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Reconciling primacy and environmental protection: *Association France Nature Environnement*

Case C-379/15, *Association France Nature Environnement* v. *Premier ministre and Ministre de l'Écologie, du Développement durable et de l'Énergie*, judgment of the Court (First Chamber) of 28 July 2016, EU:C:2016:603

1. Introduction

In *Association France*, the Court was presented with an opportunity to clarify whether it is possible to suspend the obligation to enforce Union law as to its effects within the national legal order. The referring court asked whether it could limit in time certain effects of the annulment of a domestic provision which contravened obligations provided for under EU law. On the one hand, the annulment of the national measure could give rise to a "gap" in environmental protection at the national level, which would run contrary to EU objectives recognized in the Treaty and concretized in secondary legislation.[1] On the other hand, upholding the national measure would allow the breach of EU law to persist and afford national courts an opportunity to derogate, for a period of time, from their duty to disapply a national measure that is contrary to Union law.

The judgment sheds light on some important issues. First, it is significant for our understanding of the circumstances where it is possible to modify the full effects of the principle of primacy in the national legal order. The Court explores the circumstances where primacy may be outweighed, for a certain period, by the application of other primary law interests, such as the general principle of legal certainty and the objectives in the field of environmental protection. In so doing, the Court recognizes a decentralized power available to the national courts to delay and to moderate the effects of Union law. It is noteworthy that this understanding is drawn from the EU level – in other words, by reference to the EU's own primary law materials – rather than the more traditional limits to primacy arising from, and associated with, domestic constitutional law.[2] This power is thus to be distinguished from a

1. See in both primary law, Art. 3(3) TEU, and Art. 191(1) and (2) TFEU, and secondary legislation, including Directive 2001/42/EC.

2. See e.g. BVerfG, Order of the Second Senate of 14 Jan. 2014 – 2 BvR 2728/13 on the "OMT" scheme which reveals the tensions between the ECJ and the BVerfG with respect to the

"qualification" of primacy of the latter kind, as it is the Court who authorizes the delayed operation of EU law. Second, the scope of this power offers the potential to reveal something about the unique place of environmental protection within the Union's "hierarchy of primary norms".

2. Facts

Association France Nature Environnement brought an action before the French Conseil d'État for annulment of Decree No. 2012-616,[3] arguing that the Decree infringed Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment ("the SEA Directive").[4] Article 6(3) of the SEA Directive requires Member States to designate the authorities to be consulted for an environmental assessment which, by reason of their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing plans and programmes. According to *Seaport,*[5] the authority that draws up or accepts a plan or programme may also be consulted on the measure, but another body in the Member State must also be empowered to carry out the function of consultation. The Conseil d'État confirmed that Article 1 of the Decree did not comply with the requirements stemming from Article 6(3) of the SEA Directive, as the same authority had the power to draw up and approve plans and programmes, on the one hand, and consultative power in environmental matters for programmes on the other. There was no provision ensuring that the consultative power was exercised by an entity with autonomy.

As regards the consequences of the breach, for the Conseil d'État the retroactive effect of annulment of national law risked compromising the legality of the plans and programmes adopted on the basis of the Decree and also the legality of any act taken on the basis of those plans and programmes. As it was possible under French administrative law to plead the illegality,

limits of the EU's authority to determine the degree of EU integration. And see the UK Supreme Court's comments in *R (on the application of HS2 Action Alliance Limited) (Appellant)* v. *The Secretary of State for Transport and another (Respondents)* [2014] UKSC 3, to the effect that if the interpretation of Union law by the ECJ went too far, the Supreme Court would not be inclined to follow its interpretation and would continue to apply national law in that regard.

3. Decree No. 2012-616 of 2 May 2012 relating to the assessment of certain plans and programmes having an effect on the environment (JORF of 4 May 2012, 7884).

4. Directive 2001/42/EC of the Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (O.J. 2001, L 197, at 30).

5. Case C-474/10, *Seaport (NI)*, EU:C:2011:681, para 39.

without any limitation period, of such regulatory acts, this situation would be detrimental to observance of the principle of legal certainty and to the attainment of EU objectives on environmental protection. Moreover, a legal vacuum could prevent the implementation of national provisions transposing the SEA Directive. According to the Conseil d'État, the French administrative court may use its power to "vary" the effects of an annulment decision, so that the effects of Article 1 could be maintained for the period necessary to allow for the adoption of rules consistent with the Directive.

The Conseil d'État used the judgment in *Inter-Environnement Wallonie* to support this line of reasoning.[6] As this judgment is also relied on by both the Advocate General and the Court, it is worth briefly explaining the key issues at this point. In that case, the Court had to consider whether it was necessary to annul programmes adopted in accordance with Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources ("the Nitrates Directive")[7] as no environmental assessment had been carried out pursuant to the SEA Directive. The Court recognized that plans and programmes may exceptionally remain in force under certain conditions. First, the national measure must correctly transpose the Nitrates Directive. Second, the adoption and entry into force of the new national measure containing the programme would not enable adverse effects on the environment resulting from the annulment of the contested measure to be avoided. Third, annulment of the measure would result in a legal vacuum as regards the transposition of the Nitrates Directive which would be more harmful to the environment, as it would result in a lower level of protection of waters against pollution caused by nitrates and would therefore run contrary to the fundamental objective of that Directive. Fourth, the effects of the measure may be exceptionally maintained only for a period which is strictly necessary to adopt the measures which remedy the irregularity.

On the basis of this reasoning, two questions were referred for a preliminary ruling. The first was whether a national court must in all similar cases make a preliminary reference so that the ECJ may determine whether provisions held by the national court to be contrary to EU law should be maintained temporarily in force. The second question was whether a decision of the Conseil d'État to maintain the effects of the unlawful provisions of Article 1 of Decree may be justified by an overriding consideration linked to the protection of the environment.

