

## **Are there exceptions to a Member State’s duty to comply with the requirements of a Directive?: *Inter-Environnement Wallonie***

Case C-41/11, *Inter-Environnement Wallonie et Terre wallonne v. Région wallonne*, Judgment of the Court of Justice (Grand Chamber) of 28 February 2012, nyr

### **1. Introduction**

This decision by the Grand Chamber of the Court of Justice is characterized by an unusual factual situation resulting in a legal dilemma for the referring court. That court had to decide whether to annul a programme adopted in accordance with one EU directive because no environmental assessment had been carried out as required by another directive. The problem was that if the programme were annulled, the Member State would be in breach of the first directive; whereas if it was upheld the breach of the other directive would persist. The judgment raises important questions of national procedural autonomy, whether procedural requirements can be overridden by substantive considerations and, more generally, whether there is a right for Member States to derogate from directives. It is argued that by allowing the Member State to temporarily uphold the validity of the programme the Court has reached the correct conclusion, albeit on the basis of an unsatisfactory argument.

### **2. The dispute and questions referred**

This decision is the final one in a series of judgments concerning the Belgian Region of Wallonia’s failure to transpose Directive 91/676/EEC concerning pollution caused by nitrates from agricultural sources.<sup>1</sup> The facts can be summarized as follows. In February 2007, the Region of Wallonia adopted the “contested order” in reaction to a judgment by the Court of Justice rendered in September 2005, which had found Belgium in breach of

1. Directive 91/676/EEC, O.J. 1991, L 375/1; late transposition of this Directive has been widespread and gave rise to 56 infringement proceedings overall; see Krämer, *EC Environmental Law*, 6th ed. (Sweet and Maxwell, 2007), p. 287.

its obligation to transpose Directive 91/676/EEC in time because the Region of Wallonia had failed to adopt the necessary measures to implement Article 3(1) and (2) and Article 5 of the Directive.<sup>2</sup> Article 5 requires Member States to adopt action programmes in respect of vulnerable zones designated under Article 3, with the aim of reducing water pollution caused or induced by nitrates from agricultural sources and of preventing further pollution. Nitrates are mainly introduced into groundwaters as a result of the intensive farming of livestock and the fertilization of land, in particular with manure. The Court of Justice found that the Region of Wallonia had failed to identify all groundwaters which were or could be affected by pollution and to designate vulnerable zones.<sup>3</sup> The Region had also failed to take account of coastal waters in identifying waters and designating vulnerable zones.<sup>4</sup> In addition, the action programmes in respect of designated vulnerable zones had been adopted too late.<sup>5</sup>

The contested order was based on Article 5 of Directive 91/676/EEC and lays down an action programme providing rules on the management of nitrogen in vulnerable zones.<sup>6</sup> The claimants, two environmental organizations, applied for annulment of this order to the Belgian *Conseil d'Etat*, which in the course of those proceedings made two preliminary references to the Court of Justice. The first reference in those cases concerned the question whether the contested order should have been subjected to an environmental assessment in accordance with Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment.<sup>7</sup> The Court's answer was in the affirmative,<sup>8</sup> which meant that the contested order had been adopted contrary to EU procedural requirements. The question arising in the second reference, which is the subject of the present case comment, related to the exact consequences of this breach, in particular whether the *Conseil d'Etat* would have to annul the contested decision or whether it could uphold it temporarily. The *Conseil d'Etat* had noticed that if it annulled the contested decision with retroactive effect, as would normally be required, it would leave the Belgian legal order in the Region of Wallonia without any measure transposing Directive 91/676 until the contested order was re-drafted. The result would be that Belgium would be

2. Case C-221/03 *Commission v. Belgium*, [2005] ECR I-8307.

3. *Ibid.*, para 77.

4. *Ibid.*, para 92.

5. *Ibid.*, para 136.

