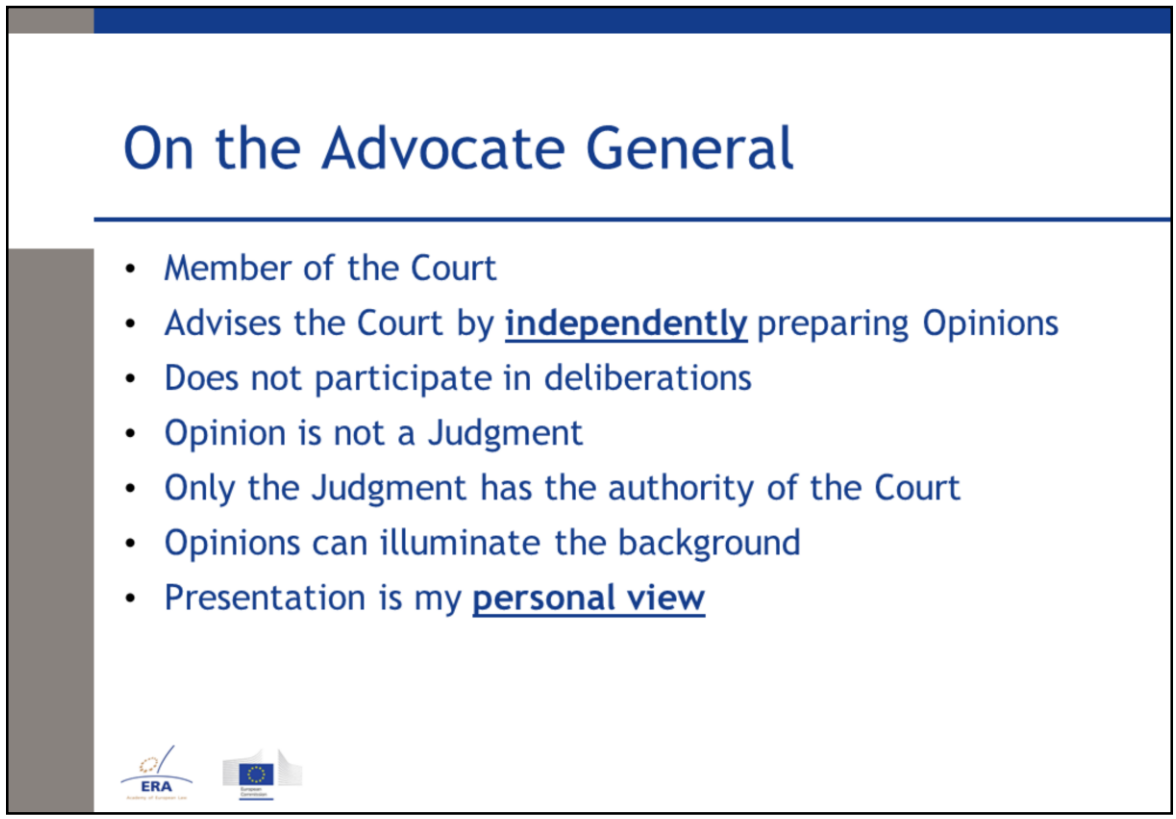
Co-operation with national judges in the field of environmental law under the European Commission Framework Contract ENV.A.I/FRA/2012/0018

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



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

© European Commission, European Environment Agency

Dr. Christoph Sobotta

Chambers of Advocate General Juliane Kokott

Court of Justice of the European Union

Presentation is based on an earlier presentation by the Commission

Please feel free to interrupt

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

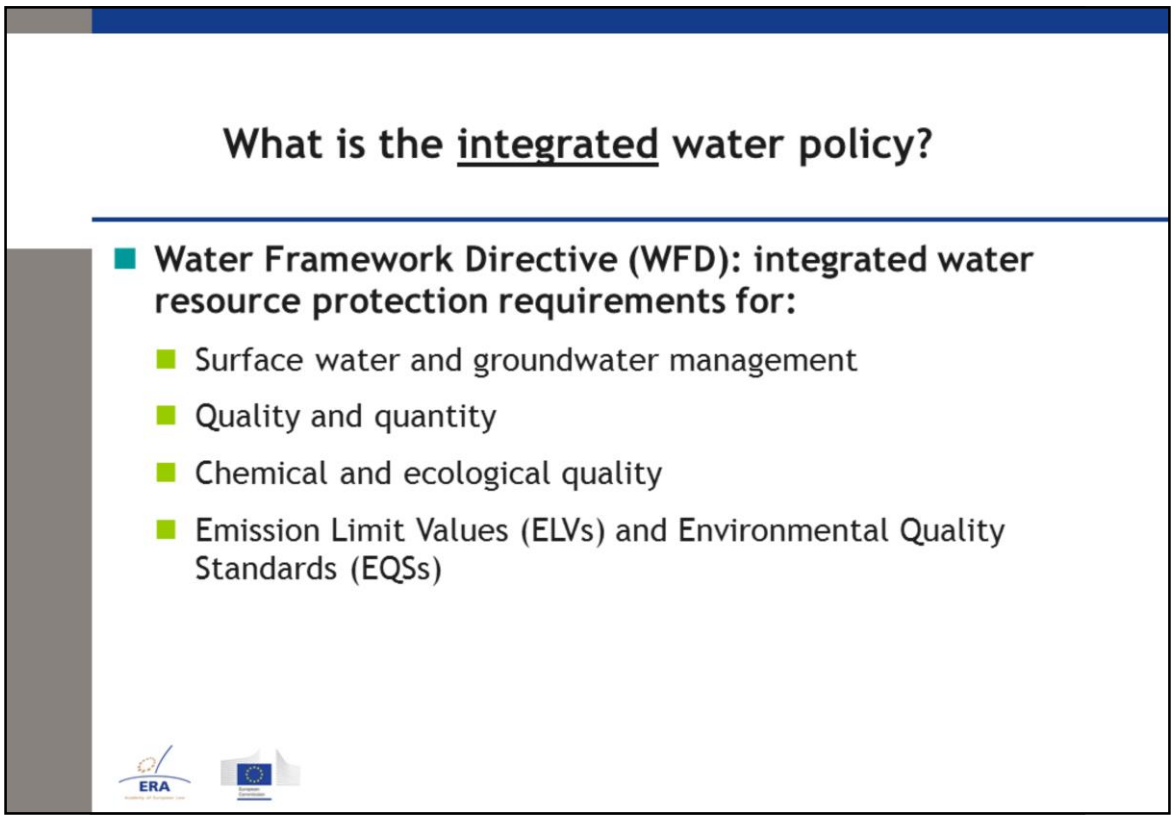
- Background and General Overview
- Prohibition of deterioration
- Objectives
- Water pricing

History and general description

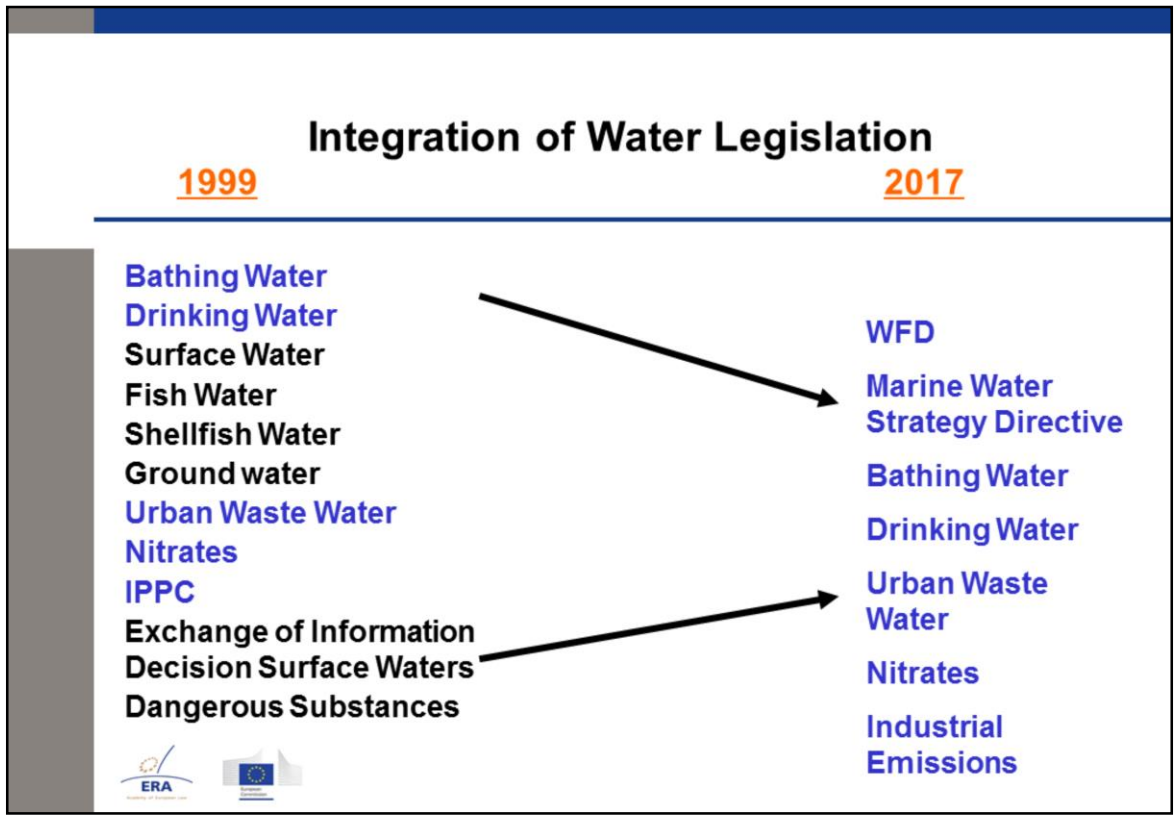
- **Why a new EC water regulatory regime?**
  - Scientific reports early 90's: degrading water quality & quantity
- **Water quality**: some improvements in respect of certain substances, but overall increasing pressures
- **Water quantity**: water shortages, given increasing abstraction by (industry, 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.



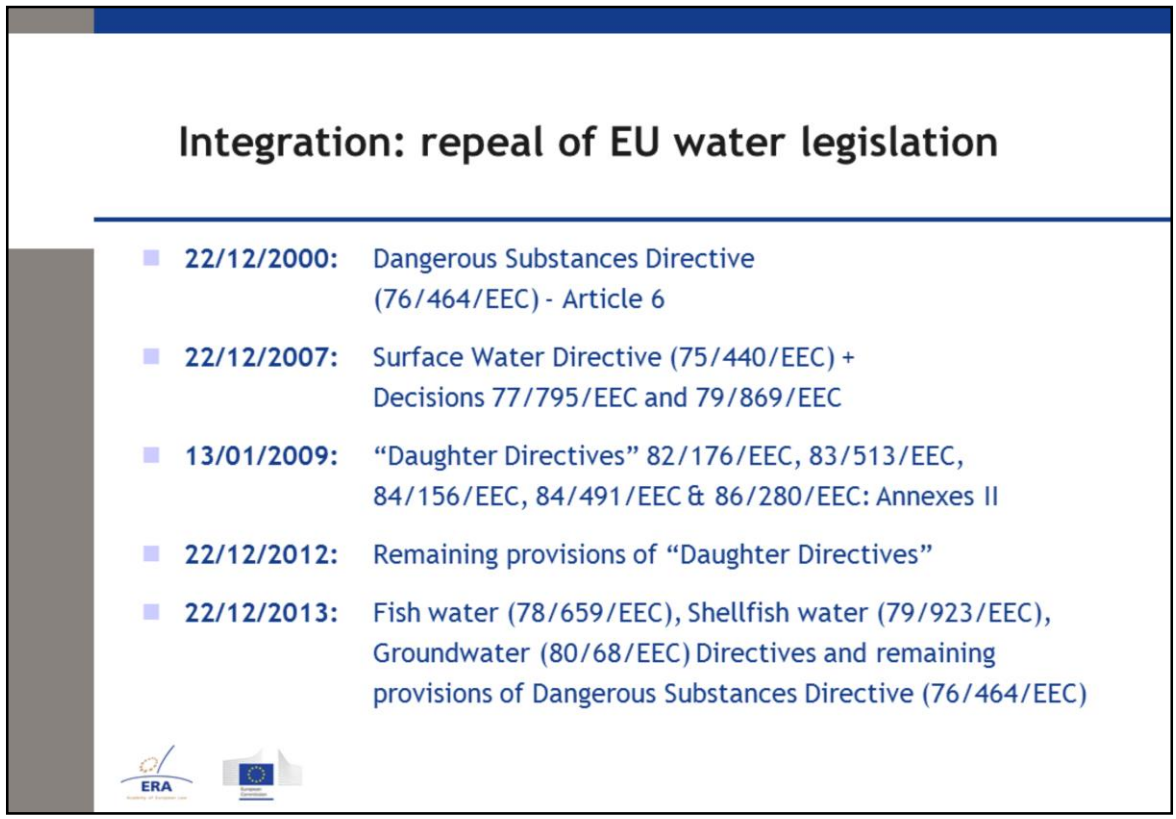
Solution found is to merge some directives and make sure that the scope of the new legislative instrument covers both quality and quantity issues of surface and ground waters.



