



INSIGHT

INTER-ENVIRONNEMENT EXPANDED: ANOTHER BRICK OUT OF THE WALL OF EU LAW SUPREMACY?

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ABSTRACT: In *Association France Nature Environnement* (judgment of 28 July 2016, case C-379/15), the Court of Justice dealt with two issues. First, is it possible for national courts to limit the effects of a judicial decision annulling national law contrary to EU law in the field of environmental protection? Second, are national courts obliged to make a preliminary reference to the Court of Justice in case of doubts on the possibility to postpone the temporal effects of a judgment annulling national law contrary to EU law? This judgment expands the *Inter-Environnement Wallonie* case law by granting to national courts further leeway to maintain in force the national legislation in breach of EU law. At the same time, it also expands the *CILFIT* case law.

KEYWORDS: Art. 267 TFEU – national measures transposing EU law – Court of Justice – supremacy of EU law – obligation to refer a preliminary ruling – Directive 2001/42/EC.

I. INTRODUCTION

The recent *Association France Nature Environnement*¹ judgment departs from the established case law on effectiveness of EU law and expands the *CILFIT* doctrine² on the duty of last instance courts to refer preliminary questions to the Court of Justice. The case originated in a preliminary reference from the French *Conseil d'Etat* during an action seeking annulment of national law in breach of EU law. The national legislation at

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¹ Court of Justice, judgment of 28 July 2016, case C-379/15, *Association France Nature Environnement*. On this judgment, see also F. PANI, *L'obbligo (flessibile) di rinvio pregiudiziale e i possibili fattori di un suo irrigidimento. Riflessioni in margine alla sentenza Association France Nature Environnement*, in *European Papers – European Forum*, *Insight* of 29 March 2017, www.europeanpapers.eu.

² Court of Justice, judgment of 6 October 1982, case C-283/81, *CILFIT*.

issue implemented Directive 2001/42,³ which regulates the assessment of the effects of certain plants and programmes on the environment. Notably, the questions referred by the *Conseil d'Etat* to the Court of Justice concerned the possibility to postpone the effects of the judgment annulling the national legislation at issue, which was found to be in breach of EU law. The *Conseil d'Etat* feared that, by annulling those national provisions, a litigation flood to challenge all the measures adopted on their basis, as well as the legal vacuum on environmental protection, would have entailed a breach of EU environmental policies.

In its judgment, the Court of Justice provided an interpretation of EU law accommodating the concerns of the *Conseil d'Etat*, by allowing the latter to mitigate the temporal effects of its annulment decision. In addition, it introduced a further hypothesis in which preliminary ruling references are compulsory on last instance courts, such as in case of doubts on the interpretation of the *Inter-Environnement Wallonie* case law.⁴

While this decision showed a remarkable example of judicial influence between supreme courts, at the same time, it partially overruled the case law on EU law supremacy and the duty of last instance courts to make preliminary references to the Court of Justice. The *Association France Nature Environnement* case is therefore to be classified among those judgments which allowed a more lenient attitude of the Court of Justice towards national law.⁵ Nevertheless, it is submitted that the lenient approach of the Court as to national law should be used with cautiousness and supported by more detailed reasoning.

II. THE LEGAL AND FACTUAL BACKGROUND OF THE CASE

On 13 June 2012, Association France Nature Environnement brought an action before the *Conseil d'Etat* challenging the lawfulness of Decree no. 2012-616 (the Decree), transposing Directive 2001/42 (the Directive). By applying the Court of Justice ruling in *Seaport*,⁶ the *Conseil d'Etat* found that the Decree was contrary to EU law since it did not properly transpose Art. 6, para. 3, of the Directive. This provision requires an independent authority to issue the authorisations for environmental plans and programmes. The *Conseil d'Etat* considered that the annulment with retroactive effects of the Decree had the risk of affecting the validity of all the measures based on it, including not only the environmental plans and programmes, but also any other legal act having the Decree as a legal basis. Under French administrative law, it is indeed possible to

³ Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

⁴ Court of Justice, judgment of 28 February 2012, case C-41/11, *Inter-Environnement Wallonie ASBL and Terre wallonne ASBL*.

