

**Dr. Christina Olsen Lundh, Senior Judge,
General court, land- and environmental
court, Vänersborg, Sweden**

**The role of national judges and
prosecutors in enforcing EU
legislation on wildlife trafficking,
deforestation and illegal logging**

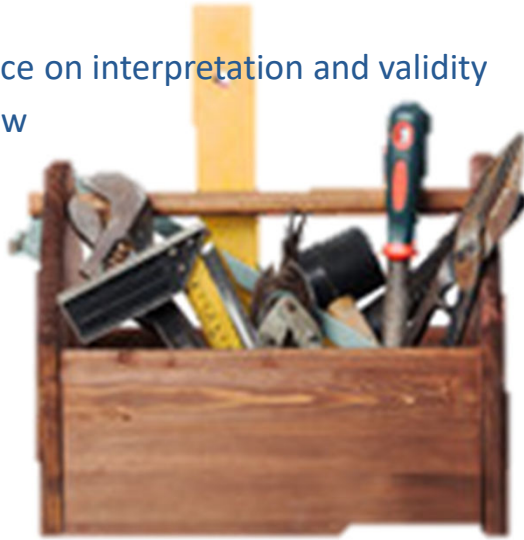
**Focus on preliminary references and the requirement for
access to justice**



**Seminar for prosecutors and judges:
EU LEGISLATION WILDLIFE AND COMBATING ASSOCIATED CRIME.**

EU toolbox for dealing with national environmental case law

- Access to justice
- Preliminary reference on interpretation and validity
- Supremacy of EU law
- Principles



My local EU-court in Vänersborg:



Case T-51/89 *Tetra Pak Rausing*, p. 42.



In the case *Tetra Pak Rausing*, the Court of Justice of the EU ruled that local courts are EU courts.

A toolbox outline



A toolbox outline



CJEU interprets EU-law

National judge interprets National Law

Interpreting national law:

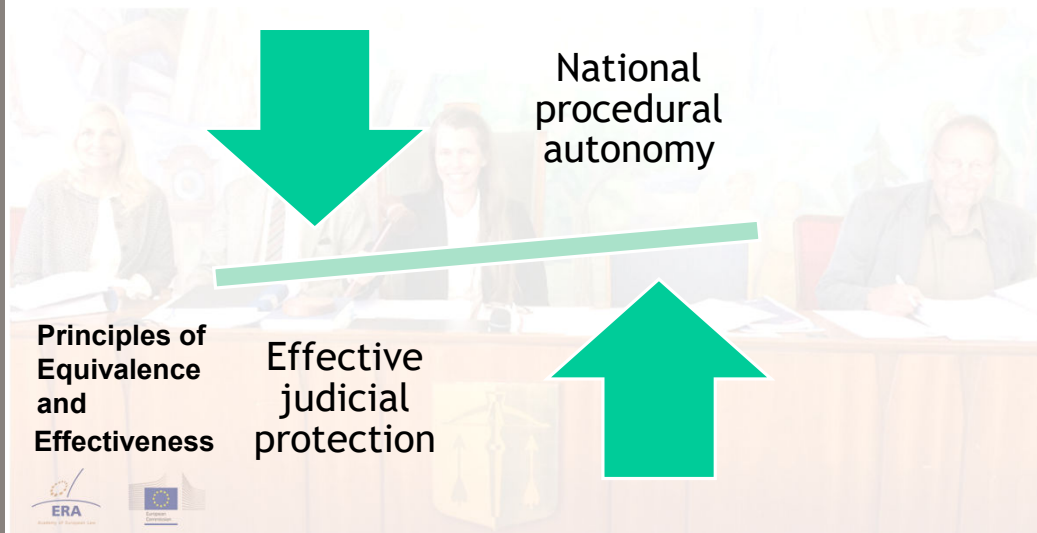
- Precedence (primacy or supremacy)
- Directives and direct effect
- Interpretation in conformity with EU law
- Limits of interpretation
- Access to justice
- Preliminary reference



- It is for the national courts to interpret national law while looking into the relation between
- Limits to interpretation that is conform to EU law.
- When the task of interpreting exceeds the national court's mandate, the preliminary referenc

CJEU interprets EU-law

National judge interprets National Law



Supremacy (precedence or primacy) of EU law

The **doctrine of supremacy** of EU law was developed by the CJEU on the basis of its conception of the “new legal order”

If EU law was subject to unilateral decisions of Member States, it would be fragmented.

→ The **uniform application** of EU law!

EU law takes precedence over any provision of national law (including constitutional law)

National courts required to **ignore or set aside** any national law which could impede the application of EU law.