6. Case C-41/11, *Inter-Environnement Wallonie and Terre wallonne*, EU:C:2012:103.

7. Directive 91/676/EEC of 12 Dec. 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, O.J. 1991, L 375/1.

3. Opinion of the Advocate General

The reasoning in the Opinion was not taken over by the Court. The Advocate General began by recalling that in the present case the rules set out in the SEA Directive were not transposed correctly, and that the referring court wished to maintain certain effects of a declaration of illegality of the contested national measures.[8] The Advocate General was of the view that *Inter-Environnement Wallonie* could not be straightforwardly applied to the present case, as the former concerned the effectiveness of measures transposing the Nitrates Directive that were adopted in breach of the SEA Directive. Rather differently, *Association France* raised the issue of the incorrect transposition of the SEA Directive itself. The relevant national measures did not aim to transpose the Nitrates Directive.

The Advocate General proceeded to explain that maintaining the effects of provisions held to be contrary to EU law would be incompatible with settled case law.[9] The national court should give full effect to EU law by refusing to apply any national provision which would lead to a decision that is contrary to EU law.[10] Only the ECJ may, exceptionally, in the application of the general principle of legal certainty, restrict the right to rely upon a provision which it has interpreted.[11] And, the ECJ itself may allow such a restriction only in the actual judgment ruling upon the interpretation sought. As the Court had not limited the interpretation of the SEA Directive in *Seaport* – the relevant case on the required autonomy of environmental authorities – as to its effects, it could no longer be rectified; *Inter-Environnement* would not justify any additional exception to the precedence of EU law.[12] While *Inter-Environnement wallonie* opened the way to maintaining certain effects of the annulment of a national measure, it "could not relate to a measure that is substantively contrary to EU law, but to one that was adopted in breach of procedural requirements".[13] Thus, it would not be possible to maintain in force the effects of national provisions so as to exclude an action against plans or programmes adopted in breach the SEA Directive.

8. Opinion, paras. 1–5.
9. Opinion, paras. 17–38.
10. Opinion, para 32. Citing Case 106/77, *Simmenthal*, EU:C:1978:49, paras. 21–23, C-617/10, *Åkerberg Fransson*, EU:C:2013:105, para 45 and Case C-463/11, *L*, EU:C:2013:247, para 44.
11. Case 43/75, *Defrenne*, EU:C:1976:56, paras. 71–75, Case C-292/04, *Meilicke and Others*, EU:C:2007:132, para 35, Joined Cases C-581 & 629/10, *Nelson and Others*, EU:C:2012:657, para 89.
12. Case C-474/10, *Seaport; Case C-41/11, Inter-Environnement wallonie;* Opinion, para 37.
13. Case C-41/11, *Inter-Environnement wallonie*, paras. 44–48.

The Advocate General also understood the reference as concerning whether the referring court had to bring a matter before the ECJ before deciding to maintain in force individual plans or programmes adopted on the basis of the contested national provisions.[14] The Advocate General recalled that the conditions developed in *Inter-Environnement* allow for the maintenance in force of the effects of annulled plans or programmes only in exceptional circumstances. Three of those conditions depend on the factual circumstances, so national courts may assess them without needing a reference to the ECJ. The Advocate General devoted more attention to the first condition: that the relevant measure must correctly transpose the Nitrates Directive. The plans and programmes at issue in the present case did not aim to transpose the Nitrates Directive. According to the Advocate General, it may be desirable to maintain in force a plan or programme adopted in breach of the SEA Directive, irrespective of the transposition of the Nitrates Directive; abolishing such a measure would open a gap in environmental protection. However, a decision of the ECJ to that effect would be inappropriate in the present case. First, there was no evidence that the referring court was dealing with the effects of individual plans or programmes. Second, in *Inter-Environnement* the Grand Chamber limited the possibility of maintaining in force plans and programmes to measures transposing the Nitrates Directive. Third, statements about maintaining in force plans or programmes would have to be made without knowledge of the conflicting interests at stake in individual cases; and such statements could weaken the effectiveness of the SEA Directive. The Advocate General thus reached the conclusion that, as it is unclear under EU law as it currently stands whether measures adopted incorrectly which do not aim to transpose the Nitrates Directive may be maintained in force, a national court against whose decision there is no judicial remedy under national law is required under Article 267(3) TFEU to bring the matter before the ECJ.

4. Judgment

The Court began by ascertaining the conditions for a national court to limit the temporal effects of a declaration of illegality of a national provision which is contrary to the SEA Directive. After summarizing the judgment in *Inter-Environnement Wallonie*, the Court went on to discuss the possible adverse environmental consequences of annulment of the relevant domestic provisions. The Court then recalled that it alone may, "exceptionally and for overriding considerations of legal certainty, grant a provisional suspension of

14. Opinion, paras. 45–57.

the usual effect which EU law has on conflicting national law".[15] A power for national courts to give precedence to national provisions over EU law, even provisionally, would damage the uniform application of EU law.

Nevertheless, in the field of environmental protection, it had been held in *Inter-Environnement* that a national court may, in light of the existence of an overriding consideration linked to environmental protection, exceptionally be authorized to make use of a national provision enabling it to maintain certain effects of an annulled national measure.[16] According to the Court, *Inter-Environnement* "sought to reconcile the principles of primacy and legality, on the one hand, and the necessity of protecting the environment" pursuant to primary law, including Article 3(3) TEU and Article 191(1) and (2) TFEU, on the other hand.[17] It recalled that in *Inter-Environnement* it had set four conditions that must be satisfied (these were listed in section 2 above). After setting out the conditions from *Inter-Environnement*, the Court dedicated its attention to the first and third conditions, that the national measure correctly transposes the Nitrates Directive, and that annulment of the measure would entail a legal vacuum as regards the transposition of the Nitrates Directive which would be more harmful to the environment. In light of the existence of overriding considerations linked to environmental protection, the first condition could encompass any measure, despite having been adopted contrary to the SEA Directive, which "correctly" transposes EU law in the field of environmental protection.[18] As regards the third condition, annulment of the national measure must have the effect of creating a legal vacuum concerning the transposition of EU law on environmental protection which would be more damaging to the environment and would thus run counter to the essential objective of EU law. The Court therefore concluded that a national court may on a case-by-case basis – when permitted by domestic law – limit in time certain effects of the annulment of national provision adopted in contravention of the SEA Directive. That limitation must be dictated by overriding considerations linked to environmental protection, and the specified conditions must be satisfied.[19]

