

**Case C-723/21**

**Request for a preliminary ruling**

**Date lodged:**

29 November 2021

**Referring court:**

Verwaltungsgericht Cottbus (Germany)

**Date of the decision to refer:**

29 November 2021

**Applicants:**

Stadt Frankfurt (Oder)

FWA Frankfurter Wasser- und Abwassergesellschaft mbH

**Defendant:**

Landesamt für Bergbau, Geologie und Rohstoffe

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[...]

VERWALTUNGSGERICHT COTTBUS (Administrative Court, Cottbus,  
Germany)

ORDER

[...]

In the administrative court proceedings of

1. Stadt Frankfurt (Oder) (Town of Frankfurt (Oder)), represented by its Mayor, [...]
2. FWA Frankfurter Wasser- und Abwassergesellschaft mbH, [...] Frankfurt (Oder),

applicants,

[...]

v

President of the Landesamt für Bergbau, Geologie und Rohstoffe (Regional Office for Mining, Geology and Raw Materials), [...] Cottbus, [...],

defendant,

Joined party:

Lausitz Energie Bergbau AG, [...] Cottbus,

[...]

concerning: water law

the 5th Chamber of the Administrative Court, Cottbus,

on 29 November 2021,

[...]

made the following **o r d e r**:

The following questions are referred to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU:

1

- a. Is Article 7(3) 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 ('the WFD') to be interpreted as meaning that all members of the public directly concerned by a project are entitled to bring judicial proceedings asserting breaches of the duty:

(a) to avoid deterioration in the quality of bodies of water intended for the production of drinking water,

(b) to reduce the level of purification treatment required in the production of drinking water,

on the basis of third-party protection in the context of the ban on deterioration of groundwater (see CJEU, judgment of 28 May 2020, *Land Nordrhein-Westfalen*, C-535/18, paragraph 132 et seq., and judgment of 3 October 2019, *Wasserleitungsverband Nördliches Burgenland and Others*, C-197/18, paragraphs 40 and 42)?

- b. If Question (a) is answered in the negative:

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In any event, are applicants who have been tasked with the production and purification treatment of drinking water entitled to bring proceedings asserting breaches of the prohibitions and requirements under Article 7(3) of the WFD?

- 2 In addition to the mandate for longer-term planning in management plans and programmes of measures, does Article 7(3) of the WFD contain, in respect also of bodies of water outside safeguard zones within the meaning of the second sentence of Article 7(3) of the WFD, an obligation, similar to that in Article 4 of the WFD, to refuse authorisation for specific projects on the ground of a breach of the ban on deterioration (see CJEU, judgment of 28 May 2020, *Land Nordrhein-Westfalen*, C-535/18, paragraph 75)?
- 3 Given that – unlike Annex V, referred to in Article 4 of the WFD – Article 7(3) of the WFD does not set its own parameters for assessing the ban on deterioration:
  - a. Under what conditions is it to be assumed that a body of water has deteriorated and, consequently, the level of purification treatment required in the production of drinking water has increased?
  - b. Could the limit values of Annex I to Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption (‘the Drinking Water Directive’) be regarded as the relevant point of reference for an increase in the level of purification treatment and thus for the ban on deterioration under Article 7(3) of the WFD, as might be inferred from the last part of Article 7(2) of the WFD?
  - c. If Question (b) is answered in the affirmative:
 

Can there be a breach of the ban on deterioration under Article 7(3) of the WFD where the only significant value is not a limit value under Parts A or B of Annex I [to the Drinking Water Directive] but an ‘indicator parameter’ in accordance with Part C of Annex I?
- 4 When is a breach of the ban on deterioration, in terms of the law on drinking water, in Article 7(3) of the WFD to be assumed (see, in relation to the criterion for the ban on deterioration under Article 4 of the WFD: CJEU, judgment of 28 May 2020, *Land Nordrhein-Westfalen*, C-535/18, paragraph 119, and, previously, judgment of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland*, C-461/13, paragraph 52)?
  - a. Is any deterioration sufficient for the assumption of a breach  
or
  - b. must it be probable that the indicator parameter for sulphate of 250 mg/l is not being complied with

or

- c. must there be a threat of remedial action, within the meaning of Article 8(6) of the Drinking Water Directive, which increases the treatment effort involved in the production of drinking water?
- 5 Does Article 7(3) of the WFD also contain, in addition to the substantive criteria for examination, specifications regarding the regulatory approval procedure, that is to say, is the Court's case-law on Article 4 of the WFD transferable to the scope of examination under Article 7(3) of the WFD (see CJEU, judgment of 28 May 2020, *Land Nordrhein-Westfalen*, C-535/18 – second question referred)?
- 6 Must the developer also commission an expert's investigation of a possible deterioration under Article 7(3) of the WFD as soon as the project is likely to infringe the provisions of Article 7(3) of the WFD?
- 7 Must it be assumed in that respect also that the investigation must have been conducted by the time of the decision taken under water law, with the result that an investigation carried out subsequently during the court proceedings cannot remedy the illegality of the authorisation granted under water law (see CJEU, judgment of 28 May 2020, *Land Nordrhein-Westfalen*, C-535/18, paragraphs 76 and 80 et seq.)?
- 8 In the balancing of interests carried out in the context of authorisation, can the requirements and prohibitions under Article 7(3) of the WFD be outweighed by the objective pursued by the project where, for example, the purification treatment effort involved is low or the purpose of the project is of particular importance?
- 9 Does Article 4(7) of the WFD apply to Article 7(3) thereof?
- 10 What obligations going beyond Article 4 of the WFD can be inferred from Article 7(2) of the WFD, with the consequence that they must be taken into account in a project authorisation procedure?

**Facts:**

The first applicant is responsible for supplying its approximately 57 000 inhabitants with drinking water. In order to fulfil that statutory task, it makes use of the services of the second applicant. The second applicant operates a waterworks on the basis of a permit granted to it under water law. The waterworks produces drinking water from groundwater and from the Spree River at a section which is not located in a safeguard zone within the meaning of the second sentence of Article 7(3) of the WFD. The water in the Spree has a high concentration of sulphate. The sulphate comes from closed opencast mines in the Spree's catchment area. It is formed by the oxidation of pyrite, which is stored in the soil under anaerobic conditions until it is dug out. The drinking water fed into the supply lines is subject to a sulphate limit value, which has so far been

narrowly complied with by the waterworks. That limit value serves to protect the pipelines from corrosion.

After operations in an open-cast mine have been completed, the joined party floods the pit created by the extraction of lignite. The lake created upon completion of the flooding is to have an overflow. The water leaving the overflow will flow into the Spree and will have a significantly higher sulphate concentration than the water already in the Spree. The applicants fear that, due to that inflow into the water of the Spree, the Spree's sulphate concentration, which is critical for water production in any event, will be exceeded at the applicants' downstream abstraction point, with the result that they will have to stop water production at that point, or fundamentally overhaul it from a technical aspect. The defendant authority approved the construction of the lake, including the overflow, by way of a planning approval decision after it had established, on the basis of an expert report, that the water of the Spree would not deteriorate within the meaning of Article 4 of the WFD. Investigations into the effects on the sulphate concentration at the water abstraction point and, where applicable, on the waterworks were not carried out. The applicants have brought the present action against the planning approval decision.

[...]

WORKING DOCUMENT