

**Case C-525/20**

**Request for a preliminary ruling**

**Date lodged:**

19 October 2020

**Referring court:**

Conseil d'État (France)

**Date of the decision to refer:**

14 October 2020

**Applicant:**

Association France Nature Environnement

**Defendant:**

Premier ministre

Ministre de la Transition écologique et solidaire

---

**CONSEIL D'ÉTAT**

acting in its judicial capacity

[...]

**FRANCE NATURE ENVIRONNEMENT**

[...]

Having regard to the following procedure:

By an application and a further pleading, lodged on 1 April 2019 and 22 September 2020 at the Judicial Affairs Secretariat of the Conseil d'État (Council of State, France), the association France Nature Environnement requested that the Conseil d'État (Council of State):

(1) annul as *ultra vires*, first, Decree No 2018-847 of 4 October 2018, in so far as Article 7 thereof provides that, 'when assessing whether the programmes and administrative decisions referred to in Article L. 212-1(XI) are compatible with

the objective of preventing the deterioration of water quality referred to in Article L. 212-1(IV)(4), account shall be taken of preventive and mitigation measures and no account shall be taken of temporary, short-term impacts without lasting consequences', and, second, the implied decision resulting from the refusal to grant its request for those provisions to be withdrawn;

(2) if necessary, refer the matter to the Court of Justice of the European Union for a preliminary ruling in order to determine whether a Member State complies with Article 4(6) of Directive 2000/60/EC of 23 October 2000 by providing in its legislation that, when assessing whether the programmes and administrative decisions taken in the field of water policy are compatible with the objective of preventing the deterioration of water quality laid down in Article 4(1) of that directive, no account is to be taken of temporary, short-term impacts without lasting consequences;

[...] **[Or. 2]** [...]

The applicant submits that the contested decree, in so far as it provides, in Article 7 thereof, that, when assessing whether programmes and administrative decisions are compatible with the objective of preventing the deterioration of water quality, no account is to be taken of temporary, short-term impacts without lasting consequences, infringes Directive 2000/60/EC of 23 October 2000, in particular Article 4(1) of that directive, which prohibits any deterioration of the status of bodies of water, whether temporary or long-term.

In her defence, lodged on 11 June 2020, the ministre de la transition écologique et solidaire (Minister for Ecological and Inclusive Transition) contends that the application should be dismissed. She argues that the plea raised is unfounded.

[...]

Having regard to:

- Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000;
- the code de l'environnement (Environmental Code);
- Decree No 2005-475 of 16 May 2005;
- the judgment of the Court of Justice of the European Union of 1 July 2015 in Case C-461/13;

[...]

Whereas:

1. By its application, the association France Nature Environnement (FNE) is seeking the annulment as *ultra vires*, first, of the Decree of 4 October 2018, in so far as it

provides, in Article 7 thereof, for the addition of a final paragraph to Article R. 212-13 of the Environmental Code, worded as follows: ‘no account shall be taken of temporary, short-term impacts without lasting consequences’, and, second, of the Prime Minister’s implied decision resulting from the refusal to grant its request for those provisions to be withdrawn, arguing that they are inconsistent with the objectives of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, in particular Article 4 thereof, inasmuch as they exclude, from the administrative authority’s assessment [**Or. 3**] of whether programmes and administrative decisions are compatible with the statutory objective of preventing the deterioration of water quality, the temporary, short-term impacts without lasting consequences of those programmes.

2. Article 4(1) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 provides that, in making operational the programmes of measures specified in the river basin management plans and for surface waters, ‘(i) Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8; / (ii) Member States shall protect, enhance and restore all bodies of surface water, subject to the application of subparagraph (iii) for artificial and heavily modified bodies of water, with the aim of achieving good surface water status at the latest 15 years after the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8; / (iii) Member States shall protect and enhance all artificial and heavily modified bodies of water, with the aim of achieving good ecological potential and good surface water chemical status at the latest 15 years from the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8; / ...’. In its judgment of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland eV v Bundesrepublik Deutschland* (C-461/13), the Court of Justice of the European Union clarified the concept of deterioration of the status of a body of water, by holding that Article 4(1)(a)(i) to (iii) of Directive 2000/60/EC of 23 October 2000 ‘must be interpreted as meaning that the Member States are required – unless a derogation is granted – to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive’.
3. Nevertheless, two derogations are provided for in Article 4(6) and (7) of Directive 2000/60/EC. Article 4(6) of that directive provides that: ‘*Temporary deterioration in the status of bodies of water shall not be in breach of the requirements of this Directive if this is the result of circumstances of natural cause or force majeure which are exceptional or could not reasonably have been foreseen, in particular*

