

elni

REVIEW

Nanomaterials as priority substances under the
Water Framework Directive

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The Marine Strategy Framework Directive and its
implementation in Spain

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Hong Kong Convention and EU Ship Recycling Regulation: Can
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Greening the Constitution. The principle of sustainable
development anchored in the Belgian Constitution

Peter De Smedt / Hendrik Schoukens / Tania Van Laer

Law and innovation in the context of nanomaterials:
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Editorial

Water is a precondition for human, animal and plant life as well as an indispensable resource for the economy. Thus, according to the *European Commission* the protection of water resources, of fresh and salt water ecosystems and of the water we drink and bathe in is therefore one of the cornerstones of environmental protection in Europe. Against this background the present issue of *elni Review* focuses on the legal framework for (the protection of) water in Europe and explains, among other things, how far it can cope with possible threats from emerging technologies and to what extent some of the legislation has been implemented in specific member States of the EU. Moreover, insights are provided into some new political or scientific initiatives to further develop the legal framework for protecting water.

First off, *Catherine Ganzleben* and *Steffen Foss Hansen* examine whether Directive 2000/60/EC ('Water Framework Directive', WFD), which aims to reduce and minimise the concentrations of dangerous chemicals in European waters, and related legal requirements include the right instruments to capture nanomaterials. They also consider whether techniques are available to allow for monitoring nanomaterials in surface waters and review data from modelling exercises that estimate concentrations of nanomaterials in EU waters.

Subsequently, *Ana Barreira* provides an overview of the main elements of the Union's Marine Strategy Framework Directive (MSFD) and analyses how Spain, as an EU country with 8000 km of coastal fringe, is complying with the directive and will review its marine governance framework.

The third article is by *Thomas Ormond* and takes another perspective, evaluating how far international and European legal instruments for the regulation of ship dismantling (potentially) ensure the safe and environmentally sound recycling of European ships in regions like South Asia.

Sarolta Tripolszky explains the concept of the term 'water services' in her contribution and outlines the economic and legal consequences of a narrow and broad definition. In this context and with specific reference to a collective complaint started by the NGOs EEB and WWF in 2006 against 11 EU member states to enforce the correct implementation of the WFD, she also describes the development of this legal instrument.

The final article with a focus on water is by *Marga Robesin* and describes current discussions on the question of how to achieve substantial water footprint reduction, focusing in particular on certification and labelling.

A second series of contributions to this issue of the *elni Review* covers a variety of other up-to-date legal issues, including the advancement and legal implementation of the concept of 'sustainable development'. To this end, *Eckard Reh binder*, who attended the United Nations Conference on Sustainable Development (Rio+20) in Rio de Janeiro in June 2012, shares some critical comments on the summit outcome.

The following contribution by *Peter de Smedt*, *Hendrik Schoukens* and *Tania Van Laer* examines the anchoring of sustainable development in the Belgian Constitution, discusses the concept's juridical enforceability and subsequently analyses the consequences of this qualification for the application in the jurisprudence.

In a further article *Julian Schenten* and *Martin Führ* present empirical data obtained by several survey methods focusing on companies which manufacture and/or use nanomaterials. They analyse the findings under the perspective of the degree to which REACH (Regulation EC 1907/2006) promotes innovations for sustainability in the field of nanomaterials.

In June 2012 the EU General Court adopted long awaited decisions in two cases in which it interprets for the first time Regulation 1367/2006 ('Aarhus Regulation') – *Anais Berthier* examines what real added value these two decisions have with regards to access to justice.

Finally, in a statement by *Almut Gaude* from BUND, the German branch of Friends of the Earth (FoE), the NGO expresses its perspective on the Rio+20 conference outcome.

We hope you enjoy reading the current journal. Contributions for the next issue of the *elni Review* are very welcome and may be sent to the editors by mid-February 2013.

