Relevance and application of the EU Water Directive in terms of Spain’s National Hydrological Plan

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Abstract The National Hydrological Plan Act was passed after the publishing of Community Directive 2000/60/EC. Officially, the Act has taken the existence of the Directive into account, but its handling of the regulation of the Ebro transfer ignores fundamental issues of the Directive, in that it does not envisage the principle of cost recovery, does not clearly determine the uses to which the transferred waters will be put, and it is not orientated towards sustainable development. Furthermore, Spanish public contract law is not in line with Community Law, and this may have repercussions in the practical aspect of possible European subsidies for carrying out the transfer.

Keywords Cost recovery; hydro basin; hydro planning; principle of precaution; sustainable development; transfer of hydro resources

Abbreviations used

CJEC Court of Justice of the European Communities

EC European Community

NHP National Hydrological Plan

OJC Official Journal of the European Communities

TEEC Treaty Establishing the European Community

Introduction: general assessment of the meaning of the Community Framework Directive

European Parliament and Council Directive 2000/60/EC of 23rd October 2000, establishing a framework for Community action in the field of water policy (OJC of 22nd December 2000)¹, is one of those documents which typically focuses maximum attention not only on the specialised doctrine of this field, but also, to a greater or lesser extent, on society as a whole. There have been countless meetings, conferences, seminars, workshops, together with the published proceedings that have gone with them, in the various countries and languages of the European Union during the Directive’s painstaking drafting process, from the moment it first appeared in February 1997 as a project, until almost three and a half years later, when it was finally approved with a text that was marginally different with regard to certain contents that it had had at the outset. And much else has occurred since then with a text that requires, firstly, to be transposed by the various Member States within a time limit...

¹ See also European Parliament and Council Decision No 2445/2001/EC of 20th November 2001, approving the list of priority substances in the field of water policy, which modifies Directive 2000/60/EC (OJC L 331/1, of 15th December 2001). This modification of the Framework Directive consists of the introduction of Annex 10 in which, for the purposes signalled in arts. 16.2 and 16.3, a list of priority substances in the field of water policy is added to replace the previous list of 1982.
of three years from its publication (cf. Article 24 of the Directive, stating that the transposition time limit expires on 22nd December 2003).

Frequent mention has been made of the significant modifications that various countries in the European Union will need to make in their water policies as a result of applying this Directive. This conclusion should not just be accepted at face value: a certain degree of critical assessment is needed. In this respect, it should be remembered that for most countries in the European Union, it is something of a novelty for the hydro basin to be established as an administrative unit, as is the principle of hydro planning also based on the basin, with the consequent need to draw up planning instruments and especially set analysis guidelines, assess their implementation, and be aware of when they need to be reviewed, among other things. This is probably not so much a novelty for Spain, where these ideas have been an integral part of her water culture for some considerable time, and therefore there is not much for her to learn from others as far as the organisational aspect and the basic significance of planning techniques are concerned.

And yet it seems clear that the Directive contains a series of principles that call for a change of attitudes regarding water, as well as the contents of the various regulations, and this affects Spain as much as the other countries of the European Union. Thus there is in the Directive a basic statement on this resource of a conservationist nature, in which it is considered as being something more than a mere economic commodity, with water exploitation gradually orientated towards sustainable development, an improvement in the eco-systems linked to water, and the consequent progressive reduction of pollution; also a principle – the shifting of the various water costs, including environmental costs to be passed on to users, and almost impossible to calculate at the moment. All these objectives and guidelines have a great many applications and nuances in the Directive, and these will certainly give rise to a large number of new regulatory realities when they start being implemented.

The importance of the Directive also needs to be seen in the context and progress of European water policy, which is relatively old by now. The various Directives that have been issued in this field since 1975 deal only partially and in a sectorially limited manner with the issue of water: the prevention of pollution, the regulation of outflows, quality criteria for certain bodies of water in terms of the use to which they are put, restrictions on the emission of certain substances, compulsory treatment of urban waste water, a restriction on the presence of nitrates, etc.