15. Judgment, para 33, citing Case C-409/06, *Winner Wetten*, EU:C:2010:503.
16. Judgment, para 34.
17. Judgment, para 36.
18. It is rather odd that the Court says that the measure must "correctly" transpose EU law. This makes little sense, as the issue in the case was the incorrect transposition of EU law. This confusion could be caused by the translation of the original judgment into English, or could be the result of the failure of the Court to consider the specific facts of *Inter-Environnement* in detail – which involved a national measure which did correctly transpose the Nitrates Directive – when extending it to the present case.
19. Judgment, para 43.

The Court then addressed the question of whether, before making use of this exceptional power, a national court has an obligation to make a reference for a preliminary ruling.[20] As the power available to national courts is exceptional, the ECJ explained that a national court against whose decisions there is no longer any judicial remedy must make a reference for a preliminary ruling when it has the slightest doubt as regards the interpretation or the correct application of Union law.[21]

5. Comment

This analysis will highlight four interesting observations drawn from the judgment. First, *Association France* contributes to the general idea that it is possible to delay the operation of the principle of primacy in specific cases. Second, the methodology of the Court in reaching the conclusion that the Conseil d'État may – if certain conditions are satisfied – temporarily maintain in force the effects of a national measure that is incompatible with Union law helps us to consider the framework through which it is possible to moderate the usual effects of Union law. The third observation concerns the nature and scope of the power (or technique) that is available to national courts in this regard. Finally, the judgment raises questions about what interests may "justify" the exercise of this exceptional power to suspend the application of Union law for a period of time.

5.1. *Moderating (or qualifying?) the application of the principle of primacy*

In *Association France*, the Court had the task of determining whether obligations stemming from EU law should be "enforced" immediately within the national legal order. As France had infringed its obligation to comply with the SEA Directive, the next question concerned the legal effects of the "breach" at national level. The ECJ concluded that a national court may, in light of overriding considerations of environmental protection and upon satisfaction of certain conditions, exceptionally be authorized to make use of a national provision enabling it to maintain certain effects of an annulled national measure. In this way, the judgment is significant as it is one of the few instances where the Court has found that the application of the principle of primacy is capable of being moderated as to its effects within the national legal

20. Judgment, paras. 44–53.
21. Judgment, para 52.

order.[22] The Court provides a useful summary of its present understanding of the balance between the Union's objectives in the field of environmental protection and the obligations associated with the principle of primacy.

The novelty of the circumstances of this case is that it is two Union interests that must be balanced together, in view of their contrasting legal consequences. The key issue is whether preference should be afforded to one principle of EU law over another and not whether national law should enjoy precedence over EU law *per se*. So, whilst the EU has an interest in the enforcement of its law over conflicting national law, at the same time, certain EU norms may lean in favour of the non-enforcement of Union law so as to avoid opening up a "legal vacuum" which may be detrimental to the environment. This poses sensitive questions about whether the Court will tolerate breaches of EU law (temporarily) in the interests of other primary law rules or principles. In confirming that the effects of specific provisions of EU law may be modified for a period of time, the judgment illustrates a general phenomenon in Union law as to the interactions between various primary law interests and the consequent judicial approach to finding a balance between them.[23] Indeed, *Association France* consolidates a prior line of case law where similar expressions have been made by the Court. For instance, there are cases in which the need to ensure the observance of the principle of primacy has been delayed by reference to certain of the Union's primary law rules and principles.[24]

22. Such a conclusion as to the nature of the principle of primacy usually only arises by implication, and the ECJ is not explicit in such a regard. For example, in cases like Case C-108/01, *Consorzio del Prosciutto di Parma*, EU:C:2003:296, the Court held that valid EU Regulations cannot be enforced within the national legal order where they have not been correctly published. The Court does not suggest that legal certainty modifies the full effects of primacy, but this is the logical implication of its conclusions. See, also, the "implied" right to derogate from commitments under directives recognized in Case C-57/89, *Commission* v. *Germany*, EU:C:1991:89.

23. A good example of this "balancing" exercise arises in the AFSJ and the judicial approach to reconciling the principle of mutual trust and the protection of fundamental rights. In certain instances, the balance allows for national provisions on fundamental rights to apply where EU legislation is silent on the particular issue. See e.g. Case C-168/13, *PPU Jeremy F*, EU:C:2013:358.

24. For example, there are circumstances where the Court gives an interpretation of EU law which the Member States argue should be limited as regards its temporal effects, due to overriding considerations of legal certainty. The Court has been able to limit the (retroactive) effects of a judgment in time, and to restrict the ability of individuals to rely on its interpretation, in the interests of legal certainty; Case C-82/12, *Transportes Jordi Besora*, EU:C:2014:108. In Case C-25/14, *UNIS*, EU:C:2015:82, the Court held that the interest in preventing legal uncertainty may justify putting the stability of contractual arrangements already in the course of performance in the area of public procurement above the observance of EU law.