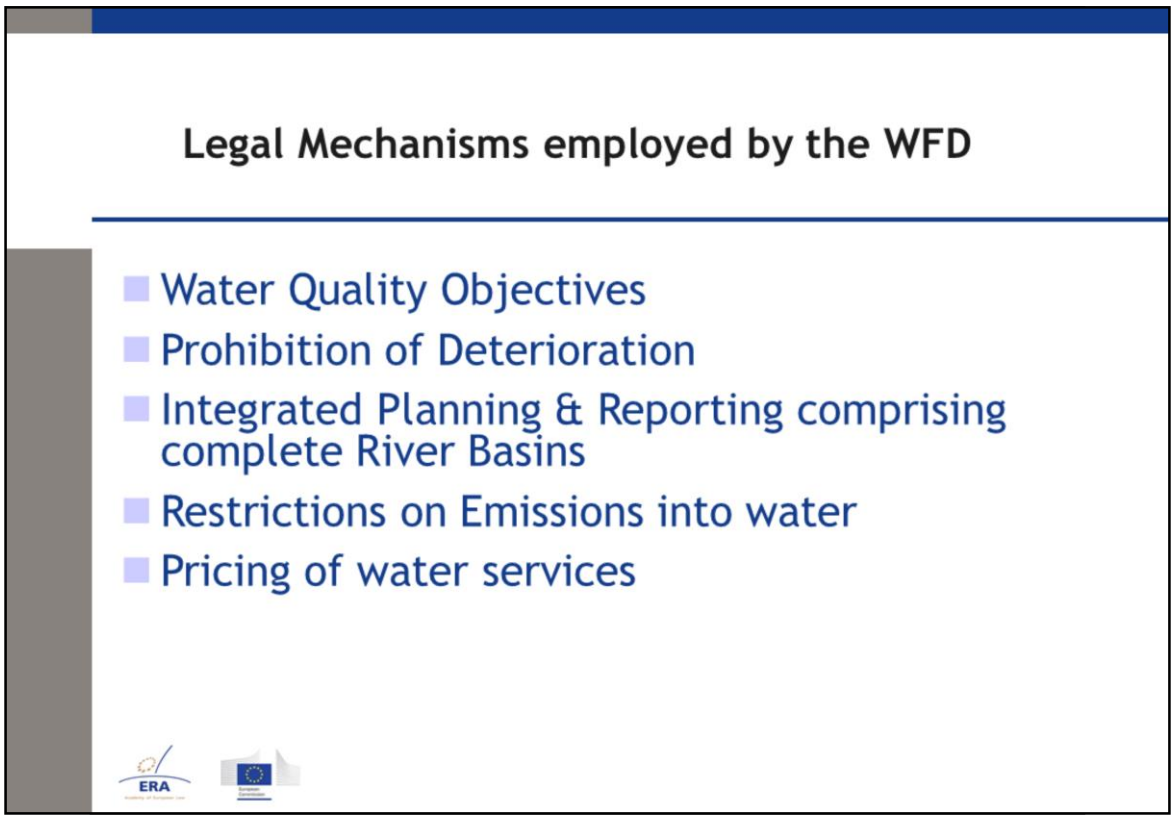
As the WFD so far did not integrate all water related directives into one overarching instrument and will only replace certain directives. It therefore remains useful always keep in mind the relation between the WFD and other directives. Be aware that the existence of the WFD next to other and often 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.



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



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.

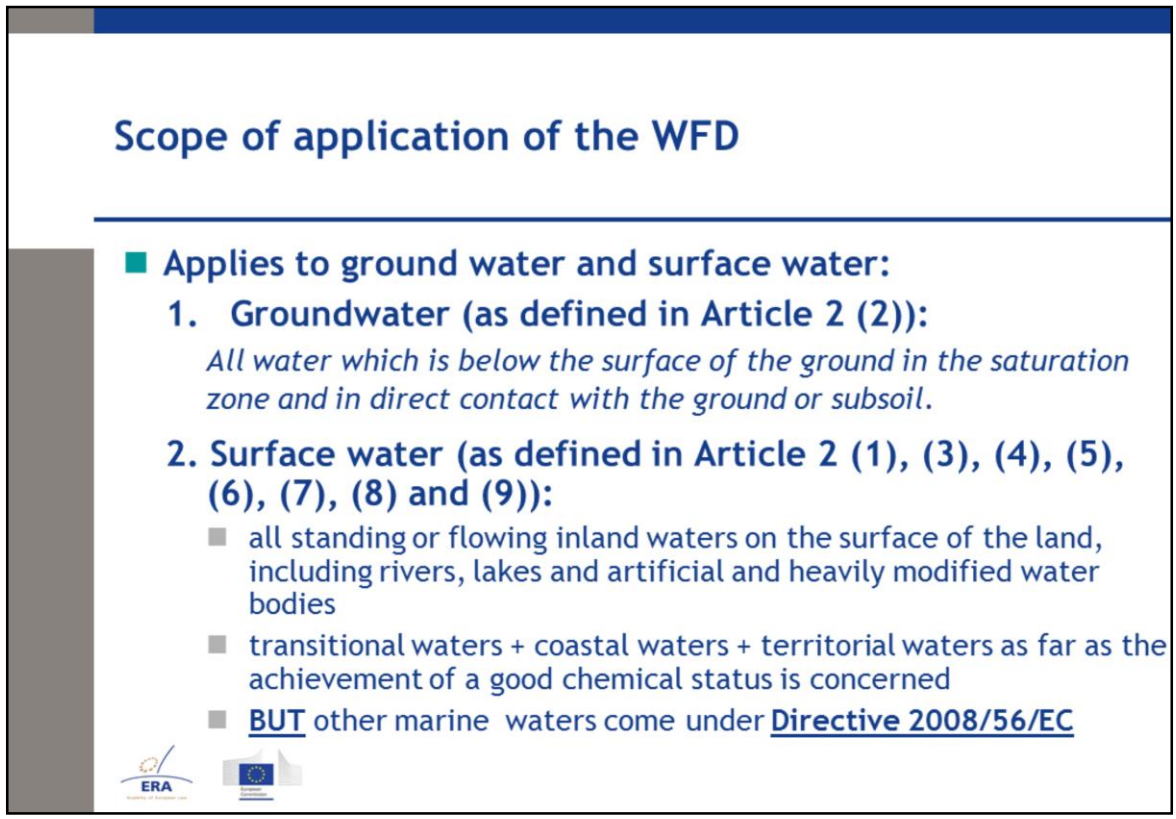
The prohibition of deterioration requires protective measures that prevent deterioration. There are parallels to site protection under the Habitats Directive.

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

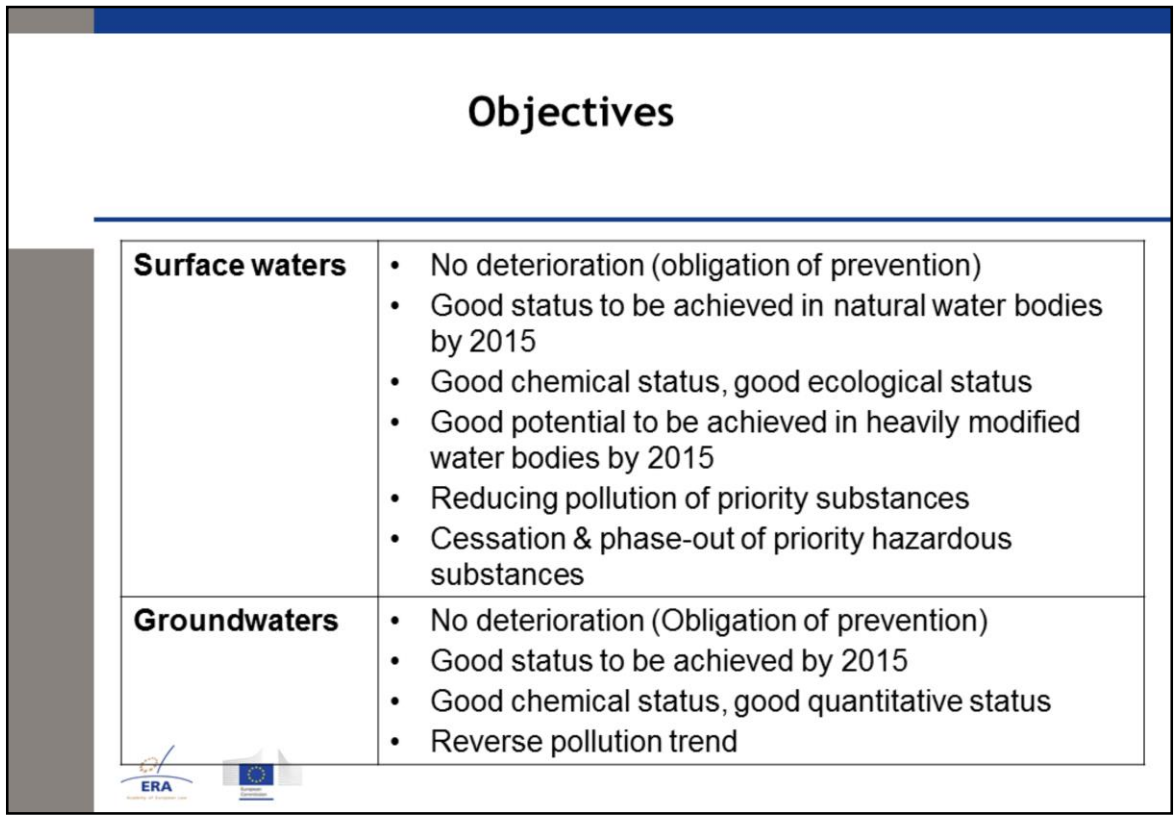
The Framework for this is the river basin.

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.



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



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.

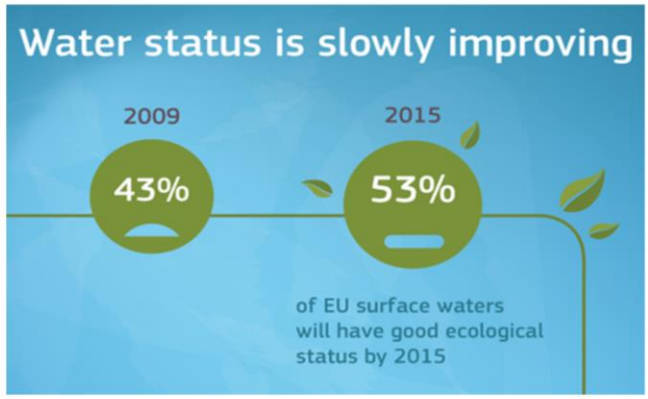
Good chemical status may be described in laymen's terms as the absence or presence below certain concentrations in waters of certain chemicals. These chemicals have been identified by EU legislation. Good ecological status of water can be described as water where natural life can thrive. This of course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

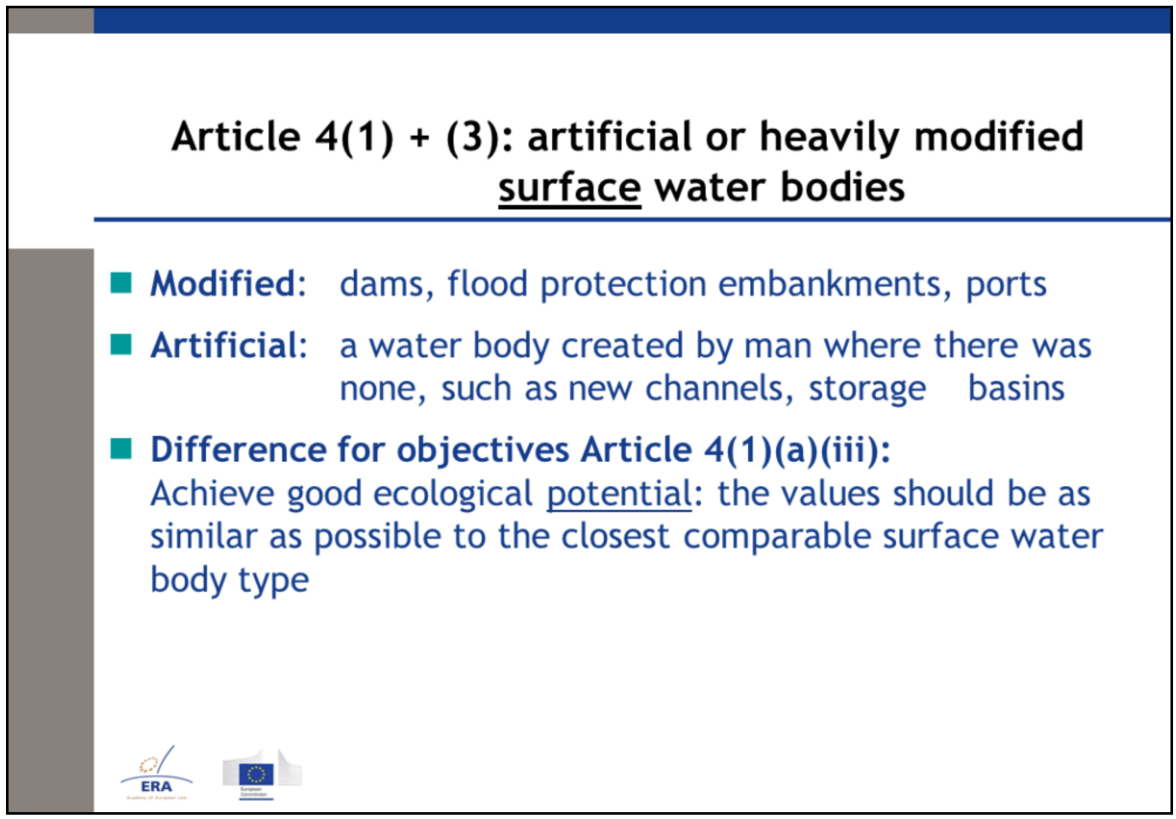
COM Prognosis 2012



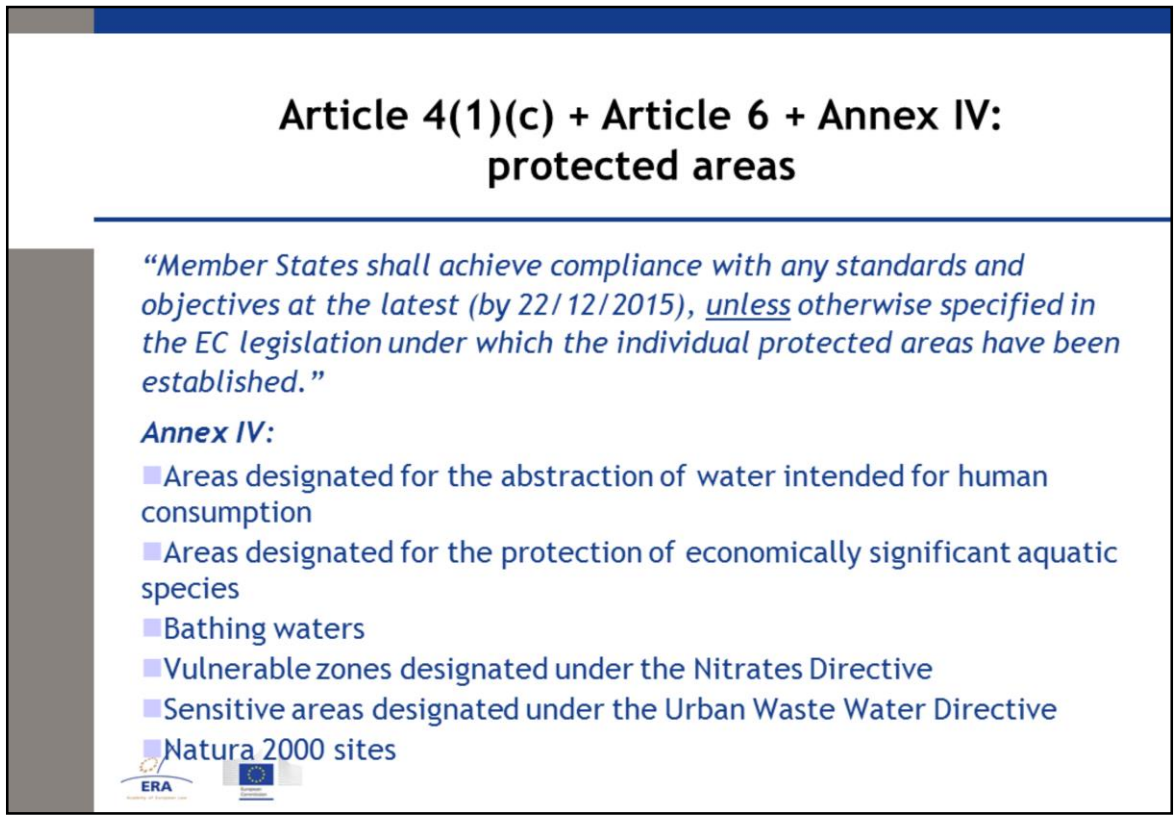
Limited to 21 MS!
Insufficient information on the chemical status of surface waters.
Groundwater (24 MS):
- quantitative status of 85% good in 2009 and 92% good expected in 2015;
- chemical status of 68% good in 2009 and 77% good expected in 2015.

