



NATIONAL JUDGES AND EU WATER LEGISLATION

Focus on access to justice
Online workshop for judges and prosecutors
17-18 and 24-25 October 2022
8:45-13:30 (CEST)

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Environmental Law



WATER FRAMEWORK DIRECTIVE UNDER SCRUTINY

Nathalie HERVÉ-FOURNEREAU

Research Director at National Centre for Scientific Research
Western Institute Law & Europe UMR 6262 CNRS
University of Rennes 1 - France-Brittany

PRELUDE

Water Framework Directive : a paradigm shift

❖ An imperative legal shift

- ✓ High ecological complexities exacerbated by climate change
- ✓ A holistic understanding of the hydrological cycle is needed
- ✓ Water is not a natural resource but much more
- ✓ Long-term integrated water protection & management is essential
- ✓ Therefore, a fragmented legal approach is inappropriate

PRELUDE

Water Framework Directive : a paradigm shift

❖ A Cardinal Directive of EU Water Legislation

- ✓ A Framework Directive which restructures existing water policy
- ✓ A Directive which establishes links with Water Directives and other environmental legislations such Natura 2000
- ✓ An implementation which requires further integration of environmental requirements into EU policies

PRELUDE

Water Framework Directive : a paradigm shift

❖ A Complex Framework Directive

- ✓ A holistic and ecosystemic approach promoted on the basis of river basin
- ✓ But control of quantity is an *“ancillary element in securing good water quality”* (recital 19 WFD)
- ✓ A high technical nature with numerous notions and annex
- ✓ A time schedule of objectives to be achieved
- ✓ Reflecting the complex *“structure/tree”* of the current water policy
- ✓ Not a complete harmonisation of Member States legislation
- ✓ Numerous guidance documents adopted for the implementation
- ✓ Implementation difficulties and disputes brought before the Courts

Water Framework Directive : the five main elements

- I. Ambitious objectives & general obligations to enhance and to prevent deterioration of the status of bodies of water
- I. Key specific obligations on Member States
- II. Directions for water protection & combined approach to discharges
- III. Water basin district, multilevel governance, information and public participation
- IV. Less stringent environmental objectives, exemptions and deadline postponement

I-Ambitious objectives & general obligations to enhance and to prevent deterioration of the status of bodies of water

❖ Six purposes for the protection of inland surface waters, transitional waters, coastal waters and groundwater

“a) prevents further deterioration and protects and enhances the status of aquatic ecosystems and with regard to their water need, terrestrial ecosystems and wetlands directly depending on the aquatic ecosystems;

b) promotes sustainable water user based on a long-term protection of available water resources.

c) aims at enhanced protection and improvement of aquatic environment, inter alia, through specific measures for the progressive reduction of discharges, emissions and losses of priority substances and the cessation or phasing-out of discharges, emissions and losses of the priority hazardous substances;

d) ensures the progressive reduction of pollution of groundwater and prevents its further pollution and;

e) contributes to mitigating the effects of floods and droughts”

I-Ambitious objectives & general obligations to enhance and to prevent deterioration of the status of bodies of water

- ❖ The ultimate objective : **a good status** for all EU surface waters (more 100 000) and groundwater (more 13 000) by **2015**
 - ✓ **For surface water** : *Good surface water status means the status achieved by a surface water body when both its **ecological status** and its **chemical status** are at least good. The ecological status comprises a series of quality elements by type of water bodies, such as biological and hydromorphological elements, quantity and dynamics of water flows, or connection to the groundwater body for lakes*
 - ✓ **For groundwater** : *Good groundwater status means the status achieved by a groundwater body when both its **quantitative status** and its **chemical status** are at least good”*

I-Ambitious objectives & general obligations to enhance and to prevent deterioration of the status of bodies of water

❖ Two General « *distinct albeit intrinsically linked binding objectives* » (Case C-461/1)

✓ **An obligation to prevent deterioration of the status of bodies of water.**

MS « *shall implement the necessary measures to prevent deterioration of the status of bodies* » of surface water and of groundwaters (art. 4 §1)

