



GENERAL CONSIDERATIONS ON THE ENVIRONMENTAL AND WATER POLICY IN THE EUROPEAN UNION

By Carmen Tirado Robles

Professor of International Public Law, University of Zaragoza.

ABSTRACT

The community environmental policy is an area of shared competences which is configured as a horizontal policy within the European construction process and, also as a protection policy for the different natural resources, urging community institutions and member states to protect them within their respective competences. One of these resources is water, so the so-called “community water policy” is inserted within the general framework of the environmental policy. The largest number of community regulations, one can say, can be found in this field. Over the last few years, emphasis has been placed on the adoption of the well-known Water Framework Directive 2000/60, as a central standard of this water policy, the axis of this new global water management model in the whole community territory.

KEY WORDS

Community environmental policy, environmental action programme, community water policy, water framework directive, detailed directives.



CONTENTS

I. INTRODUCTION. THE GENERAL FRAMEWORK OF THE ENVIRONMENTAL POLICY IN THE EUROPEAN UNION.

1. FIRST COMMUNITY INITIATIVES. THE ENVIRONMENTAL ACTION PROGRAMMES.
2. THE SINGLE EUROPEAN ACT AND THE MAASTRICHT TREATY.
3. THE AMSTERDAM TREATY AND THE CONCEPT OF SUSTAINABLE DEVELOPMENT.
4. AMENDMENTS INTRODUCED BY THE NICE TREATY.
5. THE FAILED EUROPEAN CONSTITUTION AND THE LISBON TREATY RELATED TO ENVIRONMENTAL PROTECTION.

II. THE EVOLUTION OF THE COMMUNITY WATER POLICY UNTIL THE PREPARATION OF THE FRAMEWORK DIRECTIVE.

III. THE WATER FRAMEWORK DIRECTIVE.

1. A GLOBAL AND ECOLOGICAL APPROACH TO WATER RESOURCES.
2. A COMBINED PROPOSAL AGAINST WATER CONTAMINATION.
3. THE PEOPLES' PARTICIPATION. 4. THE APPLICATION OF THE "POLLUTER PAYS" PRINCIPLE.

IV. THE TRANSPOSITION OF THE COMMUNITY RULE OF LAW ON WATER IN SPAIN. V. CONCLUSIONS. VI. BIBLIOGRAPHIC SOURCES.



I. INTRODUCTION. THE GENERAL FRAMEWORK OF THE ENVIRONMENTAL POLICY IN THE EUROPEAN UNION.

1. FIRST COMMUNITY INITIATIVES. THE ENVIRONMENTAL ACTION PROGRAMMES.

The development of the community environmental policy dates back to the sixties, despite there being no provision in the constitutional treaties that give express competence to community institutions to legislate on this matter; a logical situation if we consider that the Treaties of Rome and Paris are documents of the fifties and, at that time, environmental concerns were very limited at an international level.

The legal basis for the first community standards in environmental matters can be found in article 2 of the Treaty of Rome, more specifically when it indicates that one of the missions of the Community is to promote "a more harmonious development of economic activities throughout the Community" and foster "continuous and balanced expansion".

Community standards, mainly directives, started to be adopted in the seventies, under the protection of articles 100 and 235 of the ECT. More specifically, article 100, current article 94 ECT, is one of the general clauses that permits the approximation of national provisions that have a direct impact on the establishment or working of the common market (together with article 95 ECT). But its application conditions are very strict: on the one hand, a direct impact of the national provisions on the common market is required, and on the other hand, the decision must be taken unanimously at the Council. On its part, article 235, current article 308 ECT, is the so-called clause of *imprévision* or closure clause of the community competence system, as it serves to take the place of the lack of competence conferred expressly or implicitly on the community institutions by the member states in the treaty, so long as these competences are necessary for the Community to carry out its work and achieve the objectives established by the treaty. The application requirements are also strict in this case: the achievement of



one of the Community objectives must be pursued, the action necessary to achieve these objectives must be taken, there must be no other legal basis possible or a reservation of competence in favour of member states, so, obviously, it may only be applied collaterally.

On the other hand, at the Paris Summit of Heads of State and Government in 1972 (which is the direct precedent of the current European Councils), an article is devoted to the environment in its conclusions for the first time in this type of documents, indicating that:

“8. The Heads of State or Government underline the importance of an environmental policy in the Community, and with this aim, they invite the institutions of the Community to establish, before 31 July 1973, an action programme with an accurate calendar”.

This laid the foundations for the Environmental Action Programmes (EAP)¹, which acts as a benchmark for this entire community policy, establishing priority objectives which will be used to develop the legislation of derivative Law. The legal form that the EAP has adopted has always been atypical, either a Declaration or Resolution of the Council and of the Representatives of the Governments of the Member States, which clearly shows the controversial nature of community

¹ The first environmental Action Programme is adopted on 22 November 1973, following the Paris Summit of 19 October 1972, and water is one of the main concerns of this document (*vid.* the Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States met within the Council, of 22 November 1973, concerning an Action Programme of the European Communities on environmental matters, OJEC C 122, of 20 December 1973), followed by the second and the third (OJEC C 139, of 13 June 1977 and OJEC C 46, of 17 February 1983). The fourth programme covers the period 1987-1992 (*vid.* OJEC C 328, of 7 December 1987). The main theme of the fifth programme is sustainable development (*vid.* OJEC C 138, of 17 May 1993) and currently we are in the period covered by the sixth programme, entitled “Environment 2010: our future, our choice” which was presented by the Commission in two parts: the first is the political report of the Commission, which constitutes the main part of the programme, and the second is the text proposed by the Commission for a decision of the Ministers of the Environment of the Member States and of the European Parliament (*vid.* <http://www.europa.eu.int/comm/environment/newprg/index.htm>).



competence in environmental matters, as the regulatory force of these Programmes has been nonexistent, although they have marked, as mentioned, the general directives of this policy, acting as a basis for standards that did have a binding force.

This does not mean that the EAPs have not received certain recognition, which has been reflected in the Treaties: the EUT, in article 130S of its Maastricht version acknowledged their role to set priority objectives, and this is maintained in the Treaty of Amsterdam, in article 175.3. We are currently within the period covered by the 6th Programme, which establishes continuity as one of its main features, as in the case of the previous programmes. This has meant that the environmental policy is no longer a sectoral aspect of the community action and now affects all the areas of the European construction process.

The sixth EAP includes an innovative strategy, indicating four priority work fields: the improvement of the application of the environmental legislation in force, the integration of the environmental concerns in the other policies, involving companies and consumers in environmental work, not limiting itself to penalising cases of non-fulfilment but also rewarding good results, and, finally, procuring adequate information for the people, as decisions are taken that have direct or indirect effects on the environment. It is a significantly smaller EAP with respect to volume since, as indicated in the actual Considerations, it only represents the environmental part of a global or more extensive community strategy that refers to the other community policies, via the environmental integration mechanism in the rest of the community policies, as we will see.



2. THE SINGLE EUROPEAN ACT AND THE TREATY OF MAASTRICHT

But the great step in constituent treaties related to the environment takes place much earlier, in the Single European Act, as a specific Title, Title VII, is introduced into this reform of the treaties. This title is comprised of articles 130 R to 130 T², where the Community competence in environmental matters is definitely established, acting as a counterweight to the achievement of the interior market. At that time, the decision making would be done unanimously whilst in the reform carried out with the Treaty of Maastricht some years later, apart from reinforcing the community environmental objectives, the decisions are taken by qualified majority, which represents a considerable reinforcement of the environmental policy. At the same time, the environment becomes a horizontal type community policy, as, for example, the Cohesion Fund is enabled to finance the environmental actions decided by the beneficiary states, together with the transport infrastructures. A financial instrument for the environment is thus created in 1992, called LIFE, to support the development and application of the legislation and the policy of the Union in environmental matters³.

The European Environmental Agency⁴ also begins to operate in that period. This

² According to the SEA, the decision-making on environmental matters imposed unanimity whilst after the reform represented by the Treaty of Maastricht the decisions are made by qualified majority vote, which represents a considerable reinforcement of this community policy. Some questions remain, however, both in the regulation contained in the Treaty of Amsterdam and in the Treaty of Nice, which are still decided by unanimous vote by virtue of their exceptional importance and the fact that they are exceptions to the general rule (those of taxation, of territorial organisation and use of soil, the management of water resources and the measures that affect the choice of different energy sources by a member state and the general structure of its energy supply).

³ This financial instrument for the environment is created by Regulation 1973/92 (OJ L 206, of 22 July 1992), and is amended by Regulation 404/96 (OJ L 181, of 20 July 1996), which integrates all the existing instruments in this field (GUA, Medspa, Norspa, ACNAT).