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.



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.

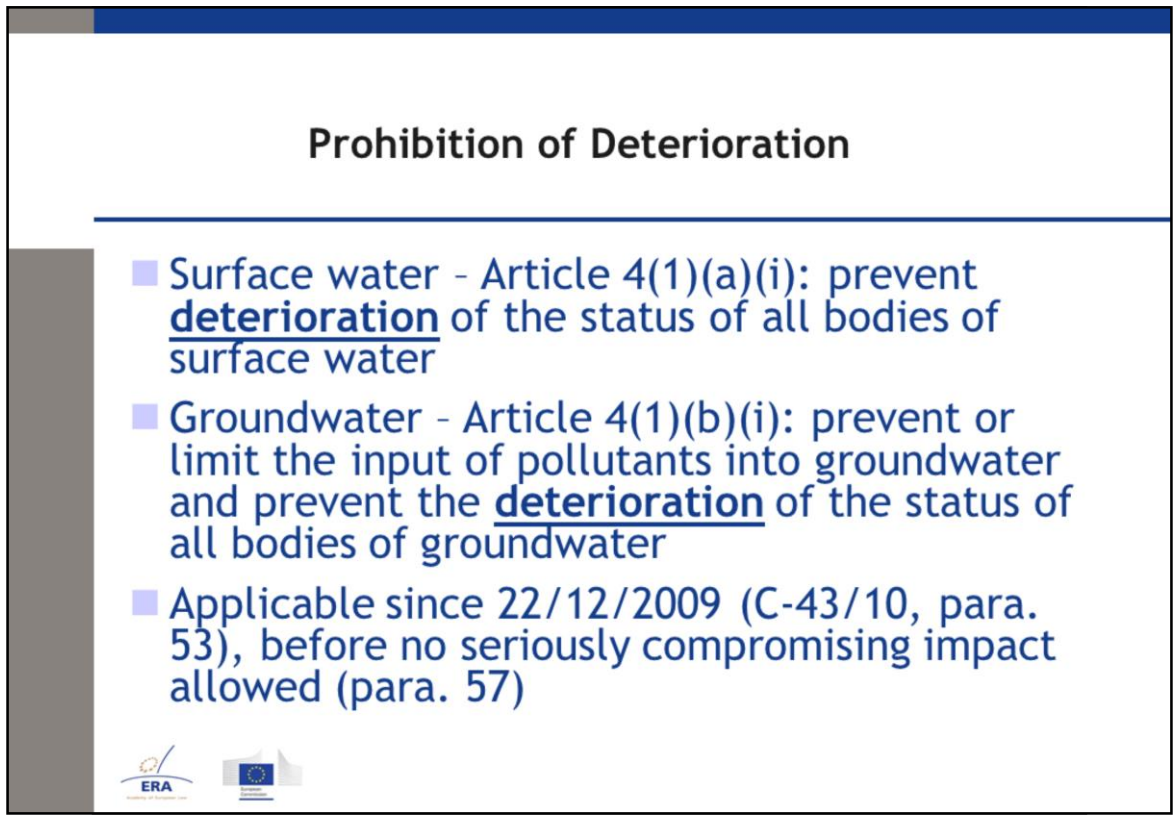


As said the WFD does not replace all water related directives, but rather integrates their existence in the broader context of achieving good ecological and chemical status of water bodies by 2015. The WFD does not intend to diminish the protection offered by these directives to water bodies. On the 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.

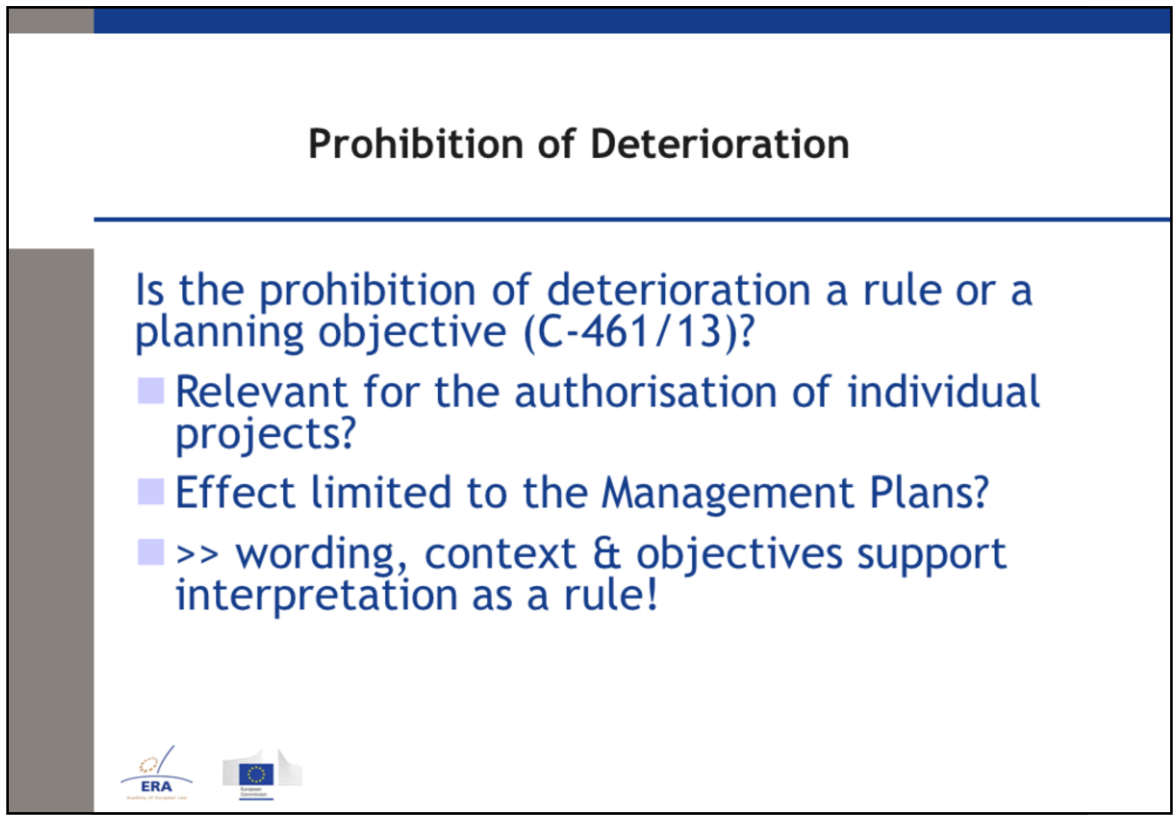
What is important to keep in mind is that the deadline of 2015 (Article 4(1) WFD) applies as a general rule, but therefore not always and under all circumstances. If a 'stand alone' directive does not set a deadline itself, as a rule, the deadline for achieving good chemical and ecological status under 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.



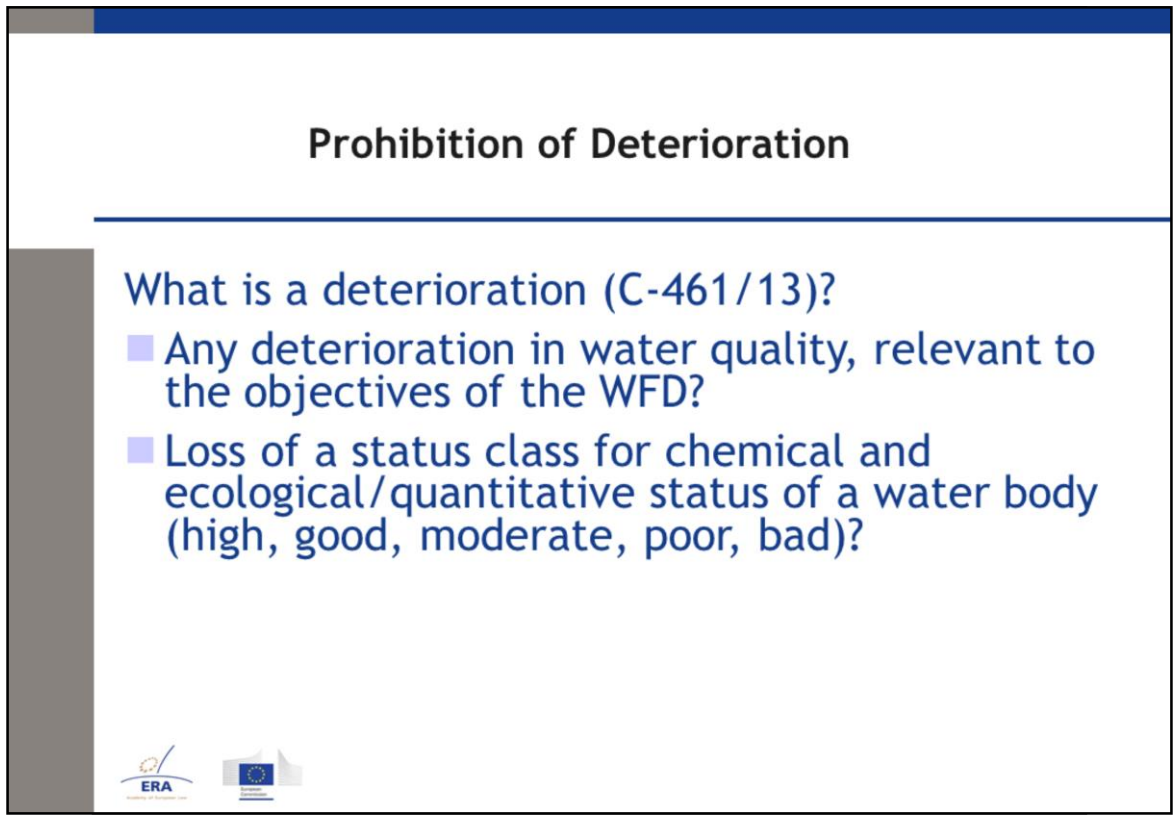
A core obligation set up by the WFD is the prohibition of deterioration. Since the end of 2009 it has applied to both types of water bodies. In addition, since the adoption of the WFD in the year 2000 all MS authorities were under an obligation to refrain from taking any measures liable seriously to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



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.

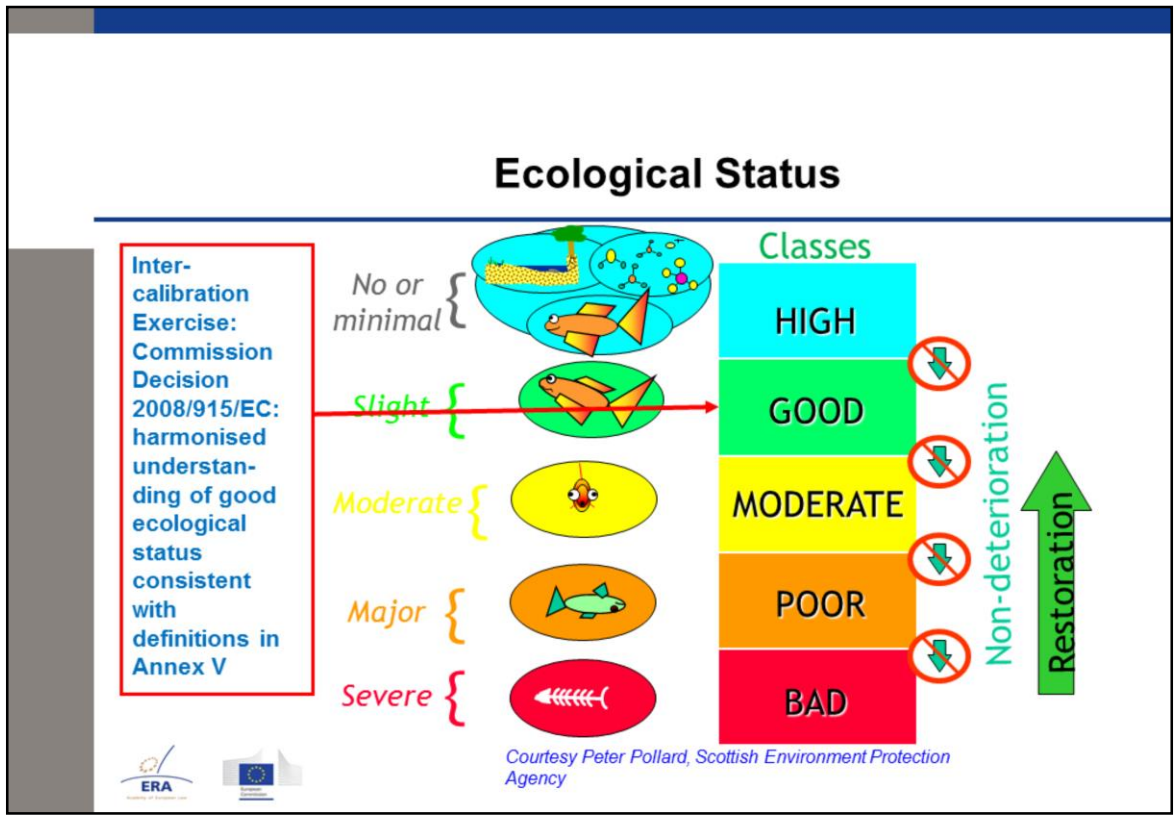
However, the CJEU relies on the wording of the provision, the context and the objectives interpret the prohibition as a rule. The earlier Acheloos case on the effect during the interim period (C-43/10) also supports this outcome.



