

ERA Workshop for Judges:

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

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- Ex post assessment of an EIA project
- Scope of the Judicial Control
- Quality control



This lecture covers what might happen *after* the EIA is supposed to have taken place.

First it will cover ex-post assessment, which, does not really exist under the directive and which actually is contrary to the fundamental idea to assess projects **before** they take place. But somehow it exists anyway. We will discuss that.

Then, I will talk about the judicial control and lastly; a few words on quality control.

Note, that when case law is referenced, it often mentions article 10a – this the present article 11.

Ex -post assessment

EU countries failing to address the environmental impacts of a project...
Can they regularise it after it has been built?

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



Ex post-assessment might be relevant if a member state fails to address the environmental impacts of a project **before** consent is given.

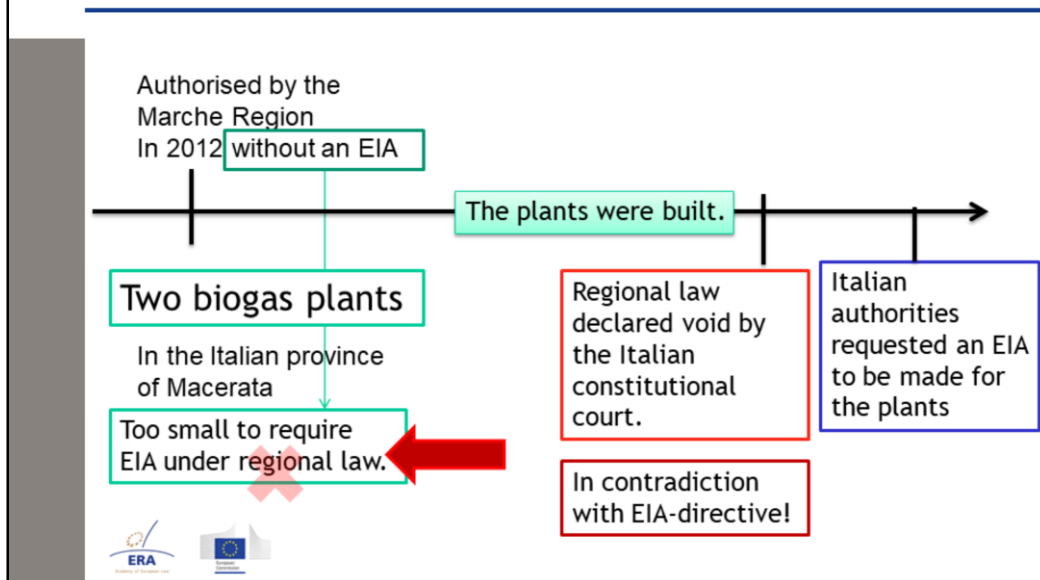
See Article 2 (1):

*1. Member States shall adopt all measures necessary to ensure that, **before** development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects on the environment. Those projects are defined in Article 4.*

The big question is; can a project be regularised after it has been built?

We will take a closer look at case 196 and 197/16

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



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

The plants were eventually built.

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

Case C-196/16

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

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

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

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

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

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

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

Case C-197/16

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

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

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

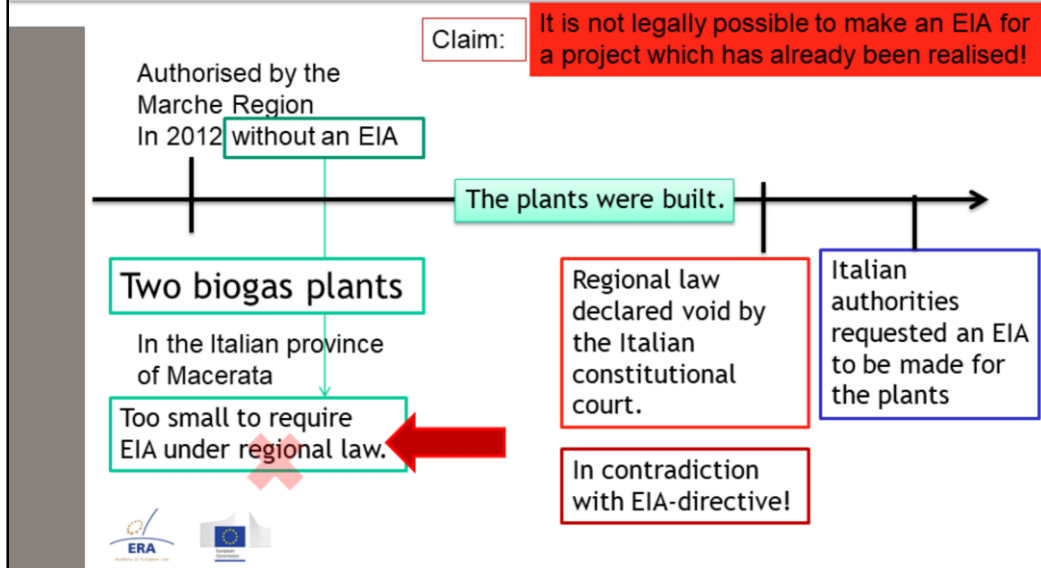
19 By judgment of 22 May 2013 (No 93/2013), the Corte costituzionale (Constitutional Court, Italy), held that the legge Regione Marche No 3/2012 (Law No 3/2012 of the Marche Region), repealing Law No 7/2004 of the Marche Region with effect from 20 April 2012, without, however, amending the criteria for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

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

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

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

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



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

Case C-196/16

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

Case C-197/16

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

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

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

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

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

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

EUCJ

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

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



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

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

The question:

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

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

C 196/16 and C-197/16 *Comune di Corridonia* Considerations of the EUCJ

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

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

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

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

Prevention rather than reparation!!



The court explained this in the following way.

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

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

C-201/02, *Wells*

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

C-215/06 *Commission v Ireland*

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

C 196/16 and C-197/16 *Comune di Corridonia*
Considerations of the EUCJ

Prevention rather than reparation!

However



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



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

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

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

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

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

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

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

C 196/16 and C-197/16 *Comune di Corridonia* Considerations of the EUCJ

Article 4 TEU

'the principle of cooperation in good faith'

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



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

According to this:

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

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* Considerations of the EUCJ

Article 4 TEU

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TEU Article 4 (3)

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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* Considerations of the EUCJ

Article 4 TEU

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

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



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

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

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

C 196/16 and C-197/16 *Comune di Corridonia* Considerations of the EUCJ

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

The Member State concerned:

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

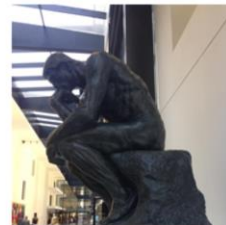
CA
stands for
Competent Authority



Obligation:

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

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



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

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

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

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

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

35 (–)

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

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

Wells, C-201/02

64 As to that submission, it is clear from settled case-law that under the principle of cooperation in good faith laid down in Article 10 EC the Member States are required to nullify the unlawful consequences of a breach of Community law (see, in particular, Case 6/60 *Humblet 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 (see, to this effect, Case C-8/88 *Germany v Commission* [1990] ECR I-2321, paragraph 13).

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

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

Commission v Ireland, C-215/06

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

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

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

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

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

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

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

C 196/16 and C-197/16 *Comune di Corridonia* Considerations of the EUCJ

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

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

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

Conditions for regularisation:

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

It should remain the exception!



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

The court concluded:

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

..... In certain cases!

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

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

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

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

Commission v Ireland, C-215/06

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

Križan and Others, C-416/10

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

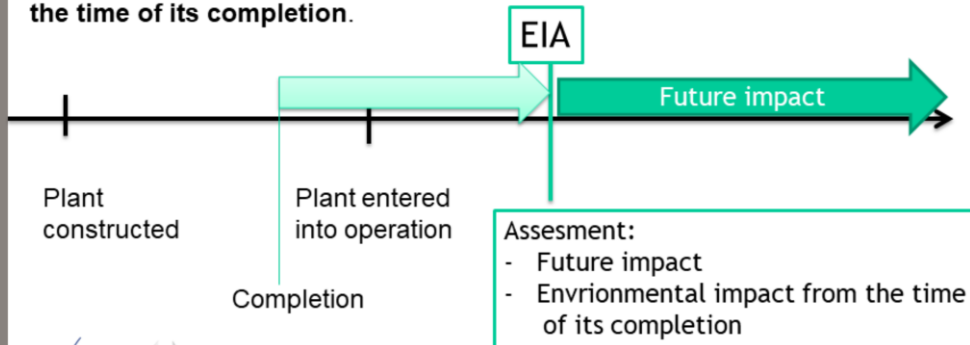
C-348/15 *Stadt Wiener Neustadt*

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

C 196/16 and C-197/16 *Comune di Corridonia* Considerations of the EUCJ

Furthermore:

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



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

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

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

Scope of the Judicial Control



And now; the scope of the Judicial Control.

Some short notes on national procedural law versus EU law

National procedural rules
governing actions for safeguarding
an individual's rights under EU law



If there are no EU rules to govern a certain matter:

It is for the legal system of each Member State to designate the courts and tribunals having jurisdiction.

Since there are very few procedural rules in EU law, it is also for the legal system of each MS to lay down the detailed procedural rules governing actions for **safeguarding rights which individuals derive from EU law.**

Some short notes on national procedural law versus EU law

The principle of equivalence

National procedural rules governing actions for safeguarding an individual's rights under EU law must not be less favorable than those governing similar domestic actions and



National rules governing actions safeguarding rights under EU law must not be less favourable than those governing similar domestic actions...

This is called the principle of equivalence.

Some short notes on national procedural law versus EU law

The principle of equivalence

National procedural rules governing actions for safeguarding an individual's rights under EU law must not be less favourable than those governing similar domestic actions and

must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law

(see Case C-268/06 *Impact* p. 46).

The principle of effectiveness



And, National rules governing actions safeguarding rights under EU law, must not make it in practice impossible or excessively difficult to exercise those rights.... **This is called the principle of effectiveness.**

Case C-268/06 *Impact*

46 On that basis, as is apparent from well-established case-law, the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, in particular, *Rewe-Zentralfinanz and Rewe-Zentral*, paragraph 5; *Comet*, paragraphs 13 to 16; *Peterbroeck*, paragraph 12; *Unibet*, paragraph 43; and *van der Weerd and Others*, paragraph 28).

The Slovak Brown Bear

C-240/09



Lesoochranské Zoskupenie VLK

an association established in accordance with Slovak law whose objective is the protection of the environment

LESOOCHRANÁRSKE ZOSKUPENIE

Is informed of the initiation of

Administrative proceedings



An important ruling in this context is the Slovak Brown Bear case.

It was about a Slovak environmental organisation (Zoskupenie) which was informed of the initiation of a number of administrative proceedings.

C-240/09 Lesoochranské Zoskupenie VLK

20 The zoskupenie was informed of the initiation of a number of administrative proceedings brought by various hunting associations or other persons concerning the grant of derogations to the system of protection for species such as the brown bear, access to protected countryside areas or the use of chemical substances in such areas.

The Slovak Brown Bear

C-240/09



LESOOCHRANÁRSKE ZOSKUPENIE

Is informed of the initiation of

Administrative proceedings

Derogation (exceptions) from the rules on protection of certain species such as the brown bear,

Access to protected areas

Use of chemical substances in such areas



These administrative proceedings had been initiated by people who wanted an exception from the rules on protection of certain species such as the brown bear. They wanted access to protected countryside areas and they wanted to use of chemical substances in such areas.

C-240/09 Lesoochranské Zoskupenie VLK

20 The zoskupenie was informed of the initiation of a number of administrative proceedings brought by various hunting associations or other persons concerning the grant of derogations to the system of protection for species such as the brown bear, access to protected countryside areas or the use of chemical substances in such areas.

The Slovak Brown Bear

C-240/09



Lesoochránárske zoskupenie VLK
(Zoskupenie)

Applies to become a
party to the proceedings

Aarhus Convention Article 9(3)

Administrative proceedings

Derogation (exceptions) from the rules on protection of certain species such as the brown bear,
Access to protected areas
Use of chemical substances in such areas

Zoskupenie applied to the Slovak Ministry of the Environment to become a "party" to the administrative proceedings.

For this purpose, the organisation relied on the Aarhus Convention, in particular, Article 9(3).

C-240/09 Lesoochránárske Zoskupenie VLK

21 The zoskupenie therefore applied to the Ministerstvo životného prostredia to be a 'party' to the administrative proceedings concerning the grant of those derogations or authorisations and relied on the Aarhus Convention for that purpose. The Ministerstvo životného prostredia rejected that request and the administrative appeal subsequently brought by the zoskupenie against that rejection.

22 The zoskupenie then brought a contentious appeal against the two decisions, arguing in particular that the provisions in Article 9(3) of the Aarhus Convention had direct effect.

The Slovak Brown Bear

C-240/09



Lesoochranárske zoskupenie VLK
(Zoskupenie)

Applies to become a
party to the proceedings

Aarhus Convention Article 9(3)

A couple of appeals later...

Najvyšší súd Slovenskej republiky

The court of final appeal in this case

Stayed the proceedings and asked the Court of Justice about
the direct effect of this provision of the Aarhus Convention.

A couple of appeals later the court of final appeal decided to stay the proceedings and refer questions to the EU CJ, in particular on the direct effect of this provision of the Aarhus Convention.

C-240/09 Lesoochranárske Zoskupenie VLK

23 In those circumstances, the Najvyšší súd Slovenskej republiky decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

1. Is it possible to recognise Article 9 and in particular Article 9(3) of the Aarhus Convention of 25 June 1998, given that the principal objective pursued by that international treaty is to change the classic definition of *locus standi* by according the status of a party to proceedings to the public, or the public concerned, as having the direct effect of an international treaty (“self-executing effect”) in a situation where the European Union acceded to that international treaty on 17 February 2005 but to date has not adopted Community legislation in order to transpose the treaty concerned into Community law?
2. Is it possible to recognise Article 9 and in particular Article 9(3) of the Aarhus Convention, which has become a part of Community law, as having the direct applicability or direct effect of Community law within the meaning of the settled case-law of the Court of Justice?
3. If the answer to the first or the second question is in the affirmative, is it then possible to interpret Article 9(3) of the Aarhus Convention, given the principal objective pursued by that international treaty, as meaning that it is necessary also to include within the concept “act of a public authority” an act consisting in the delivery of decisions, that is to say, that the right of public access to judicial hearings intrinsically also includes the right to challenge the decision of an administrative body, the unlawfulness of which lies in its effect on the environment?

And so... let's have a look at the Aarhus Convention



CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

done at Aarhus, Denmark,
on 25 June 1998

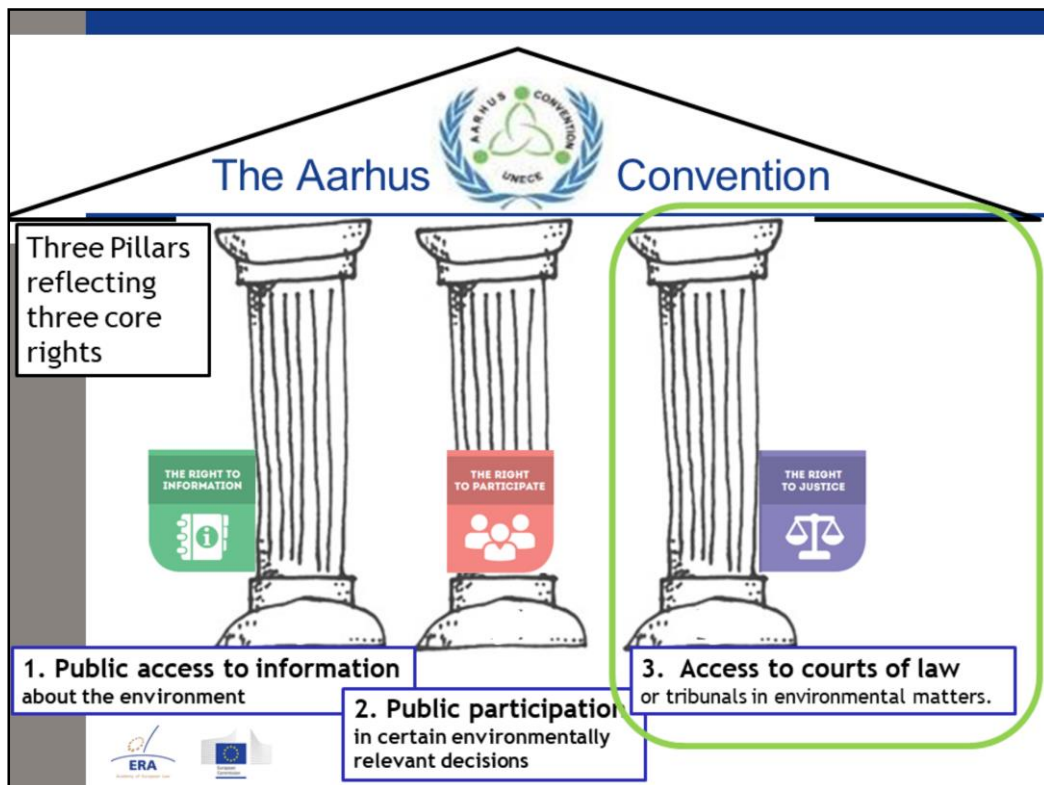
AIM OF THE CONVENTION

"In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."