⁵ See *infra*.

⁶ Court of Justice, judgment of 20 October 2011, case C-474/10, *Seaport (NI) et al.*

challenge the illegality of definitive legislative acts, such as those at issue, without temporal limits. This potential scenario was deemed by the *Conseil d'Etat* as negatively affecting both legal certainty and environmental protection. In the absence of a legal framework on environmental protection, claims to obtain and/or annul environmental licences would have been possible on the ground of the illegality of the Decree.

To avoid this situation, the *Conseil d'Etat* considered whether to make use of its powers to adapt the temporal effects of annulment judgments and to refrain from immediately setting aside the Decree as required by the settled case law of the Court of Justice on the supremacy of EU law. By postponing the effects of the annulment judgment, the adoption of new rules introducing an adequate system of administrative authorities for environmental assessment would have been possible. This would have avoided both a breach of the Directive as well as a litigation increase. Thus, the *Conseil d'Etat* made a reference to the Court of Justice asking, first, whether a national court can maintain in force national legislation considered in breach of EU law on the ground of environmental protection and, second, whether national courts must make a preliminary reference whenever there is the need to determine if national provisions contrary to EU law should be maintained temporarily in force.

III. THE POWER OF NATIONAL COURTS TO MAINTAIN IN FORCE NATIONAL PROVISIONS IN BREACH OF EU LAW: MITIGATING THE SUPREMACY OF EU LAW IN THE ENVIRONMENTAL PROTECTION SECTOR

As established by the Court of Justice, when a national law is contrary to EU law, national courts must immediately set aside that measure to ensure the supremacy and the full effectiveness of EU law.⁷ Therefore, in the case in question, the Decree should have been immediately set aside by the *Conseil d'Etat*, in order not to damage the effectiveness nor the supremacy of EU law.

However, relying on an extensive interpretation of the *Winner Wetten* case,⁸ the Court of Justice expanded the application of the criteria established in *Inter-Environnement*.⁹ Thus, it established that there are four criteria to be fulfilled by any national measure in the field of environmental protection in order not to be immediately set aside: *i*) the provision of national law at issue must correctly transpose EU law on environmental protection; *ii*) the adoption and coming into force of a new national legislation shall not avoid the negative effects on the environmental protection arising from the annulment of the contested provision of national law; *iii*) the annulment of the contested national law would create a legal vacuum concerning the transposition of EU law on environmental protection which would be more damaging to the environment;

⁷ For instance, Court of Justice, judgment of 5 March 1980, case C-243/78, *Simmenthal v. Commission*.

⁸ Court of Justice, judgment of 8 September 2010, case C-409/06, *Winner Wetten GmbH*.

⁹ *Inter-Environnement Wallonie*, cit.

iv) the exceptional maintaining in force of the effects of the contested national law lasts only for the period strictly necessary for the adoption of the measures remedying the irregularity found.¹⁰ Pre-condition to apply these criteria is the existence of an “overriding consideration linked to environment protection”, having due regard to the specific circumstances of the case.¹¹

Hence, by considering that national courts are entitled, in extraordinary circumstances, to maintain into force national legislation violating EU law, the Court of Justice has demonstrated a significant degree of openness toward the request of the *Conseil d'Etat*. This court ultimately provided a conciliatory interpretation of national law provisions with the EU law. Such judicial behaviour should be welcomed. Although it could be judged as deferential and affecting the supremacy of EU law, it is actually able to create a productive judicial collaboration between national courts and the Court of Justice.

For instance, the *Conseil d'Etat* was able to avoid an increase of the litigation concerning the Decree as well as a legal vacuum on environmental protection while waiting for the legislator's intervention. As showed also by other judgments, such as *Melki*,¹² the Court of Justice has a different approach towards preliminary rulings sent by national supreme courts. Indeed, the Court has shown a more lenient approach in answering preliminary ruling requests sent by national supreme courts.¹³ Although *Association France Nature Environnement* has provided a positive example of judicial cooperation between the Court of Justice and a supreme court, such as the French *Conseil d'Etat*, some considerations raise on the appropriateness of the reasoning adopted by the former court in this case.