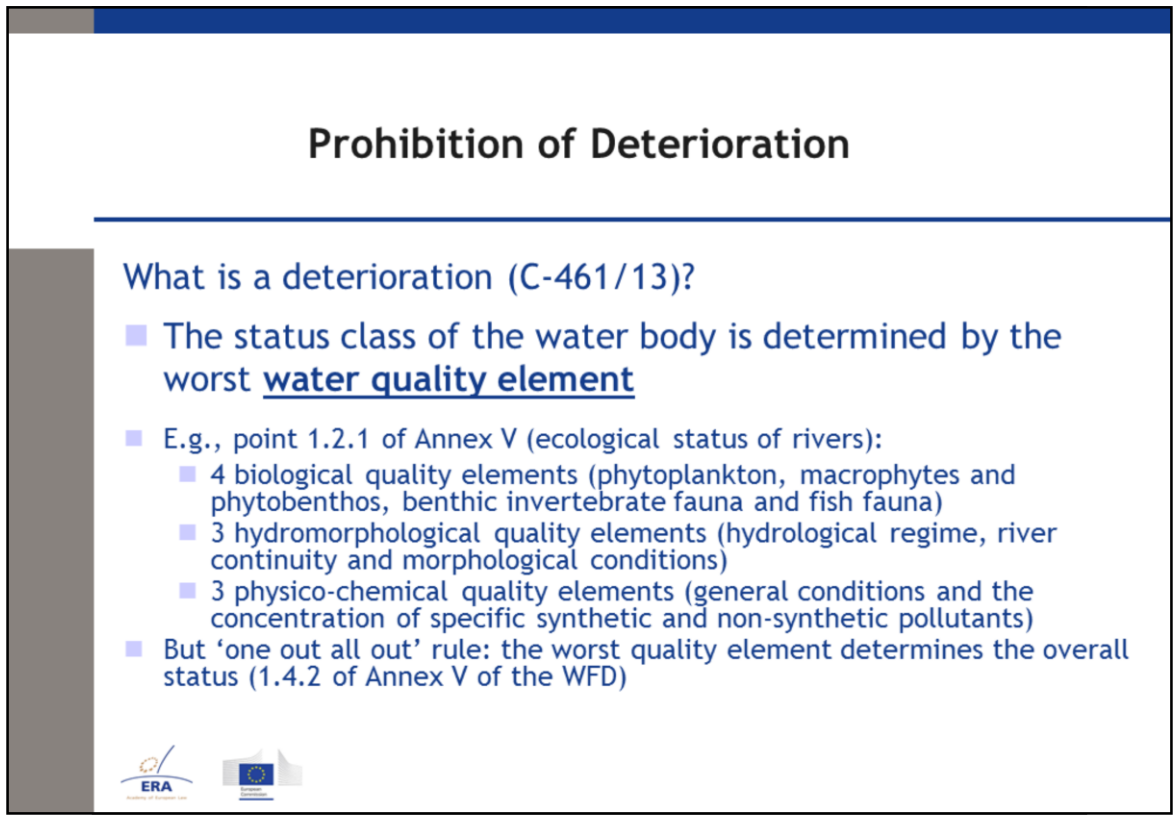
The second issue of the Weser case was how the term “deterioration” is to be understood. In the absence of an explicit definition it was argued that only the loss of a status class constituted deterioration. This opinion was based on the system of the WFD to assess quality. In addition the derogation 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.

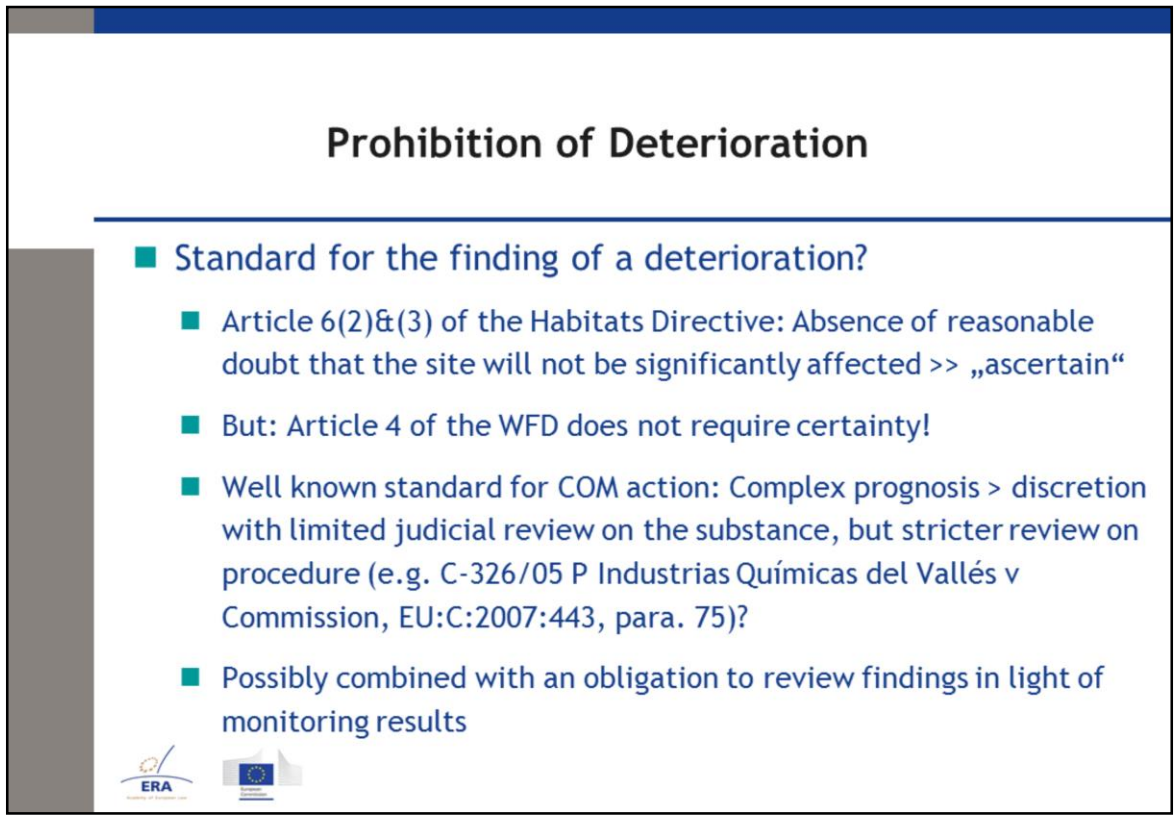
The difference between these two positions is that the former would only prohibit very substantial deteriorations while the latter would also cover very limited deteriorations.



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.

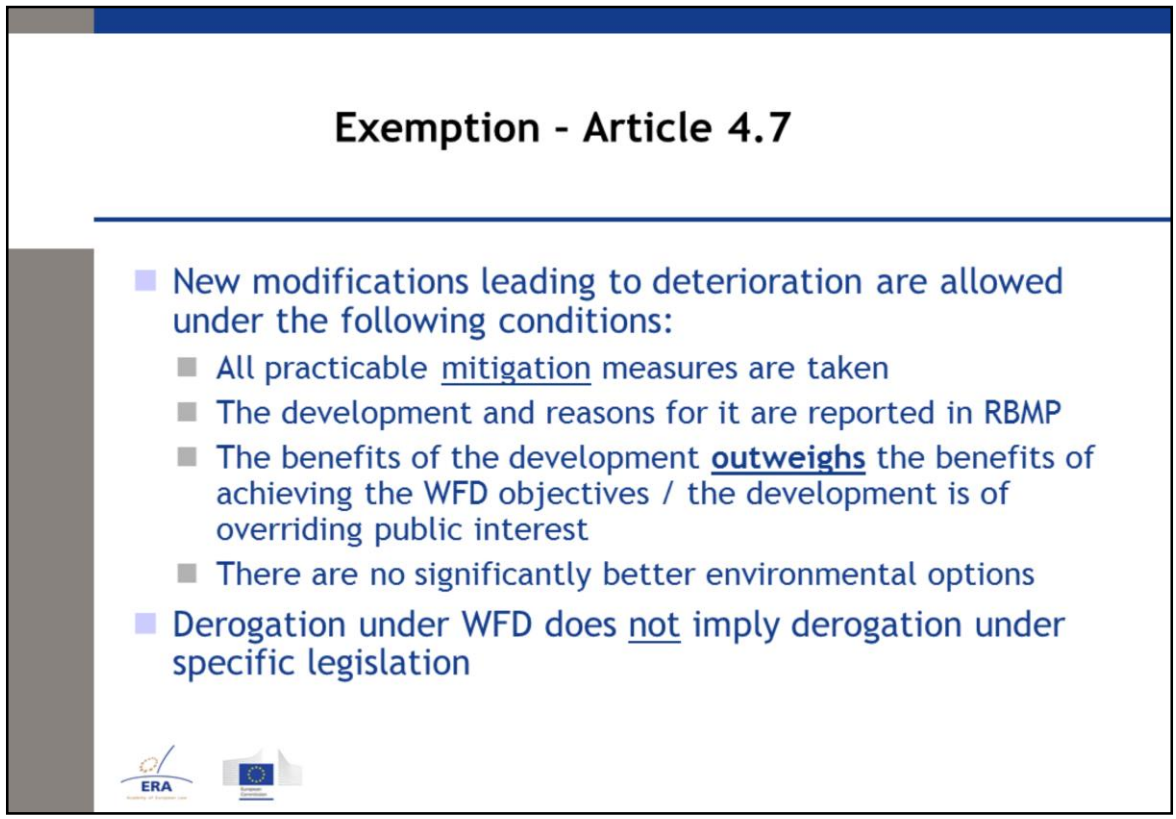


The interpretation provided by the CJEU results in a more fine-grained filter than the original position based on status classes. As the lowest status class of a quality element determines the overall status class there may be quality elements with a significantly better status than the overall assessment. 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.



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.

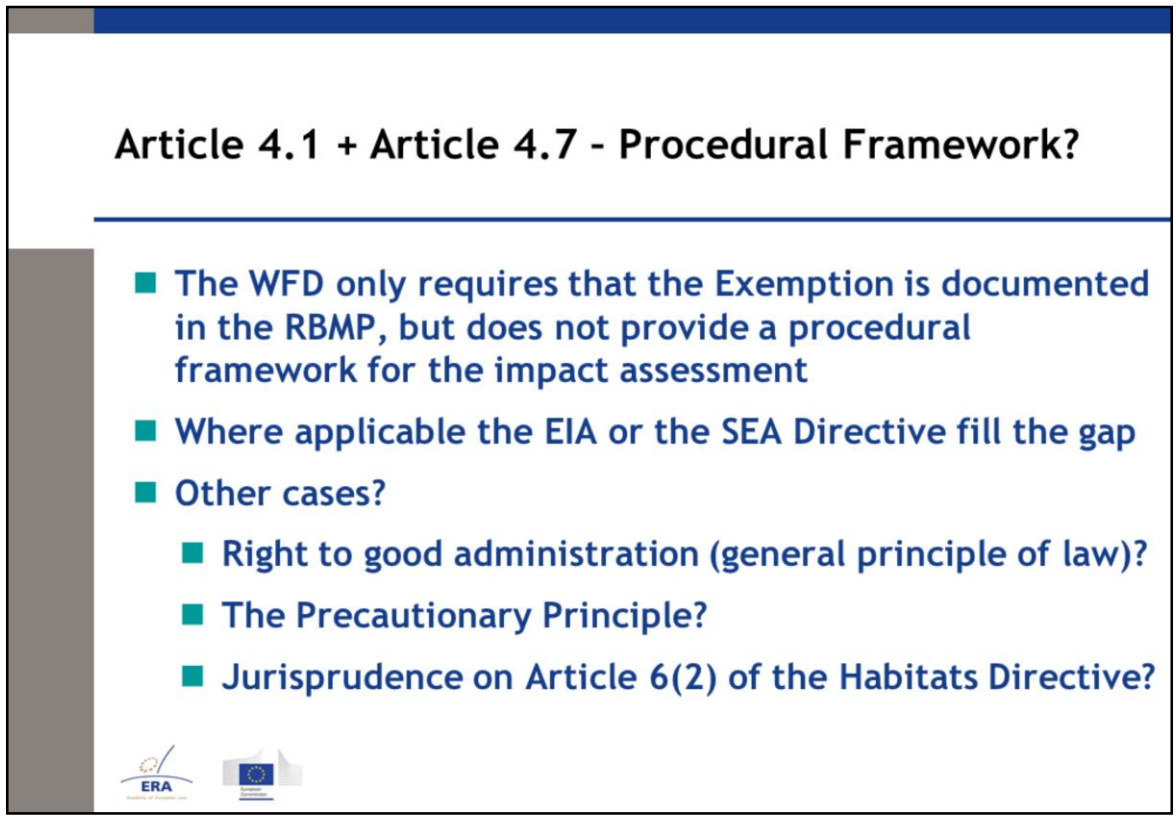
However, there is a generally applied standard for a technically complex prognosis undertaken by EU bodies: they enjoy broad discretion with limited substantial review by the courts. The courts focus on the procedural requirements.



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.

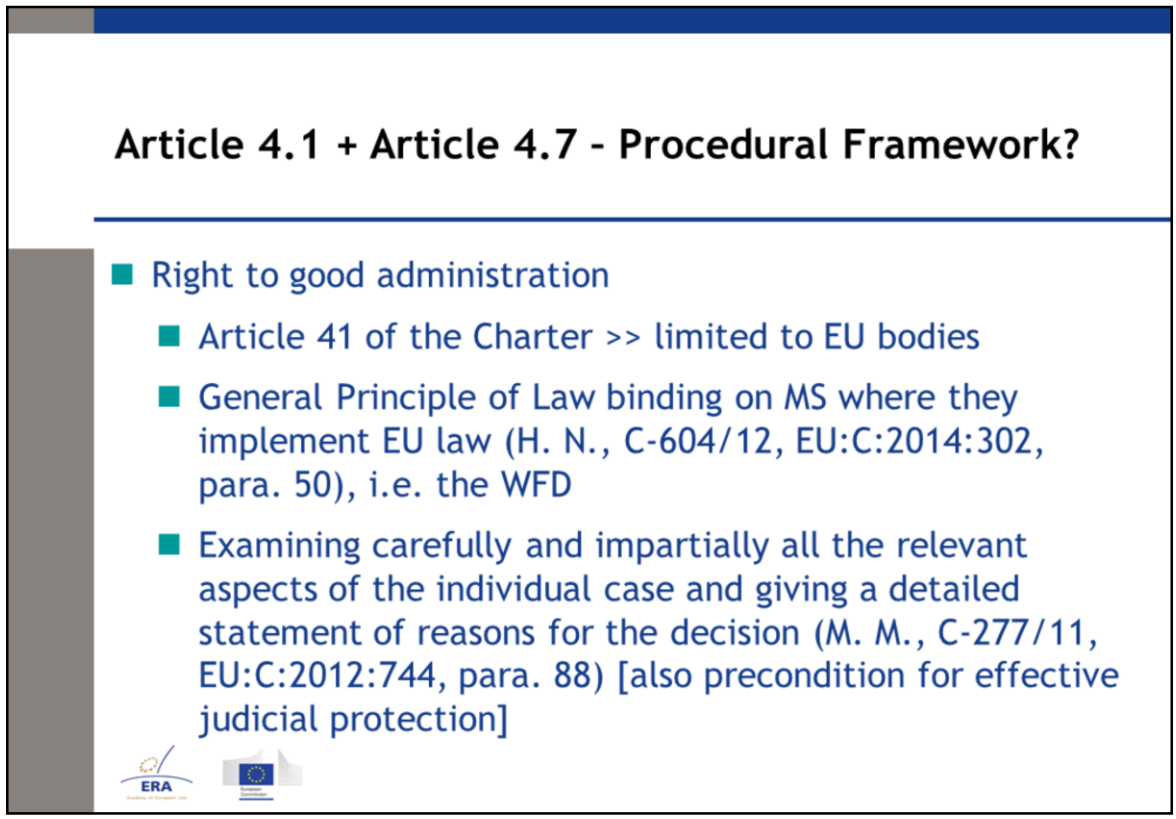


In contrast to the Habitats Directive, the WFD does not proscribe a specific assessment. But how can we find out whether there is a deterioration and whether the authorities have assessed it sufficiently?

