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■ **ENFORCEMENT AT THE NATIONAL LEVEL**

**Preliminary reference procedure for interpretation
and validity in the context of EU judicial protection in
environmental cases**



Foreword

- This presentation is meant to stimulate an exchange of experiences on EU environmental law among judges and prosecutors from different MS.
- It is just an attempt to focus, from a very personal (and partial) point of view, on some relevant issues concerning the role of national judges dealing with cases concerning environmental protection.
- Feel free to interrupt for both asking questions and adding other topics of concern to the presentation.



EU Judicial Order

Art. 19 (1) TEU

- **The Court of Justice** (jurisdiction conferred by the Treaties)

(...) shall ensure that in the interpretation and application of the Treaties the law is observed.

- **Member States** (jurisdiction in all other EU cases)

shall (...) ensure effective legal protection in the fields covered by Union law.



The scope of preliminary reference covers the entirety of EU law with some exceptions.

CJEU- Judgment from 05/06/2023 Commission v Poland C 204/21 point 78:

the Court ruled that

the **second subparagraph of Article 19(1) TEU**,

- interpreted in the light of Article 47 of the Charter,
- which imposes on the Member States a clear and precise obligation of result which is not subject to any conditions, in particular as regards the independence and impartiality of the courts and tribunals called upon to interpret and apply Union law and the requirement that they must first be established by law,
- **has direct effect,**
- which means that **any (!) national provision, case-law or practice contrary to those provisions of Union law, as interpreted by the Court, must be disapplied.**



The system can function when judges are independent and can feel free to refer a question to the CJEU.

Legal Basis is Article 267 TFEU:

The Court of Justice of the European Union shall have jurisdiction to give MS Courts **preliminary rulings** concerning:

- (a) the **interpretation** of the Treaties
- (b) the **validity** and interpretation of (EU) acts



Dealing with different layers of law

- International Conventions (Aarhus, Bern, ECHR, etc.)
- EU law - procedural/substantive
- Domestic law (federal law - regional law)
- Case law - CJEU, ECtHR - ACCC etc.
- “Soft law”
- Principles of environmental law

Toolbox of the National Judge

- **Preliminary reference** (Article 267 TFEU):
„Is the X-Directive / Y-Regulation / Z-Decision of the EU
valid as regards fundamental rights?“
- **Supremacy of EU law:**
„The EU legal act takes precedence over the XY-national act.“
- **Consistent interpretation:**
„In the light of EU law and international law
the domestic law is to be interpreted in this or that way“.



7

- The national judge has to be considered as a European judge equipped with the tools of interpretation, disapplication and consistent interpretation.
- The national judge can use the space granted by national law when carrying out consistent interpretation.

Art. 191 TFE - Union policy on the environment shall

- (1) 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) 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.



These answer to questions that can rise in environmental law.

Levels and means of protection



- Legislation
- Planning
- Authorisation
- Control
- Sanction



9

- Control is crucial to the enforcement of environmental law
- Criminal and administrative sanctions can be a deterrent to action harmful to the environment.

“Court or tribunal of a Member State”

- Article 267 TFEU speaks simply of a “court or tribunal of a Member State” as the organ entitled to submit a preliminary reference. But it does not provide a definition of that notion.
- General criteria laid down by the CJEU - *Abrahamsson* (C-407/98)
 - Whether the referring body:
 - 1) is established by law,
 - 2) is permanent,
 - 3) exercises a compulsory jurisdiction,
 - 4) follows an adversarial procedure,
 - 5) applies rules of law (as opposed to mere *ex aequo et bono* adjudication),
 - 6) is independent.



10

- The criteria has been established through case law of the CJEU.
- They concern both the structural and functional profile.

“Court or tribunal of a Member State”

- National courts performing merely administrative functions (Job Centre, C-111/94; Standesamt Stadt Niebüll, C-96/04) **NO**
- National administrative bodies performing judicial functions (Broekmeulen, 246/80) **YES**
- Arbitration bodies (Nordsee, 102/81; Denuit, C-125/04) **NO**
- Prosecution office **NO**
- Courts from overseas territories (Barr, C-355/89; Kaefer, C-100/89) **YES**

Situations where a reference may be submitted

- In line with Article 267 TFEU, a preliminary reference may be submitted if two premises are met jointly:
 - 1) a question of EU law is raised before a national court
 - and
 - 2) a decision on that question is necessary for the national court to give judgment on the case at hand.

Situations where a reference may be submitted

- **The answer to the question must be necessary to solve the dispute (Foglia, 244/80 para. 18)**
- If the relevance of the questions does not 'emerge beyond any doubt from the file' of the case, the referring court must explain why it considers that the reply is necessary for it to give judgment (Bacardi-Martini para. 44). In particular, the national court should explain why it needs the specific provisions of EU law to be interpreted and how they are linked to national law (Laguillaume, C-116/00 para. 16).



