

Case Study by Dr Matthias Keller, Aachen

Case: „Sand Quarry“



Credit: LATGEO Invest



The first slide is a title.

Scenario 1: The approach of my Chamber



Credit: LATGEO Invest

The action is not admissible.

The claimant SPQR, a public service for the protection of historic monuments, has no standing.

Participatory rights under Aarhus-, EU- and German provisions do not exist. Legal persons under public law do not belong to „the public“ or „the public concerned“.

The claimant should use its supervisory powers towards the local authority.



A public entity cannot rely on procedural rights that are meant for private NGOs.

Scenario 1:

The farmer = Standing?



Credit: LATGEO Invest

Problem in Germany, Austria, Czech-Republik:

Ordinary standing requires a

„possible violation of an individual public-law right.“

The farmer is not affected in his property or health.

However, the general idea is to establish a public interest litigation of those who belong to the „public concerned“, cf. Art. 9 Aarhus Convention.

So it all comes down to the question whether the farmer in such a situation is „affected, likely to be affected or has an interest in the decision making procedure“, cf. Art. 1(2)e EIA Directive.

From my German perspective this seems quite unclear!

Preliminary ruling to the Court of Justice?



The standing of private persons may justify a preliminary ruling to the CJEU.

Scenario 2:

„The missing EIA: May the judge raise it ex officio?“

EU framework:

Art. 19 (1) TEU

(...)

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

Cf. Art. 47 EU Charta of Fundamental Rights and
General Principles of EU law relying on Art. 6, 13 of the
European Convention of Human Rights



The interplay between the CJEU and the domestic judiciaries is explained.

Scenario 2:

„The missing EIA: May the judge raise it ex officio?

Member States enjoy „procedural autonomy“ to have their domestic set of precedural rules (no EU harmonisation)

However, those domestic rules of procedure must be exercised having regard to the

principle of equivalence

and the

principle of effectiveness.

(Cf. inter alia: C-312/93 - Peterbroek -)



The slide highlights the notion of “procedural autonomy” and its limits.

Scenario 2:

„The missing EIA: May the judge raise it ex officio?“

The principle of equivalence:

Actions under EU law must not be handled „less favourable“ than actions under domestic law.

The principle of effectiveness: (difficult to apply)

Domestic rules on procedure must not lead to a situation where the exercising of EU rights is

„practically impossible or excessively difficult“.

Not raising the question ex officio seems to be possible.

(Cf. AG Kokott, C-416/10, para. 152 ss. „Križan and Others“)



There is room for different solutions when it comes to the “ex officio question”.

Scenario 3: „The Exemption“ a) the Neighbour

a) The triangular situation in neighbourhood cases:

Can the neighbour invoke the EIA-Directive when challenging a development consent?

Yes, of course ! (CJEU C-201/02 - Delena Wells -)

Why?



Slide 7 introduces the question of direct effect.

Directives and the National Judge



Paris 2010 - La pensée CC BY-SA 2.0 Credit
Daniel Stokman Photo: Paris 2010 Day 2/3

What are the conditions of a direct application of the Directives?

Direct effect? What does it mean in a nutshell?

Direct effect :
"Van Gend&Loos"

Generally, an individual can invoke any EU provision in a national court room which is "**sufficiently precise + unconditional**" (e.g. fundamental freedoms)

Vertical direct effect:
"Van Duyn"

Directives: Against a MS or its "emanation" (vertical)
an individual can invoke those provisions of a directive that are
not timely transposed + "sufficiently precise + unconditional".

Horizontal direct effect:
"Faccini Dori"

Directives: Against another private party (horizontal)
an individual cannot use direct effect of a directive.

However, interpretation of domestic law in the light of EU law ("consistent interpretation") is always possible and even required ("as far as possible") from the national courts to reach the result to be achieved by an EU directives, cf. Art. 288 TFEU.

Good guidance by the CJEU in "Pfeiffer, C-397/01 , 116": "National methods of interpretation".



The complex problem of direct effect is shown in a nutshell.

Practitioners are not always familiar with the direct effect of EU law. The slide gives an overview on the topic. The importance of consistent interpretation is mentioned.

Do's and Don'ts

(Direct Effect of Directives)

Do consider that an „unconditional and sufficiently precise“ provision of any EU Directive is to be applied directly.

(CJEU C-431/92 - Großkrotzenburg -)

Don't allow national authorities to apply such a provision when they want to impose an obligation on the citizen.

(CJEU C-91/92 - Faccini Dori -, para. 20)

Do consider that national authorities have to apply such provisions in triangular situations: If a building permit is quashed on behalf of a neighbour, the builder affected by the decision is not confronted „with an obligation“. It is only a negative effect.

(CJEU C-201/02 - Delena Wells -)



Slide 9 is meant as a practical advice on how to deal with direct effect.