(Article 1 of the Aarhus Convention)

But before we look at what the EUCJ said, let's have a look at the Aarhus Convention.

The United Nations Economic Commission for Europe (UNECE) *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* was adopted on 25 June 1998 in the Danish city of Aarhus at the Fourth Ministerial Conference as part of the "Environment for Europe" process. The convention entered into force on 30 October 2001.



The content of the Aarhus Convention is structured around three pillars.

These three pillars reflect three core rights:

The right to information

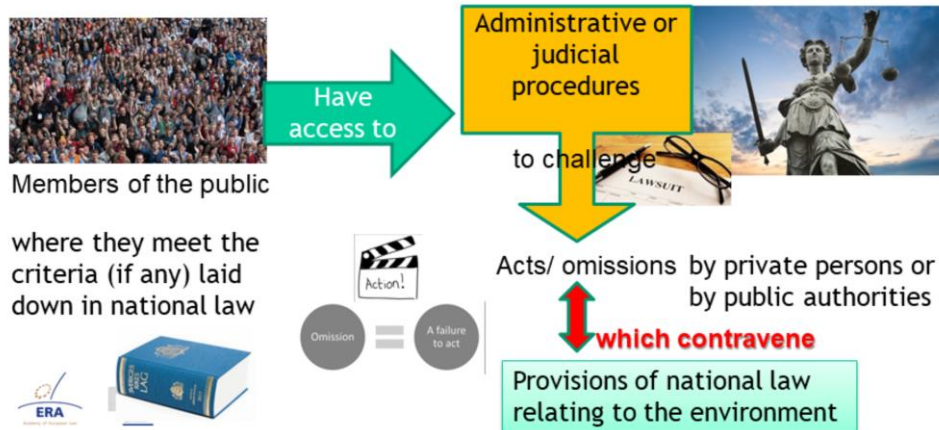
The right to participate

and the right to justice.

We will have a short look at the third pillar.

A 9(3) the Aarhus Convention Access to court

- ...each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.



In this pillar we find article 9 (3).

Article 9 (3) states that

Each Party shall ensure that members of the public, where they meet the criteria, if any, laid down in its national law have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

What the Slovakian court asked the EUCJ, was if this article, 9 (3), might have direct effect.

The Slovak Brown Bear again

The EUCJ:

In order to **ensure effective judicial protection** in the fields covered by EU environmental law:



The Court (C-240/09)
"Slovak Brown Bear"



So, what did the EUCJ say about that?

Well, first it stated that " In order to **ensure effective judicial protection** in the fields covered by EU environmental law

C-240/09 Lesoochránárske Zoskupenie VLK

50 It follows that, in so far as concerns a species protected by EU law, and in particular the Habitats Directive, it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention.

The Slovak Brown Bear again

The EUCJ:



The Court (C-240/09)
"Slovak Brown Bear /LZ (I)"

In order to ensure effective judicial protection in the fields covered by EU environmental law:

Declares that

1. EUCJ has jurisdiction to interpret the provisions of the Aarhus Convention

Ruling that

2. Article 9(3) of the Aarhus Convention has **no direct effect**.



The Court declares that it has jurisdiction to interpret the provisions of the Aarhus Convention, ruling that Article 9(3) of this Convention has **no direct effect**.

C-240/09 Lesoochránárske Zoskupenie VLK

30 The Aarhus Convention was signed by the Community and subsequently approved by Decision 2005/370. Therefore, according to settled case-law, the provisions of that convention now form an integral part of the legal order of the European Union (see, by analogy, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 36, and Case C-459/03 *Commission v Ireland* [2006] ECR I-4635, paragraph 82). Within the framework of that legal order the Court therefore has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement (see, inter alia, Case 181/73 *Haegeman* [1974] ECR 449, paragraphs 4 to 6, and Case 12/86 *Demirel* [1987] ECR 3719, paragraph 7).

43 It follows that the Court has jurisdiction to interpret the provisions of Article 9(3) of the Aarhus Convention and, in particular, to give a ruling on whether or not they have direct effect.

45 It must be held that the provisions of Article 9(3) of the Aarhus Convention do not contain any clear and precise obligation capable of directly regulating the legal position of individuals. Since only members of the public who meet the criteria, if any, laid down by national law are entitled to exercise the rights provided for in Article 9(3), that provision is subject, in its implementation or effects, to the adoption of a subsequent measure.

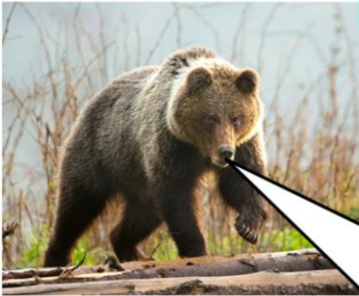
50 It follows that, in so far as concerns a species protected by EU law, and in particular the Habitats Directive, it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention.

51 Therefore, it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, so as to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law (see, to that effect, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 44, and *Impact*, paragraph 54).

52 In those circumstances, the answer to the first and second questions referred is that Article 9(3) of the Aarhus Convention does not have direct effect in EU law. (...)

The Slovak Brown Bear again

The EUCJ:



The Court (C-240/09)
"Slovak Brown Bear /LZ (I)"



In order to ensure effective judicial protection in the fields covered by EU environmental law:

1. EUCJ has jurisdiction to interpret the provisions of the Aarhus Convention

Direct effect of Aarhus convention article 9 (3), actually isn't needed:

Article 11 was introduced in directive 2003/35 (as Article 10 a) with the intention to implement the Aarhus Convention.

And since article 11 in the EIA directive was introduced with the intention to implement the Aarhus convention, direct effect of A 9(3) in the Aarhus Convention, actually isn't needed.

C-240/09 Lesoochránárske Zoskupenie VLK

The Slovak Brown Bear again

The EUCJ:



The Court (C-240/09)
"Slovak Brown Bear /LZ (I)"

In order to ensure effective judicial protection
in the fields covered by EU environmental law:

1. EUCJ has jurisdiction to interpret

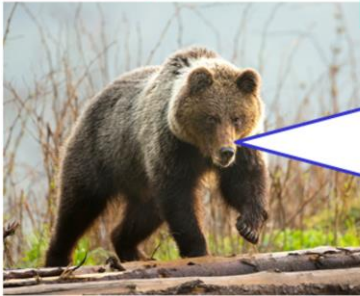
However!

has no direct effect.



The Slovak Brown Bear again

The EUCJ:



The Court (C-240/09)
"Slovak Brown Bear /LZ (I)"

In order to ensure effective judicial protection in the fields covered by EU environmental law:

It is for the national courts to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in A 9(3) of the Aarhus convention.



It is for the national courts to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in A 9(3) of the Aarhus convention.

C-240/09 *Lesoochránárske Zoskupenie VLK*

50 It follows that, in so far as concerns a species protected by EU law, and in particular the Habitats Directive, it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention.

51 Therefore, it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, so as to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law (see, to that effect, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 44, and *Impact*, paragraph 54).

52 In those circumstances, the answer to the first and second questions referred is that Article 9(3) of the Aarhus Convention does not have direct effect in EU law. It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.

Article 11 in the EIA-directive

Article 11 was introduced in directive 2003/35 (as Article 10 a) with the intention to implement Article 9(2) of the Aarhus Convention.



Knowing that article 11 in the EIA-directive was introduced with the intention to implement A 9(2) of the Aarhus Convention, we will now take a closer look at it: Article 11.

C-240/09 Lesoochránárske Zoskupenie VLK

11 Articles 3(7) and 4(4) of Directive 2003/35 introduce respectively Article 10a into Directive 85/337 and Article 15a into Directive 96/61 in order to implement Article 9(2) of the Aarhus Convention, which they reproduce in almost identical terms.

Article 11 in the EIA-directive

1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively;

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

What?

substantive or procedural legality

Article 11, in short, obliges the member states to 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**, acts or omissions **subject to the public participation provisions** of this Directive.

Article 11 in the EIA-directive

1. Member States shall ensure that, in accordance with the relevant national legal system, **members of the public concerned:**

Who?

(a) having a sufficient interest, or alternatively;

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

What?



The ones to have this access to a review procedure are the members of the public concerned....

Article 11 in the EIA-directive "public" or "public concerned"?

Definitions in Article 1 (2)



(d) **"Public"**: one or more natural or legal persons and their associations, organisations or groups;

(e) **"Public concerned"** Public **affected or likely to be affected by, or having an interest in,** the environmental decision-making procedures referred to in Article 2(2). **Non-governmental organisations promoting environmental protection** and **meeting any requirements** under national law **shall be deemed to have an interest;**



Who are the public concerned?

According to the definition in article 1(2) "Public concerned" is the public affected or likely to be affected by the environmental decision-making procedures.

According to the definition "Public concerned" also covers non-governmental organisations promoting environmental protection!

Article 11 in the EIA-directive "public" or "public concerned"?

Public concerned



"The public"



Distinction between

Article 6 gives **the public concerned** the right to

- access to environmental information,
- to participate actively

in order to ensure the effective participation of the public concerned in the decision-making procedures, **the public** shall be informed

Article 11 guarantees **the public concerned** access to the courts, under certain conditions

There is no unrestricted right for everybody!



Note the difference!

There is a distinction between "the public" and the "public concerned".

For example; article 6 gives **the public concerned** the right to access to environmental information, to participate actively in the administrative procedure evaluation the project.

But in order to ensure the effective participation of the public concerned in the decision-making procedures, **the public** shall be informed.

Then article 11 guarantees such persons access to the courts, under certain conditions - thus, there is no unrestricted right for everybody!

Article 11 in the EIA-directive

1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

Who?

- (a) having a sufficient interest, or alternatively;
- (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

What?



Thus; Article 11 covers only **the public concerned**. But that is not enough; they also need to have **a sufficient interest** or **to maintain the impairment of a right** if national law so requires.

When do you have a sufficient interest?

When do you maintain the impairment of a right?

Article 11 in the EIA-directive

3. What constitutes a **sufficient interest** and impairment of a **right** shall be **determined by the Member States**,

consistently with **the objective of giving the public concerned wide access to justice**.

Any non-governmental organisation meeting the requirements shall also be deemed to have rights capable of being impaired.



Article 11 tells us that what constitutes a **sufficient interest** and **impairment of a right** shall be **determined by the Member States**, consistently with **the objective of giving the public concerned wide access to justice**.

It also tells us that any non-governmental organisation meeting the requirements shall also be deemed to have rights capable of being impaired.

Article 11 in the EIA-directive

1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

Who?

How?

- (a) having a sufficient interest, or alternatively;
- (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

What?



The access to the review procedure, shall be in accordance with the relevant national legal system.

Article 11 in the EIA-directive

2. Member States shall determine at what stage the decisions, acts or omissions may be challenged. **When?**



It is also for the member states to determine at what stage the decisions may be challenged.

Article 11 in the EIA-directive

4. Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

Price?



And finally – the price! How must may the procedure cost?

The answer is in article 11 (4): Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

How will the public concerned know they have this right??



We can conclude that the public, or at least the public concerned, has certain rights. But how will they know about their rights?

Article 11 in the EIA-directive

5. In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.

= obligation to make this available to the public!

The mere availability of rules concerning access cannot be regarded as ensuring that the public concerned is in a position to be aware of its rights



Obligation to obtain a precise result which the Member States must ensure is achieved.

(C-427/07, Commission v. Ireland, p 96-98)

Article 11 prescribes that the member states shall ensure that practical information access to administrative and judicial review procedures are made available to the public.

Thus, there is an obligation to make the information available to the public!

In case 427/07 the court stated that this is an obligation to obtain a precise result which the Member States must ensure is achieved.

This means that the mere availability, cannot be regarded as ensuring, in a sufficiently clear and precise manner that the public concerned is in a position to be aware of its rights on access to justice in environmental matters.

The practical information must be there!

96 As regards the fifth argument, it must be borne in mind that one of the underlying principles of Directive 2003/35 is to promote access to justice in environmental matters, along the lines of the Århus Convention on access to information, public participation in decision-making and access to justice in environmental matters.

97 In that regard, the obligation to make available to the public practical information on access to administrative and judicial review procedures laid down in the sixth paragraph of Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and in the sixth paragraph of Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, amounts to an obligation to obtain a precise result which the Member States must ensure is achieved.

98 In the absence of any specific statutory or regulatory provision concerning information on the rights thus offered to the public, the mere availability, through publications or on the internet, of rules concerning access to administrative and judicial review procedures and the possibility of access to court decisions cannot be regarded as ensuring, in a sufficiently clear and precise manner, that the public concerned is in a position to be aware of its rights on access to justice in environmental matters.

C-427/07, Commission v. Ireland

96 As regards the fifth argument, it must be borne in mind that one of the underlying principles of Directive 2003/35 is to promote access to justice in environmental matters, along the lines of the Århus Convention on access to information, public participation in decision-making and access to justice in environmental matters.

97 In that regard, the obligation to make available to the public practical information on access to administrative and judicial review procedures laid down in the sixth paragraph of Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and in the sixth paragraph of Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, amounts to an obligation to obtain a precise result which the Member States must ensure is achieved.

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Some questions in the light of A 11...

 If you have participated in the decision-making procedure; is there still a right to challenge the decision?

Here, the same didactical technique as in the presentation on “screening” is used; some questions are presented, questions to which the following presentation will bring the answers.

In the end of the presentation, the questions will be presented again, and hopefully the audience will be able to answer (or rather, discuss) the questions.

Some questions in the light of A 11...



If you have participated in the decision-making procedure; is there still a right to challenge the decision?



May national legislation prescribe a minimum number of members in ENGO:s?



Some questions in the light of A 11...



If you have participated in the decision-making procedure; is there still a right to challenge the decision?



May national legislation prescribe a minimum number of members in ENGO:s?



May national legislation exclude consent processes initiated before the enter into force of A 10 a (A 11) from the scope of judicial review?



Some questions in the light of A 11...



If you have participated in the decision-making procedure; is there still a right to challenge the decision?



May national legislation prescribe a minimum number of members in ENGO:s?



May national legislation exclude consent processes initiated before the enter into force of A 10 a (A 11) from the scope of judicial review?



Is it only possible to challenge cases where no EIA has been carried out?

Some questions in the light of A 11...



If you have participated in the decision-making procedure; is there still a right to challenge the decision?



May national legislation prescribe a minimum number of members in ENGO:s?



May national legislation exclude consent processes initiated before the enter into force of A 10 a (A 11) from the scope of judicial review?



Is it only possible to challenge cases where no EIA has been carried out?



Might the principle of legal certainty be used as a restriction to the possibility to challenge a decision?

Some questions in the light of A 11...

-  If you have participated in the decision-making procedure; is there still a right to challenge the decision?
-  May national legislation prescribe a minimum number of members in ENGO:s?
-  May national legislation exclude consent processes initiated before the enter into force of A 10 a (A 11) from the scope of judicial review?
-  Is it only possible to challenge cases where no EIA has been carried out?
-  Might the principle of legal certainty be used as a restriction to the possibility to challenge a decision?
-  How much may a review procedure cost?

Some questions in the light of A 11...

-  If you have participated in the decision-making procedure; is there still a right to challenge the decision?
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-  Might the principle of legal certainty be used as a restriction to the possibility to challenge a decision?
-  How much may a review procedure cost?
-  What is a 'sufficient interest'? And what is an 'impairment of a right'?

Some questions in the light of A 11...

-  If you have participated in the decision-making procedure; is there still a right to challenge the decision?
-  May national legislation prescribe a minimum number of members in ENGO:s?
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-  Is it only possible to challenge cases where no EIA has been carried out?
-  Might the principle of legal certainty be used as a restriction to the possibility to challenge a decision?
-  How much may a review procedure cost?
-  What is a 'sufficient interest'? And what is an 'impairment of a right'?
-  Does it need to be a link between the procedural defect and the actual decision?

Some questions in the light of A 11...

