

Introduction and Framework of the German and European Water Law

**Objectives and future perspectives of effective resource management
in consideration of developing water scarcity**

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- A. Introduction

Life in general is impossible without a sufficient supply of clean water. For example, water bodies provide drinking water for people, and process water for manufacturing goods. They are habitats for many plant and animal species and contribute to preserving biological diversity.

It is therefore necessary to reconcile protection and use of water bodies as far as possible.

This requires the involvement of both **private and commercial water users**, for example in ensuring drinking and process water supplies, securing sound waste water management and preserving, or restoring if necessary, the ecological balance of water bodies.

Focussing on Germany it can be noticed that there exists an efficient water management sector. German water technologies and know-how are highly regarded throughout the world. The German government ensures effective water protection that involves all stakeholders:

- Waste Water charges create an economic incentive to reduce, as far as possible, the amount of waste water discharged.
- A range of laws and regulations ensure protection of water from inputs of harmful substances and the conservation of water bodies as habitats.
- Criminal and liability law penalises the pollution of water bodies and ensure that environmental damage is compensated.

- Focussing in detail on the European Level the main legal resource is the ***Water Framework Directive 2000/60/EC*** of the European Parliament and of the Council of 23 October 2000, that entered into force on 22 December 2000.

Recital (1) of the Directive → **“water is not a commercial product like any other, but, rather, a heritage which must be protected, defended and treated as such”.**

- In detail, the European ***Water Framework Directive*** provides for several goals to be achieved by 2015. These are:
 - preventing any further deterioration of the status of waters,
 - achieving a good ecological and chemical status for all water bodies (rivers, lakes, transitional waters, coastal waters and groundwater),
 - achieving a good quantitative status for groundwater and
 - progressively reducing pollution from a range of substances that are classified in the ***Water Framework Directive*** as presenting significant risks, referred to as priority substances. These include pesticides, heavy metals and other organic pollutants.

- B. Statutory Mechanisms

- I. European legislation

- 1. Background

- Environmental policy was originally not even mentioned in the *Treaty of Rome (1958)*.
 - it was not until the **1970s** that the emergence of environmental concerns triggered moves in this area at Community level. At the *July 1972 Paris Summit* the Heads of State and Government recognized that in the context of economic expansion and improving the quality of life particular attention should be paid to the environment.
 - the first action programme setting out the framework for Community environment policy was adopted, covering the period from 1973 to 1976.
 - the *Single European Act in 1987*, adding a title specifically on the subject to the Treaty establishing the European Community, is generally acknowledged as the turning-point for the environment. From then on, the Community measures had a legal basis explicitly defining the objectives and guiding principles for action by the European Community relating to the environment.
 - the *EU Treaty in November 1993* brought further progress on several fronts. First it added the concept of "sustainable growth respecting the environment" to the European Community's tasks and wrote the *precautionary principle* into the article on which environment policy is founded (Article 191 AEUV, ex Article 174 EC Treaty)
 - marked the beginning of a more prominent role for environmental protection in EU policy-making, introducing the principal that environmental protection should be considered in all new Community Legislation.

- EU environmental policy was substantially expanded by the *Treaties of Maastricht (1992)* and *Amsterdam (1997)*, which made sustainable development one of the EU's central objectives.

→ the *EU Treaty 1997* laid down that "environmental protection requirements must be integrated into the definition and implementation of other Community policies" = sine qua non for sustainable growth respecting the environment.

- Sustainable development of that domain also forms a key part of the *Europe 2020 strategy*, which underpins all EU policy regarding the single market. The *Lisbon Treaty (2007)* reiterated the objective of sustainable development and, in 2010, the EU renewed a number of *environmental Directives* to ensure they comply with the *Lisbon Treaty*.

2. The Prevention of water pollution as (special) part of the European Environmental Law

Due to the *transnational character* of environmental protection, the EU is increasingly active in the field of the prevention of water pollution.

→ guidelines set out in European law have a great influence on national water law and the water management of Member States and from there of German Legislation, too.

! **But** the implementation of the European Directives by the Member States requires a long run in most cases.