6. Joined Cases C-105/09 & C-110/09, *Terre wallonne and Inter-Environnement Wallonie*, [2010] ECR I-5611, para 23.

7. Directive 2001/42/EC, O.J. 2001, L 197/30.

8. *Terre wallonne and Inter-Environnement Wallonie*, cited *supra* note 6, para 55.

in breach of its obligations under that Directive in the meantime. In view of this dilemma, the *Conseil d'Etat* asked the following question:

“Can the Conseil d’État,  
– seized of an action seeking the annulment of the [contested order],  
– finding that that order was adopted without compliance with the procedure prescribed by Directive 2001/42 . . . and that it is, for that reason, contrary to the law of the European Union and must be annulled,  
– but finding at the same time that the contested order provides for an appropriate implementation of . . . Directive 91/676 . . . ,  
defer in time the effects of the judicial annulment for a short period necessary for the redrafting of the annulled measure in order to maintain in European Union environmental law a degree of specific implementation without any break in continuity?”

### 3. The Opinion of the Advocate General

Advocate General Kokott’s argument chiefly revolved around the law on the procedural autonomy of the Member States and on whether the principles of equivalence and effectiveness would be violated if the referring court upheld the contested order temporarily. Given that Belgian procedural law provides for invalid rules of domestic law to remain temporarily in force, the principle of equivalence would not be violated.<sup>9</sup> Consequently, her argument centred on the principle of effectiveness, in particular whether maintaining the action programme laid down in the contested order would render it excessively difficult to exercise the right to an environmental assessment.<sup>10</sup> The Advocate General pointed to the key difference between annulling the consent given to an individual project for lack of an environmental assessment and annulling a plan or programme. While the former will cease to have any effects, the latter will be replaced by the pre-existing regulatory regime or earlier provisions, which may be less advantageous to the environment.<sup>11</sup> In view of the objective of Directive 2001/42 to ensure a high level of protection of the environment, consideration must be given to the consequences of annulling a plan or programme adopted in violation of that Directive.<sup>12</sup> Where the rules applying in lieu of the annulled measure were less advantageous to the environment, the referring court would be

9. Opinion of A.G. Kokott, para 33.

10. *Ibid.*, para 36.

11. *Ibid.*, para 41.

12. *Ibid.*, para 43.

allowed to uphold the measure temporarily without violating the principle of effectiveness.<sup>13</sup> As a result, the Advocate General proposed that the Court should allow the *Conseil d'Etat* to uphold the contested decision, provided that the provisions which would apply if the contested decision were annulled are more disadvantageous for the environment than the contested measure.

#### **4. The judgment of the Court**

The Court of Justice's judgment in many ways echoes the Advocate General's Opinion. Regrettably it is far less clearly structured and consequently not an easy read. The Court first had to deal with a challenge to the admissibility of the reference, against the background that the Walloon Region had in the meantime adopted a new order, which had been preceded by an environmental assessment as prescribed by the Directive. The new order also repealed the contested order but provided that all orders implementing the contested order should be kept in force until revoked by their author.<sup>14</sup> The Court was quick to refute the European Commission's argument that in view of the new order the reference had become devoid of purpose. Referring to settled case law, it re-affirmed that it can only refuse to rule on a question where the question bears no relation to the facts of the main action, where the problem is hypothetical, or where the Court has not been supplied with the facts and legal material necessary to answer the question. Given that in response to an enquiry by the Court of Justice, the *Conseil d'Etat* still considered an answer necessary, the Court declared the reference admissible.<sup>15</sup>

In response to the substantive question the Court held that in view of the specific circumstances of the case, the *Conseil d'Etat* was exceptionally authorized to maintain certain effects of the contested decision. However, this authorization was subject to four conditions. First, the contested decision must be a measure correctly transposing Directive 91/676/EEC. Second, the adoption and entry into force of the new decision do not enable the adverse effects on the environment resulting from the annulment of the contested decision to be avoided. Third, the annulment of the contested measure would result in a legal vacuum in relation to Directive 91/676/EEC, which would be more harmful to the environment. Finally, the effects of the measure are only maintained for the period of time strictly necessary to remedy the irregularity.

13. *Ibid.*, para 43.

14. Judgment, para 30 et seq.

15. *Ibid.*, paras. 33–38.

