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# The Water Framework Directive and Transnational Situations: a Call to Rethink Transboundary Water Management?

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## Abstract

This article examines the transnational dimensions of the European Union's Water Framework Directive (WFD). Given that 60% of the waters covered by the WFD are transboundary, effective management requires transcending traditional legal frameworks of the nation-state. Accordingly, regulations for surface water and groundwater challenge the conventional binary division between national and transnational law. As water moves across borders, decision-making in one nation incorporates external elements into the policy processes of other nations sharing the water. The aim of this paper is to illustrate the transnational elements within the WFD and to present two cases where external factors transcend national borders.

## Keywords

water framework directive – transboundary water management – international river basin district – transboundary pollution – transboundary environmental impact assessment

## 1 Introduction

Pollution from industrial, agricultural, and urban sources can easily cross borders, impacting downstream users and ecosystems. The complex interdependencies of ecosystems, human activities, and water quality across national borders within the EU results in a necessity of water policies for effective cross-border water management of shared water resources. As 60% of EU waters are transboundary, and since all Member States – except Malta and Cyprus – share international river basins, EU-wide frameworks are essential for coordinated management, addressing shared challenges, and ensuring sustainable water use across Member States.<sup>1</sup> The cross-border nature of water bodies like rivers, lakes, and aquifers requires Member States to work together in river basins that span national borders, thereby facilitating cooperation in areas such as pollution control, monitoring, and risk management.<sup>2</sup>

The EU Water Framework Directive (WFD)<sup>3</sup> is based on the idea that common principles are needed in order to coordinate Member States' efforts to improve the protection of EU waters in terms of quantity and quality, to promote sustainable water use, to contribute to the control of transboundary water problems, to protect aquatic ecosystems, and terrestrial ecosystems and wetlands directly depending on them, and to safeguard and develop the potential uses of union waters.<sup>4</sup> This integration is essential to address the cumulative impacts of climate change, droughts, and floods that can affect entire river systems and require unified, transboundary responses.

The WFD foresees several geographical management entities, two of the most important being the river basin and water body. Whereas river basin means the area of land from which all surface run-off flows through a sequence of streams, rivers and, possibly, lakes into the sea,<sup>5</sup> a water body is a distinct element of surface water or groundwater.<sup>6</sup> The use or pollution of water within a river basin often takes place at the scale of water bodies, but may still

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1 *European Commission*, Staff Working Document – Fitness Check of the Water Framework Directive, Groundwater Directive, Environmental Quality Standards Directive and Floods Directive, SEC(2019) 438 final – SWD(2019) 440 final, p. 39.

2 *A.M. Keessen, J.J. Van Kempen & H.F. van Rijswijk*, Transboundary river basin management in Europe Legal instruments to comply with European water management obligations in case of transboundary water pollution and floods, *Utrecht Law Review* 2008 (4) pp. 35–56.

3 Council Directive 2000/60/EC establishing a framework for Community action in the field of water policy, OJ 2000 L 327/1 (the 'WFD').

4 Recital 23 WFD.

5 Article 2(13) WFD.

6 Article 2(10) WFD, Article 2(12) WFD, and CJEU Case C-301/22 *Sweetman* [2024] ECLI:EU:C:2024:347.

transcend national boundaries as the water flows from one State to the other. Since all Member States are obliged by the WFD to achieve its objective of “good status” and to prevent deterioration of the current status, the use or pollution of water in one State can result in non-compliance with the WFD in another State. This type of situation can be referred to as a transnational situation, which is defined as an administrative action that has either legal or factual effects on the territory of another legal system or is based on factual or legal elements of “foreign” origin.<sup>7</sup> This type of transnational situation is, according to the WFD, intended to be managed by transboundary cooperation between the Member States.<sup>8</sup> The basic idea in the WFD is that, through administrative cooperation between the national competent water authorities, situations where decision-making in one Member State results in non-compliance with the WFD objectives in another Member State should be managed.

This contribution explores the WFD transboundary cooperation system, and analyses two cases studies in which the notion of transboundary cooperation, as it has been enshrined into the WFD, fails to achieve its aim, due to limitations of the WFD and questionable decision-making in permit approvals. Even if there are other Directives that impact Member States water management, such as the Nitrates Directive<sup>9</sup> and the Urban Waste Water Framework Directive,<sup>10</sup> this analysis is restricted to the WFD as the idea in the WFD is that it should “frame” also these Directives through its program of measures.<sup>11</sup> The WFD therefore has a somewhat prominent status in the realm of EU water law.

## 2 The Water Framework Directive

The WFD is a comprehensive legal framework designed to protect and enhance the quality of water resources across the EU. Recognizing that many EU waters cross national borders, the WFD promotes integrated and cooperative water management across river basin districts that may span multiple countries. To achieve this, it fosters collaboration among Member States to address issues such as pollution, over-extraction of surface water and groundwater, and ecosystem enhancement. Through an idea of joint accountability for water

7 *E. Chevalier & O. Dubos*, The Notion of “Transnationality” in Administrative Law: Taxonomy and Judicial Review, *German Law Journal* 2021 (22), pp. 329–331.