⁴ *Vid.* Council Regulation 1210/90/EEC, of 7 May 1990 (OJ L 120, of 11 May 1990), amended by Council Regulation (EC) 933/1999, of 29 April 1999 (OJ L 117, of 5 May 1999). Its web page has the following address: www.eea.eu.int. The Regulation is the fruit of the impulse given by the Decision of the Council of Ministers of the Environment of 28 November 1989. A community agency is a body of European public law, which differs from community institutions and has its own



Agency is created in order to give objective information about the environment in the European Union and about the pressures that comparatively take place in this field in the different areas of the community territory, so ORTEGA ÁLVAREZ⁵ indicates that its functions are essentially instrumental ones. The EEA is an organisation that has its own legal personality, with headquarters in Copenhagen and which has had 31 member countries for several years now⁶. Thus, the Agency becomes the first body of the EU to receive the then candidate countries as members. It also cooperates actively with other international entities interested in environmental matters both inside and outside the Union; for example, the Directorate General for the Environment of the Commission, Eurostat, the United Nations Programme for the Environment, the WHO, the Economic Commission of the United Nations for Europe, the North American Agency for the protection of the environment, etc.

The mission of this Agency is, in due course, to gather and disseminate specific, relevant and reliable information about the state and evolution of the environment on a European level. The EEA publishes the Environmental Indicators each year as well as other reports and an information bulletin⁷.

legal personality. Community agencies are created via a community act of secondary legislation in order to perform a specific task of a technical, scientific or managerial nature that is specified in the relative foundational act. Currently there are thirteen bodies that respond to this definition of community agency, although there are several words used to name these bodies (Centre, Foundation, Agency, Office, Observatory) which may give rise to certain confusion, above all bearing in mind that other bodies that use these same denominations are not agencies according to this definition

⁵ . *Vid.* ORTEGA ÁLVAREZ, Luis (2000), p. 88.

⁶ The twenty-seven members of the European Union are Member states, as well as Iceland, Norway and Liechtenstein as members of the European Economic Space and Turkey, which has been a member since 1 April 2003, as we have already indicated; negotiations have also been started with Switzerland

⁷ Four reports have come out to date: The environment in Europe, the Dobris report in 1995 ; The environment in the European Union 1995 : report to review the fifth action programme, also in 1995; the Environment in Europe: second report, of 1998 and, finally, the Environment in the European Union on the threshold of the 21st century; facts and perceptions, of 1999. With respect to this latter report, we must highlight that it presents a global vision of the situation of the environment in the community territory until 2010 and the repercussions of the economic development in this field.



Three states become members of the Union at that time: Austria, Finland and Sweden, which have always been portrayed as maintaining high standards in the environmental policy, so their entry into the Union also fosters community concerns for this field of competences.

Finally, the Treaty of Maastricht introduces an amendment into article 228, with the addition of paragraph 2, which grants the Commission the possibility to decide whether to start the procedure established in this article (appeal against non-compliance) submitting the matter to the Court, in which case, it must also decide if the non-complying State should receive a sanction or pay a coercive fine and in this latter case it will establish the sum when presenting the demand. After the reform, article 228 of the ECT permits the Commission to start a second procedure for noncompliance of a decision of the Court of Luxemburg, which may give rise to the imposition on the non-complying state of a coercive fine or of a lump sum. The Commission has indicated in a Communication of 5 June 1996 (OJEC C 242, of 21 August 1996) that it considers the coercive fine channel to be more appropriate, although this does not mean that the lump sum system cannot be used. In any case, these will never be symbolic quantities as the dissuasive effect must be guaranteed.

The Commission used this new procedure for the first time in 1997 when it presented a demand against Greece due to the non-execution of the decision of 7 April 1992⁸ which had sentenced it on the basis of non-compliance with the obligations that were incumbent upon this State by virtue of Directives 75/442 and 78/319, on the environment. The sentence consisted in a coercive fine which the

With respect to the management of water resources the situation presented is not very encouraging, both related to the situation presented today and the forecasts for the future, above all in marine and coastal areas.

⁸ *Vid.* XV Annual Report on the control of the application of Community Law (1997), EJ C 250, of 10 August 1997, on the Commission/Greece, C-45/91 which ends with the decision of 4 July 2002, on the subject, Commission/Greece, C-387/97, Rec. 2000, p. 5047 and following.



Court finally established at 20,000 euros per day's delay in the adoption of the measures to comply with the previous decision, where the ECJ had declared the non-compliance of Greece.

Some conclusions can be drawn from this first pronouncement of the ECJ: firstly the retroactive application of article 228.2 to cases initiated prior to the entry into force of the Treaty of Maastricht is possible, so long as the application phase of the procedure of this article is started after this entry into force (indeed, the non-complied decision is dated April 1992 although the application of 228.2 starts in 1997, as we have territory until 2010 and the repercussions of the economic development in this field. With respect to the management of water resources the situation presented is not very encouraging, both related to the situation presented today and the forecasts for the future, above all in marine and coastal areas..indicated); secondly, the burden of proof falls upon the Commission, which must demonstrate the lack of execution of the conviction due to non-compliance and, finally, the fact that the first case where this precept was applied was in an environmentrelated matter and that the Commission chose the coercive fine and not the sanction, is indicative of the importance of the community environmental policy at all levels⁹.

2. THE TREATY OF MAASTRICHT AND THE CONCEPT OF SUSTAINABLE DEVELOPMENT

The Treaty of Amsterdam grants more extensive competence to the community institutions to take action in this matter and it transfers the principle of integration of the environmental protection requirements to the definition and the execution of the other community actions and policies. Thus it can be stated that the community environmental policy is a horizontal type policy affecting all community actions. It is also a general principle that inspires community action, because if previously it

⁹ On this matter in particular *vid.* SÁENZ DE SANTA MARÍA, Paz (2000)



was included in the community policies just like all other policies, since the Treaty of Amsterdam the mandate to reach a high environmental protection level is transferred to the first Part of the Treaty, which addresses the general principles of the Community, in current article 6 of the ECT¹⁰. The reference to sustainable development constitutes a novelty of the Treaty of Amsterdam and links up with the reference that was included in article 3, relating to the sustainable development of economic activities throughout the Community¹¹.

Despite this, we must point out that although it is well established in theory that the community environmental policy is a horizontal policy, it must be acknowledged that its practical application represents serious difficulties as there are community actions and policies where environmental protection acts as a filter, which are sometimes very difficult to apply, as for instance, the transport policy, or the industrial policy. In these cases the aim is to limit the negative effects that these policies may have on the environment. In this sense, it must be highlighted that this principle of integration does not mean, as some delegations wanted during the negotiations of the Treaty of Amsterdam, that the environmental protection will impose the introduction of new requirements in the different policies, for example¹².

¹⁰ Which says textually: "The environmental protection requirements must be integrated into the definition and execution of the Community actions and policies mentioned in article 3, above all with a view to fostering sustainable development".

¹¹ With respect to the concept of «sustainable development» the document of the United Nations Environment and Development Commission of 1987 must be taken into account, entitled "Our common future" (also called Brundtland Report, for its author), which indicates "Sustainable development is understood as the development that covers current needs without compromising the possibility of future generations satisfying their own needs"

¹² Thus, some States presented proposals in this regard that were not accepted by the other members: Sweden proposed a new article which was to foresee the possibility of the entire proposal of the Commission including an assessment of the foreseeable environmental implications; Germany, Austria, Finland and Sweden proposed amendments with respect to the free circulation of goods in an attempt to protect the environment and the work medium; Austria, Denmark and Sweden tried to introduce some environmental protection requirements into the CAP with concepts such as the "ecologically feasible agricultural production"; Sweden proposed, as a new objective of the common transport policy, respect for the principle of "road development from the environmental perspective" and together with Austria and Denmark, they proposed measures that implied, among other things, generalising the eco-rates throughout the Union, with the logical increase of road transport costs, and, finally, Austria, Denmark and Sweden formulated proposals



Furthermore, there are no mechanisms that absolutely guarantee that the environment will be respected during the execution of the community actions and policies; thus, what normally happens in the best of the situations is that the preambles of the community standards state that respect for the environment has been taken into account. On the other hand, the Treaty of Amsterdam includes a Declaration attached to the Final Document, which contains the commitment by the Commission to prepare environmental impact assessment studies¹³.

But the most important amendment introduced by the Treaty of Amsterdam in environment-related matters is the concept of sustainable development¹⁴ which is included in different articles of the new Treaty: in the preamble (in the seventh whereas and not in a separate whereas as Denmark wanted), in article 2 of the EUT (former article B), in article 2 of the ECT¹⁵ and also in article 3C thus extending the objectives of the Community with the new principles of integration of

related to Trans-European networks with a view to bearing in mind the requirements related to sustainable development and quality improvement of the environment in this policy (vid., among others, documents CONF/3966/96, CONF/3852/96, CONF/3904/96, CONF/3922/96, CONF/3910/96 and CONF/3919/96).