- **No definition** of the notion of deterioration of the status in WFD
- **No explicit criteria** for determining compliance with this obligation in WFD

I-Ambitious objectives & general obligations to enhance and to prevent deterioration of the status of bodies of water

❖ Two General « *distinct albeit intrinsically linked binding objectives*” (Case C-461/1)

- Rigorous interpretation by the CJEU for determining compliance with the obligation of no-deterioration

For surface water : “*as soon as the status of at least one of quality elements, within the meaning of annex V (...) falls by one class even if that fall does not result in a fall in classification of the body of surface water as a whole.*” Case C-461/13

For groundwater : “*any subsequent increase in the concentration of a pollutant that (...) already exceeds an environmental quality standard or a threshold value set by the Member State also constitutes a deterioration*”. Case C-535/18

I-Ambitious objectives & general obligations to enhance and to prevent deterioration of the status of bodies of water

- ❖ Two General « *distinct albeit intrinsically linked binding objectives* » (Case C-461/1)
 - ✓ **An obligation to enhance the status of bodies of water and of aquatic ecosystems**
 - First purpose of WFD (art. 2): « *enhances the status of aquatic ecosystems and with regard to their water need, terrestrial ecosystems and wetlands directly depending on the aquatic ecosystems* »
 - MS « *shall protect, enhance and restore all bodies of* » surface water and groundwater; « *shall protect and enhance all artificial and heavily modified bodies of water* » (art. 4 §1)

II- Key specific obligations on Member States

❖ Characterisation and observation of water bodies

- ✓ The characterisation of groundwater bodies must be drawn up before the management plan is produced (Case C-559/19)
- ✓ An economic analysis of water services with respect to those associated with damage or negative impacts on the aquatic environment
- ✓ A monitoring of the changes in the status of any given water body

*Reviews at the latest 13 years after the entry into force of the WFD, and every 6 years thereafter

II- Key specific obligations on MS

❖ Management plans & Programmes of measures

- ✓ A River Basin Management plans (first plans before 22/12/2009, reviews by 2015)
 - For each river basin district (Art. 13)
 - General description of the characteristics of the river basin district, of the location of water bodies and of protected areas
 - Summary of the significant pressures and impacts of human activity on the status of water bodies
 - A list of environmental objectives, a summary of the economic analysis and of the programmes of measures

II- Key specific obligations on MS

❖ Management plans & Programmes of measures

✓ Programmes of measures (first programmes by 2006) Art.11

- *basic measures* include measures required under water directives, Environmental Impact Assessment directive, Seveso Directive, Sewage sludge Directive, Plant protection products directive, Habitats directive, IPPC directive (Annex VI)
- Where necessary “*supplementary measures*”: normative instruments (legislative, administrative, economic/fiscal, negotiated agreements, codes of good practice), abstraction control, restoration of wetlands areas, desalination plants, efficiency and reuse measures, educational projects, research (...).

*The adoption of **programmes for monitoring of water status** (art. 8) which shall be operational in 2006

II- Key specific obligations on MS

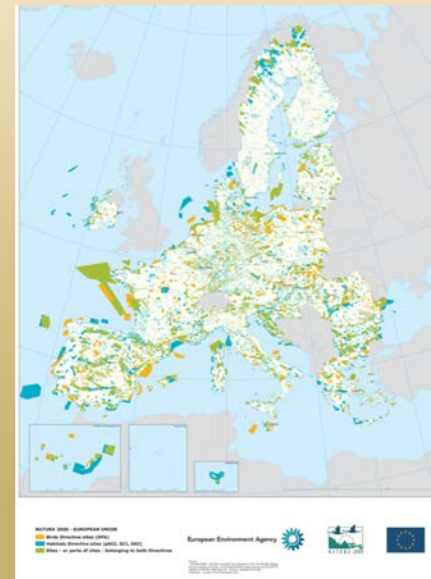
❖ Register of *Protected areas (first register(s) by 2004)*