8 Recital 35 WFD.

9 Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources, OJ 1991 L 375/1.

10 Council Directive 91/271/EEC concerning urban waste-water treatment, OJ 1991 L 135/40.

11 Article 11(3)(a) and Annex VI (a) WFD.

bodies in transboundary contexts, the WFD aims to ensure that waters shared between Member States are managed in a way that secures the achievement of the binding environmental objectives outlined in Article 4 of the WFD.

### 2.1 *Environmental Objectives*

The environmental objectives outlined in Article 4 of the WFD establish a comprehensive regulatory framework designed to safeguard and enhance the status of water bodies across Member States to achieve the overall objective of “good status”.<sup>12</sup> For surface waters and groundwater, the WFD requires the prevention of deterioration of the status of water bodies:<sup>13</sup> this is a fundamental and stringent objective that was first clarified in the CJEU landmark *Weser* case<sup>14</sup> and has been further clarified with regard to both surface and groundwater specific elements.<sup>15</sup> Without going into the depths of CJEU case law on “deterioration”, it can be said that this is a broad notion and, as a starting point, covers even minor changes that move a quality element from one status level to another. This reflects the preventive nature of the WFD in maintaining good status and securing that no deterioration takes place in the process of achieving “good status”.<sup>16</sup>

While the non-deterioration objectives so far have received the most attention from the CJEU, the main purpose of the WFD is to achieve the overarching objective of “good status”. The objective encompasses both ecological and chemical, as well as quantitative, elements. The WFD defines good ecological status as the condition where a water body’s biological, chemical, and physical characteristics are only slightly altered from its natural state.<sup>17</sup> Good ecological potential applies to heavily modified or artificial water bodies and aims for conditions close to natural waters, accounting for necessary human-induced alterations while supporting biological quality elements after mitigation measures.<sup>18</sup> Good chemical status is achieved when

<sup>12</sup> Article 4(1) WFD.

<sup>13</sup> Articles 4(1)(a)(i) and 4(1)(b)(i) WFD.

<sup>14</sup> CJEU Case C-461/13 *Bund für Umwelt und Naturschutz Deutschland* [2015] ECLI:EU:C:2015:433.

<sup>15</sup> CJEU Cases C-535/18 *Land Nordrhein-Westfalen* [2020] ECLI:EU:C:2020:391; C-559/19 *Commission v Spain* [2021] ECLI:EU:C:2021:512; and C-525/20 *Association France Nature Environnement* [2022] ECLI:EU:C:2022:350.

<sup>16</sup> *Id.*

<sup>17</sup> Articles 2(21), 2(22), and 4(1)(a)(ii), and Annex V WFD.

<sup>18</sup> Articles 2(23) and 4(1)(a)(iii), and Annex V 1.2.5. WFD.

priority substances and pollutants remain below thresholds set to protect aquatic ecosystems and human health.<sup>19</sup>

For groundwater, good chemical status under the WFD is achieved when its chemical composition meets quality standards, ensuring no significant pollution – such as from nitrates or pesticides – that could harm ecosystems or human health. Member States set threshold values to monitor and maintain this status.<sup>20</sup> Good quantitative status is achieved by managing groundwater resources to prevent over-extraction or depletion, ensuring water levels support ecological functions and meet human needs without adversely affecting connected surface water bodies or terrestrial ecosystems.<sup>21</sup>

The initial goal was to achieve these objectives by 2015. However, the deadline could be extended to allow for a phased approach to reaching objectives for bodies of water, on the condition that no further deterioration occurs in the status of the affected water body and that specific requirements are met. After the 2027 deadline to achieve “good status”, further extensions are permitted only if natural conditions prevent the objectives from being met.

The Directive also includes other exemptions. In particular, Member States may set less stringent objectives for certain water bodies if achieving “good status” is unfeasible due to their specific physical conditions, or if achieving it would entail disproportionate social, economic, or environmental costs. Such designations must be justified, ensuring that the highest possible ecological status is still pursued, and that no further degradation occurs.<sup>22</sup>

Temporary deterioration in water status is furthermore permitted if it results from exceptional or unforeseen circumstances, such as natural disasters or extreme weather. This exemption is only applicable if all feasible steps are taken to prevent further degradation and to restore conditions after the event.<sup>23</sup>

Finally, Member States may allow deterioration in status due to new modifications or sustainable development projects if the benefits to human

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19 Articles 2(24) and 4(1)(a)(ii), and the environmental quality standards set up under the Environmental Quality Standards Directive (Council Directive 2008/105/EC on environmental quality standards in the field of water policy, amending and subsequently repealing Council Directives 82/176/EEC, 83/513/EEC, 84/156/EEC, 84/491/EEC, 86/280/EEC and amending Directive 2000/60/EC of the European Parliament and of the Council, OJ 2008 L 348/84).

20 Articles 2(24) and 4(2)(b)(iii) WFD, and the Groundwater Directive (Council Directive 2006/118/EC on the protection of groundwater against pollution and deterioration, OJ 2006 L 372/19).