¹³ Declaration no. 12 indicates: «The Commission undertakes to prepare environmental impact assessment studies when it formulates proposals that may have important repercussions on the environment». This is a more ambitious Declaration than the Declarations concerning the assessment of repercussions of the community measures on the environment adopted at the Intergovernmental Conference of 1992, as here the commitment of the Commission was, in general, "to fully bear in mind the effects on the environment" every time it made its proposals, but also more limited, as the commitment of 92 was not limited to the proposals subject to having important repercussions, but rather, it was valid for all types of repercussions.

¹⁴ Indeed, the European Council of Florence (21 and 22 June 1996) requests the Irish Presidency to trace the general lines of a review project of the Treaties for the Dublin meeting and to pay special attention to the following objectives: "(...) a study must be made of the way to increase and improve the efficiency and coordination of the efforts that both the governments and the social agents carry out (...) making the environmental protection more effective and consistent with the level of the European Union to guarantee sustainable development".

¹⁵ The Spanish assistant permanent representative points out (*vid.* NAVARRO PORTERA, Miguel Angel (1998)) that the solution defended by the Nordic countries together with Germany, Belgium and the United Kingdom had been clearly anti-cohesive and had mortgaged the Spanish growth potential (it would have made us lose our situation of positive discrimination in greenhouse gas emissions reduction, for example, and it would have forced us to make very substantial environmental investments in the medium term, for which we were not prepared and which, also, went much further than our commitments in the framework of the Rio de Janeiro Agreement.



the environmental requirements that we have referred to above.

Thus, two major tendencies are formed around this concept: that of Germany, Austria, Denmark and Sweden, which defended the amendment of article B to introduce the concept of sustainable development as an obligation among the Union's objectives. The other tendency was represented by countries such as Spain that took importance away from the environment and supported the introduction of this concept but, given their lower economic level than the countries of the first tendency, they considered it important to maintain the reference to balanced development. Finally, as it is known, the formula that was adopted was an example of equilibrium in the negotiations that talks about "balanced and sustainable development".

In answer to specific proposals made by Germany, Austria, Denmark, Sweden, Belgium and the United Kingdom, a formula of consensus was finally achieved in this article. It was very important for Spain for the environmental protection objectives not to displace the economic development, especially bearing in mind that the environment-related decision-making system in this Treaty is by qualified majority.

On the other hand, it must be pointed out that the community environmental policy has been traditionally considered as a field of shared competences between the Community and its member states, except when related to the preservation of the biological resources of the sea, where the exclusive competence of the Community is recognised, inserting this task into the fisheries policy (in this sense the decision of the Court of Justice of 5 May 1981, Commission/United Kingdom, as. 804/79, Rec. 1981, page 1045 and following is representative). Related to shared competences, mention is made, on the one hand, of the technique of competition, according to which, member states are free to adopt their own regulation if there is no community legislation, but once the Community has intervened, the community legislation has precedence, which becomes imperative both for the past and future



actions of the Member states¹⁶ (this is the technique used in the community environmental policy), and on the other hand, the techniques of complementary shared competences, which do not mean that the community action replaces the action of the member states, but that the action of the Community simply supports or complements the action of the member states.

With respect to the decision-making system, a change has been made from the cooperation procedure to the qualified majority co-decision system¹⁷, so that the European Parliament becomes a co-legislator in this matter and, on the other hand, the consultation to the Committee of the Regions is introduced. Furthermore, this Treaty introduces the possibility of using the reinforced cooperation system in environmental matters, too, which means that the interested States can use this system to advance in matters that are still pending such as taxation¹⁸, as some

¹⁶ LOZANO CUTANDA, Blanca (2001) indicated that community intervention could occur either based on article 95 ECT in connection with the achievement of the domestic market, or according to the procedure regulated in article 175 ECT in connection with the regulation of the protection of the environment in areas that had no relationship with the domestic market. With respect to these questions concerning the legal basis of community competence it must be added that the Court of Justice has not dealt with the matter exclusively for the environment, as the selection of the appropriate legal basis is something that is raised in other community policies. It can be said that the criterion established by the Court of Luxemburg is that the essential objective of the specific community document must be identified, via the analysis of its purposes and content, excluding the consequences that it might represent for other related community policies (in this sense, vid. Decision of 25 February 1999, Parliament/Council, subject C-164/97 and C-165/97, Rec. 1997, page I-1153 and following, where a conflict of legal bases arises between the agricultural policy and the environmental policy).

¹⁷ As it is known, an exception to this procedure is the decision-making by unanimity in mainly tax-related aspects, in spatial organisation and use of soils, water resources management and measures that significantly affect the choice by a Member state of different energy sources. There was a proposal by Austria, supported by Italy, Ireland, the Nordic countries and the Commission, which defended the implementation in these fields, too, of the qualified majority. This proposal, however, did not prosper due to opposition of France, Germany, United Kingdom, Netherlands and Spain, which defended the quasi-constitutional nature and the highest sensitivity of these issues.

¹⁸ With respect to the tax-related issues and the difficulty to make decisions in this field, it can be indicated that Denmark proposed a Protocol to the Treaty of Amsterdam on minimum common environmental rates, where it said that they would not have a tax nature and whose legal basis would be the current 175.1, giving the possibility to establish higher rates on a national level and to influence the income of the national budget, which implied a certain environmental harmonisation in the European Union by qualified majority. This meant that this proposal was quickly rejected by a



States established serious obstacles to make decisions in these issues. It must be taken into account that the Treaty of Nice, currently in force, establishes the possibility of reinforced cooperation in this matter without the need for a majority of members, and furthermore, unanimity is no longer required to begin a reinforced cooperation system, as established in articles 43 and following of the EUT.

We consider this channel to be the most appropriate for countries that wish to advance further in environmental matters, such as the Nordic countries, Austria and in certain issues, Germany and the Benelux countries, countries that stood out in the negotiation of Amsterdam as they defended an in-depth reform of the environmental provisions, seeking a higher level of community protection but also the possibility of raising the level of national protection and making environmental protection a higher principle that has priority over the specific objectives of a good number of common policies, thus managing to export their greater environmental costs. On the other hand, the rest of the States do not wish to be continually forced to accept the maximalist tendencies of the States mentioned, as this implies assuming higher environmental costs which, in some cases, were unnecessary, as the countries of the North, due to internal political considerations, had absorbed these costs de facto¹⁹.

3. THE AMENDMENTS INTRODUCED BY THE TREATY OF NICE

The Treaty of Nice introduces some amendments relating to the environment, although the more radical postures were finally not admitted: in effect the postures that defended the total suppression of part 2 of article 175 (which includes

large opposition of the Intergovernmental Conference. Finally, it must be taken into account that the European Council of Nice gives precedence to environment incentives, above all in tax-related matters, as the aim is prepare a European strategy for sustainable development and these incentives can be decisive for their success.

¹⁹ *Vid.* In this sense the indication given by NAVARRO PORTERA, Miguel Angel (1998), pages 142 and 143), which is still true today, above all bearing in mind the last two enlargements.



exceptional cases where decisions will be taken unanimously) were rejected and finally that provision was rewritten, specifying its terms, which had given rise to doubts and controversies. Above all in connection with the “water resources management” in decision of ECJ of 30 January 2001, in subject 36/98, Spain/Council, an anticipation is made of the amendment introduced by the Treaty of Nice in the sense that the expression “water resources management” refers to quantitative management and to the “measures that directly or indirectly affect the availability of these resources”. This proposal was introduced by Austria.

Thus, the five exceptions existing in the treaty of Amsterdam, where the decisions will be taken unanimously, are maintained, whilst the general norm will continue being qualified majority. When interpreting these exceptions the will of the community legislator must be taken into account in the sense that his idea, when amending them, was not to extend the limitation related to the energy supply to the fields of territorial organisation, water resources management and use of the soil, as the proposal that contemplated this was rejected. On the other hand and at the request of Denmark, the Conference approved a declaration, verifying the will for the European Union to act as a driving force for the protection of the environment both in the Union and on an international level²⁰.

With respect to the Law derived from the provisions of the original Law that we have analysed hereto, it must be pointed out that the community environmental standards have been grouped together by sectors:

- sustainable development
- waste management
- sound disturbance

²⁰ Vid. Ministry of Foreign Affairs, Secretariat of State for European Affairs, Treaty of Nice. Justification Report for the ratification proceedings of the Treaty of Nice, Madrid, 2001, page 53 and following



- atmospheric pollution
- water protection and management
- protection of nature and of the biodiversity
- soil protection
- civil protection
- climate change

Different regulatory instruments were prepared with respect to all these fields from the seventies onwards (there are now more than two hundred), whose aim is to limit pollution by introducing minimum standards, above all in waste management and water and air pollution related matters. This, of course, has not managed to prevent the deterioration of the environment in the European Union but it has helped make the public aware of the importance of the problem and of the need for a harmonised approach not only on a European level but also on an international level.

