

ERA Workshop for Judges :

National Judges and the Aarhus Acquis - focus on Access to Justice

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3RD PILLAR OF THE AARHUS CONVENTION: ACCESS TO JUSTICE

Effective remedies



With the support of the "Cooperation with National Judges in the field of Environmental Law" programme of the EU

Effective remedies

- Principle of equivalence and principle of effectiveness
- Interim measures (Injunctive relief)
- CJEU case law



Christina Olsen Lundh
2019

The principle of national procedural autonomy.

"national procedural responsibility"



Where no relevant EU rules exist; national law determines the conditions for enforcement of EU rights.

Case 6/60 Humblet v. Belgium

It is **the responsibility** of the Member States to determine the procedural conditions under which EU rights are to be protected.



If there is no EU rules to govern a certain matter: it is for the legal system of each Member State to designate the courts and tribunals. It is for the national legal system to determine how to protect the interests of a person adversely affected by an infringement of EU law. This also means that it is the responsibility of the Member States to determine the procedural conditions under which EU rights are to be protected. According to Craig/de Burca, authors have suggested that instead of calling this the "principle of national procedural autonomy" it would be better to call it "national procedural responsibility".

The principle of national procedural autonomy.

"national procedural responsibility"



Where no relevant EU rules exist; national law determines the conditions for enforcement of EU rights. *Case 6/60 Humblet v. Belgium*

1. The principle of equivalence

Non discrimination: the remedies and forms of action *available to ensure the observance of national law* must be made *available in the same way to ensure the observance of EU law*.



Then, over time, the CJEU has imposed requirements on national law. First of all: the principle of equivalence

This principle was mentioned several times yesterday, especially during the case study - when discussing the ENGOS and the fees put on them. It is mainly about non discrimination. And here it's about non discrimination when it comes to enforcement of law. The remedies and forms of action available to ensure the observance of national law must be made available in the same way to ensure the observance of EU law.

The principle of national procedural autonomy.

"national procedural responsibility"



Where no relevant EU rules exist; national law determines the conditions for enforcement of EU rights. *Case 6/60 Humblet v. Belgium*

1. The principle of equivalence

And the emergence of requirements of

- proportionality,
- adequacy
- effectiveness

Case 222/84 Johnston v Chief Constable of the RUC

Case 222/86 UNECTEF v Heylens

Case C-327/02 Panayotova v. Minister voor Vreemdelingenzaken en Integratie



The court also added requirements of proportionality, adequacy and effectiveness....

Case 222/84 Johnston v Chief Constable of the RUC

Case 222/86 UNECTEF v Heylens

Case C-327/02 Panayotova v. Minister voor Vreemdelingenzaken en Integratie

The principle of national procedural autonomy.

"national procedural responsibility"



Where no relevant EU rules exist; national law determines the conditions for enforcement of EU rights. *Case 6/60 Humblet v. Belgium*

1. The principle of equivalence

2. The effectiveness requirement:

The requirement that national remedies must secure the effectiveness of EU rights

C-213/89 R v Secretary of State for Transport, ex p Factortame Ltd



And then; in the rather famous case Factortame, the courts emphasis is firmly on the requirement of effectiveness of EU law, rather than on the primary role of national procedural law.

**Balancing effective judicial
protection and national
procedural autonomy**



**National courts must weigh the requirements of
effectiveness and equivalence in the light of the
aim and function of the national rule.**

*C-312/93 Peterbroeck
C-430-431/93 Van Schijndel*

In the cases Peterbroeck and Van Schijndel the CJEU declared that national courts must weigh the requirements of effectiveness and equivalence in the light of the aim and function of the national rule.

Balancing effective judicial protection and national procedural autonomy



The principle of cooperation in good faith (TEU article 4(3))

Pursuant to **the principle of sincere cooperation**, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

When it comes to weighting and balancing **effective judicial protection and national procedural autonomy**, **ne of the most important is the principle of cooperation in good faith.**



From The principle of cooperation in good faith the court has derived a requirement on every organ of a Member State to nullify the unlawful consequences of a breach of EU law. Member States are therefore obliged to refrain from taking any measures that can seriously compromise the attainment of a result prescribed by EU environmental law.

Also to prevent breaches before they occur. As a result; the legal systems of the Member States must provide for effective remedies that comply with these requirements.

And: it is also necessary for a national court to consider effective remedies/reliefs where the conduct of a public authority is found to be contrary to EU law!

C-201/02

64. As to that submission, it is clear from settled case-law that under the principle of cooperation in good faith laid down in Article 10 EC the Member States are required to nullify the unlawful consequences of a breach of Community law (see, in particular, Case 6/60 *Humblet* [1960] ECR 559, at 569, and Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 36). Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned (see, to this effect, Case C-8/88 *Germany v Commission* [1990] ECR I-2321, paragraph 13).

65. Thus, it is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment (see, to this effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 61, and *WWF and Others*, cited above, paragraph 70). Such particular measures include, subject to the limits laid down by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question as provided for by Directive 85/337.

(Case C-129/96 *Inter-Environnement Wallonie*, paragraph 45.).

45. Although the Member States are not obliged to adopt those measures before the end of the period prescribed for transposition, it follows from the second paragraph of Article 5 in conjunction with the third paragraph of Article 189 of the Treaty and from the directive itself that during that period they must refrain from taking any measures liable seriously to compromise the result prescribed.

Balancing effective judicial protection and national procedural autonomy



National procedures relating to the application of EU law should not be less favourable than those governing similar domestic situations (principle of equivalence) or render virtually impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness)

Case C-201/02 *Wells* p 67

In the case of Delena Wells, the court ruled that National procedures relating to the application of EU law should not be less favourable than those governing similar domestic situations (principle of equivalence) or render virtually impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness). Case C-201/02 *Wells* p 67.

67. The detailed procedural rules applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness) (see to this effect, inter alia, Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12, and Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 31).




Article 19 (1) TEU

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

National procedures relating to the application of EU law....

...should not be less favourable than those governing similar domestic situations

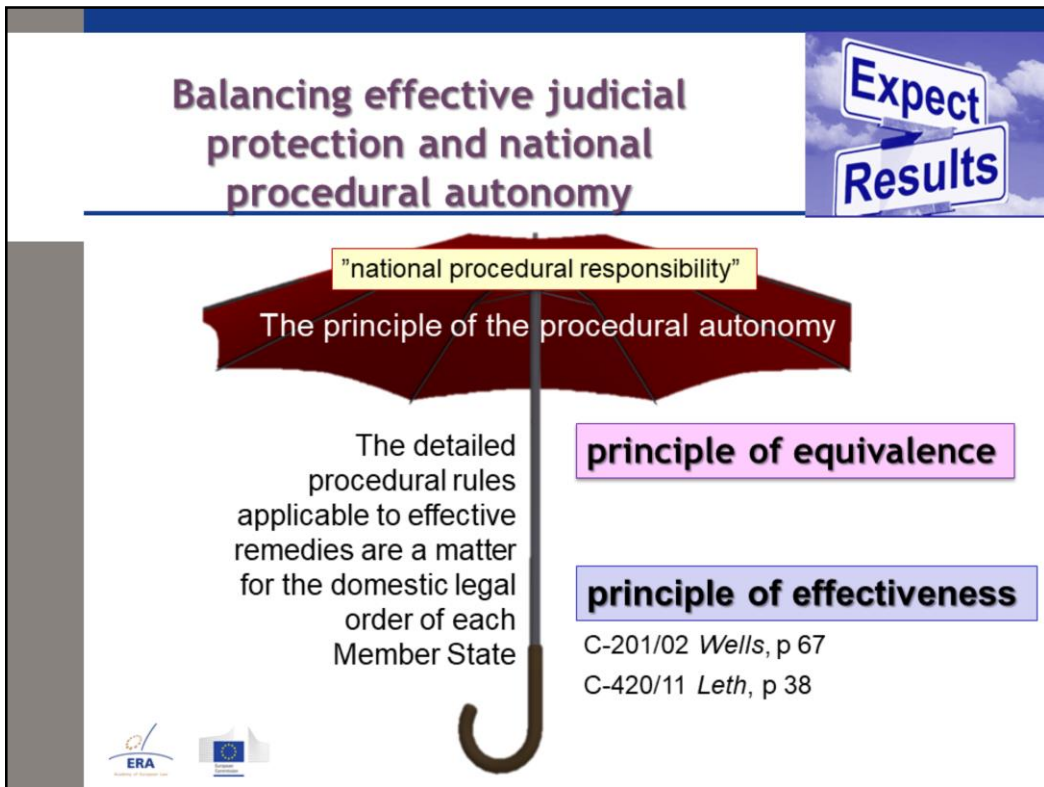
principle of equivalence

Case C-201/02 *Wells* p 67

...should not render virtually impossible or excessively difficult the exercise of rights conferred by EU law

principle of effectiveness

The judgment in *Delena Wells* was delivered in 2004. Since 2009 there has been an explicit requirement in the treaty for Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.



In summary: The detailed procedural rules applicable to effective remedies are a matter for **the domestic legal order of each Member State**.

Provided that the national procedural rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order (principle of effectiveness)

Case C-201/02 *Wells*

67. The detailed procedural rules applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness) (see to this effect, inter alia, Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12, and Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 31).

C-420/11 *Leth*, paragraph 38.

38 The detailed procedural rules that are applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (principle of effectiveness) (see *Wells*, paragraph 67).

Balancing effective judicial protection and national procedural autonomy

As summarized in C-416/10 *Križan* p 85:

In the absence of rules laid down in this field by European Union law, the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under European Union law are a matter for the legal order of each Member State, provided, however, that they are not less favourable than those governing similar domestic situations (**principle of equivalence**) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (**principle of effectiveness**)



This is also very well summarized in *Križan* where the court states that....

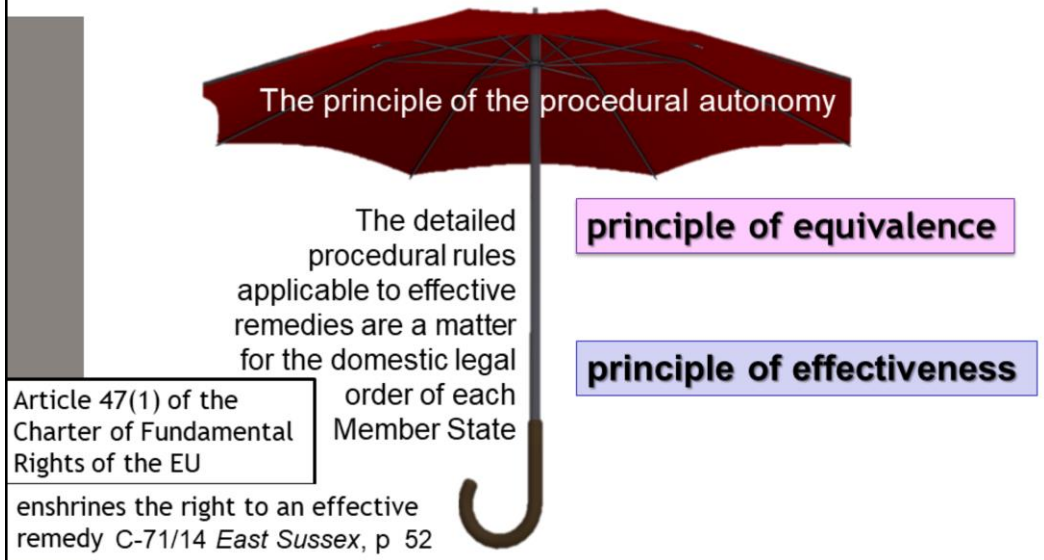
And also the wording shows very well that there is more a question of national procedural responsibility than procedural autonomy.

(Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12, and Case C-378/10 *VALE Építési* [2012] ECR, paragraph 48 and the case-law cited).

86 So far as concerns the principle of equivalence, this requires that all the rules applicable to actions apply without distinction to actions based on infringement of European Union law and those based on infringement of national law (see, inter alia, Case C-591/10 *Littlewoods Retail and Others* [2012] ECR, paragraph 31, and Case C-249/11 *Byankov* [2012] ECR, paragraph 70). It is therefore for the national court to determine whether national law allows procedural flaws of a comparable internal nature to be rectified during the administrative procedure at second instance.

87 As regards the principle of effectiveness, while European Union law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of European Union law, such a possibility is subject to the condition that it does not offer the persons concerned the opportunity to circumvent the European Union rules or to dispense with applying them, and that it should remain the exception (Case C-215/06 *Commission v Ireland* [2008] ECR I-4911, paragraph 57).

Balancing effective judicial protection and national procedural autonomy



The court has also relied on standards deriving from Article 47(1) of the Charter of Fundamental Rights of the EU which enshrines the right to an effective remedy (C-71/14 *East Sussex*, paragraph 52).

Balancing effective judicial protection and national procedural autonomy



Also the Aarhus Convention refers to effective remedies (sometimes referred to as “reliefs”).

Balancing effective judicial protection and national procedural autonomy

Aarhus Convention



Effective Remedies

Article 9 (4)

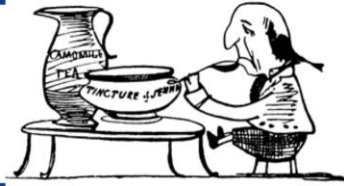
Reliefs

4. In addition and without prejudice to paragraph 1 above, **the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate,** and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

Article 9(4) requires that judicial review procedures to challenge decisions, acts and omissions shall provide adequate and effective remedies, including '*injunctive relief*' as appropriate.

(This is an supplementary requirement to those of Article 9(1),(2) and (3) of the Aarhus Convention.)

The effects of procedural defects



How to actually do that???

What do you do as a judge in a national court when you discover a procedural defect?

Does the procedural defect need to have any effect?

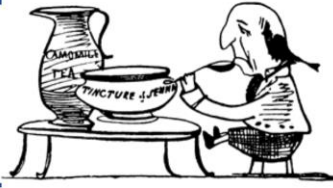


But how to actually do that??? What do you do as a judge in a national court when you discover procedural defects?



The effects of procedural defects

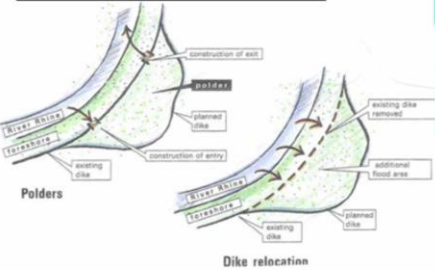
C-72/12, Altrip



Gemeinde Altrip
(municipality of Altrip),
the civil-law company
Gebrüder Hört GbR and
Mr. Schneider

↔

the Land Rheinland-Pfalz
(Rhineland-Palatinate)



Proceedings concerning a decision approving plans to construct a flood retention scheme covering over 320 hectares of a former Rhine floodplain




We will look at this through the Altrip case. Here we had a proceeding concerning a decision approving plans to construct a flood retention scheme covering over 320 hectares of a former Rhine floodplain

C-72/12, Altrip

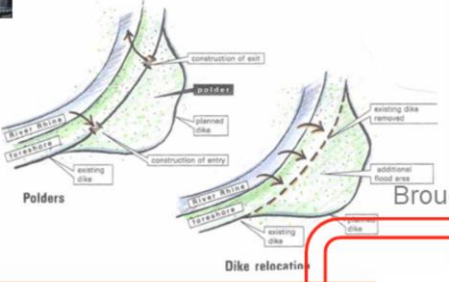
2 The request has been made in proceedings between the Gemeinde Altrip (municipality of Altrip), the civil-law company Gebrüder Hört GbR and Mr Schneider, and the Land Rheinland-Pfalz (Rhineland-Palatinate) concerning a decision approving plans to construct a flood retention scheme covering over 320 hectares of a former Rhine floodplain.



The effects of procedural defects

C-72/12, Altrip





Brought an action



Verwaltungsgericht
(Administrative Court)

Owners or tenants of land located within the area:

Seeking the annulment of the decision approving plans to construct that work

the environmental impact assessment was inadequate.




Some owners or tenants, affected by the project, brought an action (before the Administrative Court) seeking the annulment of the decision. They claimed that the environmental impact assessment carried out beforehand was inadequate.

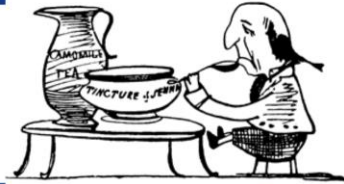
C-72/12, Altrip

16 The applicants, who are all affected by the project as owners or tenants of land located within the area acquired for the work in question for public purposes, brought an action before the Verwaltungsgericht (Administrative Court) seeking the annulment of the regional authority's decision approving plans to construct that work. In challenging that decision, they claimed that the environmental impact assessment carried out beforehand was inadequate. Their action having been dismissed, they lodged an appeal with the Oberverwaltungsgericht Rheinland-Pfalz (Rhineland-Palatinate Higher Administrative Court).