21 Articles 2(28) and 4(2)(b)(iii), and Annex V 2.1.2. WFD.

22 Article 4(5) WFD.

23 Article 4(6) WFD.

health, safety, or sustainable development outweigh the environmental impact. This exemption requires Member States to demonstrate that all practicable mitigation measures are taken, alternatives are assessed, and objectives are met for other water bodies in the basin.<sup>24</sup>

To ensure that these derogations do not permanently compromise the WFD objectives across the river basins, Member States must guarantee that these exemptions do not adversely impact the achievement of good status in other water bodies within the same basin.<sup>25</sup> In relation to this, there is a requirement that the use of exemption aligns with the overarching environmental protections under EU law, including in other EU directives – whether still in force or not (e.g. the Habitats Directive<sup>26</sup> and Directive 76/464/EEC<sup>27</sup>), thus ensuring that exemptions still uphold the historical and broader goals of environmental and water protection across the EU.<sup>28</sup>

The use of exemptions in one Member State may result in factual transnational effects on other Member States within the same river basin or with coastal water bodies receiving water – and potentially pollution – from those states. How the WFD addresses such transnational situations is outlined below.

## 2.2 *Administrative Coordination and Assessment*

Member States are responsible for identifying river basins within their national boundaries and assigning each river basin to a specific river basin district. Smaller river basins can be grouped with larger ones or with adjacent smaller basins to form distinct districts where it makes sense to do so. In cases where groundwater areas do not align with any particular river basin, they should be assigned to the closest or most appropriate district. Similarly, coastal waters must also be identified and assigned to the nearest suitable river basin district.<sup>29</sup>

To implement the WFD effectively within each river basin district, Member States are required to establish the necessary administrative arrangements. This includes appointing a competent authority to manage the district

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24 Article 4(7) WFD.

25 Article 4(8) WFD.

26 Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, OJ 1992 L 206/7.

27 Council Directive 76/464/EEC on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community, OJ 1976 L 129/23, no longer in force.

28 Article 4(9) WFD.

29 Article 3(1) WFD.

according to the WFD directions.<sup>30</sup> In situations where a river basin spans more than one Member State, it must be designated as an international river basin district. Member States sharing the basin can request assistance from the European Commission to facilitate this assignment. Each Member State within an international district must also create the appropriate administrative framework to apply the WFD within its territory.<sup>31</sup>

For each river basin district, including those that are international, Member States must work together to implement and align all necessary measures. Where international river basin districts are concerned, Member States can leverage existing agreements<sup>32</sup> to organize these efforts, with the Commission available to help establish coordinated programs of measures if requested.<sup>33</sup> In cases where a river basin district extends beyond EU borders, Member States are encouraged to coordinate with non-EU countries to pursue the Directive's objectives across the entire river basin. Each Member State is still responsible for ensuring compliance with the WFD provisions within its own territory.<sup>34</sup> In this and similar situations, the WFD adheres to the principle of formal territoriality.

Each Member State must conduct a comprehensive assessment within each river basin district or, for international districts, within the portion of the basin that falls within its territory, in this way again respective the principle of territoriality. This assessment consists of three primary components: an analysis of the district's characteristics, a review of the environmental impact of human activity on surface and groundwater status, and an economic analysis of water usage. This assessment must adhere to the technical specifications provided in Annexes II and III of the WFD.<sup>35</sup>

The analysis of the river basin district's characteristics entails mapping out key geographical, hydrological, and ecological features that influence water resources, as specified in Annex II. This includes identifying types of surface water bodies (such as rivers, lakes, and coastal waters), groundwater formations, and any unique natural features that contribute to the district's water quality and quantity. Although there is an obligation to establish international river basin districts, the WFD does not require coordinated assessment or delineation of waters to ensure consistency between Member States sharing a river basin. This lack of coordination means that, while the WFD provides a framework

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30 Article 3(2) WFD.

31 Article 3(3) WFD.

32 Article 3(3) WFD.

33 Article 3(4) WFD.

34 Article 3(5) WFD.

35 Article 5(1) WFD.

for differentiation among Member States, its interpretation can vary, resulting in differences in how water bodies are delineated. Since the WFD objectives are evaluated at the water body level, such discrepancies could potentially lead to transnational effects. If the assessment or delineation of waters takes foreign geographical, hydrological, and ecological features (a matter which is not obliged, but certainly permitted under the WFD), one could instead speak of an act of transnational imputation based on a foreign fact.

The review of human impact examines how activities such as agriculture, industry, urban development, and waste management affect water status. This evaluation considers pressures like pollution, water abstraction, and land modifications, providing an assessment of both the current and potential future impacts on the quality and availability of surface and groundwater. Annex II guides this review with detailed methodologies to classify water bodies and assess the extent of human influence on them. Just as differing delineations of water bodies can result in transnational effects, the review of human impact – which forms the basis for programmes of measures – can also lead to transnational effects. This may occur if one Member State fails to identify impacts that extend into another Member State. Such discrepancies arise because the review of human impact typically focuses on national impacts rather than transboundary impacts per se. In the same way as with the delineations of water bodies, also in this case one can identify an act of transnational imputation if foreign human impacts are taken into account in the domestic decision-making procedure.