The Court first referred to settled case law according to which each organ of a Member State is required by virtue of the duty of loyal cooperation laid down in Article 4(3) TFEU to nullify the unlawful consequences of a breach of European Union law.<sup>16</sup> It concluded that a national court had therefore to annul a plan or programme adopted in breach of Directive 2001/42 (on environmental impact assessment). Otherwise the fundamental objective of that Directive would be disregarded.<sup>17</sup> The precise way in which such nullification had to happen was a matter of domestic law. The Court highlighted the procedural autonomy of the Member States, which entailed the use of their national procedural rules provided that these rules were not less favourable than those governing similar domestic situations and that they did not render impossible in practice or excessively difficult the exercise of rights conferred by the EU.<sup>18</sup>

The Court then turned to the question whether using a national procedural provision to maintain the contested order might be justified in this case in view of the potential legal vacuum described above. The Court made explicit reference to the fact that the referring court did not rely on economic grounds in order to be authorized to derogate from the duty to annul the provision of national law. Rather, it pointed to the specific features of the case before it, in particular that the aim of achieving a high level of protection of the environment as provided for in Article 191(2) TFEU may in this case be better achieved by maintaining the effects of the contested order for a short period of time rather than by retroactive annulment.<sup>19</sup> The Court regarded this consideration relating to the protection of the environment to be overriding, so that it exceptionally authorized the *Conseil d'Etat* to maintain certain effects of the contested order under the conditions set out above.

## 5. Comment

The Court's admissibility decision is in line with its case law on the admissibility of requests for a preliminary reference and does not come as a surprise. The dispute had not in fact ceased to be of relevance when the reference was made as the contested decision still produced legal effects,<sup>20</sup> so that this part of the decision is entirely convincing. The Court's judgment

16. *Ibid.*, para 43; see with regard to Directive 85/337/EEC on environmental impact assessment, O.J. 1989, L 175/40: Case C-201/02, *Wells*, [2004] ECR I-723, para 64.

17. Judgment, paras. 46–47.

18. *Ibid.*, para 45.

19. *Ibid.*, para 56.

20. This can e.g. be contrasted with C-241/09, *Fluxys*, [2010] ECR I-12773, where the dispute had been withdrawn as far as the interpretation of EU law was concerned.

is of interest mainly for the unusual legal and factual background and the Court's pragmatic but seemingly unprincipled conclusion. It is regrettable that the Court's reasoning remains thin and lacks clear guidance on precisely why and on what doctrinal basis the conclusion was reached. It appears that the main concern for the Court was to come to a solution which would avoid what it termed a "legal vacuum".<sup>21</sup> This case comment seeks to determine the basis of the Court's decision by posing three related questions: first, whether the Court's approach was based on its case law on national procedural autonomy; second, whether the decision means that procedural obligations can in some situations be overridden by substantive considerations; and third, whether the decision implies that there is a right for Member States to derogate from directives.

### 5.1. *A question of natural procedural autonomy?*

The Court's reasoning appears to rest on its case law on national procedural autonomy, to which it made explicit reference.<sup>22</sup> It is recalled that it is generally for the national courts to ensure the application of European Union law. In doing so they may apply national procedural rules but subject to two caveats: the national rules must be no less favourable than those governing similar domestic situations (principle of equivalence) and they must not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order (principle of effectiveness).<sup>23</sup> The key question here was whether the principle of effectiveness would be violated if the national court were allowed to uphold the contested decision on a temporary basis. The Advocate General suggested that this would not be the case if the provisions applying in lieu of the contested decision were less advantageous to the environment than the contested decision. It seems that the Court had this argument in mind when making its judgment. But the Court's reasoning lacks the clarity of the Advocate General's argument and is potentially confusing. It commences by mentioning national procedural autonomy,<sup>24</sup> muddies the waters by pointing to the constitutional dilemma of a possible legal vacuum,<sup>25</sup> and then seemingly returns to its original reasoning by pointing out that the national court had at its disposal a domestic procedural provision which would allow it to temporarily uphold the contested decision. It is suggested here that the reference to procedural

21. Judgment, para 56.

22. *Ibid.*, para 45.

23. *Ibid.*, para 45.

24. *Ibid.*, paras. 45–46.