✓ Protected areas concerned

- Waters used for the abstraction of water for human consumption providing more than 10m³ a day or serving more than 50 persons as well as to bodies of water intended for such future use
- Areas special protection under Directives Birds & Natural Habitats
- Certain areas designated for special protection under Directives providing for the protection of surface water and groundwater

✓ Register of protected areas

- For each river basin district management plan
- Include maps showing the location of each protected area
- Completed at the latest four years after the date of entry into force of the WFD (2004)



II- Key specific obligations on MS

❖ Pricing of water

- ✓ *“Water is **not a commercial product like any other**, rather, a heritage which must be protected, defended and treated as such” (recital 1)*
- ✓ *An **economic analysis** conducted according to Annex III*
- ✓ *Taking account of the **principle of recovery of the costs for water service** in accordance with the polluter pays principle*

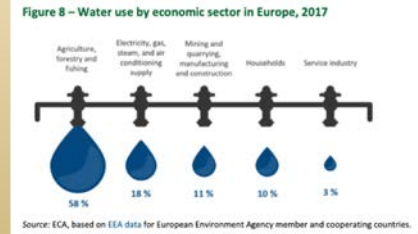


II- Key specific obligations on MS

❖ Pricing of water

MS “shall ensure by 2010”:

- *“Water-pricing policies provide adequate incentives for users to use water efficiently”*
- *An “adequate contribution of the different water uses, disaggregated into at least industry, households and agriculture to the recovery of the costs of water services”*



MS may take account of « the social, environmental and economic effects of the recovery as well as the geographic and climatic conditions of the region or regions affected »



III- Directions for water protection & combined approach to discharges

❖ Certain nuances for surface waters and for groundwater

- ✓ Groundwater pollution : Directive 2006/118/EC on the protection of groundwater against pollution and deterioration
- ✓ Surface water : Directive 2008/105 on environmental quality standards

❖ Combined approach to discharges: quality standards and limit values

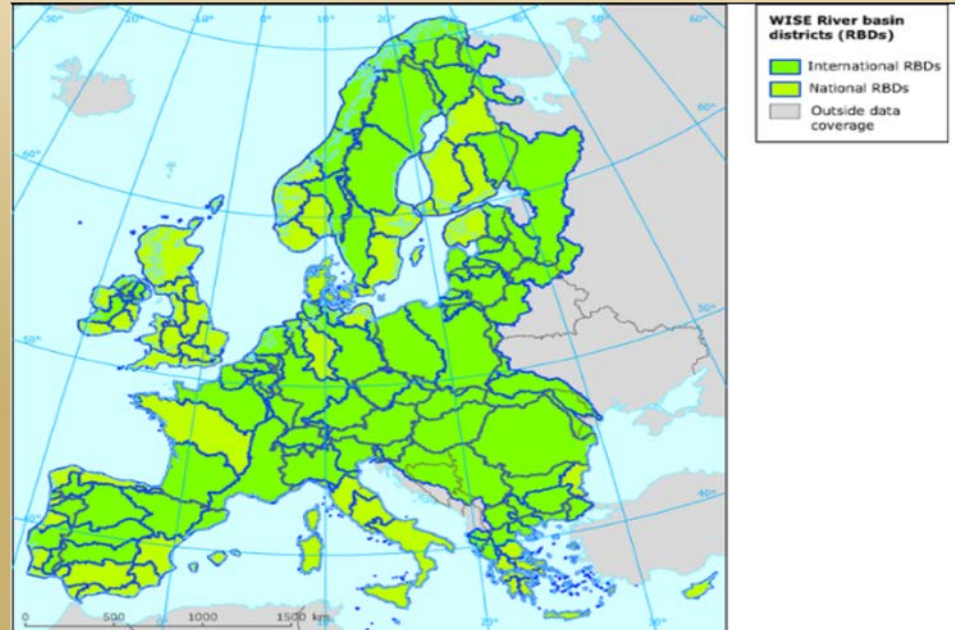
- ✓ Point sources, emission limit values or controls based on available techniques
- ✓ Diffuse impacts, to control *“including, as appropriate, best environmental practices”* provided for by those other directives

❖ Priority substances & watch list of substances

Substances added in 2022 : the insecticide & veterinary pharmaceutical fipronil, antibiotics clindamycin and ofloxacin, human pharmaceutical metformin and its metabolite guanyurea, and a group of three sunscreen agents.

