force majeure*. Lastly — except with regard to protected waters — although under the WFD good status for bodies of water must, in principle, be achieved by 2015, extensions are also permitted under Article 4(4) of the WFD.

51 — That derogation is also applicable in the event of alterations to the level of bodies of groundwater.

52 — See Opinion of Advocate General Kokott in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (EU:C:2011:651, point 62).

the near future, recover good ecological status or good ecological potential.<sup>53</sup> That is also the clear conclusion of the current Weser management plan of 2009, according to which the objectives of the WFD cannot be achieved before 2015, a situation which implies the use of derogations and extensions.<sup>54</sup> The German Government itself accepts in its written observations that the development project at issue is taken into account in the programme of measures in the context of planning, a fact which, in my view, places it within the scope of the obligations incumbent upon Member States under the WFD.

82. Consequently, making a project such as the development of the Weser subject to the prohibition of deterioration under Article 4(1)(a)(i) of the WFD not only constitutes merely application of the WFD, but is also the most appropriate measure in order to preserve the practical effect of the WFD as set out in Article 1 of the directive.

83. It is true that it must be concluded from such an interpretation of the WFD that the majority of projects which are subject to authorisation and may result in deterioration will be covered by a derogation under Article 4(7) of the WFD, even though they are covered, in principle, by the prohibition of deterioration. However, such an approach appears to me to be appropriate, since it enables projects meeting other requirements (economic, in particular) to be implemented, while observing the purpose and the principal objectives of the WFD by enabling authorisation to be made subject to appropriate conditions and limitations.

#### 5. Proposed response to the first and fourth questions referred

84. In the light of all of the foregoing considerations, I consider that the prohibition of deterioration and the requirement for improvement laid down in Article 4 of the WFD are applicable to the authorisation procedures for individual projects. It follows that, at that stage, unless a derogation is granted in accordance with the applicable provisions of EU law,<sup>55</sup> Member States are required to refuse authorisation of an individual project liable to jeopardise the purpose of that directive.

#### *C – The concept of ‘deterioration’ within the meaning of Article 4(1)(a)(i) of the WFD (second and third questions)*

##### 1. Observations of the parties

85. By its second and third questions, the national court seeks, in essence, to ascertain the circumstances in which it should be found that there is a ‘deterioration’ of the status of bodies of water, within the meaning of Article 4(1)(a)(i) of the WFD. I would point out, incidentally, that the national court’s proposed relationship between the two questions referred seems to me to be inappropriate, since it is impossible to answer the question relating to the classification system without having first analysed the concept of ‘deterioration’ as such.

53 — The BUND refers to the Weser management plan ([http://www.fgg-weser.de/Download\\_Dateien/bwp2009\\_weser\\_091222.pdf](http://www.fgg-weser.de/Download_Dateien/bwp2009_weser_091222.pdf)) from which it is clear that in the relevant areas of the lower Weser, the bodies of surface water at issue have, for the most part, only mediocre ecological potential and certain tributaries of the Weser that are also affected by the development project even have poor ecological potential.

54 — See the management plan cited above, Chapter 5, p. 6 et seq. Furthermore, the BUND states that the Commission initiated, in that regard, infringement proceedings against the Federal Republic of Germany, under reference No 2012/4081 (the Commission’s letter of formal notice is dated 21 June 2012), on the ground that the management plan is inadequate in that regard.

55 — In that regard, I take the view that it is necessary to take into account not only the derogations laid down in Article 4 of the WFD, but also all of the legislation applicable in the field of water policy which is liable to interfere with that framework directive. For a presentation of all of the relevant directives in this field, see my Opinion in *Commission v Germany* (C-525/12, EU:C:2014:449, point 43).

