Slide 1
Presentation on the Bathing Water Directive, policy and history (development of legislation)
Outline of the presentation

- Introduction
- Structure of the Bathing Water Directives
- Scope and objectives
- Key terms
- Facts on bathing water in Europe
- Obligations of Member States
- Case-law and points of discussion
- More information

Slide 2
Presentation overview.
Slide 3

- For the time being, the EU law on bathing waters is at an interim stage. Until the end of 2014 there are two directives officially in force, even though the new directive of 2006 should be implemented since March 2008.
- On account of Article 17 of Directive 2006/7/EC, one might pose the question whether non-implementation of the Directive after 2008 results in the usual „direct effect“ of EU law or in the application of a more specific regime designed with legal precedence for this directive.
- The decision of the EU legislator to keep the old Bathing Water Directive 76/160/EEC in force for another six years was taken with the idea not to leave any gaps in transposition and application for the interim period.
Taking a look at Directive 76/160/EEC of 8 December 1975, it should be noted that this was one of the very first environmental directives of the then EEC. In the field of water law it was in fact the second piece of legislation, following Dir. 75/440/EEC on the quality of surface water intended for abstraction of drinking water. From this one might derive that mass tourism on the shores of the Mediterranean was a powerful driver of European integration!

The “old” Bathing Water Directive is rather short – with 14 articles, 1 annex and 3 definitions – and concentrates on essentially two obligations:

1) to identify bathing waters and set minimum quality criteria for them, i.e. physical, chemical and microbiological parameters;
2) to monitor the quality of bathing waters regularly.

The „old“ Directive distinguishes between mandatory („I“) values – taken from the French „impérative“ – and guide („G“) values. Member States may not require less than the mandatory values but they may fix more stringent values for their bathing waters.

Art. 7 represents an early expression of the non-deterioration principle contained today also in the Water Framework Directive.

The „waiver“ in Art. 8 means that the Directive as a whole need not be applied in cases of exceptional weather or geographical conditions or natural enrichment of bathing waters; but public health requirements should nevertheless not be disregarded.

The obligation for annual reporting by Member States and Commission was established by an amendment in 1993.
The “new” Directive = 2006/7/EC

- Art. 1: Purposes and scope
- Art. 2: 17 definitions
- Art. 3: Monitoring obligation
- Art. 4: Bathing water quality assessment
- Art. 5: Classification + quality status of bathing waters
- Art. 6: Establishment of bathing water profiles
- Art. 7: Management measures in exceptional circumstances
- Art. 8: Identification + management of cyanobacterial risks
- Art. 9: Same for other parameters
- Art. 10: Cooperation on transboundary waters
- Art. 11-12: Public participation; Information to the public

Slide 5

- The “new” Directive 2006/7/EC was prepared by a Commission communication of 2000 on a new bathing water policy which essentially proposed to have ambitious and legally binding standards, and to introduce quality management that is not limited to water quality monitoring but should include anti-pollution measures, proper planning, research, communication and public participation.

- New elements of the Directive include a much longer list of definitions (17 instead of 3); the introduction of an obligation to perform quality assessments; a new classification system with 4 categories instead of the „I“ and „G“ values; the establishment of „bathing water profiles“ as a planning instrument; a more sophisticated set of management instruments which apply also in exceptional circumstances; the prioritization of cyanobacterial risks as particularly important for public health; new obligations for communication and public participation, thereby implementing the Aarhus Convention; more ambitious rules on reporting and review, plus updated comitology rules; and 5 annexes instead of 1.
New elements of the Directive also include more ambitious rules on reporting and review, plus updated comitology rules; and 5 annexes instead of 1.
The scope in Art. 1 of the new Directive should be compared with the definition of “bathing water” in Art. 1.2.a of the old Directive. It has moved from a factual definition to one where the expectations of the competent authority play the key role. This is essentially a reaction to case-law of the ECJ which limited Member States’ possibilities to opt out of their obligations by de-listing bathing waters (cf. below slides 16 and 17).
Slide 8

- The definitions of „bathing season“ and „large number“ also emphasize the importance of the competent authority’s expectations, following the arguments e.g. of the UK in the „Blackpool case“ (see below slide 16).

