



Application of EU law in the national context: principles and challenges for a judge

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judge



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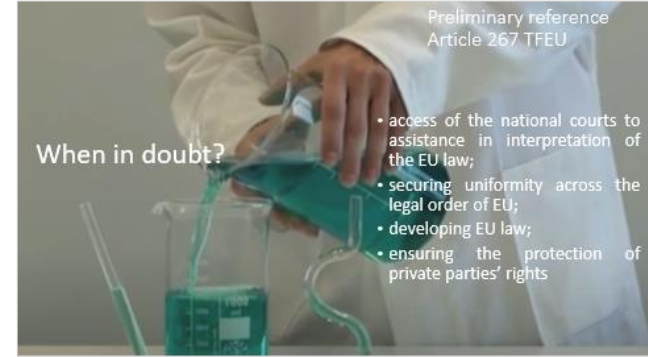
Specific characteristics of Union law

- own terminology
- autonomous concepts in EU law  national legal systems/international law
- EU law acts are drafted in 24 languages – equally authentic + given uniform interpretation and application in all MS

Interpretation of EU law

1. Grammatical or literal (textualism)?

- What if different language versions diverge?
 - Regulation No 1/58 – ‘principle of linguistic equality’ - ‘full multilingualism’ *Consorzio Italian Management*, C-561/19, EU:C:2021:799
 - „42 ... EU legislation is drafted in several languages and that the different language versions are all equally authentic.
 - 43 According to the Court’s settled case-law, one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision or be made to override the other language versions. Provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all languages of the European Union
 - 44 While a national court or tribunal of last instance cannot be required to examine, in that regard, each of the language versions of the provision in question, the fact remains that it must bear in mind those divergences between the various language versions of that provision of which it is aware, in particular when those divergences are set out by the parties and are verified”.



Preliminary reference
Article 267 TFEU

When in doubt?

- access of the national courts to assistance in interpretation of the EU law;
- securing uniformity across the legal order of EU;
- developing EU law;
- ensuring the protection of private parties’ rights



Application of EU law

- Full effect and effective judicial protection
- Direct effect
- Consistent interpretation - interpretation of national law in accordance with the requirements of EU law
- Primacy

Direct effect



Supremacy. New developments

- problems with the full and unconditional assimilation into their national constitutional systems of the principle
- various national supreme courts insist upon retaining the competence to qualify or even reject the supremacy of Union law by reference to essentially domestic constitutional principles such as respect for fundamental rights

(German Constitutional Court’s *Weiss* judgment of 5 May 2020)

CJEU answer:

- *Euro Box Promotion and Others & Asociația “Forumul Judecătoreștilor din România”* (C-357/19 & C-547/19) and *DNA - Serviciul Teritorial Oradea* (C-379/19), EU:C:2021:1034
- EU law precludes a national rule under which national courts have no jurisdiction to examine the conformity with EU law of national legislation which has been held to be constitutional by a judgment of the constitutional court of the Member State (*RS*, C-430/21, EU:C:2022:59)

Consistent interpretation

choose only those interpretative versions of domestic law which are the most compatible with the contents, purposes, functions and axiological assumptions of the EU-directive

- own interpretation, without being either compelled to make or prevented from making a reference to the Court for a preliminary ruling before doing so (*Kücükdeveci*, C-555/07, EU:C:2010:21)

□ but not *contra legem* interpretation

Q: *contra legem*?

R: contradicts the very wording of the national provision at issue
the requirement for national law to be interpreted in conformity with Community law – cannot be interpreted as requiring the referring court to give a domestic act a retrospective effect to the date by which Directive should have been transposed, as the referring court would otherwise be constrained to interpret national law *contra legem*. (*Impact*, C-268/06, EU:C:2008:223)

□ Example of acceptable consistent interpretation:

- to change its case-law in accordance with the interpretation of the CJEU

Procedural autonomy. Principle of equivalence

Whether EU law rights are subject to treatment *not less favourable* than that afforded to rights based on national law

- prescription/time-barring actions
- judicial charges
- rules of evidence, burden of proof
- rules on time-limits for appeals

two-step test of equivalence:

- Is there a similar action available on the basis of domestic law?
- How? comparing the purpose, cause of action and ‘essential characteristics’ of the relevant actions (example: domestic small claims procedures vs. procedure based on Regulation (EC) No 861/2007)
- if YES
 - are the rules applicable to an EU law action as favourable as those applicable to that domestic action?

Application of EU law *ex officio*

an express national or EU legal provision that requires the national courts to apply a given EU law norm

if an EU law provision must be applied *ex officio* (consumer law) – then – obligation for the national courts

- if the EU law provision has a public policy character?
- *debatibile*
- *incompetentia legis* – no clear obligation

the principle of effectiveness requires it


- the principle of effectiveness does require that parties be given a genuine opportunity to raise a plea based on Community law before a national court. Otherwise, the national court must have the power to raise that plea of its own

the principle of equivalence requires it

Regarding the *juris novit curia* principle, a national court is obliged to rely on points of law (EU law) *ex officio*, where national civil permits that regarding national law



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The Autonomy and the Meaning



Autonomous terminology

- terminology peculiar to it and legal concepts that do not necessarily have the same meaning as the corresponding concepts that may exist in the law of the MS (*Cilfit*, 283/81, EU:C:1982:335, paragraph 19).
 - **Jurisdiction** -the provisions relating to the rules on jurisdiction, in so far as they do not refer to the law of the MS for the purpose of determining their meaning and scope, must be given an autonomous and uniform interpretation throughout the EU; that interpretation must take into account not only the wording of those provisions but also their context and the objective pursued by the legislation in question (*Oberle*, C-20/17, EU:C:2018:485, paragraph 33).

