

Case No: 70963  
Event No: 676381  
Dec. No: 283/13/COL

## EFTA SURVEILLANCE AUTHORITY DECISION

of 10 July 2013

closing a complaint case arising from an alleged infringement by Liechtenstein of the Water Framework Directive resulting from the Government's decision to set residual water levels for the Samina power plant's three water intake stations

### THE EFTA SURVEILLANCE AUTHORITY

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in particular Article 31 thereof,

Whereas:

#### 1. Correspondence

On 13 December 2011, the EFTA Surveillance Authority ("the Authority") received a complaint from the Liechtensteinische Gesellschaft für Umweltschutz ("LGU"), an association committed to the protection of the environment, against Liechtenstein. In its complaint, LGU alleged that the Government of Liechtenstein had set the residual water levels for the Samina power plant's three water intake stations too low, thereby preventing the achievement of the binding environmental objectives specified in *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 Water Framework Directive"/"the Directive")<sup>1</sup>.

By letter of 19 December 2011, the Internal Market Affairs Directorate of the Authority ("the Directorate") informed the Liechtenstein Government of the receipt of the complaint.

This case has since then been the subject of a number of discussions with the Liechtenstein Government, aimed at clarifying the legal framework and the circumstances of the case. By letter dated 19 July 2012 (Event No 642185) the Authority required Liechtenstein to respond to questions concerning the Samina power plant. By letter of 24 August 2012 (Event No 644854), Liechtenstein provided an answer to these questions.

The case was further discussed during the package meeting which took place in Vaduz on 26 September 2012, as well as through informal communication.

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<sup>1</sup> The Water Framework Directive was incorporated into the EEA Agreement under Annex XX, Chapter II, Subchapter 13ca by Decision of the EEA Joint Committee No 125/2007 of 28 September 2007 (OJ No L 047, 21.2.2008, p. 53 and EEA Supplement No 9, 21.2.2008, p. 41).

## 2. Relevant provisions

The Water Protection Act (“*Gewässerschutzgesetz*”) of 15 May 2003 obliges public authorities in Liechtenstein to provide for adequate minimum residual water levels.

Although these minimum residual water levels are not explicitly specified in the act itself, it lists in Article 28 a series of cumulative environmental conditions public authorities have to comply with when setting these levels. These conditions include *inter alia* the water quality of the surface water, the protection of rare habitats and species as well as ensuring the free fish migration and the functions of flowing water as spawning ground on rearing area.

Article 29 of the act confers the competence to set minimum residual water levels as well as the responsibility to adopt protective measures to the Government. Before adopting these measures, the Government has the obligation to consult the communities, the authorized users and concerned bodies.

## 3. Assessment

After analysing the merits of the case, the Authority comes to the conclusion that the decision taken by the Liechtenstein Government to set residual water levels for the intake stations at Malbunbach, Stauwehr Steg and Rietern pumping stations does not amount to an infringement of the relevant EEA legal provisions in force, as will be explained below.

The discussions held between the Authority and the Liechtenstein Government have helped to clarify a number of issues related to the compliance of the national measures in question with the Water Framework Directive. One of the concerns addressed in these discussions was the manner in which the Liechtenstein Government had sought to reconcile the necessity to set minimum residual water levels with a view to preserve the status of the Samina as a natural mountain creek with the needs of energy production. The explanation given by the Liechtenstein Government revealed that it had been aware of the competing interests at stake – on the one hand, the protection of the environment and, on the other hand, the entitlement to the use of water power by the *Liechtensteinische Kraftwerke AG* (“LKW”), as well as of the requirement to weigh up these interests in order to find an adequate solution which is in line with EEA law.

After assessing the degree of conflict between both interests, the Liechtenstein Government opted for setting the minimum flow requirements at a level which ensures that the good ecological potential on the water flow routes concerned by the water abstraction can be reached timely in accordance with the Water Framework Directive. The Liechtenstein Government based its decision on the provisions of the Water Protection Act in which the provisions of the Water Framework Directive have been transposed. Furthermore, the Liechtenstein Government took into account the methods of calculation of residual water levels foreseen in the Swiss Water Protection Act (“*Bundesgesetz über den Schutz der Gewässer*”) and in the Austrian Ordinance on the determination of the ecological status of surface waters (“*Verordnung über die Festlegung des ökologischen Zustandes für Oberflächengewässer*”). In addition to this, the minimum flow quantities foreseen in Austria for the powerplant in Frastanz (Vorarlberg), which is situated at the underflow of the Samina, and the results of a minimum flow test undertaken in July 2009 at the Rietern pumping station were taken into consideration.