On the other hand, Directive 2000/60/EC actually addresses a valid “framework”, firstly for all types of waters, and secondly, for any action that may affect its quality, its environmental aspect. There are also organisational and water planning aspects that are really innovative in Community water policy.

This means that we can see in Directive 2000/60/EC a clear readiness to codify a highly complex set of regulations. As an example of this, the Directive has a long article 22 devoted to “repeals and transitional provisions” in which one article of a Directive shall be repealed as soon as the new Directive comes into force, a set of Directives repealed seven years after the Directive comes into force (para. 1), and finally other Directives thirteen years afterwards (para. 2); also included is a series of transitional provisions related to other Directives (paras. 3 et seq.). This means that Directive 2000/60/EC aims to become the main Community regulatory reference with regard to water, and plausibly sets out to replace the complex and difficult regulations that have been in place previously, and aims to make them gradually clearer.


Spain’s National Hydrological Plan was passed by Act 10/2001 of 5th July, and subsequently has received a slight modification². This is an Act that came into force after the
Community Directive did so, and this has a certain legal significance which we shall examine in more detail later. At any event, what does seem clear is that here is an Act that was drawn up with full knowledge of the existence of Directive 2000/60/EC. In this respect, it is specifically mentioned in the Act’s Statement of Purpose, referring expressly to the fact that “the National Hydrological Plan has adopted the essential principles of the Directive”. Later, it specifies which principles have been accepted:

“The principle of cost recovery, participation by society in the drafting process of the National Hydrological Plan, and guaranteeing access to information regarding water resources are clear examples of this influence and of the drafter’s desire to incorporate the Directive’s philosophy into Spanish water law”.

Later, in the main body of the Act, there are examples of this acceptance, but it is a question of terminology only. Thus, one of the early articles, article 2, says:

“1. General objectives of this Act are:
   a) To attain good status of the hydraulic public domain, particularly bodies of water”.

The reference to this “good status” of bodies of water links directly to the terminology used in the Directive and is essential for the objectives set forward. As we have said, the Directive’s terminology has been incorporated, and we can see this by examining the most important and significant content of the NHP in more detail: the transfer of water from the Ebro Basin to a series of basins in the Mediterranean Arc. Table 1 shows what this transfer involves.

These are especially significant amounts when extracted from a river with contributions that in bad years could be as little as 11,000 Hm³, in other words, approximately 10% of its contribution, although in better years (ever more infrequent according to official figures), there may be contributions of 18,000 Hm³.

We wish to point out that we are talking exclusively of the Ebro Transfer, which we consider to be the principal measure in the National Hydrological Plan. There are also other types of content, such as certain general principles and Annex II which lists several hydro works to be carried out in Spain as a whole (at a total cost, we are told, of up to four million euros), but most of these works were already included in previous documents. So, there is nothing new in the NHP; for these purposes it is merely acting as a summary.

Some important elements for judging how closely the Ebro Transfer, as envisaged in the National Hydrological Plan, follows the line of Directive 2000/60/EC, and a reference to a probable breach as regards the contract with Trasagua

We shall now refer briefly to a few elements that show how the NHP is not following the line laid down by the Community Directive.

Table 1 Details of water transfers from the Ebro Basin to receptor basins

<table>
<thead>
<tr>
<th>Receptor basin</th>
<th>Net intake (hm³/year)</th>
<th>Gross intake (hm³/year)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cataluña Inland Basins</td>
<td>180</td>
<td>190</td>
</tr>
<tr>
<td>Júcar</td>
<td>300</td>
<td>315</td>
</tr>
<tr>
<td>Segura</td>
<td>430</td>
<td>450</td>
</tr>
<tr>
<td>South</td>
<td>90</td>
<td>95</td>
</tr>
<tr>
<td>Total</td>
<td>1,000</td>
<td>1,050</td>
</tr>
</tbody>
</table>

