Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 3 September 2015 [1]

Case C-346/14

European Commission
v

Republic of Austria

(Failure to fulfil obligations — Infringement of Article 4(3) TEU in conjunction with Article 288 TFEU — Misapplication of Article 4(1) and (7) of Directive 2000/60/EC — EU water policy — Authorisation to construct a hydropower plant on the Schwarze Sulm River — Deterioration of the water status — Reassessment of the status — Correction of the management plan)

I – **Introduction**

1. It is not only the exploitation of environmentally friendly, renewable energy through the use of wind power that can lead to conflict with other environmental objectives; [2] the use of hydropower can, too. The Commission illustrates this in the action it has brought in the present case, concerning a small hydropower plant on the hitherto largely untouched upper section of the Schwarze Sulm (Black Sulm) River in the Austrian Alps. In that action, the Commission relies on the advance effect of the prohibition of deterioration laid down in Directive 2000/60/EC, [3] and takes the view that the project in question is not justified.

2. Crucially, however, the Austrian authorities corrected the assessment of the status of the Schwarze Sulm during the pre-litigation procedure. This means that, in any event, the deterioration of status complained of by the Commission no longer obtains and does not therefore require a legal justification.

II – **Legal context**

3. The key environmental objectives of the Water Framework Directive and any exceptions thereto are laid down in Article 4 of that directive:

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

(a) for surface waters

1 — Original language: German.

2 — See to that effect the Opinion I delivered today in *Commission* v *Bulgaria* (C-141/14).

3 — Directive of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1), as amended by Directive 2013/39/EU of the European Parliament and of the Council of 12 August 2013 (OJ 2013 L 226, p. 1) (‘the Water Framework Directive’).

(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) …'

III – **Facts and procedure**

4. On 24 May 2007, the authorities of the Austrian Province of Styria granted the approval required under the applicable water legislation for the construction of a hydropower plant on the Schwarze Sulm.

5. The authorities classified the ecological status of that body of water as 'high'.[4] At the same time, however, the authorities noted a small degree of drinking water abstraction (31 litres per second) upstream of the section concerned.[5]

6. The plan is to construct a 'Tyrolean weir' for the power plant, to divert a significant quantity of the river water through more than 10 km of pipelines to a power plant building located 480 metres below the weir and then to feed the water back into the river downstream after it has passed through the power plant turbines. Although the obstacle posed by the weir is mitigated, and in the case of upstream movements may even be offset, by a fish migration assistance mechanism, fish migration will still be impeded by the water level reduction. There is a further expectation that the project will result in losses of downstream-migrating fish that get caught in the turbines.[6] In short, it is established that the water status will be classifiable only as 'good' once the project has been completed.

7. In 2006, the Commission received a complaint in connection with the project and, in October 2007, invited Austria to submit its comments. In 2010, however, it terminated that procedure after the Austrian federal authorities withdrew the authorisation for the project.

8. In March 2012, however, the Austrian Verfassungsgerichtshof (Constitutional Court) annulled the decision of the federal authorities, thus reinstating the validity of the original authorisation.

9. Having examined the facts, the Commission came to the conclusion that, in approving the project, Austria had incorrectly applied the derogation from the prohibition of deterioration laid down in the Water Framework Directive, even though, in the light of the advance effect produced by Article 4 of the Water Framework Directive as a result of Article 4(3) TEU in conjunction with Article 288 TFEU, that derogation was to be applied by analogy. Consequently, on 26 April 2013, the Commission again invited Austria to submit comments and, on 21 November 2013, issued a reasoned opinion in which it gave Austria until 21 January 2014 at the latest to remedy the objections raised.

10. In the course of that pre-litigation procedure, the Styrian authorities amended the authorisation by decision of 4 September 2013. As well as making amendments to the conditions imposed which have no bearing on these proceedings, that decision stated that the status of the Schwarze Sulm was not 'high' but, on account of the abstraction of drinking water upstream of the project, only 'good'. Consequently, the water status classification was not reduced by the project and there was no deterioration.

4 — Annex to the defence, pp. 41 and 46.

5 — Annex to the defence, pp. 46 and 47.

6 — Annex to the defence, p. 48.