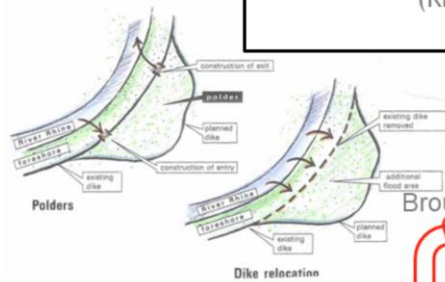


The effects of procedural defects

C-72/12, Altrip



Oberverwaltungsgericht Rheinland-Pfalz
(Rhineland-Palatinate Higher
Administrative Court).



DISMISSED

Brought an

DISMISSED

Verwaltungsgericht
(Administrative Court)

Applicants, affected by the project as owners or tenants of land located within the area acquired for the work in question

Seeking the annulment of the regional authority's decision approving plans to construct that work, claiming that **the environmental impact assessment was inadequate.**

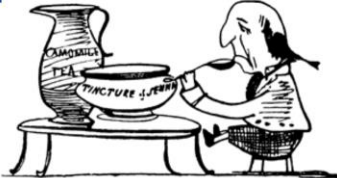


Their appeals were dismissed...



The effects of procedural defects

C-72/12, Altrip



Oberverwaltungsgericht Rheinland-Pfalz
(Rhineland-Palatinate Higher Administrative Court).

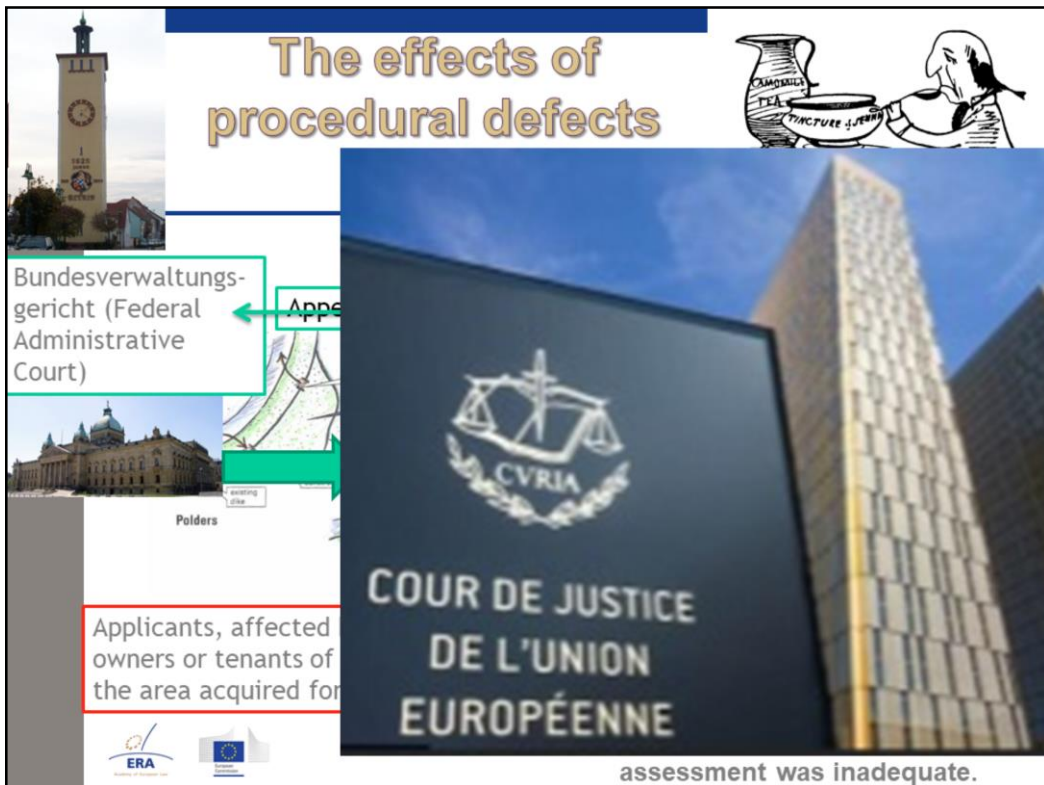
National law: Action may be brought only in the case of a pure and simple failure to carry out an environmental assessment, not in the case of a mere irregularity in the environmental assessment.

owners or tenants of land located within the area acquired for the work in question

regional authority's decision approving plans to construct that work, claiming that **the environmental impact assessment was inadequate.**




It was dismissed because national law provided that an action may be brought only in the case of a pure and simple failure to carry out an environmental assessment! In this case it was a question of a mere irregularity in the environmental assessment.



The case ended up in the European Union Court of Justice!

C-72/12, Altrip

17 The Oberverwaltungsgericht Rheinland-Pfalz dismissed that appeal, taking the view, in particular, that the applicants had no right to appeal since, under paragraph 5(1) of the UmwRG, they might not plead irregularities affecting the environmental impact assessment carried out as part of an official procedure initiated before 25 June 2005. In any case, the Oberverwaltungsgericht expressed doubts as to the admissibility of the proceedings on the ground that paragraph 4(3) of the UmwRG provides that an action may be brought only in the case of a pure and simple failure to carry out an environmental assessment and would therefore not apply in the case of a mere irregularity in the environmental assessment.

18 The applicants in the main proceedings then lodged an appeal on a point of law with the Bundesverwaltungsgericht (Federal Administrative Court). That court is uncertain whether the interpretation of paragraph 5(1) of the UmwRG as precluding the application of that law to administrative procedures initiated before 25 June 2005, even though, as in the present case, the decisions resulting from such procedures have been adopted after that date, accords with Directive 2003/35 when under Article 6 of the latter the date of 25 June 2005 is simply the date of expiry of the period allowed for transposing that directive into national law.

19 The referring court is also uncertain whether paragraph 4(3) of the UmwRG, which limits the right of action to that situation alone in which an environmental assessment has quite simply not been carried out, correctly transposes Article 10a of Directive 85/337 which requires a right of action making it possible to challenge the legality of decisions vitiated by procedural irregularities. Lastly, that court seeks to ascertain whether the case-law consistently applied by the national courts is compatible with that right, given that it holds that the rights of a person concerned by a project subject to the carrying out of an environmental assessment may be impaired only if there is a causal link between the procedural irregularity and the final result of the planning approval decision that adversely affects him.

20 In those circumstances the Bundesverwaltungsgericht decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 6(1) of [Directive 2003/35] to be interpreted as meaning that Member States were required to declare the rules of national law adopted in implementation of Article 10a of [Directive 85/337] applicable also to those administrative development consent procedures which had been initiated before 25 June 2005 but in which development consents were not issued until after that date?

2. If Question 1 is answered in the affirmative:

Is Article 10a of [Directive 85/337] to be interpreted as meaning that Member States were required to extend the applicability of the rules of national law adopted in implementation of that article for the purpose of challenging the procedural legality of a decision to include cases in which an environmental impact assessment was carried out but was irregular?

3. If Question 2 is answered in the affirmative:

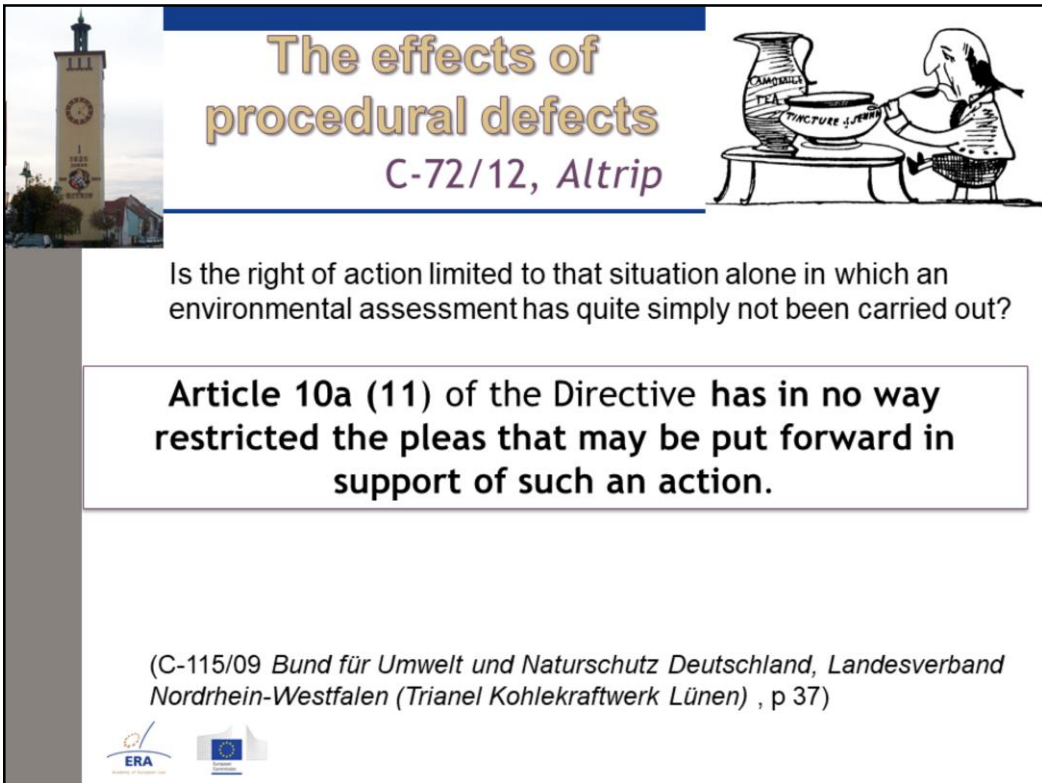
In cases in which, in accordance with subparagraph (b) of the first paragraph of Article 10a of [Directive 85/337], the administrative procedural law of a Member State lays down in principle that access to a judicial review procedure for members of the public concerned is conditional upon maintaining the impairment of a right, is Article 10a of [Directive 85/337] to be interpreted as meaning

(a) that a challenge before a court to the procedural legality of decisions to which the provisions of that directive which relate to public participation are applicable can be successful and lead to the decision's being annulled only if, in the circumstances of the case, there is a definite possibility that the contested decision would have been different without the procedural irregularity and if, at the same time, that procedural irregularity affected a substantive legal position of the applicant's, or

(b) that, in judicial proceedings challenging the procedural legality of decisions to which the provisions of that directive relating to public participation are applicable, it must be possible for procedural irregularities to lead to annulment on a greater scale?

If it is necessary to answer the above question as in (b):

What substantive requirements must apply to procedural irregularities, in order for these to be taken into account in favour of an applicant in judicial proceedings challenging the procedural legality of the decision?'



The effects of procedural defects

C-72/12, Altrip

Is the right of action limited to that situation alone in which an environmental assessment has quite simply not been carried out?

Article 10a (11) of the Directive has in no way restricted the pleas that may be put forward in support of such an action.

(C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen (Trianel Kohlekraftwerk Lünen)* , p 37)



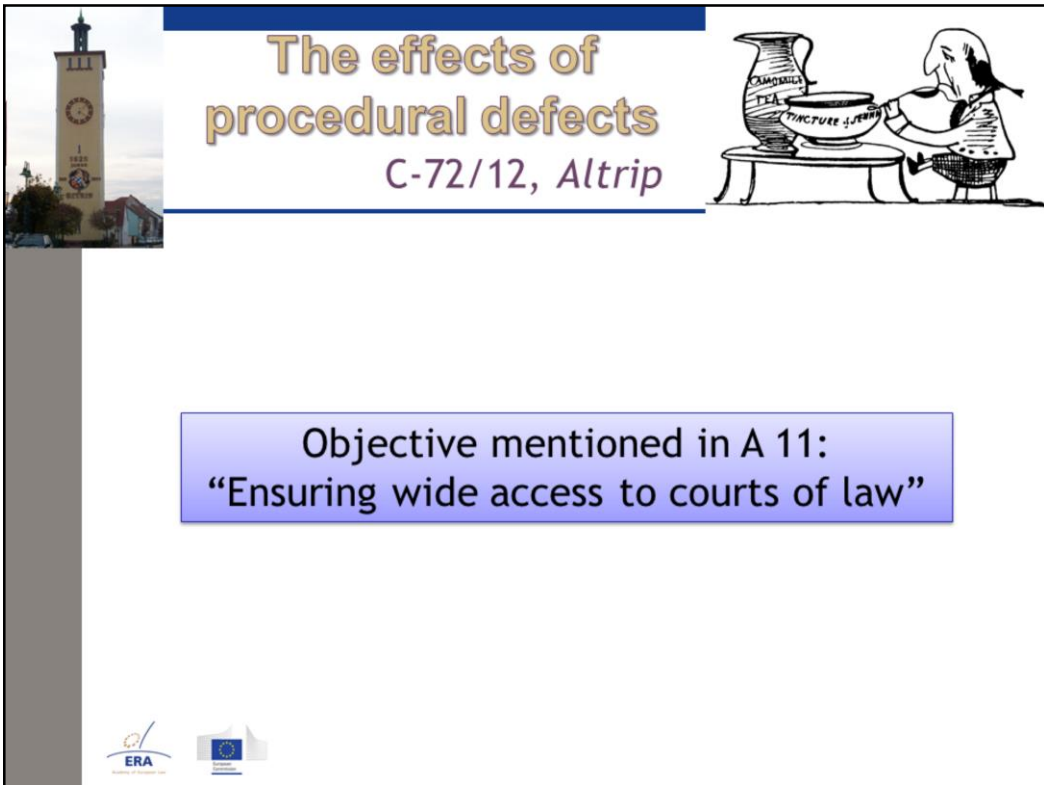

First of all, the court stated; Article 11 does not restrict the pleas that may be put forward!

C-72/12, Altrip

36 In providing that the decisions, acts or omissions referred to therein must be actionable before a court of law through a review procedure to challenge their substantive or procedural legality, the first paragraph of Article 10a of Directive 85/337 has in no way restricted the pleas that may be put forward in support of such an action (Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen (Trianel Kohlekraftwerk Lünen)* [2011] ECR I-3673, paragraph 37).

C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen (Trianel Kohlekraftwerk Lünen)*

37 First of all, it should be noted that the first paragraph of Article 10a of Directive 85/337 provides that the decisions, acts or omissions referred to in that article must be actionable before a court of law through a review procedure ‘to challenge [their] substantive or procedural legality’, without in any way limiting the pleas that could be put forward in support of such an action.



The effects of procedural defects

C-72/12, Altrip

Objective mentioned in A 11:
“Ensuring wide access to courts of law”




Then the court reminds us of the principles and objectives of the directive.

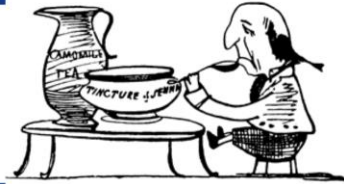
C-72/12, Altrip

37 The provisions of national law transposing that provision may not limit their applicability solely to cases in which the legality of a decision is challenged on the ground that no environmental impact assessment has been carried out. Excluding that applicability in cases in which, having been carried out, an environmental impact assessment is found to be vitiated by defects – even serious defects – would render largely nugatory the provisions of Directive 85/337 relating to public participation. **Such exclusion would therefore run counter to the objective of ensuring wide access to courts of law as mentioned in Article 10a of that directive.**



The effects of procedural defects

C-72/12, Altrip



Article 11 precludes the Member States from limiting the applicability solely to cases in which the legality of a decision is challenged on the ground that no environmental impact assessment was carried out, while not extending that applicability to cases in which such an assessment was carried out but was irregular.