2 Supplementary provision twenty-one of Act 53/2002 of 30th December, concerning fiscal, administrative and social measures, added to art. 17 a ban on transferred waters being used to water golf courses.
Lack of an environmental impact assessment prior to the passing of the Act

It is very interesting to note how Act 10/2001 of 5th July, for all the major measures to be taken in water matters it envisages, was passed without a strategic environmental impact assessment having been conducted previously. Subsequently there were studies to produce a declaration of environmental impact, and in June and July 2003, the Technical Project, together with its Environmental Impact Study has been available for public examination. However, as part of a strategy to preserve a resource, observing the principle of precaution and keeping in line with certain Community regulations, it seems clear that this assessment should have been carried out before the Act was passed, thus giving a clear over-all view of the impact that any action might give rise to.

Non-specification of the uses to which the transferred waters are to be put

Upon reading the National Hydrological Plan Act, it is impossible to discover exactly what the transferred water resources are to be used for. The Act talks about uses for supplying towns, recharging aquifers, completing allocations for under-allocated irrigation areas, etc. On the other hand, the Act says that no new irrigation zones shall be created with the transferred water resources, neither can the water be used to irrigate golf courses. But at no point are quantities given with regard to the usage or locality receiving the transferred water. It is not known how much will be transferred for town supply, what towns will be supplied, what quantity will be used to compensate for the over-exploitation of aquifers, etc. Besides flying in the face of the traditional Spanish custom of regulating water transfers, this presents an element of non-specification, incompatible with any environmental assessment of the use of a scarce natural resource. This silence goes against any principle of hydro planning – the basis of the Directive – and makes any environmental impact analysis that may be carried out not worth the paper it is written on, because the basic element of comparison and evaluation will be missing: what the transferred water will be used for. Finally, it is merely an example of a resource supply policy, incompatible with any conservationist strategy as envisaged in the Community Directive.

The continuation of unsustainable use of aquifers

When article 17 talks about the transferred waters being used for “eliminating current situations of non-sustainability due to over-exploitation in the aquifers of the recipient basin”, it says that the transfer will be carried out “by ensuring the survival of exploitations linked to these aquifers”. This precautionary measure is the embodiment of unsustainable development, since these exploitations, which the Act specifies are to be maintained, are precisely the ones that have caused an environmentally unsound result, the overexploitation of aquifers. Transferring water hundreds of kilometres, only to ignore any decision on the sustainability of aquifers, however small, lacks any sense of purpose.

Non-application of the cost recovery principle

Furthermore, in spite of the express assertion made, it is not true that the principle of cost recovery is observed: the regulation in question (art. 22) is based on the principle that the cost of the investments (or at least part of it) will not be shifted onto the users. The Act works on this principle without any clarifications, stated purpose, or analysis of circumstances – they leave them for later – that would lead to such a result along the lines suggested by art. 9 of the Community Directive. Official documents on future prices of transferred water resources are also based on the existence of this original subsidy.
The probable breach of European contract regulations with regard to the contracts with the State Company responsible for carrying out the transfer: Trasagua

Finally, in view of the recent European Community Court of Justice decision of 15th May 2003, condemning Spain for a faulty transposition of Community Law in that, among other things, State Companies were excluded from public contract regulations, it is perfectly feasible to suggest that the contracts entered into by Trasagua (the State Company that has been given the responsibility for the process to bring about the transfer) could be in breach of Community regulations. The immediate outcome of this might be to make it impossible to allot funds for measures that are in breach of Community regulations.

The need to bear in mind the stipulations of the Directive, even though it has not yet been transposed to national law

The last section of this paper needs to address what is stipulated with regard to the observance of Directives before they are transposed. In this respect, let us examine the principles that may be deduced from Community regulations, including the case law of the Court of Justice, regarding a problem that is extremely practical and not in the least theoretical.