A great majority of the standards adopted in this issue have the form of directives (such as the framework directive that we will deal with later), as the advisable thing in those numerable cases was to give member states the freedom to choose the means to protect the environment, establishing a minimum level throughout the community territory. Other standards, on the contrary, have the form of regulations, decisions, but regulatory instruments have been intensely using *sui generis*, non-binding instruments, etc. such as the Programmes, of which we will speak later, the green and white papers, the communications and others.

It must be taken into account that the European construction process has been accused on occasions of favouring economic development and trade in detriment of environmental protection, so work in this field, which has been some of the most intense in respect of regulatory development, has served to verify the need to unite these two concepts (economic development and environment protection). This has become evident very recently, as the environmental facet of the economic



development has been highlighted more and more in the European Community, acknowledging that it cannot be based on the exhaustion of the natural resources.

In this regard we can highlight the evolution in the so-called Lisbon process which came about at the European Council of Lisbon, held on 23 and 24 March 2000, representing a great turnaround in the preparation of policies in Europe. It was the first time that Heads of State attended a Council focused specifically on the economic reform within the European Union, which, based on three years' activity, established a new work framework in the area of economic and social policy with the aim of reaching higher levels of growth, productivity, employment and social inclusion. The main conclusion drawn in Lisbon was the following:

"The European Union has established a new strategic objective today for the coming decade : to become the most competitive and dynamic economy in the world, based on knowledge, able to maintain the economic growth with more and better jobs and greater social cohesion".

The Council of Lisbon authorised the development of a series of structural indicators to support the analyses of the extent to which the Lisbon objective has been achieved. These indicators cover the six main aspects of the economic reform process: general economic situation, employment, innovation and research, economic reform, social cohesion and environment. In connection with this latter point, in 2003 the Commission presented a Communication to the Council and to the European Parliament entitled *"Towards a thematic strategy for the sustainable use of natural resources"*. This communication is a first stage in the preparation of the thematic strategy relating to the use and lasting management of the resources foreseen by the Sixth Community Action Programme for the Environment. It launches a debate on a framework of use of the resources foreseen in the objectives of the Lisbon process and the strategy of the Union in favour of sustainable development²¹.

²¹ Vid. Bol. 10-2003, point 1.4.25 and COM(2003) 572 final.



4. THE FAILED EUROPEAN CONSTITUTION AND THE TREATY OF LISBON IN CONNECTION WITH ENVIRONMENTAL PROTECTION

Although our applicable Law at community level is now constituted by the Treaty of Nice, the, for the time being, two attempts to reform it must be taken into account, the failed European Constitution and the new Treaty of Lisbon. Both make contributions to the community policy on environmental protection which, according to all signs, are not going to be put into practice, at least via the texts mentioned.

The Treaty of Lisbon amends articles 174 and 175 and also includes an especially relevant aspect that the Constitutional Treaty had not considered in its articles and which, during the last months of the so-called “period of reflection” had opened up a divide in the community agenda: the climatic change. Indeed, the Treaty of Lisbon includes an explicit reference to “the particular need to fight against the climate change with international measures” within the article related to the environment. This represents an extension with respect to that contemplated in the constitutional Treaty: the objectives of the Union policy in environment-related matters had been completed by the Constitutional Treaty, adding to the stipulations of the Treaty of Nice “the promotion of international measures aimed at coping with regional or global environmental problems”. The 2007 reform has added this sentence to the objective: “and in particular to fight against climate change”. Indeed, a good majority of those measures could have quite easily been adopted in the current community competences, if, of course, there were a political will to do so. Thus, the derivation of external competence based on the existing internal competence on environment-related matters would, in our opinion, be more than sufficient to adopt the so-called actions in climate change matters. Even so, its inclusion must not be disregarded. It may facilitate the adoption of this type of action by the Union and it probably transmits the political sensation of a certain compensation to the public opinion of the States that had already ratified the Constitutional Treaty. .



II. THE EVOLUTION OF THE COMMUNITY WATER POLICY UNTIL THE PREPARATION OF A FRAMEWORK DIRECTIVE.

The most numerous, most meticulous and complex series of regulations of the entire community environmental legislation are those related to water resources protection. Indeed, the community action related to water begins to develop in the seventies and from then until now the series of rules adopted have increased in number but also in complexity²². Firstly we must point out that, strictly speaking, there is no real community water policy. What there is, is a community environmental policy where water protection represents one of the priority elements to be considered, despite the fact that in some community documents, reference is specifically made to this concept, as for example, in the Communication of the Commission to the Council and to the Parliament on “The water policy in the European Community”²³ or in Directive 2000/60/EC which establishes a community framework of action in the water policy field, which we will deal with later²⁴.

Thus, the community institutions, using the legal basis available at each moment of this evolution, have adopted standards for the protection of community waters and in this regard, we can highlight that numerous authors have proposed different stages to classify this evolution. One of these proposals was made by

²² Respect to the community water policy, refer to FANLO LORAS, Antonio (1998) “La evolución del Derecho comunitario europeo sobre el agua”, in EMBID IRUJO, Antonio (dir.) *El nuevo Derecho de agua: las obras hidráulicas y su financiación* Madrid, Seminar on Water Law of the University of Zaragoza, Ebro River Basin Authority and Civitas, page 183, as well as REICHERT, Goetz, (2005) “The European Community’s Water Framework Directive: A Regional Approach to the Protection and Management of Transboundary Freshwater Resources?”, in BOISSON DE CHAZOURNES, Laurence et SALMAN, Salman M. A. (dir.), *Les ressources en eau et le droit international – Water Resources and International Law*, Académie de Droit international, Martines Nijhoff Publishers, page 429 and following as well as my recent contribution in the collective work, Antonio EMBID IRUJO (dir.), (2007) *Diccionario de aguas (vid. the voice “Derecho comunitario de aguas”)*, Madrid, Iustel.

²³ *Vid.* COM (96) 59 end, of 21 February 1996.

²⁴ Adopted by the European Parliament and by the Council of 23 October 2000, OJEC L 327, 22 December 2000.



REICHERT²⁵, distinguishing three stages until the adoption of the Framework Directive:

- The first stage, between 1973 and 1980, when attention would be focused on controlling pollution to protect water quality, which, in the author's opinion, is a problem that is much easier to solve than others that occur in the field of water protection. In this regard, the first Environmental Action Programme proposes two strategies. The first, to limit the emissions of certain substances in the water, and, the second, to indicate water quality objectives, bearing in mind the different uses of water: drinking water, bathing water, water suitable for the lives of fish or to breed molluscs and urban waste water. These directives, several of which are not currently in force, normally respond to a common outline, establishing minimum values or standards for the quality of this water, requiring States to prepare plans or programmes, in order to respect these standards.

- The second stage, between 1980 and 1991, is characterised by the perception of the insufficiencies of the previous stage, for example, the fact that the community legislation in water matters was excessively focused on one of the sources of contamination (industrial uses), marginalising other possible sources (domestic and industrial uses). The result is Council Directive 91/271/EC related to the treatment of urban waste water²⁶ which refers to the collection, treatment and discharge of urban waste water as well as the treatment and discharge of waste water from some industrial sectors. The aim of the Directive is to protect the environment against any deterioration due to the discharge of that water. Hence a calendar is established to equip urban areas, which member states must respect and which satisfies the criteria established in the Directive, related to waste water collection and treatment systems.

²⁵ *Vid.* REICHERT, Goetz (2005), page 432 and following

²⁶ Directive of 21 May 1991 (OJ L 135, of 30 May 1991).



- The third and final stage prior to the adoption of the Framework Directive takes place between 1991 and 2000, a period when the need is perceived for a reform in this field of environmental community action, avoiding the existing fragmentation and verifying that the implementation of the standards in the national field leaves a lot to be desired in the majority of the cases²⁷. A process is thus started to reform the water resources protection legislation of the community territory, seeking to integrate the quantitative and qualitative aspects of its management, as well as develop actions for a rational use of water. The final result of this period is the Council Directive Proposal whereby a community action framework is established in the water policy area²⁸ whose aim is to implement several changes: expand the viewpoint to the protection of any type of water, integrating it into basins, introducing the so-called “combined approach” for limit emissions values and water quality standards which were dealt with separately in the first directives of the seventies, intensifying the people’s participation as well as establishing appropriate water prices. We are going to centre our brief analysis of this important legal standard on these four aspects.