IV- River basin district, multilevel governance, information and public participation

- ❖ River Basin Districts & International river basin district: the main unit of management – art 3
Defined as “the area of land & sea made up of one or more neighbouring river basin together with their associated groundwaters and coastal waters”



IV- River basin district, multilevel governance, information and public participation

❖ Information, public participation and access to justice

- ✓ *“The success of this directive relies on close cooperation at Community, MS and local levels as well as on information, consultation and involvement of the public including users”* (recital WFD)
- ✓ MS *“shall encourage the active involvement of all interested parties in the implementation of this directive, in particular in the production, review and updating of the river basin management plans »* (Art. 14)
 - At least three years before the beginning of the period to which the plan refers : *“timetable and work programme for the production of the plan, including a statement of the consultation measures to be taken”*

IV- River basin district, multilevel governance, information and public participation

❖ Information, public participation and access to justice

- ✓ MS *“shall encourage the active involvement of all interested parties in the implementation of this directive, in particular in the production, review and updating of the river basin management plans »* (Art. 14)
 - At least two years before the beginning of the period to which the plan refers: *“an interim overview of the significant water management issues identified in the river basin”*
 - At least one year before the beginning of the period to which the plan refers: *« draft copies of the river basin management plan »*

IV- River basin district, multilevel governance, information and public participation

❖ Information, public participation and access to justice

- ✓ In order to allow active involvement and consultation of interested parties, MS “*shall allow **at least six months to comment in writing***” on the draft river basin management plans and background documents and information used for it production, review and updating.
- ✓ Despite the “*aspirational in nature*” of the verb “*encourage*” (article 14): The MS have the **binding obligation to encourage active involvement**. Case C-664/15
- ✓ No specific provisions on access to justice (*The UE approved the Aarhus Convention only in 2005)

IV- River basin district, multilevel governance, information and public participation

❖ Information, public participation and access to justice

However, considering the binding effect of WFD the Court promoted:

- ✓ combined interpretation of article 14 WFD, Article 47 of the Charter of fundamental rights and article 9§3 of Aarhus Convention
- ✓ Stronger legal consistency between WFD, Directive 2011/92/UE revised in 2014 and others environmental legislations to ensure the “effectivity “ of procedural environmental rights

V- Less stringent environmental objectives, exemptions and deadline extensions

❖ Less stringent requirements for artificial or heavily modified

- ✓ Artificial water body as *“a body of surface water created by human activity”* (Art.2)
- ✓ Heavily modified water body as *“a body of surface water which as a result of physical alterations by human activity is substantially changed in character, as designated by the Member State in accordance with the provisions of Annex II”*
- ✓ The status of **good ecological potential** and **good surface water chemical status** for artificial and heavily modified water bodies which MS may designate in their river basin management plans
- ✓ The obligation to prevent the deterioration of water bodies is applicable
- ✓ High risk of a breeding ground of disputes

V- Less stringent environmental objectives, exemptions and deadline extensions

❖ Less stringent requirements for specific bodies of water (article 4 §5)

- ✓ *“affected by human activity (...) or their natural condition is such that the achievement of these objectives would be infeasible or disproportionately expensive”*
- ✓ MS have to justify that the environmental and socio-economic needs served by such human activity cannot be achieved by other means
- ✓ MS must minimise adverse impacts and comply with the obligation of prevention of non-deterioration of water bodies
- ✓ High risk of a breeding ground of disputes

