

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

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V. Enforcement at National Level

What is the role for a national judge
in water pollution litigation? - preliminary reference



Foreword

- The following presentation is meant to initiate an exchange of thoughts and experiences about EU water law among legal practitioners from different MS (peer discussion).
- It cannot be avoided that it reflects my practical experience as an administrative judge working in the German judiciary.
- I hope the more general and less specific issues I picked up are relevant for your work as well. Feel free to add other topics of concern in the course of the presentation.

Looking forward to our discussion!

Matthias Keller



List of Topics

- Setting the Scene
- The Role of the National Judge
- The WFD and the National Judge
- Preliminary Reference



Setting the Scene





Ulpian

(Ulpianus, libro 68 ad edictum, D. 43, 13, 1 pr.)

The praetor says:

„I forbid

anything to be done in a public river (or on its bank),
or anything to be introduced into that river (or on its bank),
which might cause the water to flow otherwise (then it did last summer)“.

Ait praetor:

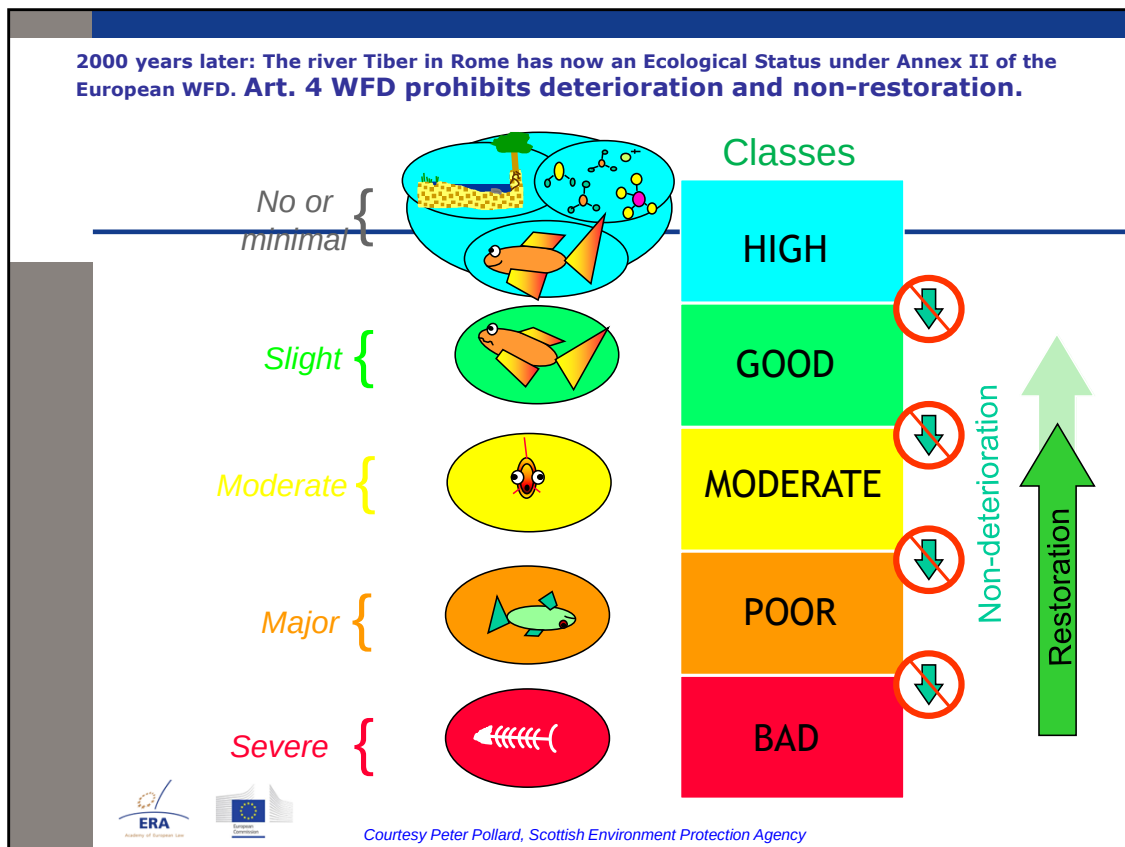
In flumine publico inve ripa eius facere aut in id flumen ripamve eius
immittere, quo aliter aqua fluat, quam priore aestate fluxit,
veto.