Autonomous terminology. Practical example

Jurisdiction

- Must a court of a Member State raise of its own motion its jurisdiction under the rule of subsidiary jurisdiction based on Article 10(1)(a) of Regulation No 650/2012, having been seised on the basis of the rule of general jurisdiction established in Article 4 of that regulation, if it finds that it has no jurisdiction under that latter provision?

YES!

- **Subsidiary** ≠ hierarchical relationship between the forum established in Article 4 of Regulation No 650/2012 and the forum established in Article 10 thereof
- **Subsidiary** ≠ is less binding than Article 4 of that regulation, relating to general jurisdiction.

(VA, C-655/20, EU:C:2022:267)



Interpretation of EU law

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 - 44 While a national court or tribunal of last instance cannot be required to examine, in that regard, each of the language versions of the provision in question, the fact remains that it must bear in mind those divergences between the various language versions of that provision of which it is aware, in particular when those divergences are set out by the parties and are verified”.

Interpretation of EU law

Grammatical or literal (textualism)?

- Conclusion
 - **textualism, as a method of interpretation, does not suffice where linguistic divergences exist.**
 - ‘the different language versions of a [EU] text must be given a uniform interpretation and hence in the case of divergence between the versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it publication’. (*Stauder*, Case 29-69, EU:C:1969:57)
 - But still can be used for **reinforcing legal reasoning**
 - Also - relying on the contextual and/or teleological interpretation of the EU law provision in question so as **to discard a linguistic version** of that text which is at odds with the common meaning shared by the other

Interpretation of EU law

Systematic interpretation

- each provision of EU law must be interpreted in such a way as to guarantee that there is no conflict between it and the general scheme of which it is part
- no provision of EU law should be redundant - in light of its '*effet utile*'
- '*a contrario*', '*ad absurdum*', '*a fortiori*'

Interpretation of EU law

Systematic interpretation

- in interpreting a provision of EU law - consider not only its wording, but also the context in which it occurs and the objectives pursued
- the operative part of a EU act is indissociably linked to the statement of reasons for it, so that, when it has to be interpreted, account must be taken of the reasons
- a EU law act must be interpreted, as far as possible, in such a way as not to affect its validity
- where - several interpretations, preference - interpretation which ensures that the provision retains its effectiveness
- (*Sturgeon*, C-402/07 și C-432/07, EU:C:2009:716)

Interpretation of EU law

Teleological interpretation

- Q: an EU law provision is ambiguous or incomplete?
 - A: interpreted in light of the objectives it pursues
- **Lindqvist**, C-101/01 [2003] ECR I-12971, the ECJ ruled that '[i]n the light of the purpose of the directive [i.e. the protection of the right to respect for private life], the expression data concerning health used in Article 8(1) thereof must be given a wide interpretation so as to include information concerning all aspects, both physical and mental, of the health of an individual'
- **Commission v Portugal**, C-55/02, a wide interpretation to the words 'reasons not related to the individual workers concerned' used in Article 1(1) of Directive 98/59

Interpretation of EU law

Teleological interpretation (functional)

- if the wording of **secondary EU law** is open to more than one interpretation, preference -to the interpretation **consistent with primary law**
- ‘or’ means alternative?
- ”the conjunction ‘or’ may, linguistically, have an alternative or a cumulative sense and must consequently be read in the context in which it is used and in light of the objectives of the act in question. In the present case, having regard to the context and objective of Directive 2011/95 as set out in recitals 3, 10 and 12 thereof, and taking account of the case-law [...], that conjunction must, in Article 14(6) of that directive, be understood in a cumulative sense”. (*M and others*, C-391/16, C-77/17 and C-78/17, EU:C:2019:403).

Functional + systematic interpretation tools

Preamble

- no binding legal force and cannot be relied on either as a ground for derogating from the actual provisions or for interpreting those provisions in a manner clearly contrary to their wording (*Karen Millen*, C-345/13, EU:C:2014:2013)

