

BASICS OF THE EU ENVIRONMENTAL LAW

SOURCES OF LAW, SYSTEM OF ENVIRONMENTAL
REGULATION AND RELATION TO OTHER EU
POLICIES, ENVIRONMENTAL LAW PRINCIPLES



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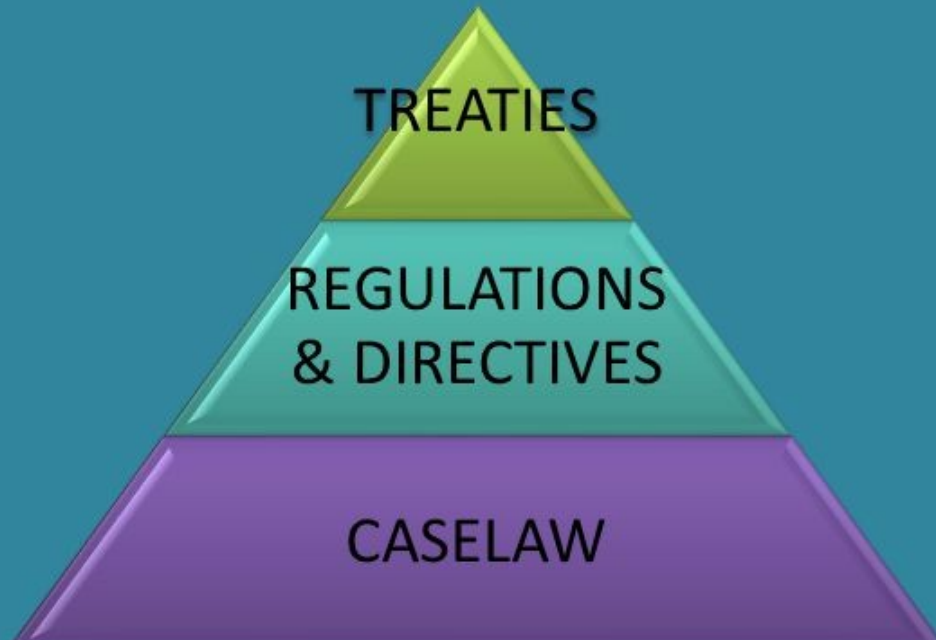
Last lecture summary

- **Environmental policy was not regulated at the Community level in the beginning, but has developed in the Treaties and CJEU case law.**
- **Economic integration was the main focus.**
- **Protection of the environment became part of the internal common policy and was followed by a huge bulk of legislation.**
- **European Union environmental legislation has developed over the last 30 years.**

Before 1986 (Treaty of Rome)	Single European Act (1986)	Maastricht Treaty (Treaty of the Union - 1992)	Amsterdam Treaty (1999)	Lisbon Treaty (2009)
Art. 100 Harmonization (internal market)	→ Art 100a Harmonization + safeguard clause	→ Art 100a Harmonization + safeguard clause	→ Art 95 Harmonization + safeguard clause	→ Art 114 Harmonization + safeguard clause
Art. 235 Objectives of the Community	Art. 235 (not in use any longer!)	Art. 235 (not in use any longer!)	Art. 308 (not in use any longer!)	Art.352 (not in use any longer!)
-	Art. 130r - Objectives - Principles - Grounds - Int. coop.	→ Art. 130r - Objectives - Principles - Grounds - Int. coop.	→ Art. 174 - Objectives - Principles - Grounds - Int. coop.	→ Art. 191 - Objectives - Principles - Grounds - Int. coop.
-	Art. 130s Legal basis and procedure	→ Art. 130s Legal basis and procedure	→ Art. 175 Legal basis and procedure	→ Art. 192 Legal basis and procedure
-	Art. 130t Minimum stringency	→ Art. 130t Minimum stringency	→ Art. 176 Minimum stringency	→ Art. 193 Minimum stringency

The Sources of EU Law

There is a **hierarchy** of law in the EU, when making a case you always want to cite the strongest sources of law. Here is an overview of the hierarchy:



Last lecture summary

- **EAPs define the framework of the EU environmental policy. They set up the challenges and priorities for a given period and create a frame for EU measures on the environment.**
- **7 EAPs – 1972 – 2020**
- **7th EAP: main goal to turn the Union into a resource-efficient, green, and competitive low-carbon economy**
- **Formal law is limited in its capacity to harmonize environmental policy, e.g. of the different Member States in the EU.**