Remark on access to justice: „standing for anybody / azione popolare /
Popularklage “Hoc interdictum **cuivis ex populo** competit, (...)

(cf. D. 43,13,1,9)



Ulpian also explains that the purpose of this *interdictum 'prohibitorium'* is to avoid any artificial modifications of the *modus ac rigor cursus aquae*, like overflows and migrations of riverbeds damaging the neighbours (D.43.13.1.3: *hoc interdicto prospexit ... ne derivationibus minus concessis flumina excrescant vel mutatus alveus vicinis iniuriam aliquam adferat*). However, so far as these interventions were concerned with the useful activity of '*munitio riparum*' or, *a fortiori*, with the protection of lands from floods of large and dangerous rivers, some jurists thought that the *praetor* could evaluate whether denying the interdicted protection.



Article 4 of the EU Water Framework Directive outlines the requirements for the establishment of a river basin management plan. The river basin management plan is a key instrument for the implementation of the Water Framework Directive and is designed to ensure the sustainable use of water resources across Europe. Overall, the requirements under Article 4 of the EU Water Framework Directive are designed to ensure the sustainable use of water resources and the protection of water quality and quantity across Europe. By establishing a river basin management plan and implementing the necessary measures, EU member states can work towards achieving the objectives of the directive and safeguarding water resources for future generations.

Weser Judgment (C-461/13): Art. 4 WFD: Hard law!

(Not just programmatic principles for planning)

If any project (hydropower plant etc.)
deteriorates water quality (or hampers its restoration)

it cannot be authorized. (unless: derogation).

**An issued authorization will be illegal
and due to cassation by the court.**

Cf. the Weser-Judgment of the CJEU from 1 July 2015 (C-461/13)
concerning the deepening of the river Weser in the north of Germany.



In the Weser case (C-461/13), the European Court of Justice settled a years-long dispute over the legal status of the environmental objectives laid down in the Water Framework Directive (2000/60/EC). The Court ruled that the objectives are legally binding: the Member States are for example obliged to refuse authorisation from individual projects estimated to compromise the objectives. The Court also took a strong stance on the so-called non-deterioration principle, ruling that it binds the Member States to such an extent that decline of the quality of the surface waters is no longer allowed. Being so, the Court did acknowledge the possibility of exemption from the now constituted norms, putting the derogation regime created in the Directive in the spotlight. Thus the alleged management planning instrument has turned into a more traditional, formalistic legal tool, affecting individual permitting procedures all across the Union.

The Role of the National Judge



EU Judicial Order

Art. 19 (1) TEU

- **The Court of Justice** (jurisdiction conferred by the Treaties)

(...) shall ensure that in the interpretation and application of the Treaties the law is observed.

- **Member States** (jurisdiction in all other EU cases)

shall (...) ensure effective legal protection
in the fields covered by Union law.



The national judge plays a critical role in the enforcement of European Union (EU) law. As a member state of the EU, each country is required to ensure that EU law is effectively implemented and enforced within its borders. National judges are responsible for interpreting and applying EU law in their domestic courts, in accordance with the principles of EU law.

Toolbox of the National Judge

- **Preliminary reference (Article 267 TFEU):**

„Is the X-Directive / Y-Regulation / Z-Decision of the EU valid ?”

„Has the EU act to be interpreted in this or that way ?”

- **Supremacy of EU law:**

„The EU legal act takes precedence over the XY-national act.“

„Directives (sufficiently precise + unconditional) direct effect v. public entities

- **Consistent interpretation:**

„In the light of EU law the domestic law is to be interpreted in this or that way“.