- Pollution is defined here very specifically for the purposes of the Bathing Water Directive, which are much more limited than those of the Water Framework Directive.
The reports on the implementation of the Bathing Water Directive present altogether a much more positive picture when compared with the implementation of other EU water directives. This may be due to its very limited scope and the strong touristic and thus economic pressure in favour of high standards in this case.
Slide 10

See text of slide 9.
Slide 11
See text of slide 9.
Slide 12
See text of slide 9.
Slide 13
See text of slide 9.
The first and foremost obligation of Member States is still to identify bathing waters and to define the bathing season (Art. 3.1).

Especially Art. 5.3 shows the results of political compromise in softening the binding nature of Member States' obligations („they shall take such realistic and proportionate measures as they consider appropriate with a view to increasing the number of bathing waters classified as ‘excellent’ or ‘good’“).
The bathing water profile is a new planning instrument, mandatory since March 2011 and explained in Annex III. It consists of a description of each bathing water, identification and assessment of causes of pollution, plus the potential for proliferation of cyanobacteria and others, and information about management measures. It is to be reviewed regularly.

The new Directive distinguishes between cyanobacterial risks – here, in case of a health risk, adequate management measures have to be taken immediately – and other risks.

There is a new obligation to inspect bathing waters visually for pollution such as tarry residues, glass, plastic, rubber or any other waste.

Articles 11 and 12 of the new Directive set out the new rules on public participation and information to the public under the Aarhus Convention which the EU had ratified shortly before.
The leading case of the European Court of Justice—or the first in a series of cases in relation to the old Bathing Water Directive—was the Blackpool case (C-56/90) where the ECJ, in 1993, had to decide on the de-listing of coastal areas by the UK. The British government argued that the areas around the city of Blackpool were no longer used by a large number of bathers and that bathing habits had changed. This was rejected by the ECJ on the grounds that the Commission had produced evidence about typical beach installations being in place, like life guards, changing huts, deckchairs and toilets. The ECJ also ruled that mere endeavours to reach the quality targets were not enough, and that Member States were obliged to actually reach the targets.

In the case Commission v. Spain (C-26/04) the ECJ decided that there was no obligation to impose a ban on bathing in case of poor water quality, but rather to take some action which could also consist in issuing a warning to the public. This was then taken up by the EU legislator and laid down as a rule in Art. 5.4 of Directive 2006/7/EC.
Case-law and points of discussion (2)

- **De-listing of bathing sites**
  - ECJ in judgment of 25.5.2000
    (Case C-307/98, COM v. Belgium; para. 30):
    
    Moreover, it is incumbent on a Member State which contends that bathing is no longer habitually practised in certain areas and wishes therefore no longer to treat them as bathing areas within the meaning of Directive 76/160 to prove both that bathing is not habitually practised in each of the areas concerned and that that situation is not the result of non-compliance in those areas with the limit values fixed in accordance with Article 3 of that Directive.
  
- **Still applicable under the new Directive?**
  - When does a competent authority expect many bathers?
Case-law and points of discussion (3)

- Sampling frequency and departure from limit values
  - ECJ in judgment of 8.6.99 in case C-198/97 (COM v. Germany, para. 35 + 36):
    “...it is not sufficient to take all reasonably practicable measures: the Directive requires the Member States to take all necessary measures to ensure that bathing waters conform to the limit values set therein...”
  - Short duration of bathing season + low number of samples does not exempt from 90% conformity quota (under old Directive).

- What are the rules under Directive 2006/7/EC?
  - See Art. 4 and 5 and Annex IV

- Possible effect of non-compliance?
- Can individuals claim compensation?

Slide 18

- In the case C-198/97 Germany was condemned for infringement because in one bathing water where only 8 or even less samples were taken because of a short bathing season, one result beyond the limit value resulted already in a violation. Germany argued that in such a case the 90% quota of Art. 5 of Directive 76/160/EEC should not apply or be interpreted “reasonably”. The ECJ rejected the argument and insisted on strict adherence to the rules of the Directive, holding that a Member State is at its own risk if its authorities take very few samples.

- In the new Directive, in particular Art. 4 now contains a sophisticated set of rules with a minimum of 16 or 12 samples according to para. 3, but again exceptions in para. 4. Altogether rules have become more complicated, even though a simplification has been introduced by reducing the parameters to 2 (e. coli and intestinal enterococchi).

- The last question – what happens if a Member State’s authorities e.g. do not inspect beaches any more and bathers are injured by broken glass, tarry or other debris on the beach – may be answered by first consulting the national compensation law. However, if no such rules should exist for effective compensation, the direct effect of the EU Directive might be invoked (cf. ECJ cases „Francovich“ and „Factortame“).
More information

- General: