

ERA Workshop for National Judges:
How to Handle Court Proceedings Invoking
Non-Compliance with EU Water Law

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V. Enforcement at National Level

Role of the national judge when dealing with files on EU Water Law

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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



The foreword sets the scene by mentioning the core of continuous legal training which is the exchange of thoughts and experiences.

List of Topics

- Setting the Scene
- The Role of the National Judge
- The WFD and the National Judge
- Article 4 WFD / Deterioration
- Article 4 (7) WFD / Exemption



It is important for the audience to have a good insight on the structure of the upcoming presentation.

Setting the Scene



When it comes to civilized societies, the protection of water has always been a topic of major concern. Judges and prosecutors are familiar with the importance of Roman law for the Western legal culture. Therefore, this little piece of historical context may be a good “appetizer” for the upcoming information on EU water law.



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)“.

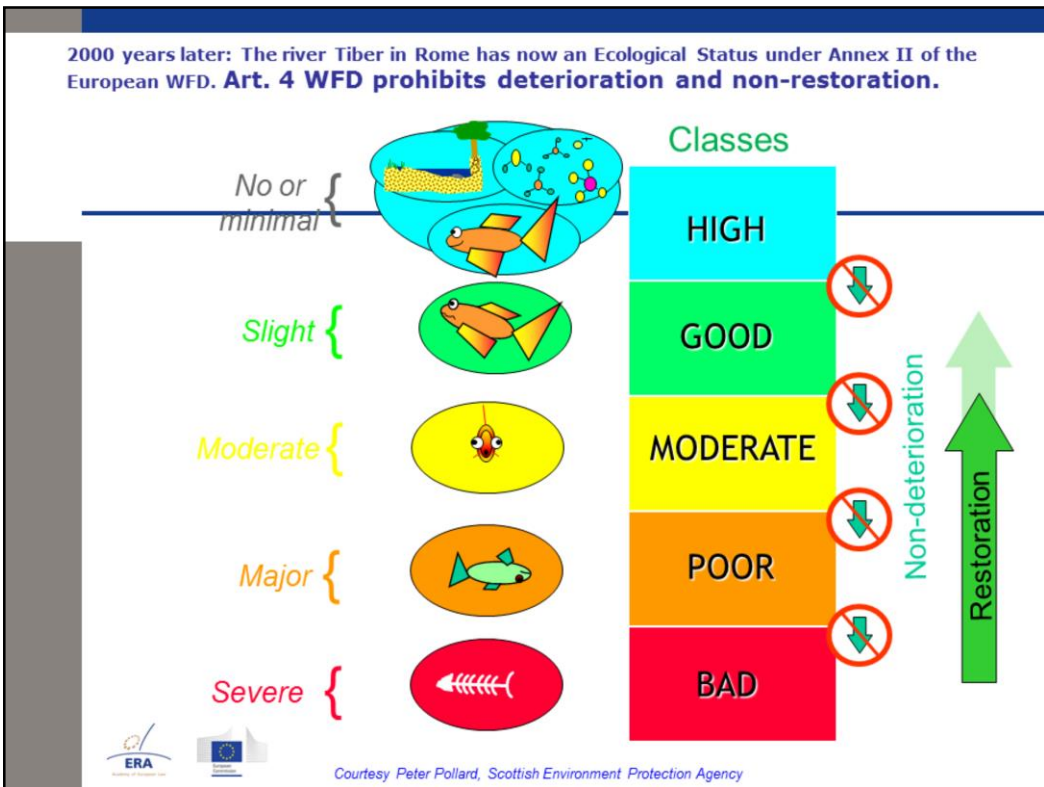
Ait praetor:

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 **cuius ex populo** competit, (...)

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





The first introduction to the technicalities of the WFD should be very simple and clear. This slide (from the Scottish Environment Protection Agency) is a perfect example on how to visualize the regulatory approach of Article 4 WFD. The overall motto is made perfectly clear: “prohibiting deterioration and non-restoration.”