Case 26/62 *van Gend & Loos*

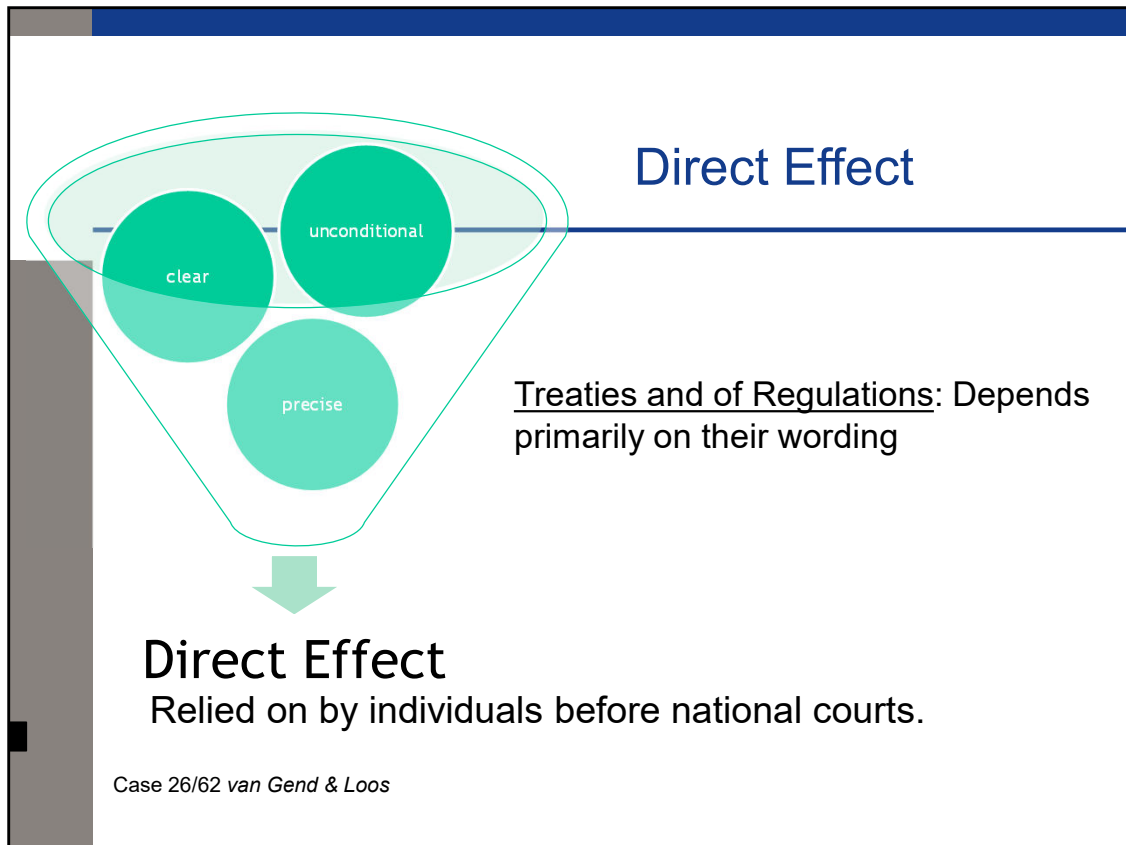
Case 6/64 *Costa*

Case 106/77 *Simmenthal*, p. 17

Case C-213/89 *Factortame and Others*, p. 18

Case C-409/06 *Winner Wetten*, p. 53

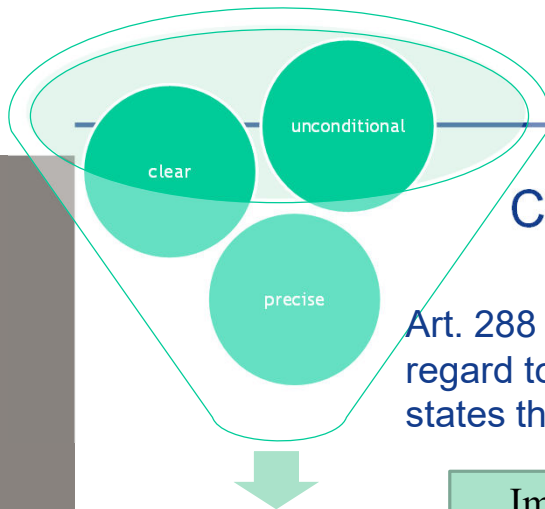
The selection of landmark cases on the supremacy of EU law is presented in this slide.



The doctrine of direct effect applies to all binding EU law.

Its exact meaning remains contested. Most often it means that when an EU law provision is clear, precise, and unconditional it can be applied directly by national courts.

