

Co-operation with national judges in the field of
environmental law under the European Commission
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Training module

**HOW TO HANDLE COURT PROCEEDINGS INVOKING NON-COMPLIANCE
WITH EU WATER LAW**

05 - 07 April 2017

Warsaw, Poland

Organised by Academy of European Law



On the Advocate General

- Member of the Court
- Advises the Court by independently preparing Opinions
- Does not participate in deliberations
- Opinion is not a Judgment
- Only the Judgment has the authority of the Court
- Opinions can illuminate the background
- Presentation is my personal view



Article 252 TFEU

The Court of Justice shall be assisted by eight Advocates-General. Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his/her involvement.

Remarks:

The Council has decided to increase the number of AGs to eleven.

The AG is not assigned to any particular chamber of the court. She/he does not participate in the deliberations of the judgment.

EU Water Framework Directive 2000/60 and the Court of Justice

Main objectives and key features. CJEU case law



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Chambers of Advocate General Juliane Kokott
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Presentation is based on an earlier presentation by the
Commission

Please feel free to interrupt



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Although the WFD dates back to 2000 already, the case law on the interesting provisions of Article 4, which sets the objective to be met in 2015 as well as a standstill clause and possible exceptions to that rule, has developed only recently. Nevertheless many issues of interpretation are still open to discussion. It will likely be national judges who, confronted with their cases, will contribute to the understanding of the WFD by asking for preliminary rulings of the Court of Justice of the European Union in Luxemburg.

Overview

- Background and General Overview
- Prohibition of deterioration
- Objectives
- Water pricing



History and general description

- **Why a new EC water regulatory regime?**
 - Scientific reports early 90's: degrading water quality & quantity
- **Water quality:** some improvements in respect of certain substances, but overall increasing pressures
- **Water quantity:** water shortages, given increasing abstraction by (industry, agriculture) and water use for tourism, industry, households etc.
- **Aquatic and terrestrial-dependent ecosystems:** affected by decreasing water quality and quantity



Highlight that the adoption of the WFD is a response to a growing understanding that the current approach to safeguard water quality and quantity was not sufficient.

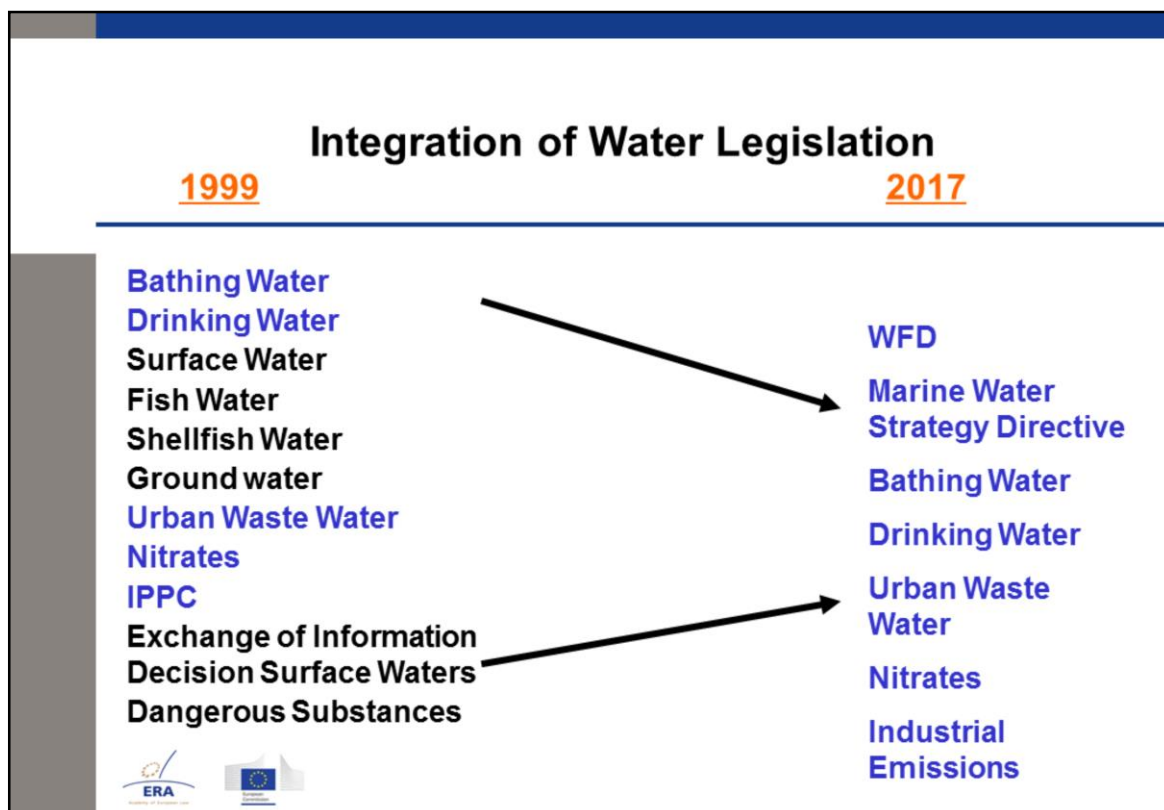
More integration is needed to curb negative trends.

What is the integrated water policy?