Not only cases where no EIA was carried out

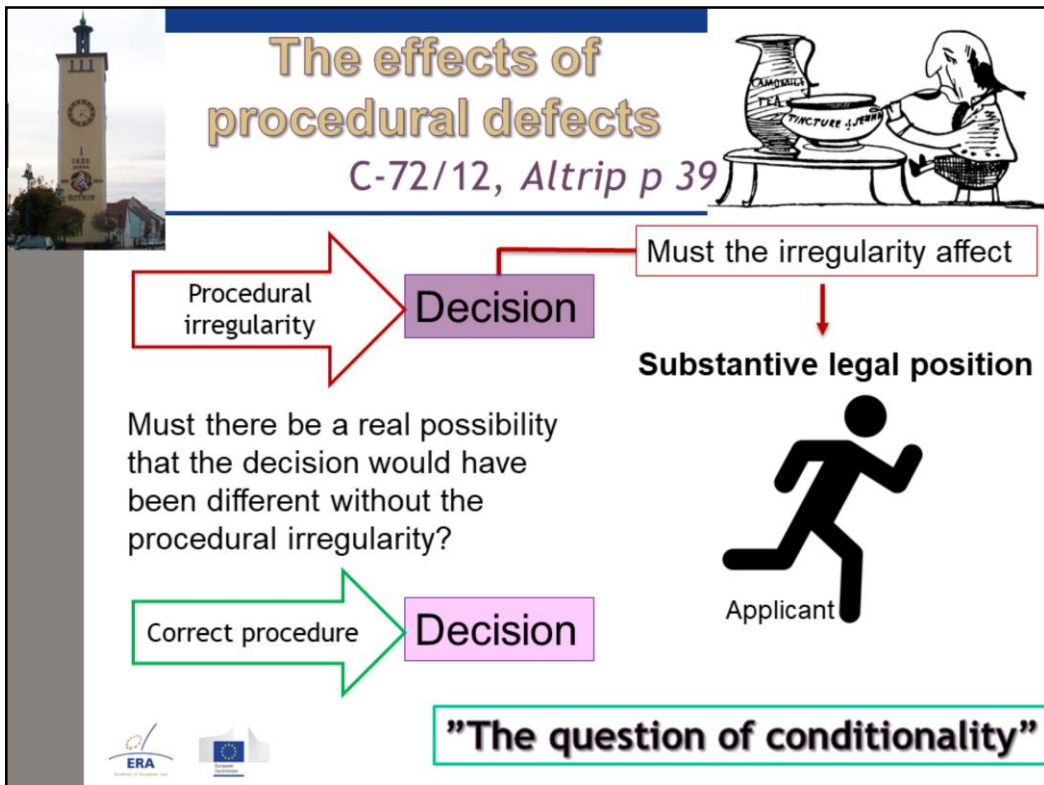
Also cases where EIA was carried out but was irregular



Then it states that Article 11 **precludes** the Member States from **limiting the applicability solely to cases in which the legality of a decision is challenged on the ground that no environmental impact assessment was carried out, while not extending that applicability to cases in which such an assessment was carried out but was irregular.**

C-72/12, Altrip

38 In those circumstances, the answer to Question 2 is that Article 10a of Directive 85/337 must be interpreted as precluding the Member States from limiting the applicability of the provisions transposing that article solely to cases in which the legality of a decision is challenged on the ground that no environmental impact assessment was carried out, while not extending that applicability to cases in which such an assessment was carried out but was irregular.



Then the court moved on to procedural irregularities and how much member states may require concerning the **effect** of a **procedural defect**.

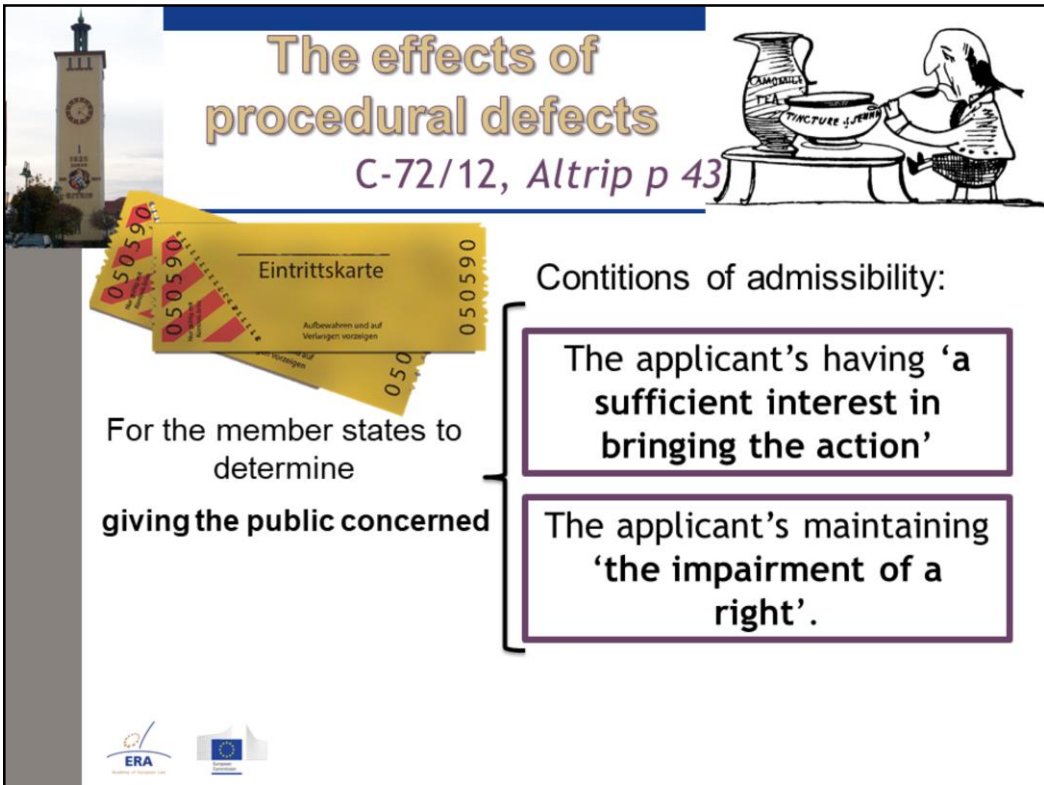
Is it necessary that the contested **decision would have been different without the procedural irregularity**? So, that we now have one decision following a procedural irregularity – which would have been a different decision if we had a correct procedure.

AND: in order for the applicant to challenge a decision...

Must this irregularity of the contested decision affect a substantive legal position of the applicant?

This use to be called "the question of conditionality".

39 In view of the answer to the second question, it is necessary to examine the third question, in which the referring court asks, in essence, whether Article 10a of Directive 85/337 is to be interpreted as precluding decisions of national courts that make the admissibility of actions subject to cumulative conditions requiring the person bringing the action, in order to establish that a right has been impaired within the meaning of that article, to prove that the procedural defect invoked is such that, in the light of the circumstances of the case, there is a possibility that the contested decision would have been different were it not for the defect and that a substantive legal position is affected thereby.



The effects of procedural defects

C-72/12, Altrip p 43

For the member states to determine
giving the public concerned

Contitions of admissibility:

- The applicant's having 'a sufficient interest in bringing the action'
- The applicant's maintaining 'the impairment of a right'.

ERA

Admissibility of such an action may be conditional either on the applicant's having 'a **sufficient interest** in bringing the action' or on the applicant's **maintaining 'the impairment of a right'** depending on which of those conditions is adopted in the national legislation. Meaning; this is for the member states to determine! Here the court refers to the Trianel case. But when deciding on this, Member States must determine consistently with **the objective of giving the public concerned.....**
Guess what???

72/12 Altrip

42 When answering the question whether the cumulative criteria as applied by decisions of national courts in order to determine whether an action is admissible are compatible with the requirements of Article 10a of Directive 85/337, it is to be borne in mind that that **article provides for two possibilities as regards the conditions of that admissibility**: the admissibility of such an action may be conditional either on the applicant's having 'a **sufficient interest** in bringing the action' or on the applicant's **maintaining 'the impairment of a right'**, depending on which of those conditions is adopted in the national legislation (see, to that effect, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, paragraph 38).

C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen (Trianel Kohlekraftwerk Lünen)* (Trianel Kohlekraftwerk Lünen)

38 With regard to the conditions for the admissibility of such actions, Article 10a of Directive 85/337 provides for two possibilities: the admissibility of an action may be conditional on 'a sufficient interest in bringing the action' or on the applicant alleging 'the impairment of a right', depending on which of those conditions is adopted in the national legislation.

72/12 Altrip

43 The first sentence of the third paragraph of Article 10a of Directive 85/337 further states that what constitutes impairment of a right **is to be determined by the Member States consistently with the objective of giving the public concerned wide access to justice** (*Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, paragraph 39).

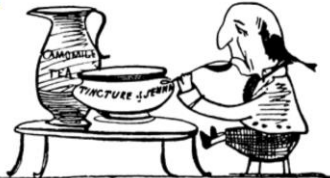
C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen (Trianel Kohlekraftwerk Lünen)* (Trianel Kohlekraftwerk Lünen)

39 The first sentence of the third paragraph of Article 10a of Directive 85/337 further states that what constitutes a sufficient interest and impairment of a right is to be determined by the Member States consistently with the objective of giving the public concerned 'wide access to justice'.



The effects of procedural defects

C-72/12, Altrip p 43





Eintrittskarte

Aufbewahren und auf Verlangen vorzeigen

For the member states to determine giving the public concerned

Contitions of admissibility:

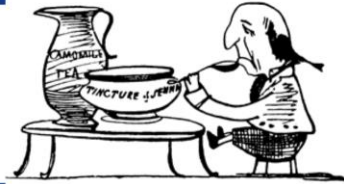
- The applicant's having 'a sufficient interest in bringing the action'
- The applicant's maintaining 'the impairment of a right'.

wide access to justice.

Wide access to justice!

The effects of procedural defects

C-72/12, Altrip p 43



For the member states to determine

giving the public concerned wide access to justice.

Conditions of admissibility:

The applicant's having 'a sufficient interest in bringing the action'

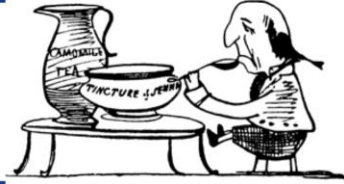
The applicant's maintaining 'the impairment of a right'.





The effects of procedural defects

C-72/12, Altrip



It is for each Member State to lay down, the detailed procedural rules governing actions for safeguarding rights which individuals derive from Union law.



C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, p 43

Then the court reminds us about the principles... First it states.: *It is for each Member State to lay down, the detailed procedural rules governing actions for safeguarding rights which individuals derive from Union law.* Which principle do we have here?

C-72/12, Altrip

44 Accordingly, it is in the light of that objective that the compatibility with Union law must be assessed of the conditions invoked by the national court that make it possible to determine, according to the national law at issue, whether a right has been impaired, as a necessary condition of the admissibility of those actions.

45 Where, there being no rules fixed in this sphere by Union law, **it is for each Member State to lay down, in its legal system, the detailed procedural rules governing actions for safeguarding rights which individuals derive from Union law**, those detailed rules (as pointed out in paragraph 30 above), in accordance with the **principle of equivalence**, must not be less favourable than those governing similar domestic actions and, in accordance with the **principle of effectiveness**, must not make it in practice impossible or excessively difficult to exercise rights conferred by Union law (*Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, paragraph 43).

C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen (Trianel Kohlekraftwerk Lünen)*

43 Lastly, it should also be recalled that where, in the absence of EU rules governing the matter, it is for the legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, those detailed rules must not be less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness).

The effects of procedural defects
C-72/12, Altrip

The principle of the procedural autonomy
National Procedural Responsibility

It is for each Member State to lay down, the detailed procedural rules governing actions for safeguarding rights which individuals derive from Union law.

C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, p 43

The principle of procedural autonomy.

This must be in accordance with.... Which principles??

C-72/12, Altrip

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The effects of procedural defects

C-72/12, Altrip

The principle of the procedural autonomy
National Procedural Responsibility

It is for each Member State to lay down, the detailed procedural rules governing actions for safeguarding rights which individuals derive from Union law.

principle of equivalence

principle of effectiveness

C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, p 43

The principle of equivalence and the principle of effectiveness!

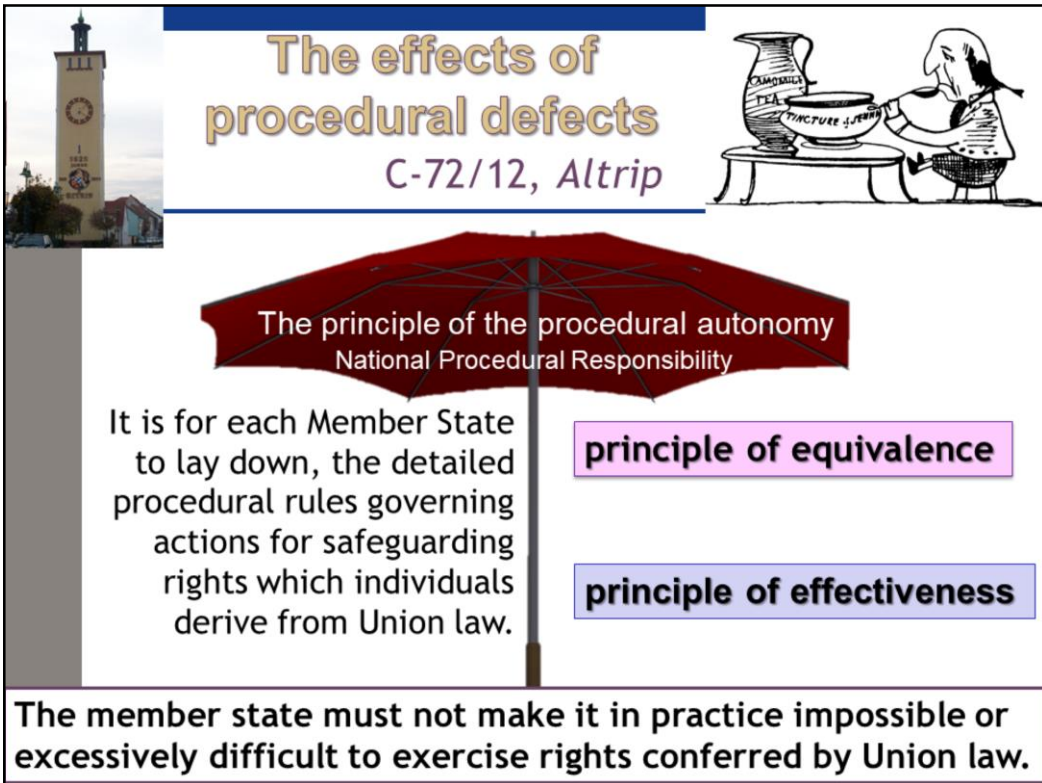
C-72/12, Altrip

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45 Where, there being no rules fixed in this sphere by Union law, **it is for each Member State to lay down, in its legal system, the detailed procedural rules governing actions for safeguarding rights which individuals derive from Union law**, those detailed rules (as pointed out in paragraph 30 above), in accordance with the **principle of equivalence**, must not be less favourable than those governing similar domestic actions and, in accordance with the **principle of effectiveness**, must not make it in practice impossible or excessively difficult to exercise rights conferred by Union law (*Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, paragraph 43).

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The effects of procedural defects

C-72/12, Altrip

The principle of the procedural autonomy
National Procedural Responsibility

It is for each Member State to lay down, the detailed procedural rules governing actions for safeguarding rights which individuals derive from Union law.

principle of equivalence

principle of effectiveness

The member state must not make it in practice impossible or excessively difficult to exercise rights conferred by Union law.

The member state must not make it in practice impossible or excessively difficult to exercise rights conferred by Union law.

C-72/12, Altrip

44 Accordingly, it is in the light of that objective that the compatibility with Union law must be assessed of the conditions invoked by the national court that make it possible to determine, according to the national law at issue, whether a right has been impaired, as a necessary condition of the admissibility of those actions.