### 2.3 *Implementation of Measures to Achieve the Objectives*

Under Article 13 of the WFD, Member States are required to develop river basin management plans for each river basin district within their territories to meet WFD objectives.<sup>36</sup> For international river basin districts entirely within the EU, Member States should coordinate to produce a single, unified river basin management plan. If coordination is not possible, each Member State must produce a river basin management plan for the portions within their borders.<sup>37</sup> For international river basin districts extending beyond EU boundaries, Member States should aim to collaborate with non-EU countries to develop a unified plan; if this is unachievable, the river basin management plan must at least cover their national territory.<sup>38</sup> Plans must include comprehensive information as outlined in Annex VII, which include a general description

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36 Article 13(1) WFD.

37 Article 13(2) WFD.

38 Article 13(3) WFD.

of the characteristics of the river basin district required under Article 5 and shall include, for example, a mapping of the location and boundaries of water bodies and a summary of significant pressures and impact of human activity on the status of water bodies, including estimation of point and diffuse source pollution.<sup>39</sup>

Each river basin management plan shall include programmes of measures, taking the results of the analyses of pressures required under Article 5 into account. The programmes of measures are established to achieve the Article 4 objectives.<sup>40</sup>

These programmes should include both “basic measures” and “supplementary measures” if necessary to meet the environmental objectives.<sup>41</sup> Through the programmes of measures, the WFD imposes a legally binding obligation on Member States in order to, for example, mitigate water pollution from point sources and diffuse sources pollution, and also to promote sustainable use of water resources.<sup>42</sup> Member States must therefore not only implement programmes of measures, but also regularly update these measures to ensure alignment with the environmental objectives. In light of Article 11(5), the WFD enforces a dynamic approach, requiring that the programmes of measures are adapted as new scientific evidence or environmental pressures emerge, highlighting the WFD adaptive approach. Both river basin management plan and programmes of measures shall be reviewed and updated at least every six years.<sup>43</sup>

Thus, Member States shall ensure the establishment programmes of measures for international river basin district within their own territory. However, if an international river basin district plan is established, the plan can give an account of how the national programmes of measures align with each other. This is consistent with the system set up by the Directive, as Member States are only responsible for achieving the WFD objectives on their side of the border. As such, the WFD’s transboundary aims appear to be largely voluntary in nature. At the same time, if the Article 4 objectives are jeopardized in a water body within a transboundary setting, it remains unclear whether the responsibility for the infringement of the obligation lies with the Member State causing the impact or the one where the affected water body is located.<sup>44</sup>

39 Article 13(4) WFD.

40 Article 11(1) WFD.

41 Article 11(3) WFD.

42 Article 11(3)(c)(g)(h) WFD and *L. Baaner*, *The Programme of Measures of the Water Framework Directive – More than just a Formal Compliance Tool*, JEEPL 2011 (8), pp. 82–100.

43 Articles 13(7) and 11(8) WFD.

44 This and other related questions have been addressed in CJEU Case C-121/21 *Czech Republic v Republic of Poland*, where the Advocate General has provided an Opinion (ECLI:EU:C:2022:74).

Logically, the Member State responsible for the impact jeopardizing the achievement of the objectives should draft a programme of measures to address the issue. However, this does not appear to be a binding requirement; instead, loyal cooperation in accordance with the Treaty seems to be expected.<sup>45</sup> This opens the possibility of adopting an act with potential transnational effects, but also with potential transnational imputation (because it would be based on the deterioration of the water quality in another Member State). However, it also risks creating a situation where one Member State might potentially fail to achieve the WFD objectives due to inaction by another.

#### 2.4 *Issues which Cannot be Dealt at Member State Level*

Albeit perhaps implicitly, Article 12, which deals with issues that Member States cannot manage by themselves, is inherently focused on transnational situations. It allows Member States to report issues affecting their water management – issues that cannot be resolved independently – to the Commission and other concerned Member States, along with recommendations for resolution. The Commission must respond to any report or recommendations within six months. The act of communication of such issues as well the subsequent acts taken to solve them are acts with transnational effects.

As described above, the WFD's ambitious goals for securing transboundary cooperation are, in many respects, voluntary for Member States. It is not unlikely that pollution may cross borders from one Member State to another, thereby reducing or even preventing the affected Member State from achieving WFD objectives.

