

ERA Workshop for Judges :
National Judges and the Aarhus Acquis - focus on Access to
Justice

Christina Olsen Lundh
Land- and environmental court, Vänersborg
University of Göteborg

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

My local EU-court in Vänersborg:



..the national courts are
acting as Community courts
of general jurisdiction...



Case T-51/89 *Tetra Pak Rausing*, p. 42.

When acting as a Union Court of General Jurisdiction:

A 19 TEU:

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

A 47 Charter of fundamental rights:

Everyone, whose rights and freedoms guaranteed by the law of the Union are violated, has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.



When acting as a Union Court of General Jurisdiction:

A 19 TEU:

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

A 47 Charter of fundamental rights:

Everyone, whose rights and freedoms guaranteed by the law of the Union are violated, has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.



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.



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*.

- 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 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:

National remedies must secure the effectiveness of EU rights

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



Balancing effective judicial protection and national procedural autonomy

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

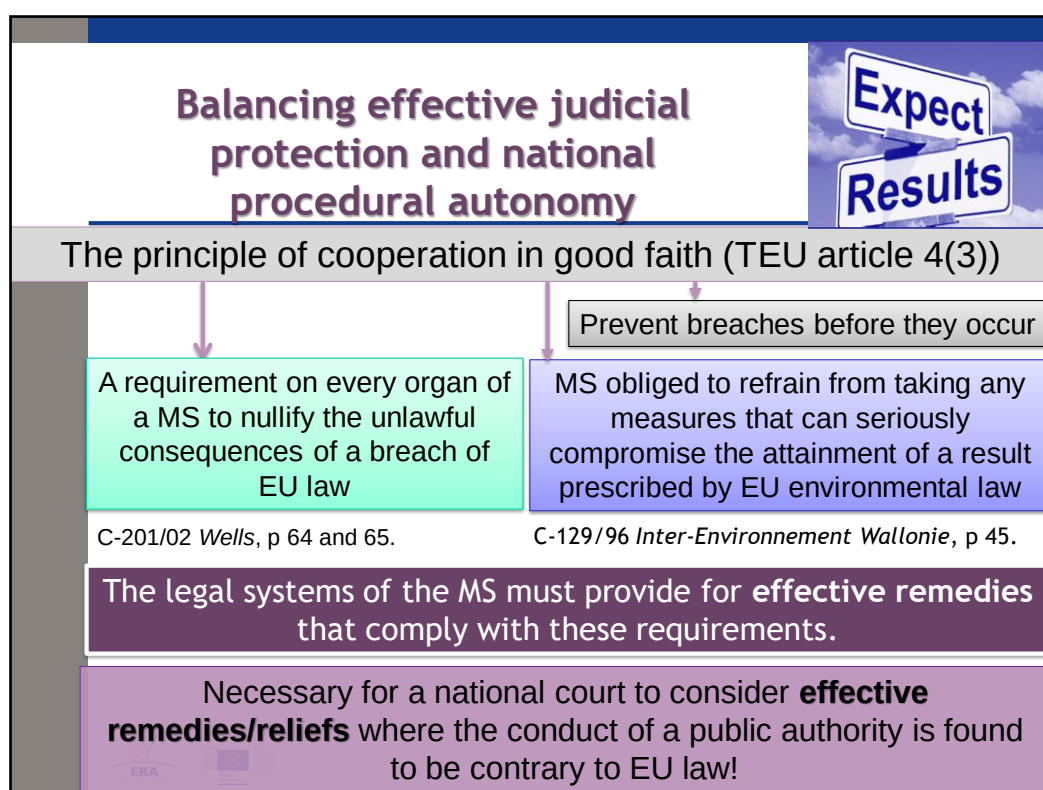


The principle of cooperation in good faith (TEU article 4(3))

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.



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.



European

Treaty

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

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

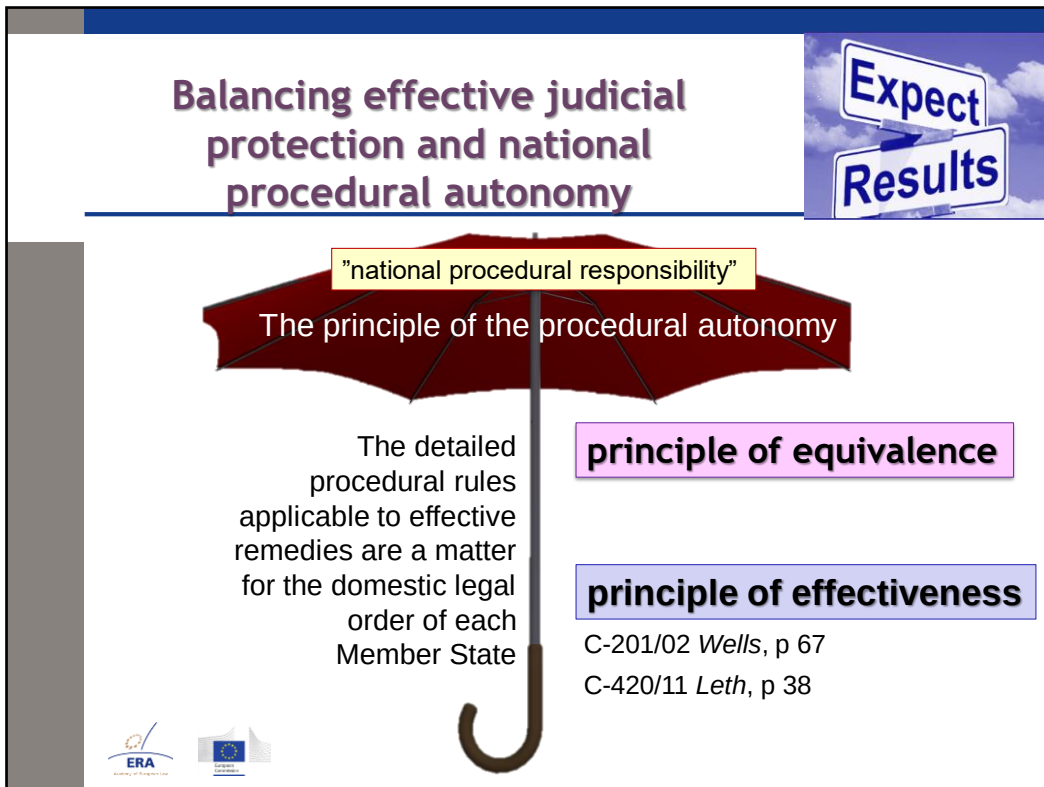
principle of equivalence

Case C-201/02 *Wells* p 67

principle of effectiveness

C-312/93 *Peterbroeck*, p. 12
C-78/98 *Preston and Others*, p. 31

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).