This lecture:

Aims of EU environmental policy:

- **High level of protection**
- **Integration**
- **Sustainable development**
- **(Public participation)**

Environmental principles (in narrow sense):

- **Prevention**
- **Precautionary principle**
- **Polluter pays**
- **Rectification at source**

Harmonization of environmental requirements

- **EU law transposition and implementation**
- **The role of national courts and the role of CJEU**

Next lecture: EU and the European Convention on Human Rights (ECHR)

- Neither of the founding treaties of the European Communities – the Treaty of Paris (1951) or the Treaty of Rome (1957) included any reference to fundamental rights.
- Nonetheless, in its case law the CJEU started to treat such rights as unwritten *'general principles of Community law'*, thereby granting them the status of primary law. It referred to the common constitutional traditions of the Member States, and to international treaties.
- When the European Union was formally established by the Treaty of Maastricht (1992), this case law of the Court of Justice on the dual sources of fundamental rights in the EU was codified in the new Treaty on European Union in its Article F(2). The Treaty of Lisbon provided for a **duty of the EU to accede to the ECHR**.
- However, when the negotiated agreement was put to the CJEU for opinion, it ruled (in 2015) that the agreement did not provide for sufficient protection of the EU's specific legal arrangements and the Court's exclusive jurisdiction.

- The EU is a party to **all major Multi-lateral Environmental Agreements** covering a whole variety of environmental issues.
- The EU is also able to fully participate in international environmental negotiations, either as an observer in the UN context or as a party to the mother treaty in various Conference of the Parties (COPs) and Meeting of the Parties (MOPs).
- The EU is often observed as a leader in global environmental politics, but the EU's external environmental policy is often characterised by a **mismatch between its ambitions and its ability to deliver in practice**.
- EU has led successful efforts to build new governance regimes around a number of global environmental issues, but has also played a weak role in some negotiations.

Legal base of EU environmental law - TFEU

- **Article 3 TEU Objectives**
- **Article 4(2)(e) Shared competence**
- **Article 13 Animal Welfare**
- **Article 191 Environment**
- **Article 194 TFEU Energy**

Legal base of EU environmental law - TFEU

Article 3/3 TEU

- The Union shall **establish an internal market**. It **shall work for the sustainable development** of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, **and a high level of protection and improvement of the quality of the environment**. It shall promote scientific and technological advance.

Transposition and implementation

Art. 4 (3) TEU:

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Characteristics

MULTI-LAYERED SYSTEM

- Where the EU regulation does not specifically provide any specific means of enforcement or refers for that purpose to national laws, regulations and administrative provisions, the *Member States are required to take all measures necessary to guarantee the application and effectiveness of EU law.*
- For example, the sanction provided for must be analogous to those applicable to infringements of national law of similar nature and importance, and must be effective, proportionate and dissuasive.

Legal base of EU environmental law - TFEU

Article 4

2. Shared competence between the Union and the Member States applies in the following principal areas:

(e) environment;

(i) energy;

Principles of subsidiarity (cannot be sufficiently achieved by the Member States) and proportionality (necessary for the aims).

Article 191

1. Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the **quality of the environment**,
- protecting **human health**,
- prudent and rational utilisation of **natural resources**,
- promoting **measures at international level** to deal with regional or worldwide environmental problems, and in particular combating climate change.

2. Union policy on the environment **shall aim** at a **high level of protection** taking into account the diversity of situations in the various regions of the Union. It shall be based on the **precautionary principle** and on the **principles that preventive action** should be taken, that environmental damage should as a priority be **rectified at source** and that **the polluter should pay**.

