

Co-operation with national judges in the field of
environmental law under the European Commission
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Training module

**HOW TO HANDLE COURT PROCEEDINGS INVOKING NON-COMPLIANCE
WITH EU NATURE PROTECTION LAW
FOCUS ON SITE PROTECTION**

4 - 6 October 2017
Trier, Germany

Organised by Academy of European Law



Case study Mountain bike downhill course

- Comments to the questions:



Q 1 - Infringement to be invoked although no derogation was granted?

- Yes
 - Art. 6 (2-4) form a coherent whole in the light of conservation objectives (C-258/11, Para 32, Sweetman)
 - Art. 6 (3) integrates the precautionary principle (C-258/11 Para 41), it can be impaired on its own by granting assent to a project without due sufficient impact assessment
 - if a derogation could be challenged as unlawful, then all the more the granting of a permit without due prior assessment
 - Principles of effectivity and effective legal protection



Q 2 - Extent of judicial review, administrative discretion?

- Judicial review of impact assessment restrained in EU law:
 - Certain margin of discretion of public authority, opinion of Advocate General Kokott:
 - C-127/02 Waddenzee Para 109
 - C-241/08 Commission v France Para 30
 - But the national court has to check whether all due efforts for scientific investigation were made by authority (C-258/11 Para 44, Sweetman)

- German doctrine: No discretion, full judicial control, if necessary with expert opinion
 - Federal Administrative Court, e.g. judgement of 01.06.2017 - 9 C 2/16 (cycle track without due assessment)



Q 3 - Integrity of site adversely affected ?

- Art. 6 (3) 1 - screening: if probability or risk of significant impacts; only to be denied if there are no reasonable scientific doubts as to the absence of such impacts (C-182/10, Para 67 - Solvay)
- Art. 6 (3) 1 - assessment: best available science must address all relevant impacts on conservation objectives; if certainty as to absence of significant effects unlikely, no assent under Art. 6 (3) 2
- here: Conservation objectives as such certainly affected, but
- loss of only 1000 m² irrelevant? - no legal threshold, salami slicing?
- 2 Annex I habitat types affected, with *Nardus* grasslands even a priority type, by Art. 1 (d) defined as „in danger of disappearance for whose conservation EU has particular responsibility“ (C-258/11, Para 42 - Sweetman)



Q 4 - Quash of permit for procedural fault?

- Yes, annulment already due to procedural fault (insufficient assessment by authority, no lawful derogation)
- Even if Court could check alternative solutions (e.g. different track) or preconditions of derogation incidentally, no „healing“ of the permit, particularly no granting of derogation by the court itself (separation of powers, perhaps regarded differently in some MS, like Sweden)
- In case the authority amends the permit before or in the oral hearing, e.g. by adding additional conditions, to be considered by the court
- May the court suggest an amicable settlement?
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Q 4 (continued) Amicable settlement?

- Principle of party disposition
- Suggestion by the court at its discretion
- In cases of legal and/or factual uncertainty?



Q 5 - Preconditions of derogation met?

- No, already because of lack of proper assessment (Art. 6 (3) 1)
- Art. 6 (4) - restrictive interpretation (C-182/10, Para 73-78 - Solvay)
- Comprehensive balancing required
 - The interest is to weigh up against the damage, CJEU:
 - C-304/05, COM v Italy, Para 83 - Stelvio
 - C-182/10, Para 74 - Solvay
 - C-142/16, COM v Germany - Moorburg coal power plant
- Criteria under Art. 6 (4) Subpara 1 - e.g. also economic reasons
- But Subpara 2 - restriction of considerations: no economic reasons admissible, if priority natural habitat type and/or priority species affected (here the case, therefore no development arg.)



Q 6 - Legal remedies / sanctions?

- Main proceedings: Action for performance to stop works and training activities admissible
- Interim proceedings: Order to oblige the authority to care for immediate stop
- Sanctions / fines?
 - According to national law
 - Is permit immediately effective or has action for annulment suspensive effect?



The END - thank you for your attention

