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**NATIONAL JUDGES AND THE EU
AARHUS ACQUIS
Focus on Access to Justice**

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Preliminary reference procedure on interpretation and validity and EU judicial protection in environmental matters



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Please feel free to interrupt



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On the Advocate General

- Member of the Court
- Advises the Court by independently preparing Opinions
- Does not participate in deliberations
- Opinion is not a Judgment
- Only the Judgment has the authority of the Court
- Opinions can illuminate the background
- Presentation is my personal view



This slide aims to illuminate the background of the author and original presenter of this presentation. There is no need for others to retain it.

Article 252 TFEU

The Court of Justice shall be assisted by eight Advocates-General. Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement.

Remarks:

The Council has decided to increase the number of AGs to eleven.

The AG is not assigned to any particular chamber of the court. She does not participate in the deliberations of the judgment.

Overview

- Why is EU law important for the domestic judge?
- The Preliminary Reference Procedure
- Specificities of the Validity Reference
- Remedies and Sanctions



Content of the presentation

The relevance of EU law

- Precedence (also: primacy, supremacy)
- Direct effect (including Directives)
- Indirect effect (interpretation in conformity)
- Flanked by the principles of effectivity & equivalence / effective judicial protection
- Effet utile / practical effect



Content of the first subsection

Precedence of EU law

- Precedence
 - Provisions of EU law render **inapplicable** any conflicting provision of national law
 - This applies to all types of national law, including constitutional law
 - Precedence aims to ensure the **uniform application** of EU law



If EU law was subject to Member State law, that is to unilateral decisions of Member States, it would be fragmented. The preliminary reference procedure would not make much sense. It would be reduced to an advisory opinion and that is not compatible with the role of a **court**. A committee of experts would be sufficient.

See :

Case 6/64 *Costa* (EU:C:1964:66)

Case 106/77 *Simmenthal* (EU:C:1978:49), paragraph 17

Case C-213/89 *Factortame and Others* (EU:C:1990:257), paragraph 18

Case C-409/06 *Winner Wetten* (EU:C:2010:503), paragraph 53

Direct Effect of EU law

- EU law is intended to give rights to individuals
 - Common Market
 - Supranational Powers
 - Union of States and peoples
 - Supervisory Function of Individuals
- Provisions must be sufficiently clear and unconditional



The Treaties intend to confer rights on individuals which become part of their legal heritage. The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted to the Commission and to the Member states under the infringement procedure (Article 258 et seq. TFEU). Individuals therefore must be considered agents in the enforcement of EU law, including environmental law.

Direct effect is only possible if the rule in question is sufficiently clear and unconditional. The absence of conditions requires in particular that no legislative intervention on the part of the Member States is necessary.

The provisions of the Treaties and of Regulations as such do not require any additional measures by Member States to become effective. Their direct effect depends primarily on their wording.

See: Case 26/62 *van Gend & Loos* (EU:C:1963:1)

Direct Effect of Directives

- EU environmental law mostly comes in the form of Directives.
- Art. 288 TFEU: Directives are binding with regard to the result but leave MS the choice of form and methods.
- Apparently there's a condition! No direct effect?



The Van Duyn case (1974)

- Directives are binding with regard to the result
- Directives can be the object of a preliminary reference
- Failure to transpose in time cannot justify failure to apply **after the time limit expired** (estoppel)
- [But: No obligations of private parties can result from the direct application of Directives]



The Court stresses that directives, too, are binding. Therefore, direct effect cannot be excluded completely. The useful effect (*effet utile*) of a directive would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of EU law. This is confirmed by Article 267 TFEU, which empowers national courts to refer to the Court questions concerning the validity and interpretation of *all* legal acts of the community institutions, without distinction between regulations, directives and other measures. Subsequently, the Court added that a Member State which has not adopted the implementing measures required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails. In contrast, until the expiration of the period fixed for the implementation of a directive Member States cannot be reproached for not having yet adopted measures implementing it in national law.