The European Commission's Fitness Check concluded that Article 12 has not been widely invoked, partly because Member States prefer to resolve transboundary water issues through existing cooperative frameworks at the river basin level, as well as through mechanisms provided by international agreements and treaties, such as the International Commission for the Protection of the Rhine or the Danube River Protection Convention. The Commission observed that collaborative structures fostered by the WFD itself, such as the requirements for joint river basin management plans, have generally been effective in managing cross-border water challenges, thus reducing the need for formal use of Article 12. However, the Fitness Check suggested that Article 12 could play a more significant role if further integrated with broader EU conflict resolution processes, enhancing its utility as a last-resort measure for cross-border water conflicts.<sup>46</sup>

45 Article 4(3) Treaty of the European Union.

46 *European Commission*, Proposal for a Directive of the European Parliament and of the Council amending Directive 2000/60/EC establishing a framework for Community action

The EU Commission has proposed amending Article 12 to include a second part that would require Member States to formalize the procedure for cooperation in a more direct manner. Under this proposal, affected Member States would identify the sources of issues that cannot be addressed by a single Member State alone and outline the measures required to resolve those issues.<sup>47</sup>

One case where Article 12 was invoked occurred when Denmark requested a resolution on managing the impact of nitrate air pollution (specifically from atmospheric deposition of nitrogen oxides) on water body status.<sup>48</sup> Given that the sources of nitrate pollution are international, assigning specific national responsibilities for these transboundary emissions is challenging. The EU Commission responded by referring to the Convention on Long-Range Transboundary Air Pollution, specifically the Sofia Protocol, which provides mechanisms for reducing such emissions. However, the question of accountability for failing to achieve WFD objectives due to transboundary emissions was not directly addressed. This case illustrates a type of impact – nitrogen oxides contributing to eutrophication – that international river basin districts alone cannot effectively manage.

### 3 Case Studies of Transnational Water Management Issues in Relation to the WFD

As described in the previous sections, if water use or pollution within one Member State hinders the ability to achieve WFD objectives, the first approach is to establish international river basin districts. Then, on a voluntary basis, joint river basin management plans can be created. Additionally, each Member State should develop a national program of measures. If a Member State finds that the transboundary impacts from another Member State cannot be managed independently and lead to non-compliance with WFD objectives, the European Commission may be called upon to assist in resolving the situation. The following section presents two case studies of legal decisions assigning accountability for failing to mitigate or prevent cross-border environmental harm.

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in the field of water policy, Directive 2006/118/EC on the protection of groundwater against pollution and deterioration and Directive 2008/105/EC on environmental quality standards in the field of water policy, Brussels, 26.10.2022 COM(2022) 540 final, pp. 30–31.

47 *Id.*

48 See *P. Hermann et al.*, International Evaluation of the Scientific and Legal Basis for Nitrogen Reduction in the 3rd Danish River Basin Management Plan, Report for the Finansministeriet och Miljöministeriet, Danish Government, 2023.

### 3.1 Coastal Water Quality in Denmark and Sweden

Sweden and Denmark share coastal water bodies in the manner that they meet at or near their mutual border, separated by a marine area without an international river basin district, despite similar rationales for cooperation as those for river basins. The area where the distance between Sweden and Denmark is shortest is the Øresund (Öresund), a strait that forms the Danish-Swedish border. The Øresund stretches 118 kilometres, with a width varying between 4 and 28 kilometres.

Above Øresund, the marine areas Kattegat and Skagerrak separate Swedish and Danish WFD water bodies, governed under the Marine Strategy Framework Directive (MSFD)<sup>49</sup> rather than the WFD. The WFD defines a river basin as the land area from which surface runoff flows through streams, rivers, and possibly lakes to a single river mouth, estuary, or delta, excluding meeting points of coastal water bodies. Consequently, international river basin districts focus on inland waters rather than coastal waters.

Both Denmark and Sweden face challenges in meeting WFD objectives for coastal waters in this region, but they apply WFD exemptions differently. For

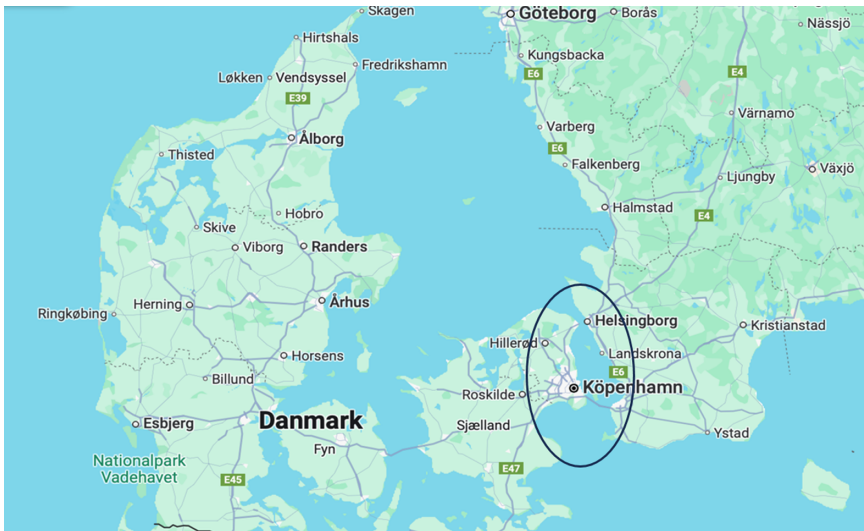


FIGURE 1 Coastal and marine water areas where the border between Sweden and Denmark is found. The circle shows where Öresund is located.