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C-115/09 Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen (Trianel Kohlekraftwerk Lünen)

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The effects of procedural defects

C-72/12, Altrip



"The question of conditionality"

A 11 leaves the Member States significant discretion to determine what constitutes impairment of a right

'it is unarguable that not every procedural defect will necessarily have consequences that can possibly affect the purport of a decision'

C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, p 55

Then the court concluded that A 11 leaves the Member States significant discretion to determine what constitutes impairment of a right. It further noted that “

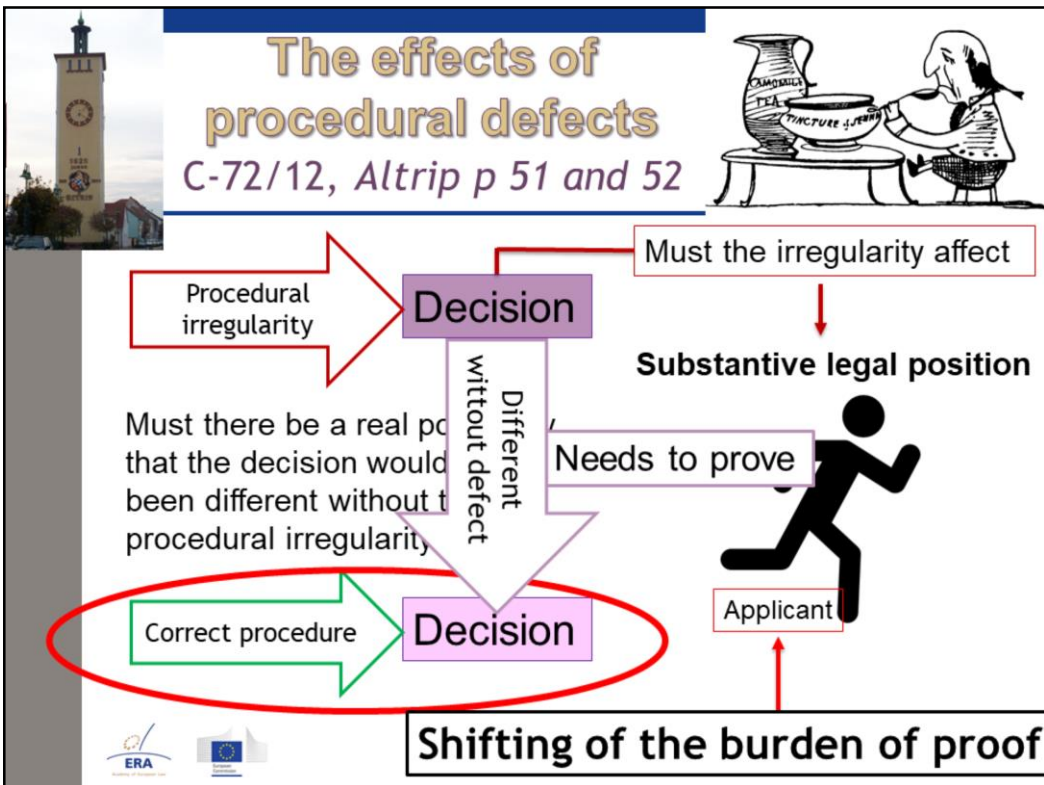
C-72/12, Altrip

49 Nevertheless, it is unarguable that not every procedural defect will necessarily have consequences that can possibly affect the purport of such a decision and it cannot, therefore, be considered to impair the rights of the party pleading it. In that case, it does not appear that the objective of Directive 85/337 of giving the public concerned wide access to justice would be compromised if, under the law of a Member State, an applicant relying on a defect of that kind had to be regarded as not having had his rights impaired and, consequently, as not having standing to challenge that decision.

50 In that regard, it should be borne in mind that Article 10a of that directive leaves the Member States significant discretion to determine what constitutes impairment of a right (see, to that effect, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen (Trianel Kohlekraftwerk Lünen)*, paragraph 55).

C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*

55 It should be noted in that regard that, taken as a whole, Article 10a of Directive 85/337 leaves the Member States a significant discretion both to determine what constitutes impairment of a right and, in particular, to determine the conditions for the admissibility of actions and the bodies before which such actions may be brought.



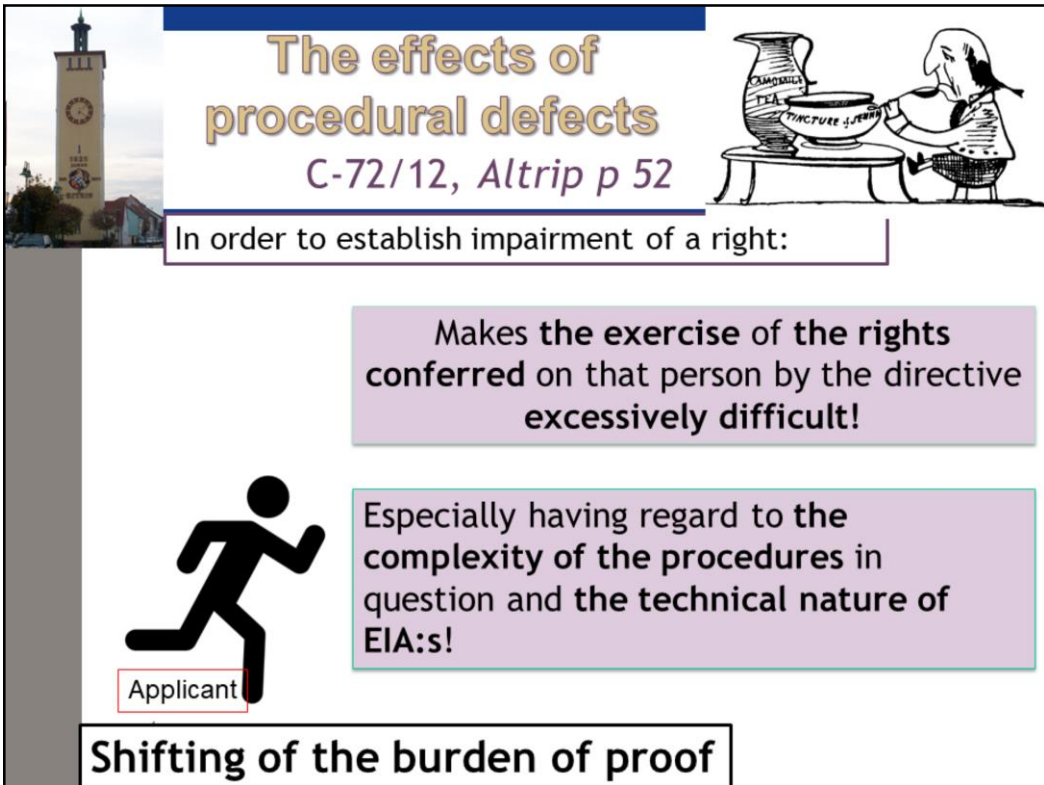
if the applicant needs to prove that the circumstances of the case make it conceivable that the contested decision would have been different without the procedural defect invoked.....

This would be a shifting of the burden of proof onto the person bringing the action.

C-72/12, Altrip

51 In those circumstances, it could be permissible for national law not to recognise impairment of a right within the meaning of subparagraph (b) of Article 10a of that directive if it is established that it is conceivable, in view of the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked.

52 It appears, however, with regard to the national law applicable in the case in the main proceedings, that it is in general incumbent on the applicant, in order to establish impairment of a right, to prove that the circumstances of the case make it conceivable that the contested decision would have been different without the procedural defect invoked. That shifting of the burden of proof onto the person bringing the action, for the application of the condition of causality, is capable of making the exercise of the rights conferred on that person by Directive 85/337 excessively difficult, especially having regard to the complexity of the procedures in question and the technical nature of environmental impact assessments.



The effects of procedural defects

C-72/12, Altrip p 52

In order to establish impairment of a right:

Makes the exercise of the rights conferred on that person by the directive excessively difficult!

Especially having regard to the complexity of the procedures in question and the technical nature of EIA:s!

Applicant

Shifting of the burden of proof

That shifting of the burden of proof onto the person bringing the action...is capable of making the exercise of the rights conferred on that person by the directive excessively difficult especially having regard to the complexity of the procedures in question and the technical nature of environmental impact assessments.

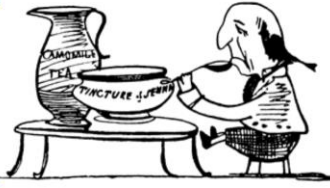
C-72/12, Altrip

52 **It appears, however**, with regard to the national law applicable in the case in the main proceedings, that it is in general incumbent on the applicant, **in order to establish impairment of a right**, to prove that the circumstances of the case make it conceivable that the contested decision would have been different without the procedural defect invoked. **That shifting of the burden of proof** onto the person bringing the action, for the application of the condition of causality, is capable of making the exercise of the rights conferred on that person by Directive 85/337 excessively difficult, especially having regard to the complexity of the procedures in question and the technical nature of environmental impact assessments.



The effects of procedural defects

C-72/12, Altrip



The burden of proof

A 11 is not precluding national courts from refusing to recognise impairment of a right if it is established that the contested decision would not have been different without the procedural defect invoked by the applicant.



ONLY if the court does not in any way make the burden of proof fall on the applicant




In the end the court came to the conclusion that A 11 is not precluding national courts from refusing to recognise impairment of a right if it is established that the contested decision would not have been different without the procedural defect invoked by the applicant. But this is ok **ONLY** if the court does not in any way make the burden of proof fall on the applicant!

C-72/12, Altrip

53 Therefore, the new requirements thus arising under Article 10a of that directive mean that impairment of a right cannot be excluded unless, in the light of the condition of causality, the court of law or body covered by that article is in a position to take the view, without in any way making the burden of proof fall on the applicant, but by relying, where appropriate, on the evidence provided by the developer or the competent authorities and, more generally, on the case-file documents submitted to that court or body, that the contested decision would not have been different without the procedural defect invoked by that applicant.

54 In the making of that assessment, it is for the court of law or body concerned to take into account, inter alia, the seriousness of the defect invoked and to ascertain, in particular, whether that defect has deprived the public concerned of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making in accordance with the objectives of Directive 85/337.

55 As regards, in the second place, the condition that a substantive legal position of the applicant should be affected, the fact remains that the national court has not itself provided any details of what constitutes that condition and that nothing in the grounds of the order for reference enables the Court to determine whether examining that condition would be useful for resolving the dispute in the main proceedings.

56 In those circumstances, there is no need for the Court to give a ruling, that being so, on the issue of whether Union law precludes that condition.

57 Accordingly, the answer to Question 3 is that **subparagraph (b) of Article 10a of Directive 85/337 must be interpreted as not precluding** national courts from refusing to recognise impairment of a right within the meaning of that article if it is established that it is conceivable, having regard to the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked by the applicant. None the less, **that will be the case only if** the court of law or body hearing the action **does not in any way make the burden of proof fall on the applicant** and makes its ruling, where appropriate, on the basis of the evidence provided by the developer or the competent authorities and, more generally, on the basis of the case-file documents submitted to that court or body, taking into account, inter alia, the seriousness of the defect invoked and ascertaining, in particular, whether that defect has deprived the public concerned of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making, in accordance with the objectives of Directive 85/337.

What to do... ...when lack of compliance with EU environmental law ?



C-201/02 *Delena Wells*



Consent for mining operations

No EIA!

EUCJ: The scope of the obligation to
remedy the failure to carry out an EIA

C-72/95, *Kraaijeveld*, p 61
C-435/97 *WWF and Others*, p 70



the principle of cooperation in good faith

Member States are required to **nullify the unlawful consequences** of a breach of Community law



Case 6/60 *Humblet*, Cases C-6/90 and C-9/90 *Francovich and Others*

But then... what to actually **do** when you discover that there is a lack of compliance with EU environmental law?

This was, to some degree, addressed in the *Delena Wells*-case.

The *Wells case* concerned the grant of a consent for mining operations. No environmental impact assessment had been carried out as it should.

The CJEU considered the scope of the obligation to remedy the failure to carry out an environmental impact assessment.

The court states that it is clear from settled case-law that under the principle of cooperation in good faith; Member States are required to nullify the unlawful consequences of a breach of Community law

(see, in particular, Case 6/60 *Humblet* [1960] ECR 559, at 569, and Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 36). Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned (see, to this effect, Case C-8/88 *Germany v Commission* [1990] ECR I-2321, paragraph 13).

What to do... ...when lack of compliance with EU environmental law ?



C-201/02 *Delena Wells*



Consent for mining operations

No EIA!

EUCJ: The scope of the obligation to
remedy the failure to carry out an EIA

C-72/95, *Kraaijeveld*, p 61
C-435/97 *WWF and Others*, p 70

Thus, it is for the **competent authorities (...)** to take, within the sphere of their competence, **all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment** and, if so, **to ensure that they are subject to an impact assessment**” (p 65)

It first held that ‘*the competent authorities are obliged to take, general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment* and, if so, *to ensure that they are subject to an impact assessment*’ (Case C-201/02 *Wells*, paragraph 65.).

What to do... ...when lack of compliance with EU environmental law ?



C-201/02 *Delena Wells*



Consent for mining operations

No EIA!

“In that regard, it is for the national court to determine whether it is possible under domestic law for a consent already granted to be **revoked or suspended** in order to subject the project in question to an assessment of its environmental effects, in accordance with the EIA directive, or alternatively, if the individual so agrees, whether it is possible for the latter to claim **compensation** for the harm suffered.”
(p 69)

Then it noted that ‘(i)t is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project to an assessment of its environmental effects’. And also, if the affected individual so agrees, to examine whether it is possible for the individual to claim compensation for the harm suffered.

Thus; according to the CJEU, revocation or suspension or compensation (if accepted).....

(Case C-201/02 *Wells*, paragraph 69).T

Thus the CJEU saw the suspension or revocation of the contested consent as being a step towards fulfilling an omitted requirement, namely the undertaking of an environmental impact assessment (Case C-201/02 *Wells*, paragraph 69).

What to do... ...when lack of compliance with EU environmental law ?



C-201/02 *Delena Wells*



Consent for mining operations

No EIA!

Revocation
Suspension
Compensation

Steps towards fulfilling the omitted requirement to
undertake an EIA

Thus; according to the CJEU, revocation or suspension or compensation (if accepted) would be steps towards fulfilling the omitted requirement of undertaking an EIA.

(Case C-201/02 *Wells*, paragraph 69).

Thus the CJEU saw the suspension or revocation of the contested consent as being a step towards fulfilling an omitted requirement, namely the undertaking of an environmental impact assessment (Case C-201/02 *Wells*, paragraph 69).

What to do... ...when lack of compliance with EU environmental law ?



Joined Cases C-128/09 to C-131/09, C-134/09 and
C-135/09 *Boxus* and C 182/10, *Solvay*



Administrative acts
"Consents"
Normally adopted after EIA

Legislative decree of the Walloon Parliament:

'Ratified' consents and
authorisations.

→ Validated them on the basis of
'overriding reasons in the general
interest'.



There we have the *Boxus* (and *Solvay* cases). The Parliament of the Belgian Region of Wallonia had adopted by legislative decree a number of development consents for certain important infrastructure projects.

Normally those consents are adopted by the executive after an appropriate environmental impact assessment.

What to do... ...when lack of compliance with EU environmental law ?

Joined Cases C-128/09 to C-131/09, C-134/09 and
C-135/09 *Boxus* and C 182/10, *Solvay*

The Supreme Administrative Court
No jurisdiction on challenges
against development consents.
Jurisdiction only to executive acts,
not legislative acts.

the Belgian **Constitutional Court**
Competent for challenges against
legislative acts.
Limited legal basis for such challenge.
Not possible to review the quality of an
EIA

Decree of the Walloon Parliament:
'Ratified' those consents and
authorisations.








The (desired) effect under Belgian law was that *the Supreme Administrative Court* (the "Council of State") no longer had jurisdiction on challenges against the development consents, because its jurisdiction extends only to executive acts, not legislative acts.

However; the Belgian *Constitutional Court* is competent for challenges against legislative acts, but the legal basis for such challenges is limited, and is not possible to extend to the review of the quality of an environmental impact assessment.

This 'judicial gap' was challenged by Belgian citizens and the Belgian courts (the Constitutional Court in *Solvay* and the Supreme Administrative Court in *Boxus*), referred the issue to the Court of Justice in a preliminary ruling.

What to do... ...when lack of compliance with EU environmental law ?



Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus* and C 182/10, *Solvay*



Projects which have been

- 1. adopted by a specific legislative act, in**
- 2. such a way that the objectives of that directive have been achieved by the legislative process,**

may be excluded from the ambit of the EIA directive. It is for the national court to verify that those two conditions have been satisfied.

First the CJEU states that according to the directive, it is ok to adopt projects by a legislative act, provided that certain criteria is fulfilled.

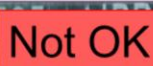
In *Boxus*, and *Solvay*, the CJEU considered how a national court should deal with a situation where national legislation did not meet the criteria to justify the non-application of environmental impact assessment requirements. It ruled that the national court should be ready to set aside the flawed legislation (Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus*, paragraph 57; and Case C-182/10 *Solvay and others*, paragraph 52.).

In *Stadt Wiener Neustadt* the CJEU considered that national legislation which could frustrate the possibility to obtain an effective remedy of the kind referred to in *Wells* was incompatible with the requirements of the Environmental Impact Assessment Directive, 2011/92/EU (Case C-348/15 *Stadt Wiener Neustadt*, paragraphs 45 to 48.). It was for the national court to ascertain this (Case C-348/15 *Stadt Wiener Neustadt*, paragraph 31.).

What to do... ...when lack of compliance with EU environmental law ?



Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus* and C 182/10, *Solvay*



Projects which have been

- 1. adopted by a specific legislative act, in**
- 2. such a way that the objectives of that directive have been achieved by the legislative process,**

may be excluded from the ambit of the EIA directive. It is for the national court to verify that those two conditions have been satisfied.

A legislative act which does no more than simply 'ratify' a pre-existing administrative act, by merely referring to overriding reasons relating to the general interest without a substantive legislative process enabling those conditions to be fulfilled having first been opened, cannot be regarded as a specific legislative act for the purposes of that provision and is therefore not sufficient to exclude a project from the ambit of the EIA directive.

It also states that it is not ok to just simply "ratify" an act without a substantive legislative process that fulfill the criteria.