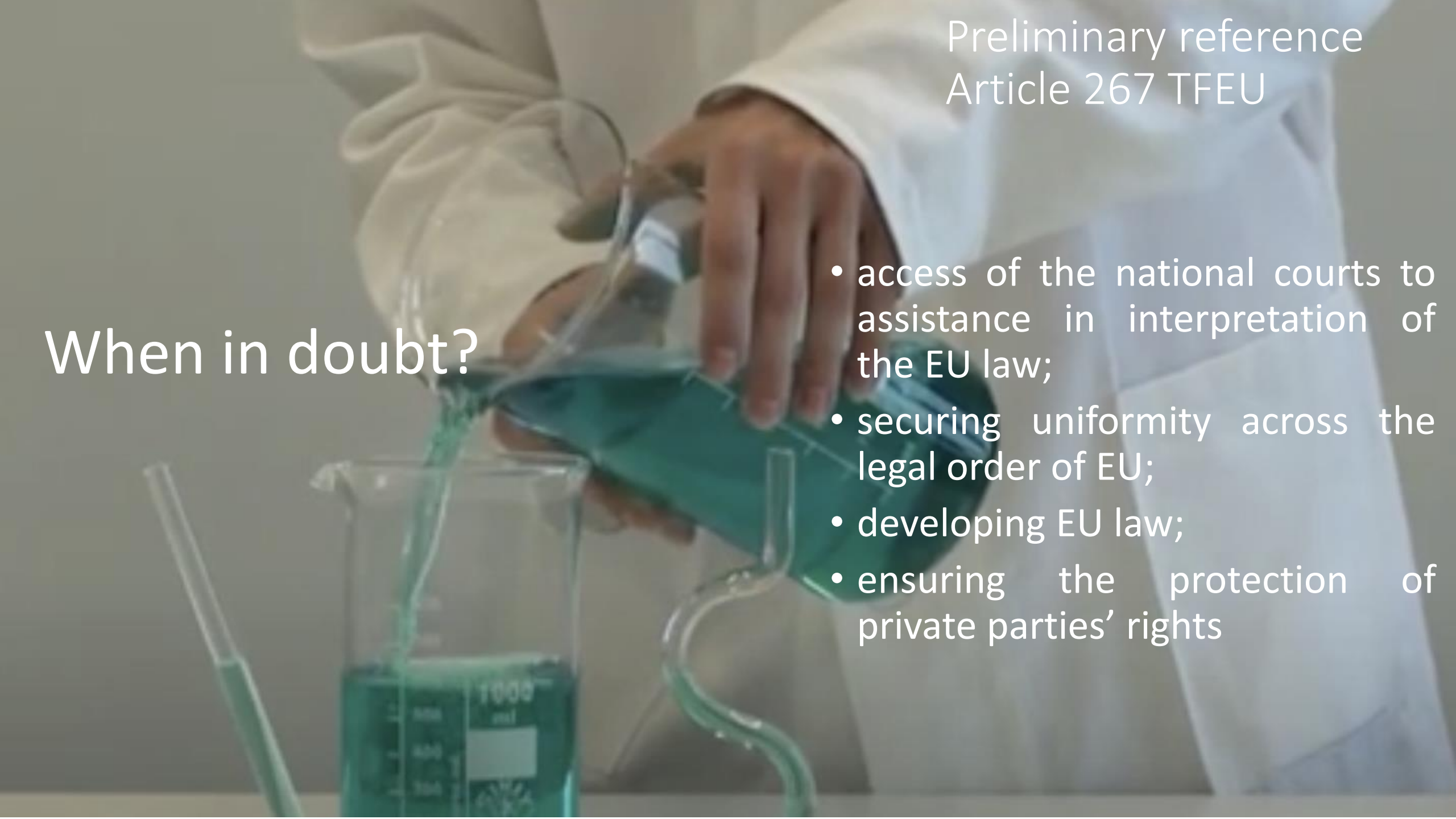
travaux préparatoires – limited use – only to support an interpretation

- confirming the interpretation of Treaty change – the scope of Article 263 TFEU: the origins of the distinction between regulatory and legislative acts (*Inuit*, C-583/11 P, EU:C:2013:625)
- the purpose and aim of that legislation, as is apparent from the relevant *travaux préparatoires*, was to extend the prohibition to cover non-Danish operators offering gaming in Denmark over the Internet (*Bent Falbert and Others*, C-255/16, EU:C:2017:983)

