

# Damage to the environment caused by a hydroelectric power station which had been duly authorised to conduct its activities

Comment on the Judgment by the Court of Justice of the European Union of 1 June 2017, the Folk case

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## 1. Introduction

The Decision we are commenting on interprets certain articles in Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, but in the version amended by Directive 2009/31/EC.

We ought to point out that the Directive referred to was adapted to the Spanish legal system under Law 26/2007 of 23 October on environmental liability. The purpose of the Directive and the Spanish law which transposes it is to lay down a framework for environmental liability based on the “polluter pays” principle with respect to the prevention and remedying of environmental damage.

As we shall see soon, the decision under review here interprets various different legal principles of interest in Directive 2004/34, particularly, those related to the concept of “environmental damage” and those concerning the application of the Directive to events where the permit had been authorised prior to the date when it became effective.

## 2. Main dispute proceedings

The matter which brought about the decision stems from the operation of a hydroelectric power station on the river Mürz in Austria, where the facilities include an outlet area of 1,455 metres. Operation of the power station was authorised under a decision by the Governor of the federal state of Styria of 20 August 1998 and it came into service in 2002, which was prior to the entry into force of Directive 2004/35 on 30 April 2007.

On the other hand, Herr Folk, who was the claimant in the main dispute proceedings, owns fishing rights on the river along a 12 km stretch of water located downstream of the dam. He asserted that operation of the hydroelectric power station has a serious effect on the environment and endangers the natural reproduction of fish, causing them to die *en masse* over long stretches of the river.



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long stretches of the river. In his view, as a result of short-term, but significant, variations in the water level, areas which are usually underwater are suddenly drying up, meaning that small and young fish are trapped in flooded areas that are separated from the main watercourse without being able to escape back to it. These repeated fluctuations affect a relatively long stretch of the river and are caused, on the one hand, by the absence of a bypass-channel at the power station and, on the other hand, by the way the power station operates.

Mr Folk's original claim, filed in his country, was dismissed under a decision of 15 May 2012 by the Independent Administrative Chamber for Styria, which found that, in essence, the operation of the hydroelectric power station at issue in the main proceedings had been authorised by a decision that was compliant with the legislation on water-related matters and was taken by the Governor of Styria.

Faced with this decision to dismiss, the claimant filed an appeal with Austria's Supreme Administrative Court in which he alleged that the solution adopted was in contravention of Directive 2004/35, since applying it tends towards a situation where every permit granted in line with water-related legislation ultimately rules out the possibility that environmental damage could occur.

Austria's Supreme Administrative Court therefore decided to suspend proceedings and refer to the Court of Justice of the European Union (CJEU) for various preliminary rulings.

### 3. Preliminary rulings sought

In light of the facts discussed, preliminary rulings were sought with regard to the following:

1. Does Directive 2004/35 also apply to damage which, although still occurring after the date mentioned in article 19, section 1 of the Directive on environmental liability, is both caused by an authorised facility that was commissioned prior to that date and covered by a permit that is in accordance with water-related legislation?
2. Does Directive 2004/35 (in particular articles 12 and 13 thereof) run counter to a national provision that prevents persons with fishing rights from initiating a review procedure within the meaning of article 13 of the Directive in relation to environmental damage as defined in article 2, section 1, letter b of the Directive?
3. Does Directive 2004/35 (in particular article 2, section 1, letter b) preclude a national provision which excludes damage that has a significant adverse effect on the ecological, chemical or quantitative status or ecological potential of the water in question from the notion of "environmental damage", if that damage is covered by a permit granted under a national legislative provision?
4. If question 3 is answered in the affirmative:

For the purpose of determining whether there is environmental damage within the meaning of article 2, section 1, letter b of Directive 2004/35, in cases where, in the granting of an authorisation under provisions of national law, no assessment has been made of the criteria laid down by article 4, section 7 of Directive 2000/60 (or of those in the national transposition thereof), is article 4, section 7 of Directive 2000/60 to be applied directly, and is it necessary to determine whether the criteria laid down by that provision are satisfied?

