

Water, Case C-43/10, *Nomarchiaki Aftodioikisi
Aitoloakarnanias and Others* - Simvoulío tis Epikratias

2021 EU FORUM OF JUDGES FOR THE
ENVIRONMENT ANNUAL CONFERENCE
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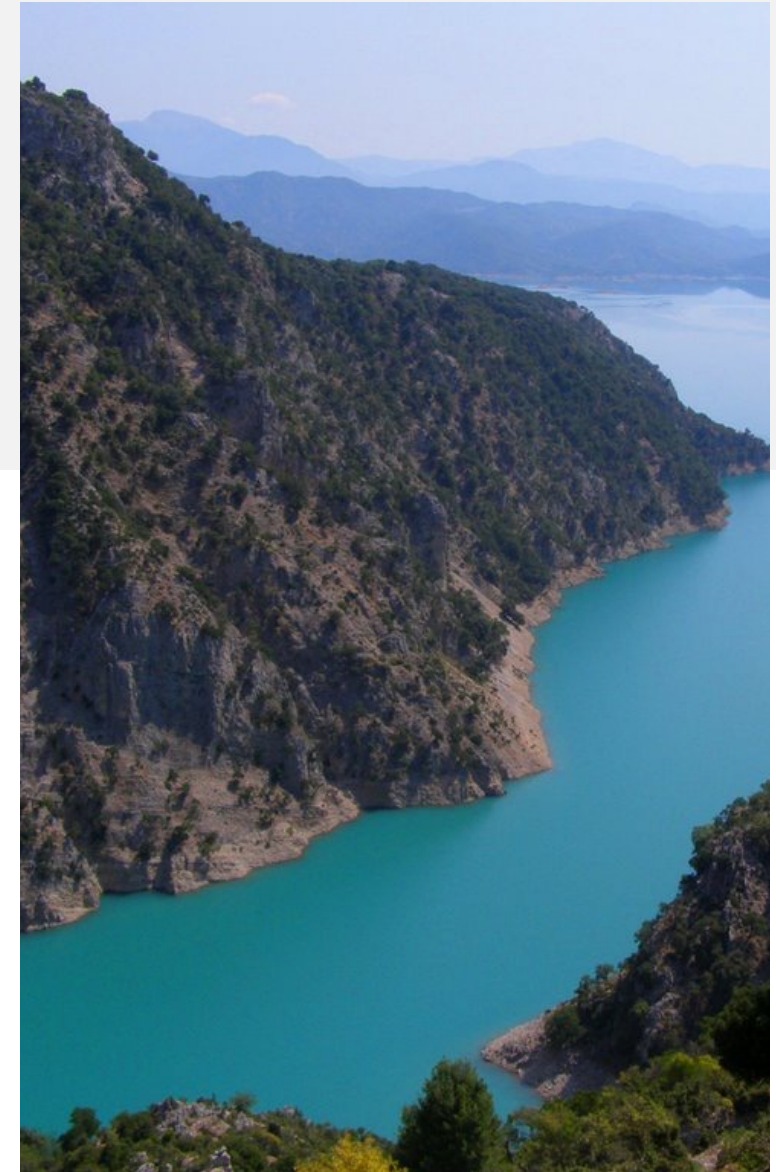


REPUBLIC OF SLOVENIA
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Acheloos River

- The Acheloos, 220 kilometres long and up to 90 metres wide, fed by a number of tributaries, flows into the sea in the Gulf of Patras. It is one of the largest natural water systems in the country and constitutes a very important fluvial ecosystem.



Diversion of Acheloos



- For more than 30 years, the Greek authorities have been working to partially divert the River Acheloos in western Greece into the River Pinios in eastern Greece and to utilise its upper waters to construct dams. The two rivers have their source in the Pindos mountain range.

However, a number of local authorities and associations brought an action before the hellenic Council of State against the Minister for the Environment, seeking the annulment of the project.