Earlier questions on the same topic

- **The Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order instead of a judgment (Article 99 of the Rules of Procedure), when:**
 - the reply to such a question may be clearly deduced from existing case-law
 - or
 - the answer to the question referred for a preliminary ruling admits no reasonable doubt (Rivas Quichimbo C-537/12 & C-116/13).

Situations where a reference must be submitted

Courts against whose decisions there is no judicial remedy

(CILFIT, 283/81 para. 15; Lyckeskog, C-99/00)

- Notion of court of last instance
- Notion of ordinary judicial remedy



Situations where a reference must be submitted

Exceptions:

Acte clair

When there is no reasonable doubt as to the manner in which the question raised is to be resolved

(CILFIT, 283/81 para. 16-20; Consorzio Italian Management C-561/19)

- The requirements for invoking the acte clair doctrine are so strict that their fulfilment in practice is difficult.



Situations where a reference must be submitted

Exceptions:

Acte éclairé

If “the question raised [by the referring court] is materially identical with a question which has already been the subject of a preliminary ruling in a similar case” (Da Costa, 28-30/62)



Intent to consider an EU measure as illegal

A national court, even if it not one of last instance, **must** still refer to the CJEU if it intends to consider an act of the institutions as illegal and to refuse its application (Foto-Frost, 314/85, paras 14-19).

Liability for not submitting an obligatory reference

- Failure to submit a preliminary reference, when the court was under a duty to do so, constitutes a violation of EU law and may lead to proceedings on the basis of Article 258 TFEU against the Member State.
- An individual who suffered a loss as a result of the failure to submit an obligatory preliminary reference – and was therefore denied access to justice – may claim damages from the Member State (Köbler, C-224/01; Traghetti, C-173/03).

The role of court and parties in preliminary reference

COURT

- “It is solely for the national court [...] to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, [...] the Court of Justice is, in principle, bound to give a ruling” (Bacardi-Martini, para. 41).
- The Court of Justice can refuse to give judgement only if the reference is clearly unnecessary to solve the case.

PARTIES

- Limited role. The court may refer on its own motion and it may decide not to refer even if the parties request it.



Preliminary references subject to appeal (in MS legal systems)

- A national legal system can provide, in its domestic procedural law, for a decision to refer to the CJEU be subject to an appeal.
- The fact that a decision to refer has been appealed does not block the CJEU from hearing the case [Article 100(1) RoP], unless it is withdrawn by the national court that made it (Rheinmühlen-Düsseldorf, 146/73 para. 4).



Scope of the preliminary reference

- Interpretation of EU Law
- Legality (validity) of an act of the EU institutions
- Conformity of national law with EU law

The CJEU cannot be asked to rule on questions of fact that are exclusively for the national court to decide (Traghetti paras 22 and 24).



Practical advice on how the reference should be written

According to **Article 94 RoP**, a preliminary reference must contain:

- 1) the questions referred to the CJEU;
- 2) 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;
- 3) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;
- 4) a statement of the reasons that prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings.



Practical advice

Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019/C 380/01)

Focus on the main guidelines



1. The subject matter of the dispute in the main proceedings and the relevant fact

The referring court or tribunal must briefly describe the subject matter of the dispute in the main proceedings and the relevant findings of fact, as determined by that court or tribunal.

(cf. Annex of the Recommendations, 2019/C 380/01 para. 15)



2. The relevant legal provisions

The request for a preliminary ruling **must contain precise references to the national provisions applicable to the facts of the dispute in the main proceedings, including any relevant case-law, and the provisions of EU law** whose interpretation is sought or whose validity is challenged.

Those references must be comprehensive and must include the precise title of and citations for the provisions concerned, as well as their publication references. As far as possible, case-law citations, whether national or European, should also include the ECLI number (**‘European Case Law Identifier’**) of the decision concerned.

(cf. Annex of the Recommendations, 2019/C 380/01 para. 15 and 16)



3. The grounds for the reference

The Court can rule on the request for a preliminary ruling only if EU law is applicable to the case in the main proceedings. The referring court or tribunal must therefore set out the reasons which prompted it to inquire about the interpretation or validity of provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings. If it considers it helpful for the purposes of understanding the case, the referring court or tribunal may set out here the arguments of the parties in that regard.

(cf. Annex of the Recommendations, 2019/C 380/01
para. 8 to 11 and 15 to 18)



4. The questions referred for a preliminary ruling

“The referring court or tribunal should set out, clearly and distinctly, the questions it is submitting to the Court for a preliminary ruling. **It must be possible to understand those questions on their own terms**, without the need to refer to the statement of the grounds for the request for a preliminary ruling.

