

Seminar for prosecutors and judges:

EU LEGISLATION WILDLIFE AND COMBATING ASSOCIATED CRIME Febr. 7, 2024

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Administrative Court Aachen

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**



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



Setting the scene ...



Illicit Trafficking of Flora and Fauna as a Challenge for the Judiciary

Timber



Copyright: www.traffic.org

Good expertise (origin of timber):
Thünen-Institut (public entity)
Bundesallee 50
38116 Braunschweig



Wildlife / Rhinos (Appendix I (II))
Rhino products, especially

Rhino horns



Copyright: www.traffic.org



Cases of illicit trafficking have an international, european and national legal context:



Copyright: www.era.int



We have (at least)
three layers of law ... (=juggling with three balls)

- **CITES (Washington Convention)**
- **Council Regulation (EC) No 338/97**
 - = Basic Regulation
 - others: Implementing Regulation
 - Permit Regulation
 - Suspension Regulation
- **National law**



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The legal framework within which European prosecutors and judges operate is very complex and multi-layered, comprising national laws, EU Regulations, and international conventions like CITES (the Washington Convention). Understanding the origins and legal history of CITES is crucial for better comprehending the aim of these legal acts, as European law is implemented law.

Law enforcement through administrative law or criminal law? Both!



Administrative Law

CITES and the Council Regulation (EC) No 338/97 follow a classical **administrative concept of regulation**, where you may need (import, export, re-export)

„permits and certificates“

(cf. Art. 4,5,10 Regulation No 338/97)



Environmental law enforcement can be achieved through both administrative and criminal law. It should be seen as a toolbox, as Professor Faure mentioned. In Germany, administrative judges review permits, while criminal judges deal with criminal offences. This situation is similar to that of driving licences, where both administrative and criminal judges are involved. Coordination between the criminal and administrative aspects can be challenging, but is essential for effective enforcement.

Law enforcement through administrative law or criminal law? Both!



Criminal Law

CITES and the Council Regulation (EC) No 338/97 provide for that the Parties / Member States „shall take“ appropriate measures to enforce the provisions and

impose (criminal) sanctions.

(cf. Art. VIII CITES / Art. 16 Reg. No 338/97)



Environmental law enforcement can be achieved through both administrative and criminal law. It should be seen as a toolbox, as Professor Faure mentioned. In Germany, administrative judges review permits, while criminal judges deal with criminal offences. This situation is similar to that of driving licences, where both administrative and criminal judges are involved. Coordination between the criminal and administrative aspects can be challenging, but is essential for effective enforcement.

Culture shock (?) when being confronted with real judicial procedures and their actors ...



In her 2015 analysis Angela Bergschmidt (Thünen Institut, Braunschweig, Germany) tried to identify problems that occur when violations of animal legislation are put to court. Public veterinarians answered to her .

Here are some of the critical answers:

“High number of criminal proceedings that are terminated without any conviction”

“ Very long and cumbersome procedure”

“Punishments are too mild ”

“ Prosecutors and judges seem to have little interest in animal welfare”

“Lack of knowledge of specific animal protection law”

“not enough staff / overload of work in the judiciary”

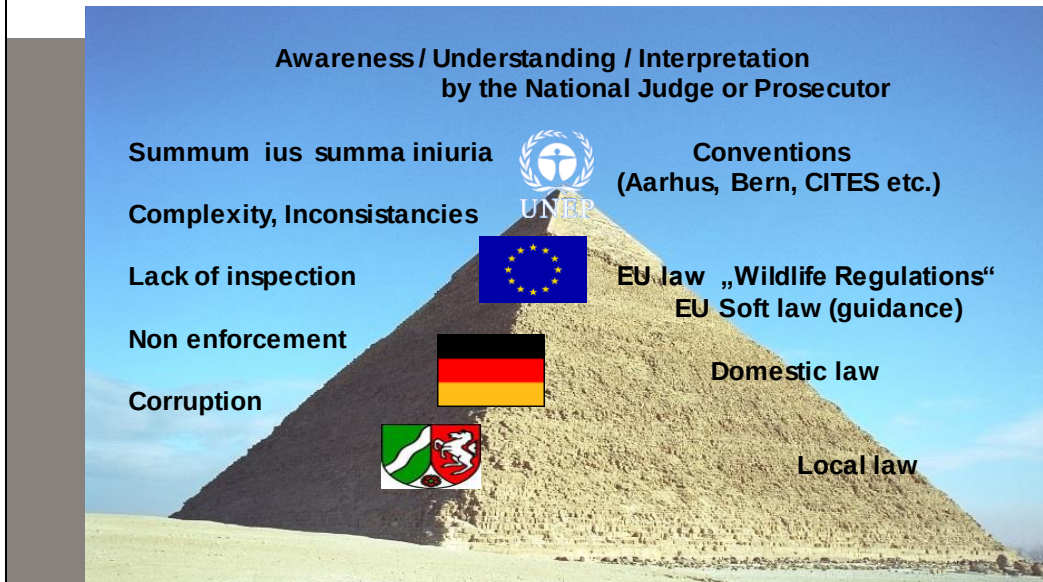
Interestingly enough for me it was said that the administrative judge showed interest in the matter but seemed to be “weltfremd” (out of this world) !



