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Christophe Verdure

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ENVIRONMENTAL LAW AND CONSUMER PROTECTION

Christophe Verdure (ed.)



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The status of consumers in European water regulation

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I. – Introduction

European citizens consider safe, clean and enough water of great value. Clean and enough drinking water is considered the most urgent. Therefore consumer protection is of great importance. The role and position of the consumer in European water law depends on the scope of that European water law. In this paper, we discuss the position of the consumer when it comes to water services like drinking water and fresh water supply, sanitation, and the use of water for bathing, recreation and nature. The position of agriculture and industry mostly overlap the position of the individual consumer but not fully.

Before discussing European water directives and the way they offer consumers protection it should be noted that in European water law, and especially in the Water Framework Directive,² water is not regarded as a commercial product like any other but must be regarded as a heritage which must be protected, defended and treated as such. It is not fully clear what this means in practice. We can conclude that EU Member States treat water and water services differently and that there is no general way of dealing with the idea of water as a heritage instead of a «commercial product like any other».

There are Member States which do not see water as a commercial product at all and Member States which see water and water services as a commercial product, which only differs slightly from others commercial products. Some Member States regard water as a public or common good, while others see water rights as property rights. Some Mem-

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² 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 L 327*, 22.12.2000, p. 1. Directive as amended by Decision No. 2455/2001/EC (*OJ L 331*, 15.12.2001, p. 1).

ber States choose a focus on public ownership, others focus on the economic regulation of private corporations. In some states water property rights are in the hands of public authorities and in some states they are the responsibility of private companies. A pure private ownership approach can be found in England and Wales, where economic regulation takes care of prices and service standards. The opposite approach is a fully and direct public management systems of water services. In between we can see differences leading to public management which have several possible delegation mechanisms. Regulation is necessary in both cases. All these differences in approach in the several EU Member States make clear that it is the EU level that should guarantee a minimum level of consumer protection by offering a right to water, by adequate provisions in water directives or by general provisions of consumer protection.

The protection of water was one of the first topics to be regulated in the field of environmental law. Water quality in the EU has improved in the last decades, but not enough. Speaking on water scarcity it is important to realize that a lack of water may lead to a struggle between several functions of water like drinking water, agriculture, energy power, shipping, industry and recreation and increasing prices for water services. For consumers it is important that those who pollute or use most water will pay a proportionate part of the costs. Therefore not only information on water pollution and water use as well as the way the costs are divided over the several stakeholders is of great importance, but also the possibilities to participate in decision making and, eventually in the end, access to justice.

The EU recognized the right to water in March 2010. Looking at the elements of the right to water as they have been developed in international law, it becomes clear that there is quite some overlap with elements of consumer protection like transparency, participation in decision making, accountability and access to justice. Besides these more procedural requirements, the right to water includes substantive elements like access to water and sanitation, at a reasonable price and the guarantee that water is clean and safe. The European approach combines a right to water with integrated water resource management (IWRM) because sufficient and clean water for all requires a sustainable and equitable use and the protection of water as a natural resource. The combination of these three : the right to water, integrated water management and consumer protection will be discussed in the following sections.

II. – Analysis framework : Elements of consumer protection and general provisions in EC Law

Important elements of consumer protection are transparency, which deals with access to information on water quality, the level of safety, the way water prices are set,

the way quality standards are elaborated, the way water rights are distributed among all interested parties and the level of service that will be given. Also important is participation in decision making, which also deals with the guaranteed water quality, the level of safety, the setting of water prices and water quality and water safety standards, the distribution of water rights among all interested parties and the level of service that will be given. And last but not least, the accountability of the decisions made by competent authorities for water services and water management and the accompanying access to justice.

Transparency, participation in decision making and access to justice are general elements in EU law and EU environmental law and follow also from international agreements like the Aarhus Treaty.³ Within the scope of this article a general overview of these elements will not be discussed.⁴

Let us see how the EU takes care of consumer protection in the field of water services and water management. When describing and analyzing consumer protection in European water law we will focus on both substantive and procedural aspects. The relevant substantive criterion is the level of protection that is offered, such as :

- the protection of the quality of water so that it is safe and free from micro-organisms and chemical substances;
- the accessibility to water and water services;
- a sustainable and equitable use of scarce fresh water;
- protection against flooding;
- protection of ecosystems;
- a fair price for water services.

Procedural criteria are :

- accessibility of relevant information;
- transparency;
- participation in decision making;
- accountability; and
- access to justice.

³ Directives 90/313/EC and 2003/4/EC.

⁴ See for example : J.H. JANS and H.H.B. VEDDER, *European Environmental Law*, Europa Law Publishing, Groningen, 2008, in particular pp. 327-334; T. TRIDIMAS, *The General Principles of EU Law*, Oxford EC Law Library, 2006; J.H. JANS, R. DE LANGE, S. PRECHAL and R.J.G.M. WIDDERSHOVEN, *Europeanisation of Public Law*, Europa Law Publishing, Groningen, 2007.

III. – Elements of consumer protection in the right to water

A. – THE RIGHT TO WATER

A right to water contemplates a given quantity of drinking water per individual, often combined with a right to sanitation. The amount in question is a very limited (50 litres per day, although 25 litres is also mentioned) quantity of clean drinking water or water for domestic uses. This is only just enough to survive. The right to water is increasingly being recognized in international conventions, but not to such an extent that a binding human right to water exists.⁵ A more broader scope of the right to water includes the protection of safety against flooding, sufficient, clean water for domestic use, food production, energy supply, sanitation, recreation and, last but certainly not least, the protection of ecosystems.

The right to water can be inferred from various conventions. Article 14(2) of the 1979 Convention on the Elimination of All Forms of Discrimination against Women compels states to ensure «adequate living conditions, particularly in relation to... water supply» for women. The 1989 Convention on the Rights of the Child compels states to combat disease and malnutrition «through the provision of adequate nutritious food and clean drinking water» (Art. 24(2)). The International Covenant on Economic, Social and Cultural Rights of the United Nations (ICESCR) is based on the Universal Declaration of Human Rights. The ICESCR contains a basis for the right to water in Articles 11 and 12. Under Article 12(1) ICESCR everyone has the right to the enjoyment of the highest attainable standard of physical and mental health. Article 12(2) ICESCR stipulates that States Parties to the Covenant must improve all aspects of environmental and industrial hygiene and take steps to achieve the healthy development of the child. According to the General Comment (no. 14) of the UN Committee of the ICESCR, Article 12 ICESCR refers not only to health care, but also to all other factors that determine the enjoyment of good health, such as access to clean drinking water, personal hygiene requirements, an adequate supply of safe food, and housing.

Article 11(1) ICESCR – the right to an adequate standard of living – also covers the availability of water. A definition of the right to water can be found in General Comment no. 15 on the Right to Water, adopted in 2002 by the Committee of Economic, Social and Cultural Rights : «*The Human Right to water entitles everyone to sufficient, safe,*

⁵ For example, in the International Covenant on Economic, Social and Cultural Rights (1966) and as a fundamental right recognized by the General Assembly of the United Nations (A/RES/54/175) and defined in General Comment no. 15 on the Right to Water, adopted in 2002 by the Committee of Economic, Social and Cultural Rights.

acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements».

When we look at the relationship between the right to water and consumer protection the following elements of the right to water are relevant :

1. Availability : the supply of water for each individual must be adequate and continuous for personal and general uses, e.g. drinking, sanitation, washing clothes, preparing food and personal and household hygiene ;
2. Quality : the water for personal and general use must be safe, and therefore free from micro-organisms, chemical substances and radiological hazards that are a danger to health. The colour, odour and taste of water must also be acceptable ;
3. Accessibility : water and water facilities must be accessible to everyone, without discrimination. Accessibility comprises :
 - Physical accessibility : water and water facilities must be located within safe physical reach for all sections of the population. Sufficient, safe and acceptable water must be accessible within each household, school and workplace ;
 - Economic accessibility : water must be affordable for everyone ;
 - Equal accessibility : water must be accessible to all, including the most vulnerable and marginalized sections of society, with no conditions or penalties attached ;
 - Information accessibility : accessibility also covers the right to seek and receive independent information on water issues.

An important aspect of accessibility is economic accessibility. General Comment no. 15 does not require water to be free, but financial obstacles must not be such that they restrict accessibility : *«Any payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households».*

The General Comment is not binding on the States Parties, although it is regularly referred to. For the actual protection of water rights it is necessary to rely on the right to water as far as it is included in a treaty or agreement from which a right to water can be derived.