## 4. Decision by the Court of Justice regarding the preliminary rulings sought

The CJEU held that questions 1, 3 and 4 should be addressed prior to examination of question 2, which presupposes that Directive 2004/EC is applicable and that environmental damage exists which is regulated by this.

### 4.1. First preliminary ruling

As we have stated, in question 1, the referring court asks, in essence, whether article 17 of Directive 2004/35 is to be interpreted as meaning that it applies *ratione temporis* to environmental damage occurring after 30 April 2007, but caused by the operation of a facility authorised in accordance with the law governing matters relating to water and put into operation before that date.

The CJEU firstly states that it has already been declared that the Directive applies to damage caused by an emission, event or incident that took place on or after 30 April 2007, the date when it came into force.

Secondly, it tells us that authorisation to operate was given before the Directive came into force and that the damage began to happen prior to the latter. Nonetheless, it is clear that environmental damage was caused after 30 April 2007, in which case Directive 2004/35 applies.

### 4.2. Third preliminary ruling sought

The third preliminary ruling sought from the European Court is of interest, owing to the scope which it might encompass, insofar as it asks whether Directive 2004/35 (in particular article 2, section 1, letter b) should be interpreted as precluding a national law which excludes damage having significant adverse effects on the ecological, chemical or quantitative status or ecological potential of the water in question from the notion of “environmental damage”, if that damage is covered by a permit granted under that law.

This is because the referring court for the preliminary ruling is of the view that it follows from the provisions of national law that damage resulting from an authorised activity cannot be classified as environmental damage within the meaning of the aforementioned Directive.

Having offered the substantiation for its conclusion, the CJEU establishes that there is indeed a national law which runs counter to the aforementioned Directive and, generally and automatically, precludes damage from being able to be classified as “environmental damage”, due to the mere fact that it is covered by an authorisation granted under that law.

### 4.3. Fourth preliminary ruling sought

In this case, the referring court asks, in essence, whether, in the event that an authorisation has been granted pursuant to national provisions without examination of whether the conditions laid down in article 4, section 7 of Directive 2000/60 have been complied with, that court must itself verify whether the conditions laid down in that article are satisfied in order to determine whether environmental damage has arisen.

After stating that, when a project may give rise to adverse effects for water, it can only be authorised if the pre-requisites are met, the Court of Justice replies that, if the national authority with jurisdiction has granted authorisation without reviewing compliance with the conditions laid down in article 4, section 7, letters a) to d) of Directive 2000, the national court is not under any obligation to examine the requirements in said article itself and can confine itself to declaring the contested act as unlawful.

#### 4.4. Second preliminary ruling sought

In this case, the referring court wishes to know if those affected by environmental damage can apply to the competent administrative authority to take measures to end it.

According to the CJEU, the three categories of affected persons described in article 12 of the Directive may submit observations on environmental damage, have the option to request that the competent authority take measures under the Directive, and, accordingly, may initiate a procedure before a court or tribunal or any other competent public body, in accordance with articles 12 and 13 of the Directive.

Thus an interpretation of national law that deprives that group of persons who hold fishing rights of the chance to initiate a review procedure as a result of environmental damage that presents itself in the form of fish dying, even though they are directly affected by this harm, does not respect the scope envisaged in the aforementioned articles 12 and 13, and is therefore incompatible with the Directive.

## Conclusions

From the analysis of this judgment by the European Court, we can conclude that Directive 2004/35 on environmental liability applies to damage caused by an emission, event or incident occurred on or after 30 April 2007, the date when it came into force, irrespective of when the activity has been authorised or even whether the damage started occurring on earlier dates. In short, we can say that the Directive applies *ratione temporis* to environmental damage occurring after 30 April 2007, but caused by the operation of a facility authorised and put into operation before that date.

On the other hand, we must also point out from this decision that the fact that a certain activity has been duly authorised by the competent body in a Member State does not mean that the damage it might cause cannot be classified as environmental damage.

Finally, in interpreting articles 12 and 13 of Directive 2004/35, the CJEU finds that natural or legal persons that are harmed by environmental damage (in this case, the holders of fishing rights) are entitled to file for initiation of a review procedure with a court or any other competent public body.