

ERA Workshop for National Judges:
How to Handle Court Proceedings Invoking
Non-Compliance with the EU Industrial Emissions Directive (IED)

Preliminary reference procedure in context: Invoking non-compliance with the IED

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

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 corner stone of the EU judicial order can be found in Article 19 TEU. It reflects the overall principle that those EU cases, that are not conferred to the EU courts, have to be decided by the courts of the Member States.

Access to Justice / Effective Legal Protection

EU Charta of Fundamental Rights / Chapter VI / Justice
Article 47: Right to an effective remedy and to a fair trial

“Everyone

whose (EU) rights and freedoms (...) are violated

has the right to an effective remedy before a tribunal (...).”

Footnote

Additionally: General Principles of EU law relying on Art. 6, 13 ECHR



The guarantee of access to justice is enshrined in Art. 47 of the EU Charter of Fundamental Rights.

Access to Justice

Latin legal maxim:

Ubi ius - ibi remedium est!

My translation

in the light of Article 19 TEU and Article 47 EU Charta :

**Where there is an (EU) right or freedom -
there must be a remedy (at least by the MS)!**



It is important for the audience to have an easy approach to a complicated topic. Existing knowledge is always a good starting point. The judges may be familiar with the legal maxim “ubi ius – ibi remedium”. This maxim can be translated into the EU law context.

Access to Justice / Preliminary References to the CJEU

Article 267 TFEU

- enables any domestic judge (not the parties!) to ask the CJEU on questions of EU law before the decision has to be taken.
- confers jurisdiction to the CJEU to give **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 should) assess the correct interpretation and the validity of an EU legal act. However, it is the monopoly of the CJEU to interpret or nullify the EU legal act.



The current EU law system is far from being perfect. An audience of judges 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. So the idea is to look not only at the bright side of the matter.

Discussion:

Have you experienced both sides of the legal pyramid?
What could be done better?



The floor is open to critical remarks of the audience.

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 as regards, for example, 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 the national law is to be interpreted in this or that way“.
- **An EU Directive (like the IED) may have “direct effect”:**
„A public entity should not win a case by relying on its own illegal behaviour,
which are transposition deficits.
The claimant should win the case and be able to require the application of
those provisions which are unconditional and sufficiently precise.“




The “Toolbox of the National Judge” shows the main legal devices within the EU law system in order to deal with its inconsistencies (“dark side”).

The trias of “preliminary reference”, “supremacy” and “consistent interpretation” is presented in a simple but easy-to-remember manner.

Additionally, the attention is drawn to the problem that EU Directives may have “direct effect”.

Practitioner's Corner / Access to Justice
„The non-compliance with the IED:
A question to be raised ex officio?

- Scenario:

The neighbour brings an action against a permit for the operation of a coal fired power plant.

The judge of Memberland studies the files and discovers that the permit is not in compliance with the emission standards of the IED.

Can he or she raise this question ex officio?



The following slides (slide 10 to 13) are called “practitioner’s corner” and are meant to reflect the challenges when applying EU law. The small case is designed to demonstrate that procedural law in the EU is not harmonised. The crucial question is whether “non-compliance with the IED” is a legal argument that has to be raised by the parties or can be raised by the judge on his or her own motion.

Practitioner's Corner / Access to Justice
„The non-compliance with the IED: A question to be
raised 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 Charter of Fundamental Rights and
General Principles of EU law relying on Art. 6, 13 of the
European Convention of Human Rights



The EU law framework (Art. 19 (1) TEU and Art.47 EU Charter of Fundamental Rights) does not give an answer. When it comes to judicial review, a diversity of approaches is in conformity with EU law (procedural autonomy of the MS).

Practitioner's Corner / Access to Justice
„The non-compliance with the IED:
A question to be raised 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 -)



However, the principles of equivalence and effectiveness must be respected.

„The non-compliance with the IED:

A question to be raised ex officio?

The principle of equivalence:

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

In Germany it leads to the result that the question of a „non-compliance with the IED“ must be raised ex officio by the administrative court like any other question of fact or 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“.

All in all : Not raising the question ex officio seems to be possible under the „procedural autonomy“ principle.

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



As a rule, the principle of effectiveness does not require an ex officio assessment by the judge.

