

Analysis: “Programmes and projects leading to only temporary and short-term deteriorations of the status of surface waters must meet exemption criteria: *Association France Nature Environnement (C-525/20)*” by Antonio Cardesa-Salzmann

In *Association France Nature Environnement v Ministre de la Transition écologique et solidaire C-525/20 (AFNE)*, rendered on 5 May 2022, the French Council of State (Conseil d’État) (referring court) sought guidance from the Court of Justice regarding the scope of the obligation of Member States under Article 4(1)(a)(i) of [Directive 2000/60/EC](#), the Water Framework Directive (WFD), to prevent the deterioration of surface water bodies, when such a deterioration is only temporary and for a short period of time.

In view of developmental needs, the question arises whether Member States can approve programmes or projects that contribute to the deterioration of the status of a body of surface water outside of the strict conditions set out in Article 4(7) WFD, when such a deterioration consists only of temporary effects on water quality elements, allowing the quality status and/or potential of water bodies to recover within a short period of time. For the sake of *sustainable* development, Article 4(7) WFD, in essence, only allows the approval of such programmes or plans when these have been included in river basin management plans and are justified for reasons of overriding public interest.

Yet, the above question is explicitly answered in an affirmative sense in [Guidance Document No. 36](#) (p. 22), adopted by the European Commission in consultation with Member States and stakeholders in the context of the Common Implementation Strategy of the WFD. This interpretation of Article 4 WFD prompted the adoption of Decree No 2018-847 of the French Ministry of Ecological and Solidary Transition, which is now challenged by *Association France Nature Environnement* before the referring court.

In *AFNE*, however, the Court of Justice departs from Guidance Document No. 36 and – in line with its prior case law – answers the above question in the negative. In *Bund für Umwelt und Naturschutz Deutschland (C-461/13)*, para 49), the Court had declared that the obligation to prevent any deterioration of the status of surface water bodies in Article 4(1)(a)(i) WFD was autonomous and, hence, not merely instrumental to the obligation of protecting, enhancing, and restoring surface water bodies (Article 4(1)(a)(ii) and (iii)). In *Commission v Austria (C-346/14)*, para 59), moreover, the Court had outlined the meaning of 'deterioration of the status' in the sense of Article 4(1)(a)(i) in very strict terms. Finally, in *Commission v Spain (C-559/19)*, para 48), the Court had also found that any programme or project leading to a deterioration of the status of water bodies, even if only transitorily, can only be authorised by Member States subject to the strict conditions set out, amongst others, in Article 4(7) WFD.

In *AFNE*, specifically, the Court of Justice concludes that the legally non-binding Guidance Document does not stand the test of a teleological interpretation of Article 4 WFD against the objectives of EU environmental policy, such as the preservation, protection and improvement of the quality of the environment, and the prudent and rational utilisation of natural resources (Article 191(1) TFEU), as well as the principles of precaution, prevention and that environmental damage should as a priority be rectified at source (Article 191(2) TFEU) (*AFNE*, paras 38-39). Accordingly, Member States may only approve programmes and projects other than under the exemptions of Article 4(7) WFD when their impact on the status of a body of surface water fails to meet the criteria of ‘deterioration of the status’ in the sense of Article 4 WFD (*AFNE*, para 45).

Environmental regulation in multilevel governance settings, like the EU, is increasingly conducted through participative and experimentalist processes, such as the Common Implementation Strategy under the WFD, with the involvement of the European Commission,

Member State regulators, and stakeholders. Yet, *AFNE* constitutes a significant reminder that the implementation of complex legislative frameworks through such experimentalist, multilevel governance processes remains subject to the judicial review of their compatibility with the objectives and principles of environmental policy enshrined in EU treaty law. *AFNE* also closes a perceived loophole for the approval of programmes or projects not contemplated in river basin management plans, nor justified for reasons of overriding public interest as required under Article 4(7), when their impact on the status of a body of surface waters amounted to a transitory, short-term deterioration only. In conclusion, *AFNE* is good news for sustainable water management in the EU. But it may also lead to more case law on the meaning of 'deterioration of the status' under Article 4(1)(a)(i) WFD.

Antonio Cardesa-Salzmann is Lecturer in EU Environmental Law (University of Strathclyde) and Co-Director of the Strathclyde Centre for Environmental Law and Governance.