Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

4 May 2016*

(Failure of a Member State to fulfil obligations — Article 4(3) TEU — Article 288 TFEU — Directive 2000/60/EC — EU water policy — Article 4(1) — Prevention of deterioration of the status of bodies of surface water — Article 4(7) — Derogation from the prohibition of deterioration — Overriding public interest — Authorisation to construct a hydropower plant on the Schwarze Sulm River (Austria) — Deterioration of the water status)

In Case C-346/14,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 18 July 2014,

European Commission, represented by E. Manhaeve, C. Hermes and G. Wilms, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Republic of Austria, represented by C. Pesendorfer, acting as Agent,

defendant,

supported by:

Czech Republic, represented by M. Smolek, Z. Petzl and J. Vláčil, acting as Agents,

intervener,

THE COURT (First Chamber),

composed of A. Tizzano, Vice-President of the Court, acting as President of the First Chamber, F. Biltgen, E. Levits, M. Berger and S. Rodin (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 3 September 2015,

gives the following

* Language of the case: German.

Judgment

1 By its application, the European Commission asks the Court to declare that, by failing to apply correctly Article 4(1) 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 (OJ 2000 L 327, p. 1), read in conjunction with Article 4(7) thereof, the Republic of Austria has failed to fulfil its obligations under Article 4(3) TEU in conjunction with Article 288 TFEU.

Legal context

EU law

2 Recitals 11, 19, 25, 26 and 32 of Directive 2000/60 are worded as follows:

'(11) As set out in Article 174 of the Treaty, the Community policy on the environment is to contribute to pursuit of the objectives of preserving, protecting and improving the quality of the environment, in prudent and rational utilisation of natural resources, and to be based on the precautionary principle and on the principles that preventive action should be taken, environmental damage should, as a priority, be rectified at source and that the polluter should pay.

...

(19) This Directive aims at maintaining and improving the aquatic environment in the Community. This purpose is primarily concerned with the quality of the waters concerned. Control of quantity is an ancillary element in securing good water quality and therefore measures on quantity, serving the objective of ensuring good quality, should also be established.

...

(25) Common definitions of the status of water in terms of quality and, where relevant for the purpose of the environmental protection, quantity should be established. Environmental objectives should be set to ensure that good status of surface water and groundwater is achieved throughout the Community and that deterioration of the status of waters is prevented at Community level.

(26) Member States should aim to achieve the objective of at least good water status by defining and implementing the necessary measures within integrated programmes of measures, taking into account existing Community requirements. Where good water status already exists, it should be maintained. For groundwater, in addition to the requirements of good status, any significant and sustained upward trend in the concentration of any pollutant should be identified and reversed.

...

(32) There may be grounds for exemptions from the requirement to prevent further deterioration or to achieve good status under specific conditions, if the failure is the result of unforeseen or exceptional circumstances, in particular floods and droughts, or, for reasons of overriding public interest, of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, provided that all practicable steps are taken to mitigate the adverse impact on the status of the body of water.'

3 Article 4 of that directive, entitled ‘Environmental objectives’, provides in paragraph 1(a):

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

(a) for surface waters
   (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;
   (iv) Member States shall implement the necessary measures in accordance with Article 16(1) and (8), with the aim of progressively reducing pollution from priority substances and ceasing or phasing out emissions, discharges and losses of priority hazardous substances

without prejudice to the relevant international agreements referred to in Article 1 for the parties concerned.’

4 Article 4(7) of Directive 2000/60 is worded as follows:

‘Member States will not be in breach of this Directive when:

— failure to achieve good groundwater status, good ecological status or, where relevant, good ecological potential or to prevent deterioration in the status of a body of surface water or groundwater is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or

— failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities

and all the following conditions are met:

(a) all practicable steps are taken to mitigate the adverse impact on the status of the body of water;

(b) the reasons for those modifications or alterations are specifically set out and explained in the river basin management plan required under Article 13 and the objectives are reviewed every six years;

(c) the reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1 are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development, and

(d) the beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option.’

5 Under Article 13 of the Directive, entitled 'River basin management plans':

'1. Member States shall ensure that a river basin management plan is produced for each river basin district lying entirely within their territory.

...

6. River basin management plans shall be published at the latest nine years after the date of entry into force of this Directive.

7. River basin management plans shall be reviewed and updated at the latest 15 years after the date of entry into force of this Directive and every 6 years thereafter.'

