

ERA Workshop for Judges:

National Judges and the EU Aarhus Acquis

Case study on
judicial review and effective remedies -
Focus on Environmental Impact Assessment (EIA)

"A Tale of Two EIA scenarios"



Dr Matthias Keller,
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... first scenario ...



I will be more than happy to know more about
your domestic situation ...

1. Is complaining about (missing) EIAs
an important feature of court
proceedings in your country?



Could you answer the first question by assigning points?

1 point „not important“

up to 12 „very important“

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| ▪ GR | ▪ RO |
| ▪ HR | ▪ UK |



2. Is there a typical complaint?



Copyright: Tim Buley, Costs in Environmental Cases, p. 15

For example: the Windfarm-EIA misses the impact on the **Bechstein's Bat**



Source: Dietmar Nill - PLoS Computational Biology, July 2009

The translation of the key words ...

3. According to your opinion are the
key words (footnote)
“screening” and
“likely to have significant effects on the environment”
well translated into your domestic language?

Cf. Recital 27 of the amended EIA Directive

“The screening procedure should ensure that an environmental impact assessment is only required for projects likely to have significant effects on the environment.”



Translation ok? Connotation ok? Collocation ok? ["Traduttore-Traditore?"]

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... second scenario ...



Give me the facts, I will give you the (EU) law ???
Da mihi facta, dabo tibi ius ???

4. Does EU law require from Judge Masaryk
to raise the question of the missing EIA
ex officio?

NO!

At least not as a general principle ...
Let us look at the legal framework ...



EU law framework:

Art. 19 (1) TEU

(...)

Member States shall provide remedies
sufficient to ensure **effective legal protection**
in the fields covered by Union law.

Cf. Art. 47 EU Charta of Fundamental Rights and
General Principles of EU law relying on Art. 6, 13 of the
European Convention of Human Rights



Procedural autonomy

Member States enjoy „procedural autonomy“ to have their domestic set of precedural rules (no EU harmonisation)

However, those domestic rules of procedure must be exercised having regard to the

principle of equivalence
and the
principle of effectiveness.

(Cf. inter alia: C-312/93 - Peterbroek -)



Here is the relevant legal test ...

The principle of equivalence:

Actions under EU law must not be handled „less favourable“ than actions under domestic law.

The principle of effectiveness: (difficult to apply = Art. 267 TFEU ??)

Domestic rules on procedure must not lead to a situation where the exercising of EU rights is

„practically impossible or excessively difficult“.

Not raising the question ex officio seems to be possible.

(Cf. AG Kokott, C-416/10, para. 152 ss. „Križan and Others“)



5. What would you have done under your domestic law?

For me as German judge the answer is very easy:
We have a very solid



„da mihi facta, dabo tibi ius“- principle

in our national procedural law.

Consequently, the principle of equivalence demands that
questions of EU law must not be handled „less favourable“
than actions under domestic law, which is

ex officio.



6. Do the neighbours have a legitimate claim to get compensated for their loss of value (100.000 Euro) as regards their land and buildings?"

If national says so, well of course ... If not, under EU law ?
State liability? Can we make it a „Francovic Claim/ C-6/90 “?

- | | |
|------------------------------------|---------------------|
| ➤ Breach of EU law (EIA Directive) | Yes! |
| ➤ Causal link? | Hm ... |
| ➤ Loss (100.000 Euro)? | Well, difficult ... |

Leth C-420/11: Understanding the aim of the EIA law.

(„vis ac potestas“ / „το τέλος“ / „οιλο“)

Protecting property value? Well not as such. However, the EIA is about „cultural heritage“. If the contested project (airport) destroys „cultural heritage“ without a prior EIA procedure. From my point of view this could give rise to a „Francovich Claim“...



Thank you
for your kind attention!