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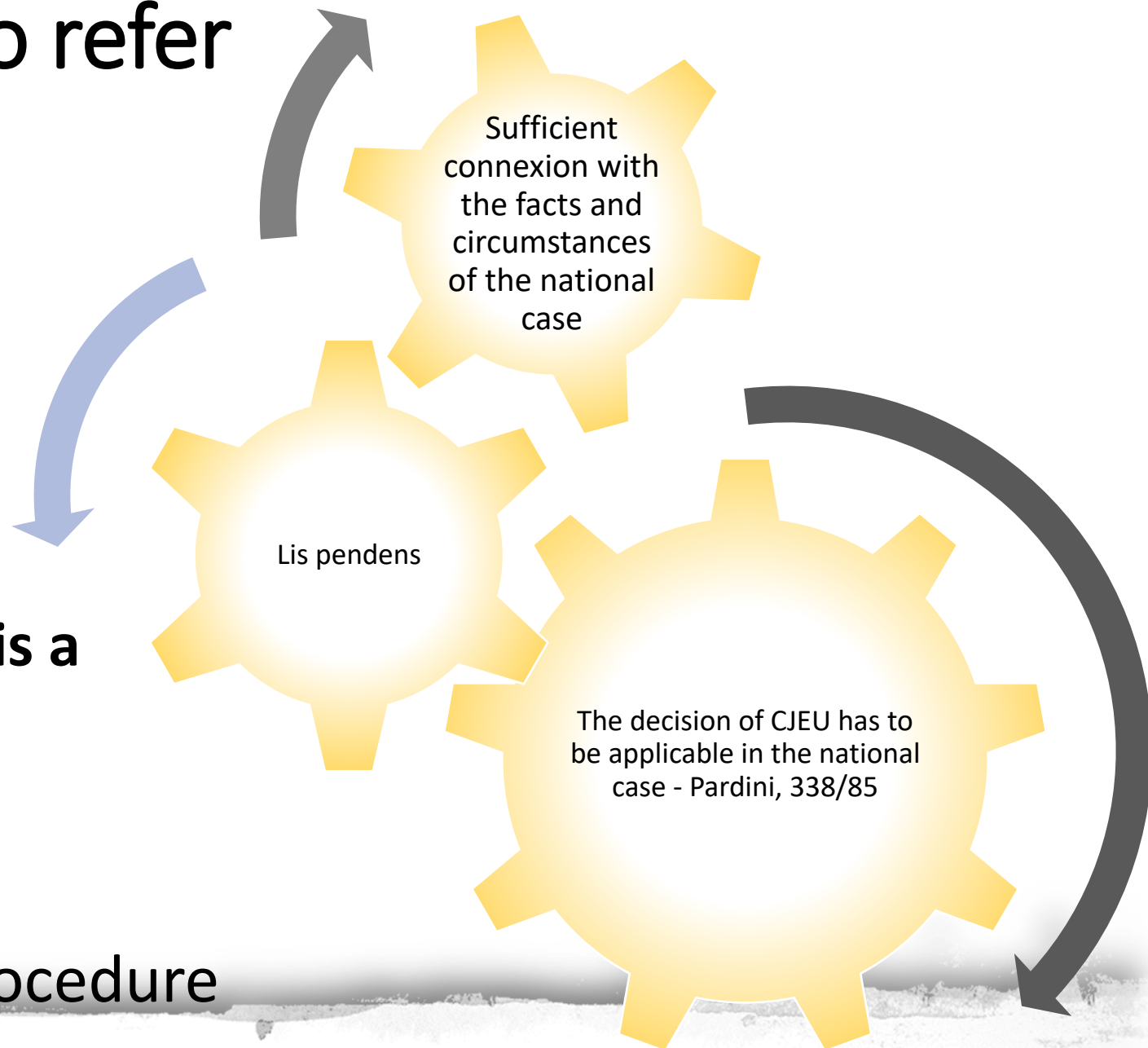
A right to refer

Margin of appreciation



**National court
against whose decisions there is a
judicial remedy**

Article 100 (2) Rules of procedure






who?

A. On validity

Foto Frost, 314/85

Duty to refer

B. On interpretation – *a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law*

 EU law concept

1. there is no other court which can set aside the lower court ruling regarding the application and interpretation of EU law;

or

2. the court which can set aside the lower court ruling, can not refer to the CJEU

who?

CILFIT test update. 06.10.2021 version

CILFIT (283/81)

C-561/10, *Consortio Italian Management*

The correct application of EU law is so obvious as to leave no scope for any reasonable doubt

- to other national courts of last instance of other Member States;
- to CJEU;
- in every language version;
- in EU law peculiar terminology;
- In light of the provisions of EU law as a whole.

ACT CLAIR

The correct application of EU law is so obvious as to leave no scope for any reasonable doubt

- to other national courts of last instance of ~~other~~ **the** Member States;
- to CJEU;
- ~~- in every language version~~ **bear in mind the differences between various versions;**
- in EU law peculiar terminology
- In light of the provisions of EU law as a whole.

ACT CLAIR.01

Application of EU law

- **Full effect and effective judicial protection**
- **Direct effect**
- **Consistent interpretation** - interpretation of national law in accordance with the requirements of EU law
- **Primacy**

Direct effect

- treaties
- regulations
- directives

- clear set of conditions
- No horizontal direct effect for directives

Longstanding
jurisprudence

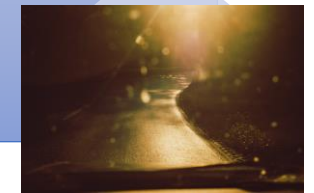


- General principles of Union law and/or the Charter of Fundamental Rights to be directly enforceable against or in relations between individual
- (*Kücükdeveci*, C-555/07, EU:C:2010:21; *Cresco*, C-193/17, EU:C:2019:43)

What's new?



- clear set of conditions?
- 1. The right has to be mandatory
- 2. Unconditional





Supremacy. New developments

- problems with the full and unconditional assimilation into their national constitutional systems of the principle
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(German Constitutional Court's *Weiss* judgment of 5 May 2020)

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own interpretation, without being either compelled to make or prevented from making a reference to the Court for a preliminary ruling before doing so (*Küçükdeveci*, C-555/07, EU:C:2010:21)

But **not *contra legem*** interpretation

Q: ***contra legem***?