The national judge acts as a mediator between EU law and national law. They are required to ensure that national law is consistent with EU law, and that national courts respect and enforce the rights and obligations established by EU law. National judges are also responsible for referring questions of interpretation and validity of EU law to the European Court of Justice (ECJ) for a preliminary ruling when necessary. The ECJ's rulings provide guidance to national judges in applying EU law in their domestic courts.

In addition to these roles, national judges also play an important role in enforcing EU law through their decisions in individual cases. National judges are responsible for ensuring that EU law is properly enforced and that individuals and businesses are held accountable for violating EU law. This helps to ensure the effectiveness and legitimacy of the EU's legal system and promotes compliance with EU law.

The WFD and the National Judge



WFD and the National Judge (I)



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Daniel Stockman-Flickr: Paris 2010 Day 3-9

Question of a domestic judge:

„Is there still any need to apply the Water Framework Directive if my MS has it already transposed into domestic water law ?“

Legal nature of the WFD under Art. 288 (3) TFEU:

“A directive shall be binding,
as to the result to be achieved,
upon each Member State to which it is addressed,
but shall leave to the national authorities
the choice of form and methods.”



Despite the fact that a directive does not have immediate legal effect in national law, it is still binding upon each member state to which it is addressed. This means that each member state must take all necessary measures to ensure that the objectives set out in the directive are achieved within the specified time frame.

In practice, this means that each member state must adopt national laws, regulations or administrative provisions to ensure that the goals and objectives set out in the directive are achieved. The member state has discretion as to how it implements the directive's requirements, but it must do so in a way that achieves the objectives set out in the directive.

WFD and the National Judge (II)



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National Judge:

„That does not answer my question:
Is it really necessary to read and apply the WFD
in the national court room ?“

Only in a “Brave New Legal World” there would be no need to apply a transposed Directive!

However, in the real world things are different:

For some reason or other MS can get lost in the transposition process ...
Transposition delayed might mean rights of EU citizens denied ...
Any “precise” provision can become highly unclear if confronted
with a specific case no one ever thought of.

The eternal problem of texts, their meaning and their gaps ...



If a member state fails to comply with a directive or improperly implements its requirements, the European Commission can take legal action against the member state and refer the matter to the European Court of Justice. The court has the power to declare that a member state has failed to fulfill its obligations under EU law, and can impose penalties on the member state if necessary. But first, it is usually the national judge to address the problem and consider measures available to ensure correct application of law.

WFD and the National Judge (III)



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What are the conditions of a direct application of the WFD?

Direct effect? What does it mean in a nutshell?

Direct effect : "Van Gend&Loos"

Generally, an individual can invoke any EU provision in a national court room which is **"sufficiently precise + unconditional"** (e.g. fundamental freedoms)

Vertical direct effect: "Van Duyn"

Directives: Against a MS or its "emanation" (vertical)
an individual can invoke those provisions of a directive that are **not timely transposed + "sufficiently precise + unconditional"**.

Horizontal direct effect: "Faccini Dori"

Directives: Against another private party (horizontal)
an individual **cannot use direct effect of a directive**.

However, interpretation of domestic law in the light of EU law ("consistent interpretation") is always possible and even required ("as far as possible") from the national courts to reach the result to be achieved by an EU directives, cf. Art. 288 TFEU.

Good guidance by the CJEU in "Pfeiffer, C-397/01 , 116": "National methods of interpretation".



In summary, the conditions for the direct application of the EU Water Framework Directive require that its provisions are clear, precise, unconditional, and confer individual rights. Additionally, the deadline for transposition into national law must have passed, and the provisions must not require further implementing measures. Nevertheless, the starting point should be interpretation of domestic law in the light of EU law.

Do's and Don'ts

(Direct Effect of Directives)

Do consider that an „unconditional and sufficiently precise“ provision of any EU Directive is to be applied directly.