Comparative administrative law may gives us more context on „ex officio review“:



- Sweden and Italy may serve as an example for two different approaches.



- In the Swedish system of a strict *ex officio* review it is the task of the ordinary or “technical” judge to explore and establish the relevant facts and provisions of law.



- In Italy it is more or less up to the parties and their lawyers to raise the relevant **grounds for the appeal** against the challenged administrative decision.



Experience shows that training in EU law is more interesting and more successful when national contexts are not left out. Therefore, slide 14 introduces to different approaches of administrative justice, drawn from Sweden (strict ex officio review) and Italy (strict non ex officio review).

However, no rule without exception ...



- In countries, like Italy, where the claimant has to present the “grounds of the appeal” (in French: *les moyens*) certain aspects of the case, like the observance of the rules on the jurisdiction of the court, are reviewed ex officio, in French: *les moyens d’office*.
- These rules are deemed to be in the public interest. It will be interesting to see whether national courts without an *ex-officio*-system will nevertheless develop an *ex-officio*-review by analogy in cases where there is a **manifest breach of EU environmental law (like IED) and therefore an important public interest involved**.
- The principle of effectiveness (see above) would be a good starting point for such a turn to a stricter scrutiny.



Many colleagues are more or less familiar with the French system of administrative justice. There, the grounds of appeal (*les moyens*) are put in the centre of the system. They define the scope of control exercised by administrative courts. The notion of “*moyens d’office*” (grounds to be raised ex officio) may be a good point of discussion whether in some countries (e.g. Italy) there should be a stricter ex officio scrutiny in order to comply with the principle of effectiveness when applying EU law.

The IED - challenged in legal proceedings



The slide is a title.

Typical concerns / complaints ...
... raised in legal proceedings

EU competences	(ultra vires?)
Member State action	(missing the EU mandate?)
Restrictions of fundamental rights	(justified or not?)
Weighing up	(benefit - cost - analysis ok?)



Here, some typical complaints are listed.

Understanding the IED

by finding its legal basis (1)

The **preamble** (between title and enacting terms)
indicates the answer. It consists of

citations (“Having regard...”) and
recitals (“Whereas:”) .

The **citations indicate**, first of all, the (general) **legal basis** for the secondary acts in the primary acts (e.g. treaties).

The preamble of the IED starts with the following citation :

“Having regard to the Treaty on the Functioning of the
European Union, and in particular Article 192(1) thereof “



Understanding the IED means - first of all – to find its legal basis. The legal basis can be found within the citations of the legal act.

Understanding IED

by finding its legal basis (2)

The legal base is Art. 192 TFEU!

The IED must be compatible with it:

A question which can be assessed by the national judge.

If she or he wants to nullify the act that can only be done by a preliminary reference to the CJEU (Art. 267 TFEU „validity“).

Art. 192 (1) TFEU provides:

The EP and the Council (...) shall decide what action is to be taken by the Union in order to achieve

“the objectives referred to in Article 191.”



Art. 192 TFEU being the legal basis for the IED leads to the objectives in Article 191 (1) TFEU.

Understanding the IED

by understanding its underlying objectives

Article 191 (1) TFEU

Union policy on the environment shall 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**.



Here the participants should recall the objectives enshrined in Article 191 (1) TFEU.

Understanding IED

by its underlying principles (1 to 5)

Art. 191 (2) TFEU: Union policy on the environment shall aim at a

high level of protection (1)

taking into account the diversity of situations in the various regions of the Union.
It shall be based on the

precautionary principle (2)

and on the principles that

preventive action should be taken, (3)

that environmental damage should as a priority

be rectified at source (4)

and that the

polluter should pay. (5)



The underlying (five) principles are the core of environmental law.

(1) High level of protection:

Is it a legal principle?

CJEU mentions it like a legal principle / requirement:

Case C-284 /95, judgment of 14 July 1998, „Safety Hi-Tech Srl“

“(49) (...) the Treaty (...)

requires Community policy in environmental matters
to aim for a high level of protection,

such a level of protection (...) does not necessarily have to be the
highest that is technically possible.”

Context: Member States can introduce more stringent protective measures.

■



The “high level of protection” is handled by the CJEU as a legal principle.