11. Since the Commission is nonetheless unsatisfied with Austria's answers, it has brought the present action and claims that the Court should:

— declare that the Republic of Austria failed to fulfil its obligations under Article 4(3) TEU in conjunction with Article 288 TFEU, in so far as by granting permission for the construction of a hydropower plant on the Schwarze Sulm it incorrectly applied the provisions of Article 4(1) in conjunction with Article 4(7) of the Water Framework Directive; and

— order Austria to pay the costs.

12. Austria contends that the Court should:

— dismiss the action brought by the Commission in the present case; and

— order the Commission to pay the costs.

13. The case was examined on the basis of the written documents; the Court has decided that a hearing is not necessary.

IV – **Legal assessment**

A – *Admissibility of the action*

14. Austria considers the action to be inadmissible. It submits that the Commission has not adequately specified the obligations which it claims to have been infringed (see Section 2 below). It also takes the view that the Commission's role as guardian of the Treaties does not include a power to review the Austrian authorities' implementation of EU law in specific, individual situations (see Section 3 below).

15. First of all, however, it is necessary to provide a clearer definition of the subject matter of the action (see Section 1 below).

1. Subject matter of the action

16. The subject matter of the action requires clarification since, although authorisation for the power plant was given on 24 May 2007, that authorisation was amended by the decision of 4 September 2013, that is to say before the reasoned opinion was issued and before the time limit of 21 January 2014 laid down therein expired.

17. In the reply, the Commission submits that it did not take into account the fact that that decision had downgraded the Schwarze Sulm from 'high' to 'good' in the form of order sought, but continued to assume that the water status was 'high'.

18. I understand that argument to mean that, although the Commission does not seek an order to the effect that the downgrading of the status of the Schwarze Sulm constitutes an infringement of EU law, it nonetheless raises an incidental objection to that downgrade and, therefore, to the authorisation given in the form of the decision of 4 September 2013.

19. Since the latter decision did not form part of the subject matter of the invitation to submit comments under Article 258 TFEU, the question is whether it — and the decision of 24 May 2007 which it amended — is capable of forming part of the subject matter of the present action.

20. It is common knowledge that the subject matter of an action brought under Article 258 TFEU is delimited by the pre-litigation procedure provided for by that provision. Accordingly, the action cannot be founded on any objections other than those stated in the pre-litigation procedure. This is because the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under EU law and, on the other, to avail itself of its right to defend itself against the objections formulated by the Commission. [7]

21. In the light of the objective thus pursued by the pre-litigation procedure, the Commission must take account of measures adopted by the Member State in the course of the pre-litigation procedure. It might otherwise fail to react to a measure adopted with a view to complying with the Member State's obligations.

22. While it is true that, without initiating a new pre-litigation procedure, the Commission cannot raise additional objections to such new measures, [8] it may nonetheless legitimately pursue the original objections, provided that the measures complained of are still in place at the time when the time limit laid down in the reasoned opinion expires. [9]

23. At first sight, the decision of 4 September 2013 does not appear to affect the Commission's objection to the decision of 24 May 2007. After all, the Commission is, in essence, criticising the justification for the power plant and that justification is not fundamentally reformulated in the decision of 4 September 2013.

24. However, now that the water status has been downgraded to 'good', the deterioration of the Schwarze Sulm of which the Commission complains [10] and which would fall to be justified no longer obtains. For that reason, the Commission calls the downgrade into question, too.

25. Accordingly, the action is not directed against a measure which, despite having been subsequently modified, is still in place. Rather, the decision of 4 September 2013 alters the decision of 24 May 2007 complained of by the Commission in one respect that is crucial to the assessment of the action.

26. There was, nonetheless, no need for the pre-litigation procedure to be carried out again from scratch. After all, Austria adopted the decision of 4 September 2013 in full knowledge of the ongoing pre-litigation procedure. Its rights of defence cannot therefore be said to have been infringed. That measure is intended rather to render the Commission's allegations unfounded. It is effectively a means of defence in the ongoing procedure and cannot, as such, trigger an obligation to carry out the entire pre-litigation procedure again. If that were the case, Member States could use such measures to block the course of proceedings for failure to fulfil obligations. [11]

27. The admissibility of the action would have to be assessed differently if the Commission were seeking an order to the effect that the decision of 4 September 2013 infringes EU law. This would constitute an unlawful extension of the subject matter of the action by comparison with the pre-litigation procedure. As the clarification contained in the reply confirms, however, the form of order sought by the applicant is not to be interpreted in this way.