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

(Not just programmatic principles for planning)

If any project deteriorates water quality (hydropower plant etc.)
(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.



The importance of the Weser Judgement (C-461/13) cannot be underestimated. A legal action against a project is successful when it will deteriorate the water quality. This leads to the question of the role of the national judge in those kind of cases.

The Role of the National Judge



EU Judicial Order

Article 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 allocation of judicial authority within the EU legal order underlines the importance of the national judge to ensure legal protection in the field 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 “Toolbox of the National Judge” shows the main legal devices within the EU law system. The trias of “preliminary reference”, “supremacy” and “consistent interpretation” is presented in a very simple manner. This is necessary to be able to keep those three in mind when handling future cases.

The WFD and the National Judge



WFD and the National Judge (I)



Paris 2010 - Le penseur CC BY-SA 2.0 Credit
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 Article 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.”



In the daily routine, applying a directive is not as easy as it seems. Article 288 (3) TFEU is a good starting point for a sound legal understanding. The obligation “as to the result” is not very common as a legal feature. Therefore, it should be explained thoroughly.

WFD and the National Judge (II)



Paris 2010 - La pensée CC-BY-SA 3.0 Credit
Daniel Stockman-Ficker: Paris 2010 Day 3-8

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 ...



This slide tries to raise a (general) awareness as regards possible incoherencies between the WFD and the national law.

WFD and the National Judge (III)



Paris 2010 - La perenne CC BY-SA 3.0 Credit:
Daniel Stockman-Picler Paris 2010 Day 3/5

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 EU directives, cf. Article 288 TFEU.

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



Practitioners are not always familiar with the direct effect of the EU law. The slide gives an overview of the topic. The importance of consistent interpretation is mentioned.

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 -)



Some typical scenarios of direct effect and references to the jurisprudence.

Conclusion:



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The Water Framework Directive,
especially with its provisions that are

„sufficiently precise + unconditional“

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



Synoptic reading as an advice for a better understanding of the water law in the EU.

Article 4 WFD / Deterioration



Article 4 WFD enshrines
the two main environmental objectives

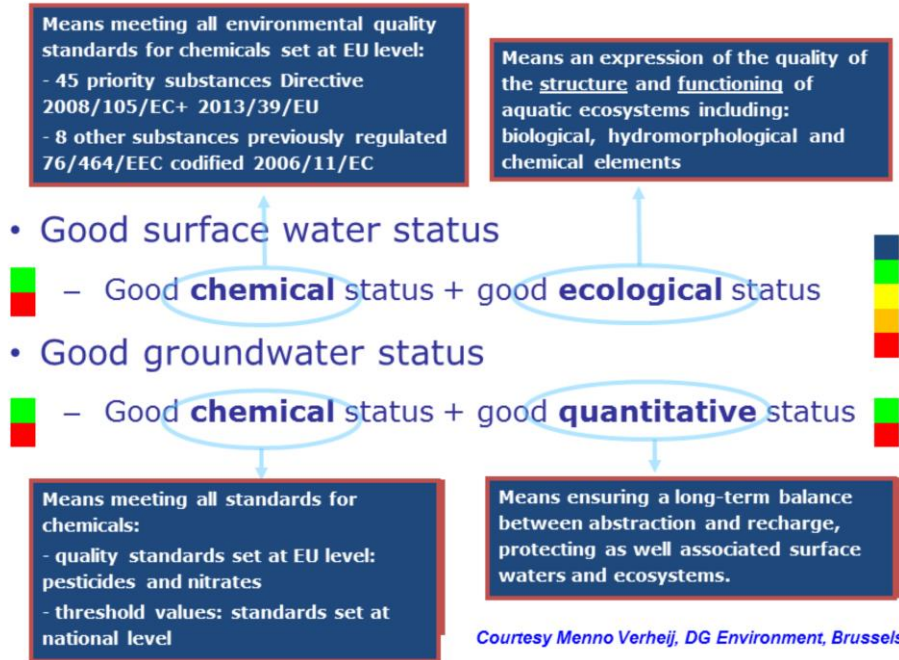
No deterioration of status
for surface and groundwater