III. THE WATER FRAMEWORK DIRECTIVE

We must begin by saying that it is during the 5th environmental action programme when this Directive is prepared, the most significant directive in water matters in the community construction process. The Framework directive opens up some new perspectives for the development of the water policy in the Community and constitutes a new stage in the construction of this community policy, as it means rationalising the entire legislation that existed until that time, which, as we have already pointed out, was a fragmented group of standards. The new standard, on the contrary, offers an integrated and global approach and is going to enable the

²⁷ In fact, it can be pointed out that in the year 2001 nine of the ten Member states were declared to have breached the community law by the Court of Justice in forty-two cases concerning seventeen directives on water.

²⁸ Vid. COM (97) 49 end



Community, over these years, to carry out a complete renewal of its water policy. Furthermore, the Framework directive acknowledges that the community water policy, like any community environmental policy, must be a horizontal policy that affects “(...) other community policy areas, such as energy, transport, agriculture, fisheries, regional policy and tourism”, as indicated in point 16 of its preamble.

The Framework Directive approaches the management of community water, which, in our opinion, converges in the general ideal of globality, of water integrity, which is the centre of this standard. This is deduced from the content of its first provision; indeed, article 1.a) talks of preventing further deterioration, protecting and enhancing the status of aquatic ecosystems, terrestrial ecosystems and wetlands directly depending on aquatic ecosystems.

The Framework Directive is based on a fundamental idea, namely the fact that the different parts of the water cycle are interconnected, related and not only referring to water per se, but also that this relationship entails the ecosystems that surround it, the climate, etc., and that, of course, this existing connection cannot be broken artificially. Consequently, the different components cannot be regulated in an isolated manner and thus, in contrast with the sectoral approach that characterised the previous legislation, the Framework directive proposes a new approach:

1. A GLOBAL AND ECOLOGICAL APPROACH TO WATER RESOURCES

The aim of the Directive that we are commenting on is to create a consistent, global and transparent legislative framework in the management of community water in order to protect it and give it a sustainable use. With this aim, the WFD abolishes several of the Directives adopted throughout the previous thirty years and therefore establishes transitory periods of seven and thirteen years after its entry into force, which took place on the day of its publication in the OJEC, on 22 December 2000 (the measures to be abolished during these periods are included in article 22 of the WFD).



In this regard, we can distinguish several approaches to community water management among the provisions of the Directive, which, in our opinion, though based on different viewpoints, converge in the general idea of globality, of water integrity, which is the centre of this standard. Firstly, there is an “ecosystemic” or ecological²⁹ approach as article 1.a) talks of preventing further deterioration, protecting and enhancing the status of aquatic ecosystems, terrestrial ecosystems and wetlands directly depending on aquatic ecosystems. Thus, the concerns are not centred on a specific use of water, or on a special type of water (fresh or salt), but rather a broad area of a specific territory is taken into account and the environmental provisions are applied to that area without any specific meaning, in principle (although in some cases specifications are made for certain areas, for example, article 4 establishes different environmental objectives for surface water and protected areas) and therefore, the area of application includes both surface water and transitional water, coastal water and groundwater, so it constitutes a novel vision even among national legislations³⁰ that normally deal with fresh water and saltwater separately.

The definitions of each one of the types of water are clearly specified in article 2 of the Directive, devoted integrally to this task. With respect to the definition of surface water it must be indicated that the concept of territorial waters disappears from the definite text of the Framework directive, although it can be found in the

²⁹ The New York Convention of 1997 on the Law related to international watercourses for different navigation purposes, in its article 20 deals with the protection and preservation of the ecosystems in the following manner: “Watercourse States shall, individually, and, where appropriate, jointly, protect and preserve the ecosystems of the international water courses”.

³⁰ The Spanish legislation mentions the Integral Water Management (IWM) and both groundwater and surface water are included in this concept (Water Act of 1985 reinforced in this regard by the successive reforms of 1999, 2001 and 2003). OLSEN indicates that the Water Act of 1985 organises water management around the basin concept but that other legislations of Member States of the Community do not bear this concept in mind, so the application of the Directive will be more difficult (*vid.* OLSEN, Asger (2001) “The new water framework Directive. Prospects for sustainable water policy for the coming decades”, *International Conference Spanish Hydrologic Plan and Sustainable Water Management. Environmental aspects, water reuse and desalination*, June, 13th - 14th, Zaragoza (Spain); [http://circe.cps.unizar.es/.](http://circe.cps.unizar.es/))



preparatory documents³¹; it appears almost exclusively in the definition of surface and continental water, but it is a key concept; in any case they are marine waters, which is clear, if we refer to the Convention of the United Nations on the Law of the Sea, signed in Montego Bay on 10 December 1982. This Convention in its article 2 and following defines the dimensions of the territorial sea of a State, referring to a concept used by the Directive: the baseline, which is normally the low-water line along the coast, as marked on large-scale charts officially recognised by the coastal State (in our opinion, this need to refer to concepts of international law supports the idea that community law is a specialised rule of law within international law and it must be referred to in the case of lacunae.

With respect to coastal waters, we must point out that this is an innovation of this Directive and one of the reasons for including them is that, firstly, as we have already mentioned, the principle of integration plays an important role in this community standard and, secondly, there were some delegations that were especially interested in including saltwaters within the field of application of this Directive, in order to cover the obligations included in international agreements³². The definition of groundwater did not pose any problems in the negotiations and

³¹ The Commission left record of its reservations on this elimination (*vid.* Situation Report of the COREPER to the Council, Brussels, 17 March 1998, interinstitutional proceedings no. 97/0067 (SYN), note 1, p. 5). In our opinion it is important to point out that the drafters of the Directive, on occasions, committed some errors that may lead to confusion, such as the fact that on some occasions they speak separately of territorial waters and seawaters, as if they were different. This occurs in the work document but this passes to the definite text in article 1, in its penultimate bullet, when it indicates that the Directive will try to contribute, among other things, to “protect territorial and sea waters...”. More specifically, the Commission, in its work documents, pointed out that it preferred not to eliminate the notion of territorial water and maintain the notion of seawater, so the Presidency of the time suggested that the definition of “surface water” should be adapted if the “territorial waters” were finally eliminated from the Directive, which, as we know, did not occur (*vid.* Situation report of the COREPER to the council, Brussels, 17 March 1998, Interinstitutional proceedings no. 97/0067 (SYN), note 5, p. 8) .

³² More specifically, Denmark, Sweden and Finland are the delegations, apart from the Commission, that place emphasis on this idea in the debates (*vid.* Situation Report of COREPER to the Council, Brussels, 17 March 1998, Interinstitutional proceedings no. 97/0067 (SYN), note 1, p. 4). On the contrary, for Spain, the inclusion of coastal waters is going to mean problems in the transposition of the community standard, as our internal rule of law traditionally regulates saltwaters (Coastal Act) and fresh water (Water Act) in a clearly separate manner.



the definition established in the work document passes to the definite text without any changes³³. However, we must emphasise here that groundwater does not always form easily identifiable units, and it is not even clear in the Directive whether they belong or not to the river basin concept that we will deal with later³⁴.

Thus, the field of application of this Directive is much broader than that of other community standards on water management, as it includes the marine medium and fresh water, as we have just mentioned. In this regard, the notion of water body appears, which will be used to help disassociate the different elements of the aquatic medium³⁵, including all the water resources available in the community territory, not only the natural resources but also those created by human activity in an artificial manner. This adds another novel element to the application field of the Framework Directive, as, until that time Water Directives had dealt with water bodies of a natural origin.

In any case, we can say that it is a novel vision of water management, even from the viewpoint of national legislations of the different Member States which, in general, treated fresh water and saltwater separately. This occurred, for example, in the Spanish legislation.

³³ “All the water that is under the surface of the soil in the saturation area and in direct contact with the soil and subsoil”. One must bear in mind that there was already a previous regulation on groundwater, specifically related to its pollution by certain hazardous substances (Directive 80/68/EEC of 17 December 1979) which had already been replaced with a new Directive in the year 2006.

³⁴ Despite the above, the solution of the river basin, according to Commission Communication on water in the Community (in the aforementioned COM (96) 59 final, of 21 February 1996), seems to be the most logical solution for groundwater aquifers.

³⁵ According to article 2, which contains the Directive definitions, water bodies can be “bodies of artificial water, much modified water body, surface water body, groundwater body”. In other words, “water body” as a global concept contains all the elements of an aquatic ecosystem, which are subdivided, for the Directive, depending on the environmental requirements to be applied, as we will see.



2. A COMBINED PROPOSAL AGAINST POLLUTION OF WATER

Among the provisions of the Directive that deal with the pollution of water, article 10 indicates the need for a combined approach for point and diffuse sources of pollution. This is defined in article 2.36 and in point 40 of the preamble and can be explained as follows: as it is necessary to control the discharges carried out into surface waters, the States must set emission controls or emission limit values, applying the principle of correction of attacks on the environment, preferably at the source.

