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The EU Water Framework Directive: Meeting the Global Call for Regulatory Guidance?

Current efforts to identify transferable solutions to the unsustainable use of water resources also focus on European resource management. But Europe does not offer any simple answers either. Europe's governance structures are rather idiosyncratic and share hardly any common reference. Nor has the EU's Water Framework Directive created the needed set of common denominators.

The growth in global water withdrawal over the last decade, extrapolated for one hundred years to come, results in an annual extraction of twenty-three times the current level. But the present yearly use of around 5000 km³ already represents more than half of the amount readily available to humans; this resource is unequally distributed around the globe and seriously compromised by environmental degradation. To arrest this development, UN members, at the Johannesburg Summit in 2002, agreed to employ the method of efficient river-basin management by 2005, and in March 2006, at a meeting of water legislators during the 4th World Water Forum, declared water to be "a property of the public domain" and access to it, possibly a human right.¹

In search for transferable solutions, analysts have also focused on European resource management, particularly on national approaches to operating and charging for water and infrastructure investments as well as the EU's Water Framework Directive (WFD).² The latter is said to facilitate integrated, economic river-basin management while considering water a non-commodity. But Europe does not offer simple answers either. For one, Europe's national and regional water systems reflect the specific climatic, topographic, cultural and social conditions of the society they serve, which explains the absence of common performance benchmarks and makes it difficult to suggest a model to be followed. Next, the EU's WFD, drafted under the impact of a protracted power struggle among EU institutions, member states and stakeholder groups, does not constitute the unifying European reference it was intended to be. Built on vague objectives and unclear monitoring criteria, it is a compromise that risks diluting pre-existing regulatory norms, invokes national discretion to close EU legislative gaps, and for all practical purposes may be unenforceable. Finally, and linking both previous issues, the lack of a unified reference hampers the EU's

ability to assess a member state's capacity to comply with WFD requirements, identify appropriate remedial actions, and develop central regulations beyond the level of the lowest common denominator.

The governance methods currently applied in the water industry in Germany, France, and England and Wales were the focal point of an earlier article³ that argued for an independent, central body to shed light on national performance and stakeholder interest. This article focuses on the evolution of EU institutional bargaining that shaped the EU Water Framework Directive and discusses its impact on national sector regulation and concerns about its enforceability.

Background and Evolution

Unlike what a first reading may suggest, the 2000 EU Water Framework Directive does not merely concern itself with issues of water quality and the environment. It affects much wider areas of EU industry, policy and governance. As a framework directive it aims to establish integrative water management by replacing pre-existing, fragmented EU water regulations with one unifying legislative act that commits member states to deliver towards mandatory, time-bound and measurable targets on a river-basin scale. Its preamble spells out that this will require (among other things) preventive action, linking emission values to environmental quality standards, insisting on the polluter-pay principle and the recovery of the total costs of water use, and decentralising decisions as closely as possible to the location where water is used or affected. The directive clearly impinges not only on all aspects

¹ Cf. 4th World Water Forum 2006 Declaration of Water Legislators, at: <http://www.worldwaterforum4.org.mx/files/Declaraciones/Legislators.pdf>; J. Scanlon et al.: Water as Human Right?, IUCN Policy Paper No.51, 2004.

² Directive 2000/60/EC of the European Parliament and the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, (2000) OJ L327/1 (WFD).

³ R. Boscheck: European Water Infrastructures: Regulatory Flux void of Reference?, in: INTERECONOMICS, Vol. 37, No. 3, May/June 2002, pp. 138-149.

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of water management. It directly calls for coordinating pan-European policies related to agriculture and fishery, navigation and transport, regional policy and tourism, as well as energy. But the WFD's ambitious agenda represents only one of the reasons why the directive has become famous amongst analysts for its tortuous evolution and still highly uncertain future. Another is that the legislation emerged during a fundamental shift in EU governance aimed at increasing public involvement, partly by means of granting co-decision power to the EU Parliament⁴ and partly by seeking the broader involvement of non-elected non-governmental organisations. In the end neither objective was achieved.⁵