B. — RECOGNITION OF THE RIGHT TO WATER BY THE EU

There is no article in the EC Treaty nor in any EC Water Directive nor in the Charter of Fundamental Rights that explicitly recognizes a right to water. Yet its presence can be deduced from EU law, of course in its relation to international law. A right to water can particularly be deduced from the general principles of EU law, the EU Charter of Fundamental Rights and the European Convention on Human Rights (ECHR). A further elaboration can be found in secondary EC law, more specifically the water directives.

Below, this multilevel protection of the right to water will be analyzed, starting with the right to water, followed by the water legislation, with its substantive and procedural provisions.

Even the restricted right to drinking water and sanitation is as yet not recognized by many countries.⁶ Granted, the European Parliament and the Council of Europe support the right to water, but a legally binding right has yet to be incorporated in a statutory text. This means that not everywhere in Europe it is possible for citizens to ensure their right to water by commencing legal proceedings. On 22 March 2010 the EU took a tougher stance on the fundamental right to water :

*« On World water day the EU reaffirms that all States bear human rights obligations regarding access to safe drinking water, which must be available, physically accessible, affordable and acceptable. (...) The EU recognizes that the human rights obligations regarding access to safe drinking water and to sanitation are closely related with individual human rights – as the rights to housing, food and health. But even more than being related to individual rights, access to safe drinking water is a component element of the rights to an adequate standard of living and is closely related to human dignity. The principles of participation, non-discrimination and accountability are crucial. Water for personal and domestic use must be safe, therefore free from substances constituting a threat to a person's health. Access to adequate and safe sanitation constitutes one of the principal mechanisms for protecting the quality of drinking water ».*⁷

So the EU sees the fundamental right to water as an essential component of existing human rights and links its realization both to substantive and procedural obligations on the part of member states. There is, however, no separate human right to water embodied in legislation; the right is based on international commitments undertaken by the EU and is detailed in European water directives that have been enacted. In Euro-

⁶ At a meeting of the United Nations in 2008. Countries that have a fundamental right are Belgium, France, Finland, Germany, Italy, Norway, Portugal, Spain, Sweden, Switzerland, Ukraine, and the United Kingdom. The right to water is also recognized in a number of Latin American and African countries.

⁷ Brussels, 22 March 2010, 7810/10 (Presse 72) P12/10.

pean law, however, fundamental rights and principles are closely interwoven. On the basis of Article 6 of the Treaty on the Functioning of the EU (TFEU), the EU considers fundamental rights that have been granted on the basis of the ECHR to be general principles of Community law. Of relevance to water rights are both the substantive rights as laid down in Article 2 ECHR, which guarantees the protection of life, and Article 1 of the first Protocol to the ECHR (protection of property) and the procedural rights needed to realize the substantive rights. The latter can be found in Articles 6 and 13 ECHR (right to access to the courts).⁸ Also of importance for the substantive right to water is the London Protocol on Water and Health, as part of the Treaty of Helsinki, and for the procedural rights the Aarhus Convention. They are both treaties to which the EU is also a party. With the entry into force of the Lisbon Treaty (amending the Treaty on European Union, and amending and renaming the EC Treaty), the Charter of Fundamental Rights of the European Union has gained importance.

IV. – Provisions in water directives

A. – GENERAL : SUBSTANTIVE AND PROCEDURAL PROVISIONS

The protection of consumers in EU water law is partly connected with the right to water and the generally provided legal protection as described above. Other important elements must be deducted from EU water directives themselves. The task of ensuring the right to water, the protection of a sufficient amount of fresh water, safety against flooding, protection against dangerous substances in water, safe bathing water, sanitation and the treatment of urban waste water, clean water and healthy aquatic ecosystems are regulated by several EU water directives. Most of these directives have a two-fold scope : protecting human health and protecting the environment. For both elements consumer protection is relevant.

The most important instruments that are used in EU water directives to ensure the substantive part of consumer protection are plans and programmes, environmental quality standards, licences, waste water treatment and other emission control instruments and monitoring obligations. Although the EU requires effective legal protection against decisions concerning the above-mentioned instruments, a strong position of

⁸ See, for example, ECHR 20 March 2008 (deaths as a result of mudslides in Russia, violation of Art. 2 ECHR); ECHR 27 January 2009 (violation of Art. 8 ECHR because the government did not provide the people living in the neighbourhood with sufficient information about the risks associated with a company where cyanide is used to extract gold); ECHR 12 November 2006 (violation of Art. 8 ECHR); ECHR 30 November 2004 (*Oneriyildiz*, violation of Art. 2 ECHR); ECHR 10 November 2004 (*Taskin*, violation of Art. 8 ECHR); ECHR 16 November 2004 (*Moreno Gomez*, violation of Art. 8 ECHR); ECHR 9 June 2005 (*Fadeyeva*, violation of Art. 8 ECHR).

consumers very much depends on the national legal systems in the several Member States.

Besides provisions to reach a good status of waters, to ensure safe drinking and bathing water, to oblige Member States to treat urban waste water and to make management plans to deal with flooding, most directives have procedural provisions concerning public participation. These provisions are supplementary to general obligations in EU law like the provisions on public access to information and to provide for public participation based on Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information⁹ and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment.¹⁰ These supplementary provisions follow from the ratification by the European Community of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Århus Convention). Furthermore, most directives have reporting obligations to the European Commission. The Commission publishes these reports on the status of European waters to make sure that consumers are not only informed by their own Member State but also on the EU level. This makes it possible to compare the status of waters within the EU.

The Water Framework Directive and the Bathing water directive¹¹ have the most extensive procedural provisions with regard to consumer protection.

B. – THE WATER FRAMEWORK DIRECTIVE

Community water policy requires a transparent, effective and coherent legislative framework. That was one of the main reasons for adopting a Framework Directive. The preamble states that the success of the Water Framework Directive (WFD) relies on close cooperation and coherent action at Community, Member State and local level as well as on information, consultation and involvement of the public, including users. The supply of water is a service of general interest as defined in the Commission communication on services of general interest in Europe.¹² To ensure the participation of the general public, including users of water, in the establishment and updating of river basin management plans, the preamble states that it is necessary to provide proper

⁹ *OJ L* 41, 14.2.2003, p. 26.

¹⁰ *OJ L* 156, 25.6.2003, p. 17.

¹¹ Directive 2006/7/EC of the European Parliament and of the Council of 15 February 2006 concerning the management of bathing water quality and repealing Directive 76/160/EEC, *OJ L* 64, 4.3.2006, p. 37.

¹² *OJ C* 281, 26.9.1996, p. 3.

information on planned measures and to report on progress with their implementation with a view to the involvement of the general public before final decisions on the necessary measures are adopted.

The purpose of the Directive is, according to Article 1, the establishment of a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater which prevents further deterioration and protects and enhances the status of aquatic ecosystems and, with regard to their water needs, terrestrial ecosystems and wetlands directly depending on the aquatic ecosystems. The WFD should promote sustainable water use based on long-term protection of available water resources, and aims to realize the enhanced protection and improvement of the aquatic environment. This is realized, *inter alia*, through specific measures for the progressive reduction of discharges, emissions and losses of priority (chemical) substances and the cessation or phasing out of discharges, emissions and losses of the priority hazardous substances. The WFD should further ensure the progressive reduction of pollution of groundwater and prevent its further pollution. It should contribute to mitigating the effects of floods and droughts, and thereby contribute to the provision of a sufficient supply of good quality surface water and groundwater. Finally, it aims to achieve the objectives of relevant international agreements. It is striking that the remaining provisions of the Directive mainly concern the protection of the quality of surface water and groundwater. Flood defence and water quantity management receive little attention, even though the preamble makes express mention of them. This lack of elaboration in the field of water quantity management is a lost opportunity in the Water Framework Directive and is nowadays solved by new European legislation on these topics.

1. – *Organizational provisions*

The WFD opts for the co-ordination of administrative arrangements and for the realization of environmental goals by way of a *river basin approach*. This means that Member States have to divide their territory into districts based on river basins (article 3).¹³ A river basin district is the area of land and sea, made up of one or more neighbouring river basins together with their associated groundwater and coastal waters, which is identified as the main unit for the management of river basins. For every river basin, the characteristics of the river basin district, a review of the environmental impact of human activity and an economic analysis of the water use must be drawn up (article 5).

¹³ A river basin is the area of land from which all surface run-off flows through a sequence of streams, rivers and, possibly, lakes into the sea at a single river mouth, estuary or delta.