86. The national court refers to findings made by the authority that adopted the planning approval. It is clear from these that, despite a finding that the development of the Weser would result in adverse changes to the current status of bodies of water, that authority nevertheless takes the view that such deterioration within a class should not be regarded as deterioration of the ecological potential or of the ecological status of a body of water. That authority therefore concluded that there is no deterioration for the purposes of Paragraph 27 of the WHG, which transposes Article 4(1) of the WFD.<sup>56</sup> By contrast, on the basis, in particular, of the wording of Article 4(1)(a)(i) of the WFD, the national court takes the view that the concept of ‘deterioration’ cannot be regarded as covering only detrimental changes which result in classification in a lower class for the purposes of Annex V to the WFD.

87. As regards the second question, according to the BUND and the Commission, ‘deterioration’ within the meaning of Article 4(1)(a)(i) of the WFD is not restricted to changes of status classes, as the WFD prohibits *any relevant deterioration* within a particular class. In that regard, they submit that that article imposes a general prohibition of deterioration of the status of bodies of surface water (see Article 4(1)(a)(i)) and refers to Annex V to the WFD, and therefore to the classification laid down therein, only as regards the requirement for improvement (see Article 4(1)(a)(ii) and (iii)).

88. As regards the third question, the BUND submits that ‘deterioration’ within the meaning of Article 4(1)(a)(i) of the WFD relates to any influence which has adverse repercussions on water status or which is above a *de minimis* threshold arising from the principle of proportionality, including, in principle, local and short-term adverse effects. The Commission considers that there is ‘deterioration’ as soon as the status of at least one of the quality elements used to assess the ecological status of surface water for the purposes of Annex V to the WFD deteriorates by one class.

89. By contrast, the German, Netherlands, Polish and United Kingdom Governments take the view that ‘deterioration’ should be understood to mean only detrimental changes which result in classification in a lower class, defined in accordance with Annex V to the WFD. The German Government and, in essence, also the Polish and United Kingdom Governments consider that, despite the fact that Article 4(1)(a)(i) of the WFD does not refer to Annex V to the WFD, the classification laid down is indirectly applicable. Furthermore, despite its proposed answer to the third question referred, the Netherlands Government suggests that ‘deterioration’ be interpreted by reference to various quality elements or substances, rather than to the overall ecological status level. Lastly, at the hearing the French Government supported the view that the concept of deterioration relates solely to an overall downgrading of ecological status, in accordance with the criteria of Annex V to the WFD.

2. The mechanism for classifying the ecological status of bodies of water<sup>57</sup> established by the WFD

90. As a preliminary point, I would observe that the doubts expressed by the national court and the differences between the parties both have their origins in the debate in the legal literature between exponents of the theory that the concept of deterioration relates to classification in a lower class in accordance with Annex V to the WFD (*the ‘classes’ theory*) and exponents of the theory that the concept of deterioration relates to any change in the status of bodies of water (*the ‘status quo’ theory*).

56 — Paragraph 27 of the WHG, entitled ‘Management objectives for surface waters’, provides: ‘(1) In so far as they are not classified as artificial or heavily modified in accordance with Paragraph 28, surface waters shall be managed in such a way as: 1. to prevent deterioration of their ecological status and their chemical status and 2. to preserve or achieve good ecological status and good chemical status. (2) Surface waters which are classified as artificial or heavily modified in accordance with Paragraph 28 shall be managed in such a way as: 1. to prevent deterioration of their ecological potential and their chemical status and 2. to preserve or achieve good ecological potential and good chemical status’.

57 — This analysis does not concern groundwater and heavily modified or artificial bodies of water.

Those theories therefore represent two extreme positions in the interpretation of the concept of deterioration within the meaning of Article 4(1)(a)(i) of the WFD. In order to be able to examine that concept, it seems to me to be essential to expand on this framework, with a more in-depth study of the technical aspects arising from the WFD.<sup>58</sup>

91. As I have already pointed out, the assessment of surface water status is based on analysis of the ecological status, which comprises five classes.<sup>59</sup>

92. It should, however, be pointed out that each class, including high ecological status, is determined on the basis of *the deviation* from the *reference conditions* for the purposes of point 1.2 of Annex V to the WFD, namely values normally associated with the surface water body type under undisturbed conditions. These are therefore the natural conditions of surface water, specific to each type of body of water,<sup>60</sup> though they are not defined by the WFD.

