

SCIENTIFIC KNOWLEDGE IN  
ENVIRONMENTAL JUDICIAL REVIEW:  
SAFEGUARDING EFFECTIVE JUDICIAL  
PROTECTION IN THE EU MEMBER STATES?  
- SUMMARY OF THE CASE STUDY  
RESPONSES

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# The menu

- Starter: EU and international requirements on the depth of review and on access to scientific knowledge
  - National procedural autonomy
  - *Upjohn* equivalence and the threshold of “manifest error”
  - How to assess “manifest error”
  - Article 9(2) and (4) Aarhus Convention
  - The Communication on Access to Justice
  - *Comitato di coordinamento*
- Main course: the case studies responses
- Dessert: Conclusions

# Starter: EU and international requirements on the depth of review: national procedural autonomy...

- ... subject to equivalence and effectiveness
  - No review of facts: unacceptable (*Dörr and Unal*) (asylum)
  - *Wednesbury* style of review seems also not to be acceptable (*Krankenhaustechnik*): not “lawful for Member States to limit review of the legality of a decision to withdraw an invitation to tender to mere examination of whether it was arbitrary” (public procurement)

# Starter: EU and international requirements on the depth of review: *Upjohn*

- *Upjohn*
  - “According to the Court's case-law, where a Community authority is called upon, in the performance of its duties, to make complex assessments, it enjoys a wide measure of discretion, the exercise of which is subject to a limited judicial review in the course of which the Community judicature may not substitute its assessment of the facts for the assessment made by the authority concerned. Thus, in such cases, the Community judicature must restrict itself to examining the accuracy of the findings of fact and law made by the authority concerned and to verifying, in particular, that the action taken by that authority is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion [...]”
  - “Consequently, Community law does not require the Member States to establish a procedure for judicial review [...] which involves a more extensive review than that carried out by the Court in similar cases”.

# Starter: how to assess “manifest error”

- *KME*

- “[t]he establishment of the facts – including whether the evidence relied on is factually accurate, reliable and consistent and whether that evidence contains all information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it” must be able to be reviewed by the Court of Justice.

# Starter: Article 9(2) and (4) Aarhus Convention

- Article 9(2): the possibility of a review of the “substantive and procedural legality”.
- Article 9(4): the requirement of “adequate and effective remedy”.
- *Altrip and Commission v. Germany*: review of all aspects of legality (not only procedural errors)



- Court has to be able to understand the technical aspects of the decision
- In line with *Upjohn* → all aspects of legality must be analysed to assess whether a manifest error was committed

## Interim conclusion: *KME + Upjohn + Altrip*

- National courts are not required to go beyond “manifest error”
  - But below is not acceptable
- In order to assess whether a manifest error has been committed, they are required under EU law to be able to assess the evidence submitted
- ... and therefore to access all necessary scientific knowledge to do so.

# Starter: Communication on Access to Justice

- “National courts are not generally required to carry out any information-gathering or factual investigations of their own.”
  - Cf: “[t]he establishment of the facts – including whether the evidence relied on is factually accurate, reliable and consistent and whether that evidence contains all information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it” must be able to be reviewed by the Court of Justice. (*KME* case)



# Starter: Communication on Access to Justice

- “However, in order to ensure an effective review of the decisions, acts or omissions at stake, a minimum standard has to be applied to the examination of the facts in order to ensure that a claimant can exercise his or her right to ask for a review in an effective manner also so far as the examination of facts is concerned”
  - What is this minimum standard?
- “If a national court could never review the facts on which the administration based its decision, this could, from the outset, prevent a claimant from presenting effectively a potentially justified claim”
  - Only not allowed to bar review of facts entirely?
  - What is the purpose of being able to review facts if courts don't have the tools to understand them?

# Starter: EU and international requirements on access to scientific knowledge

- *Comitato di coordinamento per la difesa della cava* (AG)
  - Where a Community provision confers rights, “genuine protection for them necessarily implies that experts appointed by the court must be independent so that the inquiries can be undertaken with rigorous impartiality and neutrality”.
  - Principle of effective judicial protection “is [...] compromised since, principally in technical matters where the administration is the other party, an ordinary individual has no standing to challenge what the administration says. The expert must thus reflect the independence of the judge, the need for which has been recognized by this Court”

# Main course

## Case on Natura 2000 & scientific uncertainty

- Analyzed 13 replies, categorized in two
- 1) substantial assessment in the court
  - Finland, Sweden, Germany, Austria, Hungary, Czech Republic
- 2) reviewing only lawfulness
  - Estonia, Ukraine, Cyprus, Belgium, Poland, the UK, (The EU)
- N.B.! Relation between scientific uncertainty & precautionary principle

## Case on endangered birds

- 7 replies, often shorter

# Dessert: conclusions

- An “EU-mandated” depth of review?
  - “Manifest error” (on the basis of “*Upjohn* equivalence”)
- In order to be able to review “manifest errors”, necessary knowledge should be made available to national courts
- However see the Communication on Access to Justice
- An “EU-mandated” method to access knowledge?
  - Independence of experts (AG)

# Dessert: conclusions

- Legitimate (?) differences in depth of review exist
- Legitimate (?) differences in methods to access scientific knowledge exist
- Are there national solutions below EU acceptable levels?
  - The European Energy & Environmental Law Review Special Issue 27(4) 2018
- Is this threat to uniform application of EU law?
  - According to the case studies: yes!