- **Water Framework Directive (WFD): integrated water resource protection requirements for:**
 - Surface water and groundwater management
 - Quality and quantity
 - Chemical and ecological quality
 - Emission Limit Values (ELVs) and Environmental Quality Standards (EQSs)



Solution found is to merge some directives and make sure that the scope of the new legislative instrument covers both quality and quantity issues of surface and ground waters.



As the WFD so far did not integrate all water related directives into one overarching instrument and will only replace certain directives. It therefore remains useful always keep in mind the relation between the WFD and other directives. Be aware that the existence of the WFD next to other and often older directives (such as the Nitrates and Habitats Directive) may lead to questions of interpretation.

In particular, integration does not mean that all water related issues are dealt with in one legal instrument only. The 'stand alone' directives listed remain in force because they address specific water related concerns. The WFD addresses general concerns by setting general objectives in its Article 4. The WFD however promotes their integration by making cross references to these 'stand alone' directives at several occasions (e.g. Article 4(8) and (9) of the WFD).

The Marine Water Strategy Directive should be highlighted as it is geographically complementary to the WFD. The WFD only applies to some marine waters, but the MWSD fills the gaps.

Integration: repeal of EU water legislation

- **22/12/2000:** Dangerous Substances Directive (76/464/EEC) - Article 6
- **22/12/2007:** Surface Water Directive (75/440/EEC) + Decisions 77/795/EEC and 79/869/EEC
- **13/01/2009:** “Daughter Directives” 82/176/EEC, 83/513/EEC, 84/156/EEC, 84/491/EEC & 86/280/EEC: Annexes II
- **22/12/2012:** Remaining provisions of “Daughter Directives”
- **22/12/2013:** Fish water (78/659/EEC), Shellfish water (79/923/EEC), Groundwater (80/68/EEC) Directives and remaining provisions of Dangerous Substances Directive (76/464/EEC)



Here we see different stages of repeals provided for by the WFD.

Legal Mechanisms employed by the WFD

- Water Quality Objectives
- Prohibition of Deterioration
- Integrated Planning & Reporting comprising complete River Basins
- Restrictions on Emissions into water
- Pricing of water services



The WFD is a very ambitious and complex instrument. It combines elements of other instruments to protect and improve water quality all over the EU. Therefore we can try to find inspiration in the jurisprudence on these instruments.

Water Quality Objectives are similar to ambient air quality standards and require that water quality achieves a certain minimum standard within a transition period.

The prohibition of deterioration requires protective measures that prevent deterioration. There are parallels to site protection under the Habitats Directive.

Both of these mechanisms are combined with a proportionality test allowing derogations.

The Framework for this is the river basin.

In addition the WFD provides for restrictions on certain emissions that can affect water quality.

Finally, the economic dimension of water use is also part of the WFD.

Scope of application of the WFD

■ Applies to ground water and surface water:

1. Groundwater (as defined in Article 2 (2)):

All water which is below the surface of the ground in the saturation zone and in direct contact with the ground or subsoil.

2. Surface water (as defined in Article 2 (1), (3), (4), (5), (6), (7), (8) and (9)):

- all standing or flowing inland waters on the surface of the land, including rivers, lakes and artificial and heavily modified water bodies
- transitional waters + coastal waters + territorial waters as far as the achievement of a good chemical status is concerned
- **BUT** other marine waters come under [Directive 2008/56/EC](#)



Be aware that the objectives of the WFD are different for surface water and ground water

Objectives

| | |
|-----------------------|--|
| Surface waters | <ul style="list-style-type: none"> • No deterioration (obligation of prevention) • Good status to be achieved in natural water bodies by 2015 • Good chemical status, good ecological status • Good potential to be achieved in heavily modified water bodies by 2015 • Reducing pollution of priority substances • Cessation & phase-out of priority hazardous substances |
| Groundwaters | <ul style="list-style-type: none"> • No deterioration (Obligation of prevention) • Good status to be achieved by 2015 • Good chemical status, good quantitative status • Reverse pollution trend |



A key obligation under the WFD for both surface and ground water is that of non-deterioration, which implies that the MS must make sure that they do not allow water quality and quantity concerns to become worse. This may imply refraining from taking action or, the other way round, take action to stop activities.

In contrast to surface water there is no objective to ensure good ecological status for ground waters, but 'only' to ensure good chemical status and good quantity status. This distinction is not as absolute as it seems, because water quantity may play a role in the description of ecological quality. To put it simple: the presence of certain fish can be an element for measuring ecological quality of a water body. Fish need a certain amount of water to survive, so providing sufficient quantity of water to fish even after the construction of a new dam for hydro power production, may be needed to reach good ecological status of the water body. Achieving good quantitative status for ground water addresses issues such as ground water abstraction surpassing the replenishment of ground water reserves.

It should be noted that each status has its own definition that refers to further specification. Even the chemical status for surface water and ground water are different. The definitions are very complex and technical.