93. Good ecological status for the purposes of Annex V to the WFD is therefore regarded as corresponding to a minor distortion, as a result of human activity, from the status normally associated with the relevant type of body of surface water under undisturbed conditions. In other words, the greater the deviation from the pristine or historical status of the bodies of water, the more the ecological status of a body of water will be considered to have deteriorated.

94. For the purposes of assessing ecological status, Member States must rely on the *biological quality elements* which form the basis of that status, supplemented by the *physicochemical elements* and the *hydromorphological elements*.<sup>61</sup> Each of those quality elements includes a long list of parameters.<sup>62</sup> Separate lists are laid down for rivers, lakes, transitional waters and coastal waters.

95. Next, in order to quantify the deviation between normal conditions and the current status of a body of water, the Member States are required to draw up *ecological quality ratios* ('EQRs'). EQRs represent the relationship between the values of the biological parameters observed for a given body of surface water and the values for these parameters in the reference conditions applicable to that body.<sup>63</sup> The ratio is expressed in the form of a numerical value between zero and one. High ecological status is represented by values close to one and bad ecological status by values close to zero.

96. It is therefore only at that advanced stage that the Member States divide the EQRs for each surface water category into five classes by means of a limit value *for the biological quality elements* which shows the boundary between those various classes (high, good, moderate, poor and bad).<sup>64</sup> The limit values are to be established through *the intercalibration exercise*,<sup>65</sup> which involves comparing the classification results of the national monitoring systems for each biological element and for each common surface water body type among Member States in the same geographical intercalibration

58 — For a detailed presentation of the classification system, see Common Implementation Strategy, Guidance Document No 13, entitled 'Overall approach to the classification of ecological status and ecological potential'.

59 — As regards chemical status, the WFD makes provision for two classes.

60 — For a presentation of Types A and B and the categories of bodies, see Annexes II and V to the WFD.

61 — For each type of body of water, the Member States therefore verify the hydromorphological and physico-chemical conditions representing the values of the quality elements set out in point 1.1 of Annex V to the WFD. Those Member States are also required to identify the biological reference conditions representing the values of the quality elements set out in point 1.2 of Annex V to the WFD.

62 — See point 1.2.1 of Annex V to the WFD. For biological quality elements, they include the estimation of phytoplankton, macrophytes and phytobenthos, benthic invertebrate fauna and fish fauna. For hydromorphological elements, they include the estimation of the quantity and dynamics of water flow, connection to groundwater, river continuity, channel types, width and depth variations and structure of the status of the shore. For physico-chemical elements, they include the estimation of salinity, oxygenation conditions, thermal conditions, pH and specific pollutants.

63 — Under point 1.4.1(ii) of Annex V to the WFD.

64 — In accordance with point 1.2 of Annex V to the WFD.

65 — Laid down in point 1.4.1(iv) to (ix) of Annex V to the WFD.

group, and assessing the consistency of the results with the normative definitions set out in point 1.2 of Annex V to the WFD.<sup>66</sup> The intercalibration exercise serves, however, only to define the limits of the classes for ‘high’, ‘good’ and ‘moderate’ status.<sup>67</sup> The limit values of the Member States are set out in the ‘intercalibration decision’ adopted by the Commission.<sup>68</sup>

97. Lastly, the rule of primary importance, relied on by the Commission, is that described by the formula ‘one out all out’.<sup>69</sup> According to that principle, a body of water is to be classified in the class immediately below as soon as the ratio of one of the quality elements falls below the level for the current class. That technique is linked to the definition of ‘surface water status’ given in Article 2(17) of the WFD, which must be determined by the poorer of the ecological status and the chemical status of the body of surface water.