Direct Effect



Can directives have direct effect?

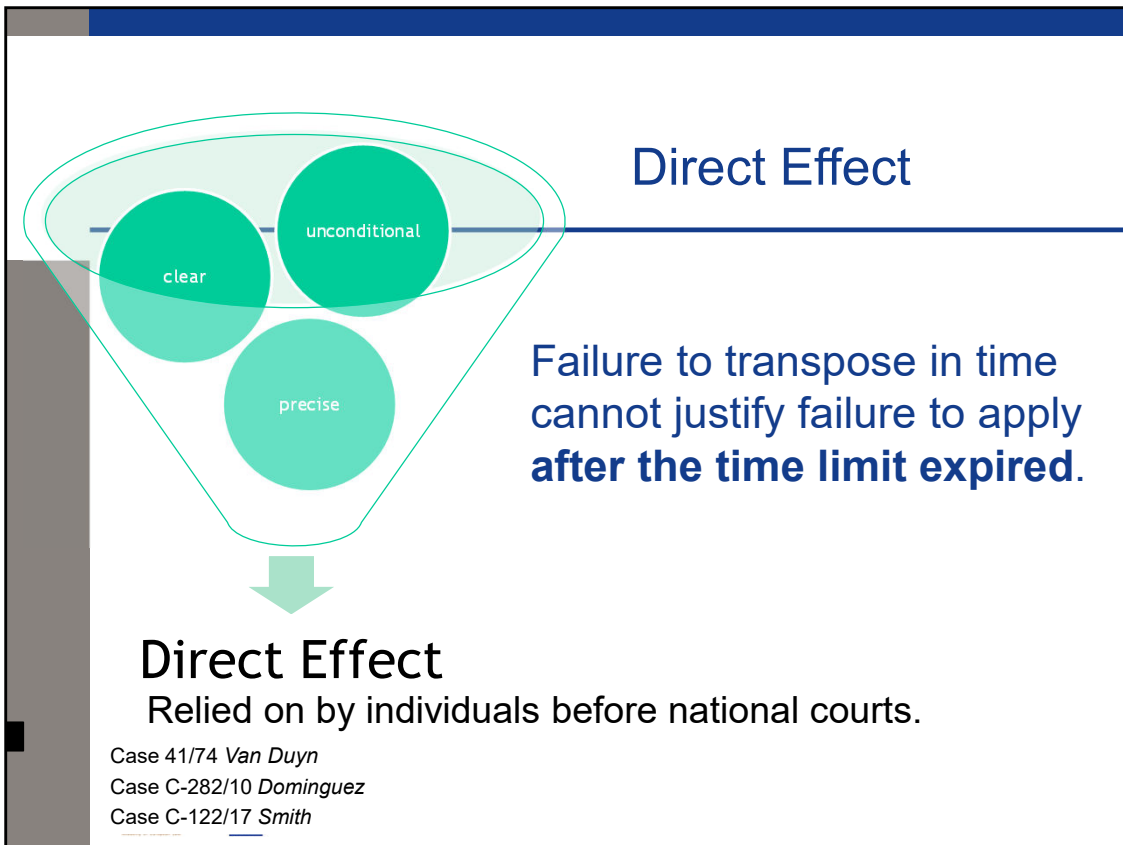
Art. 288 TFEU: Directives are binding with regard to the result but leave member states the choice of form and methods.

Direct Effect

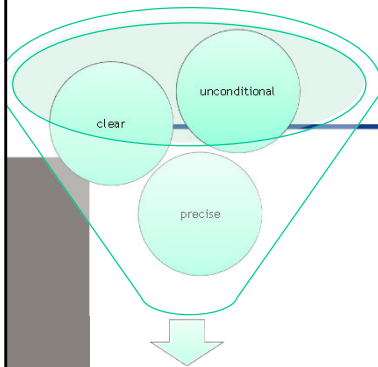
Relied on by individuals before national courts.

Implementation time: Deadline for implementation!



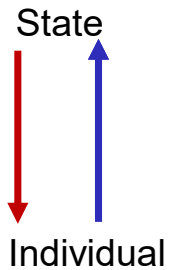


Vertical / triangular direct effect



Direct Effect

Vertical direct effect:



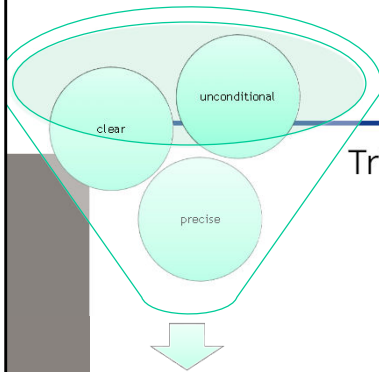
EU law is intended to give rights to citizens

A state may not rely, against individuals, on its own failure to implement a directive.