25. *Ibid.*, para 56.

autonomy is misplaced. This is because the case is different from typical cases where national procedural autonomy and with it the principles of effectiveness and equivalence are normally relevant. In most of these types of cases decided by the Court, the main question was whether a national court would be allowed to apply its mandatory procedural rules where application of these rules stood in the way of a full application of EU law.<sup>26</sup>

The situation in the present case differs in two respects. First, the question here was about the application of an exceptional and non-mandatory procedural rule rather than of the ordinary procedure. Belgian procedural law only exceptionally allows for the effects of an annulled provision to be maintained for a certain period. The *Conseil d'Etat* would thus not have been under any constraint by national procedural law if it had declared the contested decision void. This option clearly existed. But the *Conseil d'Etat* wanted to make use of the exception and uphold the illegally adopted contested order. Second, the case is further different in that the reasons advanced for applying this exceptional rule were not reasons found in the domestic legal order but ones found in the EU's own legal order. Normally, the question for the Court is whether a rule of national law, which limits the full effectiveness of EU law, can be invoked before a domestic court. Examples would be the adequacy of limitation periods<sup>27</sup> or of monetary remedies.<sup>28</sup> Here, the only reason put forward was that if the contested order were to be annulled, Belgium would (again) be in violation of its duty to implement Directive 91/676/EEC. In light of these differences, it is not entirely surprising that the Court's reasoning is lacking in structure and in principle since the starting point for its analysis is questionable.

## 5.2. *Can procedural obligations be overridden by substantive considerations?*

While the theoretical basis for the Court's decision is somewhat dubious, one can ask more generally whether the Court has paved the way for procedural obligations to be overridden by substantive considerations. It is clear from the Court's decision in *Wells* that Member States must generally ensure that an environmental assessment is carried out.<sup>29</sup> This duty is of a procedural nature. Where a planning decision has been made without a prior

26. A detailed analysis of the Court's case law on national procedural autonomy can be found in Craig, *EU Administrative Law*, 2nd ed. (OUP, 2012) pp. 703 et seq.

27. Case 33/76, *Rewe Zentralfinanz*, [1976] ECR 1989; Case C-208/90, *Emmott*, [1991] ECR I-4269.

28. Case 14/83, *von Colson and Kamann*, [1984] ECR 1891.

29. *Wells*, cited *supra* note 16, paras. 64–65.

assessment, Member States must normally nullify the unlawful consequences of such a decision, even if it was substantively in compliance with environmental law requirements. They are thus obliged to remedy a violation of the duty to carry out an environmental assessment, usually by revoking or suspending the planning decision. The question is whether the Court's judgment provides national authorities and courts with an excuse to ignore the consequences of such a breach by pointing to overriding substantive considerations, i.e. whether the Member State may derogate from its duty to disapply a national measure adopted in breach of an obligation under a Directive. In *Inter-Environnement* the Court was careful to re-emphasize that *Wells* is still good law and it has extended *Wells* to the environmental assessment under Directive 2001/42/EC.<sup>30</sup> It would thus be wrong to interpret *Inter-Environnement* as a generally applicable exception to *Wells*, which would allow for a decision to stand without an environmental assessment if substantive considerations override the formal requirements laid down in Directive 2001/42/EC.

The exceptional character of the Court's ruling is echoed in the fourth condition for upholding the contested order, which may only be maintained for as short a time as possible. With this the Court aimed to ensure that an environmental assessment must be carried out even if the substance of the decision is likely to remain unchanged. Yet it is worthwhile contrasting the case of *Wells* with the case under discussion here. *Wells* was concerned with a mining permission for a concrete mining project and not with a plan or programme. The Advocate General pointed out the important difference between decisions granting planning consent and plans and programmes,<sup>31</sup> which are essentially of a legislative nature. Where consent for a concrete project has been granted in violation of the duty to carry out an environmental assessment, the consent can be revoked without further consequences for the environment. In contrast, where a plan or programme is concerned, that plan or programme is replaced with the prior regime, which may be less favourable to the environment. With this distinction in mind, the case cannot be read as an unconditional weakening of the Court's strict stance regarding procedural requirements. But it may be asked whether for situations in which plans and programmes are in violation of procedural requirements, the Court has opened the door for substantive considerations to be taken into account. In any event, the case's exceptional factual situation will have to be considered when referring to this decision as a potential precedent.