See:

Case 41/74 (EU:C:1974:133)

Case C-282/10 *Dominguez* (EU:C:2012:33)

Case C-122/17 *Smith* (EU:C:2018:631)

Indirect Effect

- Domestic law must be interpreted, so far as possible, in order to achieve the result sought by relevant EU law.
- Courts must take the whole body of domestic law into consideration and apply all interpretative methods recognised by in their legal system.
- Can be applied against private parties.
- But this obligation cannot serve as the basis for an interpretation of national law *contra legem*.



Obviously, transposing law should be interpreted in conformity with the directive, but EU loyalty and the precedence of EU law require that also **all other** internal legal measures are interpreted to achieve the results required by EU law. This assists compliance and can in particular help to avoid a conflict between MS law and directly effective EU law. However, interpretation in conformity is not limited to clear and unconditional rules. A sufficiently clear objective is enough. Moreover, interpretation in conformity can result in **obligations put on private parties** as they result from internal law that is interpreted.

However, for reasons of legal certainty interpretation in conformity cannot result in an interpretation *contra legem*. It is not entirely clear what would constitute an interpretation *contra legem* and even whether is a concept of EU law or MS law.

See:

Case C-240/09 *Lesoochranské zoskupenie* (EU:C:2011:125)

Case C-282/10 *Dominguez* (EU:C:2012:33)

Effective judicial protection

- If EU law creates rights MS must provide access to courts
- Without EU harmonization MS determine procedural conditions
- But they must respect the principles of **equivalence** and **effectiveness**



National courts are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of community law. In the absence of harmonization, it is for the domestic legal system of each Member State to determine the procedural conditions. However such conditions cannot be less favourable than those relating to similar actions of a domestic nature (principle of equivalence). Moreover, conditions and time-limits set up by the national legal system must not make it impossible in practice to exercise the rights which the national courts are obliged to protect (principle of effectiveness).

Cf. Case C-240/09 *Lesoochránárske zoskupenie* (EU:C:2011:125)

Effet utile / practical effect

- Principle of interpretation
 - All provisions of EU law aim to have a practical effect
 - Exceptions must therefore be interpreted restrictively
- EU Environmental law
 - Aims at a high level of protection (Art. 191 TFEU)
 - Is not a (narrow) exception to general permit procedures, on the contrary



The focus on practical effect alone can strengthen EU environmental law significantly. It cannot be excluded that within Member State legal systems the interpretation of internal environmental provisions often is based on an inverse approach, in particular with regard to permit procedures. Environmental provisions often are late additions to well-established systems that aim to make projects possible. Within these procedures environmental law can appear to be the exception and may therefore be interpreted restrictively. In contrast, if the CJEU is asked to interpret EU environmental law it does not start from an established system that needs to accommodate additional environmental rules. For the CJEU most environmental rules are characterised primarily by their own objectives that should be achieved by ensuring practical effect of the provision in question. Moreover, EU environmental policy is supposed to achieve a high level of protection under Art. 191 (2) TFEU. This objective must be taken into account in the interpretation of EU environmental rules.

And now to the Court

- Brussels: most important seat of the political EU institutions (Council, Commission, important parts of the Parliament)
- Strasbourg: most of the plenary sessions of Parliament + Council of Europe and the European Court of Human Rights (ECtHR)
- Luxembourg: Court of Justice of the European Union (CJEU)



The Preliminary Reference Procedure

- Dual Objective:
 - Uniform interpretation of EU law
 - Effective judicial protection
- Nature: Co-operation between courts



The preliminary reference procedure is laid down in Art. 19 (3) b) TEU and Art. 267 TFEU. It aims to achieve a uniform interpretation of EU law by all domestic courts and to assist in the effective judicial protection of individuals. The procedure relies on the co-operation between the national judge and the Court of Justice.

