

ERA Online-Workshop for National Judges and Prosecutors:
NATIONAL JUDGES AND EU WATER LEGISLATION
Focus on access to justice

Dr Matthias Keller
Presiding Judge
Administrative Court Aachen

Case Study „Ferry Tales“ Legal Reasoning



Case study

- The Potamus is a river in Euroland and attracts many tourists. It is formed in South-Town by the confluence of the rivers Pota and Mus and reaches 50 kilometers further north the city of Mid-Town. Another 50 kilometers it empties at North-Town into the Sea.
- The legislator of Euroland transposed the Water Framework Directive. Furthermore, the Euroland Water Authority has established a River Basin Management Plan (RBMP) and a Programme of Measures (PoM) for avoiding deterioration of water quality and enhancing it.
- Interestingly enough, the Water Law of Euroland provides a clear national definition of the legal term “deterioration” of water quality. The national legislator followed the so called “status classes theory” which is the approach taken by the French legislator in Article 212 -13 Code de l’Environnement and by some German scholars. Thus, Article 4 of the Water Law of Euroland defines:
 - “In Euroland deterioration of the status of a surface water body means a detrimental change of the water class, for example from ‘good’ to ‘moderate’.

Case study

- River Boat Limited, a business company, wanted to intensify its existing ferry service (see picture above) and use much bigger boats which only will be possible if the river Potamus is deepened. As a consequence the discharge of pollution into the river will increase.
- River Boat Limited filed an application for a permit that allows the dredging and deepening (1,10 m) of the river Potamus at the three docks in South-Town, Mid-Town and North-Town. In the course of the administrative procedure the following became clear: The river Potamus is already in the water class “moderate” because one of the quality elements within the meaning of Annex V of the Water Framework Directive, is already within the category “moderate”. The project of deepening the river and the additional pollution will be detrimental to another quality element. As a result, two quality elements will be in the category “moderate”. However, the river Potamus will stay within the status class “moderate”.
- Legal problems occurred: The competent Water Authority became deeply confused when it realized that the Court of Justice in its “Weser-Judgment” from 1 July 2015 (C 461/13) held that there is a deterioration of the status as soon as at least one of the quality elements falls by one class.

Scenarios

Scenario 1:

- After one year of total administrative silence River Boat Limited brought an action to the competent Administrative Court, relying on the national water law and demanding:
 1. in a speedy case: the Court may end the “administrative silence” by granting interim relief.
 2. in a main case: order that the Water Authority issues the requested permit.

Scenario 2:

- The Water Authority granted the requested permit to River Boat Limited. Now it was the environmental NGO Clear Water that brought an action to the Administrative Court, relying on the Water Framework Directive and demanding:
 1. in a speedy case: the Court may stop the deepening works/pollution by granting interim relief.
 2. in a main case: the Court may set aside the permit for deepening the river to avoid pollution.

Questions

Scenario 1: Will the claim of River Boat Limited be successful?

1. What about the application for interim relief (speedy case)?
2. Is the action admissible without any administrative act?
3. Given that the action is admissible, will River Boat Limited win?

Scenario 2: Will the claim of the NGO Clear Water be successful?

1. What about the application for interim relief (speedy case)?
2. Is the NGO claim admissible?
3. Given that the action is admissible, will the NGO Clear Water win?

Background Information

CJEU C-461/13: (Weser-Judgment)



Article 4 WFD says (in a nutshell):