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**)

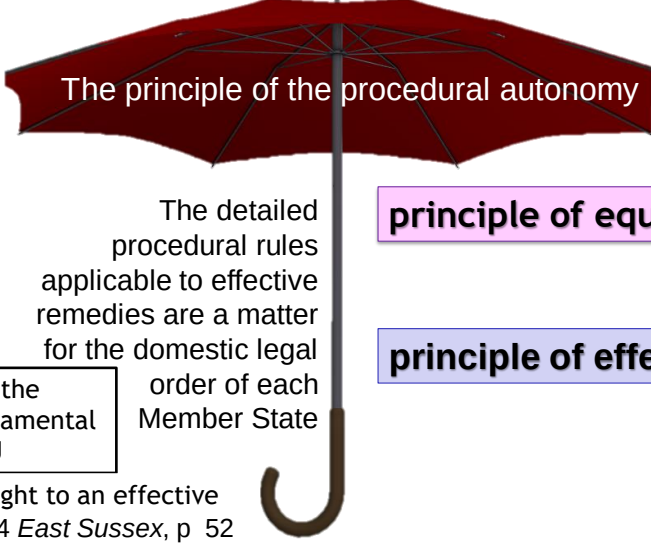


(Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12, and Case C-378/10 *VALE Építési* [2012] ECR, paragraph 48 and the case-law cited).

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 principle of the procedural autonomy

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

Article 47(1) of the Charter of Fundamental Rights of the EU

enshrines the right to an effective remedy C-71/14 *East Sussex*, p 52

principle of equivalence

principle of effectiveness

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.

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?





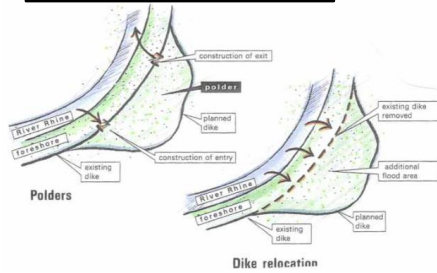
The effects of procedural defects

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)

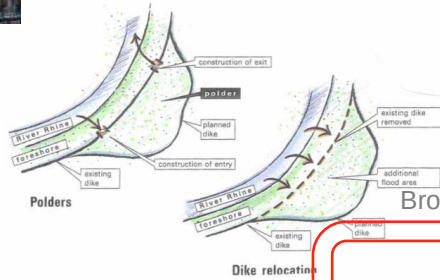
Proceedings concerning a decision
approving plans to construct a flood
retention scheme covering over
320 hectares of a former Rhine
floodplain





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.



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

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.

Article 11 EIA-directive: Member States shall ensure that (...)members of the public concerned (...) have access to a review procedure before a court of law(...) **to challenge the substantive or procedural legality** of decisions...




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:

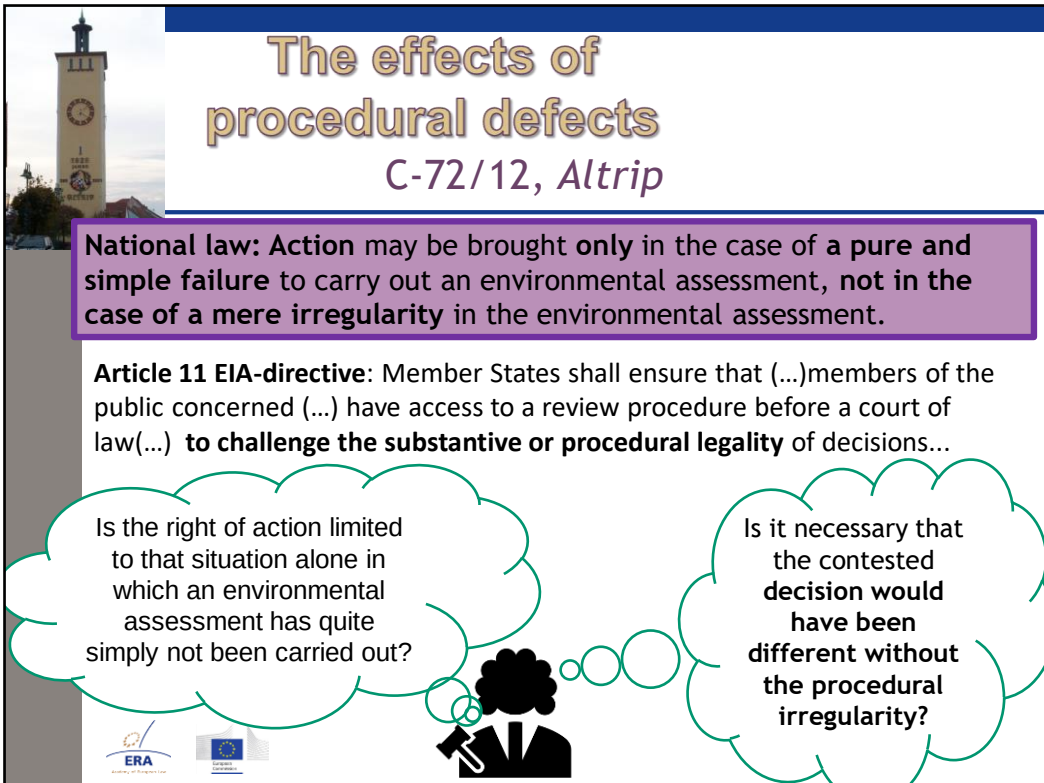
In cases in which, in accordance with subparagraph (b) of the first paragraph of Article 10a of [Directive 85/337], the administrative procedural law of a Member State lays down in principle that access to a judicial review procedure for members of the public concerned is conditional upon maintaining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

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.

Article 11 EIA-directive: Member States shall ensure that (...)members of the public concerned (...) have access to a review procedure before a court of law(...) **to challenge the substantive or procedural legality** of decisions...

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



Is it necessary that the contested decision would have been different without the procedural irregularity?




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 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)* , p 37)



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.**

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 11 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”**





The effects of procedural defects

C-72/12, Altrip

**Article 11 precludes the Member States from
limiting the applicability!**

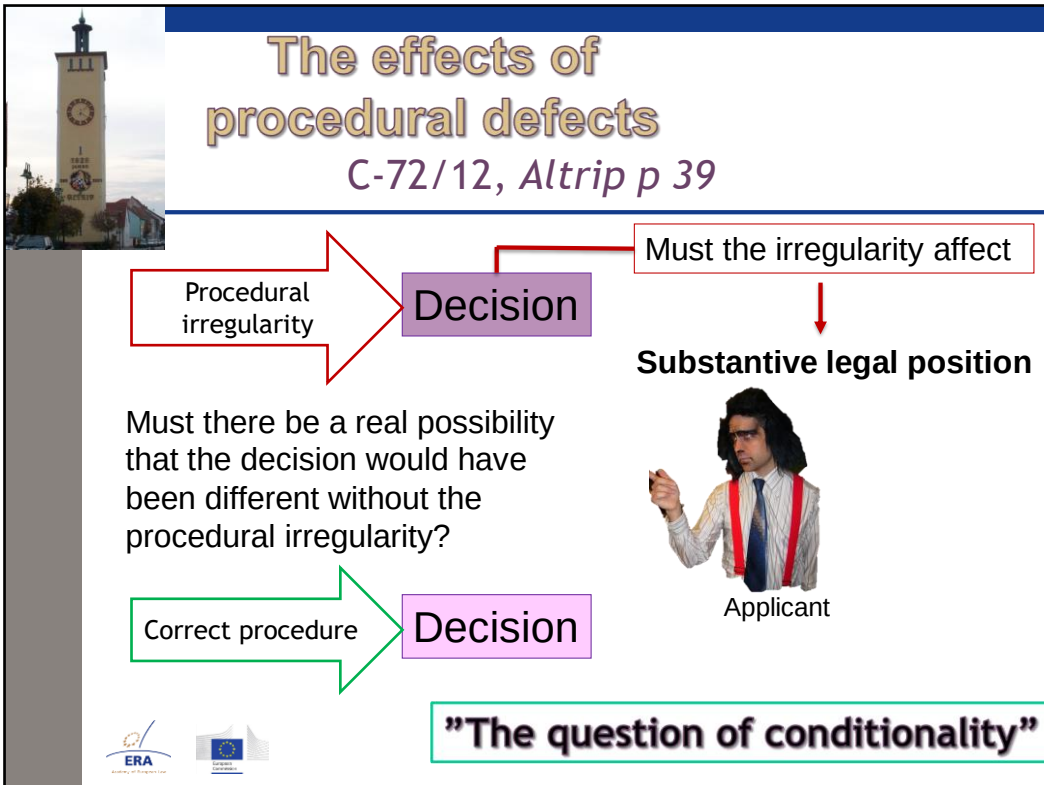
Not only cases where no EIA was carried out