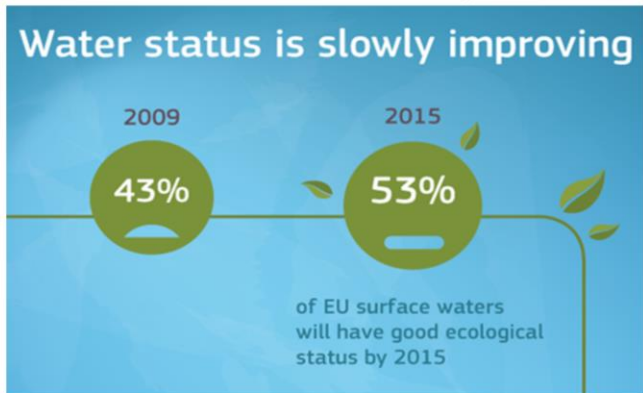
Good chemical status may be described in laymen's terms as the absence or presence below certain concentrations in waters of certain chemicals. These chemicals have been identified by EU legislation. Good ecological status of water can be described as water where natural life can thrive. This of course covers a variety of factors, such as presence

of oxygen, food availability, water quantity and structure of the water bed (sand, rock, mud). Technical specifications for determining good status are found in Annex V to the WFD and in the decision on inter-calibration.

As a rule good status should have been achieved by 2015 (see Article 4, paragraph 1, WFD). Exceptions are dealt with in the second part of the presentation.

Where are we?

COM Prognosis 2012



Limited to 21 MS!
Insufficient information on the chemical status of surface waters.
Groundwater (24 MS):
- quantitative status of 85% good in 2009 and 92% good expected in 2015;
- chemical status of 68% good in 2009 and 77% good expected in 2015.

<http://ec.europa.eu/environment/water/infographics.htm>



The Implementation Report of 2012 (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0670&from=EN>) provides the numbers mentioned in this slide.

Article 4(1) + (3): artificial or heavily modified surface water bodies

- **Modified:** dams, flood protection embankments, ports
- **Artificial:** a water body created by man where there was none, such as new channels, storage basins
- **Difference for objectives Article 4(1)(a)(iii):**
Achieve good ecological potential: the values should be as similar as possible to the closest comparable surface water body type



The WFD takes into account the fact that water bodies may not be very natural anymore or have never been, because they were constructed (canals for navigation) or modified to allow a certain use to take place (dredging the navigation channels, confinement by dykes and weirs to regulate current speed etc.). The objective for these water bodies is to achieve good ecological potential by 2015.

Article 4(1)(c) + Article 6 + Annex IV: protected areas

“Member States shall achieve compliance with any standards and objectives at the latest (by 22/12/2015), unless otherwise specified in the EC legislation under which the individual protected areas have been established.”

Annex IV:

- Areas designated for the abstraction of water intended for human consumption
- Areas designated for the protection of economically significant aquatic species
- Bathing waters
- Vulnerable zones designated under the Nitrates Directive
- Sensitive areas designated under the Urban Waste Water Directive
- Natura 2000 sites



As said the WFD does not replace all water related directives, but rather integrates their existence in the broader context of achieving good ecological and chemical status of water bodies by 2015. The WFD does not intend to diminish the protection offered by these directives to water bodies. On the contrary, by requiring the MS to set up a registry of protected areas it is made clear (to the public and all authorities involved) which general and specific obligations exist for which waters.

What is important to keep in mind is that the deadline of 2015 (Article 4(1) WFD) applies as a general rule, but therefore not always and under all circumstances. If a 'stand alone' directive does not set a deadline itself, as a rule, the deadline for achieving good chemical and ecological status under the WFD applies. This is relevant for the Nitrates Directive 91/676/EEC and the Habitats Directive 92/43/EC which themselves do not set deadlines.

However, the deadline of Article 4 WFD does not replace deadlines for the achievement of the objectives of the 'stand alone' directives. In particular, where these directives set an earlier deadline of their own (such as the urban waste water Directive 91/271/EEC), those deadlines remain in force. In other words, Article 4(1)(c) WFD does not imply that the general obligation of the MS to achieve good chemical and ecological status (or potential) by 2015 replaces specific deadlines in other water related deadlines, such as the end dates applicable for connection and treatment of urban waste water from agglomerations under Articles 3, 4 and 5 of Directive 91/271/EEC.

The deadline in Article 4(1) WFD does not serve as an excuse for not having met earlier deadlines based on these 'stand alone' directives. We will come back to this in more detail when we discuss the exceptions of Article 4 WFD.

Prohibition of Deterioration

- Surface water - Article 4(1)(a)(i): prevent deterioration of the status of all bodies of surface water
- Groundwater - Article 4(1)(b)(i): prevent or limit the input of pollutants into groundwater and prevent the deterioration of the status of all bodies of groundwater
- Applicable since 22/12/2009 (C-43/10, para. 53), before no seriously compromising impact allowed (para. 57)



A core obligation set up by the WFD is the prohibition of deterioration. Since the end of 2009 it has applied to both types of water bodies. In addition, since the adoption of the WFD in the year 2000 all MS authorities were under an obligation to refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by the WFD.

Prohibition of Deterioration

Is the prohibition of deterioration a rule or a planning objective (C-461/13)?

- Relevant for the authorisation of individual projects?
- Effect limited to the Management Plans?
- >> wording, context & objectives support interpretation as a rule!



The Weser case raised two issues on the prohibition of deterioration.