3. Relevant European Legal Framework in detail screen

a. EC *Water Framework Directive* (WFD)

The ***Water Framework Directive (Directive 2000/60/EC)*** entered into force on 22 December 2000. It marked the beginning of a new dimension in European water conservation policy. In future, waterbodies are to be managed across national and regional borders, by means of a coordinated approach within the river basin areas.

—————> central objective of the WFD is to achieve a “good status” of all waterbodies (watercourses, lakes, coastal waters, and groundwater).

—————> material provisions of the WFD are embedded in a comprehensive concept of river basin planning that is based on the natural classification of river catchment areas and which therefore extends beyond the boundaries of the German federal states and the Member States.

—————> The programmes of measures and management plans for the individual river basins had to be complete by the end of 2009. Under the ambitious timetable formulated by the Directive, the objective of a good status is to be achieved by the end of 2015.

—————> ***Directive 2000/60/EC*** establishes a Community framework for water protection and management.

—————> Besides, there has to take place ***an identification and analysis of waters***. By 2004 at the latest, each Member State had to produce an analysis of the characteristics of each river basin district, a review of the impact of human activity on water; an economic analysis of water use, a register of areas requiring special protection, as well as a survey of all bodies of water used for abstracting water for human consumption and producing more than 10 m³ per day or serving more than 50 persons. This analysis must be revised in 2013 and every six years thereafter.

In 2009, nine years after the Framework Directive entered into force, **management plans** were produced for each river basin district, taking account of the results of the analyses and studies carried out. **These plans cover the period 2009-2015.** They shall be revised **in 2015** and then every six years thereafter.

————→ the “core panel” of the environmental protection construct aspired by the **Water Framework Directive**. Their implementation should have taken place in 2012.

The management plans aim to:

- **prevent deterioration, enhance and restore bodies of surface water, achieve good chemical and ecological status of such water by 2015 at the latest and to reduce pollution from discharges and emissions of hazardous substances;**
- **protect, enhance and restore the status of all bodies of groundwater, prevent the pollution and deterioration of groundwater, and ensure a balance between groundwater abstraction and replenishment;**
- **preserve protected areas.**

————→ From 2010, Member States had to ensure that water pricing policies provide adequate incentives for users to use water resources efficiently and that the various economic sectors contribute to the recovery of the costs of water services, including those relating to the environment and resources; cp. **Principal of cost recovering** concerning the cost of water services as per **Art. 9 para.1 subpara. 2 WFD**.

The member states have to taken into account the principal of covering the costs of water services,

- which include environmental and resources costs
- water prices must give appropriate incentives for the
- efficient use of water resources and
- the costs of water services taking into account the **polluter-pays principle**

Under the **principle of cost recovering** the cost of **water services** as per Art. 9 WFD in Germany includes

- public water supply
- municipal waste water disposal
- industrial-commercial water supply (own production)
- agricultural water supply (irrigation)
- industrial-commercial waste water disposal
- direct discharger and
- the operation of impoundments for all purposes (e.g. shipping)

Environmental costs of water services can be defined as “ [...] costs of damage that water uses impose on the environmental and ecosystems and those who use the environment e.g. a reduction in the ecological quality of aquatic ecosystems or the salinisation and degradation of productive soils”. (german guidance document for the implementation of the EC WFD, compendium of the results and findings of the LAWA committees, 30.4.2003)

In Germany, first instruments for internalization of environmental and resources costs are available due to the

- **wastewater levy,**
 - **water abstraction levy,**
- as well as
- **compensation levy for nature protection.**

! Discussion concerning the **water abstraction levy** arised among experts.

b. Further EC Directives on water conservation

- **The Urban Wastewater Directive 91/271/EEC**
- **Drinking Water Directive 98/83/EC**
- **The Protection of Waters Directive on dangerous substances discharged into waters 2006/11/EC**
- **The Groundwater Directive 2006/118/EC**

II. The implementation of the **Water Framework Directive (WFD)** into the national legislative system

The aim of the **European Water Framework Directive** is to protect **good water quality** in all European water bodies by managing water bodies, i.e. lakes, rivers, groundwater bodies, transitional waters and coastal waters.