In *Boxus*, and *Solvay*, the CJEU considered how a national court should deal with a situation where national legislation did not meet the criteria to justify the non-application of environmental impact assessment requirements. It ruled that the national court should be ready to set aside the flawed legislation (Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus*, paragraph 57; and Case C-182/10 *Solvay and others*, paragraph 52.).

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What to do... ...when lack of compliance with EU environmental law ?



Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus*



If no review procedure (...) were available in respect of such an act, **any national court before which an action** falling within its jurisdiction **is brought would have the task of carrying out the review described in the previous indent and, as the case may be, drawing the necessary conclusions by disapplying that legislative act.**

Be ready to set aside the flawed legislation!

But what to do for the national court? Well, the CJEU ruled that **the national court should be ready to set aside the flawed legislation** (Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus*, paragraph 57; and Case C-182/10 *Solvay and others*, paragraph 52.).

What to do... ...when lack of compliance with EU environmental law ?

C-348/15 Stadt Wiener Neustadt

Niederösterreichische Landesregierung

Decision:

The operation of a substitute fuel treatment plant should be regarded as authorised

Stadt Wiener Neustadt

Lawfulness?????

The provision it's based on runs counter to EU law! The conditions under national law for exclusion of a project from the scope of EIA directive are not satisfied in the main proceedings







In the case *Stadt Wiener Neustadt* there were proceedings between the Stadt Wiener Neustadt and the Niederösterreichische Landesregierung, concerning a decision. Niederösterreichische landesregierung took the view that the operation of a substitute fuel treatment plant should be regarded as authorised.

Stadt Wiener Neustadt argued that the provision the decision was based on runs counter to EU law. In particular, the conditions under national law for exclusion of a project from the scope of e EIA directive are not satisfied in the main proceedings

In *Stadt Wiener Neustadt* the CJEU considered that national legislation which could frustrate the possibility to obtain an effective remedy of the kind referred to in *Wells* was incompatible with the requirements of the Environmental Impact Assessment Directive, 2011/92/EU (Case C-348/15 *Stadt Wiener Neustadt*, paragraphs 45 to 48.). It was for the national court to ascertain this (Case C-348/15 *Stadt Wiener Neustadt*, paragraph 31.).

What to do...

...when lack of compliance with EU environmental law ?



C-348/15 Stadt Wiener Neustadt p 45

CJEU: Settled case-law: The Member State is required to make good any harm caused by the failure to carry out an EIA

C-201/02, *Wells*, p 66



The court starts its reasoning in settled case law!

Member states are required to make good any harm caused by the failure to carry out an EIA.

45 Furthermore, it is the Court's settled case-law that the Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment (judgment of 7 January 2004, *Wells*, C-201/02, EU:C:2004:12, paragraph 66).

46 To that end, the competent authorities are obliged to take all general or particular measures for remedying the failure to carry out such an assessment (judgment of 7 January 2004, *Wells*, C-201/02, EU:C:2004:12, paragraph 68).

47 In that regard, it must be stated that, although the conditions for such an action for a remedy, in particular those concerning whether the unlawfulness in its entirety must be regarded as wrongful and those concerning the conditions for establishing a causal link, in the absence of any provision of EU law, stem from national law and although such an action may, as is clear from the settled case-law of the Court, be restricted to a certain period, provided that the principles of equivalence and effectiveness are observed, the fact remains that that action must, by virtue of the principle of effectiveness, be able to be carried out on reasonable conditions.

48 It follows from the foregoing that, if a national provision prevents, on expiry of a given time limit, any action for a remedy of a breach of the obligation to assess effects on the environment set out in Article 2(1) of Directive 85/337 while the time limit for bringing proceedings placed on the action for a remedy has not expired, it would be incompatible with EU law for that reason as well.

What to do... ...when lack of compliance with EU environmental law ?



C-348/15 *Stadt Wiener Neustadt* p 46

CJEU: **Settled case-law:** The Member State is required to make good any harm caused by the failure to carry out an EIA

C-201/02, *Wells*, p 66

C-201/02, *Wells*, p 68

Competent Authorities obliged to take **all measures** for **remedying** the failure to carry out such an assessment



aTo that end, the competent authorities are obliged to take all general or particular measures for remedying the failure to carry out such an assessment

What to do... ...when lack of compliance with EU environmental law ?

C-348/15 *Stadt Wiener Neustadt* p 47

CJEU: Settled case-law: The Member State is required to make good any harm caused by the failure to carry out an EIA

C-201/02, *Wells*, p 66

C-201/02, *Wells*, p 68

Competent Authorities obliged to take all measures for **remedying** the failure to carry out such an assessment

Conditions in national law for such a remedy, especially those concerning:

- whether the unlawfulness **in its entirety** must be regarded as wrongful
- the conditions for establishing a **causal link**
- action **restricted to a certain period**







Then the court states that having conditions in national law for such a remedy, especially when it concerns whether the whether the unlawfulness in its entirety must be regarded as wrongful, the conditions for establishing a causal link and action restricted to a certain period.

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What to do... ...when lack of compliance with EU environmental law ?

C-348/15 Stadt Wiener Neustadt p 47

CJEU: Settled case-law: The Member State is required to make good any harm caused by the failure to carry out an EIA

C-201/02, *Wells*, p 66

C-201/02, *Wells*, p 68

Competent Authorities obliged to take all measures for remedying the failure to carry out such an assessment

Conditions in national law for such a remedy, especially those concerning:

Ok

to have in national law provided that the principles of equivalence and effectiveness are observed!

- whether the unlawfulness in its entirety must be regarded as wrongful
- the conditions for establishing a causal link
- action restricted to a certain period







Is ok to have - provided that the principles of equivalence and effectiveness are observed!

The fact remains that that action must, by virtue of the principle of effectiveness, be able to be carried out on reasonable conditions.

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although the conditions for such an action for a remedy, in particular those concerning whether the unlawfulness in its entirety must be regarded as wrongful and those concerning the conditions for establishing a causal link, in the absence of any provision of EU law, stem from national law and

although such an action may, as is clear from the settled case-law of the Court, be restricted to a certain period, provided that the principles of equivalence and effectiveness are observed,

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And so; the CJEU concluded that national legislation which could frustrate the possibility to obtain an effective remedy of the kind referred to in *Wells* (all measures for **remedying** the failure to carry out an EIA) is incompatible with the requirements of the EIA Directive.

2011/92/EU (Case C-348/15 *Stadt Wiener Neustadt*, paragraphs 45 to 48.). It was for the national court to ascertain this (Case C-348/15 *Stadt Wiener Neustadt*, paragraph 31.). a

What to do... ...when lack of compliance with EU environmental law ?



C-348/15 *Stadt Wiener Neustadt* p 31

It is for the national court to ascertain
whether those conditions have been
satisfied

Conditions for such a remedy, especially those concerning:

Ok to have in national law
**provided that the principles of
equivalence and
effectiveness are observed!**

- whether the unlawfulness in its entirety must be regarded as wrongful
- the conditions for establishing a causal link
- action restricted to a certain period



It is for the national court to ascertain whether those conditions have been satisfied

principle of equivalence

C-416/10 *Križan*, p 86

principle of effectiveness

principle of equivalence C-591/10 *Littlewoods Retail and Others*, p 31,
C-249/11 *Byankov*, p 70

Requires that all the rules applicable to actions apply **without distinction** to actions based on infringement of European Union law and those based on infringement of national law



It is therefore **for the national court to determine** whether national law allows procedural **flaws of a comparable internal nature to be rectified during the administrative procedure** at second instance.






Now, we will look a little bit closer into the principles of equivalence and the principle of effectiveness and what they require from a national judge:

principle of equivalence

principle of effectiveness

C-416/10 *Križan*, p 87



principle of equivalence

C-591/10 *Littlewoods Retail and Others*, p 31,
C-249/11 *Byankov*, p 70

Requires that all the rules applicable to actions apply without distinction to actions based on infringement of European Union law and those based on infringement of national law



It is therefore for the national court to determine whether national law allows procedural flaws of a comparable internal nature to be rectified during the administrative procedure at second instance.

principle of effectiveness

While European Union law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of European Union law,

Conditions:

- it does not offer the opportunity to circumvent the European Union rules or to dispense with applying them,
- it should remain the exception.



Case C-215/06 *Commission v Ireland* p 57

"Make good any harm"

C-201/02, Wells, p 66



C-399/14 Grüne Liga Sachsen

Decision approving the construction of a bridge over the Elbe in Dresden

immediately enforceable

In 2004 plans were approved for the construction of a road bridge across Elbe. The decision was immediately enforceable.

C-399/14 *Grüne Liga Sachsen* :

17 On 25 February 2004 the Regional Council of the City of Dresden (Regierungspräsidium Dresden), now the Regional Management of Dresden (Landesdirektion Dresden), which is an authority of the defendant in the main proceedings, approved the plans for the construction of the Waldschlößchenbrücke road bridge spanning the Elbe (Elbauen) in the city centre of Dresden and the meadows along its banks.

18 The decision approving those plans, which was immediately enforceable, was based on a flora, fauna and habitat impact study carried out in January 2003 in relation to the implications of the construction project for the bridge in question for the protection and conservation objectives of the site 'Elbe valley between Schöna and Mühlberg' ('Elbtal zwischen Schöna und Mühlberg').

19 In carrying out that study, which concluded that the construction project at issue in the main proceedings would have no significant or permanent adverse effects on the preservation objectives of the site, the competent authority sought to rely on the requirements of Article 6(3) and (4) of the Habitats Directive. According to the evidence provided by the referring court, however, the study did not meet those requirements, but was merely a preliminary risk assessment.

20 On 15 April 2004 Grüne Liga Sachsen, a nature protection organisation authorised to be a party to legal proceedings, brought an action for annulment of the planning approval decision of 25 February 2004, which, pursuant to Section 80(2)(3) of the Code of Administrative Court Procedure, read in conjunction with Paragraph 39 of the Road law of the Land of Saxony, did not have suspensive effect. At the same time, Grüne Liga Sachsen lodged an application for interim measures on the basis of Paragraph 80(5) of the Code of Administrative Court Procedure to prevent the start of construction works.

21 In December 2004 the Commission included the Elbe valley between Schöna and Mühlberg site as an SCI in the list referred to in Article 4 of the Habitats Directive.

22 By an act of 19 October 2006, the Regional Council of the City of Dresden declared that site, with the exception of that part of the meadows along the banks of the Elbe that was situated in the city centre of Dresden, a special area of conservation for birds or their habitats.

23 Construction work on the Waldschlößchenbrücke road bridge began in November 2007 after the Sächsisches Obergerverwaltungsgericht (Higher Administrative Court of Saxony), by decision of 12 November 2007, definitively dismissed the application for interim measures filed by Grüne Liga Sachsen.

24 By a supplementary amending decision of 14 October 2008, the Regional Management of Dresden carried out a new limited assessment of the effects of the project at issue in the main proceedings, its objective being to verify, first, whether that project was likely to have a significant effect on the site concerned within the meaning of Article 6(3) of the Habitats Directive and, second, whether the conditions for derogation under paragraph 4 of that article were fulfilled as regards the adverse effects identified in relation to certain habitats and species. That assessment resulted in the authorisation of the project in question by the derogation procedure provided for in Article 6(4) of that directive by means of additional measures.

25 By a judgment of 15 December 2011, the Sächsisches Obergerverwaltungsgericht dismissed Grüne Liga Sachsen's action for annulment of 15 April 2004.

26 That organisation lodged an appeal before the Bundesverwaltungsgericht (Federal Administrative Court).

27 In 2013 the construction work on the bridge at issue was completed. The bridge was opened to traffic the same year.

28 The referring court is essentially of the view that adjudication of the case before it first requires answers to the question of under what conditions a project authorised before the inclusion of the site in question in the list of SCIs must undergo a subsequent review of its implications, under Article 6(2) of the Habitats Directive, and what criteria should then be applied. It explains that that clarification is necessary for it to verify the legality of the supplementary procedure that took place in 2008.

"Make good any harm"

C-201/02, *Wells*, p 66



C-399/14 *Grüne Liga Sachsen*

Based on a flora, fauna and habitat impact study

Conclusion: no significant or permanent adverse effects on the preservation objectives of the site

Grüne Liga Sachsen eV

Action for annulment

Freistaat Sachsen
Decision approving the construction of a bridge over the Elbe in Dresden

immediately enforceable

Application for interim measures to prevent the start of construction works

Decision was based on a flora, fauna and habitat impact study carried out in January 2003 in relation to the implications of the construction project

The study concluded that the construction project at issue in the main proceedings would have no significant or permanent adverse effects on the preservation objectives of the site,

A nature protection organization, Gründe Liga Sachsen, brought an action for annulment of the planning approval. And, at the same time, they lodge an application for interim measures to prevent the start of construction works.

"Make good any harm"

C-201/02, *Wells*, p 66



C-399/14 *Grüne Liga Sachsen*

Based on a flora, fauna and habitat impact study

Conclusion: no significant or permanent adverse effects on the preservation objectives of the site

Grüne Liga Sachsen eV

Construction work on the Waldschlößchenbrücke road bridge began and was completed

Freistaat Sachsen

Decision approving the construction of a bridge over the Elbe in Dresden

immediately enforceable

Action for annulment

Application for interim measures to prevent the start of construction works

dismissed
Appeal!

The application was dismissed.

The Construction work began and was completed.

"Make good any harm"

C-201/02, *Wells*, p 66



C-399/14 *Grüne Liga Sachsen*

One of the questions:

In the context of supplementary proceedings seeking to remedy an error found in a subsequent review under [the Habitats Directive] or in an impact assessment [under the Habitats Directive], is account to be taken (...) of the fact that the structure was permitted to be constructed and put into service because the planning decision was immediately enforceable and proceedings for interim measures had been dismissed with final effect?

It is already built – how to remedy the (eventual) error of not having assessed it before it was built?

Some appeals later we had a request for a preliminary ruling concerns the interpretation of Article 6(2) to (4) Habitats Directive') and including the most interesting question for us:

It is already built – how to remedy the (eventual) error of not having assessed it before it was built?

2 The reference has been made in proceedings between *Grüne Liga Sachsen eV* ('*Grüne Liga Sachsen*') and Others, on the one hand, and the Freistaat Sachsen (Free State of Saxony), on the other, regarding a decision taken by the authorities of the latter approving the construction of a bridge over the Elbe in Dresden (Germany).

of the supplementary procedure that took place in 2008.

Questions:

29 In those circumstances, the Bundesverwaltungsgericht decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 6(2) of the Habitats Directive to be interpreted as meaning that a construction project for a bridge which does not directly serve the management of the site and was authorised before that site was included in the list of SCIs must be the subject of a review of its implications before it is carried out, if the site was included in that list after authorisation was granted but before work began and only a risk assessment/preliminary assessment was undertaken before the authorisation was granted?

(2) If Question 1 is answered in the affirmative:

When undertaking a subsequent review, must the national authority observe the provisions of Article 6(3) and (4) of the Habitats Directive where it wished to use those provisions as a precautionary basis for the risk assessment/preliminary assessment preceding the grant of the authorisation?

(3) If Question 1 is answered in the affirmative and Question 2 in the negative:

What requirements should be applied under Article 6(2) of the Habitats Directive to a subsequent review of an authorisation granted for a project and to what date should the review relate?

(4) In the context of supplementary proceedings seeking to remedy an error found in a subsequent review under Article 6(2) of the Habitats Directive or in an impact assessment under Article 6(3) of the Habitats Directive, is account to be taken, by appropriate amendments to the review requirements, of the fact that the structure was permitted to be constructed and put into service because the planning decision was immediately enforceable and proceedings for interim measures had been dismissed with final effect? In any event, does that apply to an alternative subsequent review which is necessary in the context of a decision under Article 6(4) of the Habitats Directive?

However, as can be seen from subsequent case-law, notably in *Grüne Liga Sachsen* (Case C-399/14 *Grüne Liga Sachsen*), the possibility of redress also extends to the environment itself — in particular where compliance with the infringed requirement would have entailed avoiding or compensating for environmental damage.

"Make good any harm"

C-201/02, *Wells*, p 66

C-399/14 *Grüne Liga Sachsen*

A subsequent review under the Habitats Directive (p 67 → 54)
must meet the requirements of that directive.



Those requirements may not be amended solely because the (p 68)
structure in question was constructed pursuant to a planning decision

If national procedural law could be
used to limit the need to comply with
the requirements of that directive.

or because an application for
interim measures to prevent
the start of construction works
had been dismissed and that
dismissal decision was no
longer open to appeal

(p 69)



The effectiveness of that
directive would be
compromised



"Make good any harm"

C-201/02, *Wells*, p 66



C-399/14 *Grüne Liga Sachsen*

A plan or project
already implemented

A new assessment of the implications for the site concerned...

