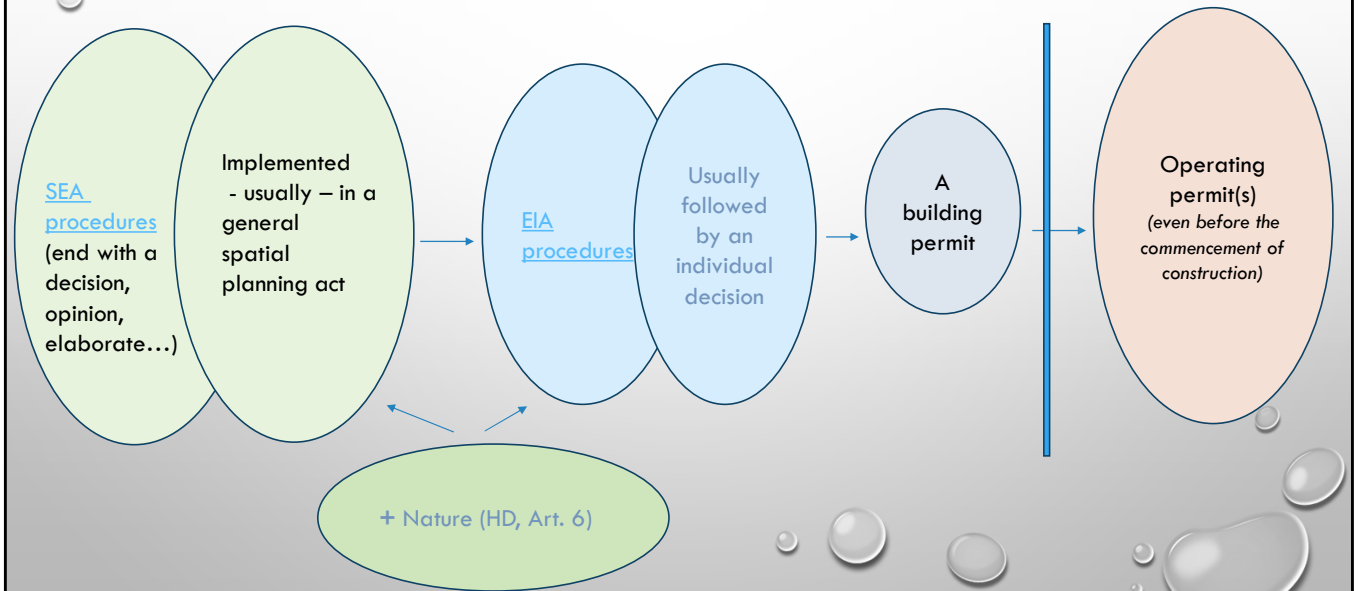


The background of the slide is a light gray gradient with several realistic water droplets of various sizes scattered across it, primarily concentrated in the top and right areas.

SCOPE OF JUDICIAL CONTROL UNDER **SEA** AND **EIA** PROCEDURE

Rajko Knez

A ROUGH LOOK AT THE PROCESS



- This varies from MS to MS.
- Due to the national procedural autonomy every MS regulates access to court and the procedure differently.
- There is an initial SEA procedure that assesses the who scope of a plan of a MS.
- Then the individual EIAs for the projects follow.

ABOUT JUDICIAL CONTROL

- Why is judicial control important... how effective can the courts/judges be?
- Partially up to the Member states... SEA and EIA are “*procedural in their nature*”
- Guidance by the EU (above all ECJ & Commission) and also by Aarhus c.
 - Timely factor (when...)
 - Regarding the system of planning (fit into the puzzles, strategic in nature)
 - Content-based (how can it be exercised)

Unlike the EIA Directive, the SEA Directive does not provide for a review procedure before a court or another independent impartial body to challenge the substantive or procedural legality of decisions, acts or omissions subject to public participation provisions of the SEA Directive. However, based on the case law, procedural rights serve the purpose of ensuring the effective implementation of EU environmental law.¹⁵ The CJEU observed in *Kraaijeveld and Others* that procedural rights serve the purpose of ensuring the effective implementation of EU environmental law: 'In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts'.¹⁶

JUDICIAL CONTROL IS NECESSARY FOR BOTH DIRECTIVES

¹⁶ *Kraaijeveld and Others*, C-72/95, EU:C:1996:404, paragraph 56.

⁵⁶ As regards the right of an individual to invoke a directive and of the national court to take it into consideration, the Court has already held that it would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts, and if the latter were prevented from taking it into consideration as an element of Community law in order to rule whether the national legislature, in exercising the choice open to it as to the form and methods for implementation, has kept within the limits of its discretion set out in the directive (*Verbond van Nederlandse Ondernemingen*, paragraphs 22 to 24).

WHEN AND WHY?