In so far as it is able to do so, the referring **court or tribunal should also briefly state its view on the answer** to be given to the questions referred for a preliminary ruling.”

(cf. Annex of the Recommendations, 2019/C 380/01 para. 19)



5. Possible need for specific treatment (particularly expeditious handling)

Where the referring court or tribunal considers that the request has to be dealt with in a particular way, both as regards the need to preserve the **anonymity** of the persons concerned by the dispute in the main proceedings and as regards **the rapidity** with which the request may have to be dealt with by the Court, **the reasons for such treatment must be set out in detail** in the request for a preliminary ruling and in any covering letter.

(cf. Annex of the Recommendations, 2019/C 380/01 para. 33 et seq.)



Procedure

EU law does not prescribe any specific procedural rules for the preliminary reference to be followed at national level

The CJEU Statute and the RoP provide for a general regulation of the procedure before the CJEU, including: submission, notifications, translation, written observations by the entities concerned, costs, legal aid.



Special procedures

Expedite procedure (Article 105 RoP): depending on the particular nature of the case, the date of the hearing is fixed immediately and the deadlines for submitting observations are shortened

Urgent procedure (Article 107 RoP): for questions regarding judicial cooperation in criminal matters, there are time limits for lodging statements or written observations



The decision

The CJEU's decision on a preliminary reference can take three possible forms:

- (1) an order of the President rejecting the reference as inadmissible;
- (2) a reasoned order of the Court answering the questions, if they have already been addressed earlier or are trivial (Article 99 RoP);
- (3) a judgment of the Court answering the questions.

There are non specific legal rules on the binding force of the CJEU preliminary ruling. However, the court that submitted the reference is bound by the CJEU's answer (Wünsche, 69/85 para. 13) as well as other courts deciding the same case (in the same proceedings).



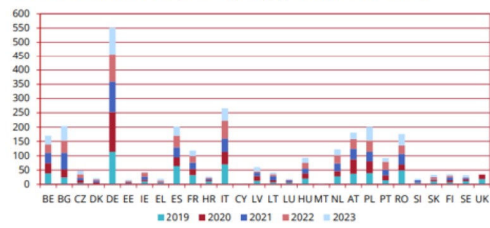
Effects of the decision for third parties

- Judgment declaring an EU act invalid: effects *erga omnes* (International Chemical Corporation, 66/80 paras 12-13).
- Judgment declaring an EU act valid: no effects *erga omnes* (Milac, 8/78 paras 4-9; cp-Pharma, C-448/06).
- Judgment interpreting EU law: no general binding effects (but still a leading function in the application of Community law); a national court may always request that the CJEU reconsider its legal opinion.



Preliminary rulings

V. New cases - References for a preliminary ruling by Member State (2019-2023)



References for a preliminary ruling by Member State	2019	2020	2021	2022	2023	Total
Belgium	38	36	36	30	30	170
Bulgaria	24	28	58	43	51	204
Czech Republic	5	9	8	13	12	47
Denmark	1	6	6	4	5	22
Germany	114	140	106	98	94	552
Estonia	3	3	2	4	4	16
Ireland	10	5	11	14	2	42
Greece	5	2	2	4	6	19
Spain	64	30	35	41	32	202
France	32	21	23	23	19	118
Croatia	10	4	5	4	4	27
Italy	70	44	46	63	43	266
Cyprus	1	0	0	0	1	2
Latvia	12	17	12	4	15	60
Lithuania	7	7	15	6	6	41
Luxembourg	6	3	5	2	2	18
Hungary	20	18	17	20	18	93
Malta	1	0	0	0	2	3
Netherlands	28	18	27	28	21	122
Austria	37	50	37	34	23	181
Poland	39	41	34	39	48	201
Portugal	14	17	20	28	13	92
Romania	49	20	38	29	40	176
Slovenia	5	2	7	0	6	20
Slovakia	10	6	2	7	8	33
Finland	7	7	10	6	5	35
Sweden	11	6	5	2	8	32
United Kingdom	18	17	0	0	0	35
Total	641	557	567	546	518	2 829



QUESTIONS

- How often do you deal with preliminary reference in your court/office?
- How much free do you feel in taking your choice among consistent interpretation, direct disapplication, preliminary reference?
- Do national superior courts or other bodies exercise a form of control on preliminary reference by inferior courts in your judicial system?
- What's the relationship between preliminary reference (to CJEU) and constitutional reference (to national Constitutional Court) in your legal system?
- Are there relevant peculiar aspects of preliminary reference in environmental matters in your legal system?



Let's share our experiences!