Relied on by individuals before national courts.

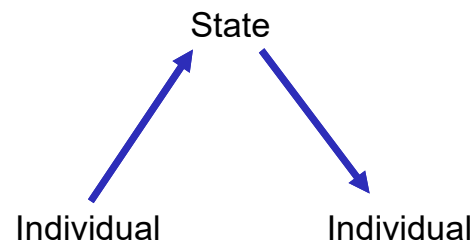
Case 26/62 Van Gend en Loos

Vertical / triangular direct effect



Triangular direct effect

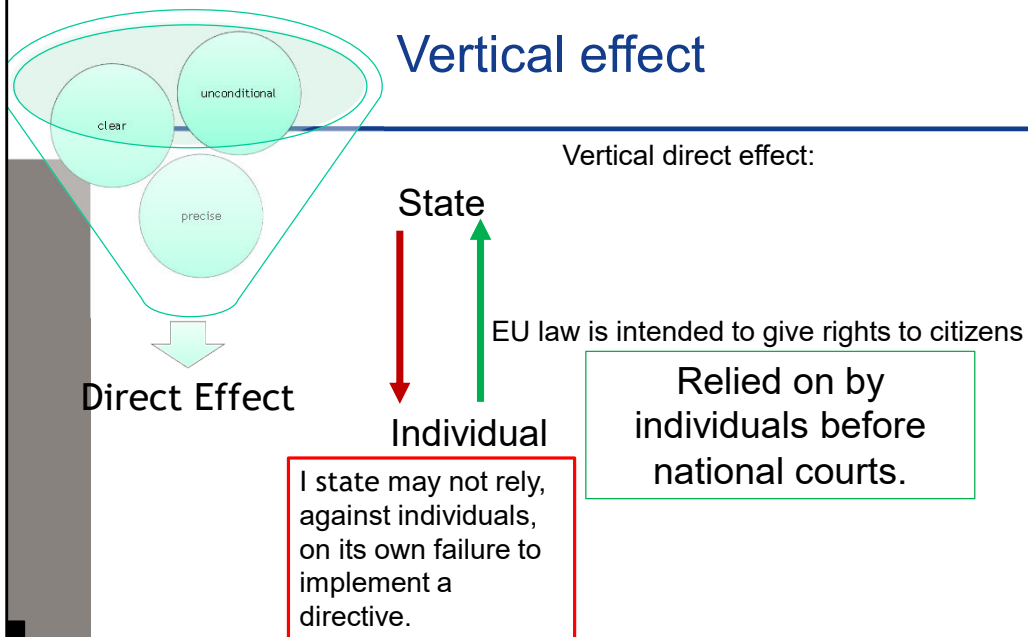
Direct Effect



Relied on by individuals before national courts.

Case C-201/02 R (Wells) v. Secretary of State for Transport,
Local Government and the Regions

Vertical effect



Case 26/62 Van Gend en Loos

Interpretation in conformity with EU law (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 to achieve the results required by EU law.
- Cannot serve as the basis for an interpretation of national law *contra legem*.



Case C-240/09 *Lesoochránárske zoskupenie*
Case C-282/10 *Dominguez*

Balancing effective judicial protection and **National Procedural Autonomy**

In the absence of harmonization, it is
for the domestic legal system of
each Member State to determine
the procedural conditions

Not less favorable!

Not make it impossible in practice to exercise the
rights which the national courts are obliged to
protect

 Case C-240/09 *Lesoochrannárske zoskupenie*

The principle of national procedural autonomy.

"national procedural responsibility"

Where no relevant EU rules exist;
national law determines the conditions
for enforcement of EU rights.

It is **the responsibility** of the Member States to
determine the procedural conditions under which
EU rights are to be protected.

Case 6/60 *Humblet v. Belgium*

Craig & De Burca suggest that we call it 'responsibility' instead autonomy. It highlights better the role of the national judge in the protection of EU rights.

The principle of national procedural autonomy.

"national procedural responsibility"

1. The principle of equivalence

Non discrimination: the remedies and forms of action *available to ensure the observance of national law* must be made *available in the same way to ensure the observance of EU law*.

- proportionality,
- adequacy
- effectiveness

Case 222/84 *Johnston v Chief Constable of the RUC*

Case 222/86 *UNECTEF v Heylens*

Case C-327/02 *Panayotova v. Minister voor Vreemdelingenzaken en Integratie*

Over time the criteria of proportionality, adequacy, and effectiveness have been added.