With regard to the competing interest of the LKW to use water power, the Liechtenstein Government came to the conclusion that the measures envisaged would lead to a decrease in energy production of 3.7 GWh per year (which corresponds to 8% of the long term average of the overall production of the LKW). However, the Liechtenstein Government deemed this decrease tolerable for the LKW in the interest of reaching the ecological goals prescribed by the Water Framework Directive. For that reason, the demand of the LKW to keep the *status quo* and not prescribe any minimum flow levels was rejected by the Liechtenstein Government.

It is the Authority's view that these facts demonstrate that the aim to protect the environment was clearly behind the decision adopted by the Liechtenstein Government to set the residual water levels at their current state. Hereby the Liechtenstein Government was guided by essentially the same considerations as the Water Framework Directive is based on, which is to guarantee good surface water. From that viewpoint, the Authority has no reason to presume that the decision in question was intended to run counter to the objectives set by the Directive. Rather the contrary seems to be the case.

The objectives pursued by the Water Framework Directive were also at the core of the monitoring measures foreseen by the Liechtenstein Government. It is important to recall in this particular context that the Directive provides for regular controls of water quality by national authorities. Monitoring is the main tool used by Member States to classify the status of each water body. Once Member States have determined the current status of their water bodies, monitoring then helps Member States to track the effectiveness of measures needed to clean up water bodies and achieve good status. The Directive sets a common approach for monitoring water quality across all Member States but does not specify the methods to be used. It is up to Member States to decide the best method based on local conditions and existing national approaches. Member States were required to set up monitoring programmes by December 2006. The key task was to adapt existing monitoring systems to meet the needs and goals of the Directive.

As specified by the Liechtenstein Government in its letter to the Authority of 24 August 2012, the Government decision was based on the results obtained in the framework of the minimum flow tests undertaken *in situ* by the national authorities in July 2009. Furthermore, as the Liechtenstein Government indicates in the same letter, the decision in question allows for an increase of the minimum flow quantities in the future if required. It explicitly foresees that the Government will adjust the levels at the latest in 2028 if the results of the above mentioned bio monitoring show that the goals foreseen in the Water Protection Act cannot be reached. The monitoring programme developed by the Liechtenstein Government was meant to start as from 1 January 2013 and will be carried out under the surveillance of the Office for Environmental Protection. According to the information provided by the Liechtenstein Government in its letter to the Authority of 3 December 2012, to this end, the operator of the power plant will be obliged to undertake a bio monitoring. The exact location of the monitoring task will be decided upon by the Office for Environmental Protection.

According to the Liechtenstein Government, the fixation of a maximum deadline for a revision of the water levels at the latest in 2028 is appropriate, as this coincides with the timeframe set by the Austrian authorities in the Vorarlberg region to grant a new concession licence for the powerplant in Frastanz which is situated at the underflow of the Samina. At the latest on this occasion an overall reappraisal of the water use of the Samina and the minimum flow at all water withdrawal points in Liechtenstein and in Austria will take place. The Liechtenstein Government is of the opinion that with a view to reaching

the goals foreseen in the Water Framework Directive by 2024 the results of the bio monitoring will serve as a basis to take timely necessary measures where required.

The Authority understands that the monitoring measures envisaged by the Liechtenstein Government and described above serve the purpose to ensure the achievement of the goals set by the Water Framework Directive. The flexible use of the available monitoring instruments and the obligation vested in the competent public authorities to report on an annual basis on the evolution of the Samina creek are intended to help incorporate the national environmental programme into the European programme established by the Directive. Adapting the national programme to its objectives and the timetable for its implementation seems to have been considered a priority from the very beginning.

The Authority does not share the complainant's view whereby the Liechtenstein Government has failed to coordinate its water policy measures with other neighbour States concerned. As far as recital 23 of the Water Framework Directive calls for a coordination of the *"Member States' effort to improve the protection of 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 waters"*, it is important to recall the efforts undertaken by the Liechtenstein Government to find solutions which were consistent with similar measures adopted by Austria and Switzerland.

As already mentioned, the methods of calculation of residual water levels foreseen in Swiss and Austrian legislation were taken into account in the decision making procedure, although ultimately an autonomous approach was taken due to the specificities of domestic law. In fact, contrary to Swiss and Austrian legislation in this field, Liechtenstein law does not contain numerical formulas to calculate the residual water levels. Nevertheless, the Liechtenstein Government based its reasoning on provisions of foreign law which would have been applicable in circumstances similar to the one at hand. This is the case of those provisions in Swiss law which exempt water bodies above 1500 meters from the calculation methods applying to innerland water bodies. Being a mountain torrent and by nature hostile to life, the Samina could hardly be comparable to innerland water bodies. Thus, the Liechtenstein Government concluded that a different approach was needed. This approach was an individual one which foresaw minimum flow tests with an aim to establish the most suitable level of residual waters for the Samina.