Appropriate administrative arrangements, including the identification of the competent authority, must be made for every river basin district in order to ensure the application of the Directive's provisions. In the event that a river basin covers the territory of more than one Member State, the river basin should be assigned to an international river basin district. It must be ensured that the requirements of the Directive for the achievement of the environmental objectives, and in particular all programmes of measures, are co-ordinated for the whole of the – eventual international – river basin district.

2. – Substantive provisions

The *environmental objectives* of the WFD can be found in Article 4. They relate to surface waters, groundwater, and protected areas and oblige a «good water status» to be reached. This can be seen as one of the most important substantial elements of consumer protection in water law.

Within 15 years after the date of entry into force of the Directive, *good surface water status*¹⁴ must be achieved. «Good surface water status» means that the status achieved by a body of surface water is ecologically¹⁵ and chemically at least «good». Good *ecological status* may vary, depending on the kind of water. For artificial and heavily modified surface water, it will suffice to reach a good ecological potential.¹⁶ For rivers, lakes, coastal waters and transitional waters, good surface water condition, including the good ecological and good chemical status, have to be achieved. Achieving a good *chemical status* is mandatory for all waters, including artificial and heavily modified surface water bodies.¹⁷

Article 4(3) enumerates the conditions under which bodies of surface water may be designated as artificial or heavily modified. For these surface waters, the environmental objectives are less stringent. It is sufficient that good chemical status and good eco-

¹⁴ «Surface water status» is the general term used to denote the condition of a body of surface water, determined by the poorer of its ecological status and its chemical status.

¹⁵ «Ecological status» is an expression of the quality of the structure and functioning of aquatic ecosystems associated with surface waters, classified in accordance with Annex V of the Directive. «Good ecological status» refers to the status of a body of surface water, so classified in accordance with Annex V. Annex V lists several classes of waters, such as rivers, lakes, coastal waters, transitional waters and artificial and heavily modified surface water bodies.

¹⁶ «Good ecological potential» is the status of a heavily modified or an artificial body of water, so classified in accordance with the relevant provisions of Annex V.

¹⁷ «Good surface water chemical status» refers to the chemical status required to meet the environmental objectives for surface waters established in Article 4(1)(a), that is the chemical status achieved by a body of surface water in which concentrations of pollutants do not exceed the environmental quality standards established in Annex IX and under Article 16(7), and under other relevant Community legislation setting environmental quality standards at Community level.

logical potential are realized. Groundwater must also have a good status, which means that both the quantitative as well as the chemical status must be good.¹⁸ «Good groundwater chemical status» is the chemical status of a body of groundwater, which meets all the conditions set out in table 2.3.2 of Annex V. To achieve this, Member States must implement the measures that are necessary to reverse any significant and sustained upward trend in the concentration of any pollutant resulting from the impact of human activity in order to progressively reduce the pollution of groundwater. The balance between abstraction and recharge of groundwater must be ensured.

The WFD contains certain provisions for *protected areas*. For these areas, Member States shall achieve compliance with any standards and objectives at the latest 15 years after the date of entry into force, which is in 2015 (Article 4). Where more than one of the objectives relate to a given body of water, the most stringent shall apply. Monitoring programmes have to be supplemented by those specifications contained in Community legislation under which the individual protected areas have been established (Article 8(1)). When applying the exceptions specified in Article 4, paragraphs 3, 4, 5, 6 and 7, it must be ensured that the application of these exceptions is consistent with the implementation of other Community environmental legislation. Moreover, steps must be taken to ensure that the application of new provisions, including the grounds for exception, guarantees at least the same level of protection as existing Community legislation. The Directive requires the establishment of a *register* of all areas lying within each river basin district which have been designated as requiring special protection under specific Community legislation for the protection of their surface water and groundwater, or for the conservation of habitats and species directly depending on water. The register or registers shall include all bodies of water identified as waters used for the abstraction of drinking water (protecting human health), areas designated for the protection of economically significant aquatic species (protecting human health), bodies of water designated as recreational waters (protecting human health), including areas designated as bathing waters under the Bathing Water Directive, nutrient-sensitive areas, including areas designated as vulnerable zones under the Nitrates Directive and areas designated as sensitive areas under the Urban Waste Water Directive (protecting water as a natural resource), areas designated for the protection of habitats or species where the maintenance or improvement of the status of water is an important factor in their protection, including relevant Natura 2000 sites designated under the Habitat Directive¹⁹ and the Birds Directive (protecting water as a natural

¹⁸ The general term «*groundwater status*» is used to denote the status of a body of groundwater, determined by the poorer of its quantitative status and its chemical status. It refers to the status achieved by a body of groundwater when both its quantitative status and its chemical status are at least «good».

¹⁹ Council Directive 92/43 on the conservation of natural habitats and of wild fauna and flora [1992], OJ L 206/7, last amended by Council Directive 97/62/EC adapting to technical and scientific

source and for nature protection).²⁰ The summary of the register required as part of the river basin management plan shall include maps indicating the location of each protected area, and a description of the Community, national or local legislation under which they have been designated. The obligation is to guarantee that the objectives of the WFD will be achieved for all waters in these protected areas, as well as the standards or objectives from the directives that formed the basis for the designation of the protected areas. The WFD does not itself contain more stringent rules for waters within the protected areas.

The objectives of the WFD must be achieved within 15 years after its date of entry into force (*i.e.*, by 2015) (Article 4(1)). This time limit may be extended under the conditions mentioned in the Directive (Article 4(4)). One of these conditions is that no further deterioration of the status of the water bodies occurs. It is also possible for Member States to pursue less stringent environmental objectives if waters are so profoundly affected by human activity, or their natural condition is such that the achievement of the general objectives would be infeasible or disproportionately expensive (Article 4(5)). This is only possible under certain circumstances. Article 4(6) offers the possibility of an exception in case of temporary deterioration only, while Article 4(7) mentions several grounds for exception in case of new modifications to the physical characteristics, or when the failure to fulfil obligations is the result of new sustainable human development activities.

Most environmental objectives in Article 4 are further elaborated in *environmental quality standards*. The water quality standards aim to give substance to the notion of «good status» of water. At Community level, environmental quality standards are based on Article 16(7) of the WFD (for concentrations of priority substances in surface water), and on its Annex IX. At Member State level, environmental quality standards are based on Annex V (for substances which are not on the list of priority substances) or on Article 16(8) (for priority substances from the Community list for which, in the absence of Community agreement, no Community environmental quality standards are yet available).

Where monitoring or other data indicate that the environmental objectives for the body of water are unlikely to be met, Member States must ensure that the causes of failure are investigated. In that case, relevant permits and authorizations must be examined and reviewed as appropriate, monitoring programmes reviewed and adjust-

progress Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora [1997], *OJ L* 305/42.

²⁰ Council Directive 79/409/EC on the conservation of wild birds [1979], *OJ L* 103/1, last amended by Directive 97/49/EC amending Council Directive 79/409/EEC on the conservation of wild birds [1997], *OJ L* 223/9.

ed as appropriate, and additional measures may be necessary to achieve those objectives established, including, as appropriate, the establishment of stricter environmental quality standards.

3. – *Instruments of the Water Framework Directive*

The Directive lists several instruments for the achievement of the Directive's objectives.

Every six years, a *river basin management plan* must be produced for each river basin district within the territory of a Member State. In the case of an international river basin district falling entirely within the Community, co-operation between Member States must be ensured with the aim of producing a single international river basin management plan. A river basin management plan should in the first place contain a (summary) of the programme of measures necessary to achieve the objectives of the Directive. In addition to this programme of measures, Annex VII of the Directive contains the substantive requirements for river basin management plans like a general description of the characteristics of the river basin district; summaries of significant pressures and the impact of human activity on the status of surface water and groundwater, economic analysis of water use, programmes of measures according to articles 4 and 7, the abstraction and impoundment of water and the public information and consultation measures taken. Also an identification and mapping of protected areas and a map of the monitoring networks are required as well as a report on the practical steps and measures taken to apply the principle of recovery of the costs of water use.

Member States have to make a *programme of measures* which are necessary to achieve the objectives of the Directive. The measures arising from the Directive amount to a combined approach for point and diffuse sources (Article 10). This combined approach involves the emission controls²¹ based on best available techniques, or relevant emission limit values, or, in the case of diffuse impacts, controls including, as appropriate, best environmental practices set out in several existing environmental directives.²² Article 10 states that the combined approach concerns all types of discharges, *i.e.* point sources and diffuse sources. Whereas the ECJ has always strictly

²¹ «Emission controls» are controls requiring a specific emission limit, for instance an emission limit value, or other specific limits or conditions relating to the effects, nature or other characteristics of an emission or operating conditions that affect emissions. The use of the term «emission control» in the Water Framework Directive in relation to provisions of any other Directive shall not be held as reinterpreting those provisions in any respect.