Julian Schenten/Martin Führ

Water services and why a broad definition under the WFD is needed to ensure the polluter pays principle

Sarolta Tripolszky

1 Introduction

‘Water services’ is a term under the EU Water Framework Directive (WFD)¹ that describes economic activities which make use of water infrastructure that changes the physical characteristic of a water body. Economic actors who make use of water in this way are asked to come up for all or part of the costs and thus contribute to the achievement of good water status – the objective of the WFD.

However many European member states have applied a narrow definition of the term in their national legislation and restricted water services to the traditional water service sectors: wastewater treatment and municipal drinking water supply, leaving agriculture, mining, hydropower or navigation aside. Because of the narrow definition of this legal term the wrong economic policies are applied to water users resulting in a poor allocation of natural and financial resources. This goes against the very essence of the WFD which was adopted to start a new area in which all human pressures on water are dealt within a single framework and in which the polluter has to pay. The involvement of all relevant sectors and application of wise economics is crucial for the timely implementation of the WFD. In turn, this is essential for the European society and economy in view of the predicted increase in pressure on water in the future.

EEB and WWF started a collective complaint against 11 member states in 2006 to enforce the correct implementation of the Directive. A decision by the European court of Justice is expected in the fall of 2012. In this article I will explain the concept of the term ‘water services’ and outline the economic and legal consequences of a narrow and broad definition. The development of the collective (or strategic) complaint from 2006 till today will also be described.

2 The origins of the water services court case

In 2006 EEB and WWF noticed that some EU member states – in their implementation of the Water Framework Directive – were planning to exempt entire sectors from paying their fair share of the costs of water infrastructure. They therefore filed a collective complaint² in July 2006 against 11 EU Member States (Austria, Belgium,

Denmark, Estonia, Finland, Germany, Hungary, Ireland, Poland, Sweden and the Netherlands). It was argued that these countries had failed to comply with the provisions in Art. 5(1) of the EU WFD 2000/60/EC that defines which sectors will be part of the Directive’s cost recovery system and which ones will not.

In 2006 when the complaint was submitted, EEB, WWF and other environmental organisations were encouraged to apply a strategic approach with regard to infringements in order to help the European Commission to focus on the most important issues. Organisations were asked not to turn to the Commission in all (‘insignificant’) cases where there was a breach of law but to review a range of cases and select the ones that could have the most far reaching implications. NGOs have expected that the submission of a strategic complaint will speed up decision-making as compared to regular handling of ‘regular’ cases which normally take up a long time.

3 Why does the definition of a ‘water service’ matter?

Article 5(1) of the WFD prescribes that Member States compile an economic analysis of water uses for all the water bodies they are responsible for.³ The definition of water services in the WFD is a broad one and includes all economic activities that make use of water infrastructure that ‘compound’, i.e. they change the physical characteristic of a water body. An example of this would be a dam or a weir, or dyke or levy that fixes water flow. The EEB and WWF found that the 11 countries are systematically excluding certain water services, e.g. hydropower, navigation or cooling and irrigation water from the definition of water services in their national legislation.

¹ 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 in: Official Journal of the European Communities L 327/1.

² Complaint to the European Commission concerning failure of Austria, Belgium, Denmark, Estonia, Finland, Germany, Hungary, Ireland, Poland, Sweden and The Netherlands to comply with the provisions of the EU Water Framework Directive 2000/60/EC Art. 5(1).

³ Art. 5(1) WFD: “Each Member State shall ensure that for each river basin district or for the portion of an international river basin district falling within its territory:

– an analysis of its characteristics,
– a review of the impact of human activity on the status of surface waters and on groundwater,
– and an economic analysis of water use

is undertaken according to the technical specifications set out in Annexes II and III and that it is completed at the latest four years after the date of entry into force of this Directive.”

According to the definitions of the WFD, water use means water services together with any other activity identified under Art. 5 and Annex II of the WFD. Water services mean all services which provide, for households, public institutions or any economic activity: (a) abstraction, impoundment, storage, treatment and distribution of surface water or groundwater, (b) waste-water collection and treatment facilities which subsequently discharge into surface water.