Horizontal legislation

- general environmental management issues rather than legislation regarding specific sectors, products or types of emissions.
- *Environmental impact assessment,*
- *Integrated pollution prevention and control,*
- *Environmental liability,*
- *Public access to environmental information, participation in proceedings, access to justice.*

Sectoral legislation

- Air pollution
- Water pollution and quality
- Waste
- Chemicals
- Nature and Biodiversity
- Land and soil protection
- Marine and Coast
- Noise

- **The main characteristics of the EU environmental law**

- **Correct application = protection of the environment**
(specific measures, quality of air or water)

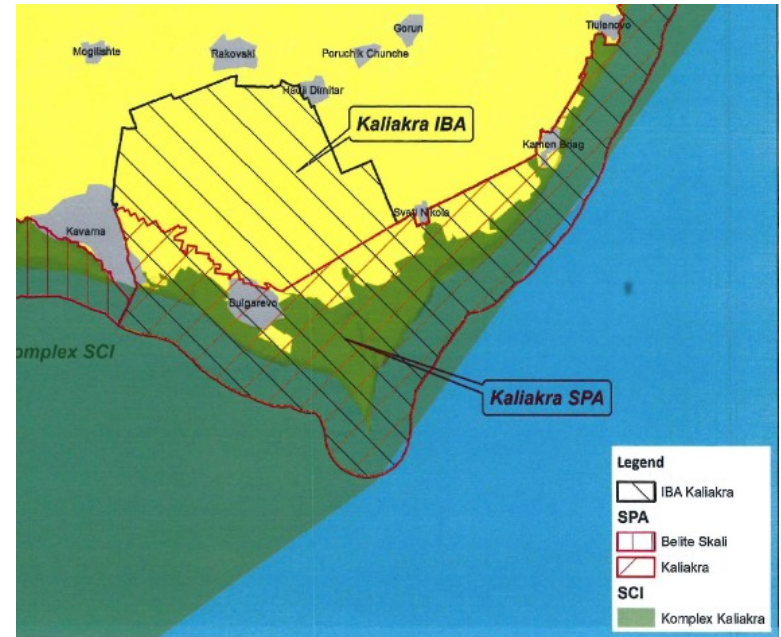
Caretta caretta (C-103/00)



- The main characteristics of the EU environmental law

- Science comes into play

Commission v Bulgaria (C-141/14)



- **The main characteristics of the EU environmental law**

- **Member State may not plead difficulties of implementation**

Commission v. France (C-121/07)