-  If you have participated in the decision-making procedure; is there still a right to challenge the decision?
-  May national legislation prescribe a minimum number of members in ENGO:s?
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-  How much may a review procedure cost?
-  What is a 'sufficient interest'? And what is an 'impairment of a right'?
-  Does it need to be a link between the procedural defect and the actual decision?

C-263/08

Djurgården - Lilla Värtans Miljöskyddsförening



The Municipality of Stockholm

Electricity company

Contract:

Construction of a tunnel through the hills between the areas of Hjorthagen and Fisksjöäng in North Djurgården **in order to house electric cables** replacing overground high tension cables.

In order to answer the questions, we will have a look at some case-law. We start in Sweden and with case C-263/08, *Djurgården - Lilla Värtans Miljöskyddsförening*.

The Municipality of Stockholm concluded a contract with an electricity company for the construction of a tunnel.

The tunnel was to be constructed in order to house electric cables.

C-263/08 Djurgården - Lilla Värtans Miljöskyddsförening

15 The Municipality of Stockholm concluded a contract with an electricity company for the construction of a tunnel approximately one kilometre in length through the hills between the areas of Hjorthagen and Fisksjöäng in North Djurgården in order to house electric cables replacing overground high tension cables.

16 The implementation of that project required, first, the abstraction of groundwater leaking into the power cable tunnel and access tunnel and, second, the construction on certain sites in the area concerned of facilities designed to drain off water and recharge it into the ground or rock in order to counteract any reduction in the amount of groundwater.

C-263/08

Djurgården - Lilla Värtans Miljöskyddsförening



27 May 2004

Länsstyrelsen i Stockholms län
(Competent Authority):

Screening Decision: Project likely to have
significant effects on the environment
particularly with respect to groundwater

In 2004 the competent authority gave their screening-decision: The works were likely to have significant effects on the environment particularly with respect to groundwater.

C-263/08 Djurgården - Lilla Värtans Miljöskyddsförening

17 By decision of 27 May 2004, the länsstyrelsen i Stockholms län (Stockholm Regional Authority), giving its decision after an examination under Chapter 6 of the Environment Act, concluded, on the basis of the environmental impact assessment carried out for that project, that the works concerned were likely to have significant effects on the environment particularly with respect to groundwater.

C-263/08

Djurgården - Lilla Värtans Miljöskyddsförening



27 May 2004

13 december May 2006

Länsstyrelsen i Stockholms län
(Competent Authority):

Screening Decision: Project likely to have
significant effects on the environment
particularly with respect to groundwater

Miljödomstolen vid Stockholms tingsrätt
(Environmental Court):

Consent to carry
out the works

By judgment the Environmental Chamber of the District Court of Stockholm granted the Municipality of Stockholm development consent to carry out the works.

C-263/08 Djurgården - Lilla Värtans Miljöskyddsförening

18 By judgment of 13 December 2006, the miljödomstolen vid Stockholms tingsrätt (Environmental Chamber of the District Court of Stockholm) granted the Municipality of Stockholm development consent to carry out the works at issue, pursuant to Chapter 11 of the Environment Act.

C-263/08

Djurgården - Lilla Värtans Miljöskyddsförening



But then.....

27 May 2004

13 december May 2006

Länsstyrelsen i Stockholms län
(Competent Authority):

Screening Decision: Project likely to have
significant effects on the environment
particularly with respect to groundwater

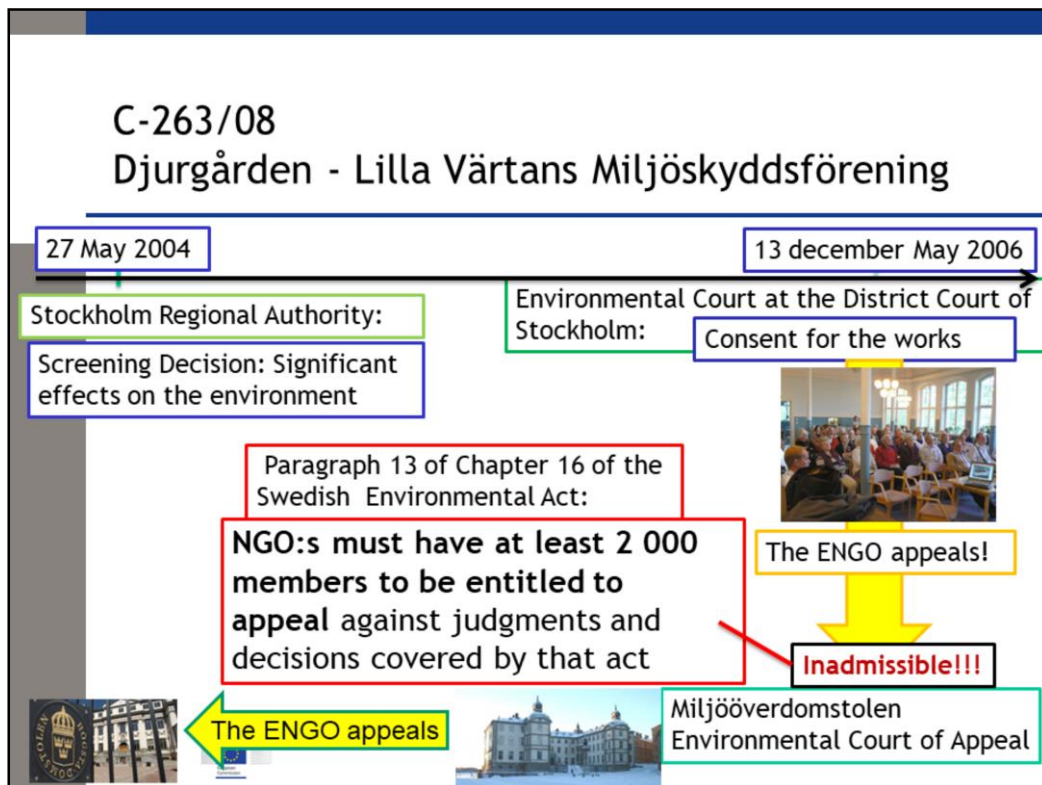
Miljödomstolen vid Stockholms tingsrätt
(Environmental Court):

Consent to carry
out the works

Djurgården-Lilla Värtans Miljöskyddsförening (Djurgården-Lilla Värmland for environmental protection, the ENGO)....



Here they are! The Djurgården-Lilla Värtans Miljöskyddsförening. And they are not happy!



The ENGO appealed before the Environmental Court of Appeal but that appeal was held to be inadmissible on the ground that the Miljöskyddsförening had not fulfilled the national conditions for ENGO:s to appeal.

According to the Environmental Act an ENGO must have at least 2 000 members to be entitled to appeal.

As you could see on the picture; this ENGO didn't fulfil that condition. It brought an appeal before *Högsta domstolen*. Here, a number of questions with EU-implications arose...

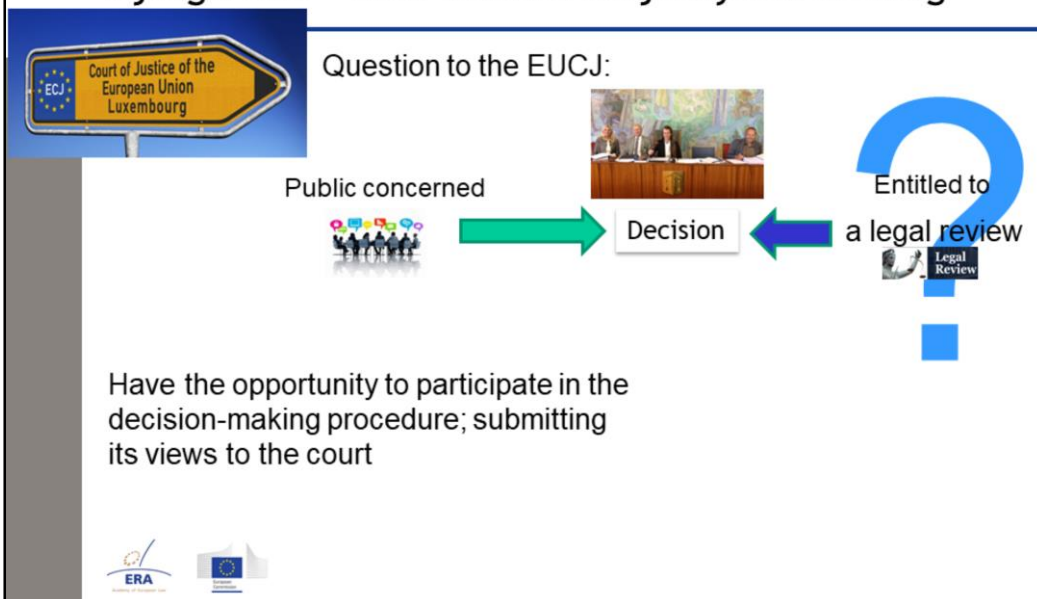
C-263/08 Djurgården - Lilla Värtans Miljöskyddsförening

19 The Miljöskyddsförening appealed against that decision before the Miljööverdomstolen of the Svea Hovrätt (Environmental Appeal Chamber of the Svea Court of Appeal), but that appeal was held to be inadmissible on the ground that the Miljöskyddsförening had not fulfilled the condition laid down in Paragraph 13 of Chapter 16 of the Environmental Act that it must have at least 2 000 members to be entitled to appeal against judgments and decisions covered by that act.

20 The Miljöskyddsförening brought an appeal against that decision before the Högsta domstolen.

C-263/08

Djurgården - Lilla Värtans Miljöskyddsförening



Högsta domstolen decided to stay the proceedings and to refer a number of questions to the Court for a preliminary ruling. One of the questions asked was the following.

Is there also a requirement that the public concerned is to be **entitled to challenge a decision of a court in planning consent proceedings** in a case **where the public concerned has had the opportunity of participating** in the court's examination of the question of planning consent and of submitting its views to that court?

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21 Before the Högsta domstolen, the question arose as to whether the project at issue fell within the scope of Directive 85/337 as a project included in Annex II, point 10(l) thereto, as that point might, in the Swedish version of the directive, be limited to the drawing off of groundwater for a profitable purpose. Furthermore, the question also arose as to the exact scope of the right of appeal provided for by the Aarhus Convention, and whether the conditions laid down by Swedish law from that point of view, were too restrictive.

22 Accordingly, the Högsta domstolen decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- (1) Is point 10 of Annex II to Directive 85/337 to be interpreted as meaning that it encompasses water-related works which involve the drawing-off from a tunnel for power cables of groundwater leaking into it and infiltration (supply) of water into the ground or hill to compensate for any reduction in the groundwater, and the construction and maintenance of installations for the drawing-off and infiltration?
- (2) If the answer to Question 1 is affirmative: Does the provision in Article 10a of Directive 85/337 – that under certain circumstances the public concerned is to have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of a decision – imply that there is also a requirement that the public concerned is to be entitled to challenge a decision of a court in planning consent proceedings in a case where the public concerned has had the opportunity of participating in the court's examination of the question of planning consent and of submitting its views to that court?
- (3) If the answers to Questions 1 and 2 are affirmative: Are Articles 1(2), 6(4) and 10a of Directive 85/337 to be interpreted as meaning that different national requirements can be laid down with regard to the public concerned referred to in Articles 6(4) and 10a, with the result that small, locally established environmental protection associations have a right to participate in the decision-making procedures referred to in Article 6(4) in respect of projects which may have significant effects on the environment in the area where the association is active but do not have a right of appeal such as is referred to in Article 10a?

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The EUCJ:

First:

The right of access to a review procedure does not depend on whether the authority is an administrative body or a court of law.



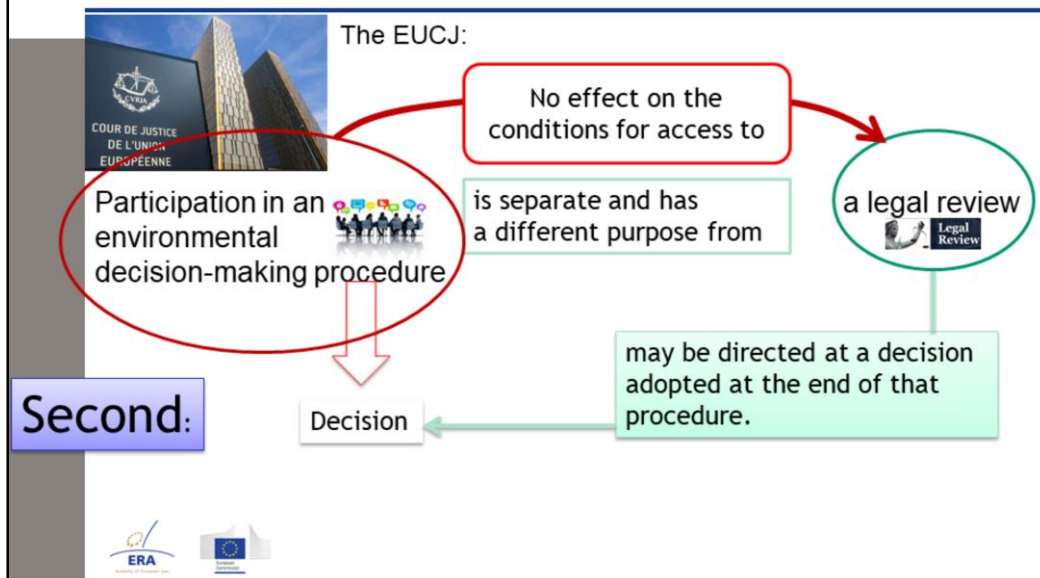
First, the right of access to a review procedure within the meaning of Article 10a of Directive 85/337 does not depend on whether the authority which adopted the decision or act at issue is an administrative body or a court of law.

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38 First, the right of access to a review procedure within the meaning of Article 10a of Directive 85/337 does not depend on whether the authority which adopted the decision or act at issue is an administrative body or a court of law. Second, participation in an environmental decision-making procedure under the conditions laid down in Articles 2(2) and 6(4) of Directive 85/337 is separate and has a different purpose from a legal review, since the latter may, where appropriate, be directed at a decision adopted at the end of that procedure. Therefore, participation in the decision-making procedure has no effect on the conditions for access to the review procedure.

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Second, participation in an environmental decision-making procedure under the conditions laid down in Articles 2(2) and 6(4) of the Directive is separate and has a different purpose from a legal review.

This is since a legal review may, where appropriate, be directed at a decision.

A decision adopted at the end of the decision-making procedure.

Therefore, participation in the decision-making procedure has no effect on the conditions for access to the review procedure.

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38 First, the right of access to a review procedure within the meaning of Article 10a of Directive 85/337 does not depend on whether the authority which adopted the decision or act at issue is an administrative body or a court of law. Second, participation in an environmental decision-making procedure under the conditions laid down in Articles 2(2) and 6(4) of Directive 85/337 is separate and has a different purpose from a legal review, since the latter may, where appropriate, be directed at a decision adopted at the end of that procedure. Therefore, participation in the decision-making procedure has no effect on the conditions for access to the review procedure.

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May Member States provide that small environmental protection associations (ex. < 2000 members) have no right of access to a review procedure?

Article 11 leaves to national legislatures the task of **determining the conditions** which may be required in order for an ENGO to have a right of appeal under the conditions set out above.

However!



C-263/08 Djurgården - Lilla Värtans Miljöskyddsförening

45 While it is true that Article 10a of Directive 85/337, by its reference to Article 1(2) thereof, leaves to national legislatures the task of determining the **conditions** which may be required in order for a non-governmental organisation which promotes environmental protection to have a right of appeal under the conditions set out above, the national rules thus established must, first, ensure 'wide access to justice' and, second, render effective the provisions of Directive 85/337 on judicial remedies. Accordingly, those national rules must not be liable to nullify Community provisions which provide that parties who have a sufficient interest to challenge a project and those whose rights it impairs, which include environmental protection associations, are to be entitled to bring actions before the competent courts.

C-263/08

Djurgården - Lilla Värtans Miljöskyddsförening



May Member States provide that small environmental protection associations (ex. < 2000 members)have no right of access to a review procedure?

Article 11 leaves to national legislatures the task of **determining the conditions** which may be required in order for an ENGO to have a right of appeal under the conditions set out above.

However!

The national rules thus established must,

1. Ensure 'wide access to justice' and,
2. Render effective the provisions of the Directive on judicial remedies.



C-263/08 Djurgården - Lilla Värtans Miljöskyddsförening

45 While it is true that Article 10a of Directive 85/337, by its reference to Article 1(2) thereof, leaves to national legislatures the task of determining the conditions which may be required in order for a non-governmental organisation which promotes environmental protection to have a right of appeal under the conditions set out above, **the national rules thus established must, first, ensure 'wide access to justice' and, second, render effective the provisions of Directive 85/337 on judicial remedies.** Accordingly, those national rules must not be liable to nullify Community provisions which provide that parties who have a sufficient interest to challenge a project and those whose rights it impairs, which include environmental protection associations, are to be entitled to bring actions before the competent courts.