As a result of this, the costs of a dam that would have multiple purposes – in terms of both drinking water provision and energy generation – would only need to be paid through the water bill but not through the energy bill. Apart from being an issue of fairness it also undermines one of the most innovative elements of current EU water policy; the WFD cost recovery mechanism not only requires the financial investment and operating costs of infrastructure to be recovered but also the environmental and resource costs. These are the negative impacts that infrastructure has on water ecosystems through disrupted water and sediments flows, and the costs of mitigating these impacts. The correct implementation of the cost recovery mechanism would completely change the economics and therefore decision-making relating to water infrastructure.

4 What effect does this have on water quality, water prices and water supply?

In the WFD implementation process each step builds strongly on the previous one(s). The compilation of the economic analysis of water uses provides a foundation for a number of further steps such as the analysis of the cost-effectiveness of potential measures, disproportionate cost analysis, and finally the drawing up of River Basin Management Plans (RMBP) and the Programme of Measures (PoM). However it is difficult to define the most cost-effective measures if not all affected sectors are correctly identified but some are purposefully left out from the scope of potential measures.

More concretely, Member States are only required to carry out an assessment of the recovery of costs for water services from users but not for any other activity (Art. 9 WFD). Thus the way in which Member States define water services in national legislation is vital as only those sectors included will be asked to contribute financially to the recovery of costs.

The development of water infrastructure, whether for the purpose of energy, navigation, irrigation or cooling has been identified by European member states as one of the main drivers behind the poor quality (in chemical, morphological and biological terms) of Europe's rivers and lakes. Industry is the biggest consumptive user of water while agriculture is the most important polluter in Europe⁴. Addressing these issues will require significant investments. This investment can be funded through the recovery of the real costs of this infrastructure. However that will only be possible, especially at a time when governments face enormous budget deficits, when these costs are shared equally among the different sectors who benefit economically from the infrastructures.

⁴ 3rd European Water Conference Brussels, 24 – 25 May 2012. Background document ANNEX A. Preliminary assessment River Basin Management Plans, Ecologic and European Commission 2012.

5 Examples from Germany and Spain

A recent analysis on water services and water pricing in Germany by Grüne Liga⁵ shows that many economic sectors enjoy wide-ranging exemptions from water abstraction fees or benefit from significantly lower rates than households. Also, these sectors are often additionally subsidised by means of public budgets (EU and national).

Thermal power stations – which abstract 20.1 billion m³ (2007) of water annually – represent the largest water users nationally. A large part of this water transpires in the cooling towers of energy plants to never to return in the river or to be returned much warmer, which is a problem for temperature-sensitive fish such as the Atlantic salmon. Coal mining requires about 800 million m³ of freshwater annually in Germany, contributing to lowered water tables across the affected regions. However, mining and energy production are by and large exempted from a duty to pay in all federal states where a tax or fee is levied on water abstraction.⁶

Grüne Liga⁷ concludes, that the application of the polluter pays principle in Germany ranges from nearly full application to no inclusion and anywhere in between depending on the water use. In fact, in Europe there are many direct and indirect subsidies that result in a perverse situation that instead of 'polluter pays' principle 'the polluter is paid' rules.

For example the majority of the EU's Common Agriculture Policy (CAP) subsidies contribute to damaging the environment, including water⁸. In the case of the water services complaint, agriculture is affected because of the irrigation. Farmers who use irrigation to increase their production and income should pay the full (or appropriate) price for the establishment, use and maintenance of the infrastructure, as well as for the environmental damage which irrigation causes (e.g. depletion of groundwater resources, degradation of rivers, lakes and wetlands caused by decreased groundwater levels, etc). The reality however is that establishment of the irrigation infrastructure is often subsidised by CAP and national budgets and agricultural water use is mostly free or lower charged than household use. In many places in Europe, farmers do not even measure their water use as water metering is not obligatory.