See

Joined Cases C-261/08 and C-348/08 *Zurita García and Choque Cabrera* (EU:C:2009:648), paragraph 36;

Case C-210/06 *Cartesio* (EU:C:2008:723), paragraph 91.

The co-operative nature becomes apparent in requirements put on the referring court to respect and assist the CJEU in its task but also in the efforts of the CJEU to provide useful answers and to protect the referring court from interference, eg. from the parties or from higher courts.

Some national systems (France, Belgium, Germany) know similar procedures, mostly limited to the validity of sub-constitutional law.

Subject Matter of the Reference

- Doubts
 - with regard to the interpretation of EU law or
 - with regard to the validity of secondary EU law
- Must be relevant for the outcome of a pending procedure before the referring court.
- Assumption that questions are relevant



Only questions of EU law can be the object of a reference, but neither national law nor international law that is not part of EU law. However, it is possible to ask the Court whether EU law is to be interpreted as to allow for certain Member State rules.

Eg. Case C-115/09 *Bund für Umwelt und Naturschutz (Trianel)* (EU:C:2011:289):

Article 10a of [the EIA Directive] precludes [internal] legislation which does not permit non-governmental organisations promoting environmental protection, ... , to rely before the courts, in an action contesting a decision authorising projects 'likely to have significant effects on the environment' ..., on the infringement of a rule flowing from the environment law of the European Union and intended to protect the environment, on the ground that that rule protects only the interests of the general public and not the interests of individuals.

In principle, all questions must be relevant for the outcome of the case pending before the domestic court. However, the CJEU considers that, in principle, the referring court alone can assess the necessity of the questions and determine their subject-matter. Therefore, the CJEU will reject a question only in exceptional and manifest circumstances as inadmissible. That is the case in particular where the problem referred to the Court is purely hypothetical or where the interpretation of a EU rule which is sought by the national court has no relation to the actual facts of the main action or to its purpose.

See: Case C-415/93 *Bosman* (EU:C:1995:463), paragraph 61;

Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* (EU:C:2010:363), paragraph 27.

Power to make a Reference

- Lower courts may use the procedure (discretion), courts of last instance are obliged make a reference
- No reference by other bodies: eg. arbitrators, competition authorities, equal treatment commissions, towns, private parties
- Parties to the procedure can suggest, but not request or prevent a reference



If questions concerning the interpretation of EU law arise in a pending case, all domestic courts are competent to make a reference (Art. 267 (2) TFEU) but courts of last instance are under an obligation to refer the question to the CJEU (Art. 267 (3) TFEU).

On the power to make a reference see Case 283/81 *Cilfit and Others* (EU:C:1982:335), paragraphs 6 et seq.

The preliminary reference procedure in principle does not create rights of parties to the proceedings to compel a reference.

Eg. Case C-138/08 *Hochtief and Linde-Kca-Dresden* (EU:C:2009:627), paragraphs 21 and 22

Power to make a Reference

Court is a concept of EU law:

- established by law,
- permanent, compulsory jurisdiction, procedure is inter partes,
- applies rules of law
- independent
- Does the reference result from a judicial procedure, aiming at a judgment?



If there is any doubt, the CJEU will assess whether the referring body is a court. [Case C-53/03 *Syfait* (EU:C:2005:333); Case C- 394/11, *Belov* (EU:C:2013:48)]

Obligation to make a Reference

- A national court against whose decisions there is no judicial remedy
- Question is relevant to the outcome of a pending case
- Exceptions
 - *Acte claire* (correct application is obvious)
 - Existing cases of the CJEU



In principle, last instance courts are obliged to make a reference if a question on EU law arises (Art. 267 (3) TFEU). Any national court or tribunal against whose decisions there is no judicial remedy under national law is a court of last instance under this provision and therefore obliged as to refer a question of EU law to the CJEU if it is relevant to the outcome of a pending case.

See Case C- 99/00 *Lyckeskog* (EU:C:2002:329), paragraphs 14 et seq.; Case C-210/06 *Cartesio* (EU:C:2008:723), paragraphs 75 to 79.

