Co-operation with national judges in the field of environmental law under the European Commission Framework Contract ENV.A.I/FRA/2012/0018

Training module

HOW TO HANDLE COURT PROCEEDINGS INVOKING NON-COMPLIANCE WITH EU WATER LAW

Developed in March 2017
The Nitrates Directive
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Introduction

- Challenge
- Outline of the Nitrates Directive
- Conflicts
The challenge

Nutrients from agriculture are a major source of eutrophication (algae blooms, dead zones, disruption of aquatic ecosystems) and a threat to drinking water quality.
http://www.fao.org/docrep/w2598e/w2598e04.htm
Dead zones in the Baltic Sea
Exposure of ecosystems to eutrophication

Average accumulated exceedance of the critical loads for eutrophication (in equivalents = [mol nitrogen] per hectare and year)
**Nitrates Directive: 91/676/EEC**

**Objective:**
- reduce water pollution caused or induced by nitrates from agricultural sources
- prevent further such pollution

**Important definitions:**
- Fertilizer
- Pollution
- Vulnerable zone

Please note that there is no deadline in the objective and that it does not describe what level of reduction suffices to meet this obligation. So it is an ongoing obligation to reduce and prevent water pollution caused or induced by agriculture.
Vulnerable zone refers to an area where agricultural activities take place and which drains into waters suffering from pollution with nutrients, caused partly by agriculture. The main other source of nutrients is human waste water, which is covered by the Urban Waste Water Treatment Directive (91/271/EEC).
These indicators identify whether action should be taken. And be aware (return to the previous slide) that achievement of these indicators does not imply that the Nitrates Directive can be set aside. That depends on whether they would also be met if action were not taken.
Additional measures are necessary when the basic measures do not suffice to achieve a downward trend in nitrate pollution.
Reduce or increase

**Reduce use of manure/fertiliser depending on:**
1. Soil type, slope angle, etc.
2. Climatic circumstances, rainfall patterns, irrigation needs
3. Land use and agricultural practices, including crop shifts and mineral balance
4. Water quality problems

**Or increase:**

**Derogation:** apply more than 170 kg N/ha PROVIDED that it does not imperil achievement of the ND objectives AND justified on the basis of objective criteria

E.g.: long growth periods, crops with high nitrogen uptake, soil type, rainfall pattern

These rules differ depending on the local circumstances.
This is an important distinction (see the next slides for the implications).
This is a picture of the situation in 2009. As you can see, vulnerable zones cover a large amount of land. Where everything is in one color, the entire territory is designated.
It makes a difference whether or not an area is designated or not.

<table>
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<th>Regime</th>
<th>Designation vulnerable zones</th>
<th>Not designated (not vulnerable) areas</th>
<th>Application on the entire territory</th>
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<td>Code good agricultural practices</td>
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<tr>
<td>Monitoring</td>
<td>Representative monitoring -&gt; extent of nitrate pollution in all the waters from agricultural sources .</td>
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Conclusions

- The unofficial ND objective is 50 mg/l nitrates = drinking water norm.
- It is not met everywhere.
- And the ecological norm <eutrophication> is much LOWER.
I will discuss landmark CJEU cases on these topics.
1. Designation

- Article 3(1) of the Directive requires the Member States to identify surface freshwaters as waters which are or could be affected by pollution only if they exceed, or could exceed if relevant action were not taken, the threshold for nitrates of 50 mg/l by reason of the direct or indirect discharge of nitrogen compounds from agricultural sources.
- 1. The Member States must therefore establish the source of the nitrates which cause that threshold to be exceeded.
- 2. The measures provided for by the action programme are to take account of the quantities of nitrogen originating from agricultural and other sources.
The answers to these questions can be found in the CJEU case law (see the next slides).
C-293/97 Standley e.a.

- Identification of proportion of agricultural pollution or exclusiveness does not follow from the system of the Directive.
- ND grants a Member State a wide discretion in determining what is significant -> meant to create the instruments to deal with agricultural pollution
C-258/00 Commission v France

- France limited use of the 50 mg/l to waters intended as a source of drinking water.
- France limited the identification of eutrophic waters to zones in which nitrogen is the controlling factor in the eutrophication (coastal zones and shallow stagnant, brackish waters).