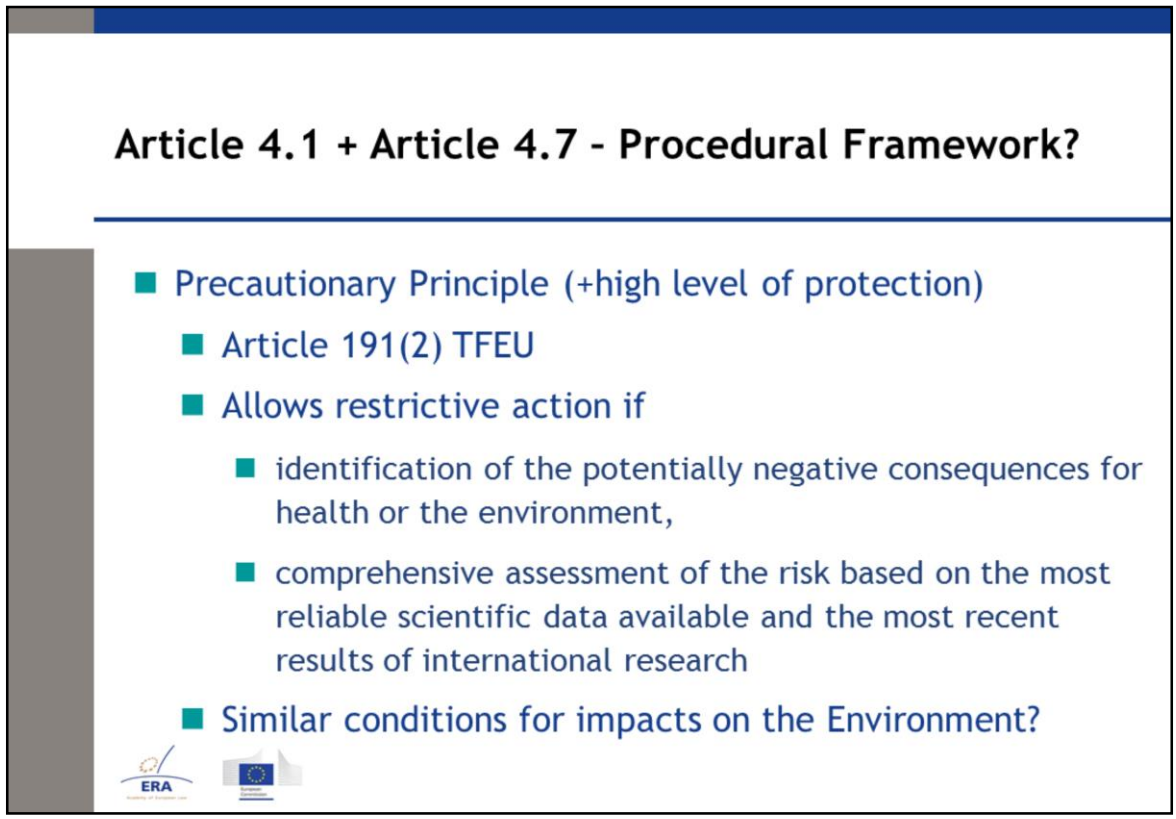
It could be argued that, if the derogation needs to be reported in the RBMP it needs to be adopted following the procedure for the adoption of the plan (Articles 13 and 14). However, this procedure is very unwieldy.

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

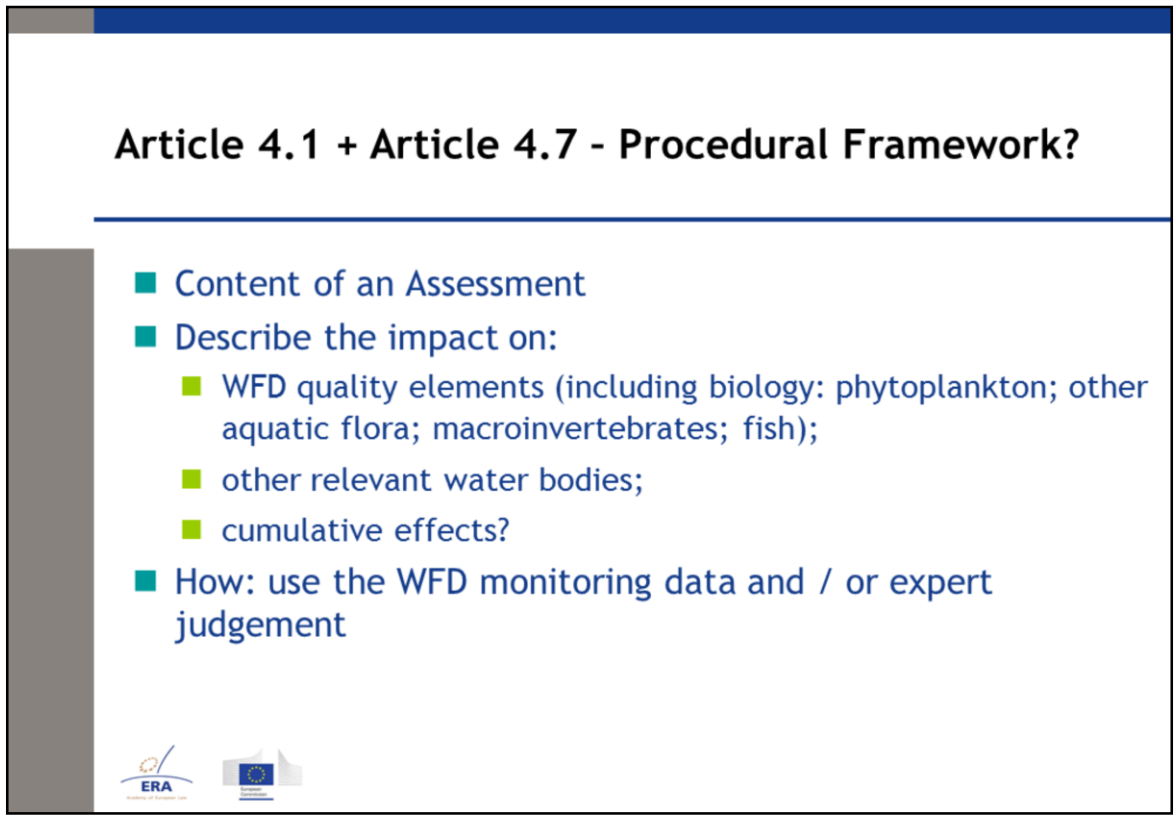
In the absence of an EIA, there are two lines of reasoning supporting an obligation to assess the project, the right to good administration and the jurisprudence on the Habitats Directive, in particular the Grüne Liga Sachsen and Others (Waldschlößchenbrücke C-399/14, EU:C:2016:10) case.



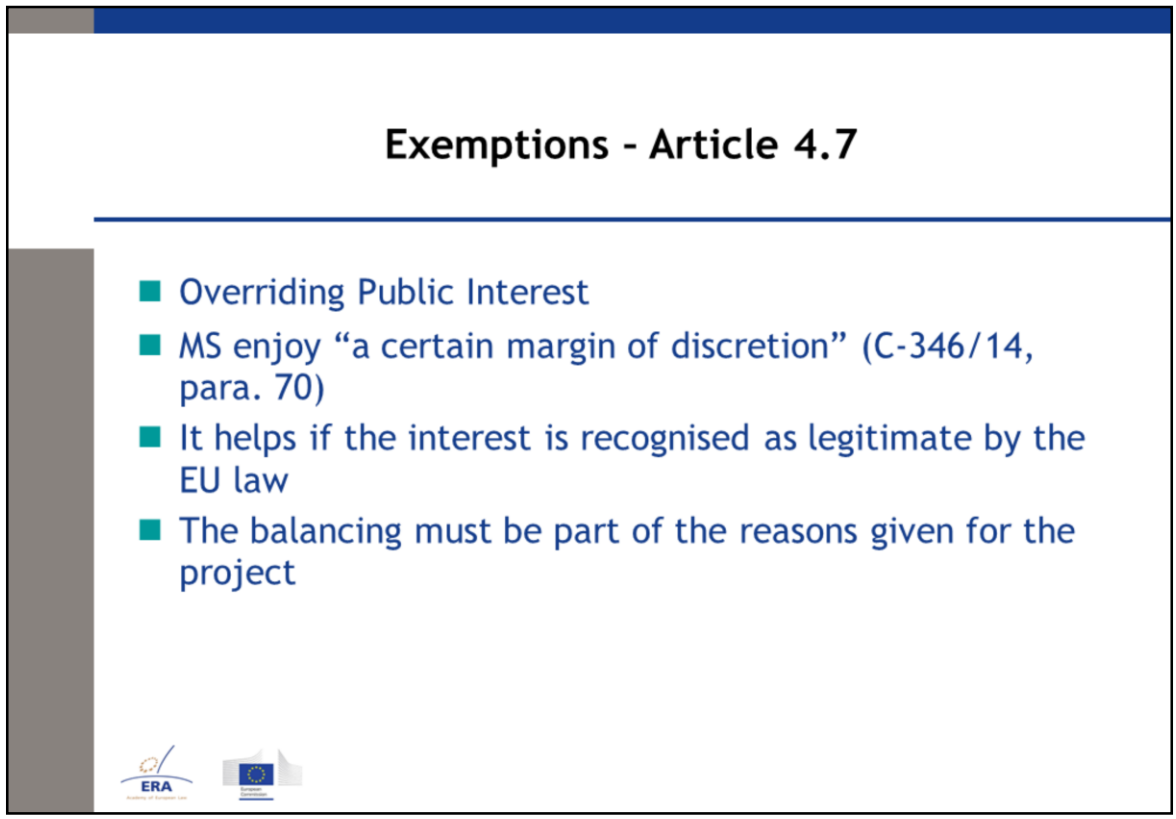
The right to good administration sets minimum standards for the administrative procedure. While the Charter right does not apply to MS there is a parallel general principle of law that provides similar guarantees and is binding on MS where they implement EU law, including WFD. A careful and impartial 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.



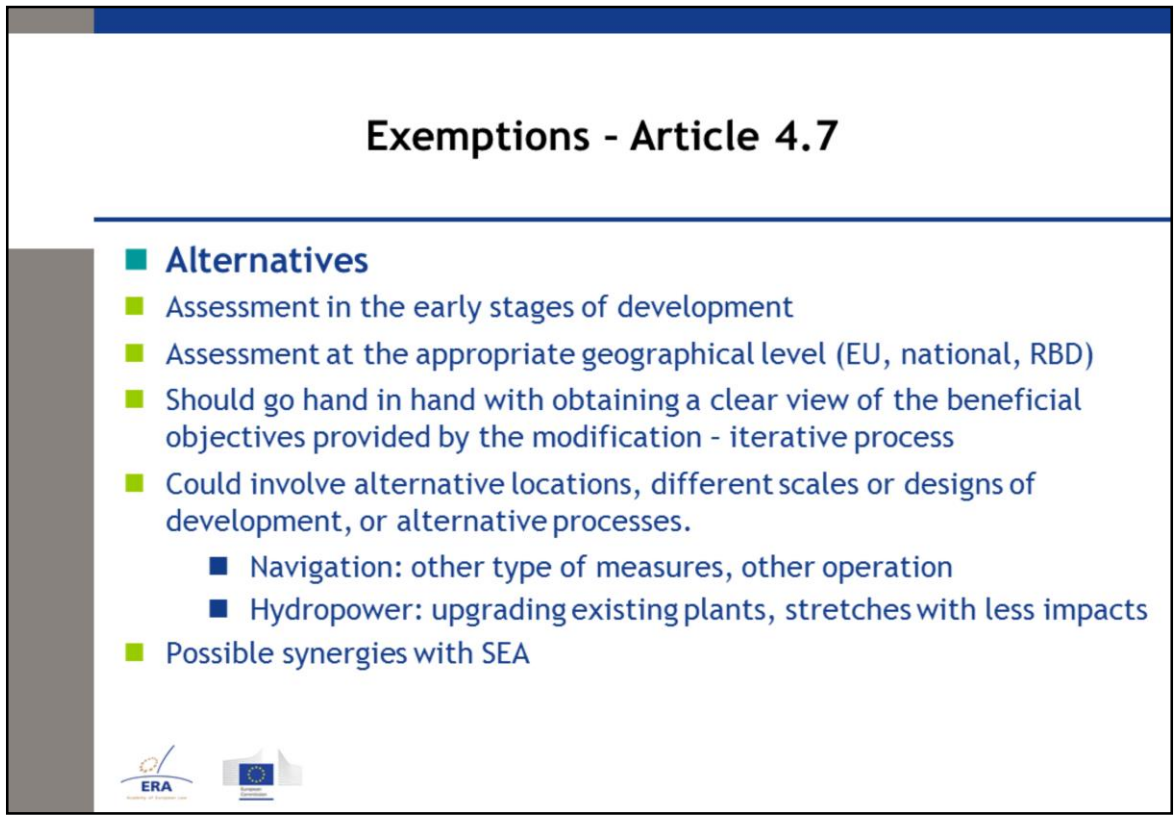
The requirements for restrictive action under the precautionary principle can be found, for example, in judgments in Case C-333/08 Commission v France, ECLI:EU:C:2010:44, paras 91–93, and Case C-343/09 Afton Chemical v Secretary of State for Transport, ECLI:EU:C:2010:419, paras 60–62. However, this principle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