In order to rule on that action, the Council of State decided (judgment nr 3054/2009) to refer 14 questions on the interpretation of European Union law to the Court of Justice.



After answering that the Water Framework Directive (Directive 2000/60/EC) and the Directive on the assessment of the effects of certain public and private projects on the environment (EIA - Directive 85/337/EEC) do not, in principle, preclude the project at issue, the Court has interpreted the Habitats Directive (Directive 92/43/EEC).



List of Sites of Community Importance (SCIs) for the Mediterranean biogeographical region

- In that regard, the Court states that the list of Sites of Community Importance (SCIs) for the Mediterranean biogeographical region – including, in relation to the area concerned, several lakes and the Acheloos delta – took effect prior to the adoption of the law approving the project for the partial diversion of the river.
- Further, it was from the time when Greece included the sites concerned in its proposed SCI list that those sites required appropriate measures of protection for the purpose of safeguarding the ecological interest which they had at national level.
- Accordingly, Greece was obliged, even before the entry into force of the decision adopting the list of SCIs, to prohibit interventions which might create the risk of seriously compromising the ecological characteristics of those sites.
- After the notification of that decision to the Member State concerned, the assessment procedure must ensure that the project is authorised to the extent that it would not adversely affect the integrity of the site.
- **That procedure must be organised in such a manner that the competent authorities can be certain that a project will not have adverse effects on the integrity of the site.**

Special Protection Area (SPA)

- **Consequently, consent cannot be given to a project for the diversion of water which is not necessary to the conservation of a special protection area (SPA), but likely to have a significant effect on it, in the absence of reliable and updated data concerning the birds in that area.**

Imperative reasons of overriding public interest

- **Further, if a project must nevertheless be carried out – for imperative reasons of overriding public interest, including those of a social or economic nature – in spite of a negative assessment of the effects on the site and there are no alternative solutions, knowledge of those effects is an essential prerequisite for the weighing of those public interest reasons and the damage to the site in order to determine the nature of any compensatory measures.**
- **The Member State must take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It will have to take into account the extent of the diversion of water and the scale of the works involved in it and thus ensure that the adverse impact of the project on the site concerned is precisely identified.**
- **Thus, irrigation and the supply of drinking water constitute an ‘overriding public interest’ which can, in principle, justify a project for the diversion of water in the absence of alternative solutions.**

Justification of a project for the diversion of water

- On the other hand, in order to justify the implementation of a project for the diversion of water which has an adverse impact on the integrity of a SCI which hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or beneficial consequences of primary importance for the environment.
- The supply of drinking water is, in principle, to be included within considerations relating to human health.
- As regards irrigation, it cannot be ruled out that it may, in some circumstances, have beneficial consequences of primary importance for the environment. Other imperative reasons of public interest may be relied on only further to an opinion from the Commission.

Assessment by the referring Court

- It is for the referring court to assess whether the project at issue in this case does in fact adversely affect the integrity of one or more SCIs hosting a priority natural habitat type and/or a priority species.

The objective of sustainable development

- Lastly, the Court has confirmed that **the Habitats Directive, interpreted in the light of the objective of sustainable development (article 6 EC), permits, in relation to sites which are part of the Natura 2000 network, the conversion of a natural fluvial ecosystem into a largely man-made fluvial and lacustrine ecosystem, provided that, inter alia, the Member State takes all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.**
- The principal objective of that directive is to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements.
- The maintenance of such biodiversity may in certain cases require the encouragement, of human activities.

Hellenic Council of State

- After this ruling of the Court of Justice, the Plenary of the hellenic Council of State has published its judgment nr 26/2014 (Acheloos Case).
- The Council of State ruled that the relevant legislative provisions enabling the implementation of the diversion project through the authorization of the *River Basin Management Plans* (RBMPs) for the critical basins and the *environmental impact assessment* (EIA) Study for the composite diversion project violate several provisions of the EU Water and Environmental Legislation (Article 4 par. 7 of the WFD, Article 1 par. 5 of the EIA Directive and Article 6 par. 3 and 4 of the Habitats Directive).
- In particular, the entire derivation plan with its various projects was annulled due to the missing appropriate assessment. The EIA could not establish that the integrity of the habitats would not be endangered as the relevant data was lacking. A problem in the monitoring of water resources meant that the latest data was not available and it was thus not possible to establish the lack of a serious environmental impact.