In its judgment, the Court acknowledges (some of) the consequences of its finding.[25] At least for the Court, the exercise of the exceptional power of national courts temporarily to suspend the effects of EU law could adversely affect the observance of the principle of primacy.[26] It is not made clear why a situation where the application of primacy is moderated for a limited time is almost considered a "qualification" of primacy. Indeed, for the Advocate General, *Inter-Environnement* – which *Association France* largely expands upon – does not provide any new form of exception to the precedence of Union law.[27] And it is interesting that in *Inter-Environnement* the Court did not mention the principle of primacy at all. Still, the Court's recognition of the consequences of its finding may provide an explanation for the Advocate General's different (and narrower) position. The Advocate General's concern seems to be to ensure that there are very few instances within which the full effects of the principle of primacy are modified. It was this caution that led him to conclude that the Conseil d'État could not limit in time the effects of national law that was incompatible with Union law. The Opinion articulates the need to uphold the normal consequences of a breach of EU law, and to avoid further expanding the situations in which it is possible to maintain certain effects of incompatible national provisions beyond the (unique) circumstances of *Inter-Environnement*.[28]

Advocate General Bot's Opinion in *Winner Wetten* shares interesting similarities with the Opinion in the present case.[29] The question in *Winner Wetten* was whether national courts may order that national provisions on games of chance may remain in force on a temporary basis where they are incompatible with the fundamental freedoms contained in the Treaty.[30]

25. The ECJ does not address the consequences of its findings for the effective judicial protection of individuals when the Member State has breached EU law, but where the consequences of the breach can be suspended. Can they claim damages against the defaulting State? Or is the "suspension" of EU law also able to defeat the right to reparation? See Case C-420/11, *Leth*, EU:C:2013:166 where the Court was asked whether individuals are able to claim damages against a Member State for the violation of the EIA Directive. The Court confirmed that individuals have a right on the basis of the EIA Directive to have the environmental effects of a project assessed and to be consulted.

26. Judgment, para 52.

27. This stance was perhaps motivated by the factual circumstances and the individualized nature of the breach in that case; a programme adopted without an environmental assessment, but which correctly transposed the Nitrates Directive. In other words, there was no question of maintaining in force effects of domestic provisions that would be contrary to EU law on a continuous basis, such as the provisions on autonomy at issue in *Association France*. See, further, section 5.3, *infra*.

28. See, further, section 5.3 *infra*.

29. Case C-409/06, *Winner Wetten*, para 109.

30. The case concerned a decision to forbid an intermediary for sports gambling from placing bets on sporting competitions, based on the proposition that it had not obtained prior

The referring court argued that the normal consequences of a breach of EU law would lead to a legal vacuum in national law. According to Advocate General Bot, the principle of primacy would constitute an obstacle of principle to the authorization for national courts to derogate from the full effects of EU law. Such an obstacle would therefore preclude the maintenance in force of domestic law which is contrary to a directly applicable Union rule. Both Opinions thus seem to reinforce the fact that the principle of primacy ought to be subject to few (if any) real limits.

Nonetheless, the effect of the language used in the judgment in *Association France* seems to push the door left open by the Court in *Winner Wetten*, in recognizing further instances where it is possible to modify (temporarily) the principle of primacy.[31] The present judgment is the first time *Winner Wetten* has been cited by the Court as authority for the proposition that legal certainty may justify a derogation from the usual effects that EU law may have on an incompatible national provision.[32] In *Winner Wetten* the Court explored how, if at all, a decision to maintain the effects of national legislation that conflicted with Union law could fit within its existing case law. First, the existence of a decision of a national constitutional court was unable to justify a temporary derogation from the principle of primacy.[33] In other words, the fact that the Bundesverfassungsgericht decided to uphold the effects of an (unlawful) legislative decision could not have the effect of preventing a "lower" national court from exercising its obligation to refrain from applying legislation that conflicted with Union law.[34] Second, the Court assessed whether the same would hold true for a possible legal lacuna in the national legal order in the event of the incompatible national provisions being immediately set aside. At least in the context of that case, the Court was reluctant to accept the arguments of the intervening Member States that the recognition of a principle authorizing the maintenance of the effects of an incompatible national rule would be justified by analogy to its case law on maintaining the effects of an unlawful Union measure for overriding considerations of legal certainty.[35] But, importantly, it did not exclude the possibility of accepting this analogy in

authorization. It was found that a public monopoly restricted the exercise of its freedom to provide services (Art. 56 TFEU), which could not be justified by the objective of preventing excessive spending on gambling and combating addiction because it did not serve to limit betting objectives in a consistent and systematic manner.

31. Despite the fact that the present judgment appears to be a logical expansion of *Winner Wetten*, the Court only makes reference to it once, at para 33.

32. Judgment, para 57.

33. Citing Case C-314/08, *Filipiak*, EU:C:2009:71.

34. Case C-409/06, *Winner Wetten*, para 73.

35. This case law has been developed on the basis of Art. 264(2) TFEU. For example, the Court has on occasion provisionally maintained the effects of Union measures annulled under Art. 263 TFEU or a measure rendered invalid under Art. 267 TFEU. A ground accepted in this

principle. Instead, it alluded to a suspension of the usual effects of Union law on the basis of the general principle of legal certainty.[36] The implication is that it might be possible to recognize a decentralized judicial power to suspend the full primacy of Union law over conflicting national law, on a temporary basis, where disapplication of domestic rules would create a legal vacuum. Arguably, the Court in *Association France* relied on the opportunity discussed in *Winner Wetten* to substantiate its specific conclusions within the sphere of environmental protection. National courts may "limit the effects" of an annulment for a temporary period until the incompatibility is remedied.[37]

Yet the question arises whether a distinction ought to be drawn between the effects of primacy in the case of directly applicable Union law and its effects in the case of a directive. With directives, as in *Association France*, moderating the full application of primacy ensures the protection of "Union-level concerns", as it avoids a legal vacuum in relation to the implementation of national provisions transposing the SEA Directive. Thus, delaying the effects of the EU law would allow for the adoption of replacement measures which are consistent with the directive. Yet, with directly applicable Union law, the logic of the decentralized power to suspend the effects of EU law would seem to give precedence to domestic concerns, as for example in *Winner Wetten* and the possible legal vacuum under national law. This naturally creates a more direct confrontation with the principle of primacy, given the absence of any identifiable "gap" in the transposition of EU legislation which needs to be avoided in such circumstances. In any case, what this section reveals is that there seems to be disjuncture between the language used by the Court as regards a possible "qualification" of primacy and the overall result of its decision merely to suspend the effects of primacy for a period of time.

