

Webinar for Prosecutors and Judges:

EU WASTE LEGISLATION AND COMBATING WASTE CRIME

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**The role of the national judge and prosecutor in enforcing
waste legislation and combating waste crimes -**

focus on preliminary references



The first slide shows the topic of the training module and speaks for itself...

Foreword

- The following presentation is meant to initiate an exchange of thoughts and experiences about EU waste law and combatting waste crime among legal practitioners from different MS (peer discussion)
- It cannot be avoided that it reflects my practical experience as an administrative judge working in the German judiciary.
- I hope the more general and less specific issues I picked up are relevant for your work as well. Feel free to add other topics of concern in the course of the presentation.

Looking forward to our discussion!

Matthias Keller



The foreword sets the scene by mentioning the core of continuous legal training which is the exchange of thoughts and experiences.

List of Topics

- Role of the National Judge
- Judicial Control
- Preliminary Reference



It is important for the audience to have a good insight in the structure of the upcoming presentation.

Role of the National Judge



This slide is a title.

The National Judge is (almost always the one and only)
Judge of the European Union!



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Daniel Stockman-Flickr: Paris 2010 Day 3-9

Why?



Rodin's *The Thinker* is meant as an eye catcher setting the path for self-reflection. The crucial point is to achieve the self-perception of the national judge as an EU judge. Therefore, the phenomenon should be thoroughly explained.

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 cornerstone of the EU judicial order can be found in Article 19 TEU.

The national judge plays a critical role in the enforcement of European Union (EU) law. As a member state of the EU, each country is required to ensure that EU law is effectively implemented and enforced within its borders. National judges are responsible for interpreting and applying EU law in their domestic courts, in accordance with the principles of EU law.

EU Judicial Order / Reflected in Article 174 TFEU:

„Save where jurisdiction is conferred
on the Court of Justice of the European Union by the Treaties,

disputes to which the Union is a party

shall not on that ground be excluded from the jurisdiction of the
courts or tribunals of the Member States.“

A maiore ad minus:

All other („weaker“) EU cases are within the MS jurisdiction.



Art. 174 TFEU reflects the overall principle that those EU cases, that are not conferred to the EU courts, are to be decided by the courts of the Member States. As a result, access to justice within the European Union is likely to be a combination of a right conferred by the EU law and the enforcement of this right by a national court.

EU Judicial Order / Cornerstone in 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



This slide recalls the core features of the preliminary reference enshrined in Article 267 TFEU. Among other things it is important for the national judge to know that he or she can (and is supposed to) assess the validity of an EU legal act. However, it is the monopoly of the CJEU to nullify the EU legal act.

The dark and the bright side of the legal pyramid



The current EU law system is far from being perfect. An audience of judges and prosecutors has experienced that in one or another way. Every practitioner knows (at least) one story where things went terribly wrong. Those stories - as sad as they may be - are an important help to start interesting discussions and to detect flaws in the system. Therefore, the idea is to look not only at the bright side of the matter.

Toolbox of the National Judge

(confronted with the « dark side » of the pyramid)

- **Preliminary reference (Article 267 TFEU):**
 „Is the X-Directive / Y-Regulation / Z-Decision of the EU valid ?”
 „Has the EU act to be interpreted in this or that way ?“
- **Supremacy of EU law:**
 „The EU legal act takes precedence over the XY-national act.“
 „Directives (sufficiently precise + unconditional) direct effect v. public entities
- **Consistent interpretation:**
 „In the light of EU law the domestic law is to be interpreted in this or that way“.






The “Toolbox of the National Judge” shows the main legal devices within the EU law system in order to deal with inconsistencies (“dark side”). The trias of “supremacy”, “consistent interpretation” and last but not least “preliminary reference” is presented in a very simple manner. This is necessary to be able to keep those three in mind when handling future cases.

