

Webinar for prosecutors and judges:

EU WASTE LEGISLATION AND PROTECTION OF THE ENVIRONMENT THROUGH CRIMINAL LAW

Focus on combating waste crime

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Webinar

Emphasis on

preliminary ruling procedure

when enforcing EU instruments for combatting waste crime



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.

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:

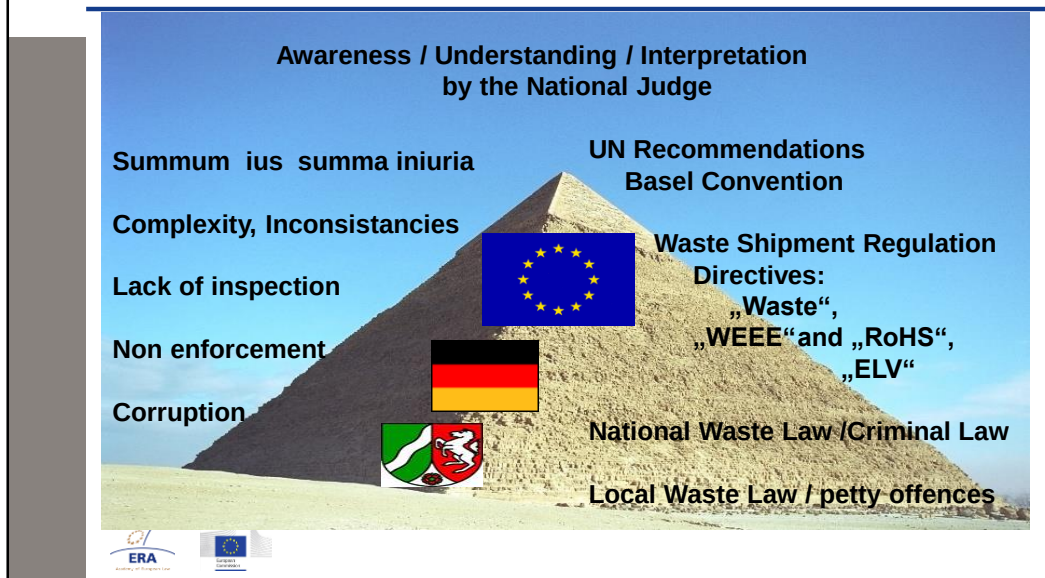
The Court of Justice of the European Union
shall have jurisdiction to give MS Courts
preliminary rulings concerning:

- (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.

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:

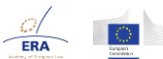
„Is the X-Directive / Y-Regulation / Z-Decision of the EU **valid** ?”

„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



This slide is a title.

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.

„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“ ?



A title.

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



A title.

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



Article 267 TFEU is to be mentioned again.

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 “Recommendations to national courts and tribunals” by the CJEU are often overlooked by national practitioners and therefore should be presented in extenso.

The essential elements of a request for a preliminary ruling

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



Especially the Recommendations' annex gives a useful vademecum.

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 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..



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-GrefeCour@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!



The slide speaks for itself.