Austrian law

6 Paragraph 21a of the Wasserrechtsgesetz (Water Law), in the version thereof applicable to the present case ('the WRG'), reads as follows:

'(1) If, after authorisation is granted, it appears inter alia in the light of the results of the inventory (Paragraph 55d) that, despite compliance with the conditions and rules laid down in the authorisation decision or other provisions, that the public interests (Paragraph 105) are not sufficiently protected, the authority must, subject to the second sentence of Paragraph 52(2), impose the other conditions or the necessary conditions, in accordance with the current state of technology (Paragraph 12a) in order to achieve sufficient protection; fix adaptation objectives and order the submission of relevant project documents on adaptation; restrict the type and extent of water use, either temporarily or enduringly, or prohibit water use, either temporarily or enduringly.

(2) The authority must allow reasonable time limits in order to allow for the execution of orders referred to in subparagraph 1 and for the planning of the necessary adaptation measures and the submission of the relevant documents; as regards the required content of the project documents, Paragraph 103 shall apply. Those time limits must be extended where the party subject to the obligation proves that it was impossible for him or her to comply with the time limit, without any fault on his or her part. A duly submitted request for extension shall have suspensive effect for the purposes of the time limit. If the time limit expires without result, Paragraph 27(4) shall apply *mutatis mutandis*.

(3) The authority may opt not to impose measures under subparagraph 1 if they are disproportionate, in which case the following principles shall also apply:

(a) the costs of implementing those measures must not be disproportionate in relation to the effect sought, taking into account the type, quantity and hazard level of the effects and of the harm due to water use, and also the duration of use, profitability and technical specificity of water use;

(b) in the event of harm to existing rights, only the least stringent means in relation to the objective pursued will be chosen;

(c) different intervention measures may be imposed successively.

...

(4) Where there is an authorised restoration plan (Paragraph 92) or a restoration programme (Paragraph 33d), the measures referred to in subparagraph 1 may not go beyond what is provided for under that plan or programme.

(5) Subparagraphs 1 to 4 shall apply *mutatis mutandis* to other facilities and authorisations covered under the present federal law.'

Pre-litigation procedure

7 By decision du 24 May 2007, the Landeshauptmann der Steiermark (Governor of the Province of Styria, Austria) granted authorisation for the construction of a hydropower plant on the Schwarze Sulm, a river that runs through Austria ('the 2007 decision').

8 In October 2007, the Commission sent a letter of formal notice to the Republic of Austria by which it drew the latter's attention to the incompatibility of the project authorised by the 2007 decision ('the contested project') with Article 4(7) of Directive 2000/60. According to the Commission, the Governor of the Province of Styria had adopted that decision without determining beforehand whether the deterioration of the status of the body of surface water of the Schwarze Sulm from 'high' to 'good', which the implementation of that decision was going to entail, was of overriding public interest within the meaning of Article 4(7)(c) of that directive.

9 In January 2008, the Republic of Austria, in response to that letter of formal notice, explained that a derogation from the prohibition of deterioration laid down in Article 4(7) of Directive 2000/60 was justified by an overriding public interest in making greater use of renewable energy sources, such as hydroelectricity.

10 In 2009, the Republic of Austria, in accordance with Article 13(1) of Directive 2000/60, published the river basin management plan concerning the river basin affected by the contested project (the '2009 plan'). According to that plan, the adoption of which had been preceded by public consultation duly conducted in accordance with Article 14 of that directive, the status of the body of surface water of the Schwarze Sulm was classified as 'high'.

11 In January 2010, the Commission closed the infringement proceedings after having been informed by the Republic of Austria that the 2007 decision had been withdrawn by Bundesministerium für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft (Federal Ministry of Agriculture, Forestry, the Environment and Water Management, Austria) following an administrative action brought by the wasserwirtschaftliches Planungsorgan (Water Planning and Management Body, Austria).

12 In March 2012, the Verfassungsgerichtshof (Constitutional Court, Austria) held that the Water Planning and Management Body had no right of action under the Constitution. As a result, the Republic of Austria considered that the ministerial decision to withdraw the 2007 decision had become immaterial, that that decision once again was valid and could no longer be challenged before an Austrian court.

13 In November 2012, the Republic of Austria declared its intention to undertake the review procedure of the 2007 decision under Paragraph 21a of the WRG, part of which would include an assessment of the status of the body of surface water affected by the contested project, in order to adapt the initial authorisation to the current state of technology, whilst adding that the initial results of that review could be expected only at the start of 2014.

14 At the Commission's request, in December 2012 the Republic of Austria explained that, notwithstanding that review procedure, construction of the hydropower plant could commence immediately on the basis of the authorisation given by the 2007 decision.

15 On 26 April 2013, the Commission sent a letter of formal notice to the Republic of Austria, in which it criticised the latter for disregarding Article 4(1) of Directive 2000/60 and misapplying the derogation from the prohibition of deterioration laid down in Article 4(7) thereof with regards to the project 'Schwarze Sulm hydropower plant — phase A of construction works'.