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Example of acceptable consistent interpretation:

to change its case-law in accordance with the interpretation of the CJEU

National jurisdiction

- International jurisdiction may be established uniformly at EU level (Regulation 1215/2012, Regulation 2201/2003, Regulation 4/2009 etc)
- National jurisdiction – national law
- Rules of procedures not established uniformly at EU level – national law

procedural autonomy

Other rules of procedure

- **qualification of legal situations based on EU law** – national court based on national law
- **Compensation for damages in case of infringing EU law** - *Brasserie du Pêcheur*, C-46/93 and C-48/93, EU:C:1996:79 – national court based on national law
 - State liability cannot be conditioned by a proof of misuse of powers in the exercise of a public function or of the intention of the national authority to cause harm
 - National law cannot limit the damage eligible for compensation to the damage caused to certain individual goods, to the exclusion of profit forgone by private individuals

Procedural autonomy. Principle of equivalence

Whether EU law rights are subject to treatment *not less favourable* than that afforded to rights based on national law

- prescription/time-barring actions
- judicial charges
- rules of evidence, burden of proof
- rules on time-limits for appeals

two-step test of equivalence:

- **Is there a similar action available on the basis of domestic law?**
 - How? comparing the purpose, cause of action and 'essential characteristics' of the relevant actions (example: domestic small claims procedures vs. procedure based on Regulation (EC) No 861/2007)
- if YES
 - **are the rules applicable to an EU law action as favourable as those applicable to that domestic action?**

Principle of equivalence

- Member States are not to provide less favourable procedural rules for claims for reimbursement of a tax based on an infringement of EU law than the rules applicable to similar actions for infringement of domestic law, given their purpose, their cause of action and their essential characteristics. It is solely for the national court, which has direct knowledge of the procedural rules intended to ensure that the rights derived by individuals from EU law are safeguarded under domestic law, to verify that those rules comply with the principle of equivalence. However, the Court may, for the purposes of the assessment which the national court will carry out, provide certain information to it relating to the interpretation of EU law (*Raiffeisen Bank and BRD Groupe Société Générale*, C-698/18 and C-699/18, EU:C:2020:537, paragraphs 76 and 77)

- the MS retain the right to apply procedural rules provided for under their national legal system, in particular concerning limitation periods or time limits, provided, however, that, in accordance with the principle of effectiveness, those rules are not arranged in such a way as to make the exercise of rights conferred by EU law practically impossible or excessively difficult. With regard to the latter point, it is necessary to take into consideration not only the general assessment criteria referred to in paragraph 22 of the present judgment, but also, where relevant, the principle of protection of the rights of the defence, the principle of legal certainty and the proper conduct of the procedure (*Cargill Deutschland*, C-360/18, EU:C:2019:1124, paragraphs 46, 47 and 51)

Procedural
autonomy.
Principle of
effectiveness

- **presumptions or rules of evidence**
 - *Comet* BV v Produktschap voor Siergewassen, 45/76, EU:C:1976:191 (time limit); *Amministrazione delle Finanze dello Stato* v SpA San Giorgio, 199/82, EU:C:1983:318 (burden of proof)
- **the *res judicata* principle**
 - does not require a national court to disapply its internal rules of procedure in order to review and set aside a final judicial decision if that decision should be contrary to Community law (*Kapferer*, C-234/04, EU:C:2006:178)
- **admissibility of an action** (*Unibet*, C-492/05, EU:C:2007:163)
- **legal aid** (*DEB*, C-279/09, EU:C:2010:811)