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The EUCJ:

Accordingly:

➡ A national law may require that such an association has as its object the protection of nature and the environment.

➡ The condition that an environmental protection association must have a minimum number of members may be relevant in order to ensure that it does in fact **exist** and that it **is active**.

➡ However; the number of members required cannot be fixed by national law at such a level that it runs counter to the objectives of the Directive and in particular the objective of **facilitating judicial review** of projects which fall within its scope.

C-263/08 Djurgården - Lilla Värtans Miljöskyddsförening

46 From that point of view, a national law may require that such an association, which intends to challenge a project covered by Directive 85/337 through legal proceedings, has as its object the protection of nature and the environment.

47 Furthermore, it is conceivable that the condition that an environmental protection association must have a minimum number of members may be relevant in order to ensure that it does in fact exist and that it is active. **However**, the number of members required cannot be fixed by national law at such a level that it runs counter to the objectives of Directive 85/337 and in particular the objective of facilitating judicial review of projects which fall within its scope.

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Third question;

Accordingly:

Article 11 precludes a provision of national law which reserves the right to bring an appeal solely to environmental protection associations which have at least 2 000 members.



C-263/08 Djurgården - Lilla Värtans Miljöskyddsförening

52 Accordingly, the answer to the third question is that Article 10a of Directive 85/337 precludes a provision of national law which reserves the right to bring an appeal against a decision on projects which fall within the scope of that directive solely to environmental protection associations which have at least 2 000 members.

How much may a review procedure cost?



C-260/11, Edwards and Pallikaropoulos

A 11, p 4: **Persons should not be prevented from seeking a review by the courts by reason of the financial burden.**



C-260/11, Edwards and Pallikaropoulos

Where a national court is called upon to make an order for costs against a member of the public who is an unsuccessful claimant in an environmental dispute

or

Where it is required that the court, at an earlier stage of the proceedings, decide on a possible capping of the costs for which the unsuccessful party may be liable

The court must satisfy itself that **that requirement has been complied with**, taking into account

- the interest of the person wishing to defend his rights and
- the public interest in the protection of the environment.

→ assessment of costs



Where a national court is called upon to make an order for costs against a member of the public who is an unsuccessful claimant in an environmental dispute or, more generally, where it is required – as courts in the United Kingdom may be – to state its views, at an earlier stage of the proceedings, on a possible capping of the costs for which the unsuccessful party may be liable, it must satisfy itself that that requirement has been complied with, taking into account both the interest of the person wishing to defend his rights and the public interest in the protection of the environment.

C-260/11, Edwards and Pallikaropoulos

35 It follows from the foregoing that the requirement, under the fifth paragraph of Article 10a of Directive 85/337 and the fifth paragraph of Article 15a of Directive 96/61, that judicial proceedings should not be prohibitively expensive means that the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result. Where a national court is called upon to make an order for costs against a member of the public who is an unsuccessful claimant in an environmental dispute or, more generally, where it is required – as courts in the United Kingdom may be – to state its views, at an earlier stage of the proceedings, on a possible capping of the costs for which the unsuccessful party may be liable, it must satisfy itself that that requirement has been complied with, taking into account both the interest of the person wishing to defend his rights and the public interest in the protection of the environment.

C-260/11, Edwards and Pallikaropoulos



In that assessment, The national court:

- cannot act solely on the basis of the claimant's financial situation
- must also carry out an objective analysis of the amount of the costs

It may also take into account:

- the situation of the parties concerned
- whether the claimant has a reasonable prospect of success
- the importance of what is at stake for the claimant
- the importance of what is at stake for the protection of the environment
- the complexity of the relevant law and procedure
- the potentially frivolous nature of the claim at its various stages
- the existence of a national legal aid scheme or a costs protection regime

In the context of that assessment, the national court cannot act solely on the basis of that claimant's financial situation but must also carry out an objective analysis of the amount of the costs. It may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime.

C-260/11, Edwards and Pallikaropoulos

On those grounds, the Court (Fourth Chamber) hereby rules:

The requirement, under the fifth paragraph of Article 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment and the fifth paragraph of Article 15a of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, that judicial proceedings should not be prohibitively expensive means that the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result. Where a national court is called upon to make an order for costs against a member of the public who is an unsuccessful claimant in an environmental dispute or, more generally, where it is required – as courts in the United Kingdom may be – to state its views, at an earlier stage of the proceedings, on a possible capping of the costs for which the unsuccessful party may be liable, it must satisfy itself that that requirement has been complied with, taking into account both the interest of the person wishing to defend his rights and the public interest in the protection of the environment.

In the context of that assessment, the national court cannot act solely on the basis of that claimant's financial situation but must also carry out an objective analysis of the amount of the costs. It may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime.

By contrast, the fact that a claimant has not been deterred, in practice, from asserting his claim is not of itself sufficient to establish that the proceedings are not prohibitively expensive for him.

Lastly, that assessment cannot be conducted according to different criteria depending on whether it is carried out at the conclusion of first-instance proceedings, an appeal or a second appeal.

C-260/11, Edwards and Pallikaropoulos

The fact that
the claimant

is seeking review



= has not been
deterred, in practice,
from asserting his
claim



Not sufficient of itself to establish that
the proceedings are not prohibitively
expensive for him

By contrast, the fact that a claimant has not been deterred, in practice, from asserting his claim is not of itself sufficient to establish that the proceedings are not prohibitively expensive for him.

C-260/11, Edwards and Pallikaropoulos

**No different criteria in the
assessment depending on...
when/where it is carried out!**



Lastly, that assessment cannot be conducted according to different criteria depending on whether it is carried out at the conclusion of first-instance proceedings, an appeal or a second appeal.

What can be challenged?

- How much must be wrong with the EIA?
- What is "wrong"? Only procedural wrongs?
- Can you solely challenge in cases where no EIA has been carried out?
- How about a bad EIA?



Now we turn to the real "scope"- *what* can be challenged?



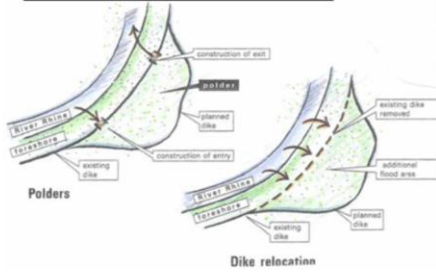
C-72/12, Altrip

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

↔

the Land Rheinland-Pfalz
(Rhineland-Palatinate)

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






We will look at this through the Altrip case.

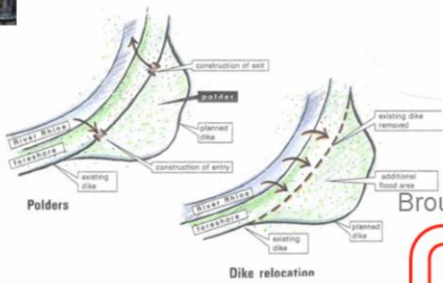
In the Altrip case, a request had been made in proceedings concerning a decision approving plans to construct a flood retention scheme covering over 320 hectares of a former Rhine floodplain.

C-72/12, Altrip

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



C-72/12, Altrip



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

Brought an action

Verwaltungsgericht
(Administrative Court)

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




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, brought an action before the Administrative Court seeking the annulment of the decision approving plans to construct that work.

They claimed that the environmental impact assessment carried out beforehand was inadequate.

C-72/12, Altrip

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

C-72/12, Altrip

**Obverwaltungsgericht Rheinland-Pfalz
(Rhineland-Palatinate Higher
Administrative Court).**

Appeal

DISMISSED

**Verwaltungsgericht
(Administrative Court)**

Brought an

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

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

ERA

European Union

Their action was dismissed.

They appealed to the Higher Administrative Court.

They may not plead irregularities affecting the **environmental impact assessment** carried out as part of an **official procedure** initiated before **25 June 2005**.

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.

expiry of the implementation time

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

DISMISSED

DISMISSED

Brought an appeal at

Verwaltungsgericht (Administrative Court)

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

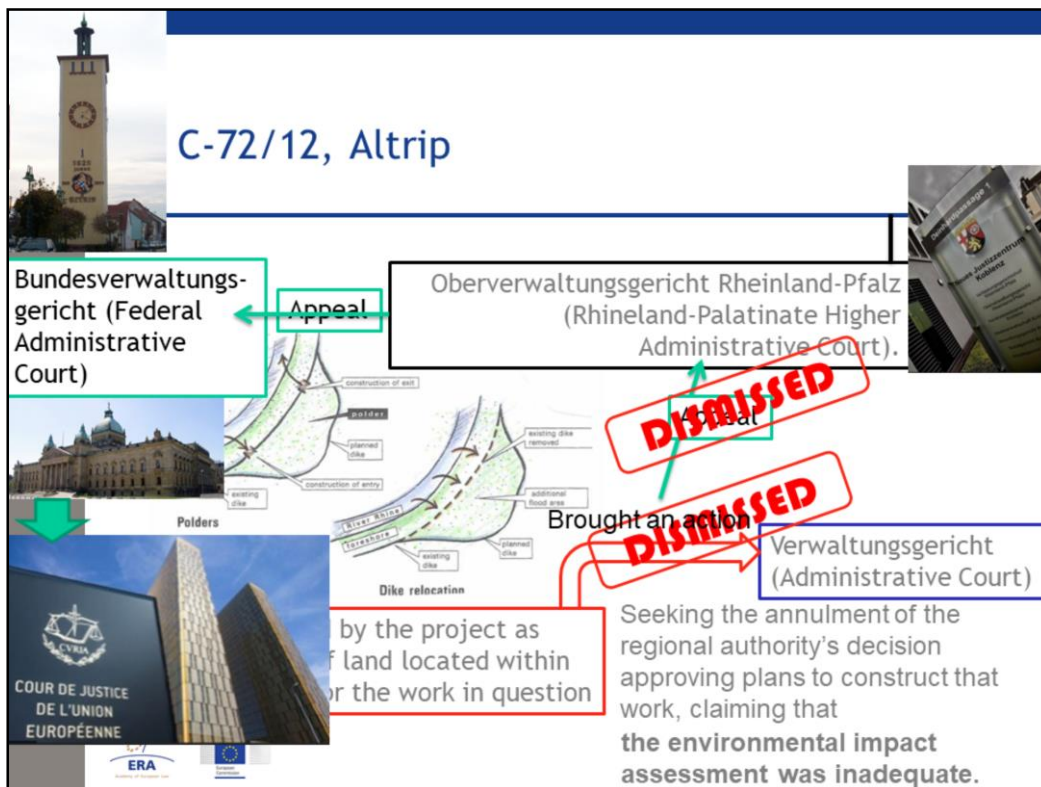
Seeking the annulment of the regional authority's decision approving plans to construct that work, claiming that **the environmental impact assessment was inadequate.**

ERA

The Oberverwaltungsgericht Rheinland-Pfalz dismissed that appeal.

The applicants had no right to appeal since they might not plead irregularities affecting the environmental impact assessment carried out as part of an official procedure initiated before 25 June 2005.

The court also expressed doubts as to the admissibility of the proceedings since national law 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.



One appeal later the case ended up in the European Union Court of Justice!

C-72/12, Altrip

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

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

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

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

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

2. If Question 1 is answered in the affirmative:

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

3. If Question 2 is answered in the affirmative:

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

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

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

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

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



C-72/12, Altrip

Are national law adopted to implement 11
applicable also to administrative development
consent procedures, initiated before 25 June 2005 but in
which **development consents were not issued until after that**
date?

expiry of the
implementation time

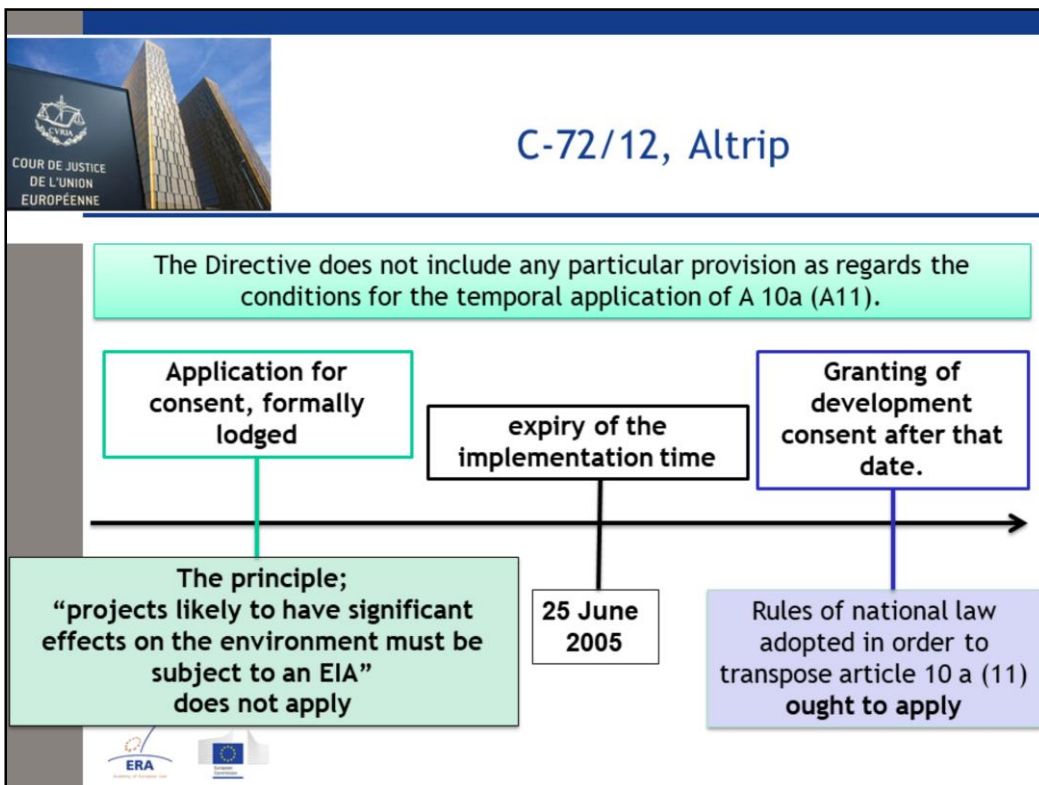
Under A6 (of the directive that implements A 10 a) Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with that directive by 25 June 2005 at the latest.



C-72/12, Altrip

The first question

21 By its first question, the referring court asks, in essence, whether, by providing that it was to be transposed into national law by 25 June 2005 at the latest, Directive 2003/35, which inserted Article 10a into Directive 85/337, is to be interpreted as meaning that the rules of national law adopted in order to transpose that article into the national legal order ought also to apply to administrative development consent procedures initiated before 25 June 2005 when they would have resulted in the granting of development consent after that date.



The court stated that The Directive does not include any particular provision as regards the conditions for the temporal application of A 10a (A11). However; if an application for consent is formally lodged before the expiry of the implementation time, the principle of having an EIA for projects likely to have significant effects on the environment does not apply.

Though; if the granting of development consent takes place after that date; rules of national law adopted in order to transpose article 11 ought to apply.

C-72/12 Altrip

22 It should be borne in mind that, in principle, a new rule of law applies from the entry into force of the act introducing it. While it does not apply to legal situations that have arisen and become definitive under the old law, it does apply to their future effects, and to new legal situations too (see, to that effect, Case C-428/08 Monsanto Technology [2010] ECR I-6765, paragraph 66). It is otherwise – subject to the principle of the non-retroactivity of legal acts – only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application (Case C-266/95 *Dichting Natuur en Milieu* and Others [2010] ECR I-1119, paragraph 32).

23 Directive 2003/35 does not include any particular provision as regards the conditions for the temporal application of Article 10a of Directive 85/337.

24 In addition, it should be borne in mind that, under Article 6 of Directive 2003/35, Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with that directive by 25 June 2005 at the latest. Article 10a of Directive 85/337, which extended the rights of members of the public concerned to challenge the decisions, acts or omissions referred to in that directive on the assessment of the effects of certain public and private projects on the environment, is among the measures which, by the same token, had to be implemented by that date.

25 The Court has previously held that the principle that projects likely to have significant effects on the environment must be subject to an environmental impact assessment does not apply when the application for consent for a project was formally lodged before the expiry of the period set for implementing Directive 85/337 (Case C-431/92 *Commission v Germany* [1995] ECR I-2189, paragraphs 29 and 32; Case C-81/96 *Gedeputeerde Staten van Noord-Holland* [1998] ECR I-3923, paragraph 21; and Case C-416/10 *Križan and Others* [2013] ECR, paragraph 94).