Is this an infringement of the Nitrates Directive?
C-258/00 Commission v France

- Both limitations infringe the Nitrates Directive.
- MS are obliged to respect the objectives of the Directive, namely, the reduction of water pollution caused by nitrates from agricultural sources.
- Thus, the exercise of their discretion may not result in a large portion of nitrogen-bearing waters falling outside the scope of the Directive.
Despite earlier court judgments on these topics, designation conflicts can still pop up.

C-194/14 Commission v Greece

- Use of 50 mg/l and/or eutrophication to assess need for designation
- It is not necessary that agricultural pollution is the only source, as long as it is a significant contribution

Reference to Standley e.a. (C-293/97)
Trends

Infringement procedures on designation -
- Increase in size of vulnerable zones
- Increase in application to the entire territory
2. Application

- Transposition failures
- Failure to establish an action programme, failure to establish monitoring etc.

E.g. C-127/99 Commission v Italy
- What constitutes a failure to take additional measures?
- Non-compliance by farmers (case study)
Article 5 (5) Nitrates Directive

- “Member States shall moreover take, in the framework of the action programmes, such additional measures or reinforced actions as they consider necessary
- if, at the outset or in the light of experience gained in implementing the action programmes,
- it becomes apparent that the measures referred to in paragraph 4 will not be sufficient for achieving the objectives specified in Article 1.
- In selecting these measures or actions, Member States shall take into account their effectiveness and their cost relative to other possible preventive measures.”

Discretionary room?
Failure to take additional measures

- Article 5(5) ND: application of additional measures is not a choice. It must be done as soon as the need is identified to achieve the objectives of the ND.

C-322/00 Commission v Netherlands
Case E-7/15 EFTA Surveillance Authority [2015], para. 40
Pending case against Germany
Right to property

- Can designation as a vulnerable zone and application of the nitrate action programme and code of good agricultural practice infringe the property rights of land owners?
Right to property

- It is a general principle of EU law
- It is not an absolute right
- It must be viewed in relation to its social function
- Its exercise may be restricted, provided that
  - Restrictions correspond to objectives of general interest pursued by the EU
  - and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed

C-293/97 Standley e.a.
(including a proportionality test)
The end?

- Nitrates Directive: any questions?
- Case study on non-compliance by farmers
- But first: relation between ND and other EU legislation
  → the Drinking Water Directive
50 mg/l is the drinking water norm for sources of drinking water, which is established by the Drinking Water Directive
The ND is older than the WFD. It is now a daughter Directive. Its measures are basic (mandatory) under the WFD. Note that the planning period of the ND and the WFD are different. The inclusion means that the ND is complemented with a deadline, while the ND contains a simple reduce and prevent obligation.

Cross-compliance obligation means that income support can be reduced in case of non-compliance with the ND obligations
We will take a closer look at this relationship in the case study.
Drinking Water Directive: 98/83/EC (80/778 EEC)

Objective

- to protect human health from the adverse effects of any contamination of water intended for human consumption by ensuring that it is wholesome and clean.
Basics

- **Essential EU quality standards for**
- All distribution systems serving more than 50 people or supplying more than 10 cubic meter per day
- Smaller distribution systems if the water is supplied as part of an economic activity;
- Drinking water from tankers, in bottles or containers;
- Water used in the food-processing industry
- Not applicable to bottled natural mineral water or medicinal water
- Monitoring and reporting requirements

There is separate EU legislation on natural mineral water and spring water: Directive 2009/54/EC and Directive 2003/40/EC.
HACCP refers to hazard analysis and critical control points and contains rules on hygiene for the purpose of food safety.
Differences

Minimum requirements
- Member States can set higher standards
- Member States can add standards
- Member States cannot set lower standards, but they can request a temporary derogation
  - Not a (potential) danger to human health
  - Provision of drinking water is not possible by any other means
The end