Also cases where EIA 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.



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

Conditions of admissibility:

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

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

ERA
European Rights Advocacy

European Union

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



For the member states to
determine
giving the public concerned

Conditions 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.



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 (Trianel)*, p 43

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).

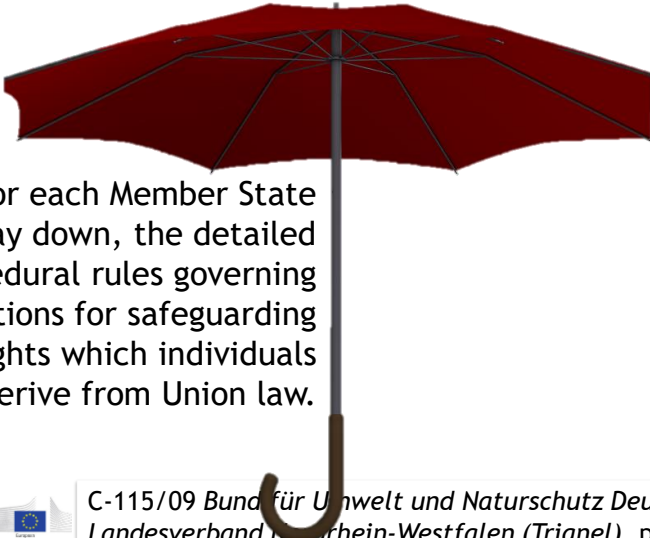
C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen (Trianel Kohlekraftwerk Lünen)*

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



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 (Trianel)*, p 43

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.

principle of equivalence

principle of effectiveness



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

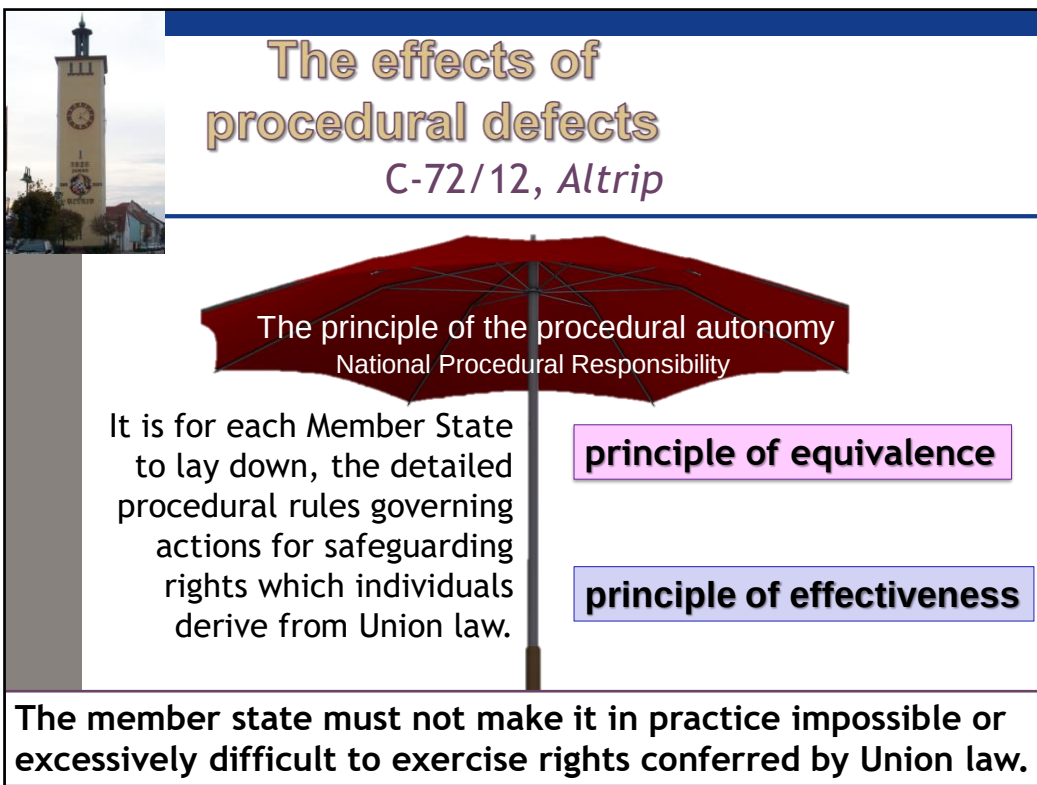
C-72/12, Altrip

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.

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.

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 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