The national judge acts as a mediator between EU law and national law. They are required to ensure that national law is consistent with EU law, and that national courts respect and enforce the rights and obligations established by EU law. National judges are also responsible for referring questions of interpretation and validity of EU law to the European Court of Justice (ECJ)

for a preliminary ruling when necessary. The ECJ's rulings provide guidance to national judges in applying EU law in their domestic courts. In addition to these roles, national judges also play an important role in enforcing EU law through their decisions in individual cases. National judges are responsible for ensuring that EU law is properly enforced and that individuals and businesses are held accountable for violating EU law. This helps to ensure the effectiveness and legitimacy of the EU's legal system and promotes compliance with EU law.

Preliminary reference (Article 267 TFEU) in a nutshell ...

Under the preliminary reference procedure the Court of Justice in Luxemburg provides the answers to the following questions that may arise before the national judge:

„Is the X-Directive / Y-Regulation / Z-Decision of the EU **valid** ?”

„Has the EU act to be **interpreted** in this or that way ?”



The reiterates the core of the preliminary reference under Article 267 TFEU which allows the national to ask questions of interpretation und validity.

Judicial Control



Is it (dangerous) waste?

Only then (criminal) sanctions may be possible.



Credit: www.iscrapapp.com/blog/how-to-get-scrap-metal-or-car-picked-up/

The problem of criminal sanctions when it comes to end-of-life vehicles is probably well known to the audience and therefore a good starting point for discussing the key notions of waste law.

The Judge and the Waste (I)



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National judge contemplating:

“I would be more than happy
if I could leave the difficult classification of waste or non
non-waste to the experts of the National Waste Authority.”
However, this contemplation does not lead very far ...

“Waste” is a legal concept like others!

(“administrative act”, “contract”, “property” etc.)

The rule of law requires that the (criminal) courts have the **ultimate say** and therefore exercise (full) judicial control and not a limited scrutiny (cf. Article 47 EU Charter).



It should be made crystal clear that the courts have the ultimate say when it comes to decide the question whether something is waste or not.

Despite the fact that a directive does not have immediate legal effect in national law, it is still binding upon each member state to which it is addressed. This means that each member state must take all necessary measures to ensure that the objectives set out in the directive are achieved within the specified time frame. In practice, this means that each member state must adopt national laws, regulations or administrative provisions to ensure that the goals and objectives set out in the directive are achieved. The member state has discretion as to how it implements the directive's

requirements, but it must do so in a way that achieves the objectives set out in the directive.

„The Judge and the Waste (II)“



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Judge Hamlet still contemplating,
but now drawing the right conclusions:

**“Whether or not a substance is discarded as waste, and,
when waste ceases to be waste
is determined on a case-by-case basis
and the interpretation of the law
is ultimately a matter for the courts.”**

(Cf. Correspondents' Guidelines No 9, Intr. Nr. 5)



There is no room for a margin of appreciation by the public authority. Here the helpful role of guidelines as a “source of inspiration” may be mentioned. Experience shows that judges focus very much on legal texts and overlook other information for a better understanding of the matter.

The Judge and the Waste (III)



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Our judge Hamlet cannot stop contemplating,
but now about the course of time ...

To classify a substance as „waste or non-waste“
in a convincing way necessitates - among other
more specific tests - a very good look at
**the given history and
the probable future of the object.**



Used vehicle or waste vehicle (=„ELV“ end-of life vehicle) ?



A case-by-case analysis should focus on the history of a product and its probable future. Then, in many cases, common sense will show the path whether a product is to be considered as waste or not. Participants should be encouraged to use a preliminary common-sense-test and then check with the details of the definition.

■ What is „waste“ ?



Definition of Waste in Art. 3 Nr. 1 WFD

(Cf. Art. 2 Nr.1 of the Basel Convention)

Article 3 Nr.1 WFD defines (like Art. 2 Nr.1 of the Basel Convention)

waste as any substance or object which the holder

- discards
- or intends to discard
- or is required to discard.

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Please note : There are **subjective** (“intends to ...”) and **objective** elements (“is required to ...”) within the definition.