"national procedural responsibility"

1. The principle of equivalence

2. The effectiveness requirement:

National remedies must secure the effectiveness of EU rights

The principle of cooperation in good faith (TEU article 4(3))

A requirement on every organ of a MS to nullify the unlawful consequences of a breach of EU law

MS obliged to refrain from taking any measures that can seriously compromise the attainment of a result prescribed by EU environmental law

Prevent breaches before they occur

C-201/02 *Wells*, p 64 and 65.
C-129/96 *Inter-Environnement Wallonie*, p 45.

National rules that impede the exercise of the rights of EU law cannot be interpreted contra legem, but must be put aside.

"national procedural responsibility"

1. The principle of equivalence

2. The effectiveness requirement:

The legal systems of the MS must provide for **effective remedies** that comply with these requirements.

The principle of cooperation in good faith (TEU article 4(3))

A requirement on every organ of a MS to nullify the unlawful consequences of a breach of EU law

MS obliged to refrain from taking any measures that can seriously compromise the attainment of a result prescribed by EU environmental law

Prevent breaches before they occur

C-201/02 *Wells*, p 64 and 65.
C-129/96 *Inter-Environnement Wallonie*, p 45.

"national procedural responsibility"

1. The principle of equivalence 2. The effectiveness requirement:

Necessary for a national court to consider **effective remedies/reliefs** where the conduct of a public authority is found to be contrary to EU law!

The principle of cooperation in good faith (TEU article 4(3))

A requirement on every organ of a MS to nullify the unlawful consequences of a breach of EU law

MS obliged to refrain from taking any measures that can seriously compromise the attainment of a result prescribed by EU environmental law

Prevent breaches before they occur

C-201/02 *Wells*, p 64 and 65.
C-129/96 *Inter-Environnement Wallonie*, p 45.

"national procedural responsibility"

Article 19 (1) TEU

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

principle of equivalence

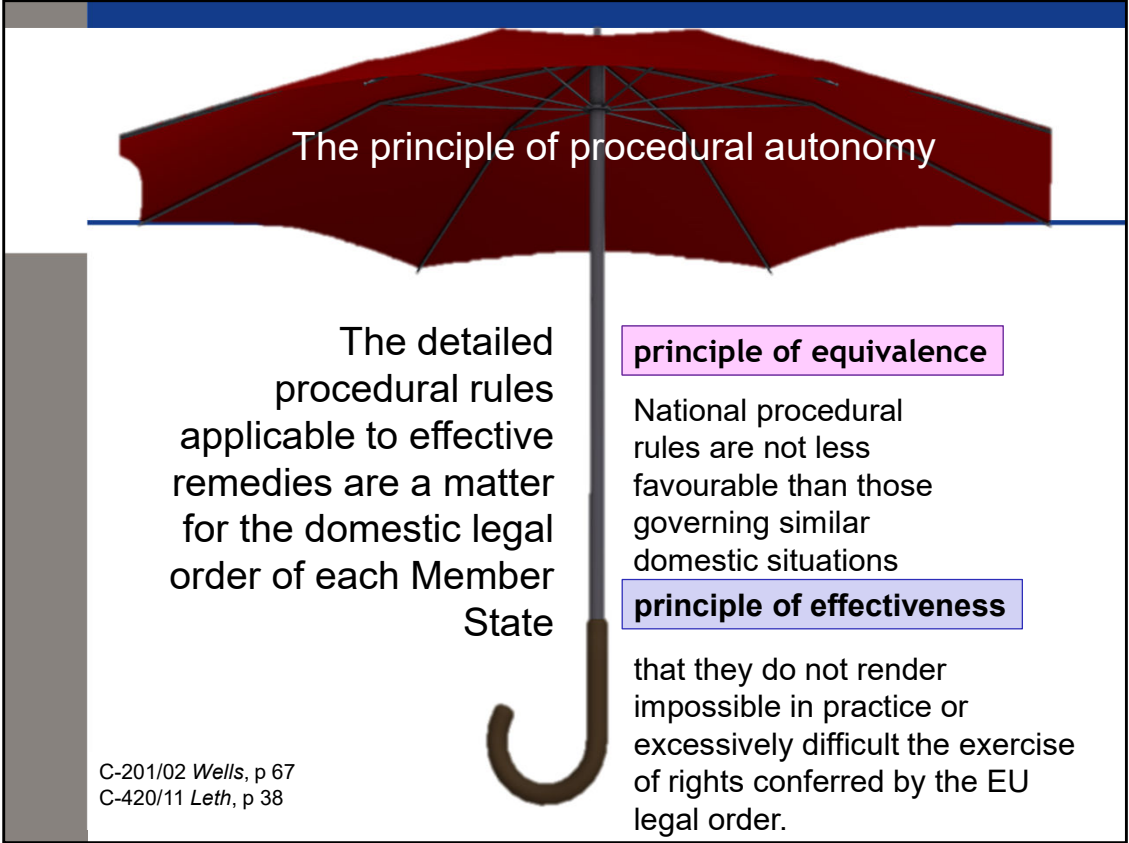
National procedures relating to the application of EU law....