„I forbid any project

that deteriorates water quality

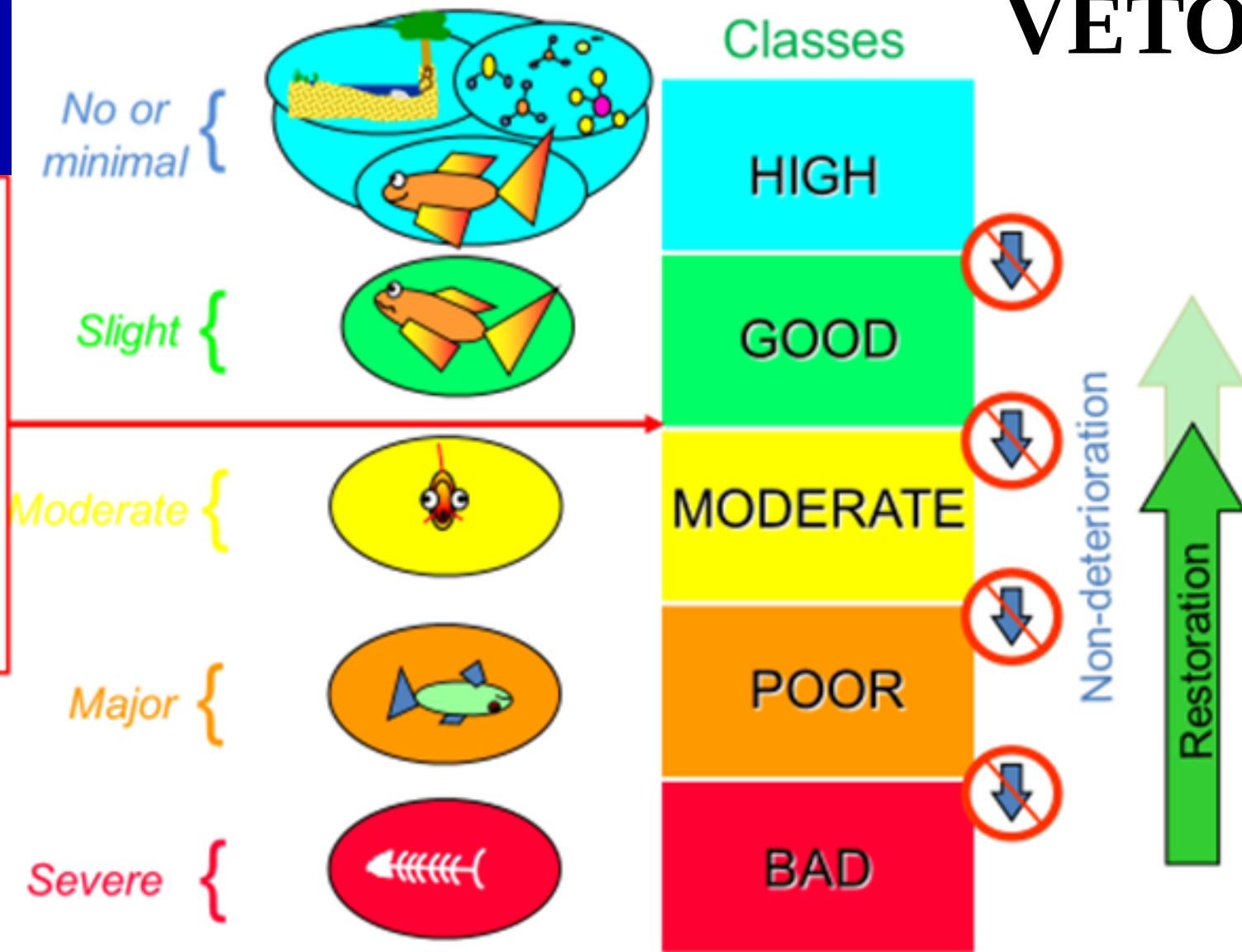
or avoids restauration of water quality.“

Ecological Status (Annex II of the WFD)

VETO



Intercalibration
Exercise:
Commission
Decision
2008/915/EC:
Harmonised
understanding of
good ecological
status consistent
with definitions in
Annex V



Legal problem of the case:

Water Framework Directive **./. National Law**

The Water Framework Directive has a broad concept of deterioration under which the detrimental change of **one quality element** (e.g. “flora”) counts as “deterioration”. (=water friendly).

Simplified representation of ecological status

Status class	Inv.	Flora	Fish	Phys Chem	Hymo	RBSP	...	Global
High	X						...	
Good		X		X	X		...	
Moderate			X			X	...	X
Poor							...	
Bad							...	