Both for diffuse sources and for point sources, the controls that must be established will include the best environmental practices, as well as those already indicated in the previous legislation, such as Directives 96/61/EEC, 91/271/EEC, 91/676/EEC, the Directives listed in article 16 of the Framework Directive, as well as the Directives mentioned in Appendix IX and the entire applicable community legislation. It is also possible to establish stricter conditions according to paragraph 3 of article 10 of the Framework Directive.

The Directive indicates a flexible combined approach imposed by the Commission (limit emission values and environmental quality standards) and not clearly determined in the Directive, because these limit values are not set with precision. Instead they are coordinated for all the Member States taking several existing Directives as reference but leaving the application and/or start-up to the States in agreement with the principle of subsidiarity. This combined approach must be translated into programmes of measures: article 11 related to the programmes of measures indicates that the measures listed in article 10 are basic measures, in other words, minimum requirements.

The Directive contains strategies to fight against pollution in general, which article 16 makes reference to: this is a very clear example of the “framework” nature of the Directive that we are studying and of the subsequent need to develop both the community and national legislation. In effect, this provision indicates the obligation



of the Parliament and of the Council to adopt specific measures against pollution of water by individual pollutants or groups of pollutants presenting a significant risk to or via the aquatic environment, especially for the abstraction of drinking water. This mechanism is organised via proposals of the Commission to progressively reduce, stop or phase-out discharges, emissions and the losses. Thus, the Commission presented a list at the time establishing the priority substances³⁶.

3. THE PARTICIPATION OF THE GENERAL PUBLIC

Already in the preamble, the WFD places emphasis on the importance of information and of consulting the general public. In line with this spirit, Article 14 establishes a procedure for public information and consultation³⁷ that means that the water resources management and planning documents are placed at the disposal of the general public within the different time intervals established by the actual standard. Consequently, Member States and community institutions have the obligation to inform, consult the public and mutually notify each other of hydrological data.

Thus, to prepare the basin hydrological plans, Member States place the necessary documents at the disposal of the public for the citizens to be able to present

³⁶ Appendix X of the Directive is established for this function but when the Directive was adopted it was still void of content. This lacuna was filled with the adoption of Decision 2455/2001/EC, of 20 November 2001, of the Parliament and of the Council, establishing the list of priority substances in the field the water policy and amending Directive 2000/60/EC (OJEC L 331, of 15 December 2001). Article 19 of the Framework Directive foresees an update mechanism for the proposals, the measures and the strategies derived from article 16 whereby the Commission presents a information plan to the regulation Committee created by article 21.

³⁷ On this particular aspect of the Framework Directive, *vid.* HARRISON Adam, (2001) *WWF's Preliminary Comments on Public Participation in the Context of the Water Framework Directive and Integrated River Basin Management*, WWF European Freshwater Programme, as well as the document of the Ministry of the Environment and the Guadalquivir River Basin Authority, Information and Monitoring Panel of the WFD, whose first part is integrally given over to the participation of the general public in the Directive and to the Spanish experience in this aspect.



comments in writing and have an influence on the preparation of the management documents of the basin or basins located in their territory, so the system established by the Directive does not just involve informing the users, but also their participation in the project. However, it does not say what virtuality they will have, or what path the comments presented by the public will follow. The counterpart to this right is the obligation imposed on the States and the institutions of the Union by the WFD to notify the other Member States and the Commission of the information related to the basin hydrological plans once prepared.

Furthermore, Member states must prepare a series of documents that the Directive demands for the correct management of the water in each river basin district: firstly, the management plans which will include a summary of the Law and of the waterrelated uses in each district, as indicated in article 13 and in appendix VII; secondly, the programmes of measures for each district too, which contain, not only basic measures but also supplementary measures, all of them included in article 11 of the Directive; thirdly, the follow-up programmes, whose aim, according to article 8.1 of the Directive is “to establish a coherent and comprehensive overview of water status in each river basin district” and, finally, the register of protected areas, which are areas resulting from the application of some sectoral Directives in the field of water that protect areas assigned to harness water for human consumption, areas appointed for the protection of significant aquatic species from the economic viewpoint, water bodies for recreational use, etc.

4. THE APPLICATION OF THE “POLLUTER PAYS” PRINCIPLE

This traditional environmental principle developed in the framework of the OECD and incorporated into several international instruments, has appeared in Community Law since the 1st environmental action programme and can be explained by saying that its objective is to compensate for the damage already caused and which was impossible to avoid and that it will be the polluter that must support the cost of the necessary measures to eliminate it or to reduce it to an



acceptable level according to the environmental quality standards adopted. The environmental policy is thus prevented from being defrayed with public aids or subsidies both from the Community and from the Member States, although these exist (not only state aids that contribute to the protection of the environment via subsidies, deductions and other tax incentives granted to the companies, but also financial resources provided by the Community via the LIFE programme).

The principle is included without ambiguities in point 11 of the preamble of the Directive, together with the other principles of environmental law, and is developed in the important article 9. Its interpretation can lead to the deduction that the Directive aims for the States, in agreement with this principle, to bear in mind the recovery of costs for water services, including environmental and resource costs, ensuring a pricing policy that provides adequate incentives for users to use water resources efficiency and thereby adequately contributes to the different water uses (industry, households and agriculture) to the recovery of the costs of water services. So far, one could say that the rule is the integral recovery of the costs of the works on account of the users, but the problem arises when we verify that the WFD includes a part 4 in this article 9 that contemplates extremely important exceptions to this cost recovery principle: indeed, the Directive indicates that the States shall not be in breach if they decide in accordance with established practices not to apply the aforementioned provisions, for a given water-use activity, where this does not compromise the purposes and the achievement of the objectives of the WFD. All this information must be included in the basin hydrological plans.

With these provisions, the integral cost recovery principle has been eliminated, above all due to the pressure of Spain³⁸, although, as EMBID IRUJO indicates, an

³⁸ Indeed, this moderated approach to the “polluter pays” principle is the result of two circumstances: firstly, the actual Treaties empower the Council to establish exceptions to the application of this principle (article 175.5 of the ECT) and, secondly, it is the fruit of the community negotiation since, as we can see, the commission project presented the principle of integral cost recovery (deduced from the changes in the initial proposal, included in article 12 of the COM



attenuated cost recovery principle is still included, as the exceptions must be encouraged “appropriately and not easily, given the terms used by the precept, and whose appreciation, in any case, will remain in the hands of the European Commission”³⁹. In the opposite opinion to the author mentioned, CARO-PATÓN CARMONA⁴⁰ following DELGADO PIQUERAS indicates that the final draft of article 9 is pragmatic, as it permits the States not to apply the principle so long as this does not compromise the purposes of the Directive and, furthermore, the objective has been established in the legal calendar for the efficient use of water and the appropriate economic contribution of the users to be effective before 2011.

In any case, we could say that although the theoretic recognition of the principle is explicit, putting it into practice implies certain problems as article 9 connects “the polluter pays” principle with the cost recovery of the services linked to the use of water but no provision of the Directive defines what the environmental costs are and what the resource costs are, so the application of the principle in this community standard is done in a more reduced manner.

The Directive does not bear in mind, either, the ideas of the Communication of the Commission of 26 July 2000 on the pricing policy and sustainable use of water resources⁴¹, which indicated that the prices must be directly related to the quantities of water used or to the pollution produced in order to thus encourage users to use water better and reduce its pollution. This viewpoint involves the users and this has not been taken into account in the text of the Directive.

Document (97) 49 end), but nine delegations (Belgium, Denmark, Germany, Spain, France, Holland, Portugal, Finland and Sweden) presented a new text, whose spirit is finally accepted, which bears in mind social and environmental effects, as well as the economic effects, of the recovery of costs, as well as the geographic and weather conditions of the region in question.

³⁹ Vid. respect to this question, EMBID IRUJO, Antonio (2003), p. 5, and, also EMBID IRUJO, A. (1996), p. 23 and following

⁴⁰ Vid. CARO-PATÓN CARMONA, Isabel (2006), p. 37 and following

⁴¹ Vid. COM (2000) 477 end.