We have already pointed out in the first section of this paper that art. 22 of Directive 2000/60/EC gives States a deadline of 22nd December 2003 to bring “into force the laws, regulations and administrative provisions necessary to comply with” this Directive. However, this does not mean that there is no type of effect or legal obligation between the time the Directive is published in the OJC and its subsequent coming into force; this, according to art. 25, occurs on the day of publication. And this is because issues such as transposition into National law and effects of Directives are on a different plane, as we shall see, based on the institutional aspect of the Community’s authority to formulate regulations, and the way this authority has been interpreted by precedent in the Court of Justice of the European Communities.

According to basic law, the Directive is an instrument that binds “any member state as to the result to be achieved while leaving domestic agencies competence as to form and means” (cf. art.249 TEEC). This means that the Directive reflects a somewhat complex regulatory process carried out in two stages, requiring the intervention of the Community and then of the various Member States. The intervention of the Member States may occur under various guises and at different times, but should always observe strict compliance with the obligation to achieve the result referred to in the Directive. In the words of the Community Court of Justice:

“...it should be remembered that even though a directive is in principle binding only on its addressees, the Member States, a directive normally constitutes an indirect mode of legislating or regulating. Indeed, the Court has repeatedly classified a directive as a measure having general scope” (cf. Decision of the CJEC of 23rd November 1995, “Asocarne”, case C-10/95 P).

Thus, in spite of all its singular features, the Directive is a means of producing European Community regulations which have general scope, and it binds Member States to achieving a result within a specified time frame usually set by the Directive itself. This is why it is common to find, in the Court of Justice precedent, references to the discretionary powers enjoyed by the States in order to achieve the result envisaged, but the fact that a certain amount of time has been granted does not mean that the Court has given the States absolute freedom to carry out actions that they may deem fit during this time, including those that go against the content of the Directive. Certainly, it is this character of “first-phase” law which the Directive has, together with the obvious prevalence of Community law over domestic State law, that has caused the Court of Justice to make pronouncements to the contrary,
imposing during the period of transposition enjoyed by the State an obligation to abstain from adopting measures which might affect the achieving of the result aimed for by the Directive. In the words of the Community Court of Justice:

“it is during the transposition period that the Member States must take the measures necessary to ensure that the result prescribed by the directive is achieved at the end of that period. Although the Member States are not obliged to adopt those measures before the end of the period prescribed for transposition, it follows from the second paragraph of Article 5 (now 10) in conjunction with the third paragraph of Article 189 (now 249) of the Treaty and from the directive itself that during that period they must refrain from taking any measures liable seriously to compromise the result prescribed by the Directive” (Cf. Judgement of the Court of Justice of 18th December 1997, “Inter-Environment Wallonie ASBL”, case C-129/96, paragraph 45 of the Judgement).

The Court of Justice has even stated that during the period granted by the Directive for its transposition, National Courts are obliged to interpret domestic law in accordance with the content of the Directive (cf. the Judgement of 8th October 1987, “Kolpinghuis Nijmegen”, case 80/86, paragraph 12)3.

This interpretation of a Community Treaty is also in line with what is contained in much more general terms in Article 18 of the Vienna Convention on the Law of Treaties of 23rd May 1969 (applicable for Spain since 27th January 1980), which lays down the obligation of a State not to compromise the objective and purpose of a Treaty before it comes into force.

It follows then that although, according to Article 24 of Directive 2000/60/EC, States – and specifically the Kingdom of Spain – have until 22nd December 2003 to transpose the Directive, this does not exempt them from having to comply with certain obligations related to this Directive. When Directive 2000/60/EC came into force on 22nd December 2000, the date of its publication in the Official Journal of the European Communities (as laid down in Article 25 of Directive 2000/60/EC with regard to its coming into force), the same date saw the beginning of the States’ obligation to refrain from carrying out any action that would compromise the result prescribed by the Directive. Taking into account the elements that we have highlighted previously in the Ebro transfer regulated by the National Hydrological Plan Act as being against the terms of the Community Directive, this has consequences that are obvious to all.

References

3 The doctrine and regulatory and case law references contained in the text are well known and may be found in any text book or specialist study of Community law sources, and so no specific quotes are given here.