In any case, it should not be left unmentioned that the Liechtenstein Government has reiterated on several occasions its resolve to cooperate with the Austrian authorities in matters related to the Samina river.

Given the fact that the water flow levels have only been monitored as from 1 January 2013, the Authority holds the view that it would be premature at this stage to come to a definitive conclusion on the question whether the measures prescribed by the decision adopted by the Liechtenstein Government are suitable and adequate to attain the objectives set by the Directive. An assessment will therefore necessarily have to be based on an *ex ante* approach. This implies examining in any case the goals pursued by the Liechtenstein Government, as well as the national legal framework regulating the respective national measures in the light of EEA law. An exhaustive analysis will require a continuous monitoring over an extended period of time and will not be feasible before sufficient data on the development of the Samina creek have been gathered.

The Authority understands that the purpose of the complaint was to require the Authority to examine the compliance of the current legal and factual situation with the Water Framework Directive. Against this background, given the fact that the measures adopted by the Liechtenstein Government seem to pursue the same goals as the Directive and to follow essentially a similar approach as envisaged by the European legislator, the Authority considers that Liechtenstein is not in breach of its obligations under the Directive.

By letter dated 25 April 2013 (Event No 663966), the complainant was informed by the Authority of its intention to close the complaint case and was invited to submit observations to the case by 25 May 2013. The deadline was extended until 13 June 2013 upon request of the complainant.

The complainant replied by letter of 29 May 2013, requiring the Authority to focus its assessment on certain aspects of the case which allegedly had not been fully taken into account in its assessment, namely the obligation upon Liechtenstein to timely achieve good ecological status of surface water bodies, particularly in connection with residual water levels and to verify whether the decision taken by the Liechtenstein Government, by which minimum residual water levels were set, runs counter to the objective pursued by the Directive, to ensure that the protection of waters in terms of quantity and quality improves.

As for the allegation made by the complainant, whereby the decision taken by the Liechtenstein Government on the Samina creek does not ensure the protection of fish resources, the Authority holds the view that the contrary is the case, as has been clarified by the Liechtenstein Government in its letter of 24 August 2012, in which it referred to the legislative objective of Article 28 of the Water Protection Act, which served as legal basis for the decision in question. According to this provision, ensuring free fish migration and the functions of flowing waters as spawning ground or rearing ground are mandatory requirements to be observed by public authorities. It must therefore be presumed that the environmental concerns raised by the complainant were duly addressed at the time the decision was taken.

The Authority further observes that the implementation of the Directive leaves a wide discretionary power to the Member States with regard to the category of individual measures to adopt in order to meet the binding objective of reaching good ecological status for surface water bodies. As mentioned before, monitoring is considered to be the main tool to classify the ecological status of each water body. The bio monitoring programme announced by the Liechtenstein Government can thus be considered to be a part of the measures aimed at implementing the Directive. This programme, which was expected to start in January 2013 intends to address the concerns raised by the complainant related to the risks resulting from setting water levels too low. Depending on the results obtained, the Liechtenstein Government expects to revise its original decision and adapt the levels of residual water accordingly. For that reason, the Authority is of the opinion that the measures planned by the Liechtenstein Government take the risk referred to by the complainant sufficiently into account.

As for the concerns regarding the timely achievement of good ecological status for the Samina creek, it is worth noting that, contrary to the allegations made by the complainant in his letter of reply of 29 May 2013, the observations submitted by the Liechtenstein Government in its letter of 24 August 2012 indicate that Liechtenstein is aware of its obligation to respect the strict timelines set by the Directive. In addition to this, nothing

seems to suggest that the Liechtenstein Government has decided to rely on the possibility foreseen in Article 4(4) of the Directive to extend those deadlines in specific circumstances. Against this background, the Authority holds the view that the plan developed by the Liechtenstein Government for the Samina creek – at least at its current stage – does not appear to be in contradiction with the time limits set by the Directive for implementation.

#### 4. Conclusion

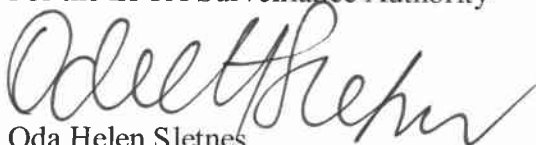
There are, therefore, no grounds for pursuing this case further.

HAS ADOPTED THIS DECISION:

The complaint case arising from an alleged infringement by Liechtenstein of the Water Framework Directive resulting from the Government's decision to set residual water levels for the Samina power plant's three water intake stations, is hereby closed.

Done at Brussels, 10 July 2013.

For the EFTA Surveillance Authority



Oda Helen Sletnes  
President



Sverrir Haukur Gunnlaugsson  
College Member