Legend: Inv.: macroinvertebrates; Flora: aquatic flora; Phys Chem: Physico Chemical parameters; Hymo: hydromorphological parameters; RBSP: river basin specific pollutants; Global: overall ecological status

water.europa.eu WISE

Whereas in our case:

Existing national law adopted a strict concept of deterioration under which only a detrimental **change of the water class** counts as “deterioration”. (project friendly, but not in conformity with the WFD!).

The Case - solution

Scenario 1: Administrative silence

Interim relief (“speedy case”)
Is a provisional ruling by the Court justified?

General requirements drawn from the EU legal order:

- An **application** for judicial interim relief must be filed (not ex officio).
- The main case must be - prima facie - **well-founded** (fumus boni juris)
- **Urgency**: Will a (positive) judgment come too late? (periculum in mora)

Problem:

The relief must be provisional („interim“) and **not the same** as in the main proceedings.

Scenario 1: Administrative silence

Admissibility without any administrative act?

Rights based approach:

In Member States in which, by tradition, judges are used to issue injunctions to public entities on how to fulfil their legal obligations (issue permits) admissibility should be no problem.

Cassation as a key feature:

It seems to be more difficult to grant access to justice if the key feature of national administrative justice is cassation. However, a cassation of a fictitious denial may be a redress if - afterwards - there is the possibility of an injunction to public administration in the following proceedings.

Scenario 1: Administrative silence

Will River Boat Limited win?

YES, in my opinion River Boat Limited wins!

Given that all other requirements are met,

River Boat Limited can **rely on the National Water Law**.

Under national law there is no deterioration!

The direct effect of Article 4 WFD
cannot be used against River Boat!

No „reverse“ direct effect!

Simplified representation of ecological status

Status class	Inv.	Flora	Fish	Phys Chem	Hymo	RBSP	...	Global
High	X						...	
Good		X		X	X		...	
Moderate			X			X	...	X
Poor							...	
Bad							...	

Legend: Inv.: macroinvertebrates; Flora: aquatic flora; Phys Chem: Physico Chemical parameters;
Hymo: hydromorphological parameters; RBSP: river basin specific pollutants; Global: overall ecological status

Scenario 2: Claim of the NGO against the permit Interim relief (“speedy case”)

Is a provisional ruling by the Court justified? (Yes)

- An **application** for judicial interim relief must be filed (OK) .
- **Urgency:** Will a (positive) judgment come too late? (may be)
(periculum in mora)
- The main case must be - prima facie - **well-founded**
(fumus boni juris)

Question:

May the NGO rely on Article 4 of the Water Framework Directive and invoke the deterioration of the water quality by the project?
(Probably! The lawfulness of the permit can be reasonably doubted!)

Scenario 2: Claim of the NGO against the permit

Admissibility?

Cassation as a key feature:

It seems to be more easy to grant access to justice for the NGO if the key feature of national administrative justice is cassation.

Rights based approach:

In Member States in which, by tradition, access to justice follows a rights based approach it may be difficult to grant access to justice.

However, “pretorian law” may reach the conclusion that the NGO claim is admissible (based on access to justice under the Aarhus Convention and trying to interpret national law “as far as possible” (Slovak Brown bear) in this direction .

Scenario 2: Claim of the NGO against the permit

Will the NGO win?

YES, in my opinion the NGO wins!

The permit (deepening the river) leads to a “deterioration” under Article 4 of the Water Framework Directive, which has direct effect.

Simplified representation of ecological status

Status class	Inv.	Flora	Fish	Phys Chem	Hymo	RBSP	...	Global
High	X						...	
Good		X		X	X		...	
Moderate			X			X	...	X
Poor							...	
Bad							...	

Legend: Inv.: macroinvertebrates; Flora: aquatic flora; Phys Chem: Physico Chemical parameters; Hymo: hydromorphological parameters; RBSP: river basin specific pollutants; Global: overall ecological status

**The NGO can use the (vertical) direct effect
vs. the public authority. („as a shield“)**

The „triangular situation“ (NGO - Public Authority - River Boat) does not exclude that **(C-201/02 - Wells)**.

Thank you
for your kind attention!