3. Consequences for the interpretation of the concept of ‘deterioration’ within the meaning of Article 4(1)(a)(i) of the WFD

98. In the light of the foregoing analysis, it is clear that the classification system is an instrument having a broad scope, on which the management system established by the WFD is based. That is confirmed by Article 2(21) of the WFD, which refers to classification in accordance with Annex V to the directive. That annex describes those ecological status classifications as ‘normative definitions’.

99. Nevertheless, it 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. It therefore seems to me that it is in particular for that reason that Article 4(1)(a)(i) of the WFD does not refer to Annex V to that directive, since the concept of deterioration, a classic concept of water law, is in this field a concept having general scope which goes beyond the technical nature of the WFD.

100. Consequently, I am of the view that, of the two opposing theories referred to above, the most balanced and coherent interpretation in relation to the objectives under Articles 1 and 4 of the WFD is to consider that the concept of ‘deterioration of the status of a body of surface water’ must be assessed in relation to any substance or any quality element used in the assessment of ecological status within the meaning of the WFD, without this always resulting in a classification change.

101. It should be pointed out that, in adopting the WFD, the legislature sought to emphasise the importance of the ecological approach in water management. That is also the approach that underpins surface water classification, which imposes various requirements in terms of the ecological status and the chemical status of the waters. That approach is supported by the application of the principle ‘one out all out’, which is a specific expression of the precautionary principle.<sup>70</sup> Nevertheless, I would point out that the application of that principle renders the classification system of little use as a potential tool for operational decision-making, since it deprives the classification system of its function of determining the (mathematical) average of the indicators for the status of the body of water concerned.

66 — See recital 5 of the preamble to the Commission decision of 20 September 2013 establishing, pursuant to Directive 2000/60/EC of the European Parliament and of the Council, the values of the Member State monitoring system classifications as a result of the intercalibration exercise and repealing Decision 2008/915/EC (OJ 2013 L 266, p. 1).

67 — See point 1.4.1(iii) of Annex V to the WFD.

68 — See Commission decision of 20 September 2013 cited in footnote 66 of this Opinion.

69 — Set out in point 1.4.2(i) of Annex V to the WFD.

70 — According to the legal literature, however, it usually results in a classification which is too low. See Josefsson, H., and Baaner, L., ‘The Water Framework Directive: A Directive for the Twenty-First Century?’, *Journal of Environmental Law*, Vol. 23, 2011, No 3, p. 471.

102. Application of the ‘one out all out’ rule in conjunction with the classes theory seems to be counterproductive to me. Like the Commission, I am of the view that adopting the classes theory may exclude waters in the lowest class from the scope of the prohibition of deterioration and weaken the protection of waters in the higher classes. Having regard to the purpose of the WFD, that type of bodies of water deserves, however, special attention in the context of water management. It is true that, according to the ‘one out all out’ principle, the deterioration of a single parameter is sufficient for the entire body to be downgraded. Nevertheless, after a body has been downgraded in such a manner, all the other parameters could deteriorate without this causing any deterioration according to the classes theory.<sup>71</sup>

103. Assessing the concept of deterioration from the perspective of classes will therefore result in excluding countless changes in the status of quality elements from the scope of the WFD, a situation which undermines achievement of the purpose of that directive.

104. Furthermore, without wishing to become involved in a scientific discussion concerning the WFD, I would point out that several criticisms have been made of the classification model.<sup>72</sup> It therefore seems that, in reality, that system leads, more often than not, to approximate or unsatisfactory results, in that it does not reflect the current status of the ecosystem.

105. By contrast, if the concept of ‘deterioration’ is interpreted by reference to a quality element or a substance, the prohibition of deterioration retains all its practical effect, since it encompasses all changes liable to undermine achievement of the principal objective of the WFD.

106. Lastly, I would point out that several parties refer to the same Commission guidance document<sup>73</sup> while drawing contradictory conclusions from it. According to that document, ‘[i]n the context of Article 4[(7)], the objectives of preventing deterioration of ecological status (or the potential) refer to changes between classes rather than within classes. Member States do not, therefore, need to use Article 4[(7)] for negative changes within a class’.