⁵ Economic Instruments in the Water Framework Directive: An Opportunity for Water Protection. Shortcomings in the First Management Cycle and the Need for Action. Policy Paper from Grüne Liga e.V. 2011.

⁶ Grüne Liga e.V. 2011 *supra* note 5.

⁷ Grüne Liga e.V. 2011 *supra* note 5.

⁸ The Truth behind the CAP – 13 Reasons for Green Reform, Coalition of NGOs, 2011.

	Groundwater		Surface water	
	per m ³	actual charge (as % of statutory rate)	per m ³	actual charge (as % of statutory rate)
Statutory rate	€0.10	100%	€0.02	100 %
Abstraction for				
Public water supply	€ 0.10	100%	–	–
Other production purposes	€ 0.10	100 %	€ 0.02	100%
Cooling water	€0.10	100 %	€0.005	25%
Opencast mine drainage	€0.00	0 %	€0.00	0%
with exemptions				
– for consumption relating to water laws	€ 0.02	20%	€ 0.02	100%
– for commercially used share/production	€ 0.02	20%	€ 0.02	100%
– for commercially used share/cooling water	€ 0.005	5%	€ 0.005	25%
Irrigation*	€ 0.007	7%	€ 0.0014	7%
Aquaculture	€ 0.00	0%	€ 0.00	0%

Table 1: Charge rates in Brandenburg for selected water uses (according to s. 40 of the Brandenburg Water Act [Brandenburgisches Wassergesetz])

*Under § 40, 93% of the irrigation water abstracted is deemed to have been "redischarged"; an untenable regulation.

The example of Spain shows how perverse subsidies lead to environmental depletion. The Spanish national plan to increase irrigation efficiency has delivered mixed results: while irrigation efficiency increased, total agricultural water use hasn't decreased because the irrigated area was enlarged in parallel⁹. Furthermore, there is an estimated half million illegal boreholes installed in the country sipping of groundwater¹⁰.

Including irrigation in the definition of water services and implying correct prices that cover the true cost of water use would provide a long-term solution to these problems. Farmers would receive an incentive to adjust their production systems to the availability of regional water resources. A water-saving culture would evolve. Subsidies could be re-directed to help farmers adapt to the changing environment instead of conserving false economic structures.

The latest analysis of the European Commission¹¹ and EEB¹² show that economic tools in the water sector are not used efficiently by other European countries either. The German and Spanish examples can be seen as exemplary for the rest of Europe.

6 What are the next steps in this case for Germany and other countries?

Since the case was brought to the Commission, the case against Poland and Estonia have been closed because they have taken steps to comply. The case against Ireland is still open but Ireland has practically agreed to change its legislation. So the court case is still open in the case of 8 countries: Austria, Belgium, Denmark, Finland, Germany, Hungary, the Netherlands and Sweden.

The European Commission issued reasoned opinions to these Member States at the end of 2011¹³. The first

⁹ Ten Rivers - A Review of Europe's New Water Protection. EEB 2012.

¹⁰ Illegal water use in Spain. Causes, effects and solutions WWF/Adena May 2006.

¹¹ Ecologic and European Commission, 2012 supra note 4.

¹² Position on the Blueprint to Safeguard Europe's Water, European Environmental Bureau, 8th May 2012.

¹³ Environment: Commission asks Ireland to recover costs of all water services. European Commission - Press release Reference: IP/11/1433

was issued against Germany who the European Commission finally took to court in May 2012¹⁴. The decision of the European Court of Justice against Germany will be binding on all member states.

7 What are the main implications?

The implications of the court decision could be far reaching. Agriculture, energy, navigation and industry all cause significant damage to aquatic ecosystems. If all sectors would be adequately included in the definition of water services they would become part of the economic analyses. This would determine the true resource and environmental costs of water use by these sectors. Based on this, a fair contribution of the sectors to the recovery of costs could be calculated. In the end this would enable countries to modify pricing policies (water prices) and subsidies to reflect the true costs of water use and pollution.