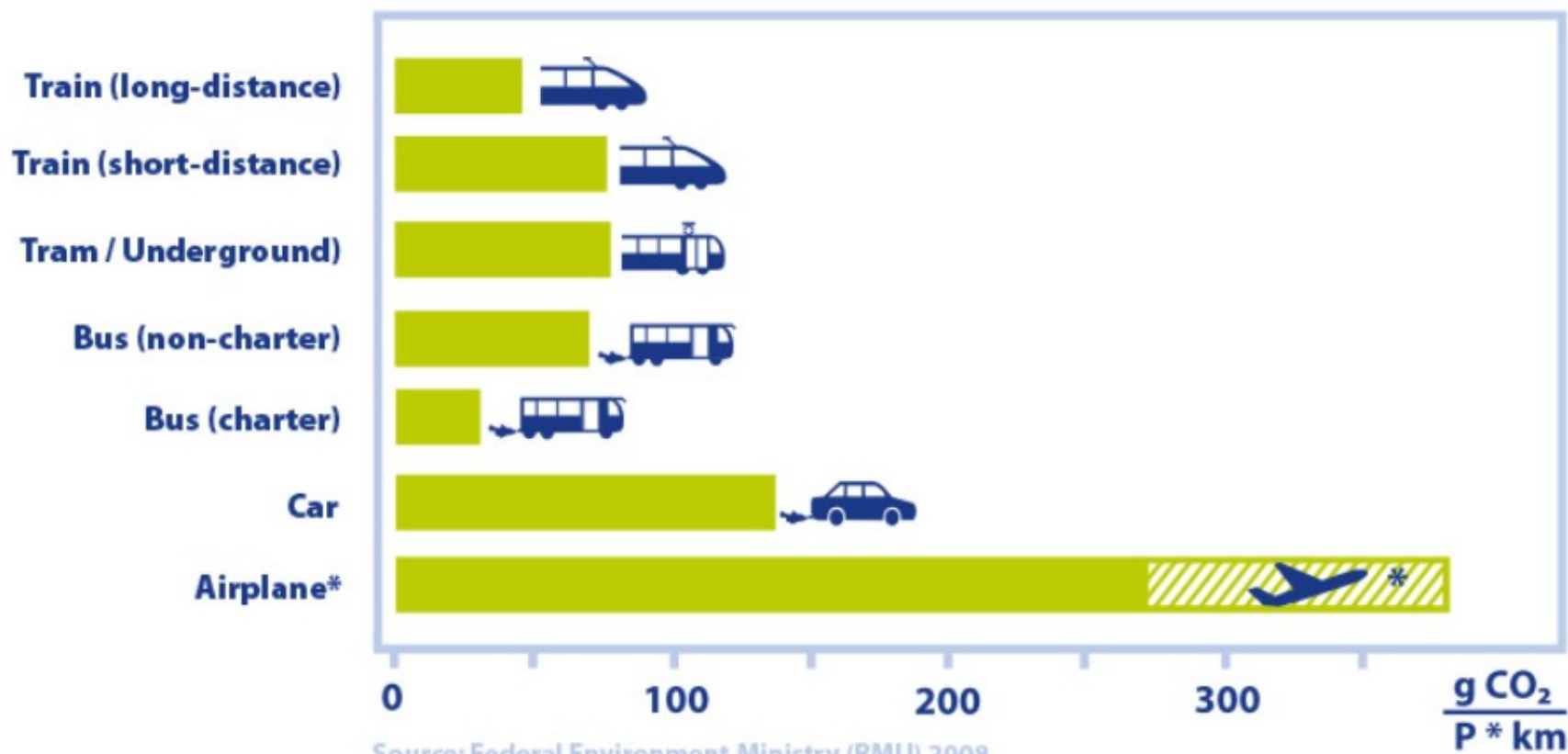


- **The main characteristics of the EU environmental law**

- **Modified rules for direct effect of the EU directives**



Dieter Janecek (C-237/07)



Source: Federal Environment Ministry (BMU) 2008



To regulate certain aspect of environmental protection, the EU must meet the following conditions:

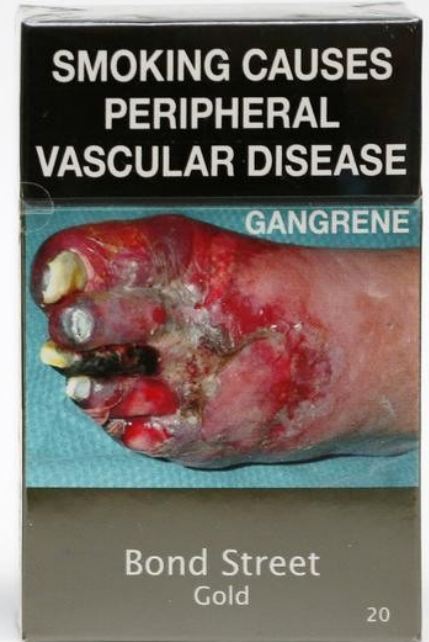
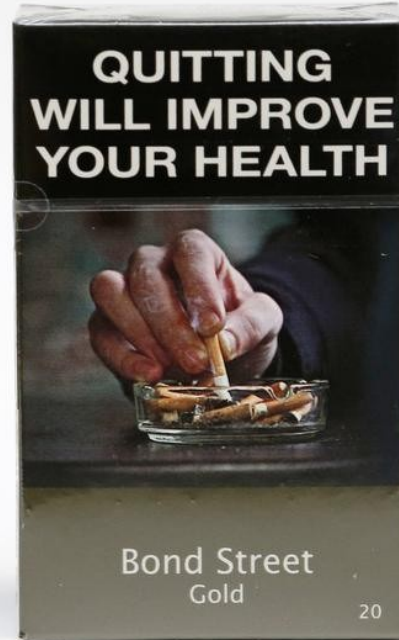
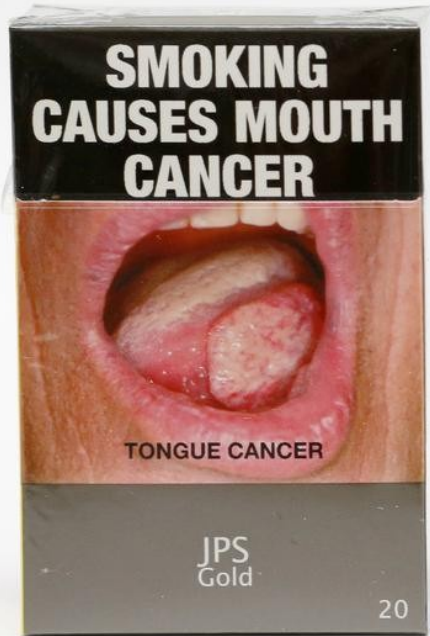
1. Competence