The first was whether this prohibition is really a rule to be applied against individual projects or merely an overall planning objective. The latter interpretation would correspond to the effect of the Directive on national emission ceilings (cf. C-165/09 to C-167/09). It could be based on the idea that, just as the objectives, the prohibition of deterioration is part of the RBMP.

However, the CJEU relies on the wording of the provision, the context and the objectives interpret the prohibition as a rule. The earlier Acheloos case on the effect during the interim period (C-43/10) also supports this outcome.

Prohibition of Deterioration

What is a deterioration (C-461/13)?

- Any deterioration in water quality, relevant to the objectives of the WFD?
- Loss of a status class for chemical and ecological/quantitative status of a water body (high, good, moderate, poor, bad)?

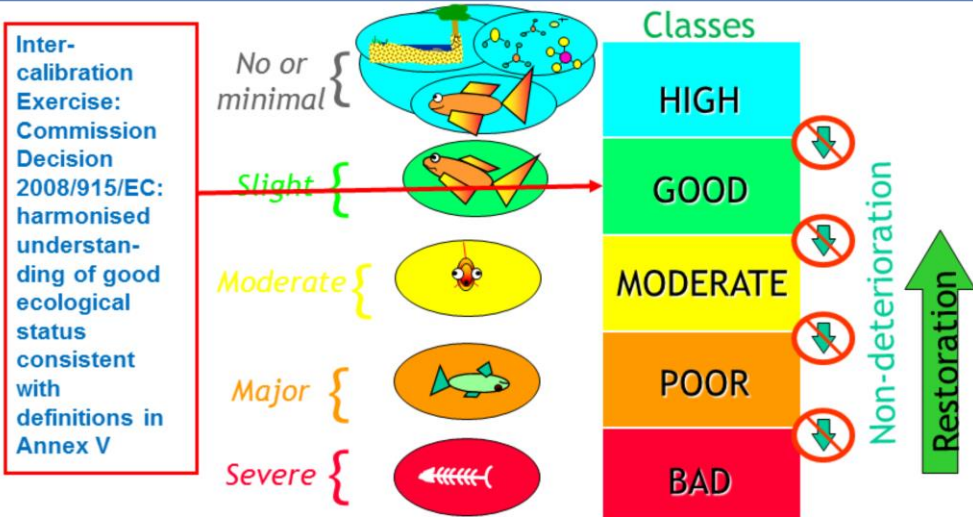


The second issue of the Weser case was how the term “deterioration” is to be understood. In the absence of an explicit definition it was argued that only the loss of a status class constituted deterioration. This opinion was based on the system of the WFD to assess quality. In addition the derogation of Article 4(7) could be invoked: it applies to “deterioration in the status of a body of surface water or groundwater”.

Conversely, a natural reading indicates that deterioration means deterioration. This would be more closely in line with some general objectives of EU environmental law: high level of protection, principle of prevention, polluter pays principle.

The difference between these two positions is that the former would only prohibit very substantial deteriorations while the latter would also cover very limited deteriorations.

Ecological Status



Inter-calibration Exercise: Commission Decision 2008/915/EC: harmonised understanding of good ecological status consistent with definitions in Annex V



Courtesy Peter Pollard, Scottish Environment Protection Agency

This graphic illustrates the system of status classes for the ecological status of surface water. The indication of “non-deterioration” could be understood as meaning that only the loss of a whole quality class was prohibited.

Prohibition of Deterioration

What is a deterioration (C-461/13)?

- The status class of the water body is determined by the worst water quality element
- E.g., point 1.2.1 of Annex V (ecological status of rivers):
 - 4 biological quality elements (phytoplankton, macrophytes and phytobenthos, benthic invertebrate fauna and fish fauna)
 - 3 hydromorphological quality elements (hydrological regime, river continuity and morphological conditions)
 - 3 physico-chemical quality elements (general conditions and the concentration of specific synthetic and non-synthetic pollutants)
- But 'one out all out' rule: the worst quality element determines the overall status (1.4.2 of Annex V of the WFD)



The interpretation provided by the CJEU results in a more fine-grained filter than the original position based on status classes. As the lowest status class of a quality element determines the overall status class there may be quality elements with a significantly better status than the overall assessment. A deterioration of such an element appears more likely to occur than the loss of a class for the ecological status, in particular if the ecological status is only moderate or good. On the other hand, there are probably many links between the different quality elements.

Prohibition of Deterioration

- Standard for the finding of a deterioration?
 - Article 6(2)&(3) of the Habitats Directive: Absence of reasonable doubt that the site will not be significantly affected >> „ascertain“
 - But: Article 4 of the WFD does not require certainty!
 - Well known standard for COM action: Complex prognosis > discretion with limited judicial review on the substance, but stricter review on procedure (e.g. C-326/05 P Industrias Químicas del Vallés v Commission, EU:C:2007:443, para. 75)?
 - Possibly combined with an obligation to review findings in light of monitoring results



Another issue is the threshold to find a deterioration. Here the differences to the Habitat Directive appear to be important. Its standard, the absence of reasonable doubt, is based on the strict specification of the precautionary principle laid down in the Directive. MS must „ascertain“ that the integrity of the site will not be adversely affected. As this is a technically complex prognosis certainty is very difficult to achieve.

