

ERA Workshop for Judges and Prosecutors:
Introduction to EU Environmental Law

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**Introduction to EU Environmental Law -
Focus on the role of national judges and prosecutors**

EU toolbox for national judges and prosecutors



Foreword

- The following presentation is meant to initiate an exchange of thoughts and experiences about EU Nature Protection Law 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



List of topics:

- Role of the the national judge
- Access to justice
- Preliminary reference (interpretation/validity)
- Supremacy of EU law
- Principles of equivalence and effectiveness



First of all, the national judges should be aware of their important role to the architecture of the European Union.

Supremacy of EU law is well established, but in many cases a matter of discussion.

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 relieson the cooperation between national and EU judges

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 authority of the Court of Justice is limited to those cases to which the authority is conferred by the treaties. So, there are a lot of cases that are not conferred to the Court of Justice.

Therefore, all the other cases involving EU law are left to the national judges.

The specific character of the EU judicial order can be seen 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.



The national judge communicates with the CJEU by the preliminary reference procedure under 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



So, in the preliminary procedure, the national judge may ask the Court of Justice about interpretation of the treaties and even ask if a piece of European law is valid (for example, if believes that it is infringing a human right).

To what concerns validity, actually, the national judges have no competency to say something about validity.

Access to Justice



Where to start when looking at green access to justice?



Source: <https://www.iucn.org/fr/node/19127>



The best starting point is the

Aarhus Convention

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



The Aarhus Convention is an instrument of the International Law, but all the MS as well as the EU itself are parties to the Aarhus Convention.

And those three are the three pillars of the Aarhus Convention.

All levels may be checked by the Aarhus Convention Compliance Committee.

The „Spirit of Aarhus“ (Preamble, para. 8):

... citizens (and NGOs) must have access to information,
be entitled to participate in decision-making and
**have access to justice in
environmental matters ...**



A case may help

to put abstract legal things

“down to earth”.



Case Scenario:

Great Cormorants like fish (about 150 kg per year) at least as much as fishermen do. The government of Saxony-Anhalt issues a **general regulation allowing to hunt cormorants**. An ENGO tries to protect the birds by bringing legal proceedings. **Quid iuris?**



Cormorant - Foto: Frank Derer

In certain countries, that would not be a problem at all, but in certain countries, it is a real problem to have access to justice.



Let's start with the obvious ...

Great Cormorants (Phalacrocorax carbo) are protected under the Birds Directive (Directive 2009/147/EC on the conservation of wild birds).

Its deliberate capture and killing, disturbance, destruction of its nests or taking of its eggs can only be allowed in accordance with the **derogation** system established in Art. 9 of the Birds Directive. (Cf. Guidance document: Great Cormorant, Applying derogations under Article 9 of the Bird Directive 2009/147/EC)

Can the ENGO bring legal proceedings claiming that the requirements of the derogation (“prevent serious damage to fisheries”) are not met?



Let's first have a look
at Art. 9 (3) AC ...



Considering the “spirit of the Aarhus” it seems to be crystal clear that in such a case the ENGO should have “a day in court”.

**Art. 9 (2) AC and Art. 9 (3) AC guarantee
access to courts of law in all environmental matters.**

However, as we put it in the German language

... “the devil lies in the detail” ...

here, the details of transposition process and national procedural law.



If you have those “minor” cases, you are not under the guarantee of art. 9 (2), which is quite well implemented in the MS, but you are under art. 9(3) (all other cases in environmental law). And then you have a problem here, with the implementation of effective access to justice when it comes to those minor cases. So, it is a problem of implementation of art. 9(3) to MS and even to the EU itself.

A first reading of Art. 9 (3) AC:



„(...) each Party shall ensure that ...
where they meet the criteria, if any, laid down in its national law,

**members of the public
have access to administrative or judicial procedures**

to challenge acts and omissions
by private persons and public authorities

**which contravene provisions of its national law relating to the
environment.”**



A second reading of Art. 9 (3) AC
from the view of a Member State
not fully embracing the spirit of Aarhus ...



