

ERA Workshop for Judges and Prosecutors:

**How to Handle Court Proceedings
Invoking Non-Compliance with EU Nature
Protection Law**

Wednesday, 29 November 2017, Barcelona



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How to Handle Court Proceedings

Invoking Non-Compliance with EU Nature Protection Law

IV. Enforcement at National Level

**Role of the judge when dealing
with files on EU Nature Protection**

Wednesday, 29 November 2017, Barcelona

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Foreword

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



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

Structure of the Presentation

- The role of the national judge
- Public interest litigation
- The legal pyramid
- Brown Bears I
- The bigger picture
- Practitioner's corner (I) and (II)



The Role of the National Judge



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



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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.
(e.g.: EU law on nature protection!)



Public interest litigation



AG Sharpston, Opinion delivered on 12 October 2017 (C-664/15):

**”Neither water nor the fish swimming in it
can go to court.”**



Credit: Wikipedia Lily M/Pants

**... neither can the trees
in Białowieża, a Polish
national parc ...**

**... nor the hunted
Slovak Brown Bear.**



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In general terms:

„The environment is a **public good**
that must be supported
by a **public voice ...**“

(Cf. Janez Potočnik, European Commissioner for Environment, SPEECH/12/856 23/11/2012)



Under the Aarhus Convention (AC binding on EU+MS)
and its three pillars ...

... the public voice shall enjoy **rights** in
environmental matters ...

a right to information,

a right to participation in decision-making

and in Article 9 **right to a wide access to justice.**

Footnote: All right?

The idea is:

Not very openly received in:

„a right (AC) is a right (EU) is a right (MS)“

MS of Central Europe (D, A, CZ)



The legal pyramid



Through the EU Directives ...

the Aarhus idea that „the public“ and „**the public concerned**“ needs access to justice

finds its way

from international law,
to supranational EU law,
to the national laws of the MS



and thus on the desk of the national judge in
environmental cases.



Brown Bears I



The small cases of environmental law are problematic in terms of access to justice

Example:



If the hunting of a brown bear is permitted **in contradiction with the Habitats Directive** the matter is only covered by the general guarantee to access to justice (Article 9 (3) Aarhus Convention) which - in some MS and the EU - has not been implemented properly



The violation of the EU law by hunting may be clear ...



Credit: Marshmallow <http://www.flickr.com/photos/tmarschner/2728816091>

- The brown bear (*ursus arctos*) is a species of Community interest in need of strict protection, cf. Annex IV to the Directive on the conservation of natural habitats and of wild fauna and flora 92/43/EEC (Habitats Directive).
- Article 12 (1) of the Habitats Directive provides that Member States establish a system of strict protection prohibiting:
 - (a) all forms of deliberate capture or killing of specimens of these species in the wild.
- The requirements for granting a derogation pursuant to Art. 16 (1) Habitats Directive do not seem to be given.



... however, to paraphrase
Advocate