Some typical scenarios of direct effect and the references to the jurisprudence.

Scenario 3:

„The Exemption“ a) the developer

b) Can the developer (when challenging a denial) rely on domestic law that is not in line with a non-transposed EIA-Directive?

Or asking from the perspective of the Memberstate:

May a local authority rely on a non-transposed provision of the EIA-Directive to deny a consent?

If this denial is categorized as a restriction of the developers's (fundamental) rights ... it gets very difficult.

Motto: No reversed direct effect of Directives (against the citizen)!

However, these questions may justify a preliminary ruling,
on which I give some information:



May direct effect of the EIA Directive be used against (!) the developer ?

Art. 267 TFEU

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



Article 267 TFEU is to be mentioned in the context of preliminary procedure.

Recommendations

Official Journal 2016/C 439/01 and Website of the CJEU:

**“Recommendations
to national courts and tribunals,
in relation to the initiation of preliminary ruling proceedings”
from 25 November 2016**

Footnote:

The above recommendations are comprehensive.

A request should be made only after these recommendations have been read by the national judges.



The relevant recommendations are important for the practitioner.

Have the parties to be heard ?

Recommendations (OJ 2016/C 439/01) para 13:

„In the interest of proper administration of justice,
it may also be desirable for the reference to be made
only after both sides have been heard.“



The parties should be heard before launching a preliminary proceedings.

Content and Form of the Request

(cf. the recommendations OJ 2016/C 439/01)

The referring court and the parties to the main proceedings.

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

The relevant legal provisions.

The grounds for the reference.

The questions referred for a preliminary ruling.

Possible need for specific treatment (anonymity).

Form that facilitates electronic processing:

- white, unlined, A4-size paper.
- commonly used font (Times New Roman, Courier or Arial).
- 12 point in the body of the text and at least 10 point in any footnote.
- all pages of the request, and the paragraphs, should numbered.

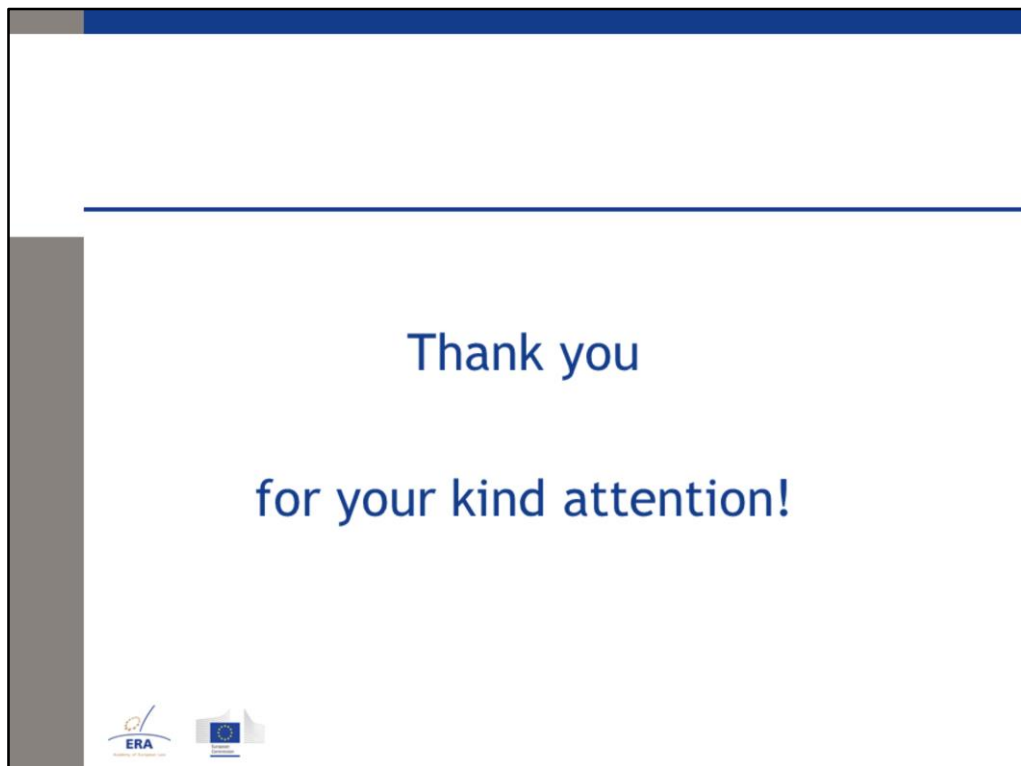
The request should be sent by registered post together with the file the case in the main proceedings to:

Registry of the Court of Justice, Rue du Fort Niedergrünwald,
2925 Luxembourg, LUXEMBOURG

Last but not least: "10" seems to be is a very good number of pages of the request.



Slide 14 gives some more practical advice.



This slide speaks for itself.