However, if the CJEU has already dealt with the point of law in question or if the correct application of EU law is obvious (*acte claire*) a reference is not necessary. It is up to the domestic court to appreciate this necessity.

Case 283/81 *Cilfit and Others* (EU:C:1982:335), paragraphs 6 et seq.

Formal requirements

- An identifiable question on EU law
- Factual background
- Domestic legal background
- **MS Court's** reasons for the reference
- Optional: proposed response



Article 94 of the Rules of Procedure of the CJEU:

In addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling shall contain:

- (a) a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based;
- (b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;
- (c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

Timing of the Reference

- No Limitations by EU law
 - Before the facts have been determined (to find out which facts are relevant)
 - After the facts been determined (to give a ruling on the facts)
- CJEU needs on average 15 - 16 months
- After reference the case continues in the domestic court



The timing of the reference lies in the discretion of the domestic court. There may be good reasons to determine the relevant facts first or after the reference, depending, for example, on the complexity of the factfinding.

The reference procedure itself takes on average 15 - 16 months in the CJEU; around half of this time is taken up by translation and external time limits to submit observations. However, the average includes cases without hearings or opinions and orders that are issued without a written procedure.

After the reference the domestic court has to apply the ruling of the CJEU to its case.

Timing of the Reference

- **Urgent Procedure**
 - Art. 107 ff. Rules of Procedure (2 – 3 months)
 - Area of Freedom, Security and Justice (Art. 67 – 89 TFEU)
 - Urgency: Deprivation of Liberty, Responsibility for Children
- **Expedited Procedure**
 - Art. 105 f. Rules of Procedure – all areas (6 months or more, rarely faster)
 - Very rare for Env cases! C-441/17, COM/Poland (Białowieża)
 - CJEU expects that domestic courts grant interim relief
- **Priority (Art. 53(3) RP), eg. C-293/17 & C-294/17 – Nitrates + Natura 2000 (150 pages) → 18 months including a hearing and an Opinion (10 weeks)**



In rare cases the treatment of a preliminary reference can be sped up:

The urgent procedure is reserved for the Area of Freedom, Security and Justice. It has only been applied where people were held in prison until the Court provided a reply or where responsibility for children was at stake.

The expedited procedure can, in principle, be applied to environmental cases. However, the only case that I am aware of was the politically charged infringement procedure where the Court had additionally issued an interim order.

What happens more often is the granting of priority. This means that at every stage the case is granted priority over other cases, but time-limits are not shortened.

Procedure

- Observations can be submitted by
 - Parties of the domestic procedure
 - Member States
 - Commission (sometimes Council and Parliament as well)
 - Member States of EEA + EFTA Surveillance authority (certain cases)
- Hearing (optional)
- Opinion by the Advocate General (optional)
- Judgment or Order



A slide on the stages of the procedure in the Court of Justice.

Costs

- No Fees for the CJEU
- Commission, other institutions or Member States bear their own costs
- Costs of the parties to the domestic case are a matter for the domestic court



A slide on the costs of a reference

Remember this Small Case?

Your court sits in a big city where air quality is an issue. A number of local citizens and an environmental NGO introduce a case. They challenge the validity of the type approval granted to newest generation of diesel car of producer X by the competent national authority. They claim that the Commission Regulation that regulates the testing of the of diesel cars infringes its legal basis in the EU Regulation on type approval.

The national authority disputes that you are competent to appreciate the validity of the EU Commission Regulation.

Are you competent to decide on this question? A - yes, B - no

[Inspired by Judgment of the General Court of 13 December 2018, *Ville de Paris and Others v Commission* (T-339/16, T-352/16 and T-391/16, EU:T:2018:927) (Appeal pending).]



This case introduces the problem of validity challenges to EU legal acts in domestic courts.