- At the end of the procedures (like when the building permit is attacked by the action of annulment) or step by step?
- Planning phase:
 - is strategic in nature;
 - is very much interdisciplinary;
 - it also includes highly expert (scientific) questions (like certain aspects of nature conservation, certain (dangerous) industries or materials);
 - is about considering different options, and variants;
 - is executing different policies (like approaches to farming land (land-sharing vs. land-sparing), go-to areas, national energy policy, traffic networks, etc.);
 - it is not about one building plot, not about only one building permit... now and in the future;
 - sometimes, it is not about building and constructions at all.

EU IS RATHER CLEAR

- when all possibilities (for strategic choices) are still open
- [C-671/16, Inter-Environnement Bruxelles ASBL](#)

62 It should be borne in mind that the fundamental objective of the SEA Directive is to ensure that 'plans and programmes' which are likely to have significant effects on the environment are subject to an environmental assessment when they are prepared and prior to their adoption (see, to that effect, judgment of 28 February 2012, *Inter-Environnement Wallonie and Terre wallonne*, C-41/11, EU:C:2012:103, paragraph 40 and the case-law cited).

63 In that regard, it is apparent from Article 6(2) of that directive that the environmental assessment is supposed to be carried out as soon as possible so that its conclusions may still have an influence on any potential decision-making. Indeed, it is at that stage that the various alternatives may be analysed and strategic choices may be made.

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 25 January 2018¹

Case C-160/17

Raoul Thybaut,
Johnny De Coster,
Frédéric Romain

v

Région wallonne,
Intervening parties:
Commune d'Orp-Jauche,
Bodymat SA

39. Secondly, the environmental assessment should be carried out at the earliest possible stage so that the results of that assessment are still capable of influencing any decisions. This objective is laid down not only in Article 6(2) of the SEA Directive, but also in Articles 8(1) and 9(2) of the Kiev Protocol,¹³ in the seventh recital and Article 3(1) of the Espoo Convention,¹⁴ in Article 6(4) of the Aarhus Convention¹⁵ and in recital 2 of the EIA Directive.¹⁶

62 In that regard, as the Advocate General stated in point 39 of her Opinion, it is clear from Article 6(2) of the SEA Directive that the environmental assessment should be carried out at the earliest possible stage so that the results of that assessment are still capable of influencing any decisions. It is indeed at that stage that the various elements of an alternative may be analysed and strategic choices made.

Case C-41/11, Inter-Environnement Wallonie

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).

47 The fundamental objective of Directive 2001/42 would be disregarded if national courts did not adopt in such actions brought before them, and subject to the limits of procedural autonomy, the measures, provided for by their national law, that are appropriate for preventing such a plan or programme, including projects to be realised under that programme, from being implemented in the absence of an environmental assessment.

HOW (1)

Commission Notice on access to justice in environmental matters

(2017/C 275/01)

3. SCOPE OF JUDICIAL REVIEW

3.1. Introduction

The scope of judicial review determines how national judges will assess the legality of contested decisions, acts and omissions. It has two aspects. The first concerns the possible grounds of judicial review, i.e. the areas of law and legal arguments that may be raised. The second concerns the intensity of scrutiny (or the standard of review).

JUDICIAL REVIEW – HOW (1)

- *locus standi* (national procedural rules influenced by Aarhus Convention – Art. 9/2 and 9/3)
- We shall understand “interplay of the interests”

State (or local) authorities

(taking care of the public interests, but resolving trumps with private interests)

Nature and Environment

Their conservation/protection is of public interests.

As “*alter ego*” these interests are represented by NGOs

(Private) Investors, capital, economy, etc.

(pursuing private interests)

Public

- individuals - public in general
- public concerned – (likely to be) affected

Also objections that were not raised in the administrative proceedings (if it is not an abuse) – C-137/14, Comm. v. Germany (par. 80)

JUDICIAL REVIEW – HOW (2)

- Intensity – scrutiny standards

- Aarhus c.: effective judicial review (Art. 9/2, 9/3)... *SEU draws demands (also) from Aarhus c.*
- ECJ: minimum requirements
 - [C-71/14 East Sussex](#): access to the env. information without proving an interest
 - Aarhus con. (Art. 9): procedural and substantive requirements
 - **Procedural**: wrong competences, inadequate public consultations, excessively diff. to exercise rights, examination of facts...
 - **Substantive (N.B. wide discretion of admin. authorities)**: wrong facts, misinterpretations, flaws, vitiated defects, whether national programs contained appropriate and coherent policies and measures capable of reaching the goals (C-165 to C-167/09), whether a measure can harm the implementation of (another) EU env. goal, ...
 - EU law shall be applied *ex officio* (even if the parties are silent about it)

JUDICIAL REVIEW – HOW (3)

- Substantive requirements for HD (Natura 2000) are (much) stricter (C-127/02, Waddenzee, paragraph 59):