However, there is a generally applied standard for a technically complex prognosis undertaken by EU bodies: they enjoy broad discretion with limited substantial review by the courts. The courts focus on the procedural requirements.

Exemption - Article 4.7

- New modifications leading to deterioration are allowed under the following conditions:
 - All practicable mitigation measures are taken
 - The development and reasons for it are reported in RBMP
 - The benefits of the development outweighs the benefits of achieving the WFD objectives / the development is of overriding public interest
 - There are no significantly better environmental options
- Derogation under WFD does not imply derogation under specific legislation



The exception of paragraph 7 allows for deterioration of water as a consequence of new developments, such as the construction of new hydro power plants (dams), new ground water abstraction on large scale which may risk depletion of all reserves or authorization of new discharges of pollutants in the water by industrial installations. Keep in mind that the WFD does not aim at preventing new developments with an impact on water, but requires that the authorities appreciate the consequences such new projects may have on the water quality and quantity and balance them with the benefits expected from the new project. This includes inter alia whether alternatives exist for the project, but it remains open for discussion to which extent the authorities need to assess possible alternatives. In case of a hydro power plant: does it concern only the location, the type and/or size of the plant? Or does it also encompass alternatives such as other forms of renewable energy such as construction of wind or solar power plants?

Another important issue concerns the mitigation measures. These measures should minimize as much as possible the deterioration of the water but not at all costs. This condition in itself implies that invoking the exception of paragraph 7 is not a *carte blanche* for deteriorating waters. The authorities have to justify why they think conditions of paragraph 7 are met.

A key message is that even if the authorities may rightfully invoke the exception of Article 4(7) for a new project, this does not at all imply that the project automatically satisfies the requirements of other Directives as well. By way of example, if a hydro power plant is to be constructed within or nearby an existing Natura 2000 site, the authorities will also have to make an appropriate assessment under Article 6(3) of the Habitats Directive 92/43/EC. Equally they will have to do an environmental impact assessment (EIA) under Directive 2011/92/EU.

Article 4.1 + Article 4.7 - Procedural Framework?

- The WFD only requires that the Exemption is documented in the RBMP, but does not provide a procedural framework for the impact assessment
- Where applicable the EIA or the SEA Directive fill the gap
- Other cases?
 - Right to good administration (general principle of law)?
 - The Precautionary Principle?
 - Jurisprudence on Article 6(2) of the Habitats Directive?



In contrast to the Habitats Directive, the WFD does not proscribe a specific assessment. But how can we find out whether there is a deterioration and whether the authorities have assessed it sufficiently?

It could be argued that, if the derogation needs to be reported in the RBMP it needs to be adopted following the procedure for the adoption of the plan (Articles 13 and 14). However, this procedure is very unwieldy.

Obviously, assessments under the EIA or SEA Directive can provide the necessary documentation. For other cases we need to rely on general principles.

In the absence of an EIA, there are two lines of reasoning supporting an obligation to assess the project, the right to good administration and the jurisprudence on the Habitats Directive, in particular the *Grüne Liga Sachsen and Others* (Waldschlößchenbrücke C-399/14, EU:C:2016:10) case.

Article 4.1 + Article 4.7 - Procedural Framework?

- Right to good administration
 - Article 41 of the Charter >> limited to EU bodies
 - General Principle of Law binding on MS where they implement EU law (H. N., C-604/12, EU:C:2014:302, para. 50), i.e. the WFD
 - Examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for the decision (M. M., C-277/11, EU:C:2012:744, para. 88) [also precondition for effective judicial protection]



The right to good administration sets minimum standards for the administrative procedure. While the Charter right does not apply to MS there is a parallel general principle of law that provides similar guarantees and is binding on MS where they implement EU law, including WFD. A careful and impartial examination of the relevant aspects of a water case would include the question whether a deterioration will be caused. This assessment should be documented in the reasoning of the decision and provide a starting point for judicial review.

Article 4.1 + Article 4.7 - Procedural Framework?

- Precautionary Principle (+high level of protection)
 - Article 191(2) TFEU
 - Allows restrictive action if
 - identification of the potentially negative consequences for health or the environment,
 - comprehensive assessment of the risk based on the most reliable scientific data available and the most recent results of international research
 - Similar conditions for impacts on the Environment?



The requirements for restrictive action under the precautionary principle can be found, for example, in judgments in Case C-333/08 *Commission v France*, ECLI:EU:C:2010:44, paras 91–93, and Case C-343/09 *Afton Chemical v Secretary of State for Transport*, ECLI:EU:C:2010:419, paras 60–62. However, this principle has not yet been understood as requiring an appropriate assessment of potential impacts.

Article 4.1 + Article 4.7 - Procedural Framework?

- Content of an Assessment
- Describe the impact on:
 - WFD quality elements (including biology: phytoplankton; other aquatic flora; macroinvertebrates; fish);
 - other relevant water bodies;
 - cumulative effects?
- How: use the WFD monitoring data and / or expert judgement



These are the elements of the impact that should be taken into account when deciding on a derogation. However, in contrast to the Habitats Directive, the WFD does not proscribe a specific assessment in this regard. It could be argued that, if the derogation needs to be reported in the RBMP it needs to be adopted following the procedure for the adoption of the plan (Articles 13 and 14). However, this procedure is very unwieldy.