5.2. *The effects of Union law in the national legal order*

There is evidence of some confusion on the part of the ECJ as to the method to employ in order to determine what effects Union law may have within the national legal order. The judgment reflects the general uncertainty permeating this line of case law on the issue of whether to postpone the annulment of a national measure for a temporary period. This is especially true of the

line of case law is the existence of overriding considerations of legal certainty (Case 402/05 P, *Kadi*, EU:C:2008:461, para 375).

36. The Court did not give a decisive determination of whether the primacy of EU law may be suspended in light of other more pressing interests; in fact, overriding considerations of legal certainty capable of justifying a suspension were found to be lacking in the case.

37. This is similar to the possible analogy recognized in *Winner Wetten* as to the annulment of EU legislative acts.

circumstances where the full enforcement of EU law may have a detrimental impact on the environment and/or legal certainty, both of which are interests that are situated at the level of EU primary law. Although the judgment makes it clear that it is possible to delay the full effects of the principle of primacy within the national legal order in order to avoid a legal vacuum, the outstanding question is how this is achieved in practice. There are two possible variations of the methodological approach.

The Court outlined its traditional approach to balancing the principle of primacy with countervailing procedural concerns that exist at the national level – such as legal certainty – in *Rewe* and *Comet*.[38] It held that in the absence of legislation on procedural and remedial rules, Member States remain free to set their own rules to ensure the effective enforcement of EU rights and obligations in their legal order. Still, notwithstanding that presumption of national procedural autonomy, the general principles of Union law, in particular effectiveness and equivalence, apply to national choices about the remedies and procedures for dealing with a breach of EU law. Therefore, when it comes to national procedural rules that reflect the need, say, to ensure legal certainty, but which also restrict the opportunities to enforce Union law, the presumption of national procedural autonomy will apply, subject to any qualifications stemming from the principles of equivalence and effectiveness.[39]

However, a more recent approach of the Court when it comes to "balancing" primacy and legal certainty inclines towards an "internal" Union-level assessment. In other words, the Court attempts to reconcile the requirements of primacy and legal certainty amongst themselves, without the mediation of the national procedural autonomy framework. This approach is illustrated in cases like *Skoma-Lux* and *Heinrich*.[40] The general pattern is as follows: if EU legislation has not been correctly published in the Official Journal, then it cannot be enforced against individuals within the national legal order – even though the legislation is otherwise valid – due to overriding reasons of legal certainty.

At first glance, *Association France* might be understood as a case which concerns national procedural autonomy. On this view, it would be possible to compare the situation to the judicial treatment of national limitation periods, the expiry of which deprives an individual of the opportunity to assert their

38. Case 33/76, *Rewe*, EU:C:1976:188, Case 45/76, *Comet*, EU:C:1976:191.

39. See e.g. the recent cases on national rules on *res judicata*: Case C-505/14, *Klausner Holz Niedersachsen*, EU:C:2015:742 and Case C-69/14, *Târşia*, EU:C:2015:662.

40. Case C-161/06, *Skoma-Lux*, EU:C:2007:773, Case C-345/06, *Heinrich*, EU:C:2009:140.

rights under Union law.[41] The tensions between the Union's interest in the enforcement of its law and the national interest in a restriction of the effects of Union law will be dealt with through a balancing framework involving the presumption of national competence. Nevertheless, the reality of the matter is quite different. Indeed, the methodology which the Court employs in order to reach its conclusion more closely resembles cases like *Skoma-Lux*. It is not the national interest, under a procedural rule, which is prioritized over the effects of EU law; it is the EU interest in ensuring a high level of environmental protection. Thus, what comes to the fore in the present judgment is the fact that the Court is reconciling the interplay between two distinct Union value choices under primary law; the principles of primacy (and legality), and the protection of the environment.[42] It is important to acknowledge that as a consequence, it is the Court, firmly at the EU level, that authorizes the national court to exercise this exceptional power. Thus, in principle there is no general (presumptive) authority for the national legal order to determine whether to remedy the incompatibility, a choice which would only then be subject to the principles of equivalence and effectiveness.

This is not to say that understanding the situation as one governed by national procedural autonomy is necessarily unfounded. This is particularly true given that the Advocate General, and possibly the Court, in the prior case of *Inter-Environnement* appeared to follow this logic.[43] For the Advocate General in *Inter-Environnement* the principle of primacy was not the appropriate reference point from which to approach the case. Unlike the Court, which made no reference to the principle of primacy at all in that case, the Advocate General specifically considered primacy and rejected it as irrelevant to the key issues.[44] The discussion therefore focused on whether the principles of equivalence and effectiveness would be undermined if the action programme was upheld temporarily.

It would therefore be useful to explore whether, and if so, how, the situation the ECJ faced in the present case is different from the traditional cases on national procedural autonomy. Most convincingly, the reasons underpinning the need to exercise such a power in *Association France* are not located in the domestic legal order – as would be the case where national procedural

41. E.g. Case C-188/95, *Fantask*, EU:C:1997:580.

42. Judgment, para 36.

43. The Court employed a more nuanced (and less clear) approach, but it nevertheless reached the same conclusion. In the first place, it discusses national procedural autonomy, and then discusses the legal vacuum that would emerge in relation to the Union's objectives in the field of environmental protection if the measure were to be annulled with immediate effect. Then, it makes reference to the fact that the national court may be authorized to use its exceptional power to suspend the effects of the annulment that exists under national law.