⁵⁹ Therefore, pursuant to Article 6(3) of the Habitats Directive, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned, in the light of the site's conservation objectives, are to authorise such activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects (see, by analogy, Case C-236/01 *Monsanto Agricoltura Italia and Others* [2003] ECR I-8105, paragraphs 106 and 113).

i.e. The competent public authorities may only authorise an activity in a protected Natura 2000 site where, taking into account the conclusions of (1) an appropriate assessment, (2a) no reasonable scientific doubt remains that, in the light of the site's conservation objectives, the (2b) activity will not adversely affect the integrity of the site. This means that, when called upon to review a decision authorising such an activity, the national judge has to determine whether or not the scientific evidence relied upon by the public authority leaves no reasonable doubt.

JUDICIAL REVIEW – HOW (4)

- Legislative and regulatory acts:

- not within the scope of Aarhus Convention, but... ECJ in [Boxus et al \(C-128/09 to C-131/09, C-134/09 and C-135/09\)](#)

53 However, Article 9 of the Aarhus Convention and Article 10a of Directive 85/337 would lose all effectiveness if the mere fact that a project is adopted by a legislative act which does not fulfil the conditions set out in paragraph 37 of the present judgment were to make it immune to any review procedure for challenging its substantive or procedural legality within the meaning of those provisions.

- 42 In the absence of provisions in that directive on the consequences of infringing the procedural provisions which it lays down, it is for the Member States to take, within the sphere of their competence, all the general or particular measures necessary to ensure that all 'plans' or 'programmes' likely to have 'significant environmental effects' within the meaning of Directive 2001/42 are subject to an environmental assessment prior to their adoption in accordance with the procedural requirements and the criteria laid down by that directive (see, by analogy, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 61; Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 70; and Case C-201/02 *Wells* [2004] ECR I-723, paragraph 65).
- 43 It is clear from settled case-law that, under the principle of cooperation in good faith laid down in Article 4(3) TEU, Member States are required to nullify the unlawful consequences of a breach of European Union law (see, inter alia, Case 6/60 *Humblet v Belgian State* [1960] ECR 559, p. 569, and Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 36). Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned (Case C-8/88 *Germany v Commission* [1990] ECR I-2321, paragraph 13, and *Wells*, paragraph 64 and the case-law cited).
- 44 It follows that where a 'plan' or 'programme' should, prior to its adoption, have been subject to an assessment of its environmental effects in accordance with the requirements of Directive 2001/42, the competent authorities are obliged to take all general or particular measures for remedying the failure to carry out such an assessment (see, by analogy, *Wells*, paragraph 68).
- 45 National courts before which an action against such a national measure has been brought are also under such an obligation, and, in that regard, it should be recalled that the detailed procedural rules applicable to such actions which may be brought against such 'plans' or 'programmes' are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (principle of effectiveness) (see *Wells*, paragraph 67 and the case-law cited).
- 46 Consequently, courts before which actions are brought in that regard must adopt, on the basis of their national law, measures to suspend or annul the 'plan' or 'programme' adopted in breach of the obligation to carry out an environmental assessment (see, by analogy, *Wells*, paragraph 65).
- 47 The fundamental objective of Directive 2001/42 would be disregarded if national courts did not adopt in such actions brought before them, and subject to the limits of procedural autonomy, the measures, provided for by their national law, that are appropriate for preventing such a plan or programme, including projects to be realised under that programme, from being implemented in the absence of an environmental assessment.

Case C-41/11, *Inter-Environnement Wallonie*, par. 42 to 47.

Ergo: general acts are to be adjudicated similarly, as individual acts.

See also:
Case C-348/15 *Stadt Wiener Neustadt*, par. 47 and 48.

JUDICIAL REVIEW – HOW (5)

- Effective remedies:

- deterrent effect, i.e.: courts shall not compromise the attainment of the EU env. objectives
- national procedural autonomy: remedies that are known to national legal order, including “injunction reliefs”
- de minimis rule - *de minimis non curat praetor*... possible
- annulment as a general rule, but can also be suspension, omissions... closely connected with the regularisation ([C-215/06, Commission v Ireland](#))

[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.

- instructions... *volle gerichtliche Überprüfung, recours de pleine juridiction*... EU is not demanding
- making good unlawful harm... also for the environment as such (C-399/14 *Grüne Liga Sachsen*)

TO CONCLUDE

Judicial review is – although basically subject to *national procedural autonomy* – **(heavily) influenced** by ex-office application of demands by EU law, ECJ and Aarhus Convention

- access to information
- access to the courts (*locus standi*)
- procedural scrutiny / substantive scrutiny... being stricter for nature conservation
- effectiveness of remedies

i.e. *courts are the last to speak... ex tunc* can also be a burden. It is also from this perspective adjudicating better for every single stage of spatial planning procedures