16 On 15 July 2013, the Republic of Austria replied to the Commission, stating that the review procedure was still under way and that the results were expected at the beginning of September 2013. It further explained that in that review it would take account of 'national guidelines for the assessment of sustainable use of hydroelectricity'.

17 On 19 November 2013, the Republic of Austria sent the Commission additional observations in which it informed the latter that on 4 September 2013 the Governor of the Province of Styria had adopted a decision confirming the 2007 decision ('the 2013 decision').

18 It is nevertheless clear from the file submitted to the Court that, in adopting the 2013 decision, the Governor of the Province of Styria based himself on the fact that, even before the commencement of the contested project, the status of the surface water of the Schwarze Sulm had to be classified as 'good' and no longer as 'high' and that, because of that lowered classification, the project could commence without the need for a derogation from the prohibition of deterioration as provided for in Article 4(7) of Directive 2000/60.

19 On 9 October 2013, the Federal Ministry of Agriculture, Forestry, the Environment and Water Management brought an action before the Verwaltungsgerichtshof (Administrative Court) seeking annulment of the 2013 decision. As that action is still pending on the date of the present judgment and does not have suspensive effect, the promoter of the contested project was able to continue construction of the hydropower plant.

20 On 21 November 2013, the Commission sent the Republic of Austria a reasoned opinion in which it reiterated its complaints. On 21 January 2014, that Member State replied that, in its view, the 2007 decision complied with Article 4(1) of Directive 2000/60.

21 Not being satisfied with the Republic of Austria's reply, the Commission decided to bring the present action.

The request for reopening of the oral procedure and the submission of new evidence

22 Following the delivery of the Advocate General's Opinion, on 3 September 2015 the Commission submitted a request to have the oral phase of the procedure reopened and to be allowed to submit new evidence, under Article 83 and Article 128(2) of the Rules of Procedure of the Court of Justice respectively, and submitted to the Court the draft 'National water management plan 2015', published on 21 January 2015 by the Federal Ministry of Agriculture, Forestry, the Environment and Water Management.

23 First, it must be pointed out that neither the Statute of the Court of Justice of the European Union nor its Rules of Procedure make provision for the parties to submit observations in response to the Advocate General's Opinion (order of 4 February 2000 in *Emesa Sugar*, C-17/98, EU:C:2000:69, paragraph 2, and judgment of 6 September 2012 in *Döhler Neuenkirchen*, C-262/10, EU:C:2012:559, paragraph 29).

24 Next, as regards the reopening of the oral procedure, it must be pointed out that the Court may, of its own motion, on a proposal from the Advocate General or at the request of the parties, order the reopening of the oral procedure under Article 83 of its Rules of Procedure if it considers that it lacks sufficient information or that the case must be dealt with on the basis of an argument which has not

been debated between the parties (see judgments of 3 March 2009 in *Commission* v *Austria*, C-205/06, EU:C:2009:118, paragraph 13, and of 6 September 2012, *Döhler Neuenkirchen*, C-262/10, EU:C:2012:559, paragraph 30).

25 Lastly, as regards the submission of evidence after the close of the written procedure under Article 128(2) of the Rules of Procedure, that provision stipulates that the party wishing to produce further evidence must give reasons for the delay in submitting such evidence and that the President may, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, prescribe a time limit within which the other party may comment on that evidence.

26 In the present case, since the Court considers that it has sufficient information to make a ruling and since the case does not have to be resolved on the basis of arguments or new evidence which were not the subject of debate between the parties, there is no need to grant the Commission's requests.

The action

Arguments of the parties

27 The Commission in essence criticises the Republic of Austria for having failed to fulfil its obligations under Article 4(1) and (7) of Directive 2000/60 by authorising the construction of a hydropower plant on the Schwarze Sulm.

28 The Commission considers that the 2007 decision disregards the obligation Member States have under Article 4(1)(a)(i) of Directive 2000/60 to implement the necessary measures to prevent deterioration of the status of all bodies of surface water.

29 The Commission claims in that regard that that obligation was binding on the Governor of the Province of Styria on the date when he adopted that decision, whereas publication of the river basin management plans became mandatory under Article 13(6) of Directive 2000/60 only as from 22 December 2009.

30 The Commission justifies its position by stating, in the light of Article 4(3) TEU in conjunction with Article 288 TFEU, that between 22 December 2000, the date of entry into force of Directive 2000/60, and 22 December 2009, the date on which the time limit referred to in Article 13(6) of that directive for the publication of management plans expired, Member States were to refrain from taking measures liable seriously to compromise the attainment of the result prescribed by Article 4 of that directive. Thus, compliance with Article 4 was already mandatory during that period.