The situation on the ground

- Although the Council's decision was very clear that the project could not go on, the situation on the ground was very different. The hydropower dam project in Mesochora was almost ready; the hydropower dam project in Sykia was partially constructed; a 17.4 km tunnel that would change the course of the river was constructed but not finalized. As of 2014, no more works could be done except some work in the tunnel to secure the construction.

Salami – slicing tactic

- In 2017, a permit was granted following an EIA for the start of one hydropower project (Mesochora). While in the past, the permitting was carried out for the plan as a whole, in 2017 a permit was then provided for one project only, without linking it to the overall derivation plan, applying the so-called ‘salami-slicing’ tactic. This approach was adopted despite a court ruling of Council of State in 1994 that one overall EIA was needed to assess the plan as a whole which was then carried out in 2002. The permit for one aspect of the overarching plan, the Mesochora hydropower project, thus contradicted this approach.
- Residents of Mesochora and other supporters filed a case for the annulment of the Mesochora project before the Council of State and continue to voice their opposition to the project. The dam construction of the Mesochora project has already been completed but due to the ongoing legal disputes the plant is not in use so far and the reservoir remains empty.

What has happened to the Natura 2000 site(s) involved?

- The river basin management plans (RBMPs), providing data on the state of the water and aquifer in both districts (Acheloos and Thessaly), were published in 2014.
- According to the RBMPs, the needs of the Thessaly district exceeded its water resources so that the derivation of the Acheloos river was considered as necessary. The derivation project was permitted under the derogation of Art. 4(7) WFD.
- Environmental NGOs filed a case for the annulment of this plan to the Council of State in 2014.

New amendment of the RBMP

- In December 2017, the initial RBMPs were amended and provided that the district of Thessaly can indeed secure its own water resources provided the water management was improved.
- Hence, according to the RBMP, the management of water resources of the Thessaly district should be prioritised to ensure that water needs could be met with resources from the same district.
- However, the provisions of the first RBMP relating to the derivation of Acheloos project were kept in force (in a footnote in the plan).
- Environmental NGOs filed an application for the annulment of the amended RBMPs mainly on the grounds of violation of Art. 4(7) WFD.
- The project developer also filed a case against the amended RBMPs because the derivation project should have been explicitly included in the RBMPs.

New judgments by the Council of State

- All three new cases were discussed before the Council of State in February 2019.
- The Council of State rejected, upon its judgment nr 2228/2020, the application for annulment filed by the project developer, for the reason that the true meaning of the new river basin management plan is that the derivation of Acheloos project isn't kept in force and that the district of Thessaly can indeed secure its own water resources provided the water management was improved.
- For the same reason the application filed by the Environmental NGOs was upheld, and the permit which provided the start of the hydropower project of Mesochora was annulled (judgment nr 2230/2020).

Conclusions

- What has been the impact of the judgement in law and practice within the Member State beyond the site/project?
- The CJEU judgment may have slowed down the process but it has not prevented the projects from being realised. As the judgment only gave guidelines, the case did not help that much overall, also due to the strong political will to realise the projects. The judgment did however reinforce the importance of an appropriate assessment and the need for appropriate data to assess the impact.
- In conclusion, we should underline the role of the national courts. Especially, the jurisprudence of the hellenic Council of State is, to a significant extent, critical in terms of ensuring the effective implementation of the environmental legislation, also through the dialogue with the CJEU, and in setting limits to projects which raise serious “sustainability” issues.

Thank you for your attention

Dimitrios Pyrgakis
Judge at the hellenic Council of State

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