Stages and Issues of Policy Formulation

During the four years between the Commission's initial communications on European water policy in 1996 and the publication of the WFD in the Official Journal of the EU in December 2000, discussions about the directive turned from a broadly shared appreciation of an important ecological initiative into an intense confrontation among stakeholders who realised the proposal's implications. Reacting to the economic costs of tightening existing regulations versus the ecological risks of diluting them, EU institutions sided with their respective constituencies to frame particular issues, review time-scales and voting rules and either limit or expand the directive's impact and binding nature. In dealing with the key concerns – economic pricing, emissions standards and the legislation's binding nature – the Commission acted as arbiter between the Council of Ministers, representing member state governments and typically focused on producer interests, and the EU Parliament, acting on its direct mandate and in response to diffuse citizen demands and broader ecological objectives. Three stages may be distinguished.

- *Council initiative and response.* In spring 1998, the Council of Ministers, keen to settle issues before having to share relevant legislative responsibilities with the EU Parliament as part of the impending co-decision procedure, tabled a draft directive, which in the eyes of many not only diluted the WFD's environmental credentials but amounted to a provocation.⁶

⁴ Introduced by the Maastricht Treaty (Article 189b) and amended by the 1997 Treaty of Amsterdam, the European Parliament, as the locally elected body in the Union's decision-making structure, was elevated to equal legislative standing with the Council of Ministers.

⁵ Kaika and Page trace both the ways in which internal changes in the EU's decision-making process have influenced the shape of the final WFD and the ways in which the increasing participation of NGOs has influenced the final text. M. Kaika, B. Page: The EU Water Framework Directive: Part 1, European Policy Making and the Changing Topography of Lobbying, in: European Environment, Vol. 13, 2003, pp. 314-327.

⁶ For a discussion see S. Schuerer: The NGO perspective, workshop The Freshwater Framework, Globe EU Fimemel, 2001.

For one, the draft had no mention of cost-efficient water pricing; in addition, it nearly tripled the permitted time for derogations on implementing the directive to 34 years. Next, the Council proposal was presented as a final version even before the EU Parliament had given the directive a first reading and without considering the views of special interests, particularly environmental NGOs, that the Commission had decided to involve informally to ensure that any new obligation would not lower substantive and enforcement standards. Reacting to this, the majority of the EU Parliament decided to revert back to the original position of the Commission, calling for full-cost pricing for all consumers, including agriculture.⁷ Following conciliation talks, that version received its first reading in the European Parliament in February 1999 which resulted in 200 amendments to the text.

- *Defying parliamentary proposals.* Reviewing the document from Parliament, the Commission rejected Amendment 1 as purely rhetorical. This amendment read, "Water is not a commercial product like any other but instead is a part of Europe's heritage which belongs to the peoples of the European Union and therefore ought to be protected." The Council, reacting more strongly, reverted to most of its previous position and thereby contravened the EU Parliament in four major areas. First, while both the Parliament and the Commission had insisted on full-cost pricing, the Council eliminated this obligation once again; second, the Ministers maintained their view on 34 years of derogation and added a range of derogations effectively exempting many European waters from the directive; third, while the EU Parliament held that the directive "obliged" member states to achieve "good water status" the Council suggested that the directive "requests that member states make an effort" to that effect. Finally, the Council proposed abandoning the zero-emission approach for substances covered under the Groundwater Directive (80/68) and eliminating zero-emission requirements for 60% of the list of 129 dangerous substances. In effect, binding legislation of the 1970s and 1980s was to be replaced by a proposal for voluntary undertakings.

- *Co-decision with a fixed deadline.* In December 1999, following the introduction of co-decisionmaking in line with the Amsterdam Treaty, the strengthened EU Parliament re-tabled most revisions previously rejected by the Council, including alterations with reference to water pricing, the elimination of hazardous substances and execution timetables. In addition, concerns about the unenforceability of the directive's language caused the EU Parliament to insist

⁷ Socialist Members of Parliament (MEPs) with southern European agricultural constituencies sided with the Council.

on clear-cut wording so as to eliminate opportunities for non-compliance. At that stage, Spain claimed that water resource management was not part of qualified decision-making according to paragraph 1, Art. 175 of the EU Treaty, but instead required unanimous support in the Council of Ministers. It took two months and a European Court of Law decision to do away with single-country veto power in environmental affairs. But the risks to the Parliament's agenda had not been completely eliminated by that. While the Amsterdam Treaty upgraded the role of the Parliament, it also stipulated that Council and Parliament had six weeks to reach a written agreement on any contending issue or else abandon it. Expectedly, the final agreement on the WFD, achieved on 30 June 2000, after long and exhausting talks, had all the trappings of a forced compromise.