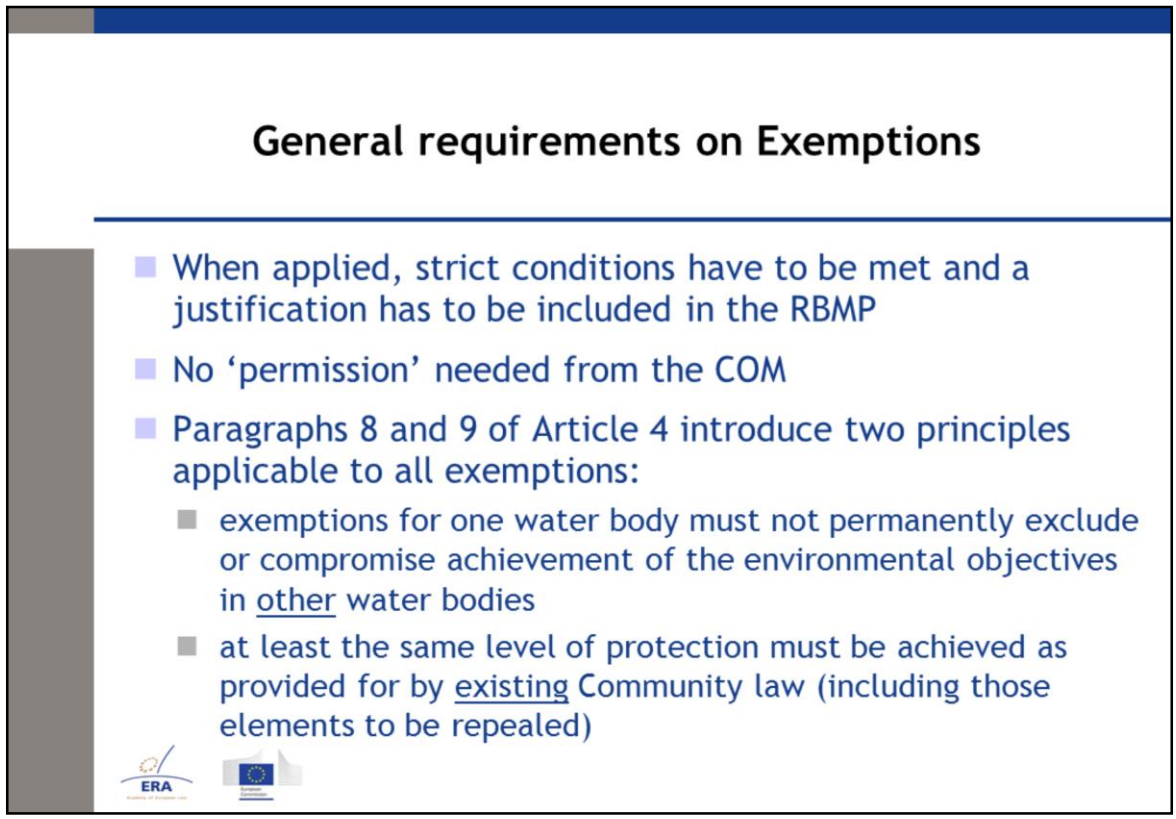
These are the elements of the impact that should be taken into account when deciding on a derogation. However, in contrast to the Habitats Directive, the WFD does not proscribe a specific assessment in this regard. It could be argued that, if the derogation needs to be reported in the RBMP it needs to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



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.



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.



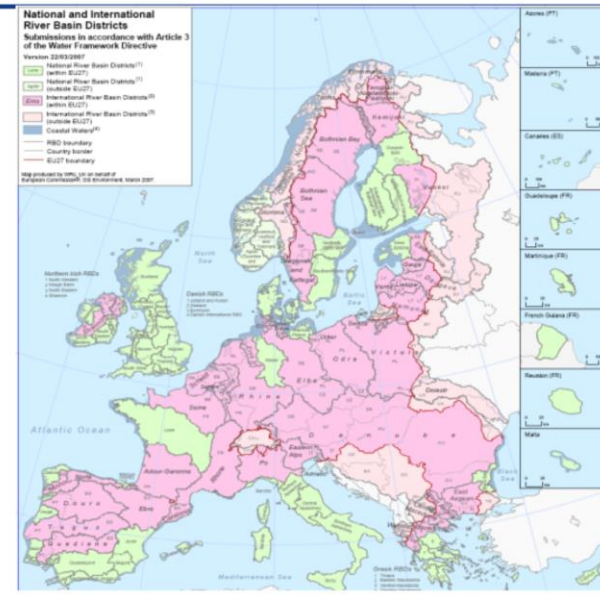
In this slide we explain some general conditions for invoking the exceptions. Most important to keep in mind are the general conditions specified in paragraphs 8 and 9. These paragraphs aim at ensuring compliance with the other water related directives, in particular by avoiding that using the WFD as 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.

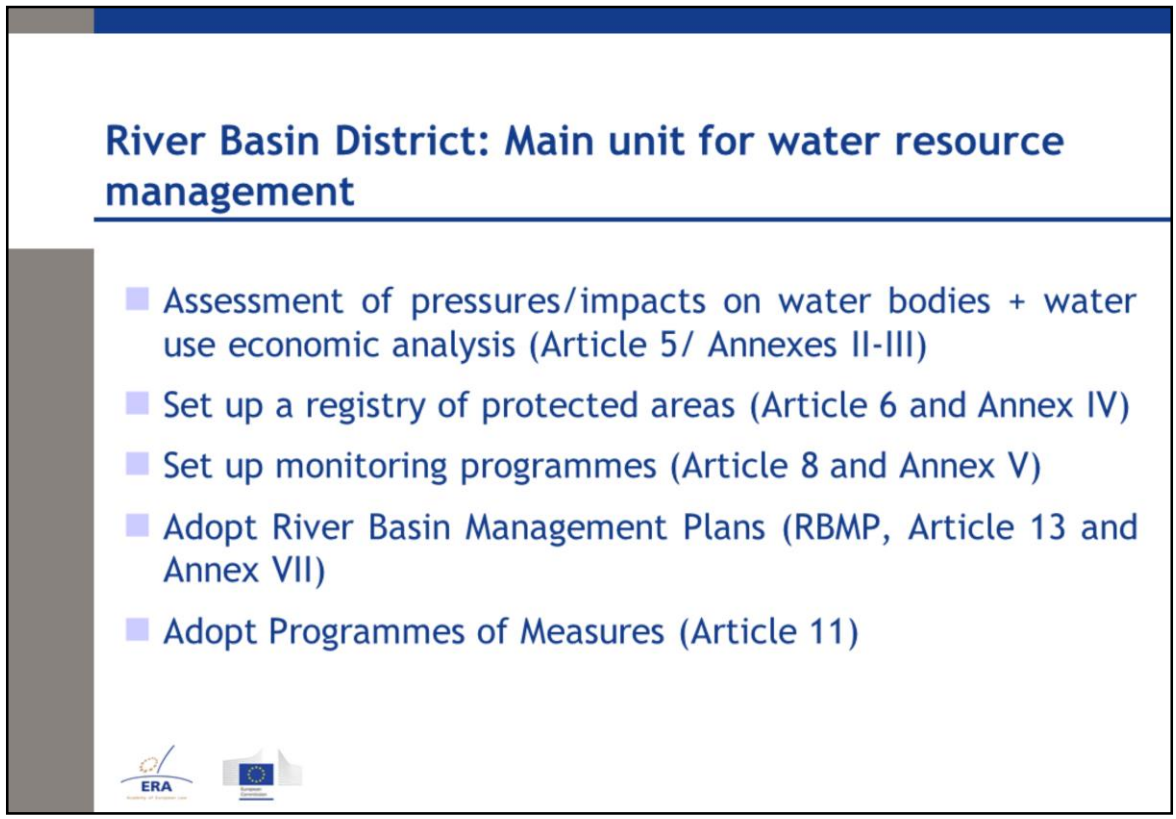
For example, a project that results in a deterioration of a water body might be justified with regard to Article 4(1) of the WFD under Article 4(7), but if the water body is designated as a special protection area under the Habitats Directive there may also need to be an appropriate assessment under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

Achieving the status objectives - International and national River Basin Districts

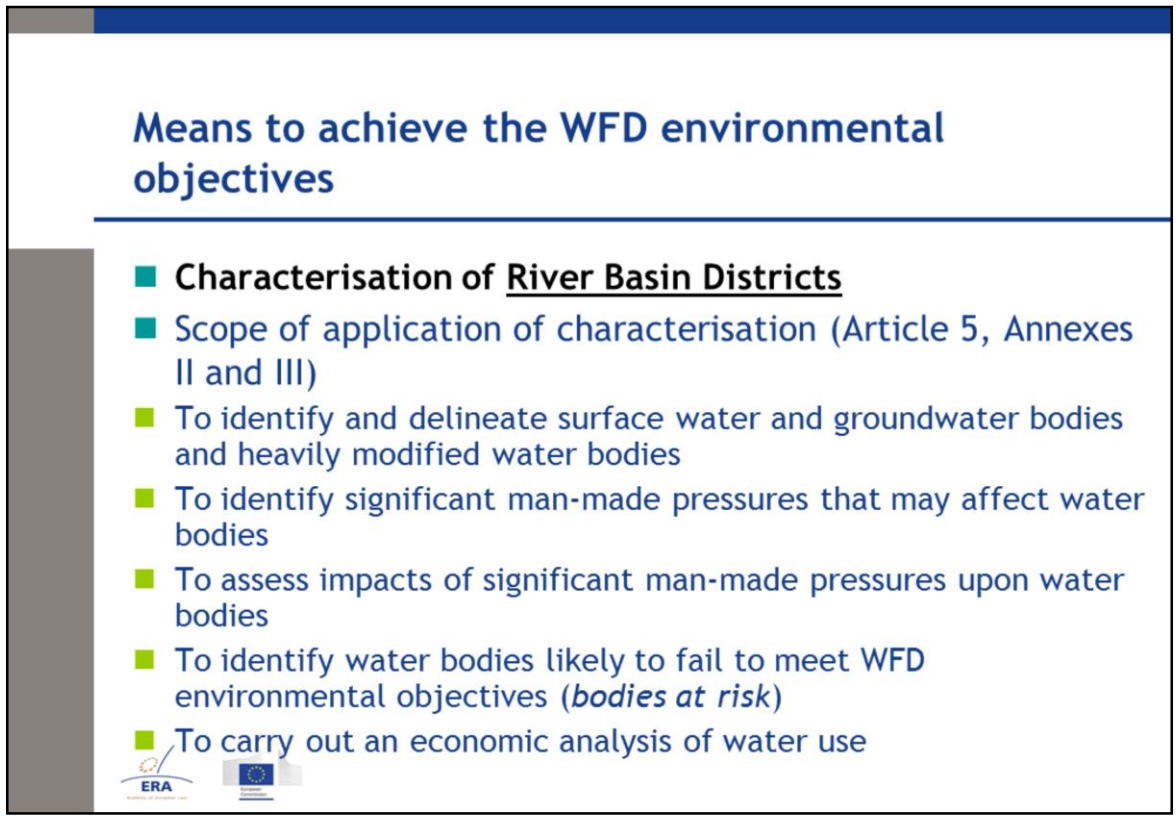
- 110 different River Basin Districts (RBD), 40 are international
- > 60 % of territory is international
- RBD size between 1.000 and 800.000 km^2



