



VIRGINIJUS SINKEVIČIUS
Commissioner for Environment
Oceans and Fisheries

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Ms Franziska Keller, MEP
European Parliament
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MEP Jutta Paulus

MEP Sergey Lagodinsky

Honourable Members,

Thank you for your letter of 20 March 2022 concerning the works performed on the Oder river at the German-Polish border and for sharing an expert opinion on the transboundary environmental impacts of on-going construction projects.

As you know, these kind of projects undertaken in Poland are subjected to a pending infringement case that reached the stage of a reasoned opinion under Article 258 TFEU regarding the bad application of Article 4(7) of the Water Framework Directive (WFD) in relation to infrastructure projects, which cause deterioration of water bodies.

Indeed, according to the WFD, the obligation of preventing deterioration of the status of all bodies of surface water shall prevail. If the disputed works fail to prevent deterioration of the water status, this can be justified only under the strict conditions set out in Article 4(7) WFD.

The Polish authorities are also, as you rightly point out in your letter, bound by other legal obligations under the Habitats Directives as well as the Environmental Impact Assessment (EIA) Directive.

Article 6(3) of the Habitats Directive defines a sequenced procedure for authorisation of plans and projects that may have an impact on the Natura 2000 sites. In the case at stake, pursuant to Article 6(3) of the Habitats Directive, the competent Polish authorities need first an appropriate assessment of the implications of the project on the sites in view of their conservation objectives. Based on this, they may only agree to the project after having ascertained that it will not adversely affect the integrity of the sites concerned and, if appropriate, after having obtained the opinion of the general public. Article 6(4) further

stipulates that if, in spite of significant impact on the Natura 2000 sites and in the absence of alternative solutions, a project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State has to take necessary compensatory measures and notify the Commission. Where the site concerned hosts a priority natural habitat or species an opinion of the Commission may be required.

Article 7 of the EIA Directive includes special provisions for cases in which a project implemented in one Member State is likely to have significant effects on the environment of another Member State. Under this framework, should the Polish authorities determine that the project is indeed likely to have significant effects on the environment of Germany, or if Germany so requests, Poland is under the obligation to send to Germany as soon as possible a description of the project and information on the nature of the decision that may be taken. Both Member States should then enter into consultations regarding, i.a. the potential transboundary effects of the project and the measures envisaged to reduce or eliminate such effects.

In that respect, it should be underlined that the Habitats Directive does not restrict the scope of the assessment to be conducted under Article 6(3) to the Natura 2000 sites in the territory of the Member States in which the project is located. The letter and the general objective of the Directive rather point to the opposite conclusion, i.e. that impacts of the above-mentioned project should also be assessed on the Natura 2000 sites located in other Member States such as Germany, and not only on the ones located in Poland.

As regards the application of Article 6(4) of the Habitats Directive, the Commission has not received from the Polish authorities neither a notification nor a request for a Commission opinion. Only the authorities of the Member State in which the project is located, in this case Poland, are competent to submit such notifications or requests.

Notwithstanding the above, the Commission does not have the power to issue orders to stop works in a Member State. Only national courts can, for instance, issue orders to administrative bodies and annul a national decision. Therefore, without prejudice to the Commission's mediating role pursuant to the Treaties in case of dispute among Member States, I take this opportunity to recall that the EIA Directive provides for a system of administrative and judicial review of the decisions, acts or omissions taken by the national authorities during the environmental impact assessment procedure.

Lastly, let me recall that, under shared management, Member States are in the first instance responsible for investigating irregularities and for making the financial corrections required and pursuing recoveries, in particular in case of projects not fulfilling the durability requirements laid down in Regulation 1303/2013^[4]/Regulation 1060/2021^[5]. Consequently, complaints on alleged irregularities affecting projects must be examined by the managing authority of the corresponding programme through arrangements that Member States must put in place to that effect.

^[4] Article 71 of Regulation (EU) No 1303/2013.

^[5] Articles 69 and 74 of Regulation (EU) No 1060/2021.

Let me reassure you that I will continue to follow this case very closely and I look forward to staying in close touch with you.

Yours sincerely,

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke at the end, representing the name Virginijus Sinkevičius.

Virginijus Sinkevičius