Procedural
autonomy.
Principle of
effectiveness

CJEU, 17 May 2022. Breach of the principle of effectiveness

C-869/19, *Unicaja Banco*

- - raise of its own motion a ground of infringement of the of Directive 93/13

C-600/19, *Ibercaja banco*

- - the effect of *res judicata* and time-barring

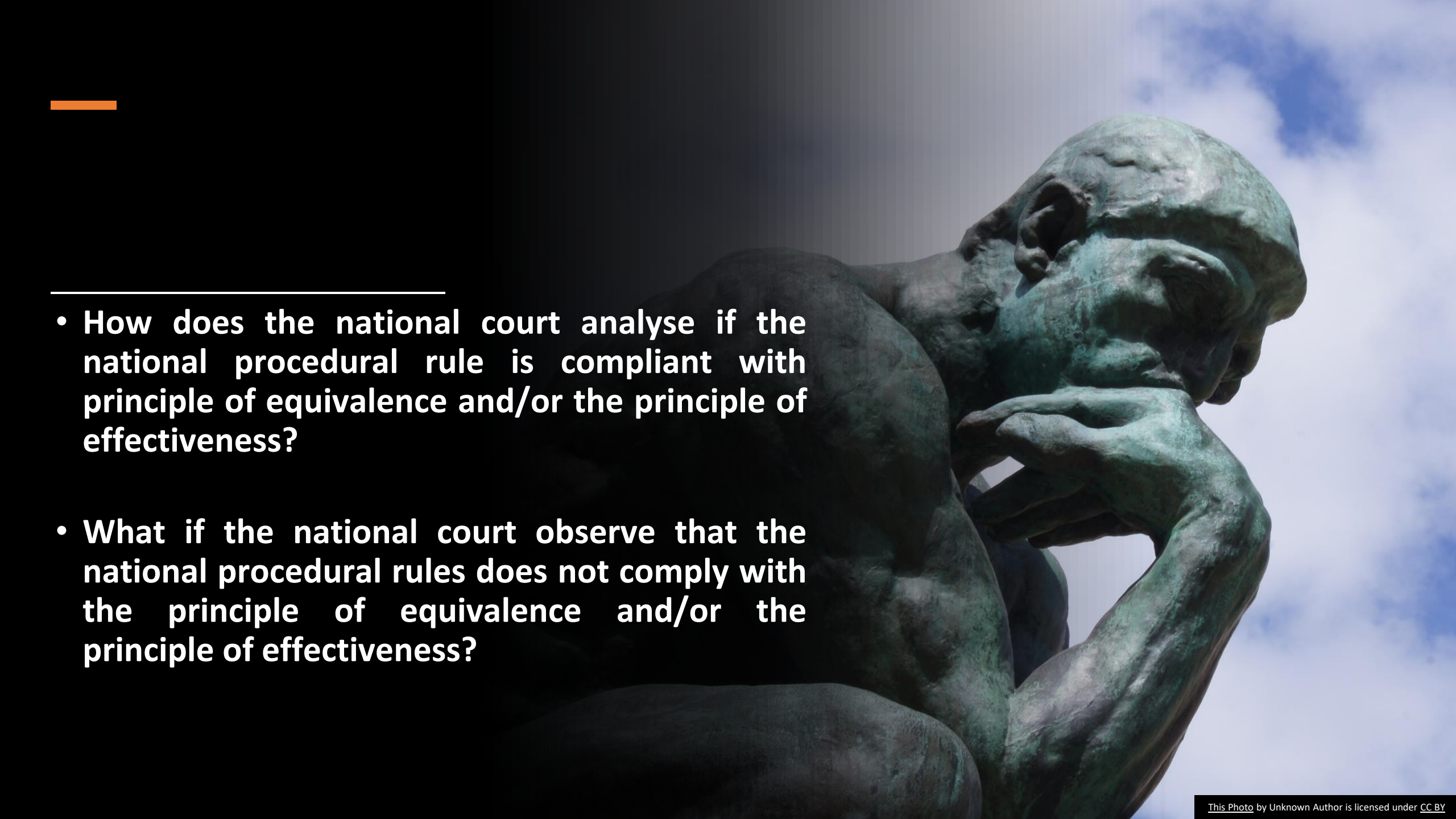
C-693/19, *SPV Project 1503*, and C-831/19, *Banco di Desio e della Brianza and Others*