49 Council Directive 2008/56/EC establishing a framework for community action in the field of marine environmental policy, OJ 2008 L 164/19. See further on this instrument S.T. Puharinen, Transnationality in EU marine environmental law – Examining the Multilayered Legal Structures through the Lens of Offshore Wind Power Development in the Baltic Sea, in this Special Issue.

example, Sweden uses time exemptions in cases where exogenous factors make it impossible to achieve “good ecological status” by standard deadlines. One such factor is nitrogen from marine areas in the Baltic Sea, which Sweden classifies as a natural condition affecting its ability to meet WFD objectives. This classification allows Sweden to extend the timeline for reaching good ecological status in coastal water bodies to, for example, 2039 and 2045. In contrast, Denmark has not used similar exemptions and struggles to achieve good ecological status due to external impacts, including those from areas outside Denmark. There are also other differences: for instance, Sweden applies less stringent objectives for water bodies impacted by agriculture, while Denmark has not adopted this approach.

On 24 June 2024, the Danish Government initiated a dialogue with the EU Commission regarding the overall approach and planning in the Danish river basin management plans, particularly concerning the handling of areas where measures will not be implemented by 2027 and the necessary steps to achieve good ecological status will not be taken by 2027. According to the Danish government, it is expected that at least two-thirds of the Danish coastal water districts will fully meet the necessary nitrogen reduction target by 2027 and, for the final third, measures will be implemented gradually and by 2030 at the latest. Even if the Communication from the Danish government speak of achieving the WFD objectives, this only concerns implementation of measures regarding nitrogen reduction and not actual achievement of the good ecological status.<sup>50</sup>

The European Commission responded to the Danish government that, after 2027, the potential for applying exemptions will be very limited, and would require evidence that all measures are in place to reach the best possible status and that further measures to achieve good status are not feasible or they are disproportionately costly, or that natural constraints impeded the achievement of the objectives in the given timelines. Where justifications are lacking or not appropriate or detailed enough, Member States may be considered in breach of the WFD. The Commission stressed that it will pay particular attention to the extent to which all measures that are required to achieve good status are put in place during the period 2022–2027.<sup>51</sup>

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50 Folketinget, website available at: <https://www.ft.dk/samling/20231/almdel/MOF/bilag/560/2886050/index.htm>, last accessed 29.12.2024.

51 European Parliament document, Answer given by Executive Vice-President Šeřčovič on behalf of the European Commission, E-001655/2024, 25.10.2024, available at: [https://www.europarl.europa.eu/doceo/document/E-10-2024-001655-ASW\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/E-10-2024-001655-ASW_EN.pdf), last accessed 29.12.2024.

However, as Denmark has not yet established the status of all water bodies, which are reported to be in 'unknown status', this seriously hampers the possibility to devise appropriate measures for reaching good ecological status, hence also to justify exemptions in accordance with the strict criteria set out in the WFD.

The WFD idea is that the three management cycles should have provided the Member States with an opportunity to see which measures are effective in order to achieve good status by 2027. Still, it cannot be ruled out that natural conditions also after 2027 limit the effectiveness of the measures and, by that, limit the potential of the implemented measures. Sweden has in this manner applied time exemptions extensively for open coastal waters and the MSFD objectives are at the same time not achieved for eutrophication in the Baltic Sea. Taking that into account, Denmark cannot expect for the transboundary pollution to decrease to a level that its coastal water bodies impacted by transboundary eutrophic pollution will have a good ecological status by 2027, even if substantial Danish measures are realized. In the response from European Commission, it is indicated that, if not all measures are implemented by 2027, a breach of the WFD could be established.

In a non-binding WFD Common Implementation Strategy (CIS) Guidance Document, it is mentioned that pollution that affects water bodies but is beyond the control of Member State to address is a potential candidate for both time extension and less stringent objectives if the achievement of good status would be infeasible or disproportionately expensive.<sup>52</sup> The Guidance Document states that countries receiving transboundary pollution via marine currents or by atmospheric deposition are also considered to be an international river basin district.<sup>53</sup>

Even if the Guidance Document gives Member States this opportunity, they must still demonstrate that the reasons for not achieving the WFD objectives in Article 4 are outside their jurisdiction and competence.<sup>54</sup> It is also likely that Member States need to show that they have taken all reasonable actions

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52 *European Commission: Directorate-General for Environment*, Guidance document on exemptions to the environmental objectives. Guidance document No 20, Publications Office, 2009, available at: <https://data.europa.eu/doi/10.2779/74977>, last accessed 29.12.2024, p. 35; and Common Implementation Strategy for the Water Framework Directive and the Floods Directive Guidance Document: Natural Conditions in relation to WFD Exemptions 2017, available at: <https://circabc.europa.eu/sd/a/49b021b3-5d8e-4b4d-946d-4754d1ae0573/NaturalConditionsinrelationtoWFDexemptions.pdf>, last accessed 29.12.2024, p. 5, 13.

53 *European Commission: Directorate-General for Environment*, Guidance document on exemptions to the environmental objectives. Guidance document No 20, Publications Office, 2009, available at: <https://data.europa.eu/doi/10.2779/74977>, last accessed 29.12.2024, p. 35.