Achievement of good status
by 2015

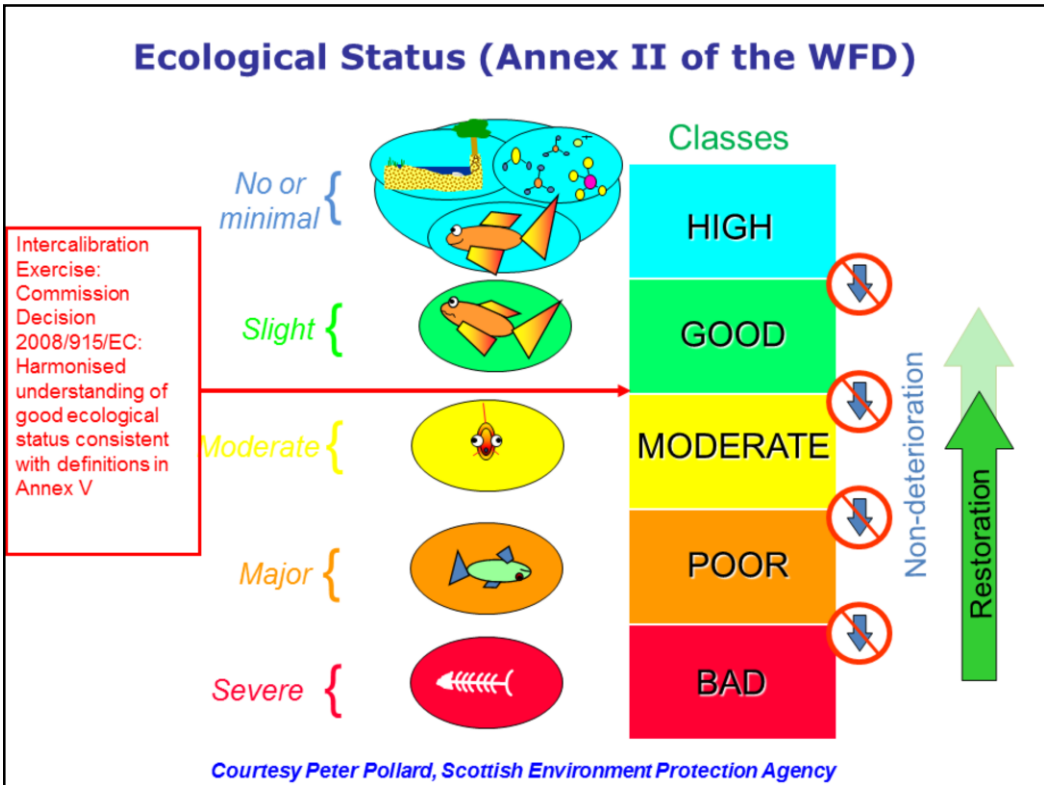


The main objectives of the WFD should be recalled here.

What is Good Status ?



This slide of the EU Commission explains “good status” in detail.



The audience is already familiar with this slide which is meant to recall the regulatory approach of Article 4 WFD.

Simplified representation of ecological status

Status class	Inv.	Flora	Fish	Phys Chem	Hymo	RSBP	...	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; RSBP: river basin specific pollutants; Global: overall ecological status



Sources:

water.europa.eu

WISE



Ecological status is explained here.

Weser (C-461/13) : „Deterioration (I)“

Simplified scenario:

The action against a permit for deepening the river Weser in the North of Germany may be successful, if this project deteriorates the ecological status of this body of surface water.

Therefore, the German Federal Administrative Court made a request for a preliminary ruling and asked the CJEU in the essence:

What qualifies for a deterioration in the sense of Article 4 WFD?