„(...) each Party shall ensure that ...
**where they meet the criteria,
if any, laid down in its national law,**
members of the public have access to (justice).”

Cormorant case closed on the national level?

In many Member States there are still “criteria in national law” that exclude access to justice in the “small and medium sized” environmental cases.



Can art. 9(3) be implemented directly? It is a problem because it is International Law, not European Law. And, main problem (and the Court of Justice said so): it is not sufficiently precise.

Why?

The European fear and the German „Angst“
of a quasi actio popularis ...



... still results in a situation where Art. 9 (3) AC is not fully transposed or implemented.

The Court (C-240/09) “Slovak Brown Bear /LZ (I)”
tries to fill the gap by demanding to bring national
procedural law in line by **interpreting it**
“to the fullest extent possible”.



When starting to do this the practitioner can find good guidance in the
Commission’s notice on access to justice in environmental matters
(2017/C 275/01) from 28 of April 2017.

Personal note: This comprehensive document is the kind of up to date “legal
commentary” you will probably not find in the library of your court or tribunal.
(Americans might call it a **“Restatement of law”**:
not meant to command but to persuade)



The Brown Bear case states that if you have the situation where there is an obstacle to green access to justice because the MS did not implement correctly, so you have to interpret your national law in the sense of the Aarhus Convention, to the fullest extent possible.

The comoran ist still waiting
for the outcome of the its case ...



E.g.: What will the German administrative judge probably do?

No access to justice (A2J) under Art. 9 (3) AC!
Even under the new Environmental Appeals Act
from 2017 and an interpretation “to the fullest
extent possible” (Slovak Brown Bear /LZ I) there is
a gap that **only the German legislator** is competent to fill in.



However, A2J for the NGO may be granted under Art. 9 (2) AC!
Basis: Court’s judgment of 8 November 2016 (C-243/15, LZ II),
sometimes referred to as

„Slovak Brown Bear II“



As a Central European judge you may find the problem that you don’t have the
access to justice guaranteed to all environmental matters.

C-243/15

„Slovak Brown Bear II“



Here, the CJEU takes a fresh start and establishes **legal standing requirements** on the basis of

Article 47 of the EU Charter of Fundamental rights
and
Article 9(2) of the Aarhus Convention
and
Article 6 of the Aarhus Convention

for decisions, acts and omission for **which the public participation provision** of Article 6 of the Aarhus Convention applies.



**Hunting Cormorants:
prior public participation?**



The decisive question for legal standing in this case turns out to be :
Does the public participation provision (Art. 6 AC) apply?

Article 6 of the Aarhus Convention provides: “1. Each Party:

- (a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed **activities listed in annex I**;
- (b) Shall, in accordance with its national law, **also apply the provisions** of this article to decisions on proposed activities not listed in annex I **which may have a significant effect on the environment.”**



German case „Komoranverordnung“:
The hunting has a significant effect.
The ENGO has legal standing.
However, the hunting is justified by
preventing serious damage to fisheries.

Cf. Court of Appeal of Saxony-Anhalt,
Decision of March 23, 2017 (2 K 127/15) and
Judgment of November 22, 2017 (2 K 127/15).



You put all this together and you find solution on article 6 of the Aarhus Convention. And that is how the case of the Cormorant bird was decided from the perspective of access to justice, although they lost in the merit (but that is a different story).

Conclusions drawn from the Cormorant case :



1. The comprehensive guarantee of access to justice under Art. 9 (3) AC is still not fully operable because of “transposition deficits” by the EU and some of its Member States.
2. The recent jurisprudence of the CJEU (Brown Bear II /LZ II) finds “a way out” to grant NGO standing by applying Article 47 of the EU Charter in conjunction with Art. 9 (2) AC and Art. 6 para. 1 lit. b) AC for matters which may have a significant effect on the environment.
3. Here there was an obvious linkage to the Birds-Directive. Linkages to Art. 6 (3) of the Habitats Directive or Art. 4 of the Water Framework Directive may lead to the same results. (Cf. CJEU, from 20 Dec. 2017, C-664/15, „Protekt“)



You should look to both Brown Bear I and II and to the substantial law.