²² Council Directive 96/61/EC on integrated pollution prevention and control [1996] *OJ L* 257/26 (19), Council Directive 91/271/EEC on urban waste water treatment [1991] *OJ L* 135/40 (20), Council Directive 91/676/EEC, n. 53 above (21), the Directives adopted pursuant to Article 16 of this Directive, the Directives listed in Annex IX, and any other relevant Community legislation.

distinguished between the concept of «discharge» and the concept of «diffuse sources», this distinction is no longer used in the Water Framework Directive.²³

Measures consist of both fundamental measures and supplementary measures. *Fundamental measures* are minimum requirements, and should be able to satisfy, among others, the requirements of Community legislation concerning the protection of water. A combined approach is required for the emission of polluting substances. Member States must prevent or control the input of pollutants, and establish emission limit values and quality objectives for both point sources and diffuse sources. Among the fundamental measures are also measures to manage water quantity. Article 11(2)(e) refers to measures regarding the abstraction of fresh surface water and groundwater and the impoundment of fresh surface water. For groundwater, measures are compulsory in the event of artificial recharge or augmentation.

If the fundamental measures do not suffice to meet the environmental objectives of the Directive, Member States must take «*supplementary measures*». Annex VI, part B contains a non-exhaustive list of supplementary measures, ranging from legislation to educational projects, economic or fiscal instruments and desalination projects. Supplementary measures may also be adopted in order to provide for the additional protection or improvement of water.

Article 8 of the Water Framework Directive requires the *monitoring* of surface water status, groundwater status and protected areas. Member States must ensure the establishment of programmes for the monitoring of water status in order to establish a coherent and comprehensive overview of water status within each river basin district. For surface waters, such programmes must cover the volume and level or rate of flow, to the extent relevant for ecological and chemical status, and ecological potential. For groundwater, such programmes must cover the monitoring of the chemical and quantitative status. For protected areas, the abovementioned programmes must be supplemented by those specifications contained in Community legislation requiring the establishment of individual protected areas.²⁴

Member States must take account of the principle of the *recovery of the costs of water services*, including environmental and resource costs, having regard to the economic analysis and in accordance with the polluter pays principle. It should be ensured that water-pricing policies provide adequate incentives for users to use water resources efficiently, and thereby contribute to the environmental objectives of the Directive. An

²³ See Case C-232/97, *L Nederhoff & Zn v. Dijkgraaf en Hoogheemraden van het Hoogheemraadschap Rijnland* [1999], ECR, I-6385 and Case C-231/97, *AML van Rooij v. Dagelijks bestuur van het Waterschap de Dommel ex p. Gebr. Van Aarle BV* [1999], ECR, I-6355.

²⁴ Annex V lists the requirements for monitoring. For technical specifications and standardized methods for the analysis and monitoring of water status, a procedure is laid down in Article 21.

adequate contribution towards the recovery of the costs of water services, based on economic analysis and taking account of the polluter pays principle, must come from different water uses, including industry, households and agriculture. It is permitted to take into account the social, environmental and economic effects of such recovery, as well as the geographic and climatic conditions of the region. Member States may, in accordance with established practices, decide to exempt a given water use from this principle, where this does not compromise the purposes and the achievement of the objectives of the Directive, although the reasons for not fully complying must be reported.

4. – *Procedural provisions*

Public participation is nowadays a very important element in water management. The WFD has specific provisions on public information and consultation in Article 14. Member States have to encourage the active involvement of all interested parties in the implementation of this Directive, in particular in the production, review and updating of the river basin management plans. Member States shall ensure that, for each river basin district, they publish and make available for comments to the public, including users :

- (a) a timetable and work programme for the production of the plan, including a statement of the consultation measures to be taken, at least three years before the beginning of the period to which the plan refers;
- (b) an interim overview of the significant water management issues identified in the river basin, at least two years before the beginning of the period to which the plan refers;
- (c) draft copies of the river basin management plan, at least one year before the beginning of the period to which the plan refers.

On request, access shall be given to background documents and information used for the development of the draft river basin management plan. Member States shall allow at least six months to comment in writing on those documents in order to allow active involvement and consultation. These obligations apply equally to updated river basin management plans.

It must be noted that since public participation focuses mainly on the river basin management plans, it is of the utmost importance that these plans give all necessary information in a clear and detailed way. If plans are vague on the consequences of the choices made in the field of water management, consumers have hardly any possibility to check if their interests are well protected. To have successful access to a court consumers must be able to prove that their interests are harmed.

Article 15 contains requirements concerning the manner of *reporting*. Member States must send copies of the river basin management plans and all subsequent updates to the Commission and to any other Member State concerned within three months of their publication. For river basin districts falling entirely within the territory of a Member State, these must include all river management plans covering that national territory, and for international river basin districts at least the part of the river basin management plans covering the territory of the Member State. Summary reports of the analyses required under Article 5 and the monitoring programmes undertaken for the purposes of the first river basin management plan are also mandatory. Finally, the Directive requires an interim report describing progress in the implementation of the planned programme of measures. Although reporting obligations may appear formal, ECJ case law shows that Member States should take them seriously, which improves the position of consumers.²⁵

C. – DRINKING WATER

The protection of drinking water has two components. In the first place, the drinking water *resources*, namely groundwater and surface water, must be protected. Adequate protection of the quality of the water resources reduces the necessity for further purification treatment of groundwater and surface water in order for the water to be used for consumption. The amount of water to be used for the drinking water supply is also of importance. Freshwater is scarce, so sustainable management of freshwater is necessary. Freshwater has many different functions. Despite the fact that some European states, compared to other countries, have a large amount of freshwater, the use of the available water must be sustainable. The drinking water supply occupies an important place in the distribution of freshwater. In some European countries like in the Netherlands it is regarded as a public task, while in England and Wales the drinking water supply is fully private. The protection of drinking water resources forms an integral part of the protection of water in general, which is regulated at European level under the WFD. Besides the protection and distribution of freshwater, drinking water as such is also regulated at European level. The Drinking Water Directive (Directive 98/83/EC) establishes certain requirements for drinking water.

1. – *Protection of drinking water resources in European law*

At European level, for a long time a Drinking Water Directive (Directive 75/440/EC), which established the protection of the drinking water resources, was in force. The Drinking Water Directive was one of Europe's first environmental directives and

²⁵ Case C-435/99, *Commission v. Portugal*.

established quality requirements for the quality of fresh surface water which, after appropriate treatment, was used for the production of drinking water. This Directive has now been integrated into the WFD and lapsed as of 22 December 2007. However, case law of the Court of Justice relating to the Drinking Water Directive 75/440/EEC is still of relevance for a correct interpretation and understanding of the WFD.

2. – *Substantive provisions*

The Directive set up a system of European and national quality standards by establishing limit values and target values. Member States had to take all necessary measures to ensure that the water conformed to the values and the Directive was to be applied without distinction to national waters and waters crossing the frontiers of Member States. The approach of the Drinking Water Directive 75/440/EEC was programmatic. In order to achieve the objectives, Member States were to draw up systematic action plans, including a timetable for the improvement of the quality of surface water. If the quality of the surface water fell short of the mandatory limit values, it was, in principle, not be used for the production of drinking water. The Member States were allowed to set stricter requirements; and the Directive also included a standstill principle. The various quality standards had to be transposed into binding legal rules. In case of non-compliance with the Directive, third parties harmed by this non-compliance had to be able to rely on mandatory rules in order to enforce their rights.²⁶

As of 22 December 2007, the system for the protection of drinking water resources has been fully implemented in the WFD. The WFD establishes a general system of protection for groundwater and surface water – the resources for the abstraction of drinking water. Surface and groundwater have to be in a good chemical status (Article 4 WFD), meeting environmental quality standards set on the EU level for dangerous substances. Furthermore, the quantity of groundwater is protected by the obligation that Member States shall protect, enhance and restore all bodies of groundwater, ensuring a balance between the abstraction and recharge of groundwater. Nonetheless, the WFD also contains specific provisions regarding drinking water resources. Under Article 6 WFD, all water bodies used for the abstraction of water intended for human consumption shall be included in a register of protected areas. These water bodies shall also be explicitly identified and monitored (Article 7 WFD). Meeting the requirements of the WFD is extremely important for the protection of drinking water resources.