2. Principle of subsidiarity

- ***Reasons for regulation (principles?)***
- ***Means of regulation***

3. Principle of proportionality

Examples: Subsidiarity x proportionality



Examples: Subsidiarity x proportionality



To regulate certain aspect of environmental protection, the MS must meet the following conditions:

- 1. It is not regulated by the EU***
- 2. It is not discriminatory***
- 3. It is proportionate***



112/84 (*Humblot*)





112/84 (*Humblot*)

- Special tax on motor vehicles
- *IN FRANCE, THERE WERE TWO DIFFERENT TYPES OF TAX DUE ANNUALLY ON MOTOR VEHICLES . FIRST THERE WAS A DIFFERENTIAL TAX TO WHICH CARS RATED AT 16 CV (FISCAL HORSEPOWER) OR LESS ARE SUBJECT AND SECONDLY A SPECIAL TAX ON VEHICLES RATED AT MORE THAN 16 CV .*
- *WHEREAS THE AMOUNT OF DIFFERENTIAL TAX PAYABLE INCREASES PROGRESSIVELY AND UNIFORMLY WITH THE POWER RATING FOR TAX PURPOSES , THE SPECIAL TAX IS LEVIED AT A SINGLE AND CONSIDERABLY HIGHER RATE .*
- *4 IN 1981 MR HUMBLLOT BECAME THE OWNER OF A CAR RATED AT 36 CV . BEFORE HE COULD PUT THE VEHICLE ON THE ROAD MR HUMBLLOT HAD TO PAY THE SPECIAL TAX , WHICH , AT THAT TIME , AMOUNTED TO FF 5 000 .*



Level of protection

- C-333/14 (*The Scotch Whisky Association*)



<http://www.theguardian.com/society/2015/dec/23/minimum-alcohol-price-in-scotland-could-breach-eu-law-court-rules>



Level of protection

- **C-333/14 (*The Scotch Whisky Association*)**
- Imposition of a minimum price per unit of alcohol ('MPU') with respect to the retail selling of alcoholic drinks in Scotland, which must be observed by the holder of any licence required for the retail selling of alcoholic drinks in Scotland.
- The MPU was set at GBP 0.50 (approximately EUR 0.70).
- There is a Regulation (EU) No 1308/2013 of the European Parliament and the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products (selling of wines).
- It contains neither provisions that permit the fixing of the retail selling prices of wines, either at national or EU level, nor provisions that prohibit Member States adopting national measures fixing such prices.



Level of protection

- The legislation pursues a twofold objective, that of reducing, in a targeted way, both the consumption of alcohol by consumers whose consumption is hazardous or harmful, and also, generally, the population's consumption of alcohol.
- *It does not seem unreasonable to consider that a measure that sets a minimum selling price of alcoholic drinks, the very specific aim of which is to increase the price of cheap alcoholic drinks, is capable of reducing the consumption of alcohol, in general, and the hazardous or harmful consumption of alcohol, in particular, given that drinkers whose consumption can be so described purchase, to a great extent, cheap alcoholic drinks.*
- ***It follows that the national legislation at issue in the main proceedings appears to be an appropriate means of attaining the objective that it pursues.***



Level of protection

- National legislation or practice cannot benefit from the derogation laid down in Article 36 TFEU if human life and health can be as effectively protected by measures that are less restrictive of trade within the European Union.
- *Yet a fiscal measure which increases the taxation of alcoholic drinks is liable to be less restrictive of trade in those products within the European Union than a measure imposing an MPU.*
- *The reason is that the latter measure, unlike increased taxation of those products, significantly restricts the freedom of economic operators to determine their retail selling prices and, consequently, constitutes a serious obstacle to access to the United Kingdom market of alcoholic drinks.*
- ***It is however for the referring court, which alone has available to it all the matters of fact and law pertaining to the circumstances of the main proceedings, to determine whether a measure other than that provided for by the national legislation at issue in the main proceedings, such as increased taxation on alcoholic drinks, is capable of protecting human life and health as effectively as that legislation, while being less restrictive of trade in those products within the European Union.***

- The main characteristics of the EU environmental law

- **Specific principles**

Prevention, rectification at source, polluter pays principle





Principles



C-2/90: The principle that environmental damage should as a matter of priority be remedied at source, laid down by Article 130r (2) of the Treaty as a basis for action by the Community relating to the environment, entails that it is for each region, municipality or other local authority to take appropriate steps to ensure that its own waste is collected, treated and disposed of; it must accordingly be disposed of as dose as possible to the place where it is produced, in order to limit as far as possible the transport of waste.