31 In the Commission's submission, however, the contested project is liable to lead to deterioration of the status of the body of surface water of the Schwarze Sulm, contrary to the prohibition on deterioration laid down in Article 4(1) of Directive 2000/60. Whilst the 2007 decision had assessed that status at 'high', the project brings that level down to 'good', thereby causing deterioration of status. The Commission considers that, in the determination of whether there is such deterioration, account cannot be taken of the fact that, by the 2013 decision, the Governor of the Province of Styria assessed that same status as being 'good', since that decision was not adopted in accordance with the procedural requirements laid down in Articles 13 and 14 of that directive. Thus, it cannot be said, notwithstanding the lowering of the status of those waters caused by the latter decision, that that project will not lead to a deterioration of that status.

32 In those circumstances, the Commission considers that the 2007 decision authorising the contested project can be well founded in law only if the conditions required by Article 4(7) of Directive 2000/60 for authorising a derogation from the prohibition of deterioration are met. The Commission observes,

however, that the Republic of Austria has not duly examined whether that derogation may validly be relied on nor, in any event, provided a sufficient statement of reasons for having recourse to such a derogation.

33 The Commission states in that regard that the Republic of Austria ought to have taken account of the fact that the capacity of the hydropower plant referred to in the 2007 decision need only be 'negligible' in relation to the regional and national hydroelectricity production. Yet the Republic of Austria did not conduct any investigations into potential substitute sites or even consider other renewable energy sources, contrary to the requirements of Article 4(7) of Directive 2000/60. Consequently, the deterioration of the status of the body of surface water of the Schwarze Sulm that will be caused by the contested project cannot be justified on the basis of that provision.

34 The Republic of Austria considers that the present action is inadmissible on the grounds, firstly, that it is not sufficiently clear and precise, in particular in terms of the complaint alleging disregard of the obligations provided for in Article 4(3) TEU, read in conjunction with Article 288 TFEU and, secondly, the Commission is empowered only to verify that the national authorities have correctly implemented the procedural obligations provided for by Directive 2000/60; it cannot review the assessment by those authorities of the merits of a specific project nor the weighing-up of interests by those authorities on the basis of Article 4(7) of that directive.

35 In the alternative, in respect of the merits, the Republic of Austria acknowledges that, since 2007, it was not authorised to adopt general or specific measures which were liable seriously to compromise the attainment of the objectives prescribed by Directive 2000/60.

36 In the Republic of Austria's submission, however, the 2007 decision could validly authorise, without disregarding those objectives, a hydropower plant project possibly entailing deterioration of the status of the body of surface water, as the conditions laid down in Article 4(7) of that directive were met.

37 The Republic of Austria observes in that regard that the 2007 decision was adopted at the end of a procedure in which a collective position as to the presence of an overriding public interest linked to the contested project was analysed and assessed from a legal standpoint, taking specific account of the objectives of Directive 2000/60 and the effects of that project on specific regional and local factors. The Republic of Austria states in that regard that it took account of a study drawn up by the Institut für Elektrizitätswirtschaft und Energieinnovation (Institute for Electricity Management and Energy Innovation, Austria) of the Technische Universität Graz (Technical University of Graz, Austria) setting out the objectives and advantages of the project and its impact on the environment.

38 The Republic of Austria states that, contrary to the Commission's assertions, the competent authority did not base itself on the principle that the production of hydroelectricity always corresponds to an overriding public interest and is a general exception to the objectives of Directive 2000/60, but examined the actual regional significance and local impact of the construction of a hydropower plant project on the Schwarze Sulm.

39 Lastly, the Republic of Austria submits that, at the time of adoption of the 2007 decision, the Governor of the Province of Styria had an appropriate margin of discretion for the weighing-up of interests he conducted in accordance with the provisions of Directive 2000/60, since the authorisation of a hydropower plant project is a complex decision comprising prognostic factors.

Findings of the Court

Admissibility of the action

40 The Republic of Austria considers, in essence, that the present action is inadmissible on the grounds, firstly, that it is not sufficiently clear and precise within the meaning of Article 120(c) of the Rules of Procedure, in particular in terms of the complaint alleging disregard of the obligations provided for in Article 4(3) TEU, read in conjunction with Article 288 TFEU. Secondly, it considers that this action should be declared inadmissible in so far as the Commission is not empowered to review the competent national authorities' assessment of the merits of a specific project or the weighing-up of the interests present.