Exemptions - Article 4.7

- Overriding Public Interest
- MS enjoy “a certain margin of discretion” (C-346/14, para. 70)
- It helps if the interest is recognised as legitimate by the EU law
- The balancing must be part of the reasons given for the project



The concept of overriding public interest is central to the derogation. In *Schwarze Sulm* the CJEU has recognised that MS enjoy discretion in defining public interest. This case was about a small hydropower plant on a virgin stream in the Alps. The CJEU accepted that there was an overriding public interest in pursuing this project. The finding of the MS in question, Austria, was supported by the general objectives of EU environmental policy, that is the development of renewable energy sources.

Exemptions - Article 4.7

■ Alternatives

- Assessment in the early stages of development
- Assessment at the appropriate geographical level (EU, national, RBD)
- Should go hand in hand with obtaining a clear view of the beneficial objectives provided by the modification - iterative process
- Could involve alternative locations, different scales or designs of development, or alternative processes.
 - Navigation: other type of measures, other operation
 - Hydropower: upgrading existing plants, stretches with less impacts
- Possible synergies with SEA



These are some issues that might become relevant with regard to Alternatives. However, there is no CJEU jurisprudence yet on this condition of a derogation, and a very limited jurisprudence on other Directives.

General requirements on Exemptions

- When applied, strict conditions have to be met and a justification has to be included in the RBMP
- No 'permission' needed from the COM
- Paragraphs 8 and 9 of Article 4 introduce two principles applicable to all exemptions:
 - exemptions for one water body must not permanently exclude or compromise achievement of the environmental objectives in other water bodies
 - at least the same level of protection must be achieved as provided for by existing Community law (including those elements to be repealed)



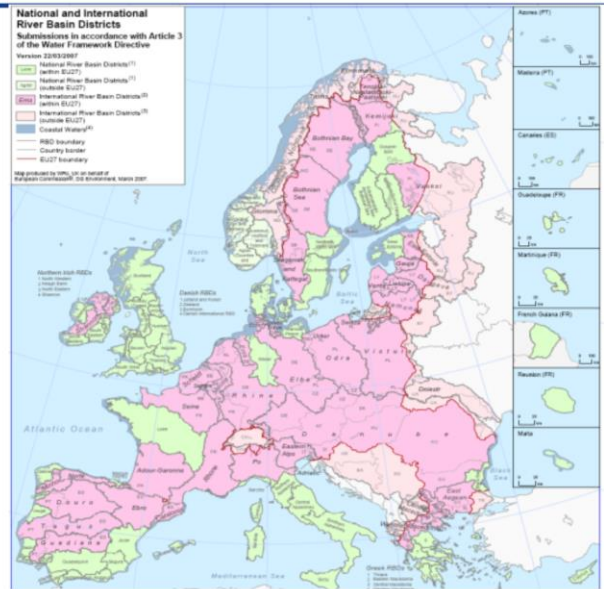
In this slide we explain some general conditions for invoking the exceptions. Most important to keep in mind are the general conditions specified in paragraphs 8 and 9. These paragraphs aim at ensuring compliance with the other water related directives, in particular by avoiding that using the WFD as an excuse for not complying with other water related directives. It is important to keep in mind that even if conditions are met for invoking one of the exceptions in paragraphs 4 to 7 of Article 4 WFD, that does not necessarily mean that conditions are met also for invoking similar exceptions in the other directives.

In other words, an exception possible under Article 4 WFD does not overrule or set aside obligations deriving from the other directives. The WFD does therefore not justify lowering the environmental protection already offered by other directives. The WFD rather seeks coordination of the obligation to achieve the different objectives, within the same river basin district and between the different directives.

For example, a project that results in a deterioration of a water body might be justified with regard to Article 4(1) of the WFD under Article 4(7), but if the water body is designated as a special protection area under the Habitats Directive there may also need to be an appropriate assessment under Article 6(3) of that directive and, probably, a justification under Article 6(4).

Achieving the status objectives - International and national River Basin Districts

- 110 different River Basin Districts (RBD), 40 are international
- > 60 % of territory is international
- RBD size between 1.000 and 800.000 km²



Speaks for itself

River Basin District: Main unit for water resource management

- Assessment of pressures/impacts on water bodies + water use economic analysis (Article 5/ Annexes II-III)
- Set up a registry of protected areas (Article 6 and Annex IV)
- Set up monitoring programmes (Article 8 and Annex V)
- Adopt River Basin Management Plans (RBMP, Article 13 and Annex VII)
- Adopt Programmes of Measures (Article 11)



These slides describe the main units referred to in this Directive: the river basin district and the water body. Mind that the objectives of Article 4 (achieving good status) apply to water bodies, whereas coordination efforts take place at a river basin district level.