“Discarding” has a broad meaning and to be understood in a way that is consistent with the aim (the “τέλος”) of the WFD.



Here, the precise legal definition of waste is introduced. It should be highlighted and explained that there are subjective and objective elements within the definition.

CJEU defining waste (I): „holder’s actions“ and „discard“

“The classification of a substance or object as waste is to be inferred primarily from the **holder’s actions** and the meaning of the term ‘**discard**’.”

C-188/07, *Commune de Mesquer*, para. 53.

C-263/05, *Commission v Italy*, para. 32.



The key words “holder’s action” and “to discard” should be highlighted.

CJEU defining waste (II): „discard“

- “The term ‘discard’ must be interpreted ...

... in the light of the aim of the Directive (...) which (...) consists in the protection of human health and the environment against harmful effects (...)

having regard to Article 191(2) TFEU, which provides that European Union policy on the environment is to aim at a high level of protection and is to be based, in particular, on the precautionary principle and the principle that preventive action should be taken.

It follows that the term ‘discard’, and therefore the concept of ‘waste’ cannot be interpreted restrictively.”

C-188/07, *Commune de Mesquer*, para. 38 und 39.



The CJEU has made clear that the legal notion of “waste” should not be interpreted restrictively.

Legal trap:

“unexcavated contaminated soil”



Art. 2 Nr. 1 (b) WFD

The following shall be **excluded from the scope**

“... land (in situ) including ...
unexcavated contaminated soil ...”

Here is the legal trap:

Former CJEU Case law took a different (!) approach in oil spill cases:

Van de Walle, C-1/03 from 2004
Commune de Mesquer, C-188/07 from 2008



This slide is meant to initiate a legal discussion. Is the jurisprudence established by two famous oil spill cases still valid? The wording of the WFD excludes “unexcavated contaminated soil”! Quid iuris?

If it is relevant for your case,

whether the „unexcavated contaminated soil”
is within the scope of the Waste Framework Directive,

it is a question of legal interpretation
that you may or are obliged to **ask the Court of Justice.**



The mentioned problem of the “oil spill cases” may serve as a good example on when to launch a preliminary reference on the interpretation of the scope of the WFD.

■ Preliminary reference



Again: 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



The preliminary reference procedure in EU law allows national courts to seek guidance from the European Court of Justice on questions of interpretation or validity of EU law. The purpose of this procedure is to ensure the uniform

interpretation and application of EU law throughout the EU, and to promote the coherence of the EU's legal system.

First: Read the (new) Recommendations !!!

Official Journal 2019/C 380/01 and Website of the CJEU:

**“Recommendations
to national courts and tribunals,
in relation to the initiation of preliminary ruling proceedings”
from 08 November 2019**

Footnote:

The above recommendations are comprehensive.

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



The Recommendation on preliminary questions (2019/C 380/01) provides guidance to national courts on how to ensure the effective and uniform application of EU law through the preliminary reference procedure. The recommendation highlights the importance of the preliminary reference procedure in promoting the coherence and effectiveness of the EU's legal system, and provides practical guidance to national courts on how to make effective use of the procedure.

Judges and General Advocates at the Court of Justice of the European Union



Let us to put ourselves in their shoes and discuss what they may expect from us when we ask them questions of **validity and/or interpretation** concerning EU law within a preliminary reference under Art. 267 TFEU.



The national judge has a “**right to refer**” for a preliminary ruling ...

Under Art 267 TFEU a national court “**may**” ask the CJEU to give a preliminary ruling if it considers that a such a decision is necessary.

This wide discretion to refer is also a right **that cannot be taken away by national procedural law.**

Cartesio, C-210/06 Rn. 88:

“Article 267 TFEU (then 234 EC) gives national courts the right - and, where appropriate, imposes on them the obligation - to make a reference for a preliminary ruling, as soon as the national court perceives either of its own motion or at the request of the parties that the substance of the dispute raises one of the points referred to in the first paragraph of Article 234 EC.