V- Less stringent environmental objectives, exemptions and deadline extensions

- ❖ Temporary deterioration in the status of bodies of water : "*not in breach*" WDF (art 4§6)
 - ✓ resulting "*from natural causes or force majeure or accidental ones, alterations to the level of bodies of groundwater or new activities of "sustainable human development"*"
 - ✓ MS take measures "*to prevent such adverse impacts and the programmes of measures and management plans have to be adapted accordingly*"
 - ✓ High risk of a breeding ground of disputes

V- Less stringent environmental objectives, exemptions and deadline extensions

- ❖ Derogations under article 4§7 WFD: failure to achieve good status of water bodies
- ✓ Two situations concerned
 - *“Result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwaters”*
 - *“Failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities”*

V- Less stringent environmental objectives, exemptions and deadline extensions

- ❖ Derogations under article 4§7 WFD: failure to achieve good status of water bodies
- ✓ Strict conditions required
 - *“All practical steps are taken to **mitigate the adverse impact** on the status of the body of water”*
 - *“The reasons for those modifications or alterations are specifically set out and **explained in the river basin management plan**”*
 - *The reasons for those modifications or alterations are of **overriding public interest** and/or the **benefits to the environment and to the society** (...) are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development”*

V- Less stringent environmental objectives, exemptions and deadline extensions

- ❖ Derogations under article 4§7 WFD: failure to achieve good status of water bodies
 - ✓ Strict conditions required
 - *“The beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means which are a significantly better environmental option”*
 - ✓ The complexity of the weighing-up of interests & conflicts of temporalities
 - Water & aquatic ecosystem protection versus renewable energy : the case of hydropower plant
 - Water & aquatic ecosystem protection versus water supply needs, electricity, irrigation : the case of diversion of the course of a river - Case C-43/10

V- Less stringent environmental objectives, exemptions and deadline postponement

❖ Deadlines postponement

- ✓ 2015 : Good status of Water Bodies in principle
- ✓ 2021& 2027 : *“if it could not reasonably be complied with for technical, natural or cost reasons”*
- ✓ But « *exception of postponing achievement of the objectives laid down in article 4 (1) is applicable only to the enhancement obligation (...) but not to the obligation to prevent deterioration*” Case C-559/19

❖ Report 2019 on the implementation of WFD

- ❖ the exemptions foreseen in Article 4 cover around half of Europe bodies
- ❖ For their third River basin management Plans, MS are strongly invited to *“reduce reliance on exemptions”* and *“improve transparency in relation to the justifications used”*

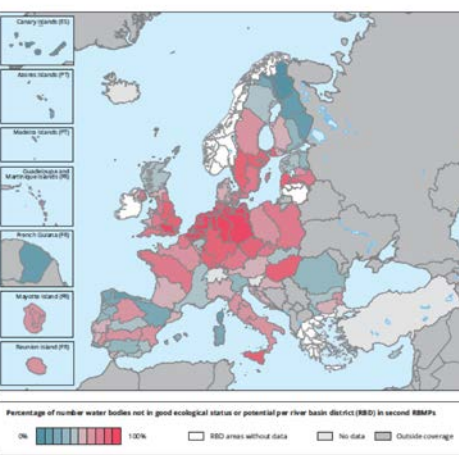
Report on the implementation of WFD - COM (2021) 970

Groundwater bodies : 75% good chemical status and 90% good quantitative status
Surface water bodies : 44 % good or high ecological status and 31% good chemical status

“These is not much time left to 2027”

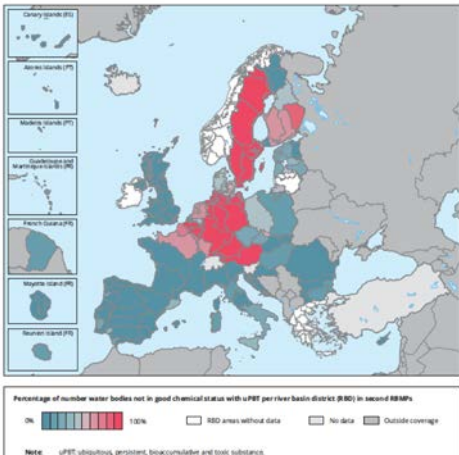
Report 7/2018 EEA “European waters, Assessment of status and pressures”