41 Both objections of inadmissibility must be rejected.

42 Regarding the first objection of inadmissibility, it is clear from the application that the Commission criticises the Republic of Austria for not having refrained, in the period between 22 December 2000, the date of entry into force of Directive 2000/60, and 22 December 2009, the date on which the time limit referred to in Article 13(6) of that directive for the publication of management plans expired, from taking measures liable seriously to compromise the attainment of the result prescribed by Article 4 of that directive. Thus, as observed by the Advocate General in point 30 of her Opinion, in paragraphs 25 and 26 of its application, the Commission refers expressly to the judgment of 11 September 2012 in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C-43/10, EU:C:2012:560), concerning the River Acheloos, in which the Court held that, even before that provision was applicable, under Article 4(3) TEU, read in conjunction with Article 288 TFEU, the Member States were to refrain from seriously compromising the attainment of the objectives of that directive.

43 Regarding the second objection of inadmissibility, as pointed out by the Advocate General in point 32 of her Opinion, the question whether and to what extent the provisions of Directive 2000/60 allow the competent national authorities a margin of discretion in weighing up the interests present and whether the parameters of that discretion were exceeded relates not to the admissibility of the action but rather its merits.

44 The action is therefore admissible.

Substance

45 The Commission, in essence, criticises the Republic of Austria for having authorised the contested project by the 2007 decision whereas, according to that same decision, it will result in a deterioration of the status of the body of surface water of the Schwarze Sulm from 'high' to 'good', which is prohibited by Article 4(1) of Directive 2000/60 and is not covered by the derogation from the prohibition of deterioration provided for in Article 4(7)(c) thereof.

46 As a preliminary point and as observed in paragraph 18 of this judgment, it should be noted that the classification of the status of the waters of the Schwarze Sulm prior to the commencement of the contested project, as established by the 2007 decision, was revised by the 2013 decision. Thus, by the latter decision, the Governor of the Province of Styria had lowered that status from 'high' to 'good', with the result that the contested project would no longer cause a deterioration of the status from 'high' to 'good'.

47 It must be remembered, however, that the 2013 decision is not the subject matter of the present action. Although the Commission has argued that no account must be taken of that decision in the present case or of the resulting lowered status of the body of surface water of the Schwarze Sulm in

order to determine whether the contested project will cause a deterioration of that status, it has not challenged the assessment of the merits of that decision or included the 2013 decision in the forms of order sought in its application. Nor has the Republic of Austria relied on the 2013 decision before this Court to challenge the presence of such deterioration and thereby argue that, by the adoption of that decision before the expiry of the time limit laid down in the reasoned opinion, it put an end to the alleged infringement. It is thus not disputing the fact that, for the purposes of the present action, account must be taken of the status of the waters of the Schwarze Sulm as assessed by the 2007 decision, but submits that the contested project does not infringe Article 4 of Directive 2000/60, as the resulting deterioration of the status of the waters is justified under Article 4(7).

48 In those circumstances, for the purposes of the present action, account need only be taken of the classification of the status of the body of surface water of the Schwarze Sulm as established by the 2007 decision; the 2013 decision need not be taken into consideration.

49 In assessing the compatibility of the 2007 decision with the provisions of Directive 2000/60, it must be remembered that the obligations provided for in Article 4 thereof have been applicable per se only since 22 December 2009, when the time limit granted to the Member States under Article 13(6) thereof to publish river basin management plans expired (see, to that effect, judgment of 11 September 2012 in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, C-43/10, EU:C:2012:560, paragraphs 51 to 56).

50 However, according to the Court's settled case-law, during the period prescribed for transposition of a directive, the Member States to which it is addressed must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive. That obligation to refrain, which is binding on all national authorities, must be understood as referring to the adoption of any measure, general or specific, liable to produce such a compromising effect (judgment of 11 September 2012 in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, C-43/10, EU:C:2012:560, paragraph 57 and the case-law cited).

51 Consequently, although the contested project did not, at the time the 2007 decision was adopted, come within the scope of Article 4 of Directive 2000/60, the Republic of Austria was nevertheless required, even before the expiry of the time limit granted under Article 13(6) of that directive to the Member States for the publication of river basin management plans, to refrain from taking measures liable seriously to compromise the attainment of the objective provided for by Article 4 (see, to that effect, judgment of 11 September 2012 in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, C-43/10, EU:C:2012:560, paragraph 60).

52 Thus, for the purposes of ruling on the present action, it must be determined whether the contested project is liable to cause a deterioration of the status of the body of surface water of the Schwarze Sulm and, if so, whether that deterioration may come within the derogation from the prohibition of deterioration provided for in Article 4(7) of Directive 2000/60.