Results and Reactions

Whilst it is not possible to predict the outcome of EU institutional bargaining merely on the basis of the types of constituencies that are being served, the EU's WFD, on a superficial level, offers at least an illustration of a fundamental regularity of public choice. The EU Parliament and the Council of Ministers, catering to diffuse and focused interests respectively, delivered apposite results: The Parliament succeeded in reinserting its avowal that, "Water is not a commercial product like any other, but rather a heritage which must be protected, defended and treated as such." The Council won the rest.

- First, even though some subordinate phrases in the latter parts of the directive assert that member states "shall" protect, enhance, or prevent water from deteriorating etc., Article 4(1)a, 4(6)a and b requires member states only to "aim to achieve" good water status. There may be an obligation to try but, whenever steps are considered "not practical," "not reasonable" or "disproportionately expensive", there is no need to achieve a "good status" of ground and surface water.
- Second, whereas the Parliament's implementation plan had a 10-year time horizon, the WFD stipulates 15 years, one year less than the Council's original bargaining position.
- Third, whilst a combined approach of environmental quality standards and emission limits is to be used in controlling polluting discharges by 2012, the prohibition of discharging radioactive substances has been dropped as has the obligation to prevent groundwater pollution.
- Fourth, Art 9.1 of the WFD outlines the objectives of water pricing as (1) the implementation of the EC polluter-pays principle (Art. 174(2) of the EC Treaty), (2) the provision of adequate incentives for users to

utilise water resources efficiently, and (3) the contribution towards a good "quantitative groundwater status", i.e. a balance between supply and demand, water abstraction and a "good ecological status of surface water." Also, in its communication on "Pricing Policies for Enhancing the Sustainability of Water Resources",⁸ the Commission has given further guidance on appropriate, effective and efficient pricing mechanisms. But both documents, for the sake of subsidiarity and flexibility, leave fundamental issues of cost recovery and usage-based pricing to member states' interpretation.

- Fifth and finally, whilst water prices are to incorporate environmental costs, the EU Parliament permitted an opt-out clause which allows member countries to ignore this requirement completely.

Hence, while the EU Parliament managed to enshrine the notion of water as a non-commodity, the Council's determination of virtually all economically and operationally significant aspects of the directive reveals the hollowness of this rhetoric and weakens the framework's binding character, substantive impact and practical relevance. Even worse, the attempt to negotiate a common ground not only lowered regulatory standards but substituted previously enforceable commitments by an appeal to voluntarism, common sense and long-term considerations. In the words of an observer, "(I)t all depends on the goodwill and the seriousness of all players to fully use the opportunities of this directive for enhanced water protection and to prevent the abuse of the legal ambiguities of the agreed text."⁹ Yet in light of the EU's record of engendering regulatory compliance – particularly in the area of the environment – this comment sounds at best naïve.

Recent studies, analysing the lack of observance of EU environmental law, identify the 2000 Water Framework Directive as one of the least implemented of all environmental internal market directives.¹⁰ The EU explains this with reference to the directive's complexity, the cost of legislative integration and the non-transparency of local environmental conditions.¹¹ To deal with this, the Commission suggests a combination of implementation advice and legal actions against non-complying member states. Yet, the problem with the first is that the WFD effectively leaves vague substan-

⁸ COM (2000) 477 Brussels 26 July 2000.

⁹ Statement by the Secretary General of the European Environmental Bureau (EEB), quoted from B. Page, A. Kaika: *The EU Water Framework Directive: Part2*, in: *European Environment*, Vol.13, 2003, pp. 328-343, here p.338.

¹⁰ D. Grimeaud: *The EC Water Framework Directive*, in: *RECIEL*, Vol. 13, 2004, No. 1, pp. 27-39.