*extreme floods and prolonged droughts, or the result of circumstances due to accidents which could not reasonably have been foreseen*’ and attaches five cumulative conditions to that derogation. For its part, Article 4(7) provides that Member States will not be in breach when *‘failure to achieve good groundwater status, good ecological status or, where relevant, good ecological potential or to prevent deterioration in the status of a body of surface water or groundwater is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater’* or when *‘failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities’* and four cumulative conditions are met.

- 4 It therefore follows from Directive 2000/60/EC that the objective of preventing the deterioration of surface water quality must lead Member States to refuse authorisation for an individual project where it may cause a [Or. 4] deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive, subject to the derogations provided for in Article 4(6) and (7) thereof.
- 5 According to Article L. 212-1(IV) of the Environmental Code, adopted for the purpose of transposing that directive, the prevention of deterioration of water quality is one of the water quality and quantity objectives established by the water development and management master plans, Article L. 212-1(XI) thereof providing that programmes and administrative decisions in the field of water policy must be compatible or be made compatible with the provisions of those plans.
6. The Minister for Ecological Transition argues, in her pleadings before the Conseil d’État (Council of State), that the provisions of Article 7 of the contested decree which are being challenged by the applicant association do not fall within the derogation relating to a temporary deterioration in the status of bodies of water referred to in Article 4(6) of Directive 2000/60/EC – which must be the result of circumstances of natural cause or force majeure – a derogation which was transposed by Article 22 of the décret du 16 mai 2005 relatif aux schémas directeurs d’aménagement et de gestion des eaux (Decree of 16 May 2005 relating to water development and management master plans) and codified in Article R. 212-24 of the Environmental Code; instead, she argues that those provisions of the contested decree fall within the derogation provided for in Article 4(7) of Directive 2000/60/EC, under which deteriorations in the status of a body of water resulting from new sustainable human development activities do not constitute an infringement of that directive provided that four cumulative conditions are met. In that regard, she produces a document drawn up in December 2017 by the relevant authorities of the EU Member States and the Commission, entitled ‘Common implementation strategy for the water framework directive and the floods directive’, which states that, when such activities have on the status of a body of water only a temporary, short-term impact without lasting consequences, the

activity in question may be authorised without that authorisation being made subject to compliance with the cumulative conditions laid down by Article 4(7) of Directive 2000/60/EC.

7. In those circumstances, the response to the applicant association's plea alleging infringement of Article 4 of Directive 2000/60/EC depends on whether, having regard to the objective of preventing the deterioration of surface water quality which must lead Member States to refuse, unless a derogation is granted, authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status, the administrative authority can disregard the temporary, short-term impacts without lasting consequences of the programmes and projects subject to its authorisation and, if it can, under what conditions and to what extent.
8. Since this question raises a serious difficulty of interpretation of EU law, it is necessary to refer the matter to the Court of Justice of the European Union, pursuant to Article 267 of the Treaty on the Functioning of the European Union, and, pending a ruling by the Court of Justice, to stay the proceedings on the application. **[Or. 5]**

HAS DECIDED AS FOLLOWS:

[...] The proceedings relating to the application of the association France Nature Environnement are stayed until the Court of Justice of the European Union has given a preliminary ruling on the following questions:

- Should Article 4 of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 be interpreted as permitting Member States, when authorising a programme or project, not to take into account their temporary, short-term impacts on surface water status which are without lasting consequences?
- If so, what conditions should those programmes and projects meet for the purposes of Article 4 of that directive and in particular paragraphs 6 and 7 thereof?

[...] **[Or. 6]** [...]