²⁶ ECJ, Case C-60/01, *ECR*, 2002, I-05679; ECJ, Case C-266/99, *ECR*, 2001, I-01981; ECJ, Case C-56/90, *ECR*, 1993, I-04109; ECJ, Case C-92/96, *ECR*, 1998, I-00505; ECJ, Case C-337/89, *ECR*, 1992, I-06103; ECJ, Case C-316/00, *ECR*, 2002, I-10527, ECJ, Case C-147/07; ECJ, Case C 58/89, *ECR*, 1991, I-4983 [02607].

For each water body used for the abstraction of water intended for human consumption, compliance with the environmental requirements of the WFD must be ensured. Questions arise with regard to determining the standards. For instance, the standards for drinking water resources traditionally focus on the protection of human health. However, the standards in the WFD can be characterized by their emphasis on the chemical and, particularly, the ecological status of water. Research has shown that the standards based on the WFD are not entirely in line with the desired standards for drinking water.

Water obtained through the application of water treatment must meet the quality requirements under Article 4 WFD and requirements regarding the drinking water produced. It is evident from the judgment of the Court of Justice in Case C-32/05 that these are obligations of result : the obligations under Article 7(2) WFD are formulated in a clear and unequivocal manner in order to ensure, in particular, that the water bodies of Member States meet the specific objectives laid down under Article 4 of the Directive. This provision thus imposes, according to the Court, obligations as to the results to be achieved and must be transposed by means of measures having binding force. Just as under the regime of the former Drinking Water Directive, in case of non-compliance with the Directive, third parties harmed by this non-compliance have to be able to rely on mandatory rules in order to enforce their rights.

Member States must ensure the protection of the identified water bodies with the aim of avoiding deterioration in their quality, in order to reduce the level of purification treatment required in the production of drinking water. Member States may establish safeguard zones for those bodies of water.

3. – *European legislation on water used for human consumption*

Besides the protection of drinking water resources under the WFD, Directive 98/83/EC – also known as the Drinking Water Directive – establishes requirements for the quality of water intended for human consumption. The objective of the Directive is to protect human health from the adverse effects of any contamination of water intended for human consumption by ensuring that it is «wholesome and clean».

4. – *Substantive provisions*

The Member States must take the necessary measures to achieve drinking water that is wholesome and clean. In accordance with the minimum requirements of the Directive, water intended for human consumption is wholesome and clean if it is free from any micro-organisms and parasites and any other substances in numbers or concentrations which constitute a potential danger to human health; if it meets the minimum

requirements set out in Annex I, Parts A and B of the Directive; and if Member States take all other measures necessary to ensure that water intended for human consumption complies with the requirements of the Directive. The measures taken to implement the Directive may in no circumstances have the effect of allowing, directly or indirectly, either any deterioration of the present quality of water intended for human consumption so far as that is relevant for the protection of human health, or any increase in the pollution of waters used for the production of drinking water.

Here, too, quality requirements and corresponding monitoring must be established. Member States must adopt values applicable to water intended for human consumption for the parameters (limit values) set out in Annex I. Member States must set values for other additional parameters where this is necessary for the protection of human health within their territories.

Water supplied from a distribution network must comply with the parametric values as set out in the Directive, at the point, within premises or an establishment, at which the water emerges from the taps that are normally used for human consumption. In the case of water supplied from a tanker, it must comply with the parametric values at the point at which it emerges from the tanker; in the case of water put into bottles or containers intended for sale, at the point at which the water is put into the bottles or containers; and in the case of water used in a food production undertaking, at the point where the water is used in the undertaking.

Strict rules apply if the requirements are not met. In the case of water supplied from a distribution network, Member States are deemed to have fulfilled their obligations where it can be established that non-compliance with the quality requirements is due to the domestic distribution system or the maintenance thereof. This is different when it concerns premises and establishments where water is supplied to the public, such as schools, hospitals and restaurants. In such a situation and if there is a risk that water supplied from a distribution network might not comply with the quality requirements, Member States must nevertheless ensure that appropriate measures are taken to reduce or eliminate the risks, such as advising property owners of any possible remedial action they could take.

Member States must ensure appropriate treatment techniques, installation and materials and the methods used to analyse the quality of water intended for human consumption should be such as to ensure that the results obtained are reliable and comparable.

5. — *Procedural provisions*

The preamble states that consumers should be adequately and appropriately informed of the quality of water intended for human consumption, of any derogations

granted by the Member States and of any remedial action taken by the competent authorities; furthermore, consideration should be given both to the technical and statistical needs of the Commission, and to the rights of the individual to obtain adequate information concerning the quality of water intended for human consumption.

Article 13 deals with information and reporting. Member States must take the measures necessary to ensure that adequate and up-to-date information on the quality of water intended for human consumption is available to consumers. Without prejudice to Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment, each Member State shall publish a report every three years on the quality of water intended for human consumption with the objective of informing consumers. Each report must include all individual supplies of water exceeding 1 000 m³ a day as an average or serving more than 5 000 persons and it shall cover three calendar years and be published within one calendar year of the end of the reporting period. The national reports must also be sent to the Commission within two months of their publication.

The Commission publishes every three years a synthesis report on the quality of water intended for human consumption in the Community.

Since the system for protecting the «raw material» for drinking water (surface water and groundwater) is included in the WFD, and the Drinking Water Directive contains a responsibility for administrative authorities as well as for drinking water companies, it is becoming clear that the task of ensuring the supply of drinking water also requires an integrated approach. A responsibility for the supply of drinking water «from the resource to the tap» can only imply a shared responsibility between the government, drinking water companies and consumers of drinking water, as each of these parties possesses a part of the competences necessary to ensure the sustainability of the supply of drinking water and to ensure that drinking water is wholesome and clean.

D. — SANITATION : URBAN WASTE WATER TREATMENT

The obligation to take care of proper sanitation is based on the Urban Waste Water Treatment Directive (Directive 91/271).²⁷ The preamble to the Directive states that it is important to ensure that information on the disposal of waste water and sludge is made available to the public in the form of periodic reports.

²⁷ Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment, *OJ L* 135, 30.5.1991, p. 40. Directive as last amended by Regulation (EC) No. 1882/2003 of the European Parliament and of the Council (*OJ L* 284, 31.10.2003, p. 1).

1. – *Substantive provisions*

Member States have to ensure that urban waste water entering collecting systems shall before discharge be subject to secondary treatment or an equivalent treatment (Article 4). Urban waste water entering collecting systems shall, before discharge into sensitive areas, be subject to more stringent treatment (Article 5). Competent authorities or appropriate bodies shall ensure that the disposal of waste water from urban waste water treatment plants is subject to prior regulations and/or specific authorization. Regulations and/or authorization shall be reviewed and if necessary adapted at regular intervals (Article 11 and 12). Furthermore, there is a monitoring obligation (Article 15).

2. – *Procedural provisions*

Article 16 is important as far as information to the public is concerned : without prejudice to the implementation of the provisions of Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment,²⁸ Member States shall ensure that every two years the relevant authorities or bodies publish situation reports on the disposal of urban waste water and sludge in their areas. These reports shall be transmitted to the Commission by the Member States as soon as they are published. Article 18 gives more clarity on the way standards and measures will be elaborated and introduces a Committee composed of the representatives of the Member States and chaired by the representative of the Commission.

E. – THE PROTECTION OF WATER FOR FOOD PRODUCTION,
ECONOMIC ACTIVITIES AND ECOSYSTEMS : FRESH WATER SUPPLY

The protection of water for food production and economic activities is also based on the WFD, while the protection of water necessary for the well functioning of ecosystems is based on the WFD, the Birds Directive (Directive 79/409/EC) and the Habitat Directive (Directive 92/43/EC). The urge to guarantee the water supply is becoming increasingly clear. Therefore we have to look at the European policy and legal instruments for the supply of fresh water.

The *supply of fresh water* is an important aspect of water management. Climate change can cause an increasing shortage of water, with consequences for water safety, drinking water supply, agriculture, forestry, fisheries, tourism, health care, buildings, industrial and transport infrastructure, the energy sector,²⁹ the environment and nature.

²⁸ OJ No. L 158, 23.6.1990, p. 56.

²⁹ Including the energy infrastructure.

A fair allocation of scarce water among the various functions within a river basin is becoming more and more important. Various policy initiatives have been developed for that purpose. Sustainable and balanced use of natural resources is one of the objectives of EU environmental policy, and dealing with drought and the prevention of water scarcity is further elaborated in the WFD.³⁰ In that context, the emphasis is on the protection and improvement of the water quality. Climate policy, including climate adaptation policy, is in itself not an EU policy objective, but must be integrated into the whole range of EU policies, including EU water policy. In addition to a Climate change adaptation strategy³¹ at the European level, a strategy for water scarcity and drought has been developed.³² The underlying assumption is that for the time being no new legislative instruments will be developed.