It follows that national courts have the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of Community law, or consideration of their validity, necessitating a decision on their part.”



The procedure is initiated when a national court is faced with a case that involves questions of EU law, but is unsure of the correct interpretation or application of that law. The national court can then refer these questions to the ECJ for a preliminary ruling.

The national judge may have “**duty to refer**” for a preliminary ruling ...

There is a “**duty to refer**”

- when courts decide their cases at **last instance**
(*Parfums Christian Dior*, C-337/95, para 26 / *CILFIT*)
- and for all courts deciding on the **validity** of EU law
(*Foto-Frost*, 314/85)



It is not mandatory for a national court to make a preliminary reference to the European Court of Justice. The national court has discretion to decide whether to refer a question of EU law to the ECJ for a preliminary ruling. However, in certain circumstances, the national court may be obliged to refer a question of EU law to the ECJ.

The *CILFIT* doctrine of “acte clair” and “acte éclairé”

(= an exemption from the duty to refer for which the national court has to give reasons)

Under the *CILFIT* doctrine” (283/81) courts are relieved from the duty to refer in **three situations** ...

- ❖ “irrelevance”: the question is irrelevant for the resolution of the dispute
- ❖ “acte éclairé”: the provision of EU law in question has already been interpreted by the Court
- ❖ “acte clair”: the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt.

Note:

The *CILFIT* doctrine was lately “confirmed but updated”

by an EUCJ judgment from 6 Oct 2021 in the case *Consorzio Italian Management C-561/19*:

A **statement of reasons** must show why the court saw the *Cilfit* criteria fulfilled ... (*Köbler* liability ?).



According to the doctrine of "consistent interpretation", national courts have a duty to ensure the uniform application and interpretation of EU law. If a national court is faced with a question of EU law that has not yet been resolved by the ECJ, and the correct interpretation of EU law is essential to the outcome of the case, the national court may be obliged to make a preliminary reference to the ECJ. This duty arises when the national court is the final court of appeal or if a decision is so apparent that it leaves no scope for reasonable doubt.

**Sometimes it is not clear
whether there is „acte clair“!**
C-683/19 (pending)



Credit: Spain's news

- In the view of the **Spanish Supreme Court** a certain EU law requirement constituted an ‘acte clair’, which meant that no request for a preliminary ruling was necessary.
- However, the **Spanish Constitutional Court** set aside that judgment. It held that the Supreme Court had erred in finding the existence of ‘acte clair’ and, as such, infringed the constitutional rights in so far as it had declared domestic law to be incompatible with EU law without having first referred a request for a preliminary ruling to the Court.
- Following that judgment, the **Supreme Court** referred the a request for a preliminary ruling to **Court of Justice**.

**Does the Constitutional Court in your Member State exert a similar
constitutional review on the “duty to refer” to the CJEU?**

Internet: LACCHI, Review by Constitutional Courts of the Obligation of National Courts of Last Instance to Refer a Preliminary Question (...), German Law Journal, Vol. 16 No. 06 (2015) 1663.

See now in a broader context:

CJEU from 6 Oct 2021, *Consortio* C-561/19

(not to forget AG Bobek’s eloquent Opinion!)



Practical advice



The essential elements of a request for a preliminary ruling

(cf. Annex of the Recommendations,
Official Journal 2019/C 380/01)



The key points of the recommendation are as follows:

1. The national courts should consider making a preliminary reference whenever they are unsure about the correct interpretation or application of EU law.
2. The national courts should frame their questions in a clear and precise manner that allows the ECJ to provide a useful and effective response.
3. The national courts should take into account the relevant EU law and case law when formulating their questions, and should avoid asking hypothetical or abstract

questions.

4.The national courts should provide a clear and complete factual background to the case, including any relevant national law or case law.

5.The national courts should ensure that the parties to the case have the

opportunity to express their views on the questions to be referred, and should give

reasons for their decision to refer a question to the ECJ.