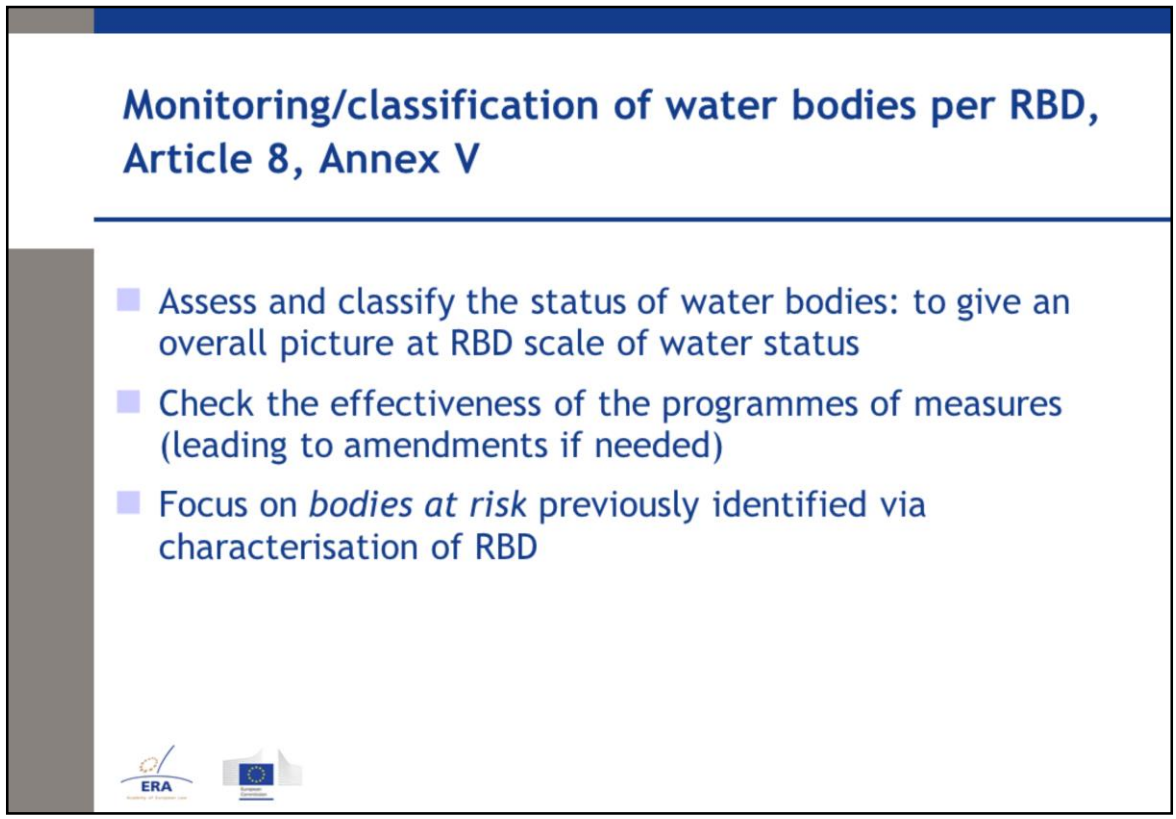
Speaks for itself



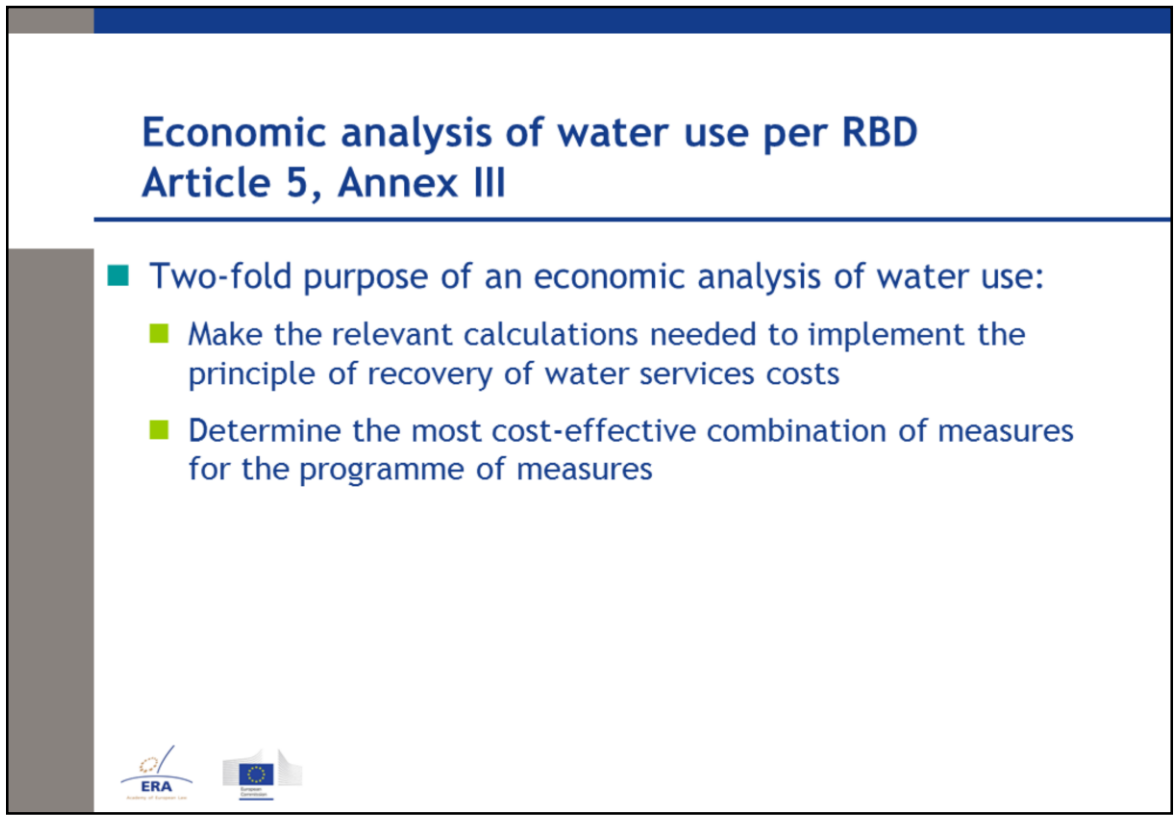
These slides describe the main units referred to in this Directive: the river basin district and the water body. Mind that the objectives of Article 4 (achieving good status) apply to water bodies, whereas coordination efforts take place at a river basin district level.



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.

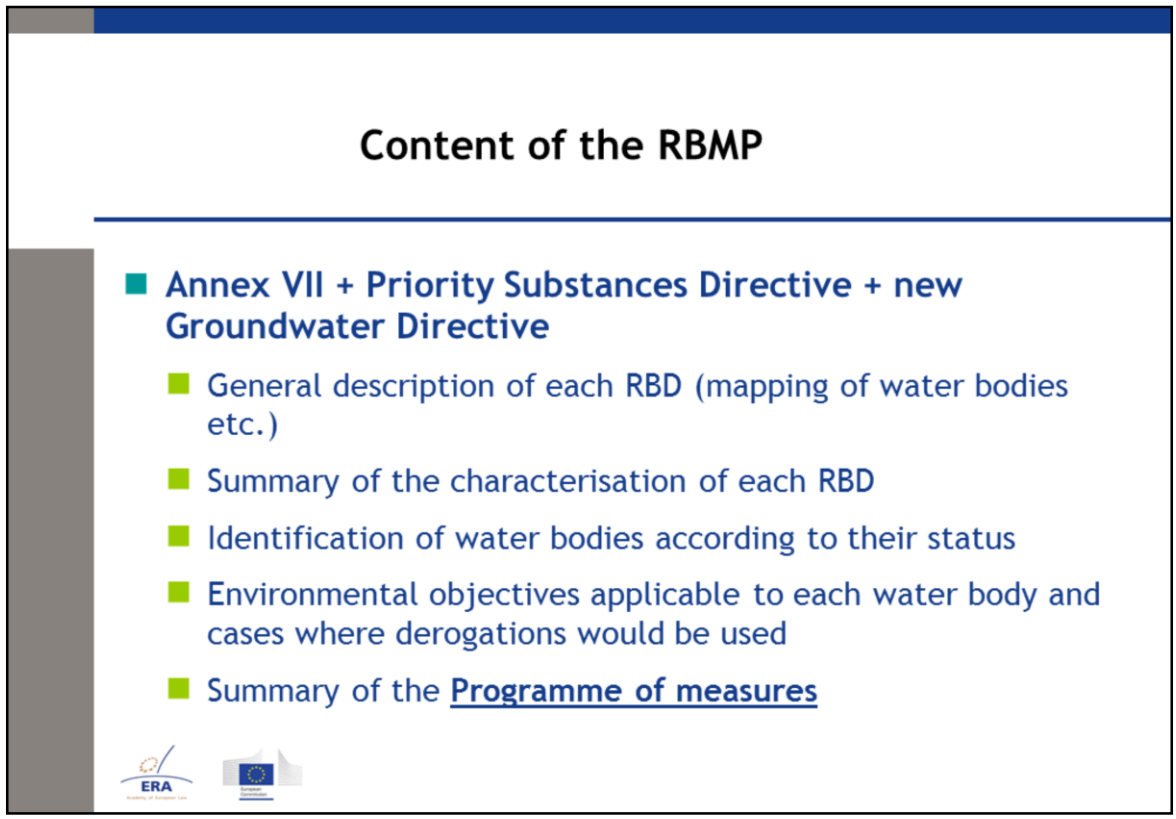


Monitoring developments in water bodies is also part of normal policy development. The monitoring required by Article 8 WFD will help the authorities to design the measures they need to take to achieve the objective of the WFD by 2015. That monitoring should in particular focus on those water bodies 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.

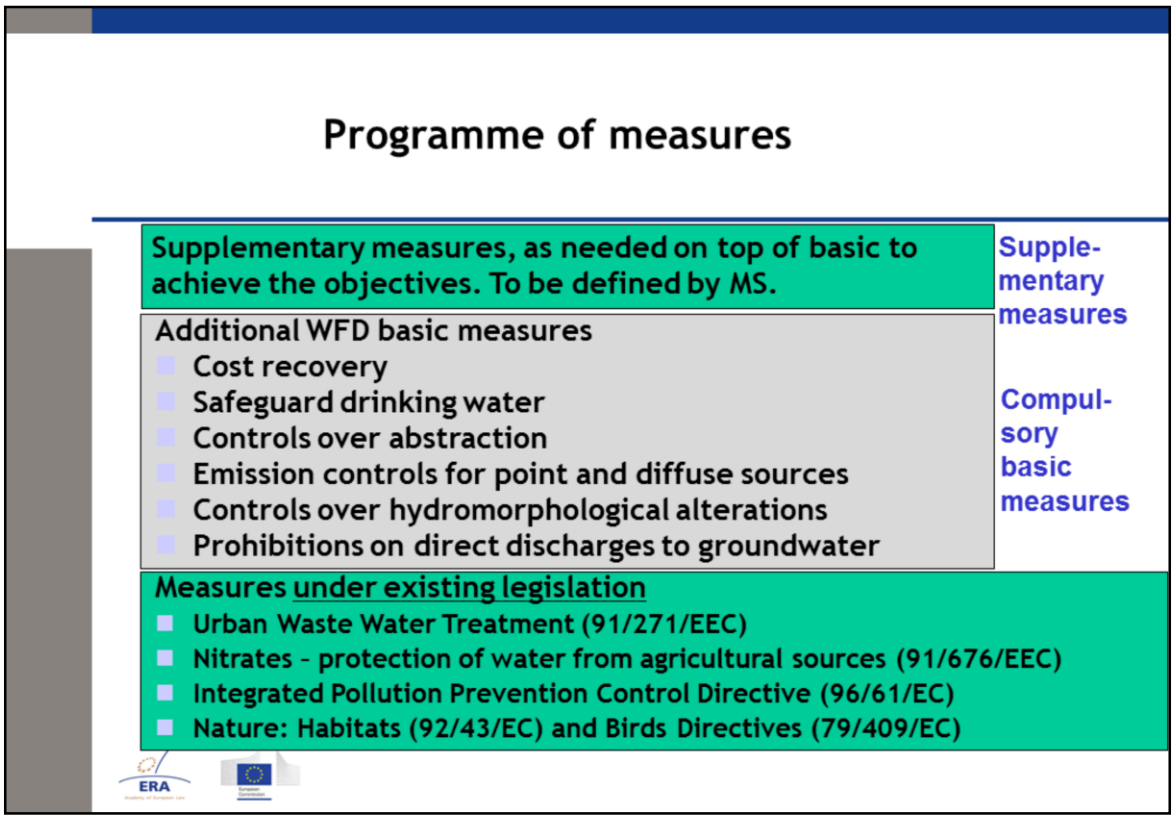

Economic analysis of water use per RBD
Article 5, Annex III
Two-fold purpose of an economic analysis of water use:
Make the relevant calculations needed to implement the principle of recovery of water services costs
Determine the most cost-effective combination of measures for the programme of measures
ERA

See before.

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.

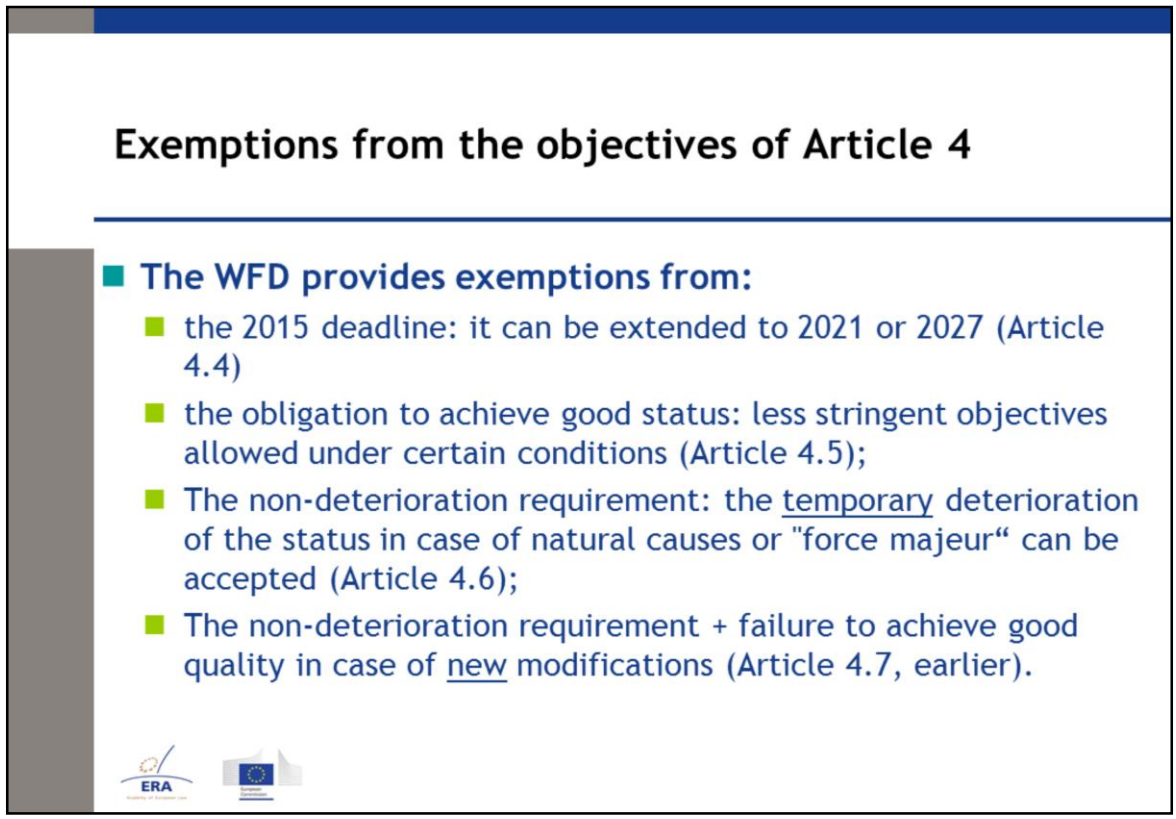

Content of the RBMP
Annex VII + Priority Substances Directive + new Groundwater Directive
General description of each RBD (mapping of water bodies etc.)
Summary of the characterisation of each RBD
Identification of water bodies according to their status
Environmental objectives applicable to each water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

See before.

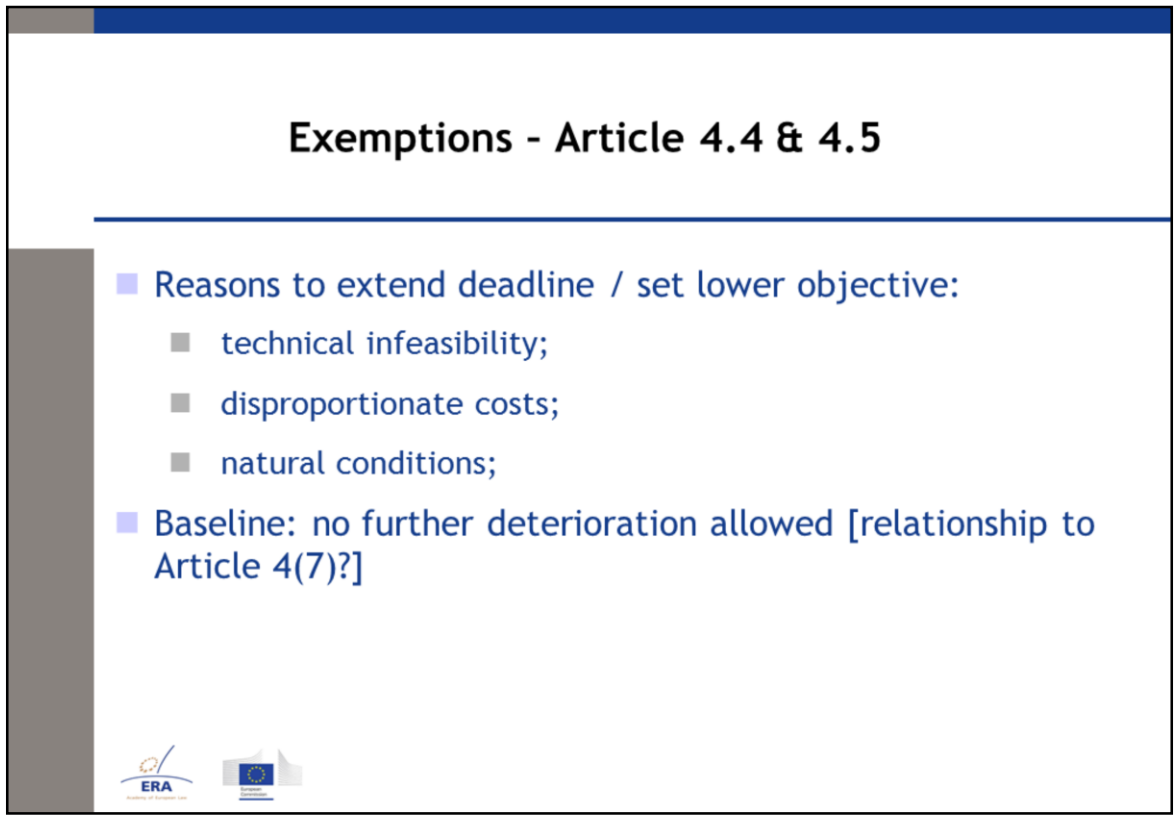


Slide 21

See before



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.