44. Opinion, paras. 17–26.

autonomy applies – but have their origin in the Union legal order. The Conseil d'État in its reference expressly addressed the "EU level" concerns of leaving a gap in environmental protection contrary to the Union's objectives under primary law.[45] This also helps to explain *Winner Wetten*, insofar as it embodies a similar methodological approach to *Association France*. As was explained above, whilst the concerns belonging to the national legal order (the decision of the Bundesverfassungsgericht) could not justify a suspension of the effects of Union law, the Court hinted that legal certainty – as a general principle of Union law – may have such an effect. It is possible that both *Winner Wetten* and *Association France* indicate that, at least when the interests that enter into tension with each other are two Union interests (as opposed to a Union and a national interest), the Court may be inclined to authorize limitations to the enforcement of Union law for a temporary period. This is quite a mature approach; one that does not allow a legal vacuum to undermine certain of the Union's essential objectives, purely so as to uphold and project its hierarchical superiority over national law.

With this in mind, it is important to explore the implications of how the issue is framed as a clash between two values enshrined in Union primary law. First, it is the ECJ which has the task of weighing the respective strengths of these competing interests. In *Winner Wetten*, the Court did not provide any indication of how the balancing exercise ought to be conducted. But, it is possible to speculate that it may have reserved for itself the task (in future cases) of determining when primacy can be outweighed by legal certainty concerns, and vice versa. This point emerges with greater clarity in *Association France* as it seems that the Court assumes a monopoly over determining which EU interests may play a role in suspending the enforcement of EU law for a temporary period. Second, the Court is also able to determine the content and extent of these interests. For example, it is clear that it is solely for the Court to decide on the conditions of the "suspension".[46] As a result, it is not the national conception of legal certainty or environmental protection, but the Union version – as interpreted by the Court – that will be decisive in these circumstances. And finally, this decentralized power for national courts is established on a case-by-case basis.[47] Although this may raise problems of consistency and predictability, such concerns can be attenuated to an extent by the conditions set out in the judgment as to when the national courts may exercise such a power. These conditions almost have the colour of a legislative stipulation insofar as they structure the judicial inquiry.

45. Judgment, para 20.
46. See, further, section 5.3, *infra*.
47. Judgment, paras. 39, 40, 42.

5.3. *What is the nature and scope of the ability to suspend the effects of Union law?*

The Court provided certain indications in the judgment as to when it is possible to delay the usual obligations associated with the enforcement of Union law in the national legal order. In terms of the nature of the power available to national courts, it can only be exercised where such a power exists under national law;[48] thus, the Court does not "create" a power for Member States. Advocate General Kokott in *Inter-Environnement* posed the question of whether such a power is required as a matter of EU law, but concluded that it was not necessary to provide an answer.[49] It is worth noting that such an eventuality would produce quite significant consequences. Indeed, it may illustrate that a centralizing tendency on the part of the Court, when it comes to balancing primary law interests, could interfere with the vertical allocation of powers between the Union and its Member States.[50] Yet, the fact that the Court only authorizes the exercise of a power that already exists at the national level raises important questions in itself. For example, is there an obligation to maintain the incompatible national law in force, irrespective of whether the national court is willing to exercise its power?[51] Or is it a mere option? If it is discretionary, it perhaps undermines the "centralized" Union-level approach that seems to prevail in the Court's reasoning discussed in section 5.2. above. It would rather share similarities with the national procedural autonomy cases, where the application of national procedural rules which limit the enforcement of EU law only becomes an issue if the national court is willing

48. E.g. Judgment, paras. 34, 43, "when this is allowed by domestic law".

49. Opinion of A.G. Kokott in Case C-41/11, *Inter-Environnement*, EU:C:2011:822, para 44.

50. See e.g. the concerns as to the creation of an "autonomous" right to reparation against Member States in Joined Cases 6 & 9/90, *Francovich*, EU:C:1991:428. This does not depend on whether an opportunity to make reparation is available under national law. The principle of State liability is inherent in the scheme of the Treaties and "is thus required by Community law". There are a set of substantive conditions for incurring liability under Union law, arising from Joined Cases C-46 & 48/93, *Brasserie du Pêcheu*r, EU:C:1996:79.

51. For example, comparisons could be made with the duty of consistent interpretation, and other obligations drawn from Art. 4(3) TEU. In Case C-453/00, *Kühne and Heitz*, EU:C:2004:17, the Court held that if a set of conditions are fulfilled, then since national authorities are bound by the principle of loyal co-operation (Art. 4(3) TEU), there may be an obligation to review a final judgment in order to take into account the Court's interpretation of EU law. Due to the requirements of effective judicial protection, it was possible to modify the way that the existing Dutch provisions pertaining to the review of administrative decisions could be applied. Even though those provisions did not contain an obligation to review a decision, but provided a mere possibility to that effect, the Court transformed the option into a mandatory obligation under Union law.

to enforce them. At present, therefore, the genuine nature of this decentralized power remains unclear.

A second point relates to the scope of this decentralized power. The Court placed a strong emphasis on its exceptional character, which can only be exercised within the confines of a set of EU-determined conditions. In order to limit certain effects of the annulment of the national provisions, it is for the national court to establish: first, that the contested provision of national law constitutes a measure transposing EU law on environmental protection. Second, the entry into force of a new domestic provision does not make it possible to avoid damaging effects on the environment arising from annulment of the contested national law. Third, annulment of the national law must have the effect of creating a legal vacuum concerning the transposition of EU law on environmental protection which would be more damaging to the environment, would result in less protection, and would thus run counter to the essential objective of EU law. Finally, maintaining the effects of the contested national law should last only for the period strictly necessary for the adoption of the measures necessary to remedy the irregularity. This final condition captures the desire of the Court to balance the principle of primacy with other EU law considerations.[52]