(Moreover, that principle is consistent with the principles of self-sufficiency and proximity set out in the Basel Convention of 22 March 1989 on the control of transboundary movements of hazardous wastes and their disposal, to which the Community is a signatory.)



Principles - Rectification at source

Rectification at source – emphasises proximity,
opposite to end-of-pipe approach, BAT

C-364/03: *„Accordingly, inasmuch as it is undisputed that emissions of sulphur dioxide and nitrogen oxide have harmful effects on human health and on biological resources and ecosystems, the obligation on Member States to adopt the measures necessary to reduce the emissions of those two substances is not dependent, contrary to the assertion of the Hellenic Government, on the general environmental situation of the region in which the industrial plant in question is located.“*



Principles – Polluter pays

Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy:

„Member States shall take account of the principle of recovery of the costs of water services, including environmental and resource costs, having regard to the economic analysis conducted according to Annex III, and in accordance in particular with the polluter pays principle.“



Principles – Polluter pays

C-254/08 (wide margin of appreciation):

- *While the Member States as the addressees of Directive 2006/12 are bound as to this result to be achieved in terms of financial liability for the cost of disposing of waste, in accordance with Article 249 EC they may, however, choose the form and the methods to be applied in order to attain that result.*
- ...as Community law currently stands, there is no legislation adopted on the basis of Article 175 EC imposing a specific method upon the Member States for financing the cost of the disposal of urban waste, so that the cost may, in accordance with the choice of the Member State concerned, equally well be financed by means of a tax or of a charge or in any other manner.



Principles – Polluter pays

C-172/08 - Pontina Ambiente:

„... cost of disposing of the waste must be borne by the waste holders. It forms part of the objective of Directive 1999/31 which, according to Article 1(1) thereof, is to meet the requirements of Directive 75/442, and in particular Article 3 thereof, which inter alia requires the Member States to take appropriate measures to encourage the prevention or reduction of waste production.“

The consequence, in particular, is that **whatever the national rules may be governing landfill sites, they must ensure that that all the operating costs of such a site is actually borne by the holders of the waste deposited in the landfill for disposal.**

(...) Causing the operator to bear such charges would amount to charging to him the costs arising from the disposal of waste which he did not generate but of which he merely disposes in the framework of his activities as a provider of services.



Principles – Polluter pays

C-172/08 (Standley) – Polluter pays x Proportionality

*the Member States are to take account of the other sources of pollution when implementing the Directive and, having regard to the circumstances, are **not to impose on farmers costs of eliminating pollution that are unnecessary**. Viewed in that light, the polluter pays principle reflects the principle of proportionality*



Principles – Prevention

- Dannish bottles case
- Various environmental standards.
- EIA Directive thresholds
- Usually on legislative level.



Principles – Precautionary principle

- Time limit x Number of endangered persons x hypothetical risk
- C-157/96 (National Farmers' Union)
- C-180/96 (Mad cow disease)



bovine spongiformencephalopathy



Principles – Precautionary principle



Differences:

- Relevant to the management of risk – usually decision-makers = political decision.
- Uncertainty - where scientific data do not permit a complete evaluation of the risk, recourse to this principle may, for example, be used to stop distribution or order withdrawal from the market of products likely to be hazardous.



Principles – Precautionary principle

Where action is deemed necessary, measures based on the precautionary principle should be, *inter alia*:

- **proportional** to the chosen level of protection,
- **non-discriminatory** in their application,
- **consistent** with similar measures already taken,
- based on an examination of **the potential benefits and costs of action or lack of action** (including, where appropriate and feasible, an economic cost/benefit analysis),
- **subject to review**, in the light of new scientific data, and
- capable of assigning responsibility for producing the scientific evidence necessary for a **more comprehensive risk assessment**.

Thank you for your attention