54 *Id.*

to fulfil their part in achieving good status in the water body affected by transboundary pollution.<sup>55</sup> Furthermore, the application of exemptions must not permanently exclude or compromise the achievement of the objectives in other water bodies within the same river basin district.

However, when there is no activity to pinpoint (as in cases in which the pollution comes from a transboundary context), it may be difficult to apply less stringent objectives, since the exemption requires a certain human activity fulfilling environmental and socio-economic needs. The Guidance Document foresees a rather pragmatic approach and states that the requirement in Article 4(5)(a) does not apply in case of transboundary pollution or transboundary ecological impacts:

In case of transboundary effects, there is no human activity within the Member States' competence that can be compared with another. The human activity causing the pollution or the ecological impacts is outside the jurisdiction of the Member State. Thus, this condition does not apply in case of transboundary pollution or transboundary ecological impacts.<sup>56</sup>

When the Guidance Documents have included principal statements that not only explain how a provision should be implemented but also provide normative interpretations, these interpretations have, on a few occasions, been challenged before the Court of Justice, which has dismissed them.<sup>57</sup> Such dismissal is likely in this case, as the interpretation of Article 4(5) WFD regarding transboundary pollutions is contrary to the scheme of the exemption and the objectives and purpose pursued by the WFD.<sup>58</sup>

Article 12 WFD can play an important role in addressing transboundary pollution by providing a mechanism for Member States to formally address water management issues that arise from transnational impacts. It offers a structured way for Member States to seek resolution for transboundary pollution that

55 *Id.* at p. 15; and Common Implementation Strategy for the Water Framework Directive and the Floods Directive Guidance Document: Natural Conditions in relation to WFD Exemptions 2017, available at: <https://circabc.europa.eu/sd/a/49b021b3-5d8e-4b4d-946d-4754d1ae0573/NaturalConditionsinrelationtoWFDexemptions.pdf>, last accessed 29.12.2024, p. 5.

56 *European Commission: Directorate-General for Environment*, Guidance document on exemptions to the environmental objectives. Guidance document No 20, Publications Office, 2009, available at: <https://data.europa.eu/doi/10.2779/74977>, last accessed 29.12.2024, p. 36.

57 Case C 525/20 *Association France Nature Environnement* [2022] ECLI:EU:C:2022:350, paras. 30–31.

58 *Hermann et al.*, *supra* note 48.

cannot be effectively managed unilaterally. Even if the case where Denmark sought support from European Commission regarding atmospheric deposition was not successful from a Danish perspective, invoking Article 12 regarding water-related transboundary questions should not be ruled out. It should also be mentioned that the MSFD includes the requirements for Member States to cooperate in the establishment of program of measures to achieve Good Environmental Status in marine waters.<sup>59</sup> In this way, the European Union has created a framework in which Denmark, together with the other Member States responsible for transboundary pollution in Danish coastal waters, can take the necessary measures to achieve the WFD objectives.<sup>60</sup> At the same time, an option to establish international river basin districts for an water area such as the one between Denmark and Sweden could have improved the situation by setting joint objectives for border water areas.

This case study has demonstrated that when a Member State invokes a derogation under the WFD, such as extending the timeframe for achieving good ecological status in its water bodies, the resulting delay can contribute to another Member State's failure to meet WFD objectives. However, the WFD lacks advanced mechanisms to address such cross-border impacts.

### 3.2 *Swedish Iron Ore Mine: Environmental Impact and Transboundary Pollution Case*

Another interesting case of transboundary cooperation stemming from an international river basin district between Finland and Sweden can be mentioned. In a noticeable case from the Land and Environmental Court in Umeå, Sweden, Finnish authorities, including Finland's Ministry of the Environment, had participated in the decision-making procedure for the revocation and re-application of a mining operation permit, in line with the previous border river agreement between Sweden and Finland.<sup>61</sup> These authorities had also appealed the decision of the Land and Environmental Court. The Land and Environmental Court of Appeal granted leave to appeal, but has not yet rendered a decision.

The background involves intermittent mining operations on the Swedish-Finnish border at Kaunisvaara and Tapuli, ongoing since 2011. The current operator took over in early 2018 and began mining in July of that year. Iron ore extraction occurs in the Tapuli open pit, with processing in Kaunisvaara, and waste is managed in waste rock dumps and tailings storage facilities.

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59 Article 5(2)(b) MSFD.

60 *Hermann et al.*, *supra* note 48.

61 Umeå Mark- och Miljödomstol, M 2090-19 (2022-12-01).

Operations currently hold a permit issued by the Border River Commission, valid until 2025.

In June 2018, the Swedish Environmental Protection Agency applied for a revocation of the permit. The operator resumed mining on 12 July 2018, despite the deficiencies and risks flagged by several national agencies, including the Environmental Protection Agency. On 13 January 2022, the Land and Environmental Court in Umeå issued a ruling on the partial revocation, noting non-compliance with the permit conditions, particularly regarding the transport of ore concentrate and the design and operation of the clarification reservoir. The court consequently reduced the permitted production to 7 million tons of ore (one-third of the original 20 million tons). This ruling was appealed, but the Land and Environmental Court of Appeal and the Supreme Court both denied leave to appeal.