The ECJ explained that the conditions in play in these circumstances are those that flow from the judgment in *Inter-Environnement*. However, it is significant that, in the present case, the Court perhaps altered the scope of the conditions originally laid down in *Inter-Environnement*, and as a result broadened the scope of the power available to national courts. This is all the more interesting given the fact that the Advocate General cautioned against an expansion of the conditions.[53] Such caution was based on the understanding that *Inter-Environnement* concerned action programmes implementing the Nitrates Directive, and the Grand Chamber did not make any more general statements including *any* measures regarding environmental protection. Nevertheless, in *Association France* the Court explained that the conditions

52. This is illustrative of the judicial approach in a number of other cases. The common thread that runs throughout the case law illustrates that the negative consequences for the correct application of EU law should only be able to persist for a temporary period, and, eventually, the "substantive" law ought to be enforced within the national legal order. This is the case as regards the maintenance of the temporal effects of (incompatible) national law. The practice also extends to national rules on *res judicata*. For example, when the Court explains that rules on *res judicata* need not be set aside to ensure the application of EU law, that does not affect the fact that there is an established breach of "the law"; see e.g. Case C-69/14, *Târsia*, EU:C:2015:662. Equally, when it comes to modifying the effects of EU law in time, the position of the Court does not render the correct interpretation of EU law obsolete. See the cases cited *supra* note 25.

53. Opinion, paras. 52–57.

could encompass any measure which transposes EU law in the field of environmental protection. The basis on which the Court reached its conclusion, through an analogy with *Inter-Environnement*, is therefore open to scrutiny. In particular, it is unclear whether *Inter-Environnement* is capable of being straightforwardly applied to a situation like that of *Association France*, or whether there are important contextual differences to take into account. It is possible to explore two separate factors in this respect.

In the first place, an important distinction appears to emerge between a suspension of procedural requirements and a suspension of substantive requirements of Union law. Indeed, it is possible that a suspension of substantive requirements may be more contentious.[54] In the present case, the referring court was not primarily seeking to question the continued validity of individual plans and programmes adopted through an incorrect procedure, as was the case in *Inter-Environnement*. Rather it was seeking to limit the effects of the annulment of a national provision, the substance of which did not ensure that authorities consulted in an environmental assessment enjoy sufficient autonomy, contrary to the SEA Directive. This distinction perhaps helps us to understand *Winner Wetten* and the Court's reluctance to suspend the effects of the fundamental freedoms on the national provisions that were substantively incompatible with EU law. Yet, the reluctance demonstrated by the ECJ in *Winner Wetten* as regards the suspension of substantive EU requirements does not appear to be maintained in *Association France*. There are cogent reasons why national provisions that are substantively incompatible with Union law should not be maintained in force (at least without explanation). In short, they could lead to continuous breaches of Union law each time they are applied.[55] This does not necessarily mean that the approach in *Association France* is incorrect, but that the Court might have engaged more thoroughly with the subtle differences between the cases.

In the second place, from the outset the Advocate General emphasized the specific factual matrix of *Inter-Environnement*.[56] In that case, the normal sanction for breaching EU law – to remedy the non-compliance with retroactive effect – would have led to the incomplete implementation of the Nitrates Directive. The Grand Chamber therefore seemed to limit its pronouncements to that case so as to ensure that a legal vacuum did not arise

54. The A.G. explained that the situation would differ from *Inter-Environnement* if the breach of Union law did not concern a procedural requirement. Opinion, para 37.

55. By contrast, in *Inter-Environnement*, the absence of an environmental assessment in the adoption of a programme constituted a self-contained breach, which would not be further aggravated by the implementation of the programme. See Opinion in Case C-41/11, *Inter-Environnement*, para 24.

56. Opinion, paras. 3–5.

in relation to the effective implementation of the Nitrates Directive. As a result, in *Association France*, the Advocate General stressed that the issue was the transposition of the SEA Directive and not plans and programmes necessary for the transposition of the Nitrates Directives (or, on the available facts, any other directive). In other words, the annulment of the contested national measures would not necessarily lead to the breach of the requirements of another directive, nor expose France to a gap in legal protection to that effect. Nevertheless, the ECJ does not seem to acknowledge the different factual dynamics of the case before it. It is unclear what the possible implications of this expansive interpretation of the conditions will be.

Overall, the cases where this technique for suspending the effects of Union law has been employed, and the conditions for its application elaborated upon, have arisen in the field of environmental protection. Its broader scope of application currently remains unclear.

5.4. *What other interests could (temporarily) outweigh the enforcement of EU law?*

There are signals in the case law that there is a more general right to suspend – for a certain period of time – the obligations contained in Union law, beyond the field of environmental protection. It was explained above that the Court in *Winner Wetten* did not rule out the possibility of suspending the enforcement of Union law on the basis of concerns relating to the general principle of legal certainty. Therefore, at least so far, there are clear expressions that both the general principle of legal certainty (*Winner Wetten*) and the Union's objectives in the field of environmental protection (*Inter-Environnement* and *Association France*) may be capable of exerting "suspensive" effects over the enforcement of Union law in the national legal order. The underlying rationale for this is that the annulment of a national measure would compromise an objective pursued by EU law.