30. Judgment, paras. 43 and 46.

31. Opinion, para 42.



### 5.3. *A new right to derogate from Directives?*

A further question is whether the Court's judgment has consequences outside the area of environmental law, in particular whether the Court has created a more general right to derogate from directives. In order to place this question into context, it is helpful to compare and contrast the decision discussed here with two other recent judgments, *Winner Wetten* and *Commission v. Poland*, in which the Court was faced with similar questions of derogation.<sup>32</sup> *Winner Wetten* concerned a German ban on bets on sporting competitions, which the referring court considered illegal in view of the Court's earlier decision in *Gambelli*.<sup>33</sup> A similar ban had also been held to infringe the German constitution by the *Bundesverfassungsgericht* (Federal Constitutional Court).<sup>34</sup> Instead of declaring the ban unconstitutional with immediate effect, the *Bundesverfassungsgericht* decided to temporarily uphold it in order to allow the legislator to impose a new ban in compliance with constitutional requirements. A similar order had earlier been made by a different administrative court with regard to the legislation at issue. That court had been aware of the ban being contrary to EU law and argued that upholding it would prevent the existence of a legal void.<sup>35</sup> In view of this the referring court asked whether it would be compatible with EU law to uphold the ban temporarily. The Court of Justice replied that by virtue of Article 264 TFEU it had jurisdiction to indicate which effects the annulment of a Union measure should have. Where overriding considerations of legal certainty existed, suspension of an annulment could be justified.<sup>36</sup> It argued, however, that even if one assumed that suspension of an annulment of a national measure could happen in the same circumstances, there was a lack of overriding considerations of legal certainty in the case before it so that a suspension was not possible.<sup>37</sup> Surprisingly, in the case annotated here the Court does not mention *Winner Wetten* even though the Advocate General dedicated four paragraphs of her Opinion to it.<sup>38</sup> The question is whether the situation in *Winner Wetten* is comparable to the present case. It is argued that the cases differ for a number of reasons. The first difference is that the cases arose in different contexts. *Winner Wetten* is essentially a case

32. Case C-409/06, *Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim*, [2010] ECR I-8015; Case C-185/10, *Commission v. Poland*, Judgment of 29 Mar. 2012, nyr.

33. Case C-243/01, *Gambelli*, [2003] ECR I-13031.

34. BVerfG 1 BvR 1054/01.

35. *Winner Wetten*, cited *supra* note 32, para 26.

36. *Ibid.*, para 64–66; e.g. applied in Case C-402/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, [2008] ECR I-6351, paras. 373–376.

37. *Winner Wetten*, cited *supra* note 32, para 67.

38. Opinion, paras. 20–23.

concerning the primacy of EU law. The question was whether a national court may under certain circumstances derogate from its *Simmenthal* obligation to disapply national law which is in conflict with EU law.<sup>39</sup> The reason put forward in *Winner Wetten* was that otherwise there would be a legal vacuum in national law, which, in the eyes of the referring court, ought to be avoided. Thus the issue was solely rooted in the legal order of the Member State, which for public policy reasons desired to ban bets on sporting competitions. In contrast, *Inter-Environnement* does not deal with domestic concerns but with concerns of EU law. The legal vacuum which would exist if the contested decision were to be annulled would have been in violation of an EU Directive. Whereas in *Winner* the annulment of the ban on bets led to a situation perfectly compatible with EU law, the annulment in *Inter-Environnement* would have led to a situation in which the Member State would have been in breach of EU law. Thus *Inter-Environnement* was not concerned with the primacy of EU law over national law but with two obligations both stemming from EU law.

The recent decision in *Commission v. Poland*, handed down only one month after *Inter-Environnement* concerned a different issue, which is also relevant for this analysis. After accession to the EU, Poland had maintained in force a law on medicinal products, which, under certain conditions, allowed for the marketing of such products in Poland without prior marketing authorization. This law contradicted Article 6(1) of Directive 2001/83, which stipulates that medicinal products may not be placed on the market without market authorization according to a number of EU Regulations.<sup>40</sup> The aim of the Directive is to facilitate trade between the Member States and to protect public health.<sup>41</sup> Against this background it also provides for a mutual recognition of marketing authorizations. Thus the Polish law had the potential of endangering the aims of the Directive. The bone of contention in this case was a provision in the law which stated that marketing authorization did not need to be obtained for a product which contains the same active substance as a product already authorized but the price of which is more “competitive”, i.e. lower. Thus Poland solely put forward economic reasons in order to argue for derogation from a duty contained in the Directive. Public health concerns, which would have been in the spirit of the Directive, could not be invoked by Poland since the law only provided for the importation of products which already had equivalents on the market.<sup>42</sup> The Directive itself contains a