(CJEU C-431/92 - Großkrotzenburg -)

Don't allow national authorities to apply such a provision when they want to impose an obligation on the citizen.

(CJEU C-91/92 - Faccini Dori -, para. 20)

Do consider that national authorities have to apply such provisions in triangular situations: If a building permit is quashed on behalf of a neighbour, the builder affected by the decision is not confronted „with an obligation“. It is only a negative effect.

(CJEU C-201/02 - Delena Wells -)



In Wells, the CJEU held that the EIA directive had direct effect. Mere adverse repercussions on rights of third parties do not justify preventing an individual from invoking the directive provisions against a Member State – even if the repercussions are certain.

Conclusion:



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The Water Framework Directive,
especially with its provisions that are

„sufficiently precise + unconditional“

should be read in a **synoptical way** with
domestic legislation .



Preliminary Reference



Legal basis is Article 267 TFEU:

The Court of Justice of the European Union shall have jurisdiction to give MS Courts **preliminary rulings** concerning:

- (a) the **interpretation** of the Treaties
- (b) the **validity** and interpretation of (EU) acts



The preliminary reference procedure in EU law allows national courts to seek guidance from the European Court of Justice on questions of interpretation or validity of EU law. The purpose of this procedure is to ensure the uniform interpretation and application of EU law throughout the EU, and to promote the coherence of the EU's legal system.

The national judge has a “right to refer” for a preliminary ruling ...

Under Art 267 TFEU a national court “**may**” ask the CJEU to give a preliminary ruling if it considers that a such a decision is necessary.

This wide discretion to refer is also a right **that cannot be taken away by national procedural law.**

***Cartesio*, C-210/06 Rn. 88:**

“Article 267 TFEU (then 234 EC) gives national courts the right - and, where appropriate, imposes on them the obligation - to make a reference for a preliminary ruling, as soon as the national court perceives either of its own motion or at the request of the parties that the substance of the dispute raises one of the points referred to in the first paragraph of Article 234 EC.

It follows that national courts have the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of Community law, or consideration of their validity, necessitating a decision on their part.”



The procedure is initiated when a national court is faced with a case that involves questions of EU law, but is unsure of the correct interpretation or application of that law. The national court can then refer these questions to the ECJ for a preliminary ruling.

The national judge may have “**duty to refer**” for a preliminary ruling ...

There is a “**duty to refer**”

- when courts decide their cases at **last instance**
(*Parfums Christian Dior*, C-337/95, para 26 / *CILFIT*)
- and for all courts deciding on the **validity** of EU law
(*Foto-Frost*, 314/85)



It is not mandatory for a national court to make a preliminary reference to the European Court of Justice. The national court has discretion to decide whether to refer a question of EU law to the ECJ for a preliminary ruling. However, in certain circumstances, the national court may be obliged to refer a question of EU law to the ECJ.

The *CILFIT* doctrine of “acte clair” and “acte éclairé”

(= an exemption from the duty to refer for which the national court has to give reasons)

Under the *CILFIT* doctrine” (283/81) courts are relieved from the duty to refer in **three situations** ...

- ❖ “**irrelevance**”: the question is irrelevant for the resolution of the dispute
- ❖ “**acte éclairé**”: the provision of EU law in question has already been interpreted by the Court
- ❖ “**acte clair**”: the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt.

Note:

The *CILFIT* doctrine was lately “**confirmed but updated**”

by an EUCJ judgment from 6 Oct 2021 in the case *Consorzio Italian Management C-561/19*:

A **statement of reasons** must show why the court saw the *Cilfit* criteria fulfilled ... (*Köbler* liability ?).



According to the doctrine of "consistent interpretation", national courts have a duty to ensure the uniform application and interpretation of EU law. If a national court is faced with a question of EU law that has not yet been resolved by the ECJ, and the correct interpretation of EU law is essential to the outcome of the case, the national court may be obliged to make a preliminary reference to the ECJ. This duty arises when the national court is the final court of appeal or if a decision is so apparent that it leaves no scope for reasonable doubt.