It would therefore prove useful to consider whether and how other grounds could be (or have been) recognized in the case law. On the one hand, it may be possible to interpret these findings in a broad sense, so that "public interests" – legal certainty and environmental protection included – are able to justify the operation of the technique available to national courts. This would be similar to the imperative requirements that are available to Member States for justifying barriers to free movement. The focus then turns to the identification of these "public interests". Can an analogy be drawn with Article 3 TEU, referred in the judgment, which covers goals of full employment, social cohesion and linguistic diversity? How far may this line of reasoning extend to

other provisions that are comparable to Article 191 TFEU, such as consumer protection in Article 169 TFEU? The answer to these questions might lie in an exploration of what constitutes an "essential" objective for the EU, an inquiry which is not exclusive to this context.[57] In its present judgment, as in *Inter-Environnement*,[58] the Court referred to environmental protection as an "essential" objective.[59] However, it is not yet clear what factors allow for objectives, such as environmental protection, to be elevated to a "special" position in this context.[60] Are all objectives situated at the level of primary law capable of being considered "essential" and able to furnish the Member States with a ground for suspending the effects of (usually) overriding EU law requirements? Or do these objectives require concretization, either in competence provisions in the Treaty or in secondary legislation, as is the case in other contexts?[61]

On the other hand, when viewed in a narrower sense, the judgment has the potential to reveal the peculiar (and perhaps unique) place of environmental protection in the Union's "hierarchy of norms".[62] This would be the case if it is the only objective capable of exerting such "suspensive" effects over the enforcement of EU law, despite the fact that the text of the Treaty does not appear to elevate the EU's objectives in this field to a special position over and above other objectives. And although in *Winner Wetten* legal certainty was recognized as a principle which could also exert "suspensive" effects over the

57. Cf. e.g. the arguments about the nature and legal effects of the "horizontal" provisions in Arts. 2 and 3 TEU, and the mainstreaming provisions, *inter alia*, on animal welfare pursuant to Art. 13 TFEU. See e.g. Ryland, "Mainstreaming after Lisbon: Advancing animal welfare in the internal market" (2013) *European Energy and Environmental Law Review*, 101.

58. Case C-41/11, *Inter-Environnement*, para 57. The Court explained that in order to be authorized to maintain the effects of the contested order, the referring court referred to the objective of protecting the environment, which constitutes one of the essential objectives of the EU and is fundamental and cross-cutting in nature (citing Case C-176/03, *Commission* v. *Council*, EU:C:2005:542, paras. 41–42).

59. Judgment, paras. 43 and 54.

60. There are illustrations in the case law as to which factors and/or objectives are not able to delay the enforcement of Union law. The question arose in Case C-185/10, *Commission* v. *Poland*, EU:C:2012:181 whether it would be possible to suspend the effects of the enforcement of Union law due to economic concerns. The ECJ did not accept that financial considerations were sufficient to outweigh the normal consequences of a breach of Union law. This serves to reiterate the point made in section 5.2 *supra*, to the effect that concerns specific to one Member State – as opposed to a wider Union interest – will not be sufficient to suspend the effects of Union law.

61. See e.g. Klamert, *The Principle of Loyalty in EU Law* (OUP, 2014), and Larik, "From speciality to a constitutional sense of purpose: On the changing role of objectives of the EU" 63 ICLQ (2014), 935.

62. In early case law, environmental protection was considered "one of the Community's essential objectives" despite the fact that the Treaty did not express such a sentiment. Case 240/83, *Procureur de la Republique* v. *Adbhu*, EU:C:1985:59.

enforcement of Union law in principle, the use of environmental protection as a basis for derogating from the enforcement of obligations under EU law may be qualitatively different from the use of the general principle of legal certainty. In particular, it is not unusual for legal certainty, as a principle which has an essentially procedural dimension, to limit the enforcement of certain rights and obligations.[63] Moreover, a parallel may be drawn with the ambiguous role of environmental protection as a justification for (apparently) directly discriminatory restrictions to the free movement of goods to support the "exceptionality" of environmental protection. This is significant, as environmental protection does not feature in the (supposedly) "exhaustive" list of justifications for direct discrimination under Article 36 TFEU.[64] In these instances the Court has also relied on the fact that a high level of environmental protection constitutes one of the "essential" objectives of the Treaty. Pursuant to such developments, it was not clear whether the justifications for direct discrimination would expand further so as to include other of the EU's recognized objectives.[65] Such an expansion has, however, not been forthcoming.[66]

On a third view it may be possible to understand the judgment in an even narrower sense. One might question whether cases like *Inter-Environnement* and *Association France* are essentially a manifestation of legal certainty concerns, motivated by the desire on the part of the Court to avoid a legal vacuum that would undermine the achievement of the Union's various objectives and the transposition of Directives. If this is the case, then it is fair to say that the Court is not necessarily influenced by substantive "public interests", but by the procedural need to avoid legal vacuums in relation to the transposition of Union law. It is even possible to draw a parallel here with the national procedural autonomy framework, which the Court typically uses to balance the tensions between primacy and legal certainty. The fact that procedural autonomy is not referred to in this context is attributable to the Court's choice of methodology. But the underlying balancing exercise is the same: when may considerations of legal certainty incline towards the suspension of the effects of EU law?

63. It is usual in domestic contexts for concerns related to the protection of legal certainty to underpin specific procedural provisions, such as on *res judicata* and limitation periods, which may limit the enforcement of domestic law. This is also recognized in the EU constitutional architecture. To give just one example, an action for annulment in Art. 263 TFEU has a strict two month time limit.

64. See Case C-379/98, *PreussenElektra*, EU:C:2001:160.

65. See, generally, Oliver, "Some reflections on the scope of Article 28-30 (ex-30-36) EC" 36 CML Rev. (1999), 783, at 804.

66. See, more recently, Case C-28/09, *Commission* v. *Austria*, EU:C:2011:854.

6. Conclusion

The question of whether it is possible to suspend the effects of the annulment of a national provision adopted in breach of the SEA Directive raises much broader issues of EU law. The judgment deals with the effects of the principle of primacy within the national legal order. By exploring the relationship between the principle of primacy and other values that the EU has an interest in protecting – due to their position in the primary law architecture – the Court confirms that there is a (limited) possibility for national courts to moderate the application of primacy in specific cases. To a certain extent the judgment reveals which primary law interests are available when it comes to carving out exceptions to the full application of EU law for a temporary period. In so doing, it exposes the objectives in the field of environmental protection as perhaps holding a special status in the Union's "hierarchy of norms".

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