

THE WORLD IS SO COMPLICATED - THE MORE I LEARN, THE LESS CLEAR ANYTHING GETS. THERE ARE TOO MANY IDEAS AND ARGUMENTS TO PICK AND CHOOSE FROM. HOW CAN I TRUST MYSELF TO KNOW THE TRUTH ABOUT ANYTHING?

AND IF EVERYTHING I KNOW IS SO SHAKY, WHAT ON EARTH AM I DOING TEACHING?



"I GUESS YOU JUST DO YOUR BEST. NO ONE CAN IMPART PERFECT UNIVERSAL TRUTHS TO THEIR STUDENTS.

AHEM

... EXCEPT MATH TEACHERS.

THANK YOU.



<https://xkcd.com/263/>

How the CJEU deals with scientific knowledge

Recent CJEU case law



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Please feel free to interrupt

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On the Advocate General

- Member of the Court
- Advises the Court by independently preparing Opinions
- Does not participate in deliberations
- Opinion is not a Judgment
- Only the Judgment has the authority of the Court
- Opinions can illuminate the background
- Presentation is my personal view

This slide aims to illuminate the background of the author and original presenter of this presentation. There is no need for others to retain it.

Article 252 TFEU

The Court of Justice shall be assisted by eight Advocates-General. Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement.

Remarks:

The Council has decided to increase the number of AGs to eleven.

The AG is not assigned to any particular chamber of the court. She does not participate in the deliberations of the judgment.

Overview

- The Challenge of Science
- Standard of Review
 - Uncertainty and EU law
 - Review of Complex Appreciations by EU institutions
 - Substantial issues
 - Procedural issues
 - Transposition to MS courts

Content of the presentation

Practice of the CJEU

- The procedural law of the CJEU allows to appoint and hear experts
- Since 2003 I have never seen that the CJEU exercised this power to hear scientific expertise
- Occasionally, parties bring experts to a hearing, sometimes question are put to them directly or indirectly to understand the case
- More often, studies are submitted, but these are rarely translated

Law as Mathematics

- Legal rules are algorithms
- Legal review appears as a check of calculations: correct or not?
- Many rules involve scientific issues - as conditions and/or for outcomes
- Science = Maths?
- Often we don't know the numbers or the formula

In principle, we can understand law and judicial review as a mathematical model. Rules are algorithms and therefore their application depends on calculations. If we frame this model in a very simplistic (or idealistic) way, there can only be one correct outcome. Either the sums add up or they do not. Courts would simply need to verify this. However, reality is significantly more complex. For many cases, we do not know all the numbers and calculations necessary to apply the rules in this way.

Scientific Uncertainty

- Complex appraisals? Uncertainty = Difference of scientific opinion
 - Incomplete/Bad Data
 - Causation/Correlation
 - Prognostic element >> future effects in complex situations
- [+Balancing = Outcome of technical/scientific appraisal, often a probability of certain effects, is part of the balancing of the interests that guides the measures to adopt]

Some illustration of scientific uncertainty.

Excursion to the Fundamentals of EU Law

- Classical: Burden of Proof (for facts)
- BUT: Did we not learn about another way how to deal with uncertainty in EU law?
- That is: Insufficiently clear and unconditional rules?
- Direct Effect!
- Are rules where we can't be sure about the conditions or the consequences because of open scientific questions sufficiently clear (or unconditional) to be applied directly (by Courts)?

In principle, there is a well tested method to address scientific uncertainty, namely burden of proof. If a fact cannot be established to the conviction of the Court, one of the parties bears the consequences.

The uncertainty inherent in unresolved scientific questions reminds us of a more general principle of EU, namely the conditions for direct effect. EU provisions have direct effect if they are sufficiently clear and unconditional.

Review of EU Acts

- EU Action rarely is the result of a “simple” calculation allowing strict review (cf. Opinion in Borealis, EU:C:2015:754, paras 131 et seq., calculation of correction factor)
- Most disputes result from the exercise of discretion (eg. Afton Chemical, EU:C:2010:419, paras 60 - 62, risk assessment, precautionary action)
- > powers often require scientific appreciation

The Opinion in Borealis provides a rare example where control of a calculation was discussed. This calculation wasn't simple because it required data from all European installations subject to the emissions trading system, but this data and the formula to apply were known.

Conversely, the Afton case confronted the Court with a more focussed, but significantly more complex question, namely whether the EU legislator had assessed the risks for human health and the environment, associated with a fuel additive correctly and drawn appropriate consequences.

60 A correct application of the precautionary principle presupposes, first, identification of the potentially negative consequences for health of the proposed use of MMT, and, secondly, a comprehensive assessment of the risk to health based on the most reliable scientific data available and the most recent results of international research (see Case C-333/08 Commission v France [2010] ECR I-0000, paragraph 92 and case-law there cited).

61 Where it proves to be impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted, but the likelihood of real harm to public health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures, provided they are non-discriminatory and objective (see Commission v France, paragraph 93 and case-law there cited).

62 In those circumstances, it must be acknowledged that the European Union legislature may, under the precautionary principle, take protective measures without having to wait for the reality and the seriousness of those risks to be fully demonstrated (see *Commission v France*, paragraph 91).

Standard of Review of EU Acts

In case of complex appraisals substantial scrutiny is limited to manifest errors of appraisal

- Competent Institution does not need definitive scientific truth to decide
- What is a manifest error?
 - Does the need for an explanation exclude a manifest error?
 - Conflict with scientific consensus? Climate Change?
 - Is an error excluded if at least one qualified expert would share the appraisal?
 - C-123/18 P on liability, para 43: an irregularity that a normally prudent and diligent administration would not have committed in similar circumstances

Where a complex appraisal is necessary the EU courts limit substantial scrutiny too manifest errors of appreciation. However, there is no definition of this term.