– The deterioration of the Schwarze Sulm

53 Recital 25 of Directive 2000/60 states that environmental objectives should be set to ensure that good status of surface water and groundwater is achieved throughout the European Union and that deterioration of the status of waters is prevented at EU level. It is also clear from the wording of Article 4(1)(a)(i) of that directive, which provides that 'Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water', that the Member States are in fact required to adopt such measures. In that regard, authorisation for a specific project such as the one covered by the 2007 decision must be understood to be an implementation coming within the scope of that provision (see, to that effect, judgment of 1 July 2015 in *Bund für Umwelt und Naturschutz Deutschland*, C-461/13, EU:C:2015:433, paragraphs 31, 32 and 35).

54 The Court has thus held that Article 4(1)(a) of Directive 2000/60 does not simply set out, in programmatic terms, mere management-planning objectives, but has binding effects, once the ecological status of the body of water concerned has been determined, at each stage of the procedure prescribed by that directive (judgment of 1 July 2015 in *Bund für Umwelt und Naturschutz Deutschland*, C-461/13, EU:C:2015:433, paragraph 43).

55 In that regard, the derogation regime provided for in Article 4(7) of that directive constitutes a matter which confirms the interpretation that prevention of deterioration of the status of the bodies of water is binding in nature (see, to that effect, judgment of 1 July 2015 in *Bund für Umwelt und Naturschutz Deutschland*, C-461/13, EU:C:2015:433, paragraph 44).

56 Moreover, it should be emphasised that the structure of the categories of derogation which are laid down in that provision permits the inference that Article 4 thereof does not contain solely basic obligations, but that it also concerns specific projects. The grounds for derogation apply in particular where failure to comply with the objectives of Article 4 follows new modifications to the physical properties of the body of surface water, resulting in adverse effects, or new sustainable human development activities. That may occur following new authorisations for projects. Indeed, it is impossible to consider a project and the implementation of management plans separately (see, to that effect, judgment of 1 July 2015 in *Bund für Umwelt und Naturschutz Deutschland*, C-461/13, EU:C:2015:433, paragraph 47).

57 Consequently, these specific projects are subject to the obligation to prevent deterioration of the status of the bodies of water laid down in Article 4 of Directive 2000/60.

58 That status is determined on the basis of ecological quality ratios broken down, 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 different classes, namely 'high', 'good', 'moderate', 'poor' and 'bad' (judgment of 1 July 2015 in *Bund für Umwelt und Naturschutz Deutschland*, C-461/13, EU:C:2015:433, paragraph 57).

59 The Court has held in that regard that there is 'deterioration of the status' of a body of surface water within the meaning of Article 4(1)(a)(i) of Directive 2000/60 as soon as the status of at least one of the quality elements within the meaning of Annex V to the directive falls by one class, even if that fall does not result in a fall in classification of the body of surface water as a whole. However, 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 (judgment of 1 July 2015 in *Bund für Umwelt und Naturschutz Deutschland*, C-461/13, EU:C:2015:433, paragraph 69).

60 In the present case, it is apparent from the file submitted to the Court that the works necessary for the construction of the hydropower plant covered by the contested project will affect the course of the Schwarze Sulm over a stretch of 8 km. In order to determine the ecological status of that river for the purposes of Directive 2000/60, an expert report drawn up by the Institut für Bodenkultur Wien (Vienna Institute of Agronomy, Austria) in 2006 concluded that the status of the body of surface water of the Schwarze Sulm was 'high' and that the project should be refused due to the deterioration of status it would cause. The classification of the status of the body of surface water of the Schwarze Sulm as 'high' was based on the final result of the planning over a given period which led to the drawing-up of the 2009 plan, as required by Article 13 of Directive 2000/60.

61 Moreover, in its reply to the first formal notice, the Republic of Austria did not dispute the fact that the implementation of the contested project would cause a deterioration of the status of the body of surface water of the Schwarze Sulm, although it did rely on the derogation from the prohibition of deterioration provided for in Article 4(7)(c) of Directive 2000/60, arguing that an overriding public interest required greater recourse to use of renewable energy sources such as hydroelectricity.

62 Lastly, as observed by the Republic of Austria in paragraph 20 of its statement in defence, at page 192 et seq. of the 2007 decision, the Governor of the Province of Styria himself recognised that the project would lead to 'at least partial fall of the surface water status', 'maintenance of a "high level" in the partial sector concerned OK 8026600', which was of public interest, and that '[in] the "upper" body of water OK 8026600, over a stretch of approximately 8 km, one of the statuses referred to in Paragraph 30a of the Water Law Act is concerned by a fall of one class, from "high" to "good"'.

63 In those circumstances, the contested project is liable to cause a deterioration of the status of the body of surface water of the Schwarze Sulm, as established by the 2007 decision.