¹¹ EU Commission: *Water Policy – Commission Acts against Eight Member States*, Press Release, 13.01.2004.

tive and procedural rules for de-central policymakers to specify. Interjecting central guidance at this stage defeats the purpose of subsidiarity and regulatory delegation, is administratively inefficient and conceivably illegitimate as it amounts to changing legislative content – *ex post*. The problem with the second is that Art.4(4)-(7) outline conditional grounds for exemptions that ultimately require cost-benefit analyses or proportionality tests to establish non-compliance, begin prosecution and determine the remedies and fines required. Yet to do so, local conditions would need to be transparent, EU monitoring and benchmarking viable and regulatory delegation to national authorities realistic. In which case, of course, non-compliance would not be an issue. But non-compliance is a potentially growing concern also in the cases of England and Wales, France and Germany.

In the UK, WFD requirements are currently being addressed separately for the water regimes of Scotland, Northern Ireland, and England and Wales. While Scotland and Northern Ireland had no licensing regime of water abstraction and impoundment and therefore started from a clean slate in designing their water regulation,¹² a large number of elements of the WFD were already contained in the existing water legislation in England and Wales. But the public's criticism of the Office of Water Services' (OFWAT) regulatory performance has triggered a number of high profile reviews of the current system of governance and the need to manage the acceptability of potential price increases. While the industry body, Water UK, expectedly promotes the need to tackle unregulated pollution, it also cautions to square investment demands with consumer debt and affordability. Meanwhile, Mr. Fletcher, preparing his next five-year price review for 2009, intends to ask consumers about their willingness to pay for environmental improvements in line with the WFD.

In France, integrated river basin management was established by the 1964 Water Law and undertaken in line with the 1992 Water Law by *Comités de Bassin*. But neither the *Agences de l'Eau* nor the *Comités de Bassin* ever concretely dealt with water management and economic analysis; in addition, public participation is restricted. While the French Ministry for Ecology and Sustainable Development proposes to increase the agricultural sector's share of water clean-up costs, it suggests that curtailed investment plans would allow consumer prices to remain stable. But investments need to increase to comply with EU standards. There is clearly a need to develop the political will to handle the thorny question of whether and how to finance WFD requirements.

¹² The Water Environment (Controlled Activities) Regulations 2005 set up a system of controls via authorisation by the Scottish Environment Protection Agency (SEPA) and were put in force in April 2006.

Germany's two main industry associations point out that meeting the 1998 EU standards alone costs €150 bn and, at annual investments of €6 to 8 bn, will take 20 to 30 years to accomplish. Still, with the level of investments undertaken today and going forward, it is estimated that 52% of the German groundwater bodies are unlikely to reach WFD quality standards by 2015.¹³ Both associations nevertheless call for a harmonious transposition of EU law into national law and the translation of WFD terminology into measurable standards as long as cost recovery continues to be ensured. However, facing growing public discontent and the political use of international "reference" data, the latter would require the uploading of German standards on pollutants and price calculation on the EU level. In view of the recent WFD experience this seems highly unlikely.

Conclusion

Current efforts to identify transferable solutions to the unsustainable use of water resources also focus on European resource management. But Europe does not offer any simple answers either. Europe's governance structures are rather idiosyncratic and share hardly any common reference. In fact, deficiencies in central data collection and incompatible measurement practices shelter national systems from market testing, offer potential windfall gains across the broader regulatory community, and may therefore be self-sustaining.

Nor did the EU's Water Framework Directive create the needed set of common denominators. Its evolution and final shape reflect, rather, the impact of a protracted power struggle among EU institutions, member states and stakeholder groups. The result is a political compromise that dilutes pre-existing regulatory norms and invokes national discretion to close EU legislative gaps. It is for all practical purposes largely unenforceable as the Commission, lacking standards, will find it difficult to assess a member state's capacity to comply with already low-level regulatory requirements.

But sliding towards non-coordination is not an option either. With more than 4000 river basins criss-crossing 46 countries, Europe's waterways link the rich and the poor, the drought-ridden and flood-prone, regions with safe and unsafe drinking-water conditions, with optimal and non-existing sanitation. As natural watersheds rarely coincide with political borders, cross-border cooperation is an integral part of European water management. In addition, the pervasive impact of water on other sectors and aspects of society require coordination for far-reaching economic and political reasons.

¹³ BGW/DVGW: Comments for the 2nd Reading of EU groundwater guidelines, 2 February 2006, 2006-06-09.