IV. THE TRANSPOSITION OF THE COMMUNITY LEGAL ORDER ON WATER IN SPAIN

Firstly, we must point out that new standards have derived from the Framework Directive, approved by the community institutions, which supplement it, develop or modify it and which form part of this “new epoch” of the community water policy, like Decision 2455/2001/EC of the European Parliament and of the Council of 20 November 2001 (OJ L 331, of 15 December 2001) establishing the list of priority substances in the field of water policy and amending Directive 2000/60/CE, Decision 2005/646/EC of the Commission, of 17 August 2005, on the establishment of a register of sites to from the intercalibration network in accordance with Directive 2000/60/EC (OJ L 243, of 19 August 2005), Directive 2006/7/EC of the European Parliament and of the Council, of 15 February 2006, concerning the management of bathing water quality and repealing Directive 76/160/EEC (OJ L 64, of 4 March 2006), Directive 2006/118/EC of the European Parliament and of the Council, of 12 December 2006, on the protection of groundwater against pollution and deterioration (OJ L 372, of 27 December 2006), Directive 2007/60/EC of the European Parliament and of the Council, of 23 October 2007, on the assessment and management of flood risks (OJ L 288, of 6 November 2007) and Directive 2008/32/CE of the European Parliament and of the Council, of 11 March 2008, amending Directive 2000/60/EC, regarding the implementing powers conferred on the Commission (OJ L 81, of 20 March 2008).

The reasons for this relatively plentiful regulatory development are very clear: this is a framework directive, which, compared with the so-called “detailed directives” must be completed to make a consistent application easier, as the framework directive leaves an extensive margin of action to the States. It only indicates the general guidelines, the most important objectives sought, without going into details, sometimes very technical ones, that are left for this type of detailed guidelines. On the other hand, the fact that the standard we are analysing is a Directive means



that its transposition to the legislation of the Member states is necessary⁴²; in other words, the states must implement the obligations contained in the Directive via the adoption of national standards that coincide with the content of the community standard. Really, we can say that the success or failure of a standard like this one depends on this. In addition, it is logically a standard that has had a transcendental influence on the water legislations of all the Member states and it will continue to do so in coming years. On the other hand, it will also influence the legislation of the Candidate states and of all the states interested in being so at some moment in time⁴³.

In the Spanish case, the transposition of the Directive took place with some delay, and following a channel which, in a first approach, one can say, would not be the approach considered for this state obligation. More specifically, it occurs via an article, no. 129, of the Act on tax and administrative measures and of a social order, the so-called Accompaniment Act of the General State Budgets for the year 2004⁴⁴.

⁴² However, despite the fact that the transposition time ended on 22 December 2003, there are still several States that have either not complied with their obligation to transpose, or have not informed the Commission of its national transposition standards of the Directive which, in any case, is a breach of the obligations linked to the fact of being Member states of the Communities: more specifically, the Commission has no information about the transposition of the framework directive in Ireland, Italy, Luxemburg, Portugal and Sweden.

⁴³ Article 49 of the EUT must be brought up here. This article demands, for adhesion, respect for the principles contained within article 6 of the same EUT and a negotiation of the conditions that will logically include respect for the *acquis communautaire*, of the community heritage, namely, not only the community Law in a strict sense, but also the content, political principles and objectives established in the Treaties, the legislation adopted in application of the Treaties, the jurisprudence of the Court of Justice, the acts adopted in the intergovernmental pillars, the international agreements executed by the Community and by the Member states among each other, as well as the statements and decisions adopted within the framework of the Union.

⁴⁴ *Vid.* BOE no. 313, of 31 December 2003, more specifically, p. 46955 and following



With respect to the content of the aforementioned article of the Act we have no objections referring to Spain's compliance with its obligation to transpose the Framework directive. It is said that the new Act will watch over the improvement of the water quality, both referring to continental waters and coastal waters (the aforementioned is a novelty introduced into the Spanish legislation by the Community law), for which it will use mechanisms such as the integral management of water bodies, something that was already reflected in our legislation some years ago. The new Act amends the Water Act integrating the basic definitions of the Directive into it, as for instance, the definition of river basin in article 16, the definition of basin district area in 16 A, or all the concepts linked to water resources management, as they appear in the Framework directive, included in the new article 40 A. However, there are some important definitions that do not appear in the new Act such as those related to the good status of the surface water and groundwater, the ecological status, etc.

With respect to the concept of river basin district, we must point out that according to some⁴⁵, the new wording of the Act does not determine this specifically, leaving this to subsequent standards, establishing the territorial limits of the basin authorities. In this regard, FANLO LORAS indicates that the concepts of river basin and river basin district are approached in a different manner in the Spanish legislation and in the Framework Directive: the concept of river basin in Spain is polyvalent as it has a geographical or physical meaning, it appoints a territorial water planning area and determines the area of competences of the River Basin Authorities; however, the concept of river basin district in the framework directive is a legal-administrative concept that integrates the river basin, transitional waters and coastal waters⁴⁶. This marks a clear difference between Spanish regulation

⁴⁵ Especially the Regional Ministers of the Environment in the socialist Autonomous Communities (*vid.* The document in this regard of 20 February 2004 at www.psoe.es).

⁴⁶ *Vid.* A. FANLO LORAS, "La adaptación de la Administración pública española a la Directiva marco comunitaria del agua", *Application in Spain of the European Water Framework Directive*, Madrid, Ecoiuris, 2003, p. 169 and following



and the community regulation that would have required a more specific reform, because now there is going to be overlapping between the competences of the River Basin Authorities (on the river basins) and the competences on transitional and coastal waters, spaces with a multiplicity of administrative competences (Coastal districts, municipalities, Autonomous Communities). The concept of river basin districts has only been recently determined in Spain, in an attempt to strictly comply with the area of river basin district given in the Directive, bearing in mind that in Spain, such determination could not take place in a preliminary vacuum. On the contrary, the consolidated structure of river basins must be respected and adapted to the organisational structure and the division of competences between the State and autonomous communities⁴⁷.

In the new wording, the Water Act includes the instructions indicated by the WFD for river basin planning, namely, river basin management plans (which article 40 and following of the Act deal with), programmes of measures (article 92 *quater*) and registers of protected areas (article 99 A), as include in the community standard that this Law transposes.

On the other hand, new organisations are created by direct mandate of the Directive, for example, the Water Council of the river basin district, in article 26.3, based on the current Water Councils of the basins, although incorporating competent agents in coastal and transitional water areas, which were not included in the competence of the previous Councils. These Councils become the appropriate channel for public participation in the river basin planning processes, so the stipulations given in the Framework Directive on this point are satisfied. The Water Councils are comprised of representatives of the administrations, users and social or economic organisations and one of their functions is to present the River

⁴⁷ *Vid.* Royal Decree 125/2007, of 2 February, which establishes the territorial scope of the river basin districts (BOE of 3 February 2007).



Basin Plan to the Government.

Therefore, the current organisation chart of organisations is maintained in essence, although to coordinate the application of the protection standards a new organisation is created, which the Framework Directive per se refers to, called competent Authority Committee, in article 36A of the new wording, which will not represent, of course, any amendment related to the distribution of competences, as it is an organisation of simple coordination comprised of representatives from the competent administrations in matters related to continental, coastal and transitional waters, which, as known, are different in Spain.

Article 121 A is introduced as a relative novelty in the Water Law, relating to community responsibility: this provision indicates that the competent public administration in each river basin district, which breaches the community objectives established by the Directive for water management and is transposed by the new drafting of the Water Act, and which gives rise with its action to Spain being sued due to breach of the community law, must assume the responsibility of such breach being attributed to it. In this regard, it must be said that the configuration of Spain as a State with a complex structure must be combined with the principle of responsibility of the State due to breach of the Community Law, whatever the power from which this breach emanates. The combination of both elements has given rise to the birth in Spanish law of mechanisms or instruments that guarantee compliance with community law, bearing in mind that although the competence with respect to guaranteeing that compliance is attributed to the State⁴⁸, this cannot affect the competence that the Autonomous Communities must constitutionally develop.

⁴⁸ As indicated by the Constitutional Court in its decision 80/1993 of 8 March, which interprets article 93 of the Constitution, taking into consideration, too, the content of its article 149.1.3.



Important criticism⁴⁹ has already been heard with respect to the way in which the transposition has taken place, as this has been made via the incorporation in the Senate of the amendments introduced by the Popular Party to the 2004 Budget Accompaniment Act, which is considered by some as unconstitutional⁵⁰. This Act, the accompaniment act, which we could call a “dumping ground”, which the Government in power uses to introduce legislative initiatives that may have been presented before that time, so not much care has been taken when including some concepts of the Directive (for example, the date to reach the environmental objectives in the Directive is 22 December, whilst the Spanish Act states 31 December). Fundamental questions such as the determination of the territorial area of the river basin districts, which has been recently done, have been relegated for ulterior legislative developments. Objectively, it would have to be pointed out that such an important Act as the Water Act, in our country, should have been the subject of a more meditated reform, above all bearing in mind that the Directive was adopted seven years ago now, and that all the States knew from that moment that they had to transpose it to the internal rule of law. On the other hand, the report of the State Council and Economic and Social Council has been avoided.