Map 2.1 Percentage of water bodies in Europe's RBDs that are not in good ecological status/potential second RBMPs



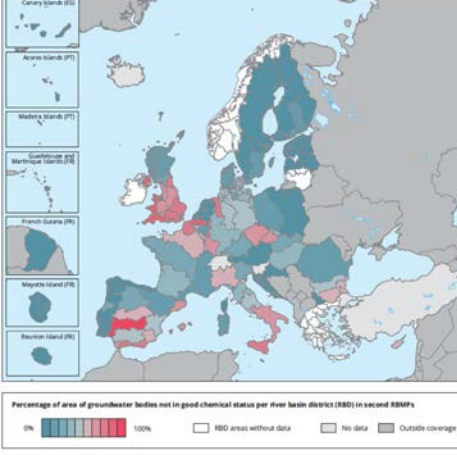
Source: Results are based on WISE-SwW database including data from 24 Member States (EU-28 except Greece, Ireland, Lithuania and Slovenia). Water bodies failing to achieve good status, by RBD, see also Surface water bodies, Ecological status or potential (groups) and Surface water bodies failing to achieve good status, by RBD.

Map 3.1a Chemical status per RBD with uPBTs



Source: Results are based on the WISE-SwW database including data from 24 Member States (EU-28 except Greece, Ireland, Lithuania and Slovenia). Surface water bodies, Chemical status with and without uPBT maps, by RBD.

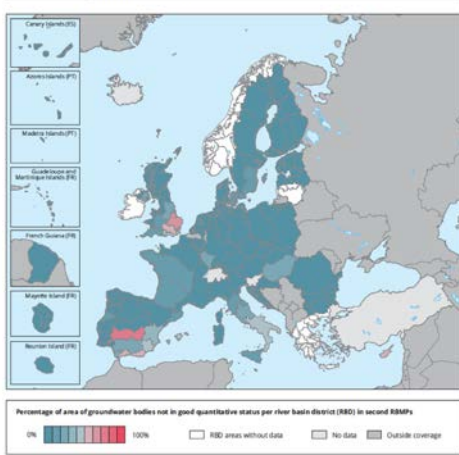
Map 4.1 River basin groundwater chemical status



Source: Results are based on the WISE-SwW database including data from 24 Member States (EU-28 except Greece, Ireland, Lithuania and Slovenia). Groundwater bodies failing to achieve good status, by RBD.

(*) Groundwater bodies at risk.

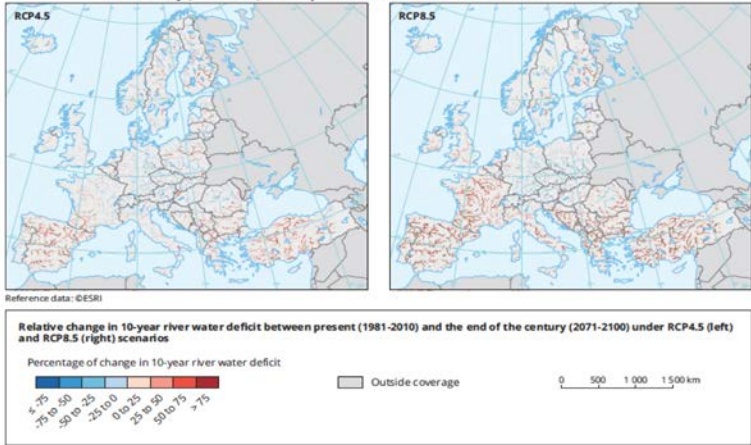
Map 5.1 Percentage of the area of groundwater bodies not in good quantitative status in Europe's RBDs in the second RBMPs



Source: Results are based on the WISE-SwW database including data from 24 Member States (EU-28 except Greece, Ireland, Lithuania and Slovenia). Groundwater bodies failing to achieve good status, by RBD.