... must take into account the assumption that the risks of deterioration or disturbance that could be significant have already appeared on account of the completion of the works in question.

That assessment must enable it to be established whether such risks are likely to materialise if those works continue to be used

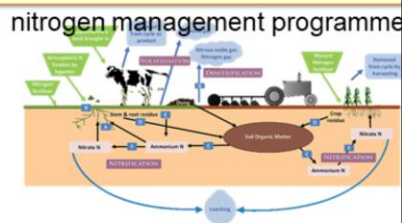
"The harm" - the EU law failure or the failure to protect the environment?



C-41/11 *Inter-Environnement Wallonie*

A "plan" or "programme"

not been the subject of an environmental assessment as required by the SEA directive



Under which circumstances may the plan provisionally be kept in force?



Case C-41/11 *Inter-Environnement Wallonie*

Concerned the circumstances in which a 'plan' or 'programme' within the meaning of the SEA directive which has not been the subject of an environmental assessment as required by that directive, may provisionally be kept in force.

In particular, the referring court fears that that annulment would present the risk that the legality of a great many plans and programmes and of the measures taken on the basis of those plans and programmes could be called into question, a situation that could give rise to a legal vacuum to the detriment of environmental protection. Owing to the retroactive effect of the annulment of those provisions of domestic law, the consultations carried out on the basis of those provisions will be deemed to have been carried out unlawfully.

"The harm" - the EU law failure or the failure to protect the environment?



C-379/15 Association France Nature Environnement

Request for annulment

of a decree relating to the assessment of certain plans and programmes



Case C-379/15 Association France Nature Environnement

The request has been made in proceedings between the Association France Nature Environnement, on the one hand, and the Premier ministre (Prime Minister) and the ministre de l'Écologie, du Développement durable et de l'Énergie (Minister for Ecology, Sustainable Development and Energy), on the other, regarding a request for annulment, for misuse of powers, of Decree No 2012-616 of 2 May 2012 relating to the assessment of certain plans and programmes having an effect on the environment (JORF of 4 May 2012, p. 7884).

Describe the problem!!!

28 In particular, the referring court fears that that annulment would present the risk that the legality of a great many plans and programmes and of the measures taken on the basis of those plans and programmes could be called into question, a situation that could give rise to a legal vacuum to the detriment of environmental protection. Owing to the retroactive effect of the annulment of those provisions of domestic law, the consultations carried out on the basis of those provisions will be deemed to have been carried out unlawfully.

**"The harm" - the EU law failure or
the failure to protect the
environment?**



C-41/11 *Inter-Environnement Wallonie* p 42, 43

C-379/15 *Association France Nature* p 30, 31

No provisions in the SEA directive on the consequences of
infringing the directive's procedural provisions!



it is for the Member States to take all measures necessary to ensure...

Member States are required to nullify the unlawful consequences
of a breach of EU law

Such an obligation is with every organ of the Member State
concerned.

In paragraph 42 of that judgment, the Court decided that, there being no provisions in Directive 2001/42 on the consequences of infringing the procedural provisions laid down in that directive, it is for the Member States to take, within the sphere of their competence, all the general or particular measures necessary to ensure that all plans or programmes likely to have significant environmental effects within the meaning of that directive are subject to an environmental assessment before being adopted in accordance with the procedural requirements and the criteria laid down by that directive.

"The harm" - the EU law failure or the failure to protect the environment?



C-41/11 *Inter-Environnement Wallonie*

C-379/15 *Association France Nature p 36*

In its judgment in *Inter-Environnement Wallonie* the Court sought to reconcile...

The principles of legality and primacy of EU law




The necessity of protecting the environment stemming from those primary EU law provisions



35 As is apparent from Article 3(3) TEU and Article 191(1) and (2) TFEU, the European Union is called upon to ensure a high level of protection and improvement of environmental protection.

36 From that point of view, in its judgment of 28 February 2012 in *Inter-Environnement Wallonie and Terre wallonne* (C-41/11, EU:C:2012:103), the Court sought to reconcile the principles of legality and primacy of EU law, on the one hand, and the necessity of protecting the environment stemming from those primary EU law provisions, on the other.

"The harm" - the EU law failure or the failure to protect the environment?



C-41/11 *Inter-Environnement Wallonie*

C-379/15 *Association France Nature*, p 43

A national court may, **when this is allowed by domestic law, exceptionally and case by case, limit in time certain effects** of a declaration **of the illegality** of a provision of national law, **provided** that such a limitation is **dictated by an overriding consideration linked to environmental protection** and having regard to **the specific circumstances** of the case pending before it.

That exceptional power may, however, be exercised **only if all the conditions** flowing from the judgment in *Inter-Environnement Wallonie and Terre wallonne* are satisfied, namely:

43 It follows from the considerations above that the answer to the second question is that a national court may, when this is allowed by domestic law, exceptionally and case by case, limit in time certain effects of a declaration of the illegality of a provision of national law adopted in disregard of the obligations provided for by Directive 2001/42, in particular the obligations arising from Article 6(3) of the directive, provided that such a limitation is dictated by an overriding consideration linked to environmental protection and having regard to the specific circumstances of the case pending before it. That exceptional power may, however, be exercised only if all the conditions flowing from the judgment of 28 February 2012 in *Inter-Environnement Wallonie and Terre wallonne* (C-41/11, EU:C:2012:103) are satisfied, namely:

- that the contested provision of national law constitutes a measure correctly transposing EU law on environmental protection;
- that the adoption and coming into force of a new provision of national law do not make it possible to avoid the damaging effects on the environment arising from the annulment of the contested provision of national law;
- that annulment of the contested provision of national law would have the effect of creating a legal vacuum concerning the transposition of EU law on environmental protection which would be more damaging to the environment, in the sense that that annulment would result in lesser protection and would thus run counter to the essential objective of the EU law; and
- that any exceptional maintaining of the effects of the contested provision of national law lasts only for the period strictly necessary for the adoption of the measures making it possible to remedy the irregularity found.

"The harm" - the EU law failure or the failure to protect the environment?



C-41/11 *Inter-Environnement Wallonie*

C-379/15 *Association France Nature*, p 43

The contested provision of national law constitutes a measure correctly transposing EU law on environmental protection,

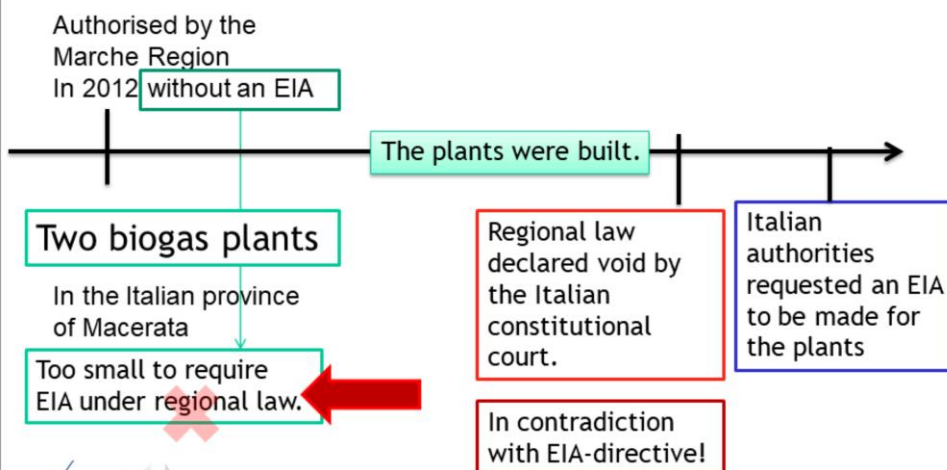
The of national law do not make it possible to avoid the damaging effects on adoption and coming into force of a new provision the environment arising from annulment of the contested provision of national law,

The annulment would have the effect of creating a legal vacuum concerning transposition which would be more damaging to the environment, in the sense that that annulment would result in lesser protection,

The effects of a contested provision exceptionally kept in force last only for the period strictly necessary for adopting measures to remedy the irregularity.

The conditions.

C-196/16 and C-197/16 Comune di Corridonia



Two biogas plants in Italy were authorised. They were authorised without an EIA since they were too small to require EIA under national laws.

The plants were eventually built.

Later, the Italian constitutional court declared that the regional law was void, because it was in contradiction with the EIA-directive and Italian authorities requested an EIA to be made for the plants.

Case C-196/16

8 On 19 October 2011, VBIO1 sought consent from the Regione Marche (Marche Region, Italy) to build and operate a plant for the generation of electrical energy from biogas obtained from the anaerobic fermentation of biomass within the territory of the municipality of Corridonia.

9 Pursuant to the legge Regione Marche No 7/2004 (Law No 7/2004 of the Marche Region), VBIO1 had also submitted that project to the Provincia di Macerata (Province of Macerata, Italy) on 4 October 2011 for a preliminary examination as to the need for an environmental assessment.

10 That procedure was, however, closed on 26 January 2012, after Law No 7/2004 of the Marche Region had been amended by the legge Regione Marche No 20/2011 (Law No 20/2011 of the Marche Region), which entered into force on 9 November 2011 and by virtue of which projects the heating potential of which did not reach a certain threshold were no longer required to undergo an assessment of their impact on the environment.

11 Consequently, the Marche Region consented, by decision of 5 June 2012, to the construction and operation of that plant in the municipality of Corridonia, which challenged that decision by bringing an action before the Tribunale amministrativo regionale per le Marche (Administrative Court for the Marche Region, Italy).

12 By judgment of 10 October 2013, that court annulled the decision on the ground that Law No 20/2011 of the Marche Region was inapplicable and that, in any event, the relevant provisions of that law were incompatible with Directive 2011/92. That judgment was upheld by the Consiglio di Stato (Council of State, Italy).

13 Drawing the consequences of that annulment, VBIO1 ceased operations at that plant and submitted an application to the Province of Macerata requesting a preliminary examination as to the need for an assessment of the impact which that plant might have on the environment.

14 On 15 November 2013, the Province of Macerata decided that such an assessment was necessary and, subsequent to that assessment, found, on 7 July 2014, that that plant complied with the environmental requirements.

Case C-197/16

16 On 16 December 2011, VBIO2 sought consent from the Marche Region to build and operate, within the territory of the municipality of Loro Piceno, a plant for the generation of electrical energy of the same type as the plant at issue in Case C-196/16.

17 That consent was granted to VBIO2 on 29 June 2012, without a prior assessment of the impact of that plant on the environment having been carried out.

18 The municipality of Loro Piceno and Mr Bartolini and Others challenged that decision by bringing an action before the Tribunale amministrativo regionale per le Marche (Administrative Court for the Marche Region).

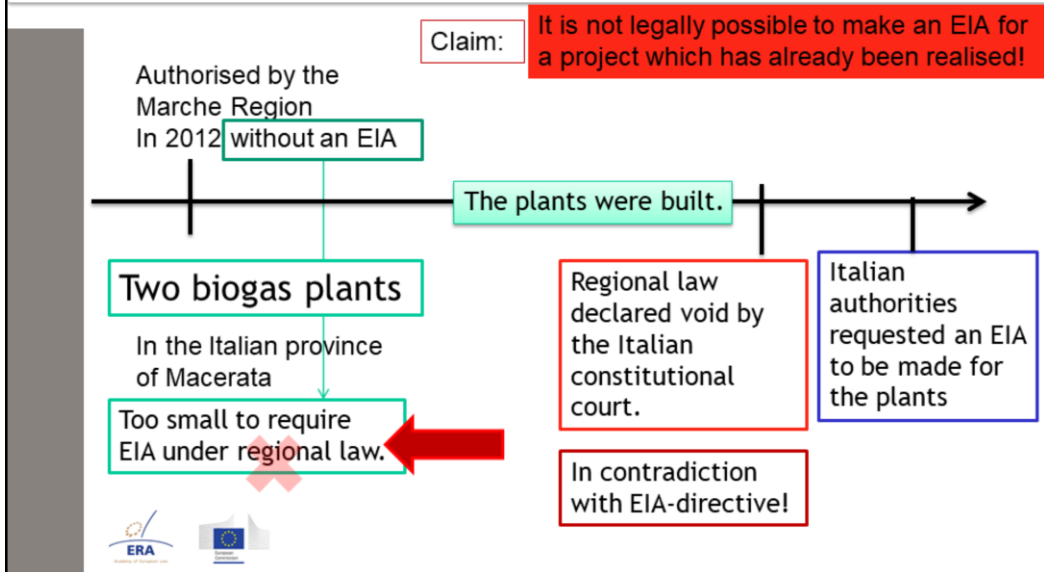
19 By judgment of 22 May 2013 (No 93/2013), the Corte costituzionale (Constitutional Court, Italy), held that the legge Regione Marche No 3/2012 (Law No 3/2012 of the Marche Region), repealing Law No 7/2004 of the Marche Region with effect from 20 April 2012, without, however, amending the criteria for identifying projects subject to environmental impact assessments, was unconstitutional in that it was incompatible with EU law to the extent that it did not, in accordance with Article 4(3) of Directive 2011/92, require account to be taken of the criteria set in Annex III to that directive.

20 On 10 October 2013, the Tribunale amministrativo regionale per le Marche (Administrative Court for the Marche Region) withdrew the consent granted to VBIO2, which filed an appeal before the Consiglio di Stato (Council of State).

21 VBIO2 requested that the Province of Macerata conduct a preliminary examination into whether it was necessary to carry out an environmental impact assessment of the plant concerned.

22 By decision of 19 November 2013, the Province of Macerata held that it was necessary to carry out such an assessment.

Two municipalities, Comune di Corridonia and Comune di Loro Piceno, considered this procedure incompatible with EU law.



Two municipalities considered this procedure incompatible with EU law and claimed that it is not legally possible to make an EIA for a project which has already been realised.

Case C-196/16

15 The municipality of Corridonia lodged an application for annulment of those decisions before the Tribunale amministrativo regionale per le Marche (Administrative Court for the Marche Region), maintaining that the assessment carried out did not comply with Article 191 TFEU or with Article 2(1) to (3) of Directive 85/337, replaced by Directive 2011/92, given that it had been carried out after the plant in question had been built.

Case C-197/16

23 The municipality of Loro Piceno and Mr Bartolini and Others applied to the Tribunale amministrativo regionale per le Marche (Administrative Court for the Marche Region) seeking an annulment of that decision and its suspension on a temporary basis.

24 That court rejected the application for suspension on the ground that the mere fact that the plant concerned was subject to an environmental impact assessment procedure did not result in serious and irreparable damage for persons residing in the area concerned.

25 The competent authorities of the Province of Macerata adopted a decision on 10 February 2015 finding that the plant at issue in the main proceedings was compatible with environmental requirements.

26 The municipality of Loro Piceno and Mr Bartolini and Others applied to the Tribunale amministrativo regionale per le Marche (Administrative Court for the Marche Region) for annulment of that decision.

C 196/16 and C-197/16 *Comune di Corridonia*

Tribunale amministrativo
regionale per le Marche
(Administrative Court for the
Marche Region)

→

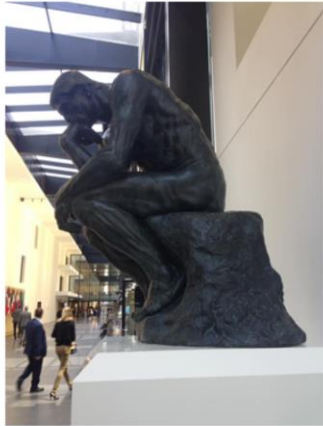
EUCJ

Is it legally possible to make an EIA for a project
which has already been realised?

EUCJ: No! Or... if we think of it... :-post EIA is
compatible with EU law.







The administrative court turned to the EUCJ and asked whether it was legally possible to make an EIA for an already realised project.

In short; the EUCJ said "no... or... yes, exceptionally it is compatible with EU law.

The question:

27 In Cases C-196/16 and C-197/16, the Tribunale amministrativo regionale per le Marche (Administrative Court for the Marche Region) decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

‘On a constructive interpretation of Article 191 TFEU and Article 2 of Directive [2011/92], is it compatible with EU law to proceed with the verification of whether an environmental impact assessment needs to be undertaken (and possibly thereafter to carry out an environmental impact assessment) after the construction of the plant where the consent has been annulled by the national court due to a failure to verify whether the environmental impact assessment was needed, because such a verification had been excluded on the basis of a national law which was contrary to EU law?’

C 196/16 and C-197/16 Comune di Corridonia



How can an ex-post EIA **exceptionally be** compatible with EU law?

Article 2(1): Projects that may have a significant impact on the environment, **must be subject to EIA before consent is granted** (C-201/02 ,Wells, p 42).