Understanding the structure...



The dark and the bright side of the legal pyramid



Aarhus Convention (AC):

3 pillars coming „directly und indirectly from above“

1. **Public access to information** about the environment
2. **Public participation** in certain environmentally relevant decisions
3. **Access to courts of law** or tribunals in environmental matters.



The Aarhus Convention ensures generous access to justice in environmental matters, which is particularly significant for administrative judges. It starts at the international level, extends to the European level, and then to the German level.

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 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 an internationale law
the domestic law is to be interpreted in this or that way“.



The judge's or prosecutor's toolbox contains three essential elements. First, the preliminary reference under Article 267 of the Treaty on the Functioning of the European Union allows questions of interpretation and validity to be raised. Judges often forget that they can ask questions of validity if they believe that a piece of European legislation is not in line with European fundamental rights. Secondly, consistent interpretation is a favourite tool to ensure that the text can be interpreted in a way that is consistent with EU law. Finally, there's the supremacy of EU law, which is a clear principle, although open to debate. These tools help practitioners to apply EU law effectively, especially in sensitive areas such as immigration and environmental law, which often involve political compromises.

The role of the national judge ...



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



Paris 2010- Le penseur CC BY-SA 2.0.Credit:
Daniel Stockman-Flickr: Paris 2010 Day 3-9

Why?



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 national judge is almost always the only judge of the European Union, as laid down in Article 19(1) of the Treaty on European Union. The Court of Justice has jurisdiction in only a few cases, but in all other EU cases jurisdiction is conferred to the Member States. It's the Member States and their judiciaries that provide effective legal protection in the areas covered by Union law.

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.**



In a recent judgment last June, in the case of Commission v Poland, Article 19(1), interpreted in the light of the Charter of Fundamental Rights, Article 47 was highlighted. The judgment emphasised the direct effect of article 19(1). There was a considerable debate in Poland at the time, with some arguing that the Court of Justice was overstepping its powers, since justice is a national matter. However, when the judiciary applies European law, it is subject to European law and the safeguards provided by it. If the judiciary decides on a matter that has nothing to do with European law, it falls into a different legal category.

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



First things first: Read the 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.



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.”



In judicial practice, a recurring question concerns the scenario where a judge considers it appropriate to transfer a case to Luxembourg, while the higher instance, such as the Higher Administrative Court, may have a different opinion. In this context, it is crucial to underline the prerogative of the judge. Irrespective of the position of the higher court, it remains within the judge's power to refer a case for a preliminary ruling.

This judicial prerogative parallels the judge's right to take evidence. Just as the higher court cannot interfere with the judge's decision to admit certain evidence, neither can it interfere with the judge's discretion to refer a case for a preliminary ruling.

Even in the event of an appeal by the parties concerned, if the higher court were to argue against referring the case to the Court of Justice in Luxembourg, such an argument would be contrary to established European law, as confirmed in the *Cartesio* judgment. Consequently, the right to refer a case for a preliminary ruling remains intact.

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)



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 “confirmed but updated”

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

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



The system has been updated to prevent abuse. An example of this is the Italian case, *Conorzio Italian Management*. The court confirmed the importance of these signs, but emphasised the need to prevent their misuse.

When a court acts as a court of last instance, its interpretation of EU law should be clear. The Court is therefore required to give reasons for its interpretation of a matter as irrelevant, “acte clair” or “acte éclairé”. This requirement is a compromise to ensure that the court's decision is justified and transparent. The court must clearly state why it considers that the criteria for its decision have been met.

In addition, there is the underlying idea of *Köbler* liability. Even the judiciary can create state liability if judges ignore their obligation to make a preliminary reference or deny the applicability of European law. In such cases, the State may be held liable, with financial consequences.

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



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 in a broader context:

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

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



In Germany and Spain as examples, it is important for the judiciary to ensure that the provisions on preliminary references are properly applied. In these countries, the constitutional courts oversee the correct application of these provisions. If a judge decides not to make a preliminary reference, he or she effectively denies the parties access to the so-called "lawful judge". The lawful judge, according to the obligation to refer, resides in Luxembourg. By deciding to deal with the case independently, the judge prevents the case from reaching the lawful judge in Luxembourg.

Action of undermining the duty to refer poses a significant challenge within the EU judicial system, as the parties involved cannot appeal to the Court of Justice. They have to navigate their way through the national judiciary, with the help of the judge responsible for the preliminary reference. Thus, failure to comply with this procedure may lead to the intervention of the constitutional court. In Germany and Spain, constitutional courts can declare such decisions unconstitutional if they result in the case not being referred to the Court of Justice in Luxembourg.

Practical advice



The essential elements of a request for a preliminary ruling

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



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)



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)



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)



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)



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)



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)



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.)



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**.



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-GrefeCour@curia.europa.eu

or by registered post addressed to the

Registry of the Court of Justice

Rue du Fort Niedergrünwald,

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..



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)



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-GrefeCour@curia.europa.eu



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



Thank you
for your kind attention!