To this effect the **Water Framework Directive** harmonizes water protection regulations within the steadily growing European Community.

—————→ The main goal is the achievement of a **“good status”** for all European water bodies in 2015, i.e.

- **a high water quality and**
- **adequate habitats for native flora and fauna.**

Although the Directive unequivocally emphasized ecological quality and biodiversity improvement and maintenance for water bodies, it places **no restrictions on core water body functions** such as supplying drinking water, shipping and flood protection.

—————> Hence both **ecological matters and water use** will form the basis for river basin management planning in the coming years.

1. Water Protection in Germany – objectives, situation

Central policy objectives of water protection policy in Germany are:

- **the conservation or restoration of the ecological balance of waters.**
- **The guarantee of a good quality as well as a sufficient supply of drinking water and industrial water.**

The German Water policy comprises an **integrative as well as uniform approach** that is predicated on the **principle that ecological and economical concerns are not mutually exclusive**. Therefore Germany tries to establish explicit regulations for the implementation of environmental objectives.

The main focus of current water protection policy is to **prevent the pollution of groundwater and surface water** (as natural resource of drinking water) with hazardous substances, e.g. with poisonous not readily degradable substances, and with several heavy metals. Referring to this German Wastewater management is a matter of importance. Hence, in future the German Wastewater management is to take into account of **cross-media aspects**.

In other words, it will undertake a **context-based assessment** of the interfaces with waste, air and soil. With the transposition of the **IPPC Directive 2010/75/EC** (Industrial Emissions Directive) into national law (deadline for the implementation is 7 January 2013), the **best available techniques (Art.13 IPPC)** are laid down as the basis for the integral approach in all environmental legislation.

2. Extent of the legislative implementation regulated by the European Union

The core aspect of current national water management is the practical implementation of the **European Water Framework Directive** in the **ten river basin districts** that are fully or partly located on German territory.

Further focal areas of water policy include **flood prevention** and **groundwater protection**.

—————> With the new Federal Water Act (WHG), which entered into force on **1 March 2010**, the German government has laid the foundations for consistent nationwide implementation of water law. At the same time there are now **uniform provisions at national level** regarding the **management of surface waters, coastal waters and the groundwater**.

3. Principal legal sources of German water law and the reform of the **Federal Water Management Act in 2010** as basic body of laws

With the **re-organization of legislative competences** in the course of the 2006 federalism reform which abolished framework legislation and transferred its matters to **article 74 of the Basic Law** that the federal government obtained the possibility for comprehensive management of water resources (cf. **article 74 No. 32 Basic Law**).

As mentioned, the new **Federal Water Act (WHG)** puts nationwide **uniform requirements** in place for the first time for the **management of surface and coastal waters** and for **groundwater**.

Another novelty of this Act is that it **contains provisions on the principles of public water supply** and the **protection of medicinal springs**.

The regulations on the management of surface waters are supplemented with provisions concerning **minimum water flow, passability, use of hydropower** and **riparian zones**. These provisions achieve a balance between the use and the protection of water bodies.

—————→ Adequate measures for the protection of fish populations are necessary for the future use of hydropower. In future it is prohibited to turn grassland into arable land in riparian zones which measure 5 metres in breadth. The same applies to the removal of site-indigenous trees and bushes, the use of substances hazardous to water and the permanent depositing of items that may hinder water runoff or which may be carried away by the water.

Going into details concerning the constitutional law related innovations of the Act 2010, it has to be mentioned, that

- the previously valid framework law of Federal Government has been partially replaced by **full regulations**.

- areas of **water resources management** previously standardized under German Federal State law are transferred into Federal law, insofar as there is a need for **standardized nationwide regulation**.

- **binding provisions under EC law are implemented** in the new WHG (cp. EU Directive on the assessment and management of flood risks/ Groundwater Directive, Priority Substances Directive)

- The new WHG also **systematizes and unifies water legislation** with the aim of improving the intelligibility and practicability of Germany's complex water legislation.
- **But:** In terms of structure and classification, it is similar to the old WHG.