Necessary to take effects on the environment into account **at the earliest possible stage!**

Objective: **Prevent** the creation of pollution or nuisances at source **rather than subsequently trying to counteract** their effects (C-215/06 *Commission v Ireland*, p 58).

Prevention rather than reparation!!



The court explained this in the following way.

It should be remembered that Article 2(1) provides that projects that may have a significant impact on the environment, must be subject to that assessment **before consent is granted** (C-201/02 ,Wells, p 42). The assessment has thus a prior nature!

This prior nature is justified by the fact that it is necessary for the competent authority **to take effects on the environment into account at the earliest possible stage** in all the technical planning and decision-making processes. And this is because of the objective with the assessment which is to **prevent** the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects (C-215/06 *Commission v Ireland*, p 58).

C-201/02 ,Wells

42 As to those submissions, under Article 2(1) of Directive 85/337 projects likely to have significant effects on the environment, as referred to in Article 4 of the directive read in conjunction with Annexes I and II thereto, must be made subject to an assessment with regard to such effects before consent is given.

C-215/06 *Commission v Ireland*

58 A system of regularisation, such as that in force in Ireland, may have the effect of encouraging developers to forgo ascertaining whether intended projects satisfy the criteria of Article 2(1) of Directive 85/337 as amended, and consequently, not to undertake the action required for identification of the effects of those projects on the environment and for their prior assessment. The first recital of the preamble to Directive 85/337 however states that it is necessary for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects.

C 196/16 and C-197/16
Comune di Corridonia

Prevention rather than reparation!

However



However, there are no provisions in the directive relating to the consequences of a breach of the obligation to carry out a prior assessment!






Prevention rather than reparation points at the necessity of a **prior assessment**.

However! If it is not done; there are no provisions in the directive relating to the consequences of a breach of the obligation to carry out a prior assessment!

The what do we do?? First of all; we need to bring in Le Penseur again!

When a directive doesn't contain provisions on a certain situation; then what do you do?.

C 196/16 and C-197/16 *Comune di Corridonia*

34 However, neither Directive 85/337 nor Directive 2011/92 contains provisions relating to the consequences of a breach of that obligation to carry out a prior assessment.

- You turn to case law, primary law and EU law principles!

C 196/16 and C-197/16 *Comune di Corridonia*



Article 4 TEU

'the principle of cooperation in good faith'

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Under the principle of cooperation in good faith Member States are required to nullify the unlawful consequences of that breach of EU law.






A very important principle of EU law is found in A 4 of the treaty of the European union; the principle of cooperation in good faith.

According to this:

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

Further, the Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Under this principle; member states are required to nullify the unlawful consequences of that breach of EU law.

C 196/16 and C-197/16 *Comune di Corridonia*

35 Under the principle of cooperation in good faith laid down in Article 4 TEU, Member States are nevertheless required to nullify the unlawful consequences of that breach of EU law. (...)

TEU Article 4 (3)

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

C 196/16 and C-197/16 Comune di Corridonia



Under the principle of cooperation in good faith Member States are required to nullify the unlawful consequences of that breach of EU law.

The Member State concerned:

is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment (C-201/02, Wells, p 66).

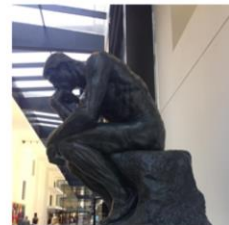
CA
stands for
Competent Authority



Obligation:

Take all measures necessary to remedy the failure to carry out an EIA!

Ex: Revoking or suspending consent already granted in order to carry out such an assessment.



(C-201/02 Wells, p 64 and 65; C-215/06 Commission v Ireland, p 59; and, C-41/11 Inter-Environnement Wallonie and Terre wallonne, p 42, 43 and 46).

Thus, since not carrying out an EIA would be a breach of EU law – the competent national authorities are under an obligation, under the principle of cooperation.... to take all measures necessary, within the sphere of their competence, to remedy the failure to carry out an EIA.

.....It might for example by revoking or suspending consent already granted in order to carry out such an assessment.

The Member State concerned..... is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment .

C 196/16 and C-197/16 Comune di Corridonia

35
(...)

The competent national authorities are therefore under an obligation to take all measures necessary, within the sphere of their competence, to remedy the failure to carry out an environmental impact assessment, for example by revoking or suspending consent already granted in order to carry out such an assessment (see, to that effect, judgments of 7 January 2004, Wells, C-201/02, EU:C:2004:12, paragraphs 64 and 65; of 3 July 2008, Commission v Ireland, C-215/06, EU:C:2008:380, paragraph 59; and of 28 February 2012, Inter-Environnement Wallonie and Terre wallonne, C-41/11, EU:C:2012:103, paragraphs 42, 43 and 46).

36 The Member State concerned is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment (judgment of 7 January 2004, Wells, C-201/02, EU:C:2004:12, paragraph 66).

Wells, C-201/02

64 As to that submission, it is clear from settled case-law that under the principle of cooperation in good faith laid down in Article 10 EC the Member States are required to nullify the unlawful consequences of a breach of Community law (see, in particular, Case 6/60 Humblet [1960] ECR 559, at 569, and Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357, paragraph 36). Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned (see, to this effect, Case C-8/88 Germany v Commission [1990] ECR I-2321, paragraph 13).

65 Thus, it is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment (see, to this effect, Case C-72/95 Kraaijeveld and Others [1996] ECR I-5403, paragraph 61, and WWF and Others, cited above, paragraph 70). Such particular measures include, subject to the limits laid down by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question as provided for by Directive 85/337.

66 The Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment.

Commission v Ireland, C-215/06

59 Lastly, Ireland cannot usefully rely on Wells. Paragraphs 64 and 65 of that judgment point out that, under the principle of cooperation in good faith laid down in Article 10 EC, Member States are required to nullify the unlawful consequences of a breach of Community law. The competent authorities are therefore obliged to take the measures necessary to remedy failure to carry out an environmental impact assessment, for example the revocation or suspension of a consent already granted in order to carry out such an assessment, subject to the limits resulting from the procedural autonomy of the Member States.

Inter-Environnement Wallonie and Terre wallonne, C-41/11

42 In the absence of provisions in that directive on the consequences of infringing the procedural provisions which it lays down, it is for the Member States to take, within the sphere of their competence, all the general or particular measures necessary to ensure that all 'plans' or 'programmes' likely to have 'significant environmental effects' within the meaning of Directive 2001/42 are subject to an environmental assessment prior to their adoption in accordance with the procedural requirements and the criteria laid down by that directive (see, by analogy, Case C-72/95 Kraaijeveld and Others [1996] ECR I-5403, paragraph 61; Case C-435/97 WWF and Others [1999] ECR I-5613, paragraph 70; and Case C-201/02 Wells [2004] ECR I-723, paragraph 65).

43 It is clear from settled case-law that, under the principle of cooperation in good faith laid down in Article 4(3) TEU, Member States are required to nullify the unlawful consequences of a breach of European Union law (see, inter alia, Case 6/60 Humblet v Belgian State [1960] ECR 559, p. 569, and Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357, paragraph 36). Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned (Case C-8/88 Germany v Commission [1990] ECR I-2321, paragraph 13, and Wells, paragraph 64 and the case-law cited).

44 It follows that where a 'plan' or 'programme' should, prior to its adoption, have been subject to an assessment of its environmental effects in accordance with the requirements of Directive 2001/42, the competent authorities are obliged to take all general or particular measures for remedying the failure to carry out such an assessment (see, by analogy, Wells, paragraph 68).

45 National courts before which an action against such a national measure has been brought are also under such an obligation, and, in that regard, it should be recalled that the detailed procedural rules applicable to such actions which may be brought against such 'plans' or 'programmes' are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (principle of effectiveness) (see Wells, paragraph 67 and the case-law cited).

46 Consequently, courts before which actions are brought in that regard must adopt, on the basis of their national law, measures to suspend or annul the 'plan' or 'programme' adopted in breach of the obligation to carry out an environmental assessment (see, by analogy, Wells, paragraph 65).

C 196/16 and C-197/16 *Comune di Corridonia*



Under the principle of cooperation in good faith **Member States are required to nullify the unlawful consequences of that breach of EU law.**

EU law does not preclude national rules which, in **certain cases**, permit the regularisation of operations or measures which are unlawful in the light of EU law

(C-215/06, *Commission v Ireland*, p 57; C-416/10 *Križan and Others*, p 87; and C-348/15 *Stadt Wiener Neustadt*, p 36).

Conditions for regularisation:

Must not offer the persons concerned the opportunity to circumvent the rules of EU law or to dispense with their application.

It should remain the exception!



And now we are getting to the core question;
Might a regularisation of operations be such a way to nullify the unlawful consequences?

The court concluded:

EU law does not preclude national rules which, in certain cases, permit the regularisation of operations or measures which are unlawful in the light of EU law.
..... In certain cases!

Such regularisation would have to be subject to the **condition** that it **does not offer the persons concerned the opportunity to circumvent the rules of EU law or to dispense with their application**, and that it should **remain the exception**

C 196/16 and C-197/16 *Comune di Corridonia*

37 The Court has, however, held that EU law does not preclude national rules which, in certain cases, permit the regularisation of operations or measures which are unlawful in the light of EU law (judgments of 3 July 2008, *Commission v Ireland*, C-215/06, EU:C:2008:380, paragraph 57; of 15 January 2013, *Križan and Others*, C-416/10, EU:C:2013:8, paragraph 87; and of 17 November 2016, *Stadt Wiener Neustadt*, C-348/15, EU:C:2016:882, paragraph 36).

38 The Court has made it clear that such a possible regularisation would have to be subject to the condition that it does not offer the persons concerned the opportunity to circumvent the rules of EU law or to dispense with their application, and that it should remain the exception (judgments of 3 July 2008, *Commission v Ireland*, C-215/06, EU:C:2008:380, paragraph 57; of 15 January 2013, *Križan and Others*, C-416/10, EU:C:2013:8, paragraph 87; and of 17 November 2016, *Stadt Wiener Neustadt*, C-348/15, EU:C:2016:882, paragraph 36).

Commission v Ireland, C-215/06

57 While Community law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of Community law, such a possibility should be subject to the conditions that it does not offer the persons concerned the opportunity to circumvent the Community rules or to dispense with applying them, and that it should remain the exception.

Križan and Others, C-416/10

87 As regards the principle of effectiveness, while European Union law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of European Union law, such a possibility is subject to the condition that it does not offer the persons concerned the opportunity to circumvent the European Union rules or to dispense with applying them, and that it should remain the exception (Case C-215/06 *Commission v Ireland* [2008] ECR I-4911, paragraph 57).

C-348/15 *Stadt Wiener Neustadt*

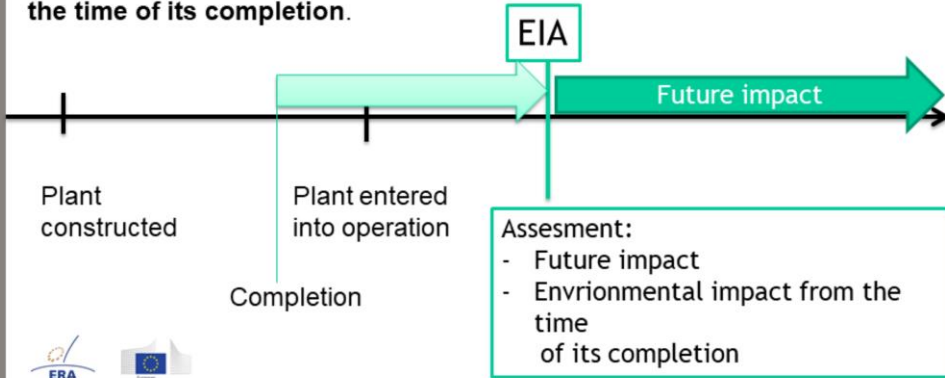
36 EU law does not preclude national legislation which, in certain cases, permits the regularisation of operations or measures which are unlawful in the light of EU law. However, such a possibility is subject to the condition that it does not offer the persons concerned the opportunity to circumvent EU law or dispense with applying it, and that it should remain the exception (see judgment of 3 July 2008, *Commission v Ireland*, C-215/06, EU:C:2008:380, point 57).

C 196/16 and C-197/16 *Comune di Corridonia*



Furthermore:

An assessment carried out after a plant has been constructed and has entered into operation cannot be confined to its future impact on the environment, but **must also take into account its environmental impact from the time of its completion.**



Furthermore, the court continued, an assessment carried out after a plant has been constructed and has entered into operation cannot be confined to its future impact on the environment, but must also take into account its environmental impact from the time of its completion.

C 196/16 and C-197/16 *Comune di Corridonia*

41 Furthermore, an assessment carried out after a plant has been constructed and has entered into operation cannot be confined to its future impact on the environment, but must also take into account its environmental impact from the time of its completion.

"Make good any harm"



C-201/02 *Delena Wells*



The Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment. (p 66)

C-72/95, *Kraaijeveld*, p 61

C-435/97 *WWF and Others*, p 70

Thus, it is for the competent authorities (...) to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment" (p 65)

By the time a contested decision, act or omission is legally challenged, harm may have already resulted. In *Wells* the CJEU held that a Member State is required to make good any harm caused by a failure to comply with EU environmental law (Case C-201/02 *Wells*,). In that case, the CJEU mentioned financial compensation for the environmental claimant. However, as can be seen from subsequent case-law, notably in *Grüne Liga Sachsen* (171), the possibility of redress also extends to the environment itself — in particular where compliance with the infringed requirement would have entailed avoiding or compensating for environmental damage.

"Make good any harm"



C-201/02 *Delena Wells*



The Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment. (p 66)



By the time a contested decision, act or omission is legally challenged, harm may have already resulted. In *Wells* the CJEU held that a Member State is required to make good any harm caused by a failure to comply with EU environmental law (Case C-201/02 *Wells*,). In that case, the CJEU mentioned financial compensation for the environmental claimant. However, as can be seen from subsequent case-law, notably in *Grüne Liga Sachsen* (171), the possibility of redress also extends to the environment itself — in particular where compliance with the infringed requirement would have entailed avoiding or compensating for environmental damage.

"Make good any harm"



C-201/02 *Delena Wells*



The Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment. (p 66)

To revoke or suspend a consent already granted in order to subject the proje to an assessment of environmental effects



it is for the national court to determine whether it is possible under domestic law.....

If the individual agrees to compensation for the harm suffered (p 69)

Financial compensation for the claimant!

By the time a contested decision, act or omission is legally challenged, harm may have already resulted. In *Wells* the CJEU held that a Member State is required to make good any harm caused by a failure to comply with EU environmental law (Case C-201/02 *Wells*,). In that case, the CJEU mentioned financial compensation for the environmental claimant. – however.... We need to consider this in the light of the *Leth* case.

”Make good any harm”

Pecuniary damage

Decrease in the value
of her home



C-420/11 *Leth*



Ms Leth



Republik Österreich and
Land Niederösterreich

application for

- (i) compensation for the pecuniary damage which she claims to have sustained as a result of the decrease in the value of her home following the extension of Vienna-Schwechat airport and
- (ii) a declaration that the defendants in the main proceedings will be liable for any future damage.

The request has been made in the course of proceedings between Ms Leth, on the one hand, and Republik Österreich (Republic of Austria) and *Land* Niederösterreich (State of Lower Austria), on the other, regarding her application for (i) compensation for the pecuniary damage which she claims to have sustained as a result of the decrease in the value of her home following the extension of Vienna-Schwechat airport (Austria) and (ii) a declaration that the defendants in the main proceedings will be liable for any future damage.

In *Leth*, which concerned a claim for compensation for alleged property de-valuation resulting from the expansion of an airport without an environmental impact assessment, the CJEU shed light on the possibility of obtaining pecuniary compensation for non-fulfilment of a requirement of EU environmental law. It confirmed that the prevention of pecuniary damage was covered by the objective of protection pursued by the Environmental Impact Assessment Directive, 2011/92/EU, and that it was for the domestic legal order of each Member State to provide detailed procedural rules covering compensation claims, subject to the principles of equivalence and effectiveness (C-420/11 *Leth*, paragraphs 36 and 38.). It recalled settled case-law establishing a doctrine of state liability according to which persons who have been harmed have a right to reparation if three conditions are met: — the rule of European Union law infringed must be intended to confer rights on them, — the breach of the rule must be sufficiently serious, and — there must be a causal link between that breach and the loss or damage sustained by the individuals (Case C-420/11 *Leth*, paragraph 41.). It stressed that the nature of the rule breached must be taken into account, doubting that the failure to carry out an environmental impact assessment could by itself constitute the reason for the decrease in value of a property (Case C-420/11 *Leth*, paragraph 46). It also confirmed that the question of whether or not the conditions for compensation were met was one for the national court. 167. The rationale of the judgment in *Leth* applies to other breaches of EU environmental law where the legislation at stake aims at protecting or granting individual rights, including access to justice rights.