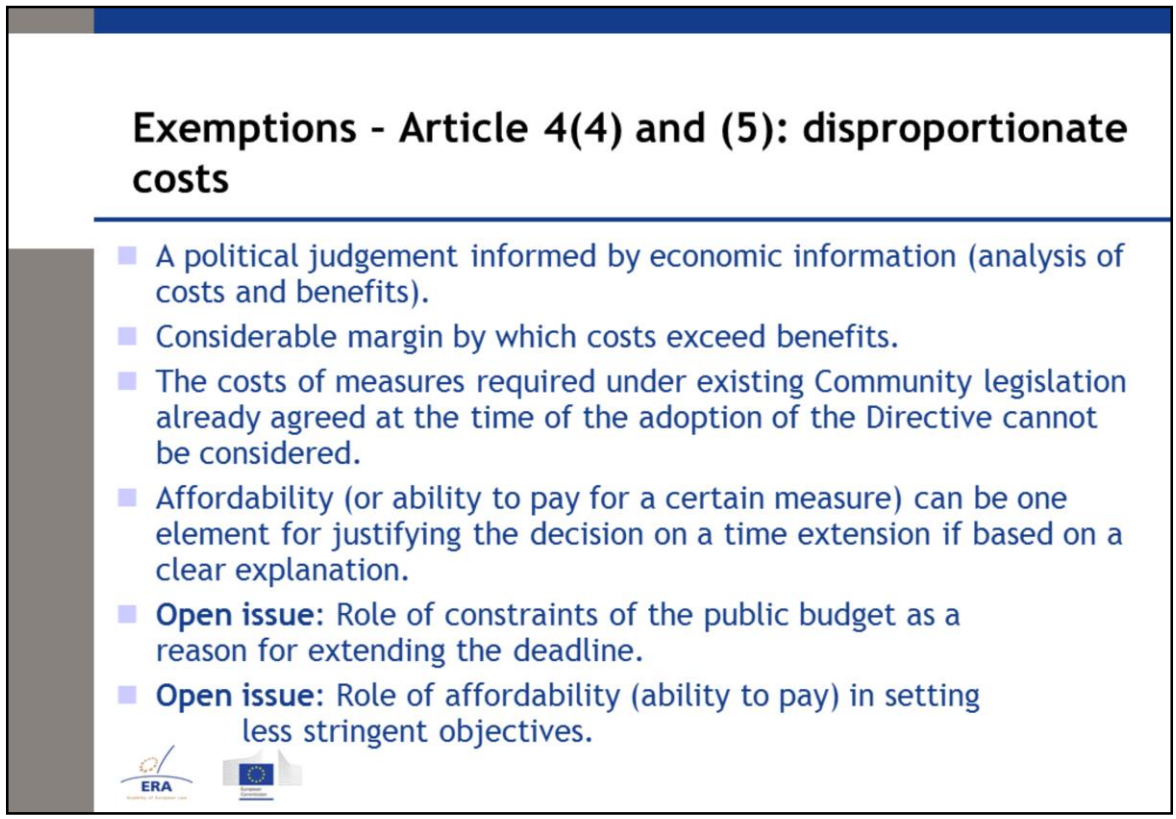


Paragraph 4 allows extending the deadline for achieving the objective of Article 4(1) by two times six years. So, if invoked, the deadline is 2021 or 2027 instead of 2015. In practice this seems to be the exception which is invoked in most cases by the authorities. Again, keep in mind that invoking this 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.

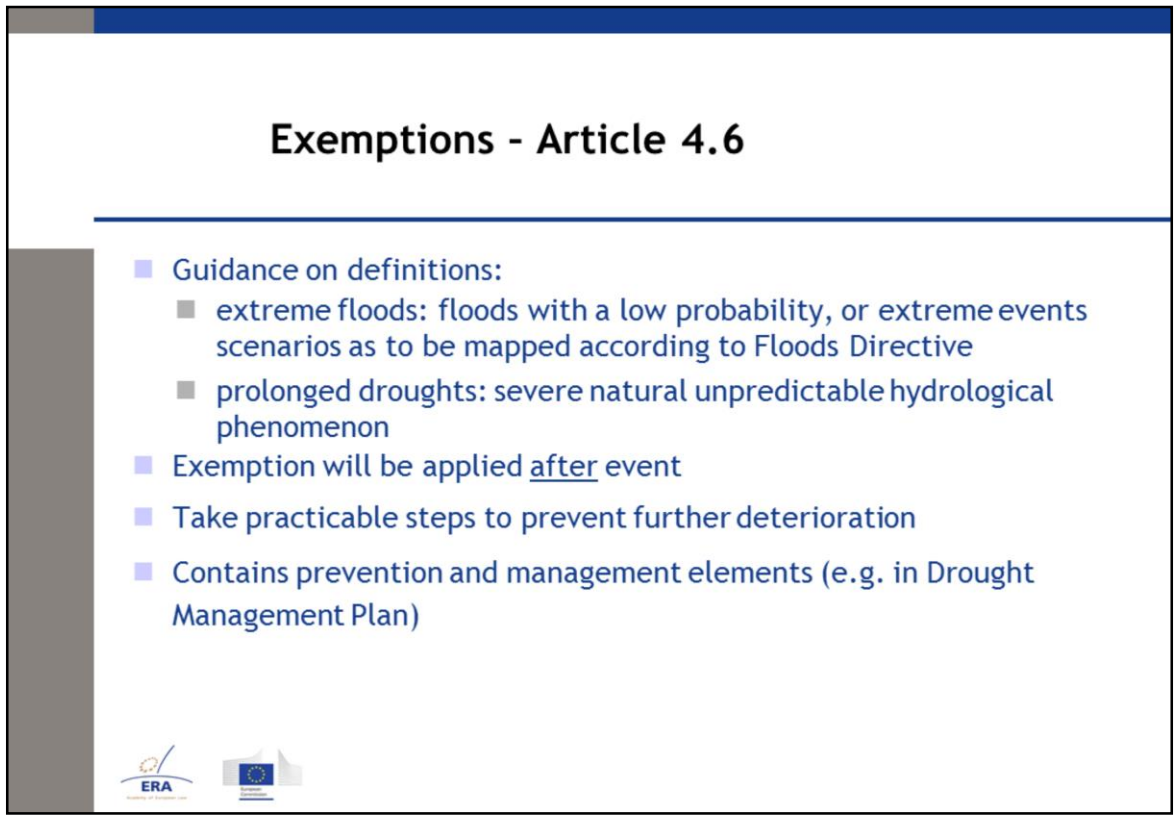
As a general condition further deterioration of the water must always be avoided. That may imply that the authorities have to take certain measures already now, despite successfully invoking the time extension or lowering of the objective.

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.

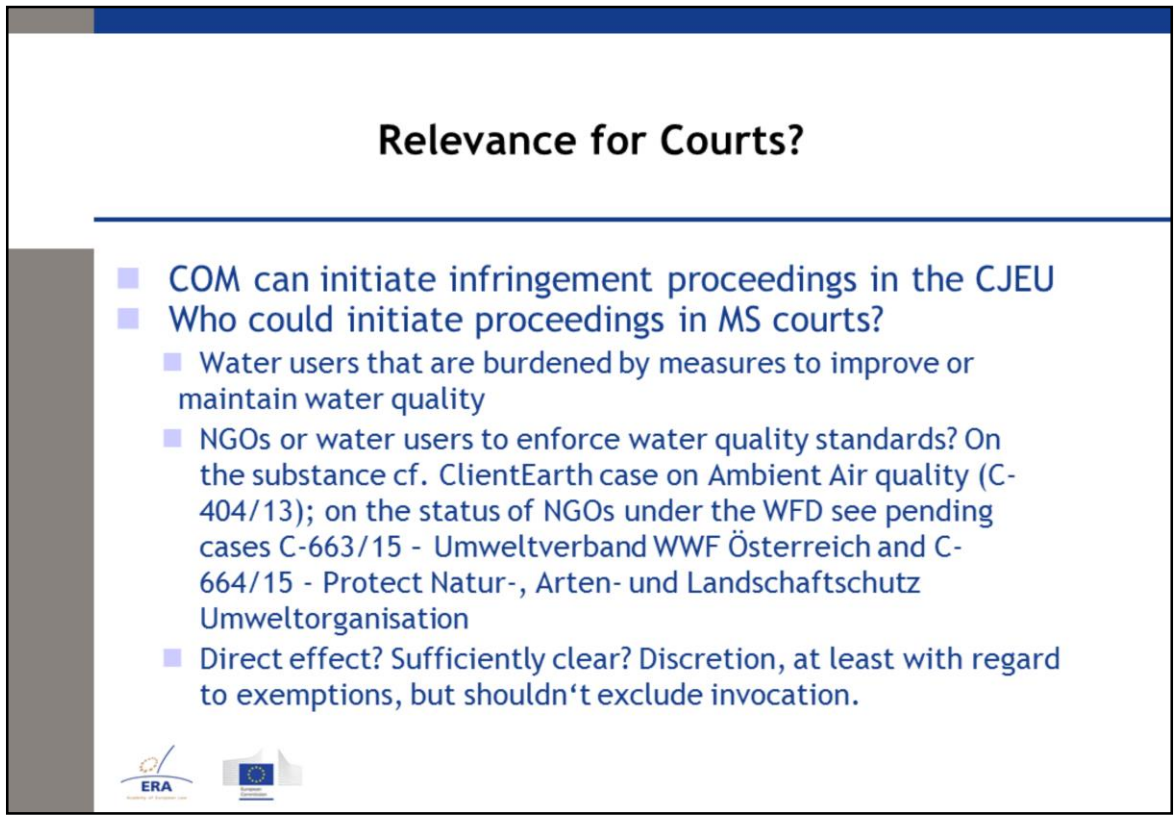


One of the reasons often invoked is that of excessive costs. This notion will certainly need interpretation in the light of necessary budget discipline.

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.



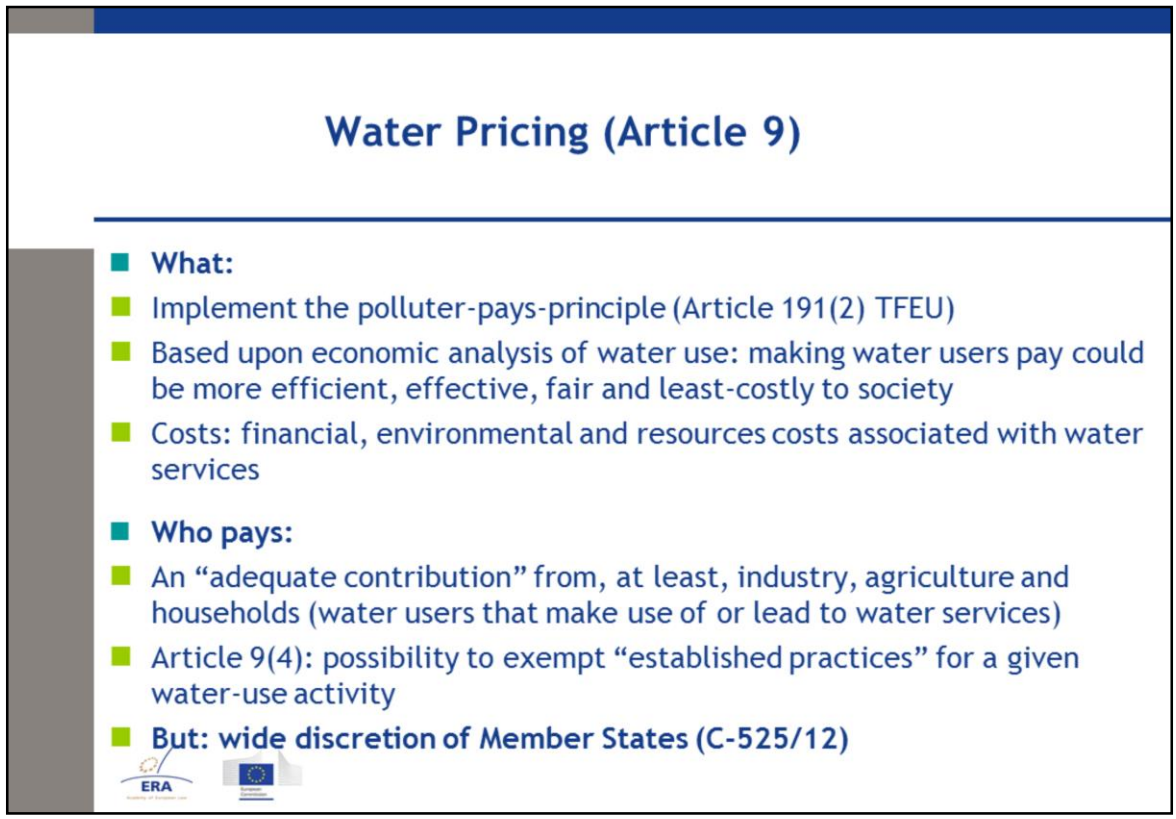
The exception of paragraph 6 aims to take account of unforeseen events which have had a negative impact on the possibility of the authorities to achieve compliance by 2015 and to avoid deterioration. Again, all conditions have to be met before the authorities can invoke this exception. Again, issues 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.



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.

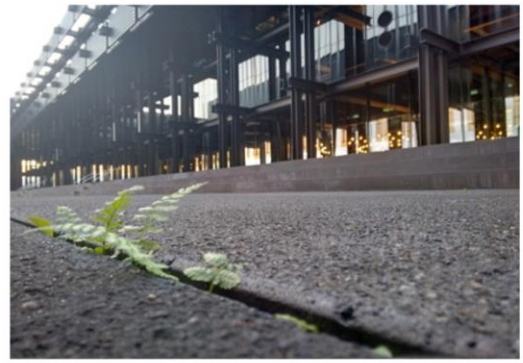


Water pricing is one of the measures which the MS must consider seriously to address concerns over water quality and quantity. The legislator considered that water pricing and cost recovery of water services are important tools to achieve the objective of the Directive.

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