Substantially, the **Federal Water Act 2010** regularizes:

1. Basic provisions (Sec. 1-49 WHG)

- basic provisions relating to water resources management (management of water quantity and quality). It states that waterbodies, as a component of the ecosystem and as a habitat for fauna and flora, must be protected and managed in such a way as to serve the general public interest and, in harmony with this, must benefit the individual, in a manner which refrains from any avoidable impairments to its ecological function (precautionary principle). A high level of protection for the environment as a whole must be ensured (integrated environmental protection).
- as a **general principle**, waterbodies are subject to Government control. All uses of water are, in principle, subject to official authorization, apart from a few significant exceptions. Permits are issued at the discretion of the responsible water authority (management discretion).

2. Particular provisions (Sec. 50-95 WHG)

- bans on discharges, may be imposed by water authorities in individual cases in the light of immission considerations, in order to achieve the aspired water quality or facilitate specific water uses, for example.
- Special provisions apply to installations for handling substances that are potentially hazardous to water.

- provisions governing the construction and operation of wastewater treatment (Sec. 54 – 61 WHG)
- water conservation officers (Sec. 64 WHG)
- the development of waters and preventive flood mitigation (Sec. 68, 72 – 81 WHG)
- the designation of water conservation areas in the interests of water supply (Sec. 50 pp. WHG).

In summary, the **Federal Water Act 2010** and its concurrent new state legislation allow a first exemplary examination of the new division of legislative powers and their implementation.

The precise concept of the new **Federal Water Act** compels to emphasize that the implicitness of the division of legislative power between the federal republic and the states is to be determined through [interpretation of the German Basic Law](#).

In detail this means

1. examination whether, and where necessary to what extent, the federal legislator has exercised his concurrent legislative power to regulate water management and by that principally excluded the states from the right to legislate.

2. states have, should the latter be the case, the right to deviate from this legislation as long as the federal provision does not concern substance- or plant-related matters in the sense of Art. 72 GG.

—————> The limited use as well as disposability of provisions of non substance- or plant-related nature can be clarified by the federal legislator through declaratory opening clauses where necessary.

But: federal legislator cannot confer to the states the competence to legislate !

3. In case of a legitimate state legislation, the federal legislator has the right to revoke, which on its part triggers again the states' right to deviate.

! This in many ways problematic interaction.

Besides the **Federal Water Act 2010**, the second important German legal resource is the **Wastewater Charges Act**.

- The **Wastewater Charges Act** regulates the **levying of charges for the direct discharge of wastewater into a waterbody**. The charge is the first eco-tax to be levied at Federal level as a steering instrument.
- It ensures that the **»polluter-pays principle«** is applied in practice, since it requires direct dischargers to bear at least some of the costs associated with their use of the environmental medium of water. In environmental law, the polluter pays principle is enacted to make the party responsible for producing pollution responsible for paying for the damage done to the natural environment.

Beneath the federal legislation in that field, there exists the water resource **legislation of the Federal German States**, which is not less important.

—————> The provisions of eleven German states levy a **charge for the abstraction of water from a water body** (see, for instance, para. 17 a of the Water Law of Baden-Württemberg, para. 16 of the Water Law of Mecklenburg-Vorpommern, para. 1 of the Saarland's Groundwater Abstraction Charge Act).

—————> **Municipalities** can also enact binding regulations within the limits of their sovereignty to pass **municipal statutes**.

III. Future prospects – The way forward

The water protection policies of tomorrow will centre on **agriculture, energy generation, and resource management policy**.

New ways must be found to reconcile the interests and concerns of the whole spectrum of water users.

The **effects of climate change** such as lengthy droughts, increased flooding, and the necessary adaptation strategies will inevitably become relevant for future action plans. **Arising Water Scarcity** in particular Member States should be envisioned as well as combated at an early stage.

If it will manage to pull together all stakeholders in this fashion, the **European Water Framework Directive in interaction with the Federal Water Act 2010** offer an extraordinary opportunity to achieve outstanding water protection in an optimally efficient manner, and in so doing **harmonize sustainable water management with other environmental protection objectives** – and as result to attain a status that will durably safeguard the scarce and therefore precious water resources.

—————> Germany's early decisions originate a good initial situation for that objective.

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