IV. THE EXPANDED APPLICATION OF THE *INTER-ENVIRONNEMENT* CASE LAW IN *ASSOCIATION NATURE FRANCE ENVIRONNEMENT*

In *Inter-Environnement*, the Court of Justice had to consider a request from the Belgian *Conseil d'Etat* aiming at postponing the effects of a judgment annulling national legislation partially in breach of EU law. Notably, whilst the contested legislation was in breach of the Directive (in particular, Art. 6, para. 3) on the one hand, it was correctly implementing Directive 91/676/EEC on the other hand.¹⁴ The referring court considered the national legislation at issue as non-severable, its annulment entailing not only the repeal of the sections in breach of the Directive but also of those correctly implementing

¹⁰ *Association Nature France Environnement*, cit., paras 38-39.

¹¹ *Ibidem*, para. 43.

¹² Court of Justice, judgment of 22 June 2010, case C-188/10, *Aziz Melki and Semil Abdeli*.

¹³ F.X. MILLET, *How much lenience for how much cooperation? On the first preliminary reference of the French Constitutional Council to the Court of Justice*, in *Common Market Law Review*, 2014, p. 195 *et seq.*

¹⁴ Directive 91/676/EEC of the Council of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources.

Directive 91/676. In addition, it argued that the national provisions were ultimately compatible with EU law following a positive assessment by the Commission for different matters.¹⁵ Furthermore, the Belgian court had asked only to postpone the effects of its annulment judgment, and not to maintain in force legislation in breach of EU law. Due to the peculiarity of the case, the Court of Justice ruled in favour of the possibility to adapt the temporal effect of the declaration of the illegality in relation to the national provision found in breach of EU law.¹⁶

In *Association France Nature Environnement*, however, the situation was different. First, the national measure at issue in this latter case was not compliant with any other EU legislation, while in *Inter Wallonie* the national measures at issue were yet in breach of the Directive but correctly implementing Directive 91/676. Second, in order to justify the maintaining in force of the national legislation at issue, the *Conseil d'Etat* brought different arguments, such as legal certainty and the potential flood of litigation. In addition, it is worth mentioning that AG Kokott offered a partially divergent opinion on this question. Notably, in her opinion AG Kokott drew a difference between maintaining in force *the effects of provisions contrary to EU law* and maintaining in force *decisions concerning plans and programmes adopted pursuant to provisions contrary to EU law*. According to AG Kokott, it would constitute a breach of EU law to maintain in force the effects of national measures able to exclude the possibility to bring an appeal based on a breach of Art. 6, para. 3, of the Directive.¹⁷ On the contrary, maintaining in force the plans and the programmes adopted pursuant to provisions contrary to EU law may be assessed on a case-by-case basis, as per the *Inter-Environnement* case-law.¹⁸

In the light of the above, it is submitted that the extension of the *Inter-Environnement* case law to *Association France Nature Environnement* is not entirely justified. Although the difference between maintaining in force *provisions contrary to EU law* and *decisions concerning plans and programmes adopted pursuant to provisions contrary to EU law* would seem "artificial", this distinction would have been useful in order to ensure the full supremacy of EU law. Indeed, by following AG Kokott's opinion, the Court of Justice could have better distinguished between the maintaining of the effects of the provisions of national law in contrast with EU law from those (at least) partially complying with it. Also, such a distinction would have not affected the right of individuals to obtain compensation from the French Government due to its violation of EU law.

The *Association France Nature Environnement* judgment has confirmed the previous case law granting a special status to environmental protection among the policies

¹⁵ *Inter-Environnement Wallonie*, cit., para. 50.

¹⁶ *Ibidem*, para. 63.

¹⁷ *Seaport*, cit.