– The derogation from the prohibition of deterioration provided for in Article 4(7) of Directive 2000/60

64 It must be remembered that unless a derogation is granted, any deterioration of the status of a body of surface water must be prevented. The obligation to prevent such deterioration thus remains binding at each stage of implementation of Directive 2000/60 and is applicable to every surface water body type and status for which a management plan has been adopted. The Member State concerned is consequently required to refuse authorisation for a project where it is such as to result in deterioration of the status of the body of water concerned or to jeopardise the attainment of good surface water status, unless the view is taken that the project is covered by a derogation under Article 4(7) of the directive (see, to that effect, judgment of 1 July 2015 in *Bund für Umwelt und Naturschutz Deutschland*, C-461/13, EU:C:2015:433, paragraph 50).

65 Thus, the Court has held that, when a project is liable to have adverse effects on water of the kind stated in Article 4(7) of that directive, consent may be given to it, at the very least if the conditions set out in Article 4(7)(a) to (d) of that directive are satisfied (judgment of 11 September 2012 in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, C-43/10, EU:C:2012:560, paragraphs 67 and 69).

66 In the present case, in order to determine whether the 2007 decision was adopted in compliance with the requirements of Article 4(7) of Directive 2000/60, it must be ascertained, first, whether all practicable steps were taken to mitigate the adverse impact of the contested project on the status of the body of water concerned; second, whether the reasons behind the project were specifically set out and explained; third, whether the project serves an overriding general interest and/or the benefits to the environment and society linked to the achievement of the objectives set out in Article 4(1) are outweighed by the benefits to human health, the maintenance of human safety or the sustainable development resulting from that project; and, fourth, whether the beneficial objectives pursued by that project cannot, for reasons of technical feasibility or disproportionate cost, be achieved by other means which are a significantly better environmental option (see, to that effect, judgment of 11 September 2012 in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, C-43/10, EU:C:2012:560, paragraph 67).

67 In arguing that the contested project complies with the requirements laid down in Article 4(7) of Directive 2000/60, the Republic of Austria submits that the objective of the construction of a hydropower plant on the Schwarze Sulm is the development of renewable energy. However, the Commission considers in essence that, in putting forward such an argument, the Republic of Austria merely states that the production of renewable energy is generally of overriding public interest, without specifying whether the contested project should come within the scope of the derogation from the prohibition of deterioration.

68 It should be noted at the outset that, contrary to the Commission's assertions, the second of the conditions referred to in paragraph 66 above is clearly satisfied in the present case, as the 2007 decision sets out in a detailed manner the reasons for the contested project, its impact on the environment and the alleged advantages of the project.

69 Next, it should be noted that the construction of a hydropower plant, such as the one envisaged through the contested project, may in fact be an overriding public interest.

70 In that regard, the Member States must be allowed a certain margin of discretion for determining whether a specific project is of such interest. Directive 2000/60, which was adopted on the basis of Article 175(1) EC (now Article 192(1) TFEU), establishes 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. Those principles and that framework are to be developed subsequently by the Member States by means of the adoption of individual measures. Thus, the directive does not seek to achieve complete harmonisation of the rules of the Member States concerning water (judgments of 30 November 2006 in *Commission* v *Luxembourg*, C-32/05, EU:C:2006:749, paragraph 41; 11 September 2014 *Commission* v *Germany*, C-525/12, EU:C:2014:2202, paragraph 50; and of 1 July 2015 *Bund für Umwelt und Naturschutz Deutschland*, C-461/13, EU:C:2015:433, paragraph 34).

71 As part of that margin of discretion, the Republic of Austria was entitled to consider that the contested project, the aim of which is to promote the production of renewable energy through hydroelectricity, is an overriding public interest.

72 Article 194 TFEU provides in paragraph 1, that, in the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, European Union policy on energy is to aim, in a spirit of solidarity between Member States, to ensure the functioning of the energy market, ensure security of energy supply in the European Union, promote energy efficiency and energy saving and the development of new and renewable forms of energy and promote the interconnection of energy networks (judgment of 6 September 2012 in *Parliament* v *Council*, C-490/10, EU:C:2012:525, paragraph 65).

73 Moreover, the promotion of renewable energy sources, which is a high priority for the European Union, is justified in particular because the exploitation of those energy sources contributes to environmental protection and sustainable development, and can also contribute to security and diversification of energy supply and make it possible to meet more quickly the targets of the Kyoto Protocol, annexed to the United Nations Framework Convention on Climate Change (judgment of 26 September 2013 in *IBV & Cie*, C-195/12, EU:C:2013:598, paragraph 56).

74 Lastly, it should be noted that, in the present case, the national authorities weighed up the expected benefits of the contested project with the resulting deterioration of the status of the body of surface water of the Schwarze Sulm. On the basis of that weighing-up, they were entitled to find that the project would give rise to benefits for sustainable development, that all practicable steps had been taken to mitigate the adverse impact of the contested project on the status of that body of surface water and that the objectives pursued by the project could not, for reasons of technical feasibility or disproportionate cost, be achieved by other means which would have been a significantly better environmental option.