107. In that regard, I would point out that there is some confusion between the concept of deterioration and a failure to comply with the provisions of the WFD itself. It seems to me that that document confirms the view that a Member State is required to adopt all the measures which enable good status of bodies of water to be attained, in particular by implementing the environmental objectives referred to in Article 4 of the WFD. On the other hand, a Member State is not subject to any penalty if, despite all its efforts, that status is not attained. In any event, as stated by the German Government, that document, as useful as it may be, has no binding effect. Nor is it a communication of the Commission within the meaning of the case-law in the field of competition law or the law on financial penalties.<sup>74</sup>

71 — In that regard, it is sufficient to refer to the situation where the status of a body of water as a whole must be classified as ‘bad’ owing to a single parameter. In such a situation, while no deterioration is formally possible, the fact of the matter is that any deterioration with regard to the remaining parameters will be permissible.

72 — Thus, in particular, it is suggested that it would be more reasonable to regard high status as equivalent to the reference conditions. Furthermore, it has been pointed out that, in order to be able to determine the boundaries between the classes, it would be appropriate to adopt a purely scientific analysis, the methodology of which has not in fact yet been determined. See a study by Van de Bund, W., and Solimini, A., *Ecological Quality Ratios for Ecological Quality Assessment in Inland and Marine Waters*, Rebecca Deliverable 10, Joint Research Centre, Institute for Environment and Sustainability 2007, p. 10. [http://publications.jrc.ec.europa.eu/repository/bitstream/11111111/10875/2/6757%20-%20Deliverable\\_10\\_1%20recc.pdf](http://publications.jrc.ec.europa.eu/repository/bitstream/11111111/10875/2/6757%20-%20Deliverable_10_1%20recc.pdf). See also, Moss, B., *The determination of ecological status in shallow lakes — a tested system (Ecoframe) for implementation of the European Water Framework Directive*, KOPS 2003.

73 — See Guidance Document No 20 entitled ‘Exemptions to the Environmental Objectives’, op. cit.

74 — See judgments in *Dansk Rørindustri and Others v Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 211 to 213) and *Commission v Portugal* (C-70/06, EU:C:2008:3, paragraph 34).

108. In any event, I wish to point out that neither the wording nor the purpose of the WFD makes it possible, under any circumstances, to confirm the existence of a *de minimis* threshold for the purposes of a significant deterioration theory, as presented by the national court. The only minimum threshold for obligations to protect water status is that arising from the EU legislation already in force, in accordance with recital 51 of the preamble to the WFD, read in conjunction with Articles 4(8) and (9) and 11(3)(a) of that directive.

109. In the light of all the foregoing considerations, I propose that the answer to the second and third questions referred should be that the concept of deterioration must be interpreted by reference to a substance or to a quality element used in the assessment of ecological status within the meaning of Annex V to the WFD, without the detrimental change necessarily having to result in a classification change. Such a classification change may none the less arise where the value of a substance or of a quality element falls below the level for the current classification.

## V – Conclusion

110. I propose that the Court give the following answers to the questions referred for a preliminary ruling:

(1) Article 4(1)(a)(i) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, as amended by Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009, is to be interpreted as meaning that the Member States must — unless a derogation is granted in accordance with the applicable provisions of EU law — refuse to authorise a project if it may either cause a deterioration of the status of a body of surface water or jeopardise the attainment of good surface water status or of good ecological potential or good surface water chemical status by the date laid down by that directive.

(2) The concept of ‘deterioration of the status’ in Article 4(1)(a)(i) of Directive 2000/60, as amended by Directive 2009/31, must be interpreted as covering detrimental changes relating to a substance or to a quality element used in the assessment of ecological status within the meaning of Annex V to that directive, without the detrimental change necessarily having to result in a classification change for the purposes of that annex. Such a classification change may none the less arise where the value of the substance or of a quality element falls below the level for the current classification.