Report 9/2021 AEE “Drivers of and pressures arising from selected key water management challenges”.

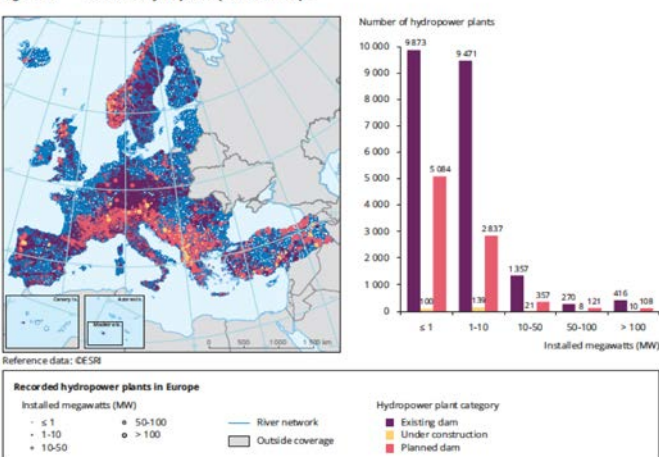
Map 3.2 Projected change in 10-year river water deficit between the present (1981-2010) and the end of the 21st century (2071-2100) in Europe, under two emissions scenarios



Notes: These maps show the relative change in 10-year river water deficit under the 95th percentile for two greenhouse gas emissions scenarios (RCP4.5 and RCP8.5).

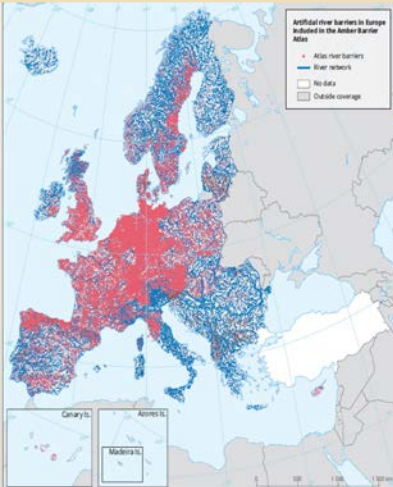
Source: Bisselink et al. (2020).

Figure 3.3 Recorded hydropower plants in Europe



Note: Distribution of hydropower plants (left) and distribution of hydropower plants by status and size class (right).

Source: WWF et al. (2019). Reproduced under the terms and conditions of Creative Commons attribution licence CC BY-NC-SA 4.0 (<https://creativecommons.org/licenses/by-nc-sa/4.0/>).



Note: This is a compilation of 620 000 unique barrier records from existing data sets, and the full barrier picture includes at least 620 000 additional barrier points whose locations are being modelled.

Source: Map based on data from ABER Consortium (2020).

EU Water Legislation and Judges : a key contribution

22 judgments of the Court of justice of EU related to WFD since 2005

- ✓ Majority of cases : **bringing infringement proceedings** against MS (15 cases)
- ✓ WFD : **not yet financial penalties** on MS compared to 8 cases related to others directives: 3 Greece (directive 91/676/EEC, Directive 91/271/EEC) 1 Italy (Directive 91/271/EEC) 2 Spain (Directive 91/271/EEC, Bathing Water Directive) 1 Belgium (Directive 91/271/EEC) 1 Luxemburg (Directive 91/271/EEC)
- ✓ A threat of financial penalties **may also have a dissuasive effect** on MS
- ✓ An **emblematic case** brought by the Czech Republic v the Republic of Poland but removed from Court's register in February 2022 (C-121/21)
- ✓ **Since 2015: 6/10 cases brought by national Courts** (for preliminary rulings) concern the interpretation of the key provisions of WFD (general obligations, pricing of water, public participation & access to justice)

***THANK YOU FOR YOUR
ATTENTION***



Nathalie.herve-fournereau@univ-rennes1.fr