75 In that regard, as stated in paragraph 37 of this judgment, it is apparent from the file submitted to the Court that, in adopting the 2007 decision, the Governor of the Province of Styria based himself in particular on a study drawn up by the Institute for Electricity Management and Energy Innovation provided to him by the applicants for authorisation for the construction of the hydropower plant.

76 It is true that the authors of that study did point out that it was for the competent authority to weigh up the interests at issue, in particular between the expected benefits of the contested project and its impact on the status of the body of surface water of the Schwarze Sulm.

77 However, after observing that that study 'established in a comprehensible and convincing manner that hydroelectricity in general and [the contested project] in particular [was] an overriding public interest and [was] of major importance for the region's sustainable development', the Governor of the Province of Styria himself stated that the authors of that study 'set out in detail the positive energy result of the project given the high water fall over a relatively short distance, as well as the economic aspects of the project for the local economy', 'that the project's positive contribution towards the reduction in global warming through the substitution for the production of fossil fuel, CO_2-emitting sources of electricity [was] also presented in a convincing manner', and that the 'report also highlight[ed] that the useful objectives [of the contested project] [could] not be achieved by other means being a significantly better environmental option'. It is also apparent from the file submitted to the Court that practical measures were planned to mitigate the contested project's negative impact on the status of the body of water concerned, in particular to limit the contested project's hampering of fish migration patterns through the establishment of assistance measures for those migration patterns.

78 Thus, the 2007 decision concluded, in the light of that report:

'The regional and transregional advantages of [the contested project] for the environment, climate and the economy, which were highlighted convincingly in a report, run counter to the negative impact of the contested project (which is rather minor compared to other possible negative effects) on the statuses referred to in Paragraph 30a of the [WRG]. Given that, by [that] project, a non-polluting form of energy may be made available in large quantities, the decision-making authority must view an important public interest on that measure in terms of sustainable energy development.

After weighing up the present circumstances of the case on which a decision must be taken, the authority concludes that the public interest in having the construction of the hydropower plant "Schwarze Sulm" are clearly higher than the established harm to environmental objectives listed in Paragraph 30 et seq. and Paragraph 104 and 104a of the [WRG].'

79 Subsequently, the 2009 plan, in accordance with Article 4(7)(b) of Directive 2000/60, incorporated an analysis of the expected benefits of the contested project, namely production of hydroelectricity representing 2/1 000 of regional production and 0.4/1 000 of national production.

80 Thus, contrary to the Commission's assertions, the Governor of the Province of Styria did analyse the contested project as a whole, including its direct and indirect impact on the objectives of Directive 2000/60, and weighed up the advantages of the project with its negative impact on the status of the body of surface water of the Schwarze Sulm. In particular, in that analysis, he took account of the fact that the Schwarze Sulm showed very high ecological quality, but found that, given the various expected advantages of the project, the appurtenant public interests clearly outweighed the negative impact on the objective of non-deterioration pursued by Directive 2000/60. Thus, contrary to the Commission's assertion, he did not merely refer in the abstract to the overriding public interest in the production of renewable energy, but rather based himself on a detailed and specific scientific analysis of the contested project, before going on to conclude that the conditions for a derogation from the prohibition of deterioration were met.

81 It follows from the foregoing that the Governor of the Province of Styria, who reached a decision on the basis of a study from the Institute which was such as to provide him with relevant information on the impact of the contested project, did take account of all of the conditions laid down in Article 4(7) of Directive 2000/60 and could rightly consider them to be met.

82 In disputing the merits of the assessment conducted by the Governor of the Province of Styria, the Commission argues in particular that hydroelectricity is only one source of renewable energy among others and that the energy produced by the hydropower plant envisaged in the contested project will have only a minor impact on the regional and national energy supply. However, as the Commission has not put forward any specific complaints showing, for example, how the study referred to in paragraph 75 above, the conclusions of which were incorporated into the 2007 decision, is incomplete or incorrect due to inadequate analysis of the ecological impact of the project on the status of the body of surface water of the Schwarze Sulm, or due to a reliability issue vitiating the hydroelectricity production forecasts, or even comparative factors permitting a classification of the forecasted electricity production as low in comparison to the scale of the project, the conclusion must be that the Commission has failed to establish the infringement as alleged.

83 It follows from all the foregoing that the Commission's action must be dismissed as unfounded.

Costs

84 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, in accordance with the forms of order sought by the Republic of Austria.

On those grounds, the Court (First Chamber) hereby:

1. Dismisses the action;

2. Orders the European Commission to pay the costs.

[Signatures]