Validity Reference

Only EU courts can decide on the validity of EU legal acts >> Foto Frost (314/85): If

- validity of an EU act is in doubt and
- the act is relevant to the outcome of the case then
- the reference is obligatory



If the case before the domestic court turns on an EU legal act and the court doubts the validity of the act, the situation changes. A declaration of invalidity by any domestic court would create a much more significant risk for the uniform application of EU law compared to some erroneous interpretation. Therefore, only EU courts can declare an EU act to be invalid. As a consequence, all MS courts must make a reference if they consider that an EU act, relevant for their case, is invalid. While they wait for the response of the CJEU they may adopt interim measures if they are absolutely necessary [Joined Cases C-143/88 and C-92/89 of 21 February 1991 Zuckerfabrik Süderdithmarschen (EU:C:1991:65) and Case C-465/93 of 9 November 1995 Atlanta Fruchthandels-gesellschaft mbH and Others (EU:C:1995:369)].

Validity Reference

- Substantial scope > derived EU law, eg. Directives, Regulations or Decisions
- Relevance for a real dispute – no (obviously) hypothetical questions, eg. C-92/09 & C-93/09, Schecke
- In exceptional cases the CJEU may examine the validity ex officio, eg. C-362/14, Schrems



There are limitations to the validity reference: It only applies to derived EU law. The CJEU cannot assess the validity of the Treaties, but only of acts of the institutions.

Moreover, a reference on the validity of an act that is not relevant to the domestic case will be rejected as inadmissible. Though in principle the assumption of relevance will also apply to a validity reference, the CJEU may in practice be more critical than with regard to questions on interpretation. It may also happen that instead of examining the validity the CJEU examines interpretation in conformity, and, as a consequence, no longer considers it necessary to examine the validity.

Validity Reference – Why?

- EU law requirements may restrict the freedom of operators
- The Public Concerned, ie. NGOs or neighbours, may oppose environmental impacts allowed by EU law (eg. pesticide authorisations, REACH decisions)
- Aarhus Compliance Committee ACCC/32 on the EU system of judicial protection



The validity reference is important to ensure effective judicial protection against EU legal acts, in particular in the field of the environment. Operators are subject to restrictions and the opponents of activities that are allowed by EU law may consider that the EU act in question is incompatible with higher ranking EU law.

And finally there are the findings of the Aarhus Compliance Committee that the EU system of judicial protection is insufficient to transpose Art. 9(3) of the Convention. In this context they rejected EU arguments that the preliminary reference could significantly contribute to compliance. But at least with regard to incidental references, resulting from actions against domestic implementing measures, this assessment appears questionable. Some legal systems, in particular Ireland, appear to go even further and allow direct actions aiming to establish the invalidity of EU acts without recourse to any implementation by the Member State.

‘Sanctions’ for a Reference

- An Order of the CJEU
 - Art. 53 RP: incompetence or inadmissibility – MS Court did not understand the system, but the order can help to make a better reference
 - Art. 99 RP: Response is manifest – but perhaps not to the MS Court!
- Domestic Appeal against the Reference? Cannot question the appreciation of the necessity!
- Disciplinary Action over a Reference? Polish, Romanian Rule of Law cases, pending



A reference to the CJEU can have consequences that may appear as sanctions.

In particular, an order of the CJEU can be perceived this way. It is true that an order based on incompetence of the CJEU or inadmissibility expresses criticism because it demonstrates that the MS court did not understand the basic requirements for a reference. However even such an order is part of the dialogue between jurisdictions. If the domestic court accepts the advice embodied in the reasoning of the order it can often use it to make another, improved reference. And the overall outcome may be much more useful than an imperfect response to the deficient initial reference.

An order that is issued because the answer is manifest may also be perceived as a criticism, but we should be realistic: What appears manifest to the Supreme Court of the European Union is not necessarily clear to a MS court (and vice versa!).