39. To that effect cf. Case 106/77, *Simmenthal*, [1978] ECR 629, para 24.

40. Regulation (EC) No 726/2004, O.J. 2004, L 136/1 and Regulation (EC) No 1901/2006, O.J. 2006, L 378/1.

41. Opinion of A.G. Jääskinen in *Commission v. Poland*, cited *supra* note 32, para 19.

42. *Ibid.*, para 53.

derogation provision in cases where there was a special medical need to import an unauthorized product in an individual case. It is hardly surprising that the court concluded that these conditions were not met. The Court further did not accept the more general argument that financial considerations should allow for derogations from duties contained in Directives.<sup>43</sup> While the Court did not question the Member States' competence to organize the finances of their health systems, it pointed out that they must do so in accordance with the provisions of EU law.<sup>44</sup> In view of this reasoning, the Court's explicit statement that the referring court in *Inter-Environnement* did not rely on economic grounds to argue for derogation from the duty to nullify the contested decision is more intelligible.<sup>45</sup> Rather the Court pointed to the fact that protecting the environment was one of the essential objectives of the Union.<sup>46</sup>

The Court's remark prompts three interrelated questions. The first question is how to identify such essential objectives. It is immediately connected to the second question of why economic considerations do not constitute such an objective. The third question is whether *Inter-Environnement* would have had a different outcome if, in a similar factual scenario, the two directives had not had as their objective the protection of the environment. Turning to the first question, one can observe that according to Article 3 TEU the protection of the environment is one of the aims of the Union. Does it therefore follow that all the objectives mentioned in Article 3 TEU are essential in that sense? This would lead to an inflation of "essential" objectives so that it is unlikely that this is what the Court had in mind. One possible way of distinguishing between essential and non-essential objectives might be whether there is an explicit legislative competence for an objective, which would make it essential. This would certainly be the case with environmental protection. But other objectives mentioned in Article 3 TEU are the promotion of peace and the well-being of the Union's peoples, for which there is no explicit competence of the Union. Would that mean that they are not essential? Another possible explanation of the essential character of the protection of the environment might be that according to Article 11 TFEU environmental protection requirements must be taken into account across all of the Union's policies. This provision certainly accords a special status to environmental protection and it is likely that the Court had Article 11 TFEU in mind. But it is unfortunate that the Court does not reveal what exact distinction the adjective "essential" denotes and one is left to guess.

43. *Commission v. Poland*, cited *supra* note 32, para 46.

44. *Ibid.*, para 47.

45. Judgment, para 57.

46. *Ibid.*

Turning to the second question, it seems that the Court does not consider financial considerations to be “essential”. They are not mentioned among the objectives in Article 3 TFEU and there is no clause similar to Article 11 TFEU providing for their being taken into consideration across policy areas. But especially during the current financial crisis the financial health of a Member State is of great concern to the Union. This can be seen from Article 126 TFEU which demands that Member States avoid excessive deficits. The same will soon be reinforced by the Treaty Establishing the European Stability Mechanism.<sup>47</sup> So it can hardly be argued that a Member State’s desire to keep a tight budget is not of concern to the EU. It is suggested that in reality the distinction should not be one between essential and non-essential objectives of the Union, since such a distinction would be so vague that it would be impossible to maintain. Rather the distinction should be one between considerations intrinsic to EU law and considerations intrinsic to the Member States’ legal orders. Viewed through this lens, one can see that, rather like in the case of *Winner Wetten*, where a legal void in the national legal order was put forward as a justification to derogate, the case of *Commission v. Poland* differs from *Inter-Environnement* in that financial considerations are considerations internal to the Member State so that they cannot justify derogation from EU law. Member States have other means than infringing EU law at their disposal in order to ensure sound finances, e.g. raising taxes or cutting spending without violating EU law. In contrast, the reason why the Court in *Inter-Environnement* allowed Belgium to derogate from Directive 2001/42/EC was to avoid the frustration of the aims of another EU Directive. It was thus intrinsic to EU law. The cases can further be distinguished in that in *Commission v. Poland* a failure to annul the Polish legislation would have led to a violation of EU law. Annulment was the only way of ensuring compliance with EU law. Unfortunately, the Court failed to point out explicitly that derogation cannot happen where the arguments put forward stem from the domestic legal order. This assessment is independent of whether the objective is an essential one or not.