1. The referring court or tribunal

A request for a preliminary ruling must specify the referring court or tribunal and, where appropriate, the chamber or formation of the court or tribunal making the reference, and must include full contact details for that court or tribunal, in order to facilitate subsequent contact between that court or tribunal and the Court of Justice.

(cf. Annex of the Recommendations, 2019/C 380/01 para. 3 to 7)



A focus should be on the mentioning of the “full contact details”. The digital account “e-curia”, which is presented later, may be already mentioned here for a first time.

2. The parties to the main proceedings and their representatives

Where it proves necessary for the protection of personal data, **the referring court or tribunal is to anonymise the request for a preliminary ruling** and, to that end, must redact the name of natural persons referred to in the request or concerned by the dispute in the main proceedings and all data likely to enable them to be identified.

(cf. Annex of the Recommendations, 2019/C 380/01 para. 21/22)



Here the question of protection of personal data should be discussed in order to raise the awareness for anonymising the request for a preliminary ruling.

3. 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)



The slide describes the basis for a good request.

4. 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)



It should be pointed out that national provisions have to be cited in their full version and jurisprudence by using ECLI.

5. 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)



The grounds for the reference form an integral part of the request.

6. 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)



Special attention should be paid to the proper formulation of the questions referred to the CJEU

7. Possible need for specific treatment

Lastly, where the referring court or tribunal considers that the request it is submitting to the Court 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.)



National judges should be aware of applying for a special treatment if needed.

Formal aspects of the request for a preliminary ruling (I)

Requests for a preliminary ruling must be submitted in a **form that facilitates electronic processing by the Court** and, in particular, that enables them to be scanned and optical character recognition to be applied. To that end:

- the request should be typed on **white, unlined, A4-size paper**,
- the text should be in a **commonly used font** (such as Times New Roman, Courier or Arial), in at least 12 point in the body of the text and at least 10 point in any footnotes, with 1,5 line spacing and horizontal and vertical margins of at least 2,5 cm (above, below, at the left and at the right of the page), and
- all the pages of the request, and the paragraphs they contain, should be **numbered consecutively**.



The formal aspects speak for themselves.

Formal aspects of the request for a preliminary ruling (II)

It is to be sent to the Court Registry, with the file of the case in the main proceedings, either by email

DDP-GreffeCour@curia.europa.eu

or by registered post addressed to the

Registry of the Court of Justice
Rue du Fort Niedergrünewald,
L-2925 Luxembourg, LUXEMBOURG.

In the event of a request for the **expedited procedure** or the urgent procedure to be applied, it is recommended that email be the preferred method of sending the request for a preliminary ruling and the editable version of that request..



The official contact data of the CJEU may be helpful for the practitioners.

Modern times ...

Or even more in the
modern e-Justice way ...

Ever heard of **e-Curia application ??**

(My personal experience in the case C-112/19
is quite good)



Here “e-Curia” is introduced.

Transmission channels recommended by the Court

(1) Lodging of the request for a preliminary ruling
(or of other relevant documents linked to that request):

- Signed original of the request for a preliminary ruling (or of the other documents linked to that request): to be sent via **the e-Curia application**. The rules on access to that application, which is free of charge and secure, and the conditions of use of **e-Curia**, are available here:

– **https://curia.europa.eu/jcms/jcms/P_78957/en/**

- Editable version of the request for a preliminary ruling (or of the other documents linked to it):

DDP-GreffeCour@curia.europa.eu



It is explained how the request may reach the Court by e-Curia.

Last but not least ...

(2) Transmission of the **final decision of the referring court** or tribunal

(anonymised, if necessary,
including for the purposes of being placed online),

following the Court's decision on the request for a preliminary ruling:

Follow-up-DDP@curia.europa.eu



The follow up should be discussed. It is in this phase that the CJEU has to be informed about the final decision taken by the referring court.

Thank you
for your kind attention!