While the revocation process was ongoing, the operator applied in July 2019 for a new permit under Chapters 9 and 11 of the Swedish Environmental Code to cover the entire operation, including mining in new open pits. The Land and Environmental Court granted the permit in December 2022.

The Finnish authorities raised several key arguments against granting the later permit. First, they argued that the Environmental Impact Assessment (EIA) provided do not adequately evaluate the cross-border environmental effects, particularly on water systems that may be impacted by the project. They believe these impacts could hinder conservation efforts under EU environmental regulations, such as the WFD and Natura 2000 provisions under the Habitats Directive. They indicate that these assessments do not fulfil the requirements of international environmental conventions, such as the Espoo Convention, which calls for comprehensive transboundary consultations. Secondly, they considered that essential documents have not been translated into Finnish. Instead of a decision from the Court, Finland's Ministry of the Environment anticipated that negotiations under the Espoo Convention should continue. The Ministry argued that the Land- and Environmental Court, as competent Swedish authority under the EIA Directive, could not issue a reasoned conclusion on the EIA given the material's inadequacies.

The Swedish authorities also raised several arguments regarding the permit application and especially the EIA for the project. For example, they argued that the EIA lacked sufficient detail to enable a thorough assessment of the environmental impacts of the proposed operations, especially concerning water emissions. Also the environmental risk assessment was criticized and the authorities pointed out uncertainties in modelling results and questioned the reliability of predicted water quality impacts. Gaps in the EIA were highlighted, particularly its fragmented and difficult-to-navigate structure,

which hindered stakeholders, including authorities, from reviewing and interpreting it cohesively.

The Land and Environmental Court provided several arguments against the Finnish objections and ultimately decided to grant the operator a permit.

Firstly, the court found that the consultation process, including with respect to the compliance with the Espoo Convention, was adequately conducted. This included notification to the Finnish authorities and the opportunity for Finnish stakeholders to provide input, which, according to the court, met the legal obligations for transboundary EIA. Although the Finnish authorities argued that insufficient translation limited their participation, the court ruled that the materials provided were sufficient.

The court also responded to the critiques raised by Swedish authorities regarding the EIA. The court found that the EIA submitted by the operator met the required standards under Swedish law, despite the concerns raised by the authorities. The court determined that the EIA sufficiently addressed environmental impacts, including emissions and water quality issues, both during operation and after closure.

These arguments ultimately led the court to grant the permit, viewing the operator's EIA and proposed safeguards as adequate to address the environmental and procedural concerns raised by the authorities.

The case study involves a transnational situation under the WFD and EIA Directive and raises important water-related questions due to its cross-border impacts. Activities at the mine may generate pollutants that flow downstream into Finnish waters. Considering the European Court of Justice case law, questions arise as to whether the EIA should have been approved and whether a reasoned conclusion was adequately provided.<sup>62</sup> If Sweden does not implement adequate measures to prevent transboundary impacts, responsibility for these effects could be imputed to Sweden under the WFD, EIA Directive and Espoo Convention.<sup>63</sup>

In essence, the case underscores the challenges of transnational water governance under the WFD framework, particularly when one Member State's actions or inaction compromise another's ability to achieve shared environmental objectives.

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62 See e.g. CJEU Case C-535/18 *Land Nordrhein-Westfalen* [2020] ECLI:EU:C:2020:391.

63 A somewhat similar case is the CJEU Case C-121/21 *Czech Republic v Republic of Poland*, where Poland extended a lignite mine's permit without conducting an EIA or adequately consulting the Czech Republic, leading to cross-border impact.

#### 4 Conclusion

Based on the analysis of the WFD and two examples of transnational situations, it appears that there are deficits in the WFD regulation of potential transnational effects. For example, in a transboundary river basin, the use of derogation options by one Member State could result in unwanted transnational effects in another Member States. At the same time, taking the factual situation of other MS into account (generating therefore an act of transnational imputation) is permitted but not mandated by the Directive. For example, an extended timeframe beyond 2027 in one Member State could lead to non-compliance with the WFD objectives in another Member State. If the use of exemptions is legitimate, the resulting transnational situation complies with the WFD in that Member State; however, it may still create a situation of non-compliance in another Member State.

Another situation which may increasingly become likely is one where, due to inaction by one Member State, another Member State – which may have implemented the necessary measures – fails to achieve the WFD objectives by 2027. This type of transnational situation could be addressed by invoking Article 12, as this would lead to the European Commission being informed of the non-compliance, and then potentially initiate infringement proceedings against the inactive Member State.

In summary, this contribution has demonstrated that, while the WFD expects transboundary cooperation between Member States and provides a framework for such collaboration, unwanted transnational effects can still arise under the Directive. With the 2027 deadline fast approaching, a shared perspective on WFD water management in transboundary settings is likely to become increasingly important to prevent conflicts between Member States regarding responsibilities for achieving WFD objectives.