On the basis of the previous discussion an answer to the third question whether the outcome would have been the same had the directives pursued different objectives, is hard to give. In the Court’s eyes there are certainly other essential objectives of the Union, which suggests that the outcome could have been the same. On the other hand, the facts of the case are quite unusual in that an environmental assessment had to be carried out for a measure designed to protect the environment and not, as in typical cases, for measures potentially resulting in negative consequences for the environment, such as

47. Available at: <[www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf](http://www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf)> [accessed 27 Nov. 2012].

construction or mining. But given the lack of principled guidance on the identification of such objectives, one can only be left to guess.

One further point should be made in this context. The Court allowed a temporary derogation only where the four conditions mentioned above are satisfied. While the first three conditions are not surprising, the final condition is that the effects of the measure may only be maintained for the period of time strictly necessary to remedy the irregularity. But what if the irregularity is not remedied swiftly? Clearly, Belgium would be in breach of its obligations under Directive 2001/42, which explains why the Court is adamant that the violation is removed as quickly as possible. Yet would a finding that the violation has not been removed quickly force Belgium to annul the contested decision? The Court's decision appears to suggest this, but of course the problem of a legal vacuum would not disappear in the meantime. Thus the fourth condition should probably be regarded as a reminder to the Walloon Region that a swift resolution of the breach, which had been found in joined cases C-105/09 and C-110/09, is necessary.

## 6. Conclusions

The Court's decision in *Inter-Environnement* leaves a number of questions open. It has been argued here that the approach of the Court of and the Advocate General based on the national procedural autonomy of the Member States is not convincing since this case is not about the application of a mandatory national procedural rule. Rather it is concerned with whether a facultative procedural rule can be applied in order to uphold a substantive objective of EU law. It will remain to be seen whether the Court's affirmative answer to the *Conseil d'Etat's* question will lead to new challenges to procedural obligations determined by EU law on the basis of allegedly overriding substantive goals. Most of these challenges are likely to remain unsuccessful since the decision must be understood as a confirmation of the Court's earlier case law on the consequences of failures to carry out an environmental assessment. This means that, save for unusual situations such as the one in this case, national courts are obliged to either revoke or suspend a planning permission or to annul a plan or programme granted without a required prior environmental assessment. In addition, the judgment should not be understood as having the wider implication that there is a right to derogate from Directives where essential objectives of the Union need to be protected. It is clear from *Winner Wetten* and *Commission v. Poland* that Member States must comply with their obligations under EU law. Only where the reasons are intrinsic to EU law, i.e. have nothing to do

with the legal order of the Member State, might such derogation be allowed to take place in the future. Furthermore, *Inter-Environnement* is an unusual case. It is unlikely that a similar factual scenario where compliance with the duty to annul a national measure adopted in contravention of a directive would automatically lead to a breach of an obligation flowing from another directive will reach the Court again in the near future. As the examples of *Winner Wetten* and *Commission v. Poland* show, most cases concern the primacy of EU law over the law of the Member States. It is unfortunate that the Court did not exploit the unusual facts better and did not solve the case in a more principled manner.

Nonetheless, it is submitted that the Court has reached a “correct” result. It managed to avoid a gap in the effective protection of the environment against pollution caused by nitrates by allowing the referring court to temporarily uphold the contested decision. An annulment of the action programme against nitrates would have left the Walloon region without any such measure in place, which might have resulted in serious environmental damage. Furthermore, there is no guarantee that the action programme would be any different after an environmental assessment has been carried out. Thus the Court had to balance whether the environment would be better off if the action programme was annulled with immediate effect or if it was upheld and the procedural defect were remedied as quickly as possible, and it came to a convincing conclusion. With this in mind, one is left to wonder why the environmental organizations who were claimants in these proceedings insisted on the annulment of the contested order knowing that a legal vacuum would ensue. Perhaps they shared the stance taken by the Advocate General and presumed that a measure subject to an assessment would be more favourable to the environment.<sup>48</sup> But even if that is indeed so, some programme managing the nitrates in groundwater is better than none. Thus the litigation tactics of the claimants remain a mystery.

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48. Opinion, para 40.

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