...should not be less favourable than those governing similar domestic situations

...should not render virtually impossible or excessively difficult the exercise of rights conferred by EU law

principle of effectiveness

Case C-201/02 *Wells* p 67.
C-312/93 *Peterbroeck*, p. 12
C-78/98 *Preston and Others*, p. 31



The principle of procedural autonomy

The detailed
procedural rules
applicable to effective
remedies are a matter
for the domestic legal
order of each Member
State

principle of equivalence

National procedural
rules are not less
favourable than those
governing similar
domestic situations

principle of effectiveness

that they do not render
impossible in practice or
excessively difficult the exercise
of rights conferred by the EU
legal order.

C-201/02 *Wells*, p 67
C-420/11 *Leth*, p 38

When acting as a Union Court of General Jurisdiction:



When acting as a Union Court of General Jurisdiction:

A 19 TEU:

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by EU law.

A 47 Charter of fundamental rights:

principle of effectiveness

Everyone, whose rights and freedoms guaranteed by the law of the Union are violated, has **the right to an effective remedy before a tribunal** in compliance with the conditions laid down in this Article.

Access to justice!



Note that it is the Member States, not the EU that must provide the remedies.

Access to justice:

Legal standing - locus standi

"...justice is open to all, like the Ritz Hotel."

The public is the guardian of the correct application of EU law, through **access to the national court systems**.

It is for the courts of the member states to ensure judicial protection of a person's right under EU law.

C-243/15 *Lesoochrannárske zoskupenie VLK* (LZ II)
C-348/16 *Sacko*



Sir James Charles Mathew, Irish judge
(1830 - 1908)

Legal standing is fundamental.

Individuals or ENGO:s can only be heard by
a judge
if they have
the right to bring a challenge.



Environmental Justice

Ascertain people the capability of affecting their own environment.



Information

Used to influence a decision

Public participation in decision-making procedures

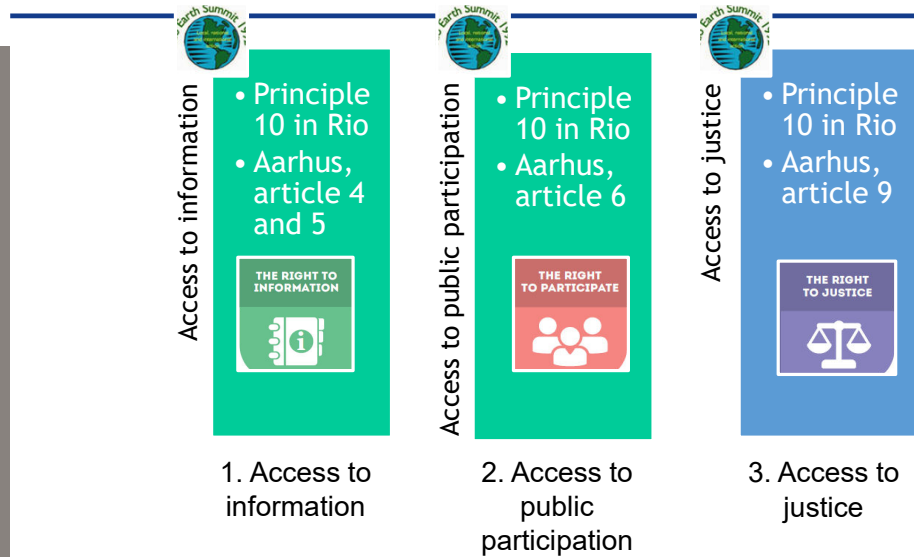
Challenge decisions concerning the environment in a court of law

Access to justice



Now we focus more in the administrative law area.

The Three Pillar Structure



Ensure wide access to justice.

C-115/09, *Bund für Umwelt und Naturschutz (Trianel)*
ERA
Ministry of Environment and Natural Resources

This is important to remember. Interpretation of procedural rules must be wide and must ensure access to justice.