¹⁸ Opinion of AG Kokott delivered on 28 April 2016, case C-379/15, *Association France Nature Environnement*.

of EU law. A previous example of this kind of case-law may be found in the *Wells* case.¹⁹ Such decision was able to recognise a higher status to EU law over national law. With *Association France Nature Environnement*, the trend seems to be inverted, being national law able to still produce effects notwithstanding an annulment decision for breach of EU law. It may be argued that since EU policies such as environmental protection have now become part of national legal systems, the Court of Justice is more willing to grant prevalence to national law under certain constraints and circumstances. Also, the Court appears more collaborative towards the national legislator, who has the duty to repeal national law in contrast with EU law. Nevertheless, such attitude by the Court should be used with cautiousness. While the lenient attitude of the Court towards national law has the positive effects mentioned above, the risk of affecting the uniform application of EU law should not be underestimated.

V. *CILFIT* REVISITED?

The second issue arising in the context of *Association Nature* was whether a national court must make a reference for a preliminary ruling before using the exceptional power enabling it to maintain certain effects of a national measure incompatible with EU law. According to the Treaties, while lower courts are not subject to an obligation to make a reference for a preliminary ruling to the Court of Justice whenever there is a doubt on the interpretation of EU law to be applied in a pending case,²⁰ last instance courts have such an obligation.²¹ All national courts are subject to the obligation to make a preliminary request to the Court of Justice when there are doubts as to the validity of EU law.²² In *CILFIT*,²³ the Court established that there are three situations in which courts against whose decisions there is no judicial remedy are not obliged to make a preliminary ruling request: *i*) when there is no reasonable doubt as to the interpretation of EU law; *ii*) when the same question has been the object of a previous judgment of the Court and *iii*) when the question is irrelevant to solve the case.

After recalling this case law, in *Association France Nature Environnement* the Court of Justice held that courts against whose decisions there is no judicial remedy *are in principle required*²⁴ to make a reference for a preliminary ruling to the Court to assess whether national measures, found to be incompatible with EU law, may be temporarily maintained in force for overriding considerations related to environment protection. Such an obliga-

¹⁹ Court of Justice, judgment of 7 January 2004, case C-201/02, *Wells*.

²⁰ Art. 267, para. 1, TFEU.

²¹ Art. 267, para. 3, TFEU.

²² Court of Justice, judgment of 22 October 1987, case C-314/85, *Foto-Frost*.

²³ *CILFIT*, cit.

²⁴ *Association France Nature Environnement*, cit., para. 53.

tion does not exist only when such national courts have no reasonable doubts as to the interpretation and the application of the *Inter-Environnement Wallonie* criteria.

On the basis of this judgment, it can be inferred that the Court of Justice has introduced a specific hypothesis in which national courts of last instance shall make a reference to the Court for the interpretation of EU law. The underlying reason is to be found in the relevance attributed to the environmental protection among EU policies and in the potential damaging effect of a ruling of last instance courts for the uniform application of EU law. At the same time, the Court of Justice did not introduce a general obligation for national courts to make preliminary references in such a case. However, it is submitted that this obligation should have been introduced also for other national courts in order to preserve the uniform application of EU law.

VI. CONCLUSION

Association France Nature Environnement is an example of the renewed judicial collaboration between the Court of Justice and national supreme courts. It seems that the former is willing to provide an interpretation of EU law which is more accommodating towards national exigencies and policies. In this case two issues arose: first, whether national courts are allowed not to immediately set aside national legislation in contrast with EU law but to mitigate the temporal effects of the decision annulling such legislation. Second, the potential overruling of the *CILFIT* case-law concerning the obligation of courts of last instance to make a reference for a preliminary ruling question to the Court.

In relation to the first issue, by providing an extensive interpretation of previous case law, the Court of Justice showed significant openness toward the request of the *Conseil d'Etat*. Indeed, it ruled in favour of the possibility to postpone the temporal effects of a decision annulling national legislation in contrast with EU law. As to the second issue, the Court reiterated the *CILFIT* case law and introduced an additional situation in which national courts of last instance must make a reference for a preliminary ruling to the Court of Justice, i.e. when there are doubts as to the application of the *Inter-Environnement Wallonie* case law.

To conclude, *Association Nature France Environnement* is another decision in which the Court of Justice has mitigated the principles of supremacy and effectiveness of the EU. On the basis of this trend, one might wonder whether these principles will be reshaped by the Court of Justice case law in the coming years. The current European political context might suggest so.