It's also possible that parties do not agree with reference and appeal over it to a higher MS court. However, the scope of such an appeal may not affect the appreciation of the referring court whether there are doubts over EU law. Neither can lower courts be bound to the interpretation of EU law by higher domestic courts to the effect that a reference is excluded. See Case C-378/08 *ERG and Others* (EU:C:2010:126), paragraph 32 and Case C-173/09 *Elchinov* (EU:C:2010:581), paragraph 27. However, it is possible that an appeal against a reference is successful for other reasons, independently from the reference.

Currently, the CJEU is dealing with cases that raise the possibility of real sanctions for references, namely the risk of disciplinary proceedings because of making a reference. It remains to be seen how the CJEU will deal with this issue.

Remedies for a failure to refer (ECHR & MS)

There are remedies against an *arbitrary* refusal to make a reference,

- Art. 6 of the ECHR - the right to a fair trial (Ullens de Schooten, 3989/07 and 38353/07, Dhahbi, no. 17120/09 – absence of reasons for refusal) or
- Member State constitutional law (Germany, Austria, Spain).



ECtHR of 20 september 2011, Ullens de Schooten et Rezabek v. Belgium, complaints 3989/07 and 38353/07, points 54 et seq.

Art. 6 (1) ECHR includes a right that a case is heard by the competent judge. If a reference procedure is foreseen, an arbitrary refusal to use it can infringe the right to a fair trial:

National courts against whose decisions there is no judicial remedy under national law, and which refuse to request a preliminary ruling from the CJEU on a question raised before them concerning the interpretation of European Union law, are required to give reasons for such refusal in the light of the exceptions provided for by the case-law of the CJEU. They must therefore indicate the reasons why they have found that the question is irrelevant, that the European Union law provision in question has already been interpreted by the CJEU, or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt.

Sanctions for a Failure to Refer

No direct EU remedy for the parties of the domestic procedure, but

- Infringement procedure (C-129/00, COM/Italy, C-416/17, COM/France)
- Damages (C-224/01, Köbler, manifest violation)
- Obligation to review a final administrative decision (C-453/00, Kühne & Heitz, stringent conditions)



Case C-129/00 Commission/Italy (EU:C:2003:656)

MS are responsible for infringements by all their agencies, including constitutionally independent institutions [such as Courts and their jurisprudence].

Case C-224/01 Köbler (EU:C:2003:513)

Damages: the provision infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties.

With regard to the second of those conditions and its application with a view to establishing possible State liability owing to a decision of a national court adjudicating at last instance, regard must be had to the specific nature of the judicial function and to the legitimate requirements of legal certainty... State liability for an infringement of EU law by a decision of such a court can be incurred only in the exceptional case where the court has manifestly infringed the applicable law.

Case C-453/00, Kühne & Heitz (EU:C:2004:17)

The principle of cooperation arising from Article 4 (3) EU imposes on an administrative body an obligation to review a final administrative decision, in order to take account of the interpretation of the relevant provision given in the meantime by the Court where

- under national law, it has the power to reopen that decision;
- the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance (exhaustion of remedies);
- that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under the third paragraph of Article 267 TFEU; and
- the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court;

[- and the interests of third parties are not adversely affected.]

“Benefits” of a reference

“Correct” application of EU law

“Justice” for the parties

Participation in the EU law discourse

- Agenda setting
- Make your view heard
- Somebody will make the reference
(and up-end your jurisprudence?)



Finally, the benefits of a reference should not be lost from view:

1. Obviously, a reference helps to assure the correct application of EU law.
2. Therefore, with a reference the likelihood of just outcome for the parties increases.
3. What is often overlooked is that the reference allows MS courts to participate in the discourse over EU law. They set the agenda of the CJEU and with the reference they can make their view on the matter heard – in particular by the CJEU, but finally by everybody in the EU legal community. Furthermore, abstaining from a reference can mean that another court takes the opportunity and a court that decided without a reference may have to change its jurisprudence.

Thank you for your attention!



Case law:

<http://curia.europa.eu/juris/recherche.jsf?language=en>,
<https://www.unece.org/env/pp/cc/com.html>