Thus, a reform process of the Water Act is now proposed in order to attend to the faults committed in this hurried reform that we have commented. In this coming reform, the problems detected must be solved and also, as LACALLE⁵¹ advises: “The new Water Act should clearly and globally assume the new proposals of the water policy of the European Union, especially the ecosystem proposal, the priority

⁴⁹ *Vid.* the evaluation made on the transposition in Spain by CARO-PATON CARMONA, Isabel (2006), p. 44 and following

⁵⁰ *Vid.* in this regard, the declarations of the Regional Minister of the Environment of the Catalan Generalitat that appear in Heraldo de Aragon of 7 February 2004, p. 5. Furthermore, other Autonomous Communities expressed their intention to present appeals of unconstitutionality against this Act.

⁵¹ LACALLE, Abel (2008).



of protection, sustainable use and a broad integrating vocation” and this process must be carried out now in the legislature that begins this year, 2008.

V. CONCLUSIONS

In our opinion, it must be pointed out that after more than thirty years’ legislative activity, the community water policy is configured as one of the most developed fields of the environmental protection policy in the community territory: during the first stages, the adoption of standards did not have a clear strategy or a general framework with single guidelines. Rather it was a way of solving problems case by case and, therefore, the directives that were adopted were focused on controlling the resource pollution levels, establishing, for instance, maximum emission limits for certain substances, and, on the other hand, treating water from the viewpoint of the use it was destined for. This situation is solved by the adoption of the Framework Directive which, despite being subject to criticism, becomes the essential standard for the construction of a coherent water policy, with clear objectives, deadlines to comply with them and clearly establishing the parties concerned.

Hence, the Directive is a legislative example of water management that bears in mind not only the community dimension of this management but also, because it is a directive, the national dimension, which affects the public powers and the individual powers of the Member States, and finally, the international dimension, as it also includes the protection levels established by the international treaties via a vocabulary, some environmental principles or some internationally acknowledged application instruments⁵². We can say, therefore, that the community water policy

⁵² According to CARO-PATÓN, Isabel (2006), p. 54, the Directive represents the incorporation of the principles of international law on equitable and reasonable use of water, as included in the European Charter on Water Resources of the Council of Europe of 17 October 2001, which indicates that this principles requires the consideration of geographic, hydrographic, hydrological, climatic and ecological aspects; the economic and social needs of the populations concerned; the



is in a construction phase but that it already has theoretic and practical experience that converts it into an original, sophisticated and multi-dimensional, legal regime, which is matchless in the current water-related legislative panorama.

Despite the general positive balance, it is only fair, too, to point out that the framework directive has some criticisable aspects such as excessive deadlines which, to achieve its objectives, are set for the Member States or the fact that the participation of the general public is not clearly defined in the Directive, which means that its application in the member states is difficult.

Insofar as the application of this Directive in Spain is concerned, we must point out that, in our opinion, it is a standard that introduces important novelties. It even, in the words of some authors such as EMBID IRUJO⁵³ incorporates a change with respect to the water culture. Indeed, the Directive implies a change in the water resource management because this will be done globally, including all the waters and ecosystems attached to them, as well as saltwaters. Furthermore, it means that the States assume the planning by basins and river basin districts and reform the organisations and authorities that are responsible for that management.

In any case, it sets a challenge for the adaptation capacities of the institutional legal framework of the States, specifically in the Spanish case, characterised in many case by the overlapping of competences among the different levels of the State Administration. It is the local level that is going to give rise to greater difficulties, although the participation of the general public will be essential to overcome them. So, our assessment of this standard is a very positive one; the Framework Directive is a step forward, a progression and an important contribution

effects of the utilisation of the resource on the users and the need to conserve water, harness water resources and avoid wastage, as well as the cost of measures taken to this end.

⁵³ Vid. EMBID IRUJO, Antonio (2003), p. 3 and following



to the protection of the environment on a European regional level, but the collaboration of all the stakeholders will be necessary for these important objectives to be fulfilled as, due to the fact that it is a framework standard it will require an ulterior development both via community law provisions and in the national law of each Member state. We will see where changes are made in the new pending reform of the Spanish Water Act, a reform that is totally necessary to adequately transpose the WFD and, in general, the community water policy.

BIBLIOGRAPHIC SOURCES

- **CARO-PATÓN CARMONA, Isabel** (2006), *“La Directiva marco de aguas y su transposición al Derecho español: análisis jurídico general”*, Revista Aranzadi de Derecho Ambiental, no. 9, page 37 and following.
- **EMBIG IRUJO, Antonio** (2003), *“Consideraciones jurídicas generales sobre la Directiva marco de aguas, con atención especial a las aguas subterráneas”*, Revista interdisciplinar de Gestión Ambiental, January, page 3 and following,
- **EMBIG IRUJO, Antonio** (1996), *“Condicionamientos jurídicos de una política de precios del agua”*, in EMBIG IRUJO, Antonio (1996) (coord.) *Precios y mercados del agua*, Madrid, Civitas, 1996, page 23 and following
- **FANLO LORAS, Antonio** (2003), *“La adaptación de la Administración pública española a la Directiva marco comunitaria del agua”*, *Aplicación en España de la Directiva Europea Marco de Aguas*, Madrid, Ecoiuris, page 169 and following.
- **FANLO LORAS, Antonio** (1998) *“La evolución del Derecho comunitario europeo sobre el agua”*, un EMBIG IRUJO, Antonio (dir.) *El nuevo Derecho de agua: las obras hidráulicas y su financiación*, Madrid, Seminario de Derecho del agua de la Universidad de Zaragoza, Confederación Hidrográfica del Ebro y Civitas, page 183 and following.
- **HARRISON Adam and others** (2001), *WWF’s Preliminary Comments on Public Participation in the Context of the Water Framework Directive and*



- Integrated River Basin Management*, WWF European Freshwater Programme.
- **LACALLE, Abel** (2008) *“La adaptación española de la Directiva marco del agua”*, PANEL CIENTÍFICO-TÉCNICO DE SEGUIMIENTO DE LA POLÍTICA DE AGUAS, Convenio Universidad de Sevilla-Ministerio de Medio Ambiente, <http://www.unizar.es/fnca/index3.php?id=1&pag=24>.
 - **LOZANO CUTANDA, Blanca** (2001) *“La política de medio ambiente”*, en LINDE PANIAGUA, Enrique (Coord.), *Políticas comunitarias*, Colex, Madrid, page 601 and following.
 - **NAVARRO PORTERA, Miguel Angel** (1998) *« Medio ambiente »*, España y la negociación del Tratado de Amsterdam, Estudios de Política Exterior/Biblioteca Nueva, Madrid, 1998, page 131 and following.
 - **OLSEN, Asger** (2001) *“The new water framework Directive. Prospects for sustainable water policy for the coming decades”*, International Conference Spanish Hydrologic Plan and Sustainable Water Management. Environmental aspects, water reuse and desalination; June, 13th - 14th, Zaragoza (Spain); <http://circe.cps.unizar.es/>.
 - **ORTEGA ÁLVAREZ, Luis** (2000), *Lecciones de Derecho del Medio Ambiente*, Valladolid, Lex Nova, 2nd edition
 - **PAREJO ALONSO, Luciano** (1996) *“Origen y desarrollo del Derecho medioambiental en el ordenamiento comunitario europeo”* in PAREJO ALONSO, Luciano & KRAMER, Ludwig, *Derecho ambiental de la Unión Europea*, Madrid, McGraw-Hill.
 - **PLAZA MARTÍN, Carmen** (2005), *Derecho ambiental en la Unión Europea*, Valencia, Tirant lo Blanc.
 - **REICHERT, Goetz** (2005), *“The European Community’s Water Framework Directive: A Regional Approach to the Protection and Management of Transboundary Freshwater Resources?”*, un BOISSON DE CHAZOURNES, Laurence et SALMAN, Salman M. A. (dir.), *Les ressources en eau et le droit international – Water Resources and International Law*, The Haye,



Académie de Droit international, Martines Nijhoff Publishers, 2005, page 429 and following.

- **SÁENZ DE SANTA MARÍA, Paz** (2000). “*Primera multa coercitiva a un Estado miembro por inejecución de sentencia (Comentario a la sentencia del ECJ de 4 de juliode 2000, Comisión c. Grecia)*”, *Revista de Derecho comunitario europeo*, julio/diciembre.
- **TIRADO ROBLES, Carmen** (2007), voz “*Derecho comunitario de aguas*” en EMBID IRUJO, Antonio (dir.), *Diccionario de aguas* , Madrid, Iustel.

ACRONYMS

EEA- European Environmental Agency COM- COM Documents (Documents of the European Commission) WFD-Water framework directive EAP- Community Environmental Acton Programme EUT- European Union Treaty ECT- European Community Treaty OJ- Official Journal of the European Union