26 That directive is primarily designed to cover large-scale projects, the completion of which will most often be spread over a long period. It would therefore not be appropriate for the relevant procedures, which are already complex at national level, to be made even more cumbersome and time-consuming by the specific requirements imposed by that directive and for situations already established to be affected by it (*Gedeputeerde Staten van Noord-Holland*, paragraph 24, and *Križan and Others*, paragraph 95).

27 However, neither the new requirements arising from Article 10a of Directive 85/337, nor the actual requirement that project be subject to an environmental assessment, can in themselves be considered to make administrative procedures more cumbersome and time-consuming. As the Advocate General observed in point 59 of his Opinion, the legislation at issue in the main proceedings does not create new requirements of that kind but is instead designed to improve access to a legal remedy. Furthermore, if extending the right of action of the public concerned to challenge acts or omissions relating to such projects is likely to increase the risk that those projects will become the subject of contentious proceedings, that increase of a pre-existing risk cannot be regarded as affecting a situation already established.

28 Although it is true that that extension may have the effect, in practice, of delaying the completion of the projects involved, a disadvantage of that kind is inherent in the review of the legality of decisions, acts or omissions falling within the scope of Directive 85/337, a review in which the legislature of the European Union has, in accordance with the objectives of the Aarhus Convention, sought to involve members of the public concerned having a sufficient interest in bringing proceedings or maintaining the impairment of a right, with a view to contributing to preserving, protecting and improving the quality of the environment and protecting human health.

29 In the light of those objectives, the disadvantage mentioned in the preceding paragraph cannot warrant rendering Article 10a of Directive 85/337 (inserted by Directive 2003/35) redundant in situations already existing at the date by which that article had to be transposed into national law when those procedures resulted in the grant of development consent after that date.

30 In those circumstances, even though the Member States, by virtue of their procedural autonomy and subject to observance of the principles of equivalence and effectiveness, enjoy discretion in implementing Article 10a of Directive 85/337 (Case C-182/10 *Solvay and Others* [2012] ECR, paragraph 47), they may not, for all that, restrict the application of that provision exclusively to administrative development consent procedures initiated after 25 June 2005 alone.

31 It follows from the foregoing considerations that the answer to Question 1 must be that, by providing that it was to be transposed into national law by 25 June 2005 at the latest, Directive 2003/35, which inserted Article 10a into Directive 85/337, is to be interpreted as meaning that the rules of national law adopted in order to transpose that article into the national legal order ought also to apply to administrative development consent procedures initiated before 25 June 2005 when they resulted in the granting of development consent after that date.

Case C-428/08 *Monsanto Technology*

46 In order to answer that question, it must be borne in mind that, according to settled case-law, new rules apply, as a matter of principle, immediately to the future effects of a situation which arose under the old rule (see, *inter alia*, Case C-334/07 *P Commission v Freistaat Sachsen* [2008] ECR I-9465, paragraph 43 and case-law cited).

Case C-266/95 *Dichting Natuur en Milieu and Others*

32 As a matter of principle, a new rule of law applies from the entry into force of the act of which it forms part. While it does not apply to legal situations which have arisen and become definitive under the old law, it applies to their future effects, as well as to new legal situations (see, to that effect, Case C-428/08 *Monsanto Technology* [2010] ECR I-0000, paragraph 66). It is otherwise – subject to the principle of the non-retroactivity of legal acts – only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application.

Case C-431/92 *Commission v Germany*

29 In this case the documents before the Court show that the application for consent for the project at issue was lodged with the Regierungspräsidium Darmstadt by Preußler Elektro AG, the developer, on 26 July 1988, and thus after 3 July 1988. Consequently, the obligation imposed by the directive to carry out an environmental impact assessment could not in principle be waived in respect of the consent procedure for the project at issue.

32 Informal contacts and meetings between the competent authority and the developer, even relating to the content and proposal to lodge an application for consent for a project, cannot be treated for the purposes of applying the directive as a definite indication of the date on which the procedure was initiated. The date when the application for consent was formally lodged thus constitutes the sole criterion which may be used. Such a criterion accords with the principle of legal certainty and is designed to safeguard the effectiveness of the directive. The Court moreover followed this approach in *Bund Naturschutz*, cited above (paragraph 16).

Case C-81/96 *Gedeputeerde Staten van Noord-Holland*

23 However, since the directive does not make provision for transitional rules covering projects in respect of which the consent procedure was initiated before 3 July 1988 and which were still in progress on that date, the Court has held that that principle does not apply where the application for consent for a project was formally lodged before 3 July 1988. It has stated that that formal criterion is the only one which accords with the principle of legal certainty and enables the effectiveness of the directive to be safeguarded (Case C-431/92 *Commission v Germany* [1995] ECR I-2189, paragraph 32).

24 The reason for that is that the directive is primarily designed to cover large-scale projects which will most often require a long time to complete. It would therefore not be appropriate for the relevant procedures, which are already complex at national level and which were formally initiated prior to the date of the expiry of the period for transposing the directive, to be made more cumbersome and time-consuming by the specific requirements imposed by the directive, and for situations already established to be affected by it.

C-416/10 *Križan and Others*

94 According to settled case-law, the principle that projects likely to have significant effects on the environment must be subject to an environmental assessment does not apply where the application for authorisation for a project was formally lodged before the expiry of the period set for transposition of Directive 85/337 (Case C-431/92 *Commission v Germany* [1995] ECR I-2189, paragraphs 29 and 32; and Case C-81/96 *Gedeputeerde Staten van Noord-Holland* [1998] ECR I-3923, paragraph 23).

95 That directive is primarily designed to cover large-scale projects which will most often require a long time to complete. It would therefore not be appropriate for the relevant procedures, which are already complex at national level, to be made even more cumbersome and time-consuming by the specific requirements imposed by that directive and for situations already established to be affected by it (*Gedeputeerde Staten van Noord-Holland*, paragraph 24).



C-72/12, Altrip

2. Does A 11 mean that Member States were required to extend the applicability of the rules for the purpose of challenging the procedural legality of a decision to include cases in which an **EIA was carried out but was irregular?**

Is it possible for member states to have rules that makes it possible to challenge only cases where no EIA has been carried out?

Does the directive require from the member states to make it possible to challenge cases in which an EIA was carried out but was irregular?



Next question was, in short;

is it possible for member states to have rules that makes it possible to challenge only cases where no EIA has been carried out?

Or if the directive requires from the member states to make it possible to challenge cases in which an EIA was carried out but was irregular?

The second question

32 In view of the answer to the first question, it is necessary to examine the second question, in which the referring court asks, in essence, whether Article 10a of Directive 85/337 precludes 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.




C-72/12, Altrip

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

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




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

C-72/12, Altrip

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

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

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



C-72/12, Altrip

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

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



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

C-72/12, Altrip

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



C-72/12, Altrip

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

The provisions of national law **may not limit their applicability solely to cases** in which the legality of a decision is challenged on the ground that **no EIA has been carried out**.

Excluding that applicability in cases in which an EIA has been carried out but is found to be vitiated by defects - even serious defects - would render largely nugatory the provisions relating to public participation.




And from those it concludes that:

Excluding the applicability in cases in which an EIA has been carried out but is found to be vitiated by defects – even serious defects – would render largely nugatory the provisions relating to public participation.

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

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

The provisions of national law **may not limit their applicability solely to cases** in which the legality of a decision is challenged on the ground that **no EIA has been carried out**.

Excluding that applicability in cases in which an EIA has been carried out but is found to be vitiated by defects - even serious defects - would render largely nugatory the provisions relating to public participation.

Would run counter to the objective of ensuring wide access to courts of law as mentioned in Article 10a of that directive.



Excluding in such a way would 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

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

The provisions of national law **may not limit their applicability solely to cases** in which the legality of a decision is challenged on the ground that no EIA has been carried out.

Excluding that applicability in cases in which an EIA has been carried out but is found to be vitiated by defects - even serious defects - would render largely nugatory the provisions relating to public participation.

Article 10a (11) **precludes the Member States from limiting the applicability solely to cases in which the legality of a decision is challenged on the ground that no environmental impact assessment was carried out, while not extending that applicability to cases in which such an assessment was carried out but was irregular.**




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

C-72/12, Altrip

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

C-72/12, Altrip -

Is A 11 to be interpreted as meaning

A challenge concerning the **procedural legality** of decisions, can lead to the annulment of the decision only if there is a real possibility that

1. the contested decision would have been different without the procedural irregularity and if
2. that procedural irregularity affected a substantive legal position of the applicant's?

OR

In judicial proceedings challenging the **procedural legality** of decisions it must be possible for procedural irregularities to lead to annulment on a greater scale?



Next question concerned the procedural legality and if it is necessary that the contested **decision would have been different without the procedural irregularity and if that procedural irregularity must affect a substantive legal position of the applicant's, in order for them to be able to challenge it.**

Or must it be possible for procedural irregularities to lead to annulment on a greater scale

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.



C-72/12, Altrip

C-72/12, Altrip

The article provides for two possibilities as regards the conditions of that admissibility:

1. the applicant's having 'a sufficient interest in bringing the action'

depending on which of those conditions is adopted in the national legislation

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

(C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, p 38)



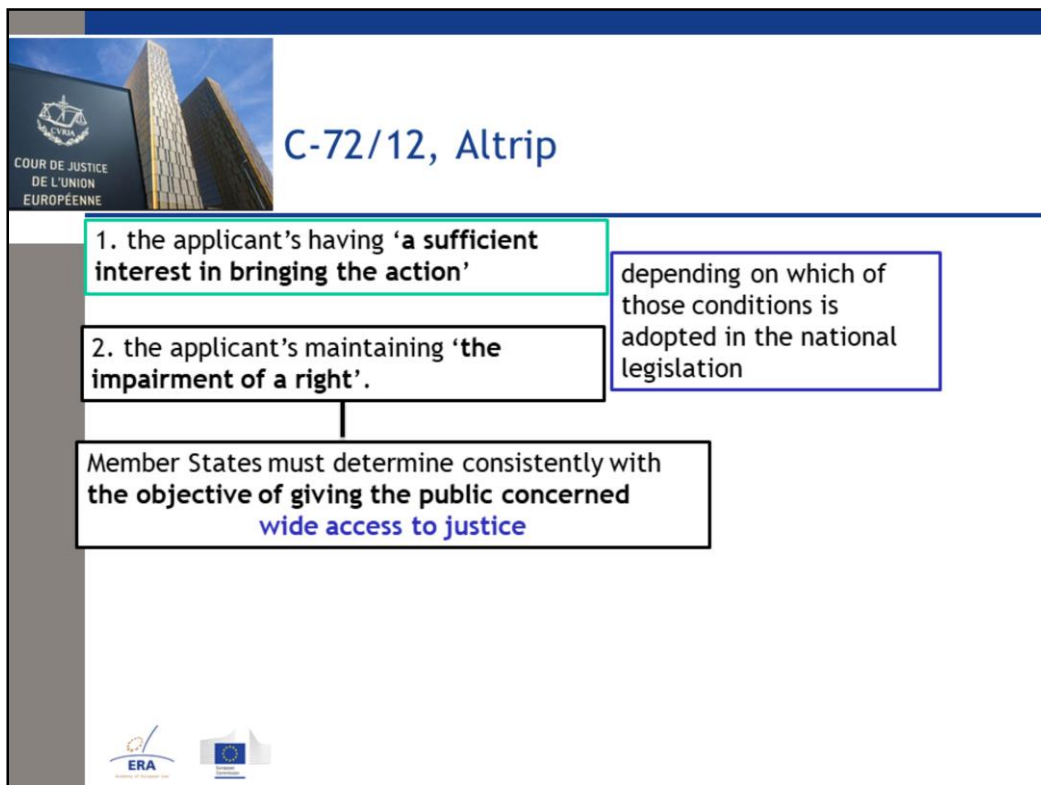

The court held that the article provides for two possibilities as regards for conditions of admissibility:

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.



When deciding this, Member States must determine consistently with **the objective of giving the public concerned wide access to justice.**

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)

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'.



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.

principle of equivalence

Those detailed rules must not be less favourable than those governing similar domestic actions

Principle of effectiveness!

Those detailed rules must not make it in practice impossible or excessively difficult to exercise rights conferred by Union law




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

And when there are no rules fixed in this sphere by Union law, it is up to the member states' national legal system.

But this must be:In accordance with the principle of equivalence and..... the principle of effectiveness. The member state must not make it in practice impossible or excessively difficult to exercise rights conferred by Union law.

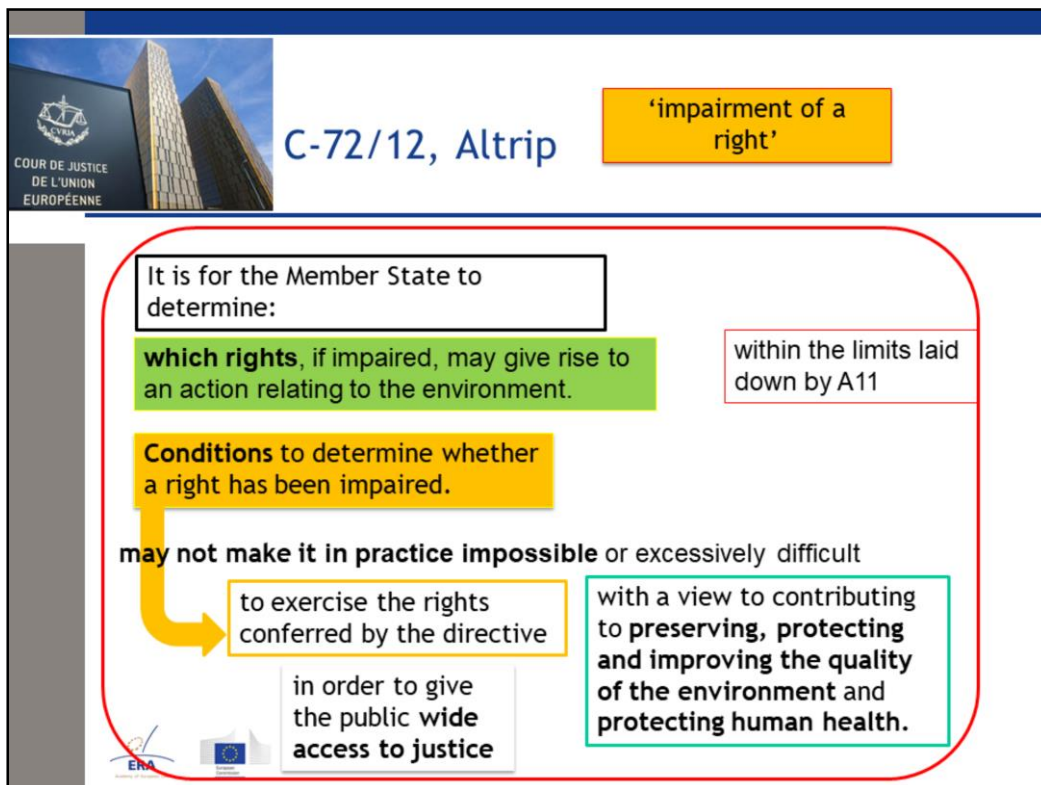
C-72/12, Altrip

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).



Accordingly, although it is for the Member State to determine...

C-72/12, Altrip

46 Accordingly, although it **is for the Member State to determine**, where this is provided for in its legal system, as it is in the present case, which rights, if impaired, may give rise to an action relating to the environment, within the limits laid down by Article 10a of Directive 85/337, the conditions fixed by the Member States for that purpose **may not make it in practice impossible or excessively difficult** to exercise the rights conferred by that directive in order to give the public concerned wide access to justice, with a view to contributing to preserving, protecting and improving the quality of the environment and protecting human health.



COUR DE JUSTICE
DE L'UNION
EUROPÉENNE

C-72/12, Altrip

‘the condition of causality’

that there must be a causal link between the procedural defect invoked and the content of the final contested decision

The Union legislature has in no way limited the pleas in law that may be put forward in support of an action.

It was not the intention to make the possibility of invoking a procedural defect conditional upon that defect’s having an effect on the purport of the contested final decision.




And thus, when it comes to the condition of causality which the question was about....

C-72/12, Altrip

47 In the present case, concerning, in the first place, the criterion that there must be a causal link between the procedural defect invoked and the content of the final contested decision (**‘the condition of causality’**), it is to be noted that, by requiring Member States to ensure that the members of the public concerned have the opportunity to bring an action challenging the substantive or procedural legality of decisions, acts or omissions falling within the scope of Directive 85/337, **the Union legislature** – as has been pointed out in paragraph 36 above – **has in no way limited the pleas in law that may be put forward in support of an action**. In any event, it **was not the intention of the legislature to make the possibility of invoking a procedural defect conditional upon that defect’s having an effect on the purport of the contested final decision**.