Some of the possible long-term consequences would be:

- those who use or pollute water more would pay more. Those who use and pollute less would pay less;
- the individual consumer would not be required to pay the bill of business directly;
- those using or polluting more would receive a powerful economic incentive to become more efficient;
- water efficiency technologies and measures would spread quickly without implementing costly awareness raising campaigns or ineffective voluntary commitments;
- increased knowledge about the environmental and resource costs of water using sectors would result in the revision and shifting of subsidies;
- sufficient financing would be available for implementing the WFD; and
- the overall costs of achieving the WFD objective would be lower.

8 Conclusion

EEB and WWF have started a collective complaint against 11 EU member states in 2006 to enforce the broad definition of the term ‘water services’ of the EU Water Framework Directive. The term ‘water services’ identifies the economic actors who use water-related infrastructure such as weirs, dams, levies, treatment and supply facilities and the like for their operations.

Many EU countries use ‘water services’ in a narrow sense for a subset of water infrastructure-using activities, excluding entire sectors, like agriculture, navigation, industry or hydropower generation. EEB and WWF hope that the judgment of the European Court of Justice will prove that a broad definition of the term ‘water services’ has to be applied. This will ensure that all water-using sectors are included in the implementation of the WFD and contribute their fair share to the building and maintenance of infrastructure as well as for mitigating the negative environmental effects of infrastructure. This will fundamentally change the water management and result in a more fair and balanced sharing of responsibility including lessening the financial burden on the individual customer and governments who at the moment bear most of the costs. The broad implementation of ‘water services’ is a concrete example of making the polluter pays principle work in practice. This is why the complaint and the decision expected later in 2012 will be of crucial importance.

EEB and WWF hope that the decision of the European Court of Justice will be quickly followed up by the change of national legislation in Germany and the other countries, broadening the definition of water uses and services. Secondly governments need to assess and revise their national water pricing policies: that the system of taxes and levies is corrected and unjust exemptions and indirect harmful subsidies are abolished. It is crucial that this is done promptly so as to impact the planning of the second round of River Basin Management Plans, which have already started and are due to be completed in 2015.

Another lesson learnt from the water services complaint is that the collective, ‘strategic’ approach hasn’t worked better than the ‘regular’ approach. Because of the number of member states involved but also because of the level of abstraction associated to such a strategic complaint it took the European Commission six years to finally take a member state to court. This isn’t shorter than the usual period for handling complaints. Once the court decision is taken it might take countries several more years to apply the decision and change national laws and economic incentives accordingly. Thus it seems that the additional resources NGO invested to submit strategic complaints did not allow the Commission to handle the case more efficiently and with more priority.

Date: 24/11/2011. And: Environment: Commission asks Belgium, Denmark, Finland and Sweden to recover costs of all water services European Commission - Press release Reference: IP/11/1264 Date: 27/10/2011.

¹⁴ Environment: Commission refers Germany to Court over incomplete cost recovery for water services. European Commission - Press release Reference: IP/12/536 Date: 31/05/2012.

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The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.

The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

The Environmental Law Division of the Öko-Institut:

The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

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The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R. carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

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The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.

The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.

The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of homo oeconomicus institutionalis, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

The areas of research cover

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- Role of standardization bodies
- Biodiversity and nature conservation
- Water and energy management
- Electronic public participation
- Economic opportunities deriving from environmental legislation
- Self responsibility

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elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focusing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt).

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researchers, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

elni publishes a series of books entitled "Publications of the Environmental Law Network International". Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference.

elni Website: elni.org

The elni website www.elni.org contains news about the network. The members have the opportunity to submit information on interesting events and recent studies on environmental law issues. An index of articles provides an overview of the elni Review publications. Past issues are downloadable online free of charge.

elni Board of Directors

- Martin Führ - Society for Institutional Analysis (sofia), Darmstadt, Germany;
- Jerzy Jendroska - Centrum Prawa Ekologicznego (CPE), Wrocław, Poland;
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