The protection and allocation of scarce water is elaborated at European level in the strategy for water scarcity and drought, which aims to achieve greater water efficiency and better management of the demand for water. This is considered a task of the Member States, and should be carried out by measures of adaptation, sustainable practices, more water savings, fiscal instruments, monitoring systems and adapted risk management tools. The most important elements in this strategy for water scarcity and drought are :

- Improving land-use planning as a driver for water use, since many economic activities take place in areas where there is insufficient available water. The influence of European policy on national spatial planning will therefore increase ;
- Integration of water-related concerns in other policy areas ;
- Active promotion of the use of market-based instruments³³ in combination with a complete implementation of the WFD. All users of water must pay, but there is a special position for private households, which – regardless of their financial resources – must be provided with water, because public provision of drinking water must always have the highest priority ;
- The development of a water hierarchy in order to realize water savings ;

³⁰ Drought is a temporary reduction in the availability of water, for instance as a result of insufficient rainfall. Water scarcity indicates a situation where the demand for water is greater than the amount of water that can be extracted from reserves in a sustainable manner.

³¹ Green Paper – Adapting to climate change in Europe – options for EU action, Brussels, 29 June 2007, COM(2007) 354 final, p. 3 and White Paper – Adapting to climate change : towards a European framework for action [SEC(2009) 386] [SEC(2009) 387] [SEC(2009) 388] COM (2009) 0147 final.

³² European Commission, Communication Addressing the challenge of water scarcity and droughts in the European Union, Brussels, 18 July 2007, COM (2007) 414 final, p. 2.

³³ Commission Communication on Pricing policies for enhancing the sustainability of water resources, Brussels, 26 July 2000, COM (2000) 477 final.

- Amendment of river basin management plans to identify areas with water scarcity and include drought risk management plans, with observatories, warning systems, and civil protection (Art. 13, para. 5 WFD);
- Compulsory measures on water saving and water efficiency if problems are not solved;
- Establishing drought thresholds and drought mapping;
- If, and only if, the above-mentioned policy intentions have been met, and where demand still exceeds water availability, additional water supply infrastructure can be developed, such as the storage of surface or ground waters, water transfers, or the use of alternative sources, such as desalination of brackish or saltwater. Construction of reservoirs, water supply dams and water transfers must take into account the demand and supply of water, and the status of the water in the rest of the river basin. Adverse effects linked to water supply infrastructure must be fully taken into account in the environmental assessment;
- The development of water-efficient technologies and practices in order to prevent water wastage as a result of leakages in public water supply networks and irrigation networks, and the construction of buildings which use water inefficiently;
- Legislative proposals are being made in the area of water-saving, such as the development of standards for water-using devices, including water efficiency criteria in performance standards for buildings and the use of certification systems.

The choice is for legislation at the level of the Member States and not at EU level. The EU is no more than a stimulus for the Member States to adopt legislation or to make voluntary agreements with the relevant economic sectors.

1. – *Substantive provisions*

EU law aspects of the fresh water supply focus on the protection, improvement and allocation of the available amount of water. The public task of protecting scarce water and regulating its use is elaborated in EU water law in principles and general (regulatory) objectives, such as the objectives of the «sustainable management» of water, and achieving «good water status» (both in the WFD, where the environmental objective of achieving good water status is a further elaboration of the general objective) and the provision of «wholesome and clean» drinking water (Drinking Water Directive).

It follows from the case law of the Court of Justice that even though these general regulatory objectives are not completely unconditional and sufficiently detailed, they

do indicate the limits of the discretionary powers of the competent authorities.³⁴ The limits of discretion are directly effective, and individuals must be able to rely on these in the courts. If water is not sustainably managed, or if good water status is not achieved, or no clean drinking water is available, then the limits have been exceeded. By means of these regulatory objectives, which are often further elaborated in specific quality requirements or threshold values – as the European Commission also proposes for water scarcity and droughts – a link can be made between policy intentions in the Climate Change Adaptation strategy and the policy for water scarcity and drought, on the one hand, and the legal protection which individuals enjoy in a democratic state governed by the rule of law, on the other – whereby enforcement, review by an independent court, and accountability to democratically elected bodies are all important. Contrary to what is often believed, these principles and conditions do not impose limitations, but they give direction and set conditions for later decision-making. Detailed implementing requirements are then, in principle, not needed. The necessary flexibility can be made available by a stronger legal status of principles, – which is crucial for adaptation to climate change, and which offers sufficient room for innovative solutions.

The European policy on water scarcity and droughts sees the complete implementation of the WFD as the most important tool. The general overarching objective of the WFD is the protection of all natural water and aquatic and terrestrial ecosystems depending on water; the promotion of sustainable water use based on a long-term protection of available water resources; and a contribution to mitigating the effects of droughts. The Member States should ensure the availability of sufficient good quality surface water and groundwater as needed for sustainable balanced and equitable use of that water (Art. 1 under (a) (b) and (e)). It is not clear whether the general objective also has direct effect in relation to the limits on discretion. This is indeed necessary for an effective adaptation policy in times of water scarcity, as will be apparent in the following. The integrated approach and protection of water in Europe (Art. 3) requires international cooperation. In order to understand the European rules on water scarcity and drought, it is necessary to examine the instruments of the WFD to see what possibilities it offers to regulate water use.

In order to achieve an equitable allocation of scarce water, the various claims on water can be ranked, and water interests or rights can be prioritized, to form the so-called water hierarchy for which the European Commission pleads. This ranking should be based on the most urgent needs. Drinking water must be available for everyone, but not to an unlimited extent. Water for the natural environment must be guaranteed, but only to the extent that no irreversible damage is done. Water for economic activity is necessary, but not in unlimited quantities and everywhere for all activities.

³⁴ Case C-72/95, *Kraaijeveld* [1996], ECR, I-5403, and Case C-435/97, *Bozen* [1999], ECR, I-5613.

The allocation of scarce water is – for the time being – not included in the WFD in the shape of legal rules for water use when there is a water shortage or threshold values in times of drought, but is shaped with the help of general instruments such as environmental objectives (Art. 4), the river basin management plans (Art. 13), the programmes of measures (Art. 11) and the principle of the recovery of the costs of water services (Art. 9).

The general aims of the WFD are further elaborated in the environmental objectives in Article 4. For surface water, the environmental objectives focus on the quality of the water, with a distinction being made between chemical and ecological quality (Art. 4, para. 1 under (a)). Good surface water status is an important element in relation to the availability of sufficient surface water. In periods of drought and water shortage, the concentrations of polluting substances will of course increase, and ecological status could deteriorate. For adequate protection of scarce surface water, an expansion of the environmental objectives is, however, advisable, because many of the implementing instruments are aimed above all at achieving the environmental objectives, and not so much at the general objectives in Article 1 WFD.

For groundwater, the WFD does contain explicit quantitative aims : good quantitative groundwater status (Art. 4, § 1 under (b) (ii) WFD). The measures to be taken by the Member States must ensure that all bodies of groundwater are protected, enhanced and restored, that there is a balance between abstraction and recharge of groundwater, that the groundwater resource does not decrease and is managed sustainably. These environmental objectives are further made explicit in environmental quality standards and threshold values, but these are only of indirect importance for the allocation of scarce water in times of shortage. Annex V of the WFD does contain criteria for the allocation and protection of the amount of scarce water.

The Member States must draw up a policy to prevent water shortage in the river basin management plans (Art. 13 WFD). In order to be able to take the appropriate measures, it must first be clear what the present status of the water bodies is, what environmental effects there are as a result of human activities, and what use is made of water. For that reason, Article 5 lays down the obligation to analyse the characteristics of each river basin, to review the impact of human activity on the status of the water and to make an economic analysis of water use. Article 7 includes a special protective regime for waters used for the abstraction of drinking water. The river basin management plans can be supplemented by more detailed programmes and management plans for each sub-basin, sector, issue, or water type, in which the consequences of water scarcity and drought are taken into account (Art. 13, § 5). At the same time, monitoring programmes should be developed, whereby the volume and level or rate of flow of surface water should be monitored, and for groundwater the programmes should cover, *inter alia*, the monitoring of the quantitative status (Art. 8). Article 14 regulates

information of the public and consultation in relation to drawing up the plans and the programmes of measures.

The actual allocation of scarce water between the different functions is set out in the plans and programmes. The plans thus provide the link between the normative and instrumental aspects of the range of legal instruments.