7 — See, for example, the judgments in *Commission* v *Belgium* (C-221/03, EU:C:2005:573, paragraphs 36 and 38); *Commission* v *Cyprus* (C-340/10, EU:C:2012:143, paragraph 21); and *Commission* v *Germany* (C-211/13, EU:C:2014:2148, paragraph 22).

8 — Judgment in *Commission* v *Belgium* (C-221/03, EU:C:2005:573, paragraph 41).

9 — See to that effect the judgment in *Commission* v *Belgium* (C-221/03, EU:C:2005:573, paragraphs 39 and 40).

10 — See in that regard points 40 to 44 below.

11 — See, to that effect, the judgments in *Commission* v *Austria* (C-203/03, EU:C:2005:76, paragraph 30) and *Commission* v *Belgium* (C-221/03, EU:C:2005:573, paragraph 40).

2. Specificity of the action

28. Austria's first objection relates to the fact that, pursuant to Article 120(c) of the Rules of Procedure, the application must state the subject matter of the dispute and a summary of the pleas in law on which the application is based. That statement must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the application. It is therefore necessary for the essential points of law and fact on which a case is based to be indicated coherently and intelligibly in the application itself and for the form of order sought to be set out unambiguously so that the Court does not rule *ultra petita* or indeed fail to rule on a claim. [12]

29. It is submitted that the Commission infringed those requirements by failing to specify which of the obligations laid down in Article 4(3) TEU in conjunction with Article 288 TFEU it is claiming to have been infringed. It is further submitted that the Commission has not shown to what extent Article 4(1) in conjunction with Article 4(7) of the Water Framework Directive, as provisions of a directive, are applicable at all.

30. That argument cannot succeed, however. After all, as paragraphs 25 and 26 of its application make clear, the Commission links the form of order it seeks to the judgment in *River Acheloos*, in which it was held that, in accordance with Article 4(3) TEU in conjunction with Article 288 TFEU, the Member States were to refrain from seriously compromising the attainment of the objectives of Article 4 of the Water Framework Directive even before Article 4 of the Water Framework Directive became applicable. [13] Accordingly, Austria makes no further mention of that objection in the rejoinder.

3. Scope of the Commission's power of review

31. So far as concerns the implementation of EU law in specific, individual situations, Austria does not dispute that the Commission is entitled to monitor the application of EU law to specific, individual cases and to ask the Court to review its application in such cases as part of proceedings for failure to fulfil obligations. [14] What it objects to is, rather, the fact that the Commission has reviewed an assessment decision adopted by the competent national authorities.

32. However, that argument must be rejected not least because the questions concerning the extent to which the provisions of EU law at issue afford the competent national authorities a margin of discretion in the conduct of an assessment and, if so, whether that discretion was exceeded are concerned not with the admissibility of an action in proceedings for failure to fulfil obligations but with the merits of that action.

B – *Merits of the action*

33. While it is true that the dispute between the parties to the proceedings has to do primarily with whether the authorisation given for the hydropower plant is justified in accordance with the principles set out in Article 4(7) of the Water Framework Directive, it nonetheless falls to be examined whether, in the light of the Austrian amendment decision of 4 September 2013, there is evidence of any deterioration requiring justification having taken place at all.

12 — Judgments in *Commission* v *Finland* (C-195/04, EU:C:2007:248, paragraph 22) and *United Kingdom* v *Council* (C-209/13, EU:C:2014:283, paragraph 30).

13 — Judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C-43/10, EU:C:2012:560, in particular paragraphs 57 to 67).

14 — See, for example, the judgments in *Commission* v *Germany* (C-431/92, EU:C:1995:260, paragraph 19 et seq.); *Commission* v *Germany* (C-20/01 and C-28/01, EU:C:2003:220, paragraph 30); and *Commission* v *Greece* (C-394/02, EU:C:2005:336, paragraph 16).

1. Applicable provisions

34. Since the present case concerns a 2007 decision which was amended in 2013, it is conceivably governed by two formally different regimes, that is to say Article 4 of the Water Framework Directive and the advance effect of that provision.