The Slovak Brown Bear

C-240/09



People want
exception
from speices
protection act

Authority

Lesoochránárske
zoskupenie VLK
(Zoskupenie) (ENGO)

In order to ensure effective judicial protection
in the fields covered by EU environmental law:

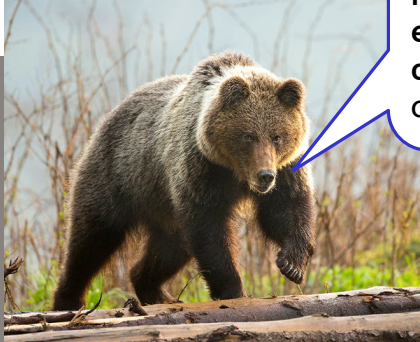
1. EUCJ has jurisdiction to interpret the provisions of the Aarhus Convention
2. Article 9(3) of the Aarhus Convention has **no direct effect**.



- An environmental organisation was informed of procedures regarding the exemption of species from protection.
- The organisation applied to take part in the proceedings.
- The Court referred the question on the 'wide access to justice' provision of the Aarhus convention.

The Slovak Brown Bear

C-240/09



It is for the national courts to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in A 9(3) of the Aarhus convention.

In order to ensure effective judicial protection in the fields covered by EU environmental law:

1. EUCJ has jurisdiction to interpret the provisions of the Aarhus Convention
2. Article 9(3) of the Aarhus Convention has **no direct effect**.



Despite the lack of direct effect, conform interpretation is an obligation of the national court.

Access to justice

It is for the national courts to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in A 9(3) of the Aarhus convention.

Case C-240/09 LZ I, Slovakian brown bear case

Implementation of Article 9(3) include the **uniform application and interpretation of EU law**.

A key mechanism for ensuring this is the possibility for/duty on national courts to **ask for a preliminary ruling**. (Article 267 of the TFEU).



The Preliminary Reference Procedure

Official Journal of the European Union



English edition

Information and Notices

C 380

Volume 62

8 November 2019

Contents

I *Resolutions, recommendations and opinions*

RECOMMENDATIONS

Court of Justice of the European Union

2019/C 380/01

Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings

1



- + The Institution
- + Court of Justice
- + General Court
- + Case-law
- + Press and Media
- + Library
- + Judicial Network of the EU

e-Curia



e-Curia is an application of the Court of Justice of the European Union that enables the representatives of parties in cases brought before the Court of Justice and the General Court, as well as national courts and tribunals in the context of a reference to the Court of Justice for a preliminary ruling, to exchange procedural documents with the Registries by exclusively electronic means.

- [Decision of the Court of Justice of 16 October 2018 on the lodging and service of procedural documents by means of e-Curia](#)
- [Decision of the General Court of 11 July 2018 on the lodging and service of procedural documents by means of e-Curia](#)
- [Conditions of Use of e-Curia](#)
- [User Guide](#)

Requesting an account

In order to use e-Curia, a request to open an account must be submitted using an account request form.

The procedure for opening an account varies depending on whether the user follows the standard procedure or the special procedure.

The standard procedure enables an account to be opened in order for procedural documents to be exchanged with the Court of Justice or the General Court. It is available to a party's representative ('representative' account), or, in the context of a request for a preliminary ruling before the Court of Justice, to a person acting on behalf of a court or tribunal of a Member State ('court' account) or to a person who does not have the status




The Preliminary Reference Procedure



COUR DE JUSTICE
DE L'UNION
EUROPÉENNE

ENTREE ERASMUS

The originator of the request for a preliminary ruling - **who can make a reference?**

The subject matter and scope for a preliminary ruling - **what to ask and not to ask about?**

The appropriate stage at which to make a reference – **when to ask?**

Form and content for a preliminary ruling

Some **practical questions**



The Preliminary Reference Procedure



Objectives:

1. Uniform interpretation of EU law in the EU
2. Effective judicial protection

ENTREE ERASMUS

Court of Justice

CJEU provides useful answers and protect the referring court from interference

National Judge

The referring court is required to respect and assist the CJEU



Joined Cases C-261/08 and C-348/08 *Zurita García and Choque Cabrera*, p. 36;
Case C-210/06 *Cartesio*, p. 91.

The Preliminary Reference Procedure

Who can make a Reference?

- Lower courts **may** make a reference.
- Courts of last instance are **obliged** to make a reference

Exceptions:

Acte claire (the correct application is obvious)

Existing cases of the CJEU



Case 283/81 *Cilfit and Others*
Case C- 99/00 *Lyckeskog*
Case C-210/06 *Cartesio*

- ALL Courts can make a preliminary reference request.
- Exceptions exist.
- Only courts, no authorities at all.

The Preliminary Reference Procedure

Who can make a Reference?