**Sometimes it is not clear
whether there is „acte clair“!**
C-683/19 (pending)



Credit: Spain's news

- In the view of the **Spanish Supreme Court** a certain EU law requirement constituted an ‘acte clair’, which meant that no request for a preliminary ruling was necessary.
- However, the **Spanish Constitutional Court** set aside that judgment. It held that the Supreme Court had erred in finding the existence of ‘acte clair’ and, as such, infringed the constitutional rights in so far as it had declared domestic law to be incompatible with EU law without having first referred a request for a preliminary ruling to the Court.
- Following that judgment, the **Supreme Court** referred the a request for a preliminary ruling to **Court of Justice**.

**Does the Constitutional Court in your Member State exert a similar
constitutional review on the “duty to refer” to the CJEU?**

Internet: LACCHI, Review by Constitutional Courts of the Obligation of National Courts of Last Instance to Refer a Preliminary Question (...), German Law Journal, Vol. 16 No. 06 (2015) 1663.

See now in a broader context:

CJEU from 6 Oct 2021, *Consortio* C-561/19
(not to forget AG Bobek’s eloquent Opinion!)



Practical advice



Recommendations

Official Journal (2019/C 380/01) and Website of the CJEU:

**“Recommendations
to national courts and tribunals,
in relation to the initiation of preliminary ruling proceedings”
from 8 November 2019**

Footnote:

The above recommendations are comprehensive.

A request should be made only after these recommendations have been read by the national judges.



The Recommendation on preliminary questions (2019/C 380/01) provides guidance to national courts on how to ensure the effective and uniform application of EU law through the preliminary reference procedure.

The recommendation highlights the importance of the preliminary reference procedure in promoting the coherence and effectiveness of the EU's legal system, and provides practical guidance to national courts on how to make effective use of the procedure.

Have the parties to be heard ?

Recommendations (2019/C 380/01):

„In the interest of proper administration of justice,
it may also be desirable for the reference to be made
only after both sides have been heard.“



How to formulate a preliminary question?

(Example drawn from the „Ferry-Tale“ case)

Is Article 4 (1) of Directive 2000/60/EC to be interpreted in a way

that its provisions on the prevention of the deterioration of the status of surface water

can be a legal ground to **deny the authorization of a project** to deepen a river, although this project is in conformity with national water law?

Footnote:

As far as I know the problem of **reversed direct effect (against the citizen)** still necessitates clarification.



Content and Form of the Request

(cf. the recommendations OJ 2019/C 380/01)

The referring court and the parties to the main proceedings.

The subject matter of the dispute in the main proceedings and the relevant facts.

The relevant legal provisions.

The grounds for the reference.

The questions referred for a preliminary ruling.

Possible need for specific treatment (anonymity).

Form that facilitates electronic processing:

- white, unlined, A4-size paper.
- commonly used font (Times New Roman, Courier or Arial).
- 12 point in the body of the text and at least 10 point in any footnote.
- all pages of the request, and the paragraphs, should be numbered.

The request should be sent by registered post together with the file the case in the main proceedings to: Registry of the Court of Justice, Rue du Fort Niedergrünwald,

2925 Luxembourg, LUXEMBOURG

Last but not least: “10” seems to be a very good number of pages of the request.



The key points of the recommendation are as follows:

1. The national courts should consider making a preliminary reference whenever they are unsure about the correct interpretation or application of EU law.
2. The national courts should frame their questions in a clear and precise manner that allows the ECJ to provide a useful and effective response.
3. The national courts should take into account the relevant EU law and case law when formulating their questions, and should avoid asking hypothetical or abstract questions.
4. The national courts should provide a clear and complete factual background to the case, including any relevant national law or case law.
5. The national courts should ensure that the parties to the case have the opportunity to express their views on the questions to be referred, and should give reasons for their decision to refer a question to the ECJ.

Thank you
for your kind attention!