35. The obligations under Article 4 of the Water Framework Directive have been directly applicable only since 22 December 2009, the date on which the period imposed on the Member States, under Article 13(6) of the Water Framework Directive, for the publication of the river basin management plans expired.[15] Consequently, the authorisation granted for the power plant in 2007 was not yet subject to that provision, but was governed by the advance effect of Article 4 that obtained at that time. Accordingly, the Member States had to refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by Article 4 of the Water Framework Directive.[16]

36. Conversely, there is no doubt that Article 4 of the Water Framework Directive was applicable in 2013, when the second decision was adopted. That decision must therefore be assessed by reference to Article 4. The advance effect of Article 4 of the Water Framework Directive would continue to be relevant only in so far as the 2007 decision is unaffected by the 2013 decision.

37. The question of the extent to which the project affects the status of the Schwarze Sulm forms the subject matter of the 2013 decision. That decision is therefore subject to the prohibition of deterioration laid down in Article 4(1)(a)(i) of the Water Framework Directive.

38. The Court has recently made it clear — somewhat surprisingly[17] — that there is deterioration of the status of a body of surface water as soon as the status of at least one of the quality elements, within the meaning of Annex V to the Water Framework Directive, falls by one class. It makes no difference in this regard whether that fall results in a fall in classification of the body of surface water as a whole. If the quality element concerned, within the meaning of that annex, is already in the lowest class, any deterioration of that element constitutes a 'deterioration of the status' of a body of surface water.[18]

39. Normative definitions of the aforementioned quality elements and the associated status classes are given in point 1.2 of Annex V to the Water Framework Directive and were agreed, in relation to the three highest status classes (high, good and moderate), in the course of an 'intercalibration' exercise carried out by the Member States with a view to ensuring that they are.[19] In the case of rivers, for example, point 1.2.1 of Annex V mentions four biological quality elements, namely the status of phytoplankton, macrophytes and phytobenthos, benthic invertebrate fauna and fish fauna, three hydromorphological quality elements, namely the hydrological regime, river continuity and morphological conditions, and, finally, three physico-chemical quality elements, namely general conditions and the concentration of specific synthetic and non-synthetic pollutants.

2. Application of the prohibition of deterioration

40. Pursuant to the prohibition of deterioration as interpreted above, the Commission would have to demonstrate that the adverse effect of the project on the Schwarze Sulm will be such as to cause at least one of the quality elements applicable to that body of water to fall by one class.

15 — Judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C-43/10, EU:C:2012:560, paragraphs 51 to 56).

16 — Judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C-43/10, EU:C:2012:560, paragraph 60).

17 — See the convincing Opinion of Advocate General Jääskinen in *Bund für die Umwelt und Naturschutz Deutschland* (C-461/13, EU:C:2014:2324, in particular point 100).

18 — Judgment in *Bund für die Umwelt und Naturschutz Deutschland* (C-461/13, EU:C:2015:433, paragraph 69).

19 — See the judgment in *Bund für die Umwelt und Naturschutz Deutschland* (C-461/13, EU:C:2015:433, paragraphs 57 and 58).

41. It would probably be relatively easy to prove that, in accordance with the criteria established by the Court, the project will lead to deterioration within the meaning of Article 4(1)(a)(i) of the Water Framework Directive, in relation to the biological quality elements, for example.[20] However, the Commission does not claim that such deterioration will arise and Austria has not had an opportunity to defend itself against a claim to that effect. Such deterioration does not therefore form the subject matter of these proceedings.

42. What the Commission does claim is that the project will cause the overall assessment of the waters to fall by one class, that is to say from 'high' to 'good'. Such deterioration presupposes that at least one quality element has fallen by one class and therefore includes deterioration within the meaning of the interpretation adopted by the Court.

43. The Commission's argument to that effect is at odds with the Styrian authorities' decision of 4 September 2013. That decision states that, contrary to the original assessment, the status of the relevant section of the Schwarze Sulm is only 'good'. Accordingly, the power plant project cannot cause the status of the Schwarze Sulm to fall from 'high' to 'good'.

44. The action can therefore succeed only if the Commission rebuts the reassessment of the status of the Schwarze Sulm contained in the decision of 4 September 2013.

45. The Commission's objections are based on the proposition that the reassessment deviates from the information contained in the management plan. The assessment of the relevant section of the Schwarze Sulm should not have been amended on an ad hoc basis when the power plant project was evaluated. Rather, the applicable management plan should have been adjusted to that end. In this connection, the Commission further claims that the reassessment is based on new criteria and that the public was not sufficiently involved. It does not, however, call into question the substance of the reassessment.