C-72/12, Altrip

‘the condition of causality’

Nevertheless:

Not **every** procedural defect will **necessarily have consequences** that can possibly affect the decision and it cannot, therefore, be considered to impair the rights of the party pleading it.

It **does not appear** that the objective 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**.

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

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

I will not read through this; I will only refer to the conclusion: A 11 leaves the Member States significant discretion to determine what constitutes impairment of a right

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

‘the condition of causality’ - burden of proof

It appears, however, with regard to the national law applicable in the case in the main proceedings (in the German court):



in order to establish impairment of a right

burden of proof onto the person bringing the action!

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

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!**




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.



C-72/12, Altrip

'the condition of causality' - burden of proof

→

A 11 is not precluding national courts from refusing to recognise impairment of a right 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.

ONLY if the court (or body hearing the action)

- **does not in any way make the burden of proof fall on the applicant**

The burden of proof





In the end the court came to the conclusion that

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.



C-72/12, Altrip

‘the condition of causality’ - burden of proof

➔ A 11 is not precluding national courts from refusing to recognise impairment of a right 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.

ONLY if the court (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, 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 the Directive.

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.

C-137/14, Commission v Germany

Article 11(1) lays down no restriction whatsoever on the pleas which may be relied on in support of such a review (see *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, C-115/09, p 37). That consideration meets the objective of ensuring broad access to justice in the area of environmental protection.

A restriction laid on the applicant cannot be justified by considerations of compliance with the principle of legal certainty. It is in no way established that a full review by the courts of the merits of that decision would undermine that principle.

The very objective pursued by Article 11 is also to ensure that that review covers **both the substantive and procedural legality** of the contested decision in its entirety.



When it comes to the argument that the principle of legal certainty makes it impossible to challenge decisions which grants rights for the developer, the court has concluded the following.

C-137/14, Commission v Germany

Findings of the Court

75 Paragraph 2(3) of the UmwRG and Paragraph 73(4) and (6) of the VwVfG restrict the pleas in law which may be raised by an applicant in support of legal proceedings against an administrative decision falling within the scope of Article 11 of Directive 2011/92 and Article 25 of Directive 2010/75 to objections made during the administrative procedure.

76 In that regard, although, indeed, neither Article 11(4) of Directive 2011/92 nor Article 25(4) of Directive 2010/75 excludes an action before an administrative authority preceding the legal proceedings and does not prevent national law from requiring the applicant to exhaust all administrative review procedures before being authorised to bring legal proceedings, those provisions of EU law do not, however, allow restrictions on the pleas in law which may be raised in support of legal proceedings.

77 The Court has previously held that Article 11(1) of Directive 2011/92, pursuant to which the decisions, acts or omissions covered by that article must be subject to a review procedure before a court of law or another independent and impartial body established by law to challenge their substantive or procedural legality, lays down no restriction whatsoever on the pleas which may be relied on in support of such a review (see, to that effect, judgment in *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, C-115/09, EU:C:2011:289, paragraph 37). That consideration meets the objective pursued by that provision of ensuring broad access to justice in the area of environmental protection.

78 Paragraph 2(3) of the UmwRG and Paragraph 73(4) of the VwVfG lay down specific conditions restricting the review by the courts which are not provided for in either Article 11 of Directive 2011/92 or Article 25 of Directive 2010/75.

79 **Such a restriction laid on the applicant** as to the nature of the pleas in law which he is permitted to raise before the court reviewing the legality of the administrative decision which concerns him **cannot be justified by considerations of compliance with the principle of legal certainty. It is in no way established that a full review by the courts of the merits of that decision would undermine that principle.**

80 As regards the argument concerning the efficiency of administrative procedures, although it is true that the fact of raising a plea in law for the first time in legal proceedings may, in certain cases, hinder the smooth running of that procedure, it is sufficient to recall that **the very objective pursued by Article 11 of Directive 2011/92 and Article 25 of Directive 2010/75 is not only to ensure that the litigant has the broadest possible access to review by the courts but also to ensure that that review covers both the substantive and procedural legality of the contested decision in its entirety.**

C-137/14, Commission v Germany

None the less, the national legislature may lay down specific procedural rules, such as the inadmissibility of an argument submitted abusively or in bad faith, which constitute appropriate mechanisms for ensuring the efficiency of the legal proceedings.



None the less, the national legislature may lay down specific procedural rules, such as the inadmissibility of an argument submitted abusively or in bad faith, which constitute appropriate mechanisms for ensuring the efficiency of the legal proceedings.

C-137/14, Commission v Germany

81 None the less, the national legislature may lay down specific procedural rules, such as the inadmissibility of an argument submitted abusively or in bad faith, which constitute appropriate mechanisms for ensuring the efficiency of the legal proceedings.

Article 11 and the principles of effectiveness and equivalence:

It is for the Member States to determine what rights can give rise, when infringed, to an action concerning the environment,

The Member States **cannot deprive environmental protection organisations** which fulfil the conditions laid down in Article 1(2) of that directive of the opportunity of playing the role granted to them both by the EIA-Directive and by the Aarhus Convention.



(C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen (Trianel Kohlekraftwerk Lünen)* , p 43-44)

Over all conclusion.

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).

44 Thus, although it is for the Member States to determine, when their legal system so requires and within the limits laid down in Article 10a of Directive 85/337, what rights can give rise, when infringed, to an action concerning the environment, **they cannot, when making that determination, deprive environmental protection organisations which fulfil the conditions laid down in Article 1(2) of that directive of the opportunity of playing the role granted to them both by Directive 85/337 and by the Aarhus Convention.**

What about the SEA Directive?

The SEA Directive **does not provide for a review procedure** before a court or another independent impartial body when it comes to challenge the substantive or procedural legality of

- decisions,
- acts or
- omissions

subject to public participation provisions of the SEA Directive!



However!

Remember the Aarhus convention...

What about the SEA Directive?

The SEA Directive **does not provide for a review** by a court or another independent body.



subject to public participation Directive!

It is for the national courts to interpret its national law in a way which, **to the fullest extent possible**, is consistent with the objectives laid down in A 9(3) of the Aarhus convention.



...and the Slovakian Brown Bear: **It is for the national courts to interpret its national law** in a way which, **to the fullest extent possible**, is consistent with the objectives laid down in **A 9(3)** of the Aarhus convention.

Also; we have the principles of equivalence and efficiency!

Quality control of the EIA information



Quality control of the EIA information

Quality of the EIA Report - Article 5(3)

3. In order to **ensure the completeness and quality** of the environmental impact assessment report:



Quality control of the EIA information

Justification of final decisions

Mandatory post-EIA monitoring

Article 3 Article 5 Article 8 Article 9 Annex III Annex IV

Effectiveness objective (quality) - covered in a satisfactory manner:

Quality control mechanism;

Assessment of reasonable alternatives;

Monitoring measures of significant adverse effects on the environment;

Broader scope of EIA covering new environmental issues;

Justification of screening/EIA decisions.

Quality control of the EIA information

Quality of the EIA Report - Article 5(3)

3. In order to ensure the completeness and quality of the environmental impact assessment report:

(a) **the developer shall ensure that the environmental impact assessment report is prepared by**



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Quality control of the EIA information

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☐ Broader scope of EIA covering new environmental issues;

☐ Justification of screening/EIA decisions.

Quality control of the EIA information

Quality of the EIA Report - Article 5(3)

3. In order to ensure the completeness and quality of the environmental impact assessment report:

(a) the developer shall ensure that the environmental impact assessment report is prepared by competent experts;

(b) **the competent authority shall ensure that it has, or has access as necessary to, sufficient expertise to examine the environmental impact assessment report;** and



Quality control of the EIA information

Justification of final decisions

Mandatory post-EIA monitoring

Article 3 Article 5 Article 8 Article 9 Annex III Annex IV

Effectiveness objective (quality) - covered in a satisfactory manner:

☐ Quality control mechanism;

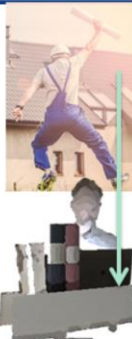
☐ Assessment of reasonable alternatives;

☐ Monitoring measures of significant adverse effects on the environment;

☐ Broader scope of EIA covering new environmental issues;

☐ Justification of screening/EIA decisions.

Quality control of the EIA information



Quality of the EIA Report - Article 5(3)

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- (a) the developer shall ensure that the environmental impact assessment report is prepared by competent experts;
- (b) the competent authority shall ensure that it has, or has access as necessary to, sufficient expertise to examine the environmental impact assessment report; and
- (c) where necessary, **the competent authority shall seek from the developer supplementary information**, in accordance with Annex IV, **which is directly relevant to reaching the reasoned conclusion on the significant effects of the project on the environment.**



Quality control of the EIA information

Justification of final decisions

Mandatory post-EIA monitoring

Article 3 Article 5 Article 8 Article 9 Annex III Annex IV

Effectiveness objective (quality) - covered in a satisfactory manner:

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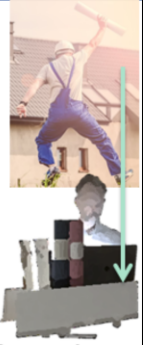
Quality control of the EIA information



Quality of the EIA Report - Article 5(3)

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- (c) where necessary, the competent authority shall seek from the developer supplementary information, **in accordance with Annex IV**, which is directly relevant to reaching the reasoned conclusion on the significant effects of the project on the environment.



Quality control of the EIA information

Justification of final decisions

Mandatory post-EIA monitoring

Article 3 Article 5 Article 8 Article 9 Annex III Annex IV

Effectiveness objective (quality) - covered in a satisfactory manner:

☐ Quality control mechanism;

☐ Assessment of reasonable alternatives;

☐ Monitoring measures of significant adverse effects on the environment;

☐ Broader scope of EIA covering new environmental issues;

☐ Justification of screening/EIA decisions.

Annex IV

ANNEX IV

INFORMATION REFERRED TO IN ARTICLE 5(1)

(INFORMATION FOR THE ENVIRONMENTAL IMPACT ASSESSMENT REPORT)

Description of the project

Location

Reasonable alternatives

Baseline scenario

Likely significant effects

Methods used

Measures to avoid adverse effects

Non technical summary

Reference list



Quality control of the EIA information - summary

Quality of the EIA Report - Article 5(3)

The objective: Guarantee

1. the **quality** of the EIA report and
2. that it is **complete**.



Quality control of the EIA information

Quality of the EIA Report - Article 5(3)

The objective: Guarantee the **quality** of the EIA report and that it is **complete**.

This is made by a **shared responsibility by**



Put in other words – or in other pictures; content of article 5 (3) will be repeated.

Quality control of the EIA information

Quality of the EIA Report - Article 5(3)

The objective: Guarantee the **quality** of the EIA report and that it is **complete**.

This is made by a **shared responsibility by**



developer



Quality control of the EIA information

Quality of the EIA Report - Article 5(3)

The objective: Guarantee the **quality** of the EIA report and that it is **complete**.

This is made by a **shared responsibility by**



developer

and



the competent authority

Quality control of the EIA information

Quality of the EIA Report - Article 5(3)

The objective: Guarantee the **quality** of the EIA report and that it is **complete**.

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developer

and



the competent authority

Two cumulative situations:



Quality control of the EIA information

Quality of the EIA Report - Article 5(3)

The objective: Guarantee the **quality** of the EIA report and that it is **complete**.

This is made by a **shared responsibility by**



developer

and



the competent authority

Two cumulative situations:

Developer shall ensure that the EIA report is prepared by competent experts



Quality control of the EIA information

Quality of the EIA Report - Article 5(3)

The objective: Guarantee the **quality** of the EIA report and that it is **complete**.

This is made by a **shared responsibility by**



developer

and



the competent authority

Two cumulative situations:

Developer shall ensure that the EIA report is prepared by competent experts

+

The CA shall ensure that it has, or has access to, sufficient expertise to examine the EIA report.



Quality control of the EIA information

Quality of the EIA Report - Article 5(3)

The objective: Guarantee the **quality** of the EIA report and that it is **complete**.

This is made by a **shared responsibility by**



developer

and



the competent authority

Where necessary:

Two cumulative situations:

Developer shall ensure that the EIA report is prepared by competent experts

+

The CA shall ensure that it has, or has access to, sufficient expertise to examine the EIA report.



Quality control of the EIA information

Quality of the EIA Report - Article 5(3)

The objective: Guarantee the **quality** of the EIA report and that it is **complete**.

This is made by a **shared responsibility by**



developer

and



the competent authority

Where necessary:

Seek
supplementary
information

Two cumulative situations:

Developer shall ensure that the EIA report is prepared by competent experts

+

The CA shall ensure that it has, or has access to, sufficient expertise to examine the EIA report.



Where necessary, CA shall seek from the developer supplementary information, directly relevant to reaching the reasoned conclusion on the significant effects of the project.

Which expert does the court believe?

Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 54 (1901);t Testimony



the competent authority



be used by the judge!

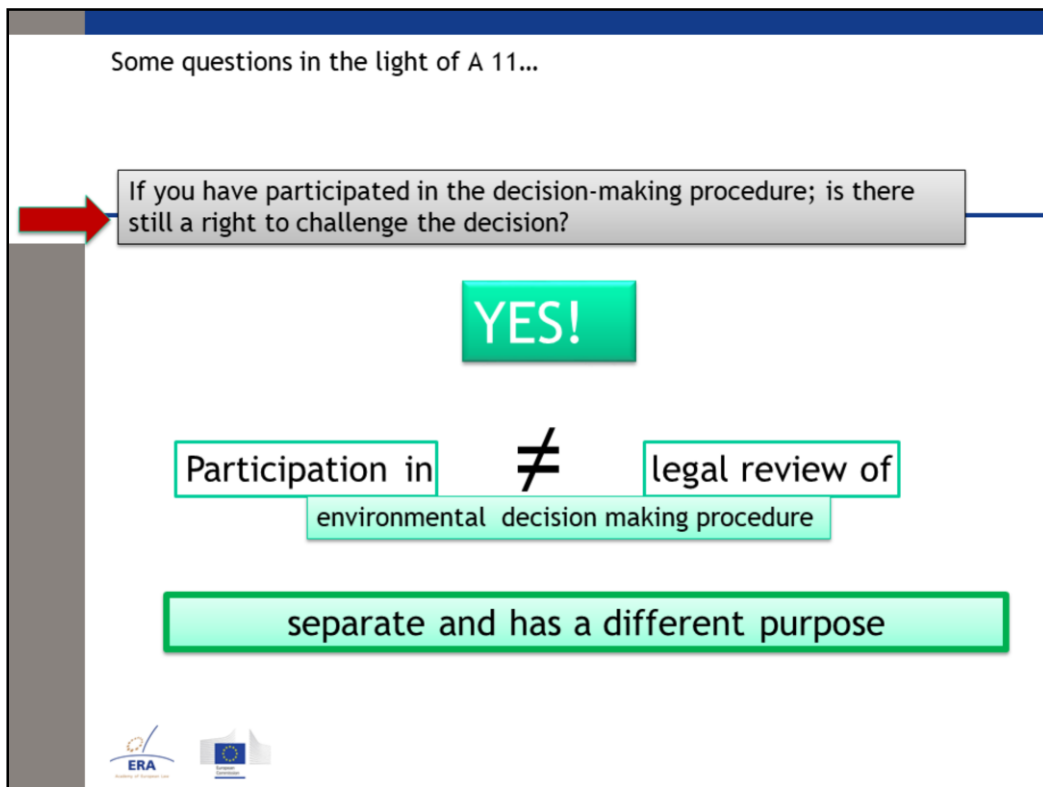



Talking about the burden of proof – if an EIA is challenged; and there are as many reports and as many different scenarios as there are experts involved – Which information may the court use and which expert should the court believe?

In 1901 the US Judge, Judge Learned Hand published a still very interesting article in Harvard Law Review; *Historical and Practical Considerations regarding Expert testimony*. Judge Hand notes that the experts differs from witness since the expert is in effect not telling of facts at all, but of uniform physical rules, natural laws or general principles which the judge must apply to the facts of the case. Here he notes that it is not really important with any absolute discrimination between “fact” and “opinion” , since the apparently simplest “fact” is indeed a conclusion.