Preliminary reference (interpretation/validity)



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 recommendations give good guidance ...

Official Journal 2018/C 257/01 and Website of the CJEU:

“Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings” from 20 July 2018

Footnote:

The above recommendations are comprehensive.

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



The essential elements of a request for a preliminary ruling

(cf. Annex of the Recommendations,
Official Journal 2018/C 257/01)



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, 2018/C 257/01)



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, 2018/C 257/01)



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, 2018/C 257/01)



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, 2018/C 257/01)



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, 2018/C 257/01)



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, 2018/C 257/01)



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, 2018/C 257/01)



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**.



Numbering the paragraphs is to facilitate processing (for example, for translation purposes).

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..



Supremacy of EU law



EU law: supremacy and direct applicability
(La primauté et l'effet direct)



The Court's judgment of 15 July 1964
in the Costa/Enel case defined



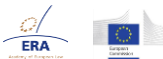
It is a landmark case and said, in a nutshell, that European Community Law is not just any International Public Law.

...

Meaning over national Constitutions.

What's going on in Germany?

- The principle of the supremacy of EU law over national law has been recognised by the national courts.
- Therefore, it attracts the attention of the legal community if this principle is not followed entirely.
- The German Bundesverfassungsgericht has been contemplating on the “non applicability” of EU law in “extreme situations of denial of justice” and finally detects an example for it.



This has created, at least in Germany, a discussion at a very abstract level.

The German Constitutional Court has some doubts about this absolute supremacy in some extreme situations (the “extreme situations of denial of justice”). And for the first time that Court has materialized its own thinking.



German Bundesverfassungsgericht contemplates on the “non applicability” of EU law in “extreme situations of denial of justice”:

[„Dangerous“ News:]

- *Human Rights standard*
- *Ultra vires acts*
- *Core of Constitution*

„Cooperation“:
Before setting aside EU law the German BVerfG launches a preliminary reference on the validity under Art 267 TFEU.



[„Good“ News:]

The 1st Senate of the BVerfG will apply the **EU-Charter of Fundamental Rights as standard of constitutional review** (Beschluss vom 6. November 2019 - 1 BvR 276/17 - Recht auf Vergessen II)



PSPP by ECB: “It is ‘incomprehensible’ for the 2nd Senate of the German Federal Constitutional Court **how the European Court of Justice examines and affirms proportionality** when it comes to making a legal assessment as to whether the European Central Bank exceeded the limits of its monetary policy mandate by purchasing government bonds. (Beschluss vom 5. Mai 2020 2 BvR 859/15 u.a. - PSPP)

Principles of equivalence and effectiveness



The previous – extreme – case will not be encountered by the national judges. What will be encountered is a situation when his/her national law is an obstacle to the effectiveness of the European Law. That is a normal situation.

Introduction

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 missing EIA 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“.



Let's discuss it in a case context:

„The missing EIA: A question to be raised ex officio?

- Scenario:

The neighbour brings an action against a permit for a land fill.

The judge of Memberland studies the files and discovers that the mandatory environmental impact assessment (EIA) was not carried out during the administrative proceedings.

Can he or she raise this question ex officio?



„The missing EIA: 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 Charta of Fundamental Rights and
General Principles of EU law relying on Art. 6, 13 of the
European Convention of Human Rights



„The missing EIA: A question to be raised ex officio?

Member States enjoy „procedural autonomy“ to have their domestic set of procedural 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 missing EIA: 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 missing EIA 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“.

Not raising the question ex officio seems to be possible.

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



Summing up: Toolbox of the National Judge

- Role of the the national judge as EU judge
- Access to justice in the light of the Aarhus Convention
- Preliminary reference
- Supremacy of EU law
- Principles of equivalence and effectiveness



Thank you for your kind attention!



Source: www.spiegel.de