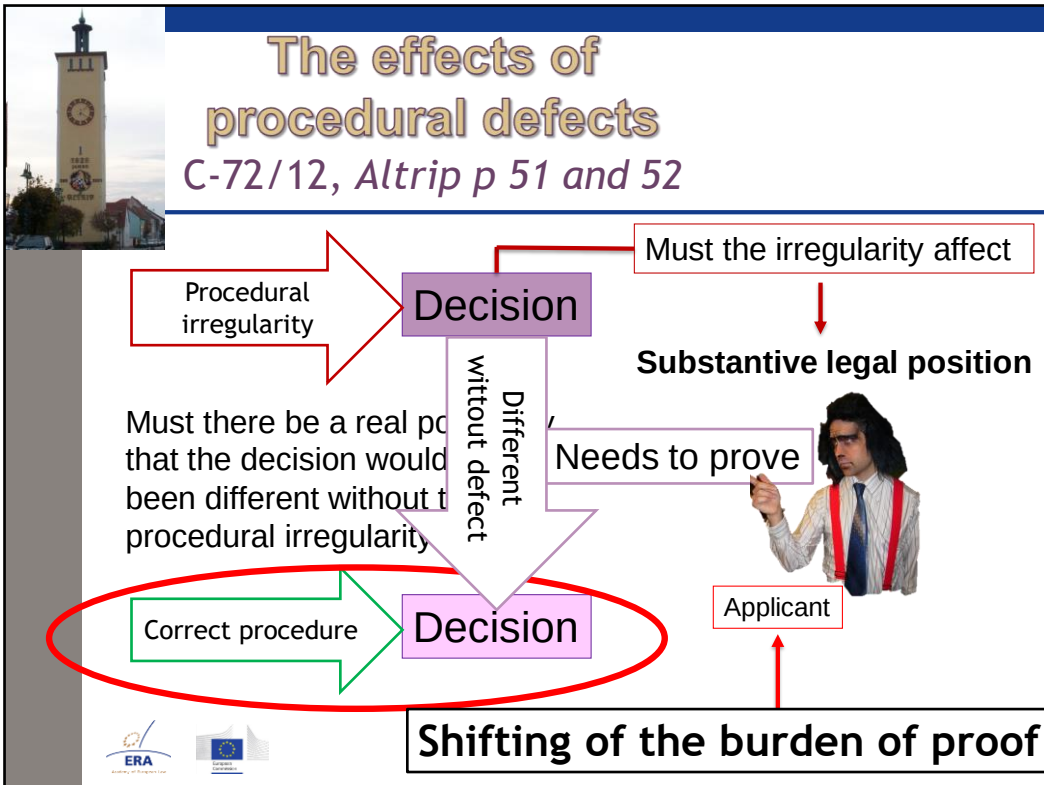
C-72/12, Altrip

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*

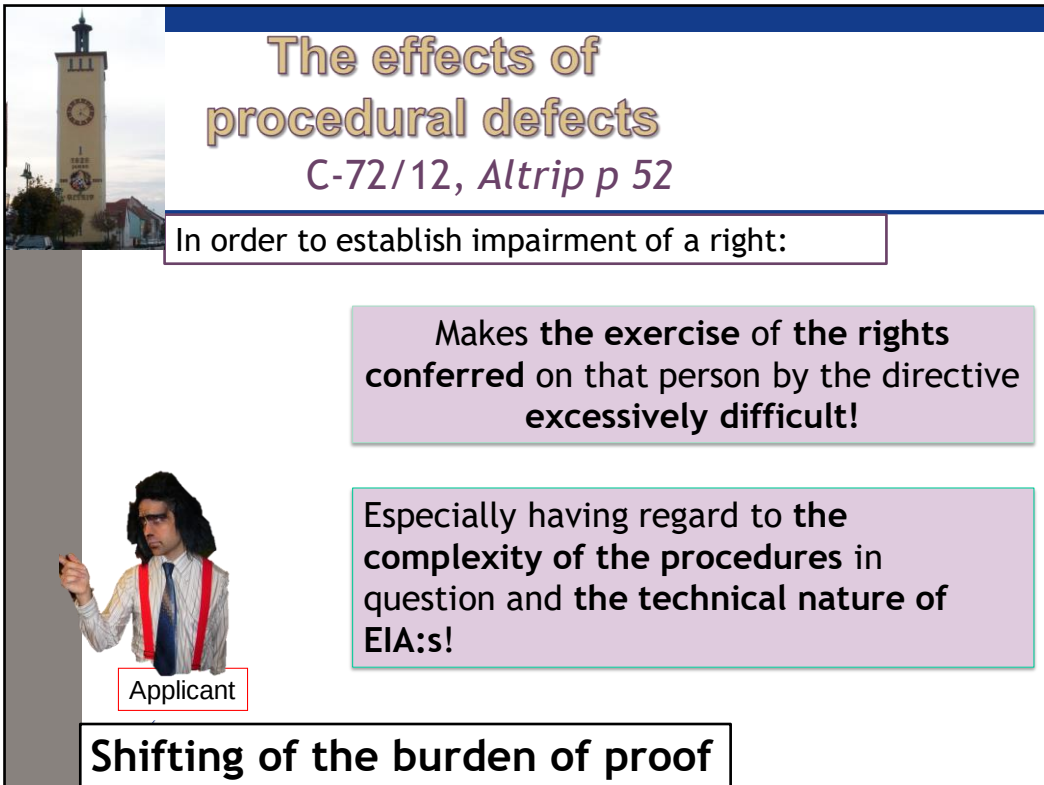
55 It should be noted in that regard that, taken as a whole, Article 10a of Directive 85/337 leaves the Member States a significant discretion both to determine what constitutes impairment of a right and, in particular, to determine the conditions for the admissibility of actions and the bodies before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



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!

Shifting of the burden of proof

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

Article 10a 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**




C-72/12, Altrip

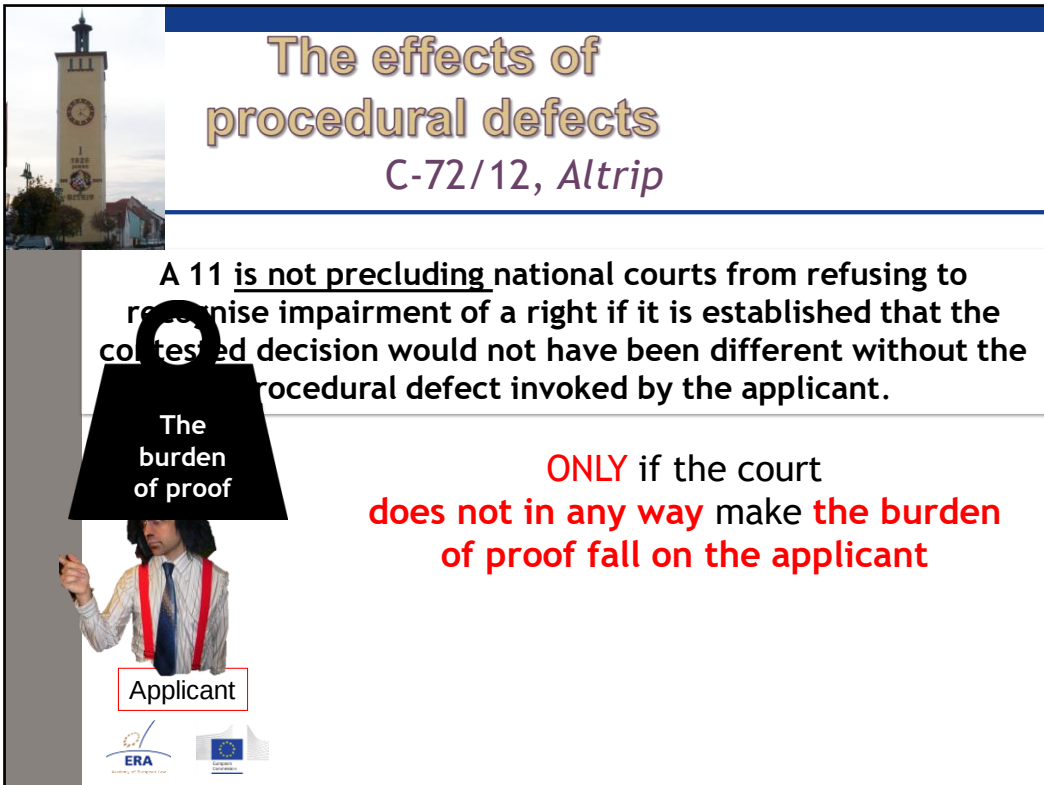
53 Therefore, the new requirements thus arising under Article 10a of that directive mean that impairment of a right cannot be excluded unless, in the light of the condition of causality, the court of law or body covered by that article is in a position to take the view, without in any way making the 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.