(2) Precautionary principle

Principle derived and translated from German “Vorsorgeprinzip”.
Precaution is “caution in advance” from Latin prae-cavēre:

“better save than sorry”

Legal function:

The precautionary principle legitimises **risk management**.

Action against practices should be taken even if **the knowledge base is weak** and leaves it **uncertain** whether those practices cause harm to human health and/or environment .

“Cause-effect-relationship” cannot fully be established.

Example: Ban on British beef:

The Mad Cow Disease (BSE) is said to cause a human disease (Creutzfeldt-Jakob).



The “precautionary principle” is an important feature of risk management within environmental law.

(3) Preventive action should be taken (Prevention)

A preventive action is an action of stopping an event or practice that (according to a solid knowledge base) **may cause harm**.

The English word “prevention” is based on the French word “prévention” which is based on Late Latin *praeventionem* (nominative *praeventio*): “**action of anticipating**” (to avoid harm).

Legal meaning:

Prevention is avoidance of practices that are
known to cause harm.

(“not only risk but danger management”)



Prevention is not only risk but “danger management”.

(3) Prevention	Precaution, see (2)
▪ Knowledge based ▪ Danger ▪ Scientific knowledge counts	▪ Uncertainty ▪ Risk ▪ Social acceptance is taken into account
(4) Damage should be rectified at the source	(5) Polluter-pays-principle
 	

Here a comparison is made between “prevention” and “precaution”.

Understanding IED by the context of the EU's **integrated preventive approach**

IED is a part of the EU environmental policy
that comprises human activities and their consequences for the **environment**.

This **integrated preventive approach** means that the **permits** must take into account the whole environmental performance of the plant, covering e.g.

- emissions to the air,
- water and land,
- generation of waste ,
- use of raw materials,
- energy efficiency,
- noise,
- prevention of accidents.



It is important to know that the IED follows an integrated preventive approach.
Permits under the IED must take into account the whole environmental
performance of the plant.

Understanding IED
by the context of the EU's *integrated preventive approach*

The broad scope of the permit ...

... leads to a broad scope of legal proceedings.



Permits under the IED cover a wide range of questions. If legal proceedings are brought it is the court who has to deal with this wide range of questions as well.

Article 25 (1) IED : Access to justice

1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to Article 24 when one of the following conditions is met:

- (a) they have a sufficient interest;
- (b) they maintain the impairment of a right,

where administrative procedural law of a Member State requires this as a precondition.



The access to justice provision in Art. 25 (1) IED is to be explained as a transposition of the Aarhus Convention (Art. 9) by the EU

Article 25 (2) + (3) IED : Access to justice

- 2. Member States shall determine at what stage the decisions, acts or omissions may be challenged.
- 3. What constitutes a sufficient interest and impairment of a right shall be determined by Member States, consistently with the objective of giving the public concerned wide access to justice.



Art. 25 (2) and (3) gives the Member States some discretion when regulating their administrative justice system. However, domestic rules must hamper the objective of giving the public concerned wide access to justice.

Article 25 (4) + (5) IED : Access to justice

- 4. Paragraphs 1, 2 and 3 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

- 5. Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.



Art. 25 (4) and (5) require what the author likes to call “green due process”.

■ Preliminary reference



The slide is a title.

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



This slide recalls again Article 267 TFEU. It should be reiterated that the national judge may launch preliminary rulings on the interpretation or the validity of EU normative acts.

Preparation (II):

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 “Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings” (revised: 2018/C 257/01) are introduced as a very helpful piece of comprehensive information. Experience shows that judges focus very much on legal texts and overlook other information.

Preparation (III): 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.“



It is indeed advisable to hear the parties before launching a preliminary ruling.

Preliminary question (Just an idea ...)

Is Article xy of the IED

(e.g. the baseline report under Art 22 (2) IED)

be interpreted in a way that its provisions can be a legal ground to deny the authorization of a project that is in conformity with national law

(which has not transposed Art. 22 (2) IED)

Footnote:

According to my knowledge the problem of reversed direct effect (against the citizen) necessitates clarification.



An example of a preliminary question on “reverse direct effect”.

Thank you ...

... for your kind attention!

Matthias Keller



This last slide speaks for itself.