"Make good any harm"

Pecuniary damage

Decrease in the value
of her home



C-420/11 *Leth*, p 36, 38



Ms Leth



Republik Österreich and
Land Niederösterreich

Prevention of pecuniary damage is covered by the objective of protection pursued by the EIA Directive

It is for the domestic legal order of each Member State to provide detailed procedural rules covering compensation claims, subject to the principles of equivalence and effectiveness

36 It must therefore be concluded that the prevention of pecuniary damage, in so far as that damage is the direct economic consequence of the environmental effects of a public or private project, is covered by the objective of protection pursued by Directive 85/337. As such economic damage is a direct consequence of such effects, it must be distinguished from economic damage which does not have its direct source in the environmental effects and which, therefore, is not covered by the objective of protection pursued by that directive, such as, inter alia, certain competitive disadvantages.

37 As regards a right to compensation for such pecuniary damage, it follows from the Court's settled case-law that, under the principle of sincere cooperation laid down in Article 4(3) TEU, Member States are required to nullify the unlawful consequences of a breach of European Union law. In that regard, the Court has already held that, in order to remedy the failure to carry out an environmental impact assessment of a project within the meaning of Article 2(1) of Directive 85/337, it is for the national court to determine whether it is possible under national law for a consent already granted to be revoked or suspended in order to subject the project in question to an assessment of its environmental impacts, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered (see *Wells*, paragraphs 66 to 69).

38 The detailed procedural rules that are applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (principle of effectiveness) (see *Wells*, paragraph 67).

It recalled settled case-law establishing a doctrine of state liability according to which persons who have been harmed have a right to reparation if three conditions are met: — the rule of European Union law infringed must be intended to confer rights on them, — the breach of the rule must be sufficiently serious, and — there must be a causal link between that breach and the loss or damage sustained by the individuals (Case C-420/11 *Leth*, paragraph 41.). It stressed that the nature of the rule breached must be taken into account, doubting that the failure to carry out an environmental impact assessment could by itself constitute the reason for the decrease in value of a property (Case C-420/11 *Leth*, paragraph 46). It also confirmed that the question of whether or not the conditions for compensation were met was one for the national court. 167. The rationale of the judgment in *Leth* applies to other breaches of EU environmental law where the legislation at stake aims at protecting or granting individual rights, including access to justice rights.

"Make good any harm"

Pecuniary damage

Decrease in the value
of her home



C-420/11 *Leth*, p 41

Settled case-law establishing a **doctrine of state liability** **according** to which persons who have been harmed have a **right to reparation if three conditions are met:**

1. The rule of European Union law infringed must be intended to confer rights on them;
2. The breach of that rule must be sufficiently serious;
3. and there must be a direct causal link between that breach and the loss or damage sustained by the individuals

C-429/09, *Fuß*, p 47,

C-568/08 *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others*, p 87

It recalled settled case-law establishing a doctrine of state liability according to which persons who have been harmed have a right to reparation if three conditions are met: — the rule of European Union law infringed must be intended to confer rights on them, — the breach of the rule must be sufficiently serious, and — there must be a causal link between that breach and the loss or damage sustained by the individuals (Case C-420/11 *Leth*, paragraph 41.).

"Make good any harm"

Pecuniary damage

Decrease in the value
of her home



C-420/11 *Leth*, p 46

Settled case-law establishing a **doctrine of state liability** **according** to which persons who have been harmed have a **right to reparation if three conditions are met:**

1. The rule of European Union law infringed must be intended to confer rights on them;
2. The breach of that rule must be sufficiently serious;
3. and there must be a direct causal link between that breach and the loss or damage sustained by the individuals

The nature of the rule breached must be taken into account!

It stressed that the nature of the rule breached must be taken into account, doubting that the failure to carry out an environmental impact assessment could by itself constitute the reason for the decrease in value of a property (C-420/11 *Leth*, paragraph 46). It also confirmed that the question of whether or not the conditions for compensation were met was one for the national court. The rationale of the judgment in *Leth* applies to other breaches of EU environmental law where the legislation at stake aims at protecting or granting individual rights, including access to justice rights.

If competent administrative authorities fail to take measures...



C-237/07 Janecek

Mr Janecek
Lives in the Landshuter
Allee district in Munich

Application for an
order to draw up an
air quality action
plan

Freistaat Bayern

to include the measures to be taken
in the short term to ensure
compliance with the limit set by
Community legislation in respect of
ambient air emissions of particulate
matter PM₁₀

1. This reference for a preliminary ruling concerns the interpretation of Article 7(3) of the Directive on ambient air quality assessment and management.
2. The reference has been made in the course of proceedings where Mr Janecek made an application for an order requiring the Freistaat Bayern to draw up an air quality action plan in the Landshuter Allee district in Munich, where the applicant lives.

The plan in question should include the measures to be taken in the short term to ensure compliance with the limit set by Community legislation in respect of ambient air emissions of particulate matter PM₁₀.

If competent administrative authorities fail to take measures...



C-237/07 *Janecek* "preparation of action plans", p 39-42

Natural or legal **persons directly concerned by a risk** that the **limit values or alert thresholds may be exceeded** must be in a position to **require the competent authorities to draw up an action plan where such a risk exists**, if necessary **by bringing an action before the competent courts**.

39 It follows from the foregoing that the natural or legal persons directly concerned by a risk that the limit values or alert thresholds may be exceeded must be in a position to require the competent authorities to draw up an action plan where such a risk exists, if necessary by bringing an action before the competent courts.

40 The fact that those persons may have other courses of action available to them – in particular, the power to require that the competent authorities lay down specific measures to reduce pollution, which, as indicated by the referring court, is provided for under German law – is irrelevant in that regard.

41 Directive 96/62 does not place any restrictions on the measures which may be adopted pursuant to other provisions of national law; moreover, it contains wording that is quite specific with regard to planning for the purposes, as stated in the 12th recital in the preamble to the directive, of protecting the environment 'as a whole', taking account of all the factors to be considered, such as, in particular, the requirements for the operation of industrial installations or travel.

42 The answer to the first question must therefore be that Article 7(3) of Directive 96/62 must be interpreted as meaning that, where there is a risk that the limit values or alert thresholds may be exceeded, persons directly concerned must be in a position to require the competent national authorities to draw up an action plan, even though, under national law, those persons may have other courses of action available to them for requiring those authorities to take measures to combat atmospheric pollution.

If competent administrative authorities fail to take measures...



C-237/07 *Janecek* "preparation of action plans", p 39-42

Natural or legal **persons directly concerned by a risk** that the **limit values or alert thresholds may be exceeded** must be in a position to **require the competent authorities to draw up an action plan where such a risk exists**, if necessary **by bringing an action before the competent courts**.

- ➡ A national court can require the public authority to adopt such a plan.
- ➡ Points to the role of national courts in ordering omitted measures to be adopted.

The CJEU confirmed that a national court can require the public authority to adopt such a plan.

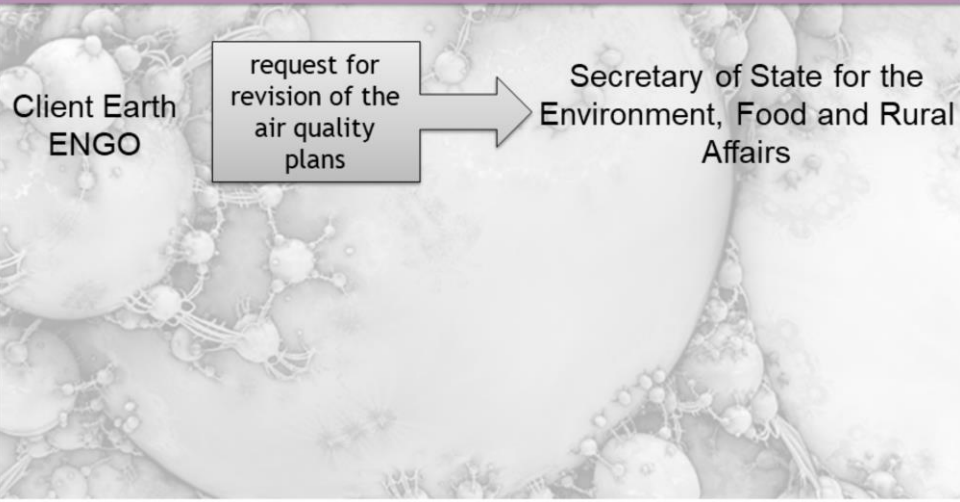
This case therefore points to the role of national courts in ordering omitted measures to be adopted.

In *Janecek* (Case C-237/07 *Janecek*, paragraphs 39-42.), the CJEU considered the failure by a public authority to adopt a legally required air pollution action plan to address a problem of high levels of particulate matter, and confirmed that a national court can require the public authority to adopt such a plan. This case therefore points to the role of national courts in ordering omitted measures to be adopted.

If competent administrative authorities
fail to take measures...



C-404/13 *Client Earth*, p 58 C-237/07 *Janecek*, p 35 - 39



The ENGO ClientEarth, requested for revision of the air quality plans for certain zones and agglomerations.

Janecek (Case C-237/07 *Janecek*, paragraph 46) and *Client Earth* (Case C-404/13 *Client Earth*) and *Altrip* (Case C-72/12 *Altrip*.) all go further, indicating that the role of the national court extends to checking the content of decisions and acts to ensure that they fulfil EU law requirements. As a corollary, effective remedies therefore need to include steps that address content deficiencies, for example an instruction requiring an already adopted air quality action plan to be revised (Case C-379/15 *Association France Nature Environnement*).

If competent administrative authorities
fail to take measures...



C-404/13 *Client Earth*, p 58 C-237/07 *Janecek*, p 35 - 39

Client Earth
ENGO

request for
revision of the
air quality
plans

Secretary of State for the
Environment, Food and Rural
Affairs

Where a **Member State** has failed to comply with the **requirements** [of the directive] and has not applied for a postponement of the deadline, **it is for the national court** having jurisdiction, should a case be brought before it, **to take, with regard to the national authority, any necessary measure**, such as **an order in the appropriate terms**, so that the authority establishes the plan required by the directive in accordance with the conditions laid down by the latter.

Janecek (Case C-237/07 *Janecek*, paragraph 46) and *Client Earth* (Case C-404/13 *Client Earth*) and *Altrip* (Case C-72/12 *Altrip*.) all go further, indicating that the role of the national court extends to checking the content of decisions and acts to ensure that they fulfil EU law requirements. As a corollary, effective remedies therefore need to include steps that address content deficiencies, for example an instruction requiring an already adopted air quality action plan to be revised (Case C-379/15 *Association France Nature Environnement*).

Interim measures - injunctive relief -



Allow a court to order that a contested decision or act not be implemented or that some positive measure be taken before the court delivers its final judgment.

Aim: Avoid harm arising from a decision or act that might ultimately turn out to be unlawful.



A 9 (4) of the Aarhus Convention

Interim measures — referred to as '*injunctive relief*' in Article 9(4) of the Aarhus Convention — allow a court to order that a contested decision or act not be implemented or that some positive measure be taken before the court delivers its final judgment.

The aim is to avoid harm arising from a decision or act that might ultimately turn out to be unlawful.

Interim measures - injunctive relief -



C-416/10 *Križan*



Mr Križan and others

Slovak Environment Inspection
decisions of the administrative authority
authorising the construction and operation
of a landfill site for waste

Must IED+Aarhus convention be interpreted as meaning that members of the public concerned must be able to ask the court to order interim measures of a nature temporarily to suspend the application of a permit within the meaning of Article 4 of that directive pending the final decision?

The *Križan*, - case concerned a permit for a landfill, the CJEU was asked whether the access to justice provisions of what is now the Industrial Emissions Directive, 2010/75/EU, allowed for interim measures (despite not specifically mentioning them).

Must IED+Aarhus convention be interpreted as meaning that **members of the public concerned must be able to ask the court to order interim measures of a nature temporarily to suspend the application of a permit** pending the final decision?

Does the requirement arising generally under the IED for Member States to engage in the prevention and control of pollution by providing the public with fair, equitable and timely administrative or judicial proceedings (...) apply to the possibility for the public to seek the imposition of an administrative or judicial measure which is preliminary in nature in accordance with national law (for example, an order for the judicial suspension of enforcement of an integrated permit) and allows for the temporary suspension, until a final decision in the case, of the construction of an installation for which a permit has been requested?

This request has been made in proceedings between, on the one hand, Mr Križan and 43 other appellants, natural persons, residents of the town of Pezinok, as well as Mesto Pezinok (town of Pezinok), and, on the other, the Slovenská inšpekcia životného prostredia (Slovak Environment Inspection; 'the inšpekcia') concerning the lawfulness of decisions of the administrative authority authorising the construction and operation by Ekologická skládka as ('Ekologická skládka'), the intervener in the main proceedings, of a landfill site for waste.

In *Križan*, which concerned a permit for a landfill, the CJEU was asked whether the access to justice provisions of what is now the Industrial Emissions Directive, 2010/75/EU, allowed for interim measures (despite not specifically mentioning them). It stated that '*the exercise of the right to bring an action provided for by Article 15a of [the then] Directive 96/61/EC would not make possible effective prevention of that pollution if it were impossible to prevent an installation which may have benefited from a permit awarded in infringement of that directive from continuing to function pending a definitive decision on the lawfulness of that permit. It follows that the guarantee of effectiveness of the right to bring an action provided for in that Article 15a requires that the members of the public concerned should have the right to ask the court or competent independent and impartial body to order interim measures such as to prevent that pollution, including, where necessary, by the temporary suspension of the disputed permit*' (Case C-416/10 *Križan*, paragraph 109).

Interim measures - injunctive relief -



C-416/10 *Križan*, p 109

The CJEU:

The **exercise of the right to bring an action (...) would not make possible effective prevention of that pollution if it were impossible to prevent an installation which may have benefited from a permit awarded in infringement of that directive from continuing to function pending a definitive decision on the lawfulness of that permit.**

It follows **that the guarantee of effectiveness of the right to bring an action** provided for, requires that the members of the public concerned should have **the right to ask the court or competent independent and impartial body to order interim measures** such as to prevent that pollution, **including**, where necessary, by **the temporary suspension of the disputed permit**

The court stated that *'the exercise of the right to bring an action provided for by Article 15a of [the then] Directive 96/61/EC would not make possible effective prevention of that pollution if it were impossible to prevent an installation which may have benefited from a permit awarded in infringement of that directive from continuing to function pending a definitive decision on the lawfulness of that permit. It follows that the guarantee of effectiveness of the right to bring an action provided for in that Article 15a requires that the members of the public concerned should have the right to ask the court or competent independent and impartial body to order interim measures such as to prevent that pollution, including, where necessary, by the temporary suspension of the disputed permit'* (Case C-416/10 *Križan*, paragraph 109).

Interim measures - injunctive relief -



C-416/10 *Križan*, p 110

Members of the public concerned must be able, in the context of the action provided for by that provision, to ask the court to order interim measures such as temporarily to suspend the application of a permit.



In the light of the foregoing, the answer to the fourth question is that Article 15a of Directive 96/61 must be interpreted as meaning that members of the public concerned must be able, in the context of the action provided for by that provision, to ask the court or competent independent and impartial body established by law to order interim measures such as temporarily to suspend the application of a permit, within the meaning of Article 4 of that directive, pending the final decision.

In *Križan*, the CJEU also recalled that the possibility of interim measures is a general requirement of the EU legal order. In the absence of EU rules, and in line with the principle of procedural autonomy, it is up to Member States to lay down the detailed conditions for granting interim measures. The CJEU itself has defined criteria for deciding on applications for interim measures where it has jurisdiction itself. Orders it has made, including in the field of EU environmental law, refer to the need for the CJEU to be presented with a *prima facie* case, the urgency of the matter and the balance of interests (See for example *Commission v Malta*, C-76/08 R. Point 21 states that: '*It is settled case-law that the judge hearing an application for interim measures may order interim relief only if it is established that such an order is justified, prima facie, in fact and in law and that it is urgent in so far as, in order to avoid serious and irreparable harm to the applicant's interests, it must be made and produce its effects before a decision is reached in the main action. Where appropriate, the judge hearing such an application must also weigh up the interests involved (see, inter alia, the order in Case C-404/04 P-R Technische Glaswerke Ilmenau v Commission [2005] ECR I-3539, paragraph 10, and the case cited)*'. Point 22 states that '*The conditions thus imposed are cumulative, so that an application for interim measures must be dismissed if one of them is not met (see, inter alia, Technische Glaswerke Ilmenau v Commission, paragraph 11, and the case cited)*'.).