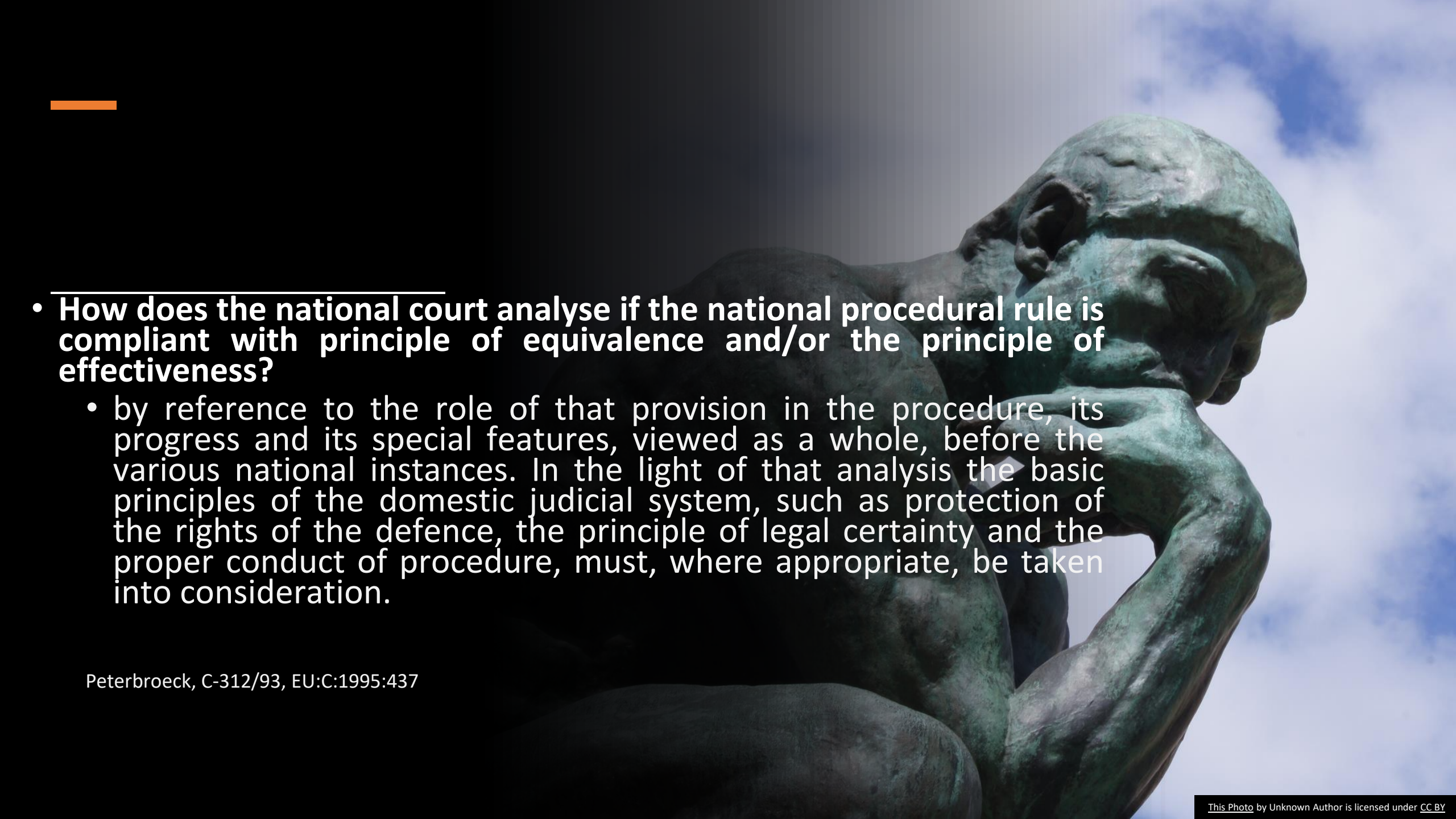
- - the force of *res judicata*

C-725/19, *Impuls Leasing România*

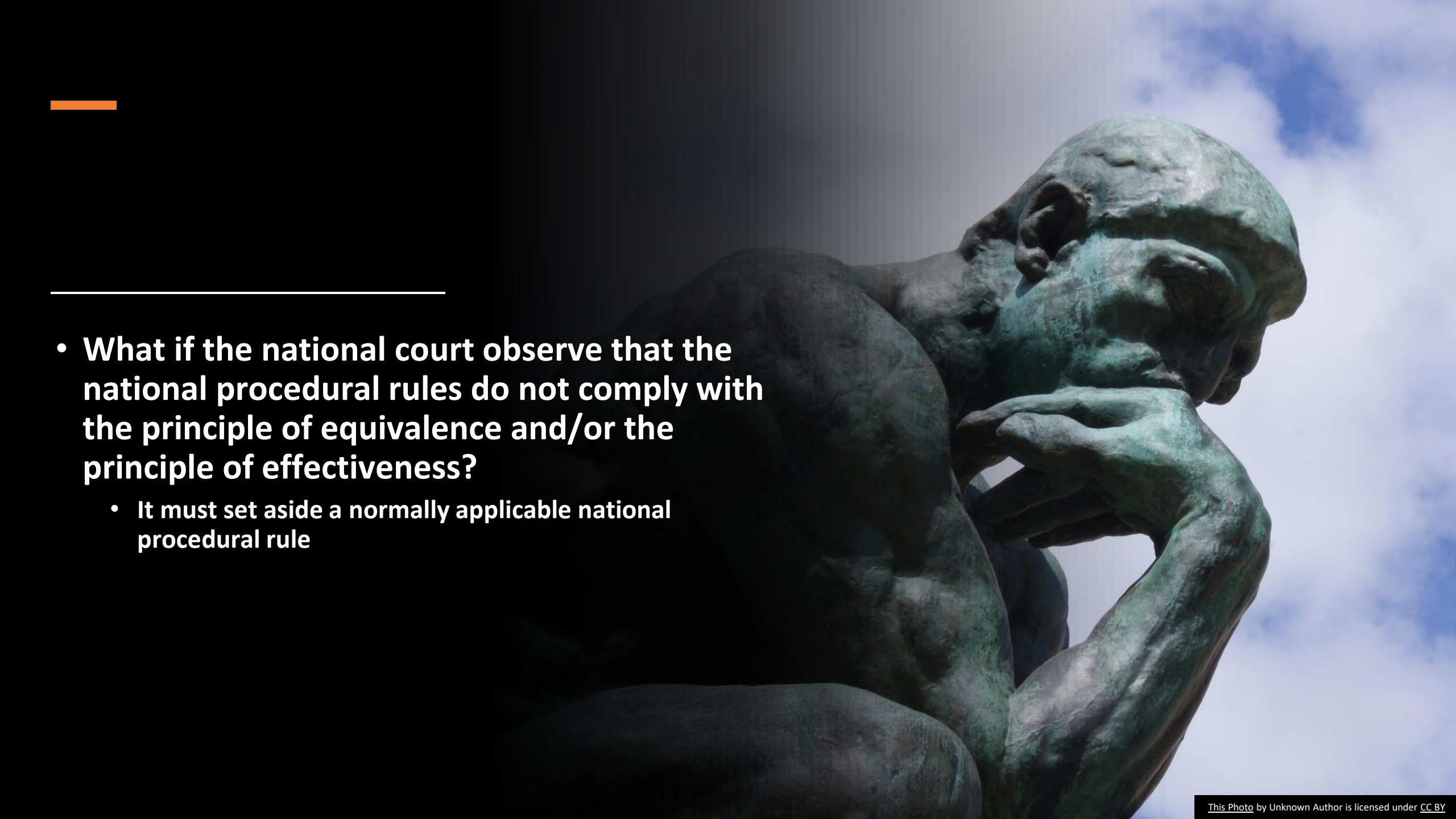
- - the consumer seeking suspension of the enforcement proceedings is required to pay a **security** calculated on the basis of the value of the subject matter of the action – breach of the principle of effectiveness

Principle of
effectiveness
Unfair terms

- 
-
- **How does the national court analyse if the national procedural rule is compliant with principle of equivalence and/or the principle of effectiveness?**
 - **What if the national court observe that the national procedural rules does not comply with the principle of equivalence and/or the principle of effectiveness?**

- 
- **How does the national court analyse if the national procedural rule is compliant with principle of equivalence and/or the principle of effectiveness?**
 - by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.