The Weser judgement is already introduced. This slide shows the case scenario.

Weser (C-461/13): „Deterioration (II)“

- The CJEU answered: Deterioration of the status of a body of surface water is given as soon as at least one of the quality elements under Annex V WFD falls by one class.

(for example: flora)

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



Sources: water.europe.eu / WISE

Under the Weser judgement it already qualifies for a deterioration if at least one quality element falls by one class.

Weser (C-461/13): „Deterioration (III)“

- It makes no difference in this regard whether the fall of an element results in a fall in classification of the body of the surface water as a whole

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



Sources: water.europe.eu / WISE



The fall in the classification of the body of surface water as a whole is not necessary to establish a deterioration.

Weser (C-461/13): „Deterioration (IV)“

- If the quality element concerned is already in the lowest class, any deterioration of the element constitutes a „deterioration of the status“ of a body of surface water.

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



Sources: water.europe.eu / WISE

If the quality element is already in the lowest status class, any worsening of this element is considered to be a deterioration.

Consequences from the Weser ruling (C-461/13):

A project
may lead quite often to
the deterioration of status of a body of surface water.

Therefore, the exemption under Article 4(7) WFD
will be more and more in the centre of
(judicial) proceedings.



The slide puts the focus on Article 4 (7) WFD which provides for exemptions.

Article 4 (7) WFD / Exemption



Article 4(7) WFD: Exemption (I)

Even if a project deteriorates the status of the affected water body it may be authorized if it is – among other conditions – justified by an

overriding public interest,

Footnote:

One is reminded of the wording in
Article 6 (3) and (4) of the Habitats Directive.



The slide mentions the key concept: “overriding public interest” and annotates that the same concept is used in the Habitats Directive.

Article 4(7) WFD: Exemption (II)

Where do I get useful information from?

COMMON IMPLEMENTATION STRATEGY
FOR THE WATER FRAMEWORK DIRECTIVE (2000/60/EC)

Guidance Document No. 20:

GUIDANCE DOCUMENT ON EXEMPTIONS TO THE ENVIRONMENTAL OBJECTIVES



Experience shows that many national practitioners are not very well aware of the fact that they can find useful information in Guidance Documents (“not binding, just a source of inspiration”).

Schwarze Sulm (C-346/14): Exemption (III)

Scenario (Infringement case against Austria)

The Schwarze Sulm (Black Sulm) is a river in the Austrian Alps.

The competent authorities granted an approval for the construction of a hydropower plant on the Schwarze Sulm.

This will - under the relevant information - have the result that the ecological status of that body of water will fall from „high“ to „good“.



The Schwarze Sulm case (here in a simplified scenario) may be a good start to engage in a legal discussion on exemptions.

Schwarze Sulm (C-346/14): Exemption (IV)

Since the deterioration of the Schwarze Sulm is clear the question is:

Does the approval of the **hydropower plant** meet the requirements of an exemption under Article 4(7) WFD?

CJEU (C-346/14): Yes!

Para. 71: As part of that margin of discretion, the Republic of Austria was entitled to consider that the contested project, the aim of which is to promote the production of renewable energy through hydroelectricity, is an overriding public interest.



When it comes to demonstrate an "overriding public interest" the MS enjoys a "margin of discretion". This is a feature of EU law. It does not say anything about the question on how to control an exemption in the context of national administrative justice.

Schwarze Sulm (C-346/14): Exemption (V)

More detailed, an exemption Article 4(7) WFD requires:
(cf. CJEU C-346/14 para. 66):

- | | |
|---------|--|
| First: | All practicable mitigation measures are taken. |
| Second: | Reasons behind the project are set out. |
| Third: | The project serves an <u>overriding public interest</u> and/or the benefits of the development outweigh the benefits of achieving the WFD objectives. |
| Fourth: | No significantly better environmental option. |



The strict requirements of issuing an exemption are shown here. The audience may discuss the intensity of judicial control.

Thank you
for your kind attention!