The effects of procedural defects

C-72/12, Altrip

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**

The
burden
of proof

Applicant

ERA
European Research Area

European Union

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*

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*

(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)

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)

(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

(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 ?



C-201/02 *Delena Wells*



Consent for mining operations

No EIA!

Revocation
Suspension
Compensation

Steps towards fulfilling the omitted requirement to
undertake 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'.



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.



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.



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.

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.

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*



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!

(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.).

principle of equivalence

principle of effectiveness

C-416/10 *Križan*, p 86



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 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



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 Oberverwaltungsgericht (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 Oberverwaltungsgericht 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

Decision

Approving the construction of a bridge over the Elbe in Dresden

immediately enforceable

Grüne Liga Sachsen eV

Action for annulment

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*

One of the questions:

The bridge 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 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

"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.

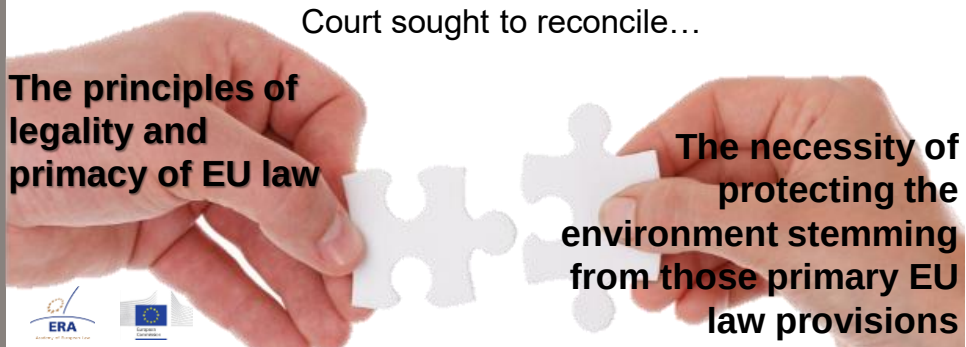
That assessment must enable it to be established whether such risks are likely to materialise if those works continue to be used

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

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

The principles of legality and primacy of EU law

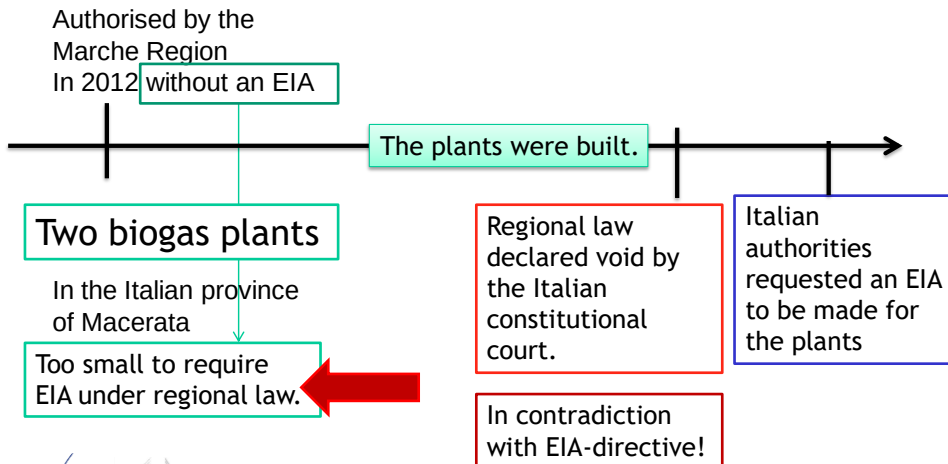
The necessity of protecting the environment stemming from those primary EU law provisions



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.

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



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).

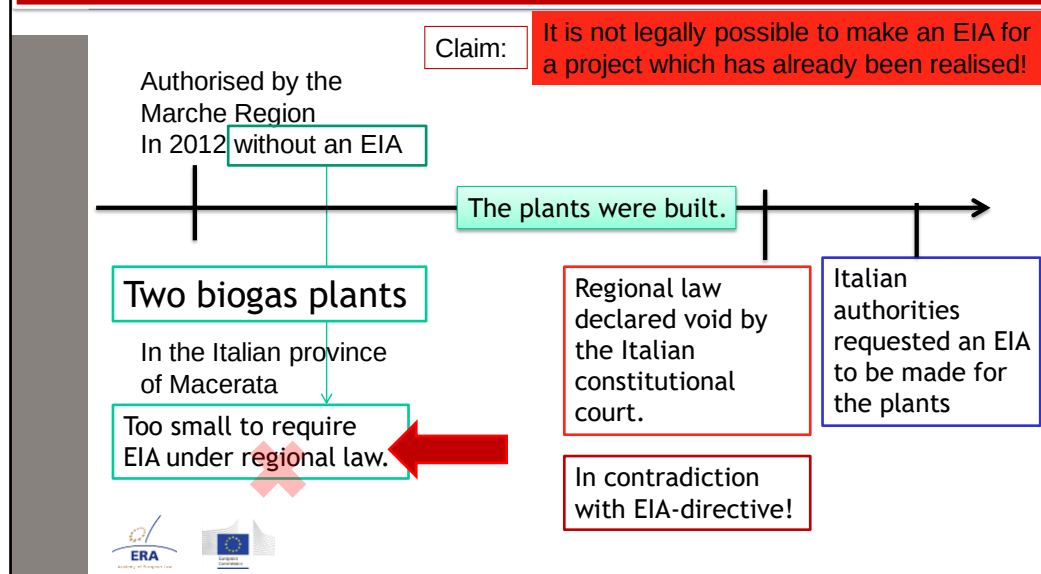
19 By judgment of 22 May 2013 (No 93/2013), the Corte costituzionale (Constitutional Court, Italy), held that the legge Regione Marche No 3/2012 (Law No 3/2012 of the Marche Region), repealing Law No 7/2004 of the Marche Region with effect from 20 April 2012, without, however, amending the criteria for 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.



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*



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!!



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

Under the principle of cooperation in good faith (article 4 TEU) **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*

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*



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).

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).

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 *Francoovich 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 Belgium State* [1960] ECR 559, p. 569, and Joined Cases C-6/90 and C-9/90 *Francoovich 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!