Peterbroeck, C-312/93, EU:C:1995:437

- 
-
- **What if the national court observe that the national procedural rules do not comply with the principle of equivalence and/or the principle of effectiveness?**
 - **It must set aside a normally applicable national procedural rule**

Application of EU law *ex officio*

an express national or EU legal provision that requires the national courts to apply a given EU law norm

If an EU law provision must be applied *ex officio* (consumer law) - then - obligation for the national courts

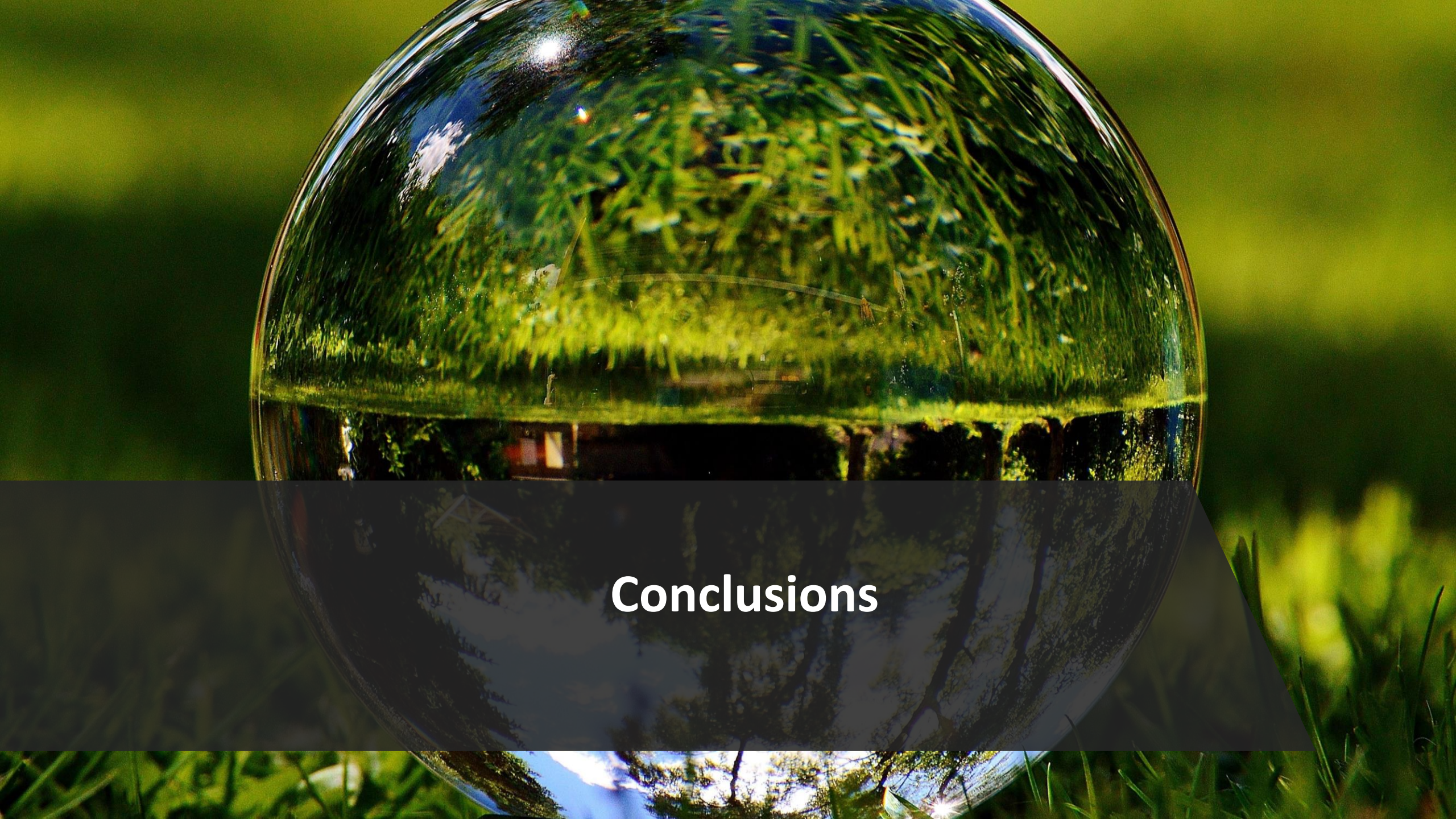
- If the EU law provision has a public policy character?
 - debatable
 - in competition law - no clear obligation

the principle of effectiveness requires it

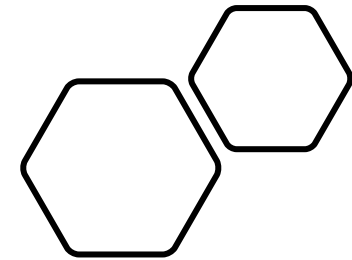
- the principle of effectiveness does require that parties be given a genuine opportunity to raise a plea based on Community law before a national court. Otherwise, the national court must have the power to raise that plea of its own

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Regarding the *iura novit curia* principle, a national court is *obliged* to rely on points of law (EU law) *ex officio*, where national civil permits that regarding national law



Conclusions



Thank you!

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