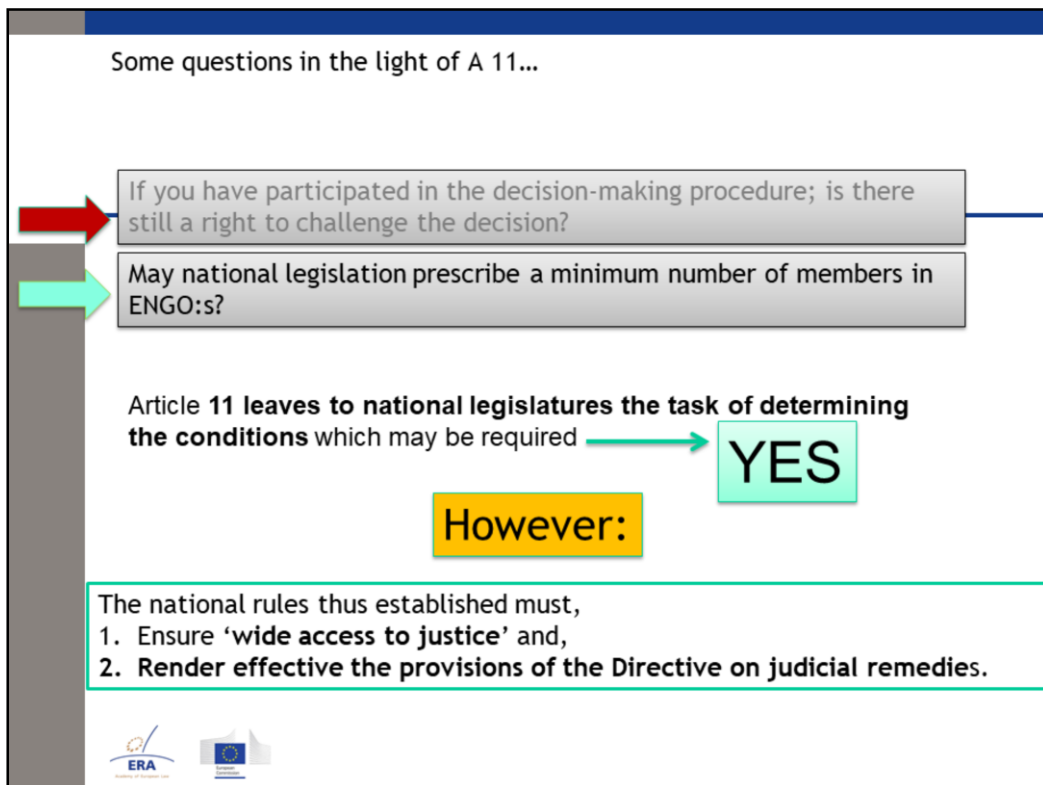
One of the problems with experts is that, if the judge believe the expert; would the expert actually take the place of the judge?

And how do we know if we can believe the expert? In order to ask questions that might show that there are gaps in the expert opinion – you need to be an expert yourself; or at least, almost an expert! And I think this is a very good reason to have expert appointed by the court and IN the court so it is possible to discuss what the experts, appointed by the parties, actually said.



C-263/08 Djurgården - Lilla Värtans Miljöskyddsförening

38 First, the right of access to a review procedure within the meaning of Article 10a of Directive 85/337 does not depend on whether the authority which adopted the decision or act at issue is an administrative body or a court of law. Second, participation in an environmental decision-making procedure under the conditions laid down in Articles 2(2) and 6(4) of Directive 85/337 is separate and has a different purpose from a legal review, since the latter may, where appropriate, be directed at a decision adopted at the end of that procedure. Therefore, participation in the decision-making procedure has no effect on the conditions for access to the review procedure.

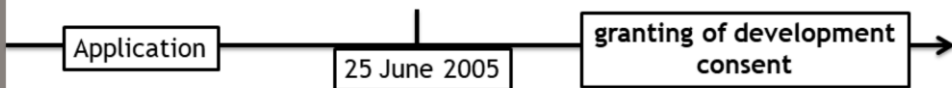


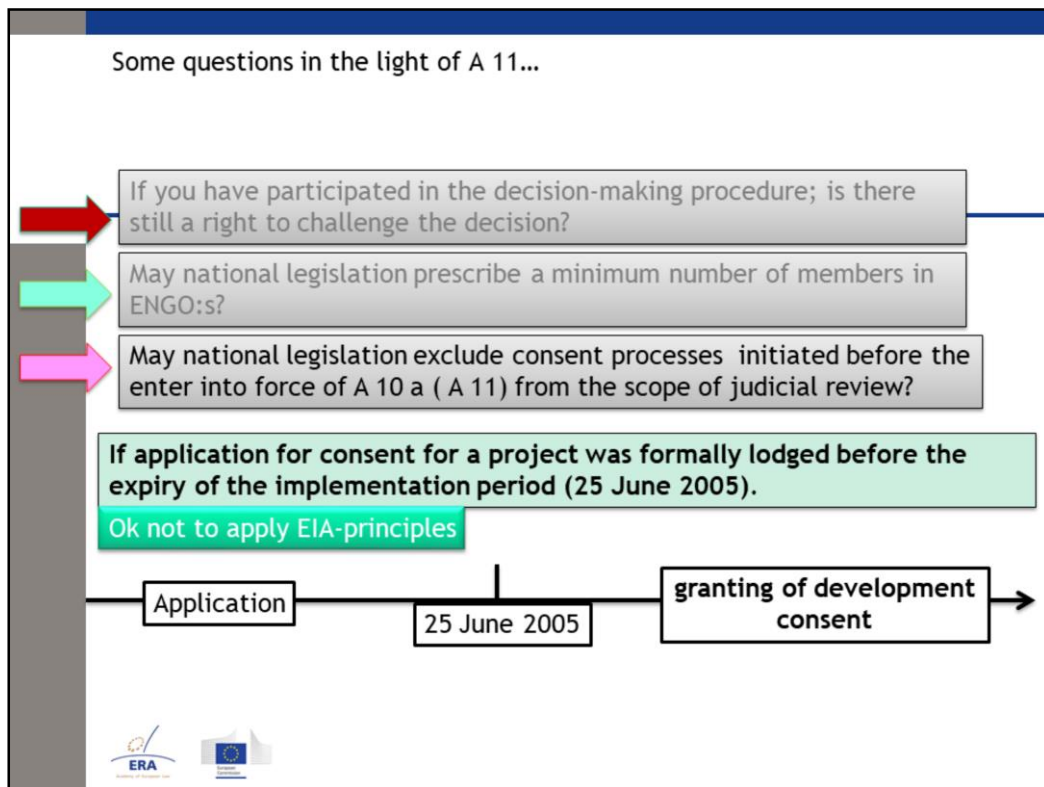
C-263/08 Djurgården - Lilla Värtans Miljöskyddsförening

45 While it is true that Article 10a of Directive 85/337, by its reference to Article 1(2) thereof, leaves to national legislatures the task of determining the conditions which may be required in order for a non-governmental organisation which promotes environmental protection to have a right of appeal under the conditions set out above, the national rules thus established must, first, ensure 'wide access to justice' and, second, render effective the provisions of Directive 85/337 on judicial remedies. Accordingly, those national rules must not be liable to nullify Community provisions which provide that parties who have a sufficient interest to challenge a project and those whose rights it impairs, which include environmental protection associations, are to be entitled to bring actions before the competent courts.

Some questions in the light of A 11...

-  If you have participated in the decision-making procedure; is there still a right to challenge the decision?
-  May national legislation prescribe a minimum number of members in ENGO:s?
-  May national legislation exclude consent processes initiated before the enter into force of A 10 a (A 11) from the scope of judicial review?





C-72/12 Altrip

22 It should be borne in mind that, in principle, a new rule of law applies from the entry into force of the act introducing it. While it does not apply to legal situations that have arisen and become definitive under the old law, it does apply to their future effects, and to new legal situations too (see, to that effect, Case C-428/08 *Monsanto Technology* [2010] ECR I-6765, paragraph 66). It is otherwise – subject to the principle of the non-retroactivity of legal acts – only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application (Case C-266/09 *Stichting Natuur en Milieu and Others* [2010] ECR I-13119, paragraph 32).

23 Directive 2003/35 does not include any particular provision as regards the conditions for the temporal application of Article 10a of Directive 85/337.

24 In addition, it should be borne in mind that, under Article 6 of Directive 2003/35, Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with that directive by 25 June 2005 at the latest. Article 10a of Directive 85/337, which extended the rights of members of the public concerned to challenge the decisions, acts or omissions referred to in that directive on the assessment of the effects of certain public and private projects on the environment, is among the measures which, by the same token, had to be implemented by that date.

25 The Court has previously held that the principle that projects likely to have significant effects on the environment must be subject to an environmental impact assessment does not apply when the application for consent for a project was formally lodged before the expiry of the period set for implementing Directive 85/337 (Case C-431/92 *Commission v Germany* [1995] ECR I-2189, paragraphs 29 and 32; Case C-81/96 *Gedeputeerde Staten van Noord-Holland* [1998] ECR I-3923, paragraph 23; and Case C-416/10 *Kriszán and Others* [2013] ECR, paragraph 94).

26 That directive is primarily designed to cover large-scale projects, the completion of which will most often be spread over a long period. It would therefore not be appropriate for the relevant procedures, which are already complex at national level, to be made even more cumbersome and time-consuming by the specific requirements imposed by that directive and for situations already established to be affected by it (*Gedeputeerde Staten van Noord-Holland*, paragraph 24, and *Kriszán and Others*, paragraph 95).

27 However, neither the new requirements arising from Article 10a of Directive 85/337, nor the actual requirement that project be subject to an environmental assessment, can in themselves be considered to make administrative procedures more cumbersome and time-consuming. As the Advocate General observed in point 59 of his Opinion, the legislation at issue in the main proceedings does not create new requirements of that kind but is instead designed to improve access to a legal remedy. Furthermore, if extending the right of action of the public concerned to challenge acts or omissions relating to such projects is likely to increase the risk that those projects will become the subject of contentious proceedings, that increase of a pre-existing risk cannot be regarded as affecting a situation already established.

28 Although it is true that that extension may have the effect, in practice, of delaying the completion of the projects involved, a disadvantage of that kind is inherent in the review of the legality of decisions, acts or omissions falling within the scope of Directive 85/337, a review in which the legislature of the European Union has, in accordance with the objectives of the Aarhus Convention, sought to involve members of the public concerned having a sufficient interest in bringing proceedings or maintaining the impairment of a right, with a view to contributing to preserving, protecting and improving the quality of the environment and protecting human health.

29 In the light of those objectives, the disadvantage mentioned in the preceding paragraph cannot warrant rendering Article 10a of Directive 85/337 (inserted by Directive 2003/35) redundant in situations already existing at the date by which that article had to be transposed into national law when those procedures resulted in the grant of development consent after that date.

30 In those circumstances, even though the Member States, by virtue of their procedural autonomy and subject to observance of the principles of equivalence and effectiveness, enjoy discretion in implementing Article 10a of Directive 85/337 (Case C-182/10 *Solovy and Others* [2012] ECR, paragraph 47), they may not, for all that, restrict the application of that provision exclusively to administrative development consent procedures initiated after 25 June 2005 alone.

31 It follows from the foregoing considerations that the answer to Question 1 must be that, by providing that it was to be transposed into national law by 25 June 2005 at the latest, Directive 2003/35, which inserted Article 10a into Directive 85/337, is to be interpreted as meaning that the rules of national law adopted in order to transpose that article into the national legal order ought also to apply to administrative development consent procedures initiated before 25 June 2005 when they resulted in the granting of development consent after that date.

Case C-428/08 Monsanto Technology

66 In order to answer that question, it must be borne in mind that, according to settled case-law, new rules apply, as a matter of principle, immediately to the future effects of a situation which arose under the old rule (see, inter alia, Case C-334/07 P *Commission v Freistaat Sachsen* [2008] ECR I-9465, paragraph 43 and case-law cited).

Case C-266/09 Stichting Natuur en Milieu and Others

32 As a matter of principle, a new rule of law applies from the entry into force of the act of which it forms part. While it does not apply to legal situations which have arisen and become definitive under the old law, it applies to their future effects, as well as to new legal situations (see, to that effect, Case C-428/08 *Monsanto Technology* [2010] ECR I-0000, paragraph 66). It is otherwise – subject to the principle of the non-retroactivity of legal acts – only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application.

C-431/92 Commission v Germany

29 In this case, the documents before the Court show that the application for consent for the project at issue was lodged with the Regierungspräsidium Darmstadt by Preußen Elektra AG, the developer, on 26 July 1988, and thus after 3 July 1988. Consequently, the obligation imposed by the directive to carry out an environmental impact assessment could not in principle be waived in respect of the consent procedure for the project at issue.

32 Informal contacts and meetings between the competent authority and the developer, even relating to the content and proposal to lodge an application for consent for a project, cannot be treated for the purposes of applying the directive as a definite indication of the date on which the procedure was initiated. The date when the application for consent was formally lodged thus constitutes the sole criterion which may be used. Such a criterion accords with the principle of legal certainty and is designed to safeguard the effectiveness of the directive. The Court moreover followed this approach in *Bund Naturschutz*, cited above (paragraph 16).

Case C-81/96 Gedeputeerde Staten van Noord-Holland

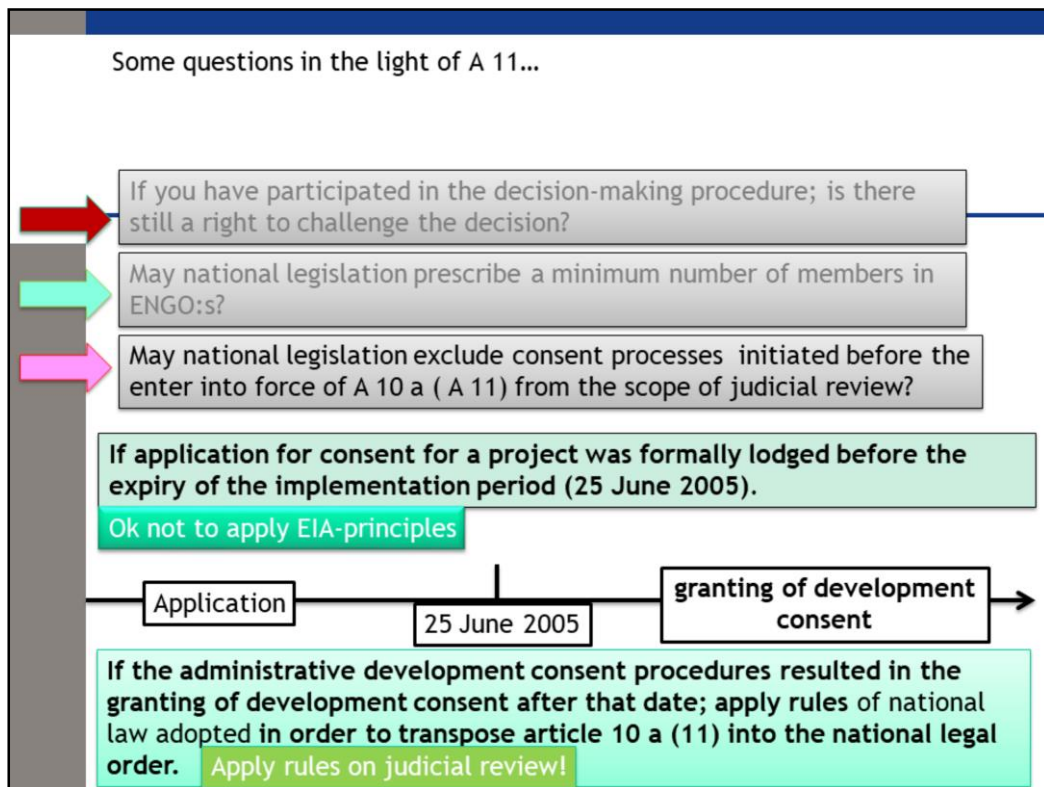
23 However, since the directive does not make provision for transitional rules covering projects in respect of which the consent procedure was initiated before 3 July 1988 and which were still in progress on that date, the Court has held that that principle does not apply where the application for consent for a project was formally lodged before 3 July 1988. It has stated that that formal criterion is the only one which accords with the principle of legal certainty and enables the effectiveness of the directive to be safeguarded (Case C-431/92 *Commission v Germany* [1995] ECR I-2189, paragraph 32).

24 The reason for that is that the directive is primarily designed to cover large-scale projects which will most often require a long time to complete. It would therefore not be appropriate for the relevant procedures, which are already complex at national level and which were formally initiated prior to the date of the expiry of the period for transposing the directive, to be made more cumbersome and time-consuming by the specific requirements imposed by the directive, and for situations already established to be affected by it.