The mandatory measures in the programme of measures (Art. 11, § 3) include, at all events, measures resulting from existing directives; particularly relevant in the context of water scarcity and droughts are the EIA Directive (Environmental Impact Assessment), the Habitats Directive and the Birds Directive, and the Bathing Water Directive. Other mandatory elements are the type of recovery of costs of water services, and the measures needed for the promotion of sustainable and efficient water use. In order to ensure that the right amount of water is in the right place, there is also an obligation to include measures concerning the abstraction of freshwater and the impoundment of fresh surface water, including registers of water abstractions and a requirement of prior authorization for abstraction and impoundment (Art. 11, § 3 under (e)). Prior authorization is also required for the artificial recharge or augmentation of groundwater bodies (Art. 11, § 3 under (f)). Given all the predictions about climate change, it will be less and less possible to consider a prolonged drought to be unforeseeable, and in the future the circumstances will have to be very exceptional for the failure to take supplementary measures to be justified.

If the failure to achieve the objectives is caused by problems which cannot be solved at the level of the Member States – for instance, if other states take measures within a river basin which obstruct sustainable and efficient water use in the whole river basin, or take measures as a result of which there is not enough water within a river basin for other states – then a Member State can bring the problem to the Commission (Art. 12). Notwithstanding the Commission's recommendations in the strategy for water scarcity and drought, it is unclear to what extent Member States may impose far-reaching requirements for saving water on products, buildings and infrastructure without coming into conflict with the EU internal market requirements.

An important aspect of the climate change adaptation strategy is the use of a pricing policy and market-based instruments. The WFD requires the recovery of the costs of water services (Art. 9), taking account of the economic analysis of water use (Art. 5). By 2010, water-pricing policies were supposed to provide adequate incentives for users to use water resources efficiently.

Article 9 does not obstruct the funding of preventive or remedial measures from state resources, and account may also be taken of the social effects of recovery, and of special geographic and climatic conditions. Exceptions to the general rule of the recovery of the costs of water services may not, however, impede the achievement of the

objectives of the Directive, and must be explained in the river basin management plan. The WFD does not prohibit the use of economic and financial instruments, and their use is recommended in the Commission Communication on water scarcity and droughts. The principle «the user pays» plays a complementary role, in this context, to the role played by the principle «the polluter pays».

The use of water can be restricted by a pricing policy, which also provides the necessary state funds in order to ensure that water is managed in a sustainable fashion and that everyone has enough clean water at their disposal. A certain solidarity is the point of departure for this. Financial incentives usually take the form of a price or a tax. A realistic price for drinking water ensures that people do not waste water needlessly.

Recent research into the allocation of scarce water shows that a system of tradable water rights can – from an economic point of view – form a good supplement to the existing administrative law instruments, but that legislation is more suitable for the guarantee of primary use needs – safety, utilities such as drinking water supply, and vulnerable nature.³⁵

For the climate change adaptation strategy to be successful, it is necessary that the interpretation and understanding of Article 9 – including the financial instruments utilized to prevent water shortages – must be seen in the light of the general aims of the WFD.

The WFD offers enough instruments to facilitate the protection of the fresh water resource and to prevent water shortages. In order to achieve actual and effective use of the existing instruments, however, it is to be recommended that the environmental objectives in Article 4 are expanded to include the objective «to limit water shortage by ensuring a ‘good quantitative surface water status’». This is necessary because many of the instruments in the WFD are formulated in such a way that they should contribute to achieving the environmental objectives; sustainable use of scarce surface water in order to prevent water shortage is, however, one of the general objectives.

For measures in policy areas other than water management – such as requirements in relation to the efficient use of water in buildings, certificates and labelling – the WFD does not lay down any mandatory instruments, even though such measures could be included as supplementary measures in the programme of measures. However, clarity is needed on the question how far the Member States have power to set far-reaching product requirements without infringing the internal market rules. A programme of measures may also include a good land use plan, elaborated in the local and national spatial plans.

³⁵ A. JOLINK, *Legal implications of introducing Economic Instruments in the Field of European and Dutch Water Management*, Utrecht University, 2010.

F. – SAFETY AGAINST FLOODING

The protection against flooding is based on Directive 2007/60/EC.

1. – *Substantive provisions*

In order to have available an effective tool for information, as well as a valuable basis for priority setting and further technical, financial and political decisions regarding flood risk management, it is necessary to provide for the establishing of flood hazard maps and flood risk maps showing the potential adverse consequences associated with different flood scenarios, including information on potential sources of environmental pollution as a consequence of floods. In this context, Member States should assess activities that have the effect of increasing flood risks. In the end Member States have to make flood risk management plans. The directive does not offer any safety standard to citizens. The directive obliges close cooperation with the Water Framework Directive (Article 9) especially when it comes to information exchange and the achievement of common synergies and benefits having regard to the environmental objectives laid down in Article 4 of Directive 2000/60/EC.

2. – *Procedural provisions*

In particular the development of the first flood hazard maps and flood risk maps and their subsequent reviews shall be carried out in such a way that the information they contain is consistent with relevant information presented according to the Water Framework Directive. It is also possible to integrate both management plans. To make it easier for the public it is obliged to coordinate the active involvement of all interested parties under the Flooding Directive and the Water Framework Directive. The information that has to be made available to the public are the preliminary flood risk assessment, the flood hazard maps, the flood risk maps and the flood risk management plans. Active involvement of interested parties in the production, review and updating of the flood risk management plans must be encouraged.

G. – BATHING WATER

The Bathing Water Directive³⁶ aims to preserve, protect and improve the quality of the environment and to protect human health by complementing the WFD and has to be coordinated with Council Directive 91/271/EEC of 21 May 1991 con-

³⁶ Directive 2006/7/EC of the European Parliament and of the Council of 15 February 2006 concerning the management of bathing water quality and repealing Directive 76/160/EEC.

cerning urban waste-water treatment and Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources.³⁷ The directive applies to any surface water where the competent authority expects a large number of people to bathe and has not imposed a permanent bathing prohibition, or issued permanent advice against bathing (hereinafter bathing water).

The Bathing Water Directive is the most explicit example of a water directive with great attention for the position of the «consumer». The preamble states that appropriate information on planned measures and progress on implementation must be disseminated to stakeholders. The public should receive appropriate and timely information on the results of the monitoring of bathing water quality and risk management measures in order to prevent health hazards, especially in the context of predictable short-term pollution or abnormal situations. New technology that allows the public to be informed in an efficient and comparable way on bathing waters across the Community should be applied. With a reference to the ratification by the European Community of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Århus Convention) the preamble states that specific provisions on public access to information and to provide for public participation in its implementation to supplement Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information³⁸ and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment³⁹ are included in the Bathing Water Directive.

1. – *Substantive provisions*

Substantive elements of the directive are provisions for the monitoring and classification of bathing water quality and the management of bathing water quality. Management means that measures will be taken for the establishment and maintenance of a bathing water profile; the establishment of a monitoring calendar; monitoring bathing water; assessing bathing water quality; classifying bathing water; identifying and assessing causes of pollution that might affect bathing waters and impair bathers' health; giving information to the public; taking action to prevent bathers' exposure to pollution and taking action to reduce the risk of pollution. Of a more procedural char-

³⁷ OJ L 375, 31.12.1991, p. 1. Directive as amended by Regulation (EC) No. 1882/2003.

³⁸ OJ L 41, 14.2.2003, p. 26.

³⁹ OJ L 156, 25.6.2003, p. 17.

acter are the provisions on information to the public on bathing water quality (article 1).⁴⁰

Monitoring obligations refer directly to eventual risks for the public, since the monitoring point shall be the location within the bathing water where most bathers are expected or the greatest risk of pollution is expected, according to the bathing water profile (Article 3).

Bathing waters have to be classified as (a) «poor»; (b) «sufficient»; (c) «good»; or (d) «excellent». By the end of the 2015 bathing season, all bathing waters must be at least «sufficient». If a bathing water is classified as «poor» for five consecutive years, a permanent bathing prohibition or permanent advice against bathing must be introduced.

In case of exceptional circumstances that may have an adverse impact on bathing water quality and on bathers' health, measures have to be taken. Such measures must include information to the public and, if necessary, a temporary bathing prohibition (article 7).

In case of cyanobacterial proliferation and a health risk has been identified or presumed, adequate management measures shall be taken immediately to prevent exposure, including information to the public (article 8). The same regime applies for other parameters and waste (article 9).

2. – *Procedural provisions*

Exchange of information is regulated in Article 11, dealing with public participation and Article 12 dealing with information to the public. Member States shall encourage public participation in the implementation of this Directive and shall ensure the provision of opportunities for the public concerned :

- to find out how to participate, and
- to formulate suggestions, remarks or complaints.