46. In accordance with Article 4 of the Water Framework Directive, as regards surface waters and groundwater, Member States are to adopt appropriate measures of conservation in making operational the programmes of measures specified in river basin management plans.[21] This means that, as a general rule, decisions on the application of the prohibition of deterioration must also be made on the basis of the information documented in the management plan.

47. That information includes the status of the bodies of surface water concerned. After all, in accordance with Section A.4 of Annex VII to the Water Framework Directive, the information in the management plan must include a presentation in map form of the results of the monitoring programmes carried out pursuant to Article 8 and Annex V.

48. The Commission concludes from this that water status may be reassessed only as part of an update of the management plan, which must be carried out at least every six years.

49. That argument is to be endorsed in so far as reassessment is based on new criteria, since, in the interests of consistent management, such criteria must be applied to all the bodies of water covered by the plan.

20 — See p. 182 of the Annex to the defence.

21 — Judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C-43/10, EU:C:2012:560, paragraphs 51 and 52).

50. It is true that the Commission claims that the reassessment at issue here is based on such new criteria, that is to say the 2010 Austrian Qualitätszielverordnung Ökologie Oberflächengewässer (Regulation setting quality targets applicable to the ecology of bodies of surface water).[22] That regulation, it argues, contains new assessment criteria by comparison with the initial management plan produced in 2009. That argument cannot succeed, however, since the aforementioned regulation had in fact already formed the basis of the Austrian management plan.[23]

51. Furthermore, the information on the abstraction of drinking water in the upper section of the Schwarze Sulm[24] was also already common knowledge at the time when the authorisation for the project was given in 2007.[25]

52. The 2013 decision is thus actually intended to apply the assessment criteria applicable to the management plan correctly for the first time. It therefore constitutes a correction of an error in the management plan the accuracy of which has not itself been called into question by the Commission in these proceedings.

53. Correcting an error in this way must be possible in principle. After all, as Confucius once said,[26]

54. It would hardly be reasonable to require that a decision be taken on the basis of information which has been shown to be incorrect simply because that information forms part of the management plan. The contrary conclusion would not only allow unjustified obstacles to projects to remain in place, but, as Austria rightly submits, would also jeopardise the protective objectives pursued by the Directive in cases where facts subsequently emerge which require the adoption of more stringent protective measures.

55. Consequently, the point of reference in the present case should not be the assessment of the status of the Schwarze Sulm that is contained in the management plan, but rather the actual status of that body of water, the substance of which has not been called into question. That status cannot therefore have deteriorated from 'high' to 'good' as the Commission claims.

56. Nor can the Commission call that finding into question by objecting to the fact that the management plan has not been adjusted or criticising the level of public participation. After all, irrespective of whether those formal and procedural objections are justified, they are not such as to support the assumption in the present proceedings that the status of the Schwarze Sulm is 'high' when, according to the information presented to the Court, its status is only 'good'.

57. If the deterioration alleged by the Commission cannot be established, it does not require any justification. For that reason, moreover, the Commission's criticism of that justification cannot be upheld.

58. Consequently, the action must be dismissed.

22 — Verordnung des Bundesministers für Land- und Forstwirtschaft, Umwelt and Wasserwirtschaft über die Festlegung des ökologischen Zustandes für Oberflächengewässer (Regulation of the Federal Minister for Agriculture, Forestry, the Environment and Water Management on the determination of the ecological status of bodies of surface water) (*Bundesgesetzblatt* 2010, Part II, No 99 of 29 March 2010).

23 — National water management plan 2009 — NWMP 2009, (http://www.bmlfuw.gv.at/dms/lmat/wasser/wasser-oesterreich/plan_gewaesser_ngp/nationaler_gewaesserbewirtschaftungsplan-nlp/ngp/NGP_Textdokument_30_03_2010.pdf, p. 100).

24 — Annex A-10 to the application, p. 144.

25 — Annex A-14 to the application, p. 7.

26 — Analect 15.29, meaning: To make a mistake and change nothing, *that* is the mistake.

V – **Costs**

59. Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay all the costs.

VI – **Conclusion**

60. I therefore propose that the Court should:

(1) dismiss the action;

(2) order the European Commission to pay the costs.