C-416/10 Kriszán and Others

94 According to settled case-law, the principle that projects likely to have significant effects on the environment must be subject to an environmental assessment does not apply where the application for authorisation for a project was formally lodged before the expiry of the period set for transposition of Directive 85/337 (Case C-431/92 *Commission v Germany* [1995] ECR I-2189, paragraphs 29 and 32, and Case C-81/96 *Gedeputeerde Staten van Noord-Holland* [1998] ECR I-3923, paragraph 23).

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C-72/12 Altrip

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29 In the light of those objectives, the disadvantage mentioned in the preceding paragraph cannot warrant rendering Article 10a of Directive 85/337 (inserted by Directive 2003/35) redundant in situations already existing at the date by which that article had to be transposed into national law when those procedures resulted in the grant of development consent after that date.

30 In those circumstances, even though the Member States, by virtue of their procedural autonomy and subject to observance of the principles of equivalence and effectiveness, enjoy discretion in implementing Article 10a of Directive 85/337 (Case C-182/10 *Solovy and Others* [2012] ECR, paragraph 47), they may not, for all that, restrict the application of that provision exclusively to administrative development consent procedures initiated after 25 June 2005 alone.

31 It follows from the foregoing considerations that the answer to Question 1 must be that, by providing that it was to be transposed into national law by 25 June 2005 at the latest, Directive 2003/35, which inserted Article 10a into Directive 85/337, is to be interpreted as meaning that the rules of national law adopted in order to transpose that article into the national legal order ought also to apply to administrative development consent procedures initiated before 25 June 2005 when they resulted in the granting of development consent after that date.

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Case C-81/96 *Gedeputeerde Staten van Noord-Holland*

23 However, since the directive does not make provision for transitional rules covering projects in respect of which the consent procedure was initiated before 3 July 1988 and which were still in progress on that date, the Court has held that that principle does not apply where the application for consent for a project was formally lodged before 3 July 1988. It has stated that that formal criterion is the only one which accords with the principle of legal certainty and enables the effectiveness of the directive to be safeguarded (Case C-431/92 *Commission v Germany* [1995] ECR I-2189, paragraph 32).

24 The reason for that is that the directive is primarily designed to cover large-scale projects which will most often require a long time to complete. It would therefore not be appropriate for the relevant procedures, which are already complex at national level and which were formally initiated prior to the date of the expiry of the period for transposing the directive, to be made more cumbersome and time-consuming by the specific requirements imposed by the directive, and for situations already established to be affected by it.

C-416/10 *Kriszán and Others*

94 According to settled case-law, the principle that projects likely to have significant effects on the environment must be subject to an environmental assessment does not apply where the application for authorisation for a project was formally lodged before the expiry of the period set for transposition of Directive 85/337 (Case C-431/92 *Commission v Germany* [1995] ECR I-2189, paragraphs 29 and 32, and Case C-81/96 *Gedeputeerde Staten van Noord-Holland* [1998] ECR I-3923, paragraph 23).

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Some questions in the light of A 11...

- If you have participated in the decision-making procedure; is there still a right to challenge the decision?
- May national legislation prescribe a minimum number of members in ENGO:s?
- May national legislation exclude consent processes initiated before the enter into force of A 10 a (A 11) from the scope of judicial review?
- Is it only possible to challenge cases where no EIA has been carried out?

Is it possible for a member state to limit the applicability of national provisions on judicial review solely to cases where a decision is challenged on the ground that no EIA was carried out?

NO!



C-72/12, Altrip

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

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-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.

Some questions in the light of A 11...

If you have participated in the decision-making procedure; is there still a right to challenge the decision?

May national legislation prescribe a minimum number of members in ENGO:s?

May national legislation exclude consent processes initiated before the enter into force of A 10 a (A 11) from the scope of judicial review?

Is it only possible to challenge cases where no EIA has been carried out?

NO!

Article 10a 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.

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.

Some questions in the light of A 11...

-  If you have participated in the decision-making procedure; is there still a right to challenge the decision?
-  May national legislation prescribe a minimum number of members in ENGO:s?
-  May national legislation exclude consent processes initiated before the enter into force of A 10 a (A 11) from the scope of judicial review?
-  Is it only possible to challenge cases where no EIA has been carried out?

NO!

The very objective pursued by Article 11 is not only to ensure that the litigant has the broadest possible access to review by the courts but also to ensure that that review covers **both the substantive and procedural legality** of the contested decision in its entirety.

C-137/14, Commission v Germany

80 As regards the argument concerning the efficiency of administrative procedures, although it is true that the fact of raising a plea in law for the first time in legal proceedings may, in certain cases, hinder the smooth running of that procedure, it is sufficient to recall that **the very objective pursued by Article 11 of Directive 2011/92 and Article 25 of Directive 2010/75 is not only to ensure that the litigant has the broadest possible access to review by the courts but also to ensure that that review covers both the substantive and procedural legality of the contested decision in its entirety.**

Some questions in the light of A 11...

- If you have participated in the decision-making procedure; is there still a right to challenge the decision?
- May national legislation prescribe a minimum number of members in ENGO:s?
- May national legislation exclude consent processes initiated before the enter into force of A 10 a (A 11) from the scope of judicial review?
- Is it only possible to challenge cases where no EIA has been carried out?

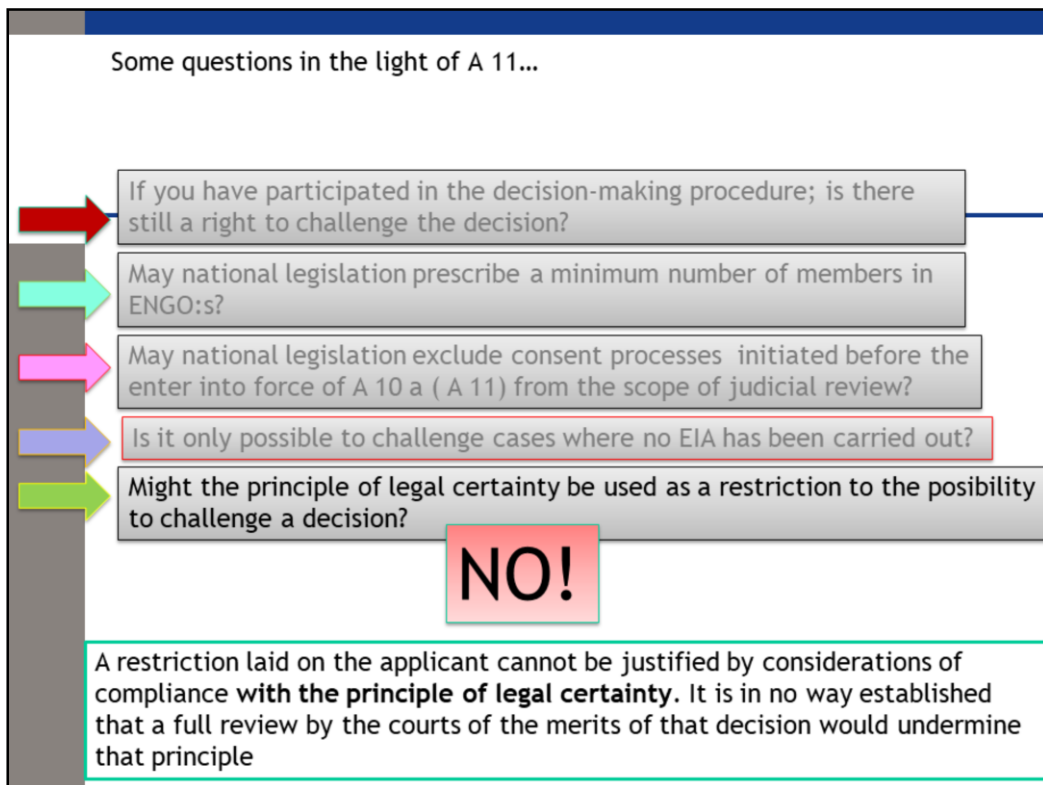
NO!

None the less, the national legislature may lay down specific procedural rules, such as the inadmissibility of an argument submitted abusively or in bad faith!



C-137/14, Commission v Germany

81 None the less, the national legislature may lay down specific procedural rules, such as the inadmissibility of an argument submitted abusively or in bad faith, which constitute appropriate mechanisms for ensuring the efficiency of the legal proceedings



C-137/14, Commission v Germany

79 **Such a restriction laid on the applicant** as to the nature of the pleas in law which he is permitted to raise before the court reviewing the legality of the administrative decision which concerns him **cannot be justified by considerations of compliance with the principle of legal certainty**. It is in no way established that a full review by the courts of the merits of that decision would undermine that principle.

Some questions in the light of A 11...

-  If you have participated in the decision-making procedure; is there still a right to challenge the decision?
-  May national legislation prescribe a minimum number of members in ENGO:s?
-  May national legislation exclude consent processes initiated before the enter into force of A 10 a (A 11) from the scope of judicial review?
-  Is it only possible to challenge cases where no EIA has been carried out?
-  Might the principle of legal certainty be used as a restriction to the possibility to challenge a decision?
-  How much may a review procedure cost?

Some questions in the light of A 11...

Persons should not be prevented from seeking a review by the courts by reason of the financial burden that might arise as a result.

The court must satisfy itself that that requirement has been complied with, taking into account both

- the interest of the person wishing to defend his rights and
- the public interest in the protection of the environment.

Not sufficient of itself to establish that the proceedings are not prohibitively expensive for him

How much may a review procedure cost?



C-260/11, Edwards and Pallikaropoulos

On those grounds, the Court (Fourth Chamber) hereby rules:

The requirement, under the fifth paragraph of Article 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment and the fifth paragraph of Article 15a of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, that judicial proceedings should not be prohibitively expensive means that the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result. Where a national court is called upon to make an order for costs against a member of the public who is an unsuccessful claimant in an environmental dispute or, more generally, where it is required – as courts in the United Kingdom may be – to state its views, at an earlier stage of the proceedings, on a possible capping of the costs for which the unsuccessful party may be liable, it must satisfy itself that that requirement has been complied with, taking into account both the interest of the person wishing to defend his rights and the public interest in the protection of the environment.

In the context of that assessment, the national court cannot act solely on the basis of that claimant's financial situation but must also carry out an objective analysis of the amount of the costs. It may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime.

By contrast, the fact that a claimant has not been deterred, in practice, from asserting his claim is not of itself sufficient to establish that the proceedings are not prohibitively expensive for him.

Lastly, that assessment cannot be conducted according to different criteria depending on whether it is carried out at the conclusion of first-instance proceedings, an appeal or a second appeal.

Some questions in the light of A 11...

-  If you have participated in the decision-making procedure; is there still a right to challenge the decision?
-  May national legislation prescribe a minimum number of members in ENGO:s?
-  May national legislation exclude consent processes initiated before the enter into force of A 10 a (A 11) from the scope of judicial review?
-  Is it only possible to challenge cases where no EIA has been carried out?
-  Might the principle of legal certainty be used as a restriction to the possibility to challenge a decision?
-  How much may a review procedure cost?
-  What is a 'sufficient interest'? And what is an 'impairment of a right'?

Some questions in the light of A 11...

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

A 11 is not precluding national courts from refusing to recognise impairment of a right 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.

ONLY if the court (or body hearing the action)

- **does not in any way make the burden of proof fall on the applicant**

What is a 'sufficient interest'? And what is an 'impairment of a right'?

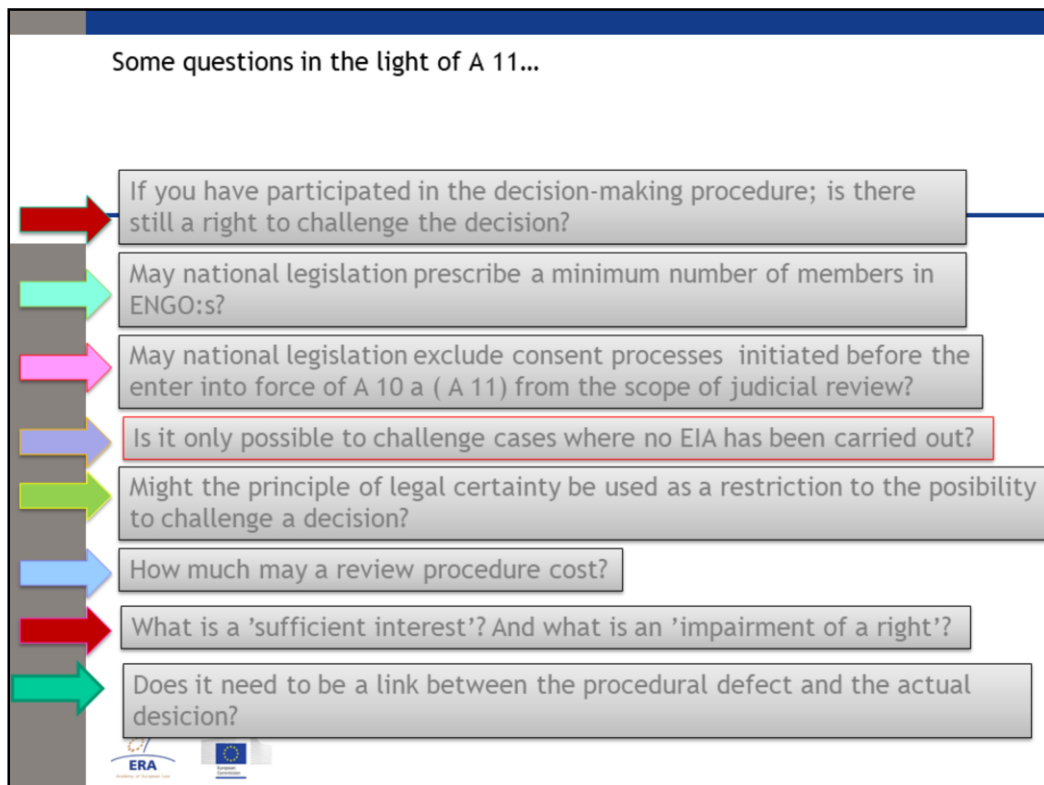


C-72/12 Altrip

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.

Some questions in the light of A 11...

-  If you have participated in the decision-making procedure; is there still a right to challenge the decision?
-  May national legislation prescribe a minimum number of members in ENGO:s?
-  May national legislation exclude consent processes initiated before the enter into force of A 10 a (A 11) from the scope of judicial review?
-  Is it only possible to challenge cases where no EIA has been carried out?
-  Might the principle of legal certainty be used as a restriction to the possibility to challenge a decision?
-  How much may a review procedure cost?
-  What is a 'sufficient interest'? And what is an 'impairment of a right'?
-  Does it need to be a link between the procedural defect and the actual decision?



C-72/12 Altrip

47 In the present case, concerning, in the first place, the criterion that there must be a causal link between the procedural defect invoked and the content of the final contested decision (**'the condition of causality'**), it is to be noted that, by requiring Member States to ensure that the members of the public concerned have the opportunity to bring an action challenging the substantive or procedural legality of decisions, acts or omissions falling within the scope of Directive 85/337, **the Union legislature** – as has been pointed out in paragraph 36 above – **has in no way limited the pleas in law that may be put forward in support of an action**. In any event, it **was not the intention of the legislature to make the possibility of invoking a procedural defect conditional upon that defect's having an effect on the purport of the contested final decision**.

Summary of case law

Right to have the consequences assessed

C-420/11, *Leth*

Right of individuals to rely on a directive and of the national court to take it into consideration

C-72/95, *Kraaijeveld and Others*

C-435/97, *WWF and Others*

C-287/98, *Linster*

C-201/02, *Wells*

Aarhus Convention is part of *acquis*

C-240/09, *Lesoochránárske zoskupenie, Slovak bear-Case*



Here I have listed some key-conclusions from Case law. All of the situations or the cases mentioned are not discussed in the presentation; view this "list" as kind of a handbook.

Summary of case law

Information on access to justice

C-427/07, Commission v. Ireland, p 9

Access to justice

Not confined only to participation in administrative procedure

C- 263/08, Djurgården- Lilla Värtan

Vide acces to justice required

C-263/08, Djurgården - Lilla Värtan

Rights of ENGO:s

C-263/08, Djurgården-Lilla Värtan

C-115/09, Trianel Kohlekraftwerk Lünen

Subjective rights and protection of public interest

C-115/09, Trianel Kohlekraftwerk Lünen



In article 11 (5) of the Directive there is an obligation to make practical information on access to administrative and judicial review procedures available to the public. This is an obligation to obtain a **precise result** which the Member States must ensure is achieved.

(C-427/07, Commission v. Ireland, p 96-98)

Summary of case law

Interests capable of being impaired - under EU law and domestic law

C-115/09, *Trianel Kohlekraftwerk Lünen*

Injunctive relief

opinion AG Kokott in C-416/10 *Križan*

Information on access to justice

C-427/07, *Commission v. Ireland*



Thank you!