- Lower courts **may** make a reference.
- Courts of last instance are **obliged** to make a reference
- **ONLY COURTS!**

Parties to a national procedure in a national court **can suggest** a reference.

Parties to a national procedure in a national court **can not request or prevent** a reference.

Case C-138/08 *Hochtief and Linde-Kca-Dresden*, paragraphs 21 and 22

They can however, withdraw their application.

Who can make a Reference?

A court or not a court?

- Established by law?
- Permanent?
- Compulsory jurisdiction?
- Is its procedure *inter partes*?
- Applies rules of law?
- Independent?



A court



Not a court

Case C-53/03 *Syfait*

Case C-196/09 *Miles and Others*

Case C- 394/11 *Belov*

The Preliminary Reference Procedure

What to ask and not to ask about?

When you, as a national judge is in doubt...

...regarding the **interpretation** of EU law

...regarding the **validity** of secondary EU law



What to ask and not to ask about? Validity Reference

Only EU courts can decide on the validity of EU legal acts

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 for all courts

Foto Frost (314/85

Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen*

What to ask and not to ask about? Validity Reference - limits

- Only derived EU law, (Directives, Regulations or Decisions)
- No hypothetical questions!
- If an exceptional case; the CJEU may examine the validity ex officio

The Preliminary Reference Procedure

What to ask and not to ask about?

When you, as a national judge is in doubt...

...regarding the **interpretation** of EU law

...regarding the **validity** of secondary EU law

The question must be relevant for the outcome of a pending procedure before the referring court.

Case C-415/93 *Bosman*, p. 61

Joined Cases C-188/10 and C-189/10 *Melki and Abdeli*, p. 27

The Preliminary Reference Procedure

When to ask (in time)?

As soon as the national court finds that a ruling on the interpretation or validity of EU law is necessary to enable it to give judgment!

No Limitations by EU law



How to ask for a preliminary reference?



Form and content

The content of any request for a preliminary ruling is prescribed by Article 94 of the Rules of Procedure of the Court

The request **must** contain:

- a summary of the subject matter of the dispute in the main proceedings and the relevant findings of fact as determined by the referring court or tribunal,
- the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law,
- a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of EU law
- the relationship between those provisions and the national legislation applicable to the main proceedings





Costs?

- Preliminary ruling proceedings before the CJEU are free of charge
- The CJEU does not rule on the costs of the parties to the proceedings pending before the referring court or tribunal. It is for the referring court or tribunal to rule on those costs.



And then... ?

The case continues in the domestic court, and the domestic court has to apply the ruling of the CJEU to its case.

EU toolbox for dealing with national environmental case law

- Supremacy of EU law
- Principles
- Access to justice
- Preliminary reference on interpretation and validity



Supremacy of EU law

- The validity of EU law can never be assessed by reference to national law.
- National courts are required to give effect to EU law, of whatever rank, in cases which arise before them, and to **ignore or set** aside any national law, of whatever rank, which could impede the application of EU law.

You may need to include the suspension, revocation or annulment of unlawful decisions or acts, and the disapplication of legislation and regulatory acts.



Direct effect

Treaties and of Regulations: Depends primarily on their wording (sufficiently clear, precise and unconditional)

Directives might have direct effect if sufficiently clear, precise and unconditional (the implementation time has past):

- Vertical direct effect (towards the state) and
- Triangular direct effect (where the state may impose obligations on a private subject)



Interpretation (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.
- This obligation cannot serve as the basis for an interpretation of national law *contra legem*.



Procedural law

While considering our National procedural autonomy (or rather national procedural responsibility) we need to apply the principles of equivalence and effectiveness

National procedural rules are not less favourable than those governing similar domestic situations

principle of equivalence

National procedural rules should not render virtually impossible or excessively difficult the exercise of rights conferred by EU law

principle of effectiveness



Access to justice

- EUCJ has jurisdiction to interpret the provisions of the Aarhus Convention
- Article 9(3) of the Aarhus Convention has no direct effect.
- It is for the Member States to define what constitutes the impairment of a right! This discretion is qualified by the need to respect the objective of **ensuring wide access to justice** for the public concerned.
- It is for the national courts to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in A 9(3) of the Aarhus convention.



Preliminary reference on interpretation and validity

Preliminary reference procedure: ensure the **uniform application** of EU law!

- Lower courts **may** make a reference.
- Courts of last instance are **obliged** to make a reference
- If it concerns the validity of an EU act; the reference is obligatory for **all courts**.

The question must be relevant for the outcome of a pending procedure before the referring court.

We may ask as soon as we find that a ruling on the interpretation or validity of EU law is necessary to enable us to give a judgment!





Thank you!