Means to achieve the WFD environmental objectives

- **Characterisation of River Basin Districts**
- Scope of application of characterisation (Article 5, Annexes II and III)
- To identify and delineate surface water and groundwater bodies and heavily modified water bodies
- To identify significant man-made pressures that may affect water bodies
- To assess impacts of significant man-made pressures upon water bodies
- To identify water bodies likely to fail to meet WFD environmental objectives (*bodies at risk*)
- To carry out an economic analysis of water use



The WFD has a simple logic for policy development: first, the authorities need to identify their water bodies and river basin districts and then analyse what is going on, what quality and quantity issues there are and where they stem from. This is what Article 5 WFD is about. It requires the authorities to establish a basis for their future policy, to take a picture so to say. The so-called economical analysis of water use based on Article 5 WFD must also give insight in the economic dimension of current water use so as to be able to develop cost effective policy measures.

Monitoring/classification of water bodies per RBD, Article 8, Annex V

- Assess and classify the status of water bodies: to give an overall picture at RBD scale of water status
- Check the effectiveness of the programmes of measures (leading to amendments if needed)
- Focus on *bodies at risk* previously identified via characterisation of RBD



Monitoring developments in water bodies is also part of normal policy development. The monitoring required by Article 8 WFD will help the authorities to design the measures they need to take to achieve the objective of the WFD by 2015. That monitoring should in particular focus on those water bodies which are at risk of not meeting the objective of good status by 2015. Monitoring should allow fine tuning of the measures envisaged by the authorities.

Economic analysis of water use per RBD

Article 5, Annex III

- Two-fold purpose of an economic analysis of water use:
 - Make the relevant calculations needed to implement the principle of recovery of water services costs
 - Determine the most cost-effective combination of measures for the programme of measures



See before.

Means to meet the WFD environmental objectives

- **River Basin Management Plan (RBMP)**
(Article 13-14, Annex VII)
 - A RBMP for each RBD
 - A planning tool: how to meet the WFD environmental objectives



The economic analysis of Article 5 WFD and subsequent monitoring carried out are the basis for the policy measures to be adopted by the authorities. These measures are laid down in the River Basin Management Plan (RBMP). These plans consist of two main parts: the description (overall picture) of the water bodies in a district and the program of measures (which can be considered as the toolbox of the authorities). The latter should enable the authorities to meet their objective by 2015. These measures consist of those measures which the authorities are already required to take under 'stand alone' directives (such as the Nitrates Directive, Urban Waste Water Directive, Habitats Directive), basic measures required under the WFD and, if these are not sufficient to achieve the objective by 2015, supplementary measures.

Content of the RBMP

- **Annex VII + Priority Substances Directive + new Groundwater Directive**
 - General description of each RBD (mapping of water bodies etc.)
 - Summary of the characterisation of each RBD
 - Identification of water bodies according to their status
 - Environmental objectives applicable to each water body and cases where derogations would be used
 - Summary of the Programme of measures



See before.

Programme of measures

Supplementary measures, as needed on top of basic to achieve the objectives. To be defined by MS.

Supplementary measures

Additional WFD basic measures

- Cost recovery
- Safeguard drinking water
- Controls over abstraction
- Emission controls for point and diffuse sources
- Controls over hydromorphological alterations
- Prohibitions on direct discharges to groundwater

Compulsory basic measures

Measures under existing legislation

- Urban Waste Water Treatment (91/271/EEC)
- Nitrates - protection of water from agricultural sources (91/676/EEC)
- Integrated Pollution Prevention Control Directive (96/61/EC)
- Nature: Habitats (92/43/EC) and Birds Directives (79/409/EC)



Slide 21

See before

Exemptions from the objectives of Article 4

- **The WFD provides exemptions from:**
 - the 2015 deadline: it can be extended to 2021 or 2027 (Article 4.4)
 - the obligation to achieve good status: less stringent objectives allowed under certain conditions (Article 4.5);
 - The non-deterioration requirement: the temporary deterioration of the status in case of natural causes or "force majeure" can be accepted (Article 4.6);
 - The non-deterioration requirement + failure to achieve good quality in case of new modifications (Article 4.7, earlier).



We've already discussed one exemption laid down in Article 4, namely the exemption to the prohibition of deteriorations that result from new modifications (projects), laid down in Article 4(7). It can also be invoked if such projects prevent the achievement of quality objectives. Article 4 WFD lists several additional exceptions. It is in the RBMP that the authorities invoke the exceptions and their justification. You as a judge could be asked whether that is justified or not.

Exemptions - Article 4.4 & 4.5

- Reasons to extend deadline / set lower objective:
 - technical infeasibility;
 - disproportionate costs;
 - natural conditions;
- Baseline: no further deterioration allowed [relationship to Article 4(7)?]



Paragraph 4 allows extending the deadline for achieving the objective of Article 4(1) by two times six years. So, if invoked, the deadline is 2021 or 2027 instead of 2015. In practice this seems to be the exception which is invoked in most cases by the authorities. Again, keep in mind that invoking this extension does not mean that deadlines in other directives are extended as well.

Paragraph 5 allows under certain conditions to lower the objective to be achieved.

As a general condition further deterioration of the water must always be avoided. That may imply that the authorities have to take certain measures already now, despite successfully invoking the time extension or lowering of the objective.

Article 4(4) and (5) do not say whether their specific prohibitions on deterioration allow for an application of Article 4(7). On the other hand, Article 4(7) generally applies to deterioration. Moreover, there is no reason for stricter protection of water bodies under Article 4(4) and (5) than under Article 4(1). If a project is justified by overriding public interest, the outcome of the balancing exercise should not change because the deadline has been extended or because a lower objective has been set.