This shall relate, in particular, to the establishment, review and updating of lists of bathing waters. Competent authorities shall take due account of any information obtained (Article 11).

⁴⁰ The term «public concerned» in the Bathing Water Directive has the same meaning as in Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment. *OJ L 175*, 5.7.1985, p. 40. Directive as last amended by Directive 2003/35/EC of the European Parliament and of the Council (*OJ L 156*, 25.6.2003, p. 17).

Member States shall ensure that the following information is actively disseminated and promptly made available during the bathing season in an easily accessible place in the near vicinity of each bathing water :

- (a) the current bathing water classification and any bathing prohibition or advice against bathing by means of a clear and simple sign or symbol;
- (b) a general description of the bathing water, in non-technical language, based on the bathing water profile;
- (c) in the case of bathing waters subject to short-term pollution :
 - notification that the bathing water is subject to short-term pollution,
 - an indication of the number of days on which bathing was prohibited or advised against during the preceding bathing season because of such pollution, and
 - a warning whenever such pollution is predicted or present,
- (d) information on the nature and expected duration of abnormal situations during such events;
- (e) whenever bathing is prohibited or advised against, a notice advising the public and giving reasons;
- (f) whenever a permanent bathing prohibition or permanent advice against bathing is introduced, the fact that the area concerned is no longer a bathing water and the reasons for its declassification; and
- (g) an indication of sources of more complete information.

Appropriate media and technologies, including the Internet, must be used to disseminate actively and promptly the above-mentioned information and also the following information in several languages, when appropriate :

- (a) a list of bathing waters;
- (b) the classification of each bathing water over the last three years and its bathing water profile, including the results of monitoring carried out in accordance with this Directive since the last classification;
- (c) in the case of bathing waters classified as being «poor», information on the causes of pollution and measures taken with a view to preventing bathers' exposure to pollution and to tackle its causes; and
- (d) in the case of bathing waters subject to short-term pollution, general information on :
 - conditions likely to lead to short-term pollution,
 - the likelihood of such pollution and its likely duration,

- the causes of the pollution and measures taken with a view to preventing bathers’ exposure to pollution and to tackle its causes.

The list referred to in point (a) shall be available each year before the start of the bathing season. The results of the monitoring referred to in point (b) shall be made available on the Internet upon completion of the analysis.

Member States and the Commission shall, wherever possible, provide information to the public using geo-referenced technology and present it in a clear and coherent manner, in particular through the use of signs and symbols.

The Commission publishes an annual summary report on bathing water quality in the Community, including bathing water classifications, by 30 April every year, including via the Internet. An active participation of consumers is provided in article 15 : when the Commission presents a draft of the measures to be taken, it shall consult representatives of Member States, regional and local authorities, relevant tourist and consumer organisations and other interested parties.

V. – Analysis and conclusion

When we have a look at the relevant provisions in EU water law which are related to consumer protection, we can see a strong focus on substantive provisions. These are meant to guarantee a level of protection to citizens or consumers. Several instruments are used in European water law to realize the environmental and consumer protection objectives. The focus lies on protection of water resources, setting environmental quality standards, making plans and programmes, emission control instruments, monitoring and reporting obligations and the obligation for the recovery of costs for water services. Important elements of the right to water as discussed in paragraph 3 are not fully guaranteed in EU water directives like provisions with regard to physical and equal accessibility and provisions with regard to price setting.

TABLE 1
Substantive provisions for consumer protection in EU Water Law

	<i>WFD</i> 2000/60	<i>Drinking water</i> 98/83	<i>Sanitation</i> (91/271)	<i>Fresh water supply</i> 2000/60	<i>Flooding</i> 2007/60	<i>Bathing water</i> 2006/7
<i>Water quality :</i>						
– plans & programmes	+ (art. 13) + (art. 11)	-	-	+ (art. 13) + (art. 11)	+ (art. 7)	-
– quality standards	+ (art. 4 & 16)	+ (art. 4 & 5)	+	-		+
– emission control	(art. 10 & 11)	-	+ (art. 12)	-	-	-
– treatment	+ (art. 11)	+	+ (art. 3 & 4)	-	-	-
– monitoring	+ (art. 8)	+ (art. 10)	+ (art. 15)	-	+ (art. 7 en 9)	+ (art. 3 & 4)

TABLE 1
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	<i>WFD</i> 2000/60	<i>Drinking water</i> 98/83	<i>Sanitation</i> (91/271)	<i>Fresh water supply</i> 2000/60	<i>Flooding</i> 2007/60	<i>Bathing water</i> 2006/7
– protected areas	+ (art. 6 & 7)	+ (art. 7)	+ (art. 5)	-		+ (art. 3)
<i>Accessibility :</i>						
– physical	+/- (art. 1)	-	-	+/- (art. 1)	-	-
– equal		-	-		-	-
<i>Availability :</i>						
– sustainable	+/- (art. 1)	-	-	+/- (art. 1)	-	-
– equitable use of fresh water	+/- (art. 1)		-	+/- (art. 1)	-	+
<i>Protection against flooding</i>	+/- (art. 1)	-	-	-	+/- (no standards)	
<i>Protection of ecosystems</i>	+ (art. 1, 4, 6)	-	+ (art. 5)	+/- (art. 1)	-	+/-
<i>Price (affordable and fair)</i>	+ (art. 1 & 9)	-	-	+ (art. 1 & 9)	-	-

EU law and the European Court of Justice offer the consumer quite some legal protection. EU law requires *effective* legal protection and the Court of Justice decided that environmental quality standards as well as plans and programmes⁴¹ give rights to citizens on which they have to be able to rely on before the courts.

However, some remarks have to be made. Mandatory obligations are of course easier to rely on before the courts than voluntary measures. Besides, it is most important that plans and programmes give full clearance on consumer rights and obligations. If plans and programmes are vague on the distribution of profits and burdens, the distribution of water between all interested parties, the way the recovery of costs is taken care of, the measures that will be taken to comply with quality standards as well as the costs and time that are needed, it is hard to enforce rights before the court. Furthermore, competent authorities have room for policy discretion when it comes to choices as to what measures will be taken and when. It is not up to judges to decide on these matters. Accountability of these kinds of decisions will have to take place in a more political arena.

We have seen that EU water directives give special attention to the accessibility of information and public participation in decision making but still some problems remain to be solved and consumer protection can be improved.

⁴¹ ECJ Case C-237/07, *Dieter Janeczek v. Freistaat Bayern* [2008], I-06221.

TABLE 2

Procedural provisions for consumer protection in EU Water Law

	<i>WFD</i> 2000/60	<i>Drinking water</i> 98/83	<i>Sanitation</i> 91/271	<i>Fresh water supply</i> 2000/60 & <i>policy documents</i>	<i>Flooding</i> 2007/60	<i>Bathing water</i> 2006/7
Accessibility of information	art. 13 & 14		art. 16	art. 13 & 14	art. 9	art. 11, 12, 13
State and improvement of environment	+	+	+	+	+	++
Drinking water quality		+				
Plans & Programmes (measures)	+	-	-	+	+	+
	+	+	+/-	+	+	+
Price setting	+/-	-	-	+/-	+/-	-
Availability	-/+	-/+	+	+/-	-	++
Fair distribution	+/-	-	+/-	+/-	-	-
Transparency	+	+/-	+/-	+/-	+	++
Participation in decision making	+	-	-	+	+	+
Accountability	+/-	-/+	+/-	+/-	+/-	+/-
Access to justice	EU & national law	EU & national law	EU & national law	EU & national law	EU & national law	EU & national law

It may be a problem when there is an overkill of information, plans, programmes, monitoring results and reports. Individual consumers as well as consumer and environmental organizations need time, knowledge and money to participate properly in all foreseen procedures. Furthermore, it is difficult to participate in standard setting, price setting and prioritising the measures that will be taken to comply with all obligations that follow from the water directives. It is doubtful whether river basin management plans and programmes of measures give full insight in the way competent authorities deal with the need for equal access to water resources at a reasonable and fair price. It is also unclear whether all relevant information can be received from all competent authorities and private drinking water companies, like information on price setting, dangerous substances in drinking water or surface or groundwater, the effects of accidents and so on.

Procedural provisions like the right to information gain importance when consumers have access to the courts to ensure their rights. Access to the courts is only useful when the courts have enough detailed information, based on plans and programmes, to judge if the consumer is properly protected. The position of the consumer in EU water law is quite good, but can certainly be improved.