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*

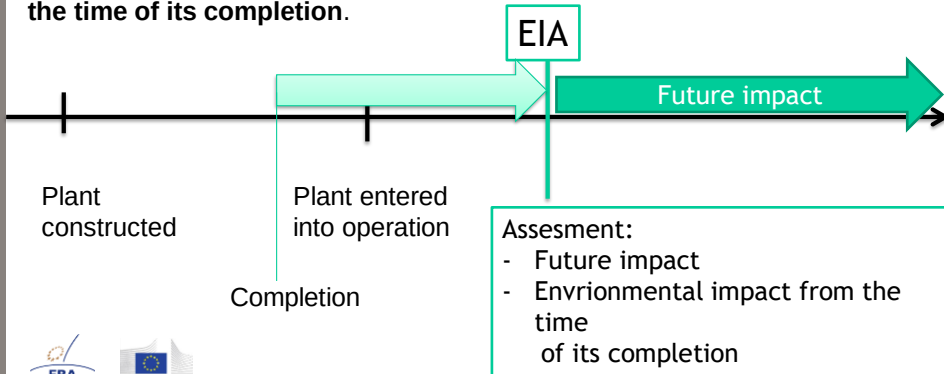
36 EU law does not preclude national legislation which, in certain cases, permits the regularisation of operations or measures which are unlawful in the light of EU law. However, such a possibility is subject to the condition that it does not offer the persons concerned the opportunity to circumvent 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.**



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

It is for the competent authorities to take 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)

"Make good any harm"

C-201/02 *Delena Wells*



(p 69)

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 so agrees, whether it is possible for the latter to claim compensation for the harm suffered



Compare Case C-420/11, *Leth*

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**



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



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.



After Janecek

9 october 2012: Administrative Court, Munich: Enjoined the Land of Bavaria to amend the air quality action plan in such way as to include measures necessary in order for the limit value set for NO₂ to be complied with as soon as possible.

21 June 2016: Administrative Court, Munich, threatened the Land of Bavaria with a financial penalty of EUR 10 000 if it did not comply with that injunction within one year from service of the order.

27 February 2017: Higher Administrative Court of Bavaria threatened the Land of Bavaria with financial penalties in an amount of EUR 2 000 to EUR 4 000 if it did not take the measures necessary to comply with the limit values, including the imposition of traffic bans in respect of certain diesel vehicles in various urban zones



After Janecek

The *Land* of Bavaria did not comply in full with the obligations flowing from the order of 27 February 2017.

26 October 2017: Administrative Court, Munich required the *Land* of Bavaria to pay a financial penalty in the sum of EUR 4 000.

The *Land* of Bavaria did not appeal against that order and paid that sum.

The Land of Bavaria still did not comply in full.

On the contrary: Representatives of the Land of Bavaria, including its Minister-President, **publicly stated their intention not to comply** with the aforementioned obligations relating to the imposition of traffic bans.

C-752/18

16 By order of 21 June 2016, the Verwaltungsgericht München (Administrative Court, Munich) threatened the *Land* of Bavaria with a financial penalty of EUR 10 000 if it did not comply with that injunction within one year from service of the order. In the appeal against that order, the Bayerischer Verwaltungsgerichtshof (Higher Administrative Court of Bavaria, Germany), by order of 27 February 2017, threatened the *Land* of Bavaria with financial penalties in an amount of EUR 2 000 to EUR 4 000 if it did not take the measures necessary to comply with the limit values set by Directive 2008/50, including the imposition of traffic bans in respect of certain diesel vehicles in various urban zones. That order has also become final.

17 Since the *Land* of Bavaria did not comply in full with the obligations flowing from the order of 27 February 2017, the Verwaltungsgericht München (Administrative Court, Munich), upon application of Deutsche Umwelthilfe, required the *Land* of Bavaria, by order of 26 October 2017, to pay a financial penalty in the sum of EUR 4 000. The *Land* of Bavaria did not appeal against that order and paid that sum.

18 Subsequently, the *Land* of Bavaria still did not comply in full with the terms of the injunction granted against it by the order of 27 February 2017. On the contrary, representatives of the *Land* of Bavaria, including its Minister-President, publicly stated their intention not to comply with the aforementioned obligations relating to the imposition of traffic bans.

19 By orders of 28 January 2018, the Verwaltungsgericht München (Administrative Court, Munich), upon application of Deutsche Umwelthilfe, required payment by the *Land* of Bavaria of a financial penalty in the sum of EUR 4 000 because it had failed to comply with a point of the operative part of the order of 27 February 2017, and threatened to impose upon it an additional financial penalty of the same amount if it did not comply, within a fresh period, with another point of the operative part of that order. On the other hand, that court dismissed, in particular, the application for coercive detention of the Minister for the Environment and Consumer Protection of the *Land* of Bavaria or, failing this, of its Minister-President. The *Land* of Bavaria appealed against the orders of 28 January 2018 to the Bayerischer Verwaltungsgerichtshof (Higher Administrative Court of Bavaria), which dismissed the appeals by order of 14 August 2018.

20 However, the appeal lodged by Deutsche Umwelthilfe against the order of 28 January 2018, by which its application for coercive detention was dismissed, is still pending before the Bayerischer Verwaltungsgerichtshof (Higher Administrative Court of Bavaria). According to the referring court, there is no reason to expect that the *Land* of Bavaria will comply with the order of 27 February 2017 by adopting the traffic bans at issue.

After Janecek

28 January 2018: Administrative Court, Munich (upon application of Deutsche Umwelthilfe) required payment by the *Land* of Bavaria of a financial penalty in the sum of EUR 4 000 because it had failed to comply with the order. The court threatened to impose an additional financial penalty if it did not comply.

The court dismissed the application for coercive detention of the Minister for the Environment and Consumer Protection of the *Land* of Bavaria or, failing this, of its Minister-President.

The *Land* of Bavaria appealed against the orders of 28 January 2018 to the Higher Administrative Court of Bavaria, which dismissed the appeals by order of 14 August 2018.

Deutsche Umwelthilfe appealed against the order of 28 January 2018, by which its application for coercive detention was dismissed.

After Janecek

Referring court (Higher Administrative Court of Bavaria):

There is no reason to expect that the *Land* of Bavaria will comply with the order by adopting the traffic bans at issue!

Where the executive demonstrates so clearly its determination not to comply with certain judicial decisions, the view must be taken that the setting and payment of fresh financial penalties, of a higher amount, are not liable to alter that conduct.

The referring court takes the view that, although, in principle, it could be conceivable to ensure compliance with the obligations and judicial decisions at issue by ordering the coercive detention of certain members of the government of Upper Bavaria, the Minister for the Environment and Consumer Protection of the *Land* of Bavaria or the Minister-President of that *Land*, for reasons of constitutional law that instrument is not applicable here.

According to the referring court, there is no reason to expect that the *Land* of Bavaria will comply with the order of 27 February 2017 by adopting the traffic bans at issue. The referring court states that, where the executive demonstrates so clearly its determination not to comply with certain judicial decisions, the view must be taken that the setting and payment of fresh financial penalties, of a higher amount, are not liable to alter that conduct. Indeed, payment of a financial penalty does not result in any economic loss for the *Land* of Bavaria. On the contrary, the financial penalty is paid by entering the amount fixed by the court as a debit item under a given heading of the budget of the *Land* concerned and creating the same amount to its credit fund.

22 The referring court takes the view that, although, in principle, it could be conceivable to ensure compliance with the obligations and judicial decisions at issue by ordering the coercive detention of certain members of the government of Upper Bavaria (Germany), the Minister for the Environment and Consumer Protection of the *Land* of Bavaria or the Minister-President of that *Land*, for reasons of constitutional law that instrument, provided for by the ZPO, is not applicable here.

23 Whilst, under the first sentence of Paragraph 163(1) of the VwGO, the measures provided for in Book 8 of the ZPO, including coercive detention, may be applied save where the VwGO otherwise provides, Paragraph 172 of the VwGO is such a provision that provides otherwise, precluding application of the enforcement measures set out in Book 8 of the ZPO.

24 The referring court acknowledges that the Bundesverfassungsgericht (Federal Constitutional Court, Germany) has previously held that the administrative courts are, in principle, under a duty to take the view, where appropriate, that they are not bound by the restrictions resulting from Paragraph 172 of the VwGO.

25 Nevertheless, according to the referring court, if the coercive detention of office holders involved in the exercise of official authority were ordered on the basis of Paragraph 888 of the ZPO, that would be tantamount to failing to have regard to the requirement, stated by the Bundesverfassungsgericht (Federal Constitutional Court) in its order of 13 October 1970, that the intention of the legislature when it adopted a provision which is used as the legal basis for a deprivation of liberty must have encompassed the objective for the fulfilment of which that provision is now applied. According to the referring court, in the light of the history of Paragraph 888 of the ZPO, the requirement thereby is not met so far as concerns office holders involved in the exercise of official authority.

26 The referring court is nevertheless uncertain whether EU law demands a deeper assessment of the legal situation at issue in the main proceedings.

27 It states that, if the ordering of coercive detention in a situation such as that at issue in the main proceedings is required under EU law, the German courts are not permitted to take account of the obstacle that the aforementioned constitutional case-law represents.

28 In those circumstances, the Bayerischer Verwaltungsgerichtshof (Higher Administrative Court of Bavaria) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

¹Are

- the requirement laid down in the second subparagraph of Article 4(3) TEU, according to which the Member States must take any appropriate measure to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union,
- the principle of effective implementation of EU law by the Member States, which is established in, *inter alia*, Article 19(1) TFEU,
- the right to an effective remedy guaranteed by the first paragraph of Article 47 of the Charter,
- the obligation devolving on the Contracting States to ensure effective remedies in environmental matters, which arises from the first sentence of Article 94(1) of the Aarhus Convention,
- the obligation devolving on the Member States to ensure effective legal protection in the fields covered by EU law, which is established in the second subparagraph of Article 19(1) TEU,

to be interpreted as meaning that a German court is entitled – and possibly even obliged – to impose coercive detention on office holders involved in the exercise of the official authority – of a German Federal *Land* in order thereby to enforce the obligation of that Federal *Land* to update an air quality plan, within the meaning of Article 23 of Directive 2008/50, with specific minimum content if that Federal *Land* has been ordered, by way of a final judgment, to carry out an update having that specific minimum content, and

- the Federal *Land* has been threatened with and subjected to financial penalties on several occasions without success,
- threats of financial penalties and the imposition of financial penalties do not result in a significant persuasive effect even if higher amounts than before are threatened and imposed, for the reason that the payment of penalties does not involve actual losses for the Federal *Land* against which a final judgment has been given, but rather, in this respect, there is merely a transfer of the amount imposed in each case from one accounting item within the *Land*'s budget to another accounting item within the *Land*'s budget,
- the Federal *Land* gains which a final judgment has been given has stated to the courts and publicly – *inter alia* before parliament via its most senior political office holder – that it will not fulfil the judicially imposed obligation in connection with air quality planning,
- while national law does in principle provide for the instrument of coercive detention for the purpose of enforcing judicial decisions, case-law of the national constitutional court precludes the application of the relevant provision to a situation of the nature involved here, and
- for a situation of the nature involved here, national law does not provide for coercive instruments that are more expedient than threats and imposition of financial penalties but are less invasive than detention, and recourse to such coercive instruments does not come into consideration from a substantive point of view either?

Enligt den hänskjutande domstolen kan det inte förväntas att delstaten Bayern följer beslutet av den 27 februari 2017 genom att införa de aktuella trafikförbuden.

21 När den verkställande makten så tydligt visar att den inte har för avsikt att rätta sig efter vissa domstolsbeslut, kan det konstateras att förordnandet och påförandet av nytt vite till ett högre belopp inte kan ändra detta beteende. Betalning av ett vite medför nämligen inte någon förmögenshetsförstärkning för delstaten Bayern. Tvärtom medför betalningen av detta vite utveckling av ett belopp som domstolen fastställt upptar i en bestämd post i den berörda delstatens budget samtidigt som detta belopp krediteras som en inkomst i delstatens centrala kassaförvaltning.

22 Även om det i princip skulle kunna vara möjligt att säkerställa fullgörandet av de aktuella rättsliga skyldigheterna och domstolsbesluten genom att förordna om frihetsberövande mot vissa medlemmar av distriktet Oberbayerns (Tyskland) regering, delstaten Bayerns minister för miljö och konsumentskydd samt delstatens ministerpresident, anser den hänskjutande domstolen att detta instrument, som föreskrivs i ZPO, av konstitutionelltillsägga skäl inte är tillämpligt i förevarande fall.

23 Även om det enligt 167 § punkt 1 första meningen VwGO är möjligt att, om inte annat föreskrivs i denna lag, tillämpa åtgärder som föreskrivs i Brotecksboken ZPO, däribland frihetsberövande, utgör nämligen 172 § VwGO en sådan annan föreskrift: lag som utesluter tillämpningen av de verkställighetsåtgärder som anges i Brotecksboken ZPO.

24 Bundesverfassungsgericht (Föderal författingsdomstolen, Tyskland) har visserligen redan slagit fast att de administrativa domstolarna i princip har en skyldighet att i förekommande fall anse att de inte är bundna av de inskränkningar som följer av 172 § VwGO.

25 Den hänskjutande domstolen anser att ett förordnande om frihetsberövande mot vissa innehavare av ämbeten som innebär utövande av offentlig makt på grundval av 888 § ZPO emellertid skulle innebära ett åsidosättande av det krav som fastställts av Bundesverfassungsgericht (Föderala författingsdomstolen) dess beslut av den 13 oktober 1970. Enligt detta krav skulle lagstiftarens avsikt att påbjudas av en bestämmelse som utgör rättslig grund för ett frihetsberövande ha omfattats det syfte för vilket bestämmelsen numera tillämpas. Enligt den hänskjutande domstolen är ovan angivna krav, med hänsyn till bakgrunden till 888 § ZPO, inte uppfyllt med avseende på innehavare av ett ämbete som innebär utövande av offentlig makt.

26 Den hänskjutande domstolen vill emellertid förklara att inte unionsrätten kräver en annan bedömning än den rättsliga situationen i det nationella målet.

27 Om det enligt unionsrätten är nödvändigt att förordna om frihetsberövande i en sådan situation som den i det nationella målet, har de tyska domstolarna nämligen inte rätt att beakta det hinder som ovan nämnda konstitutionella rättspraxis utgör.

28 Mot denna bakgrund beslutade Bayerischer Verwaltungsgerichtshof (Bayerns förvaltningsöverdomstol) att vilande förklara målet och ställa följande fråga till EU-domstolen.