Exemptions - Article 4(4) and (5): disproportionate costs

- A political judgement informed by economic information (analysis of costs and benefits).
- Considerable margin by which costs exceed benefits.
- The costs of measures required under existing Community legislation already agreed at the time of the adoption of the Directive cannot be considered.
- Affordability (or ability to pay for a certain measure) can be one element for justifying the decision on a time extension if based on a clear explanation.
- **Open issue:** Role of constraints of the public budget as a reason for extending the deadline.
- **Open issue:** Role of affordability (ability to pay) in setting less stringent objectives.



One of the reasons often invoked is that of excessive costs. This notion will certainly need interpretation in the light of necessary budget discipline.

The costs for measures which the authorities must implement on the basis of other directives (such as Nitrates, urban waste water, drinking water) cannot be taken into account. The excessive costs should only relate to the extra efforts required under the WFD. In the end however, as with all issues of interpretation, it will be up to the national judges and in the end the CJEU to decide.

Exemptions - Article 4.6

- Guidance on definitions:
 - extreme floods: floods with a low probability, or extreme events scenarios as to be mapped according to Floods Directive
 - prolonged droughts: severe natural unpredictable hydrological phenomenon
- Exemption will be applied after event
- Take practicable steps to prevent further deterioration
- Contains prevention and management elements (e.g. in Drought Management Plan)



The exception of paragraph 6 aims to take account of unforeseen events which have had a negative impact on the possibility of the authorities to achieve compliance by 2015 and to avoid deterioration. Again, all conditions have to be met before the authorities can invoke this exception. Again, issues of interpretation are likely to arise. The economic analysis made under Article 5 and the subsequent monitoring under Article 8 may be relevant for determining whether the event at stake is really unforeseen or exceptional.

Relevance for Courts?

- COM can initiate infringement proceedings in the CJEU
- Who could initiate proceedings in MS courts?
 - Water users that are burdened by measures to improve or maintain water quality
 - NGOs or water users to enforce water quality standards? On the substance cf. ClientEarth case on Ambient Air quality (C-404/13); on the status of NGOs under the WFD see pending cases C-663/15 - Umweltverband WWF Österreich and C-664/15 - Protect Natur-, Arten- und Landschaftschutz Umweltorganisation
 - Direct effect? Sufficiently clear? Discretion, at least with regard to exemptions, but shouldn't exclude invocation.



While the objectives are obviously a very important task for the competent authorities, their relevance for judicial practice in the MS at first glance appears remote. Primarily we would expect the Commission to enforce these obligations.

However, we know from cases on EU Ambient Air Quality legislation that there may be an interest by affected individuals and NGOs. The question is whether the objectives are sufficiently clear to have direct effect. A practical problem lies in the complexity of objectives, but the legal issue lies in the necessary balancing exercise that is required under the exemptions. I would argue that in this regard MS authorities enjoy wide discretion. Therefore judicial control should be limited to manifest errors and respect of procedural requirements, e.g. public participation.

You should also note that Advocate General Bobek in C-529/15 – Folk argued that Article 4(7) was not directly applicable by courts, meaning that they could not on their own verify whether a measure was justified under this provision. However, he reserved the question whether they could review the application of this exemption.

Water Pricing (Article 9)

■ What:

- Implement the polluter-pays-principle (Article 191(2) TFEU)
- Based upon economic analysis of water use: making water users pay could be more efficient, effective, fair and least-costly to society
- Costs: financial, environmental and resources costs associated with water services

■ Who pays:

- An “adequate contribution” from, at least, industry, agriculture and households (water users that make use of or lead to water services)
- Article 9(4): possibility to exempt “established practices” for a given water-use activity
- **But: wide discretion of Member States (C-525/12)**

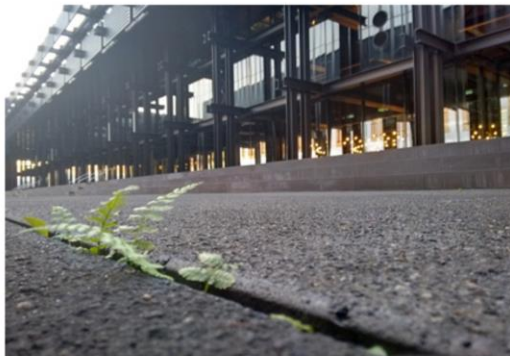


Water pricing is one of the measures which the MS must consider seriously to address concerns over water quality and quantity. The legislator considered that water pricing and cost recovery of water services are important tools to achieve the objective of the Directive.

In an infringement case against Germany (C-525/12) the CJEU considered MS enjoy a wide margin of discretion how to implement this obligation. In particular there is no obligation to implement a comprehensive system to recover costs or to make each sector mentioned contribute.

The CJEU based this finding on the drafting history of the WFD, its nature as a Framework Directive that doesn't provide for complete harmonisation, its focus on water quality and the River Basin District as primary level of decision-making.

Thank you for your attention!



Case law: <http://curia.europa.eu/juris/recherche.jsf?language=en>

Guidance: http://ec.europa.eu/environment/water/water-framework/facts_figures/guidance_docs_en.htm