Standard of Review

Reasons for Judicial Self-Restraint on Substance

- Better Expertise of Specialised Authorities
 - Eg. Commission with regard to Competition, Agricultural Policy, Fisheries
 - ECB with regard to Monetary Policy
 - Expert Witnesses? (Eg. Congestion Charge (UK) or Diesel Ban (DE)?)
- Democratic Legitimacy with regard to Balancing of Interests

The judicial self-restraint practiced by EU courts rests on a double foundation:

Firstly, there is the better expertise that specialised authorities have. They can employ experts and acquire practical knowledge in their area of responsibility. Commission action in the areas of Competition, Agricultural Policy or Fisheries provides many examples and lies at the roots of this jurisprudence. Recent cases on monetary policy confirms this approach. Obviously, the counter-argument lies in the possibility to hear expert witnesses. But in particular without specific training judges risk hearing bad experts and might be convinced for the wrong reasons.

The example of traffic measures to achieve air quality serves as an example. In the UK it appears that congestions charges are recommended by the experts while in Germany diesel bans appear to be the measure of choice.

The second foundation is even more important: Whenever the balancing of interests is required the legislator, but also administrative authorities subject to parliamentary supervision enjoy better democratic legitimacy than independent courts.

Standard of Review of EU Acts

Exceptionally: strict substantial scrutiny (Digital Rights Ireland and Others, EU:C:2014:238):

- Serious interferences with fundamental rights (para 47)
- In particular: the extent and seriousness of the interference with important role of personal data for private life caused by retention of bulk communications data (para 48)
- Similar considerations should apply to other important interests (right to life and health?) and to non-legislative acts
- But what standard is actually applied? Digital Rights was primarily about balancing, not science!

However, the Court has recognised that particularly serious impacts of EU action justify strict review. It is unclear whether the Court would apply this jurisprudence to other cases, but I would argue that significant risks to human health and life, eg. breaches of ambient air quality standards, require similar standards of review.

Less clear is the standard that would need be applied in cases of scientific uncertainty. Should judges ask to be convinced by the assessment? Could they decide that another expertise is to be preferred?

Standard of Review of EU Acts

AND: Procedural Obligations must be enforced

- Right to be Heard or to Participate (EIA, SEA, IED)
- EU level: often participation of expert bodies foreseen
- Duty to provide reasons (absence of gaps, contradictions?)
- Has all relevant information been taken into account? [Who decides? Is this simple?]
- Review of Effectiveness of Measures, again with reasons (often foreseen in legislation)
- Access to Environmental Information

The review of procedural obligations can be effective. In particular the duty to provide reasons is central to understand administrative action and to find possible issues for substantial review. A specific feature of environmental legislation is that it often requires review of the effectiveness of measures taken and, if necessary, adaptations. Any review would have to be accompanied by reasons. Access to environmental information can also help. And, with regard to Art. 9(2) the right to participate in the decision-making process is most important.

Precautionary Principle

A Specific Expression in Environmental or Health matters

- Justifies restrictive measures in case of uncertainty over the existence of a risk without having to wait until the reality and seriousness of those risks become fully apparent
- Identification of the potentially negative consequences
- Comprehensive assessment of the risk based on the most reliable scientific data available and the most recent results of international research [Who decides?]
- (Cf. Afton Chemical, EU:C:2010:419, paras 60 - 62, Verlazza, EU:C:2019:270, paras 56 ff)

The precautionary principle is a specific expression of the margin of appreciation that exists if complex issues need to be assessed.

Transposition to MS Courts

MS enjoy procedural autonomy, subject to

- the principle of Equivalence
 - similar treatment to purely domestic cases
- and the principle of Effectiveness
 - not impossible
 - not excessively difficult

These principles limit the procedural autonomy of Member States.

The Principle of Equivalence means that EU law cases must not be treated differently than similar cases of a purely domestic nature. Such differences are quite rare and if there are differences it needs to be assessed whether the cases really are sufficiently similar to require similar treatments. E. g. there are rules in some MS that require a reopening of cases that were definitively judged if an infringement of the European Human Rights Convention becomes apparent. However, possible infringements of EU law do not require such reopening because, in principle, a reference to the Court of Justice could have been made to prevent the infringement (C-234/17).

In CJEU practice, the principle of Effectiveness is more important. Among other things, it means that the design of judicial review in a MS must not make it impossible or excessively difficult to exercise the rights derived from EU law. Eg., mandatory delays to introduce actions are allowed under this principle, but the Slovak design of judicial review if the applicant was denied the status of a party in the administrative procedure was considered too restrictive (C-243/15).

Transposition to MS Courts

- MS are free to provide for stricter review by their courts
- But Minimum Standard can be derived from EU Court practice (C-120/97, C-211/03)

With regard to the review practiced by MS courts the CJEU does not require more intensive review than it applies itself with regard to decisions by the institutions. The core concept in this respect is “complex appreciation”, balancing could be added as a specific expression and the counterpoint would be the exclusion of discretion.

Transposition to MS Courts

An example: C-723/18 - Craeynest,
1st question on siting Air Quality
sampling points

- Opinion: explicit transposition > strict review, life and health
- Judgment: implicit transposition?
 - Review of limits of discretion (paras 34, 50 and 52)
 - Sound scientific data & comprehensive documentation (para 51)

A recent case provides an illustration how this standard might be transposed to MS courts reviewing the application of EU law. It concerned the Rules on ambient air quality, specifically the siting of sampling points. Though there is discretion, in particular if more than one site meets the criteria, the limits of discretion need to be enforced. Exercise of discretion requires the use of sound scientific data. This can only be verified if there is sufficient documentation (duty to provide reasons!).

Thank you for your attention!