^{28a}

- den i artikel 4.3 andra stycket i fördraget om Europeiska unionen (FEU) förankrade principen enligt vilken medlemsstaterna ska vidta alla lämpliga åtgärder för att säkerställa att de skyldigheter fullgörs som följer av fördragen eller av akter som antagits av unionens institutioner,
- principen om medlemsstaternas faktiska genomförande av unionsrätten, som bland annat stadgas i artikel 197.1 i fördraget om Europeiska unionens funktionsätt (FEUF),
- rätten till ett effektivt rättsmedel, som säkerställs genom artikel 47 i fördraget om Europeiska unionens funktionsätt (FEUF),
- den skyldighet för de fördragsstaterna att erbjuda effektiva rättsmedel på miljöområdet, vilket följer av artikel 9.4 i första meningen i Århuskonventionen, och
- medlemsstaternas skyldighet enligt artikel 19.1 i andra stycket FEU att säkerställa ett effektivt domstolskydd inom de områden som omfattas av unionsrätten,

taklas på så sätt, att en viss domstol har rätt att – och eventuellt till och med är skyldig att – besluta om frihetsberövande av personer som innehar ett ämbete som innebär utövande av offentlig makt i en ... delstat för att på så sätt genomdriva denna delstats skyldighet att uppdatera en luftkvalitetsplan, i den mening som avses i artikel 23 i direktiv 2008/50, med ett bestämt minsta innehåll, om denna delstat genom en lagkraftvunnen dom har dömts att göra en uppdatering med detta minsta innehåll, och

- vite vid flera tillfällen har förordnats om och verkställs gentemot delstaten, utan resultat,
- förordnande och fastställande av vite inte heller har haft någon nämnvärd effekt trots att det har fastställts till högre belopp än tidigare, eftersom delstaten, som dömts genom en lagkraftvunnen dom, inte gör någon ekonomisk förutsevärt betalas, utan det fastställda beloppet endast överförs från en bokföringspost till en annan i delstatens budget,
- delstaten som har dömts genom en lagkraftvunnen dom formellt har förklarat både för domstolarna och offentlig att den inte kommer att fullgöra de skyldigheter som har ålagts av domstol i samband med luftkvalitetsplanen – och detta inför parlamentet bland annat genom innehavaren av delstatens högsta politiska ämbete,
- institutet frihetsberövande för verkställighet av domstolsavgöranden i princip försvärs i den nationella lagstiftningen, men en nationell konstitutionell praxis utgör hinder för tillämpning av den relevanta bestämmelsen i en situation som den aktuella, och
- den nationella lagstiftningen, för en situation som den aktuella, inte föreskriver tvångsåtgärder som är mer verkingsfulla än förordnande om och fastställande av vite, men mindre ingripande än frihetsberövande, och sådana tvångsåtgärder inte heller är materiellt möjliga?²⁸

After Janecek

Referring court (Higher Administrative Court of Bavaria):

if the ordering of coercive detention in a situation such as that at issue in the main proceedings is required under EU law, the German courts are not permitted to take account of the obstacle that the aforementioned constitutional case-law represents.



After Janecek

Referring court (Higher Administrative Court of Bavaria):

Is a German court entitled — and even obliged — to impose coercive detention on office holders involved in the exercise of the official authority ... of a German Federal *Land* in order thereby to enforce the obligation of that Federal *Land* to update an air quality plan, with specific minimum content if that Federal *Land* has been ordered to carry out an update having that specific minimum content and

- the Federal *Land* has been threatened with and subjected to financial penalties on several occasions without success,
- threats of financial penalties and the imposition of financial penalties do not result in a significant persuasive effect,
- the Federal *Land* has stated to the courts and publicly that it will not fulfil the judicially imposed obligations in connection with air quality planning,
- while national law does in principle provide for the instrument of coercive detention for the purpose of enforcing judicial decisions, case-law of the national constitutional court precludes the application of the relevant provision to a situation of the nature involved here, and
- for a situation of the nature involved here, national law does not provide for coercive instruments that are more expedient than threats and imposition of financial penalties but are less invasive than detention, and recourse to such coercive instruments does not come into consideration from a substantive point of view either?

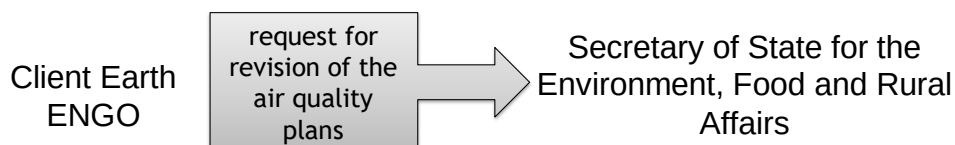
Case C-752/18, *Deutsche Umwelthilfe eV*

EU law, in particular the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that, in circumstances in which a national authority persistently refuses to comply with a judicial decision enjoining it to perform a clear, precise and unconditional obligation flowing from EU law, in particular from Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, it is incumbent upon the national court having jurisdiction to order the coercive detention of office holders involved in the exercise of official authority where provisions of domestic law contain a legal basis for ordering such detention which is sufficiently accessible, precise and foreseeable in its application and provided that the limitation on the right to liberty, guaranteed by Article 6 of the Charter of Fundamental Rights, that would result from so ordering complies with the other conditions laid down in that regard in Article 52(1) of the Charter. On the other hand, if there is no such legal basis in domestic law, EU law does not empower that court to have recourse to such a measure.



If competent administrative authorities fail to take measures...

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



Where a **Member State** has failed to comply with the **requirements** of the directive, it is for the **national court**, 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.



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 - 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?

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.



National procedural responsibility

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

In the absence of [Union] rules it is for the domestic systems of each Member State to designate the courts having jurisdiction and the procedural conditions governing actions at law intended to ensure the protection of the rights which subjects derive from the direct effects of [Union] law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature nor render virtually impossible or excessively difficult the exercise of rights conferred by [Union law]

The principle of national procedural autonomy



The principle of non-discrimination

The principle of effectiveness
(The remedy must be effective)

Effective remedies (reliefs)



There is a general requirement on every body of a Member State to nullify the unlawful consequences of a breach of EU environmental law. Member States must also refrain from taking any measures that can seriously compromise the attainment of a result prescribed by EU environmental law. Member States have discretion with regard to effective remedies, provided that they comply with the principles of equivalence and effectiveness.

The effects of procedural defects

C-72/12, Altrip



Minor procedural defects do not require remedies, provided it can be established (without placing any burden on the applicant for judicial review) that they did not impact on the contested decision.



”Make good any harm”

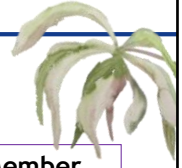
C-201/02 *Wells*, p 64 and 65; C-215/06 *Commission v Ireland*, p 59; and, C-41/11 *Inter-Environnement Wallonie and Terre wallonne*, p 42, 43 and 46



National courts must consider taking general or particular measures to address a lack of compliance with EU environmental law. These may need to include the suspension, revocation or annulment of unlawful decisions or acts, and the disapplication of legislation and regulatory acts.



"Make good any harm"



Under the principle of cooperation in good faith (article 4 TEU) **Member States are required to nullify the unlawful consequences of that breach of EU law.**

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!**



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

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*



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

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**.

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



Interim measures

C-416/10 Krížan



A national court dealing with a dispute governed by EU environmental law must be in a position to order interim measures.



Thank you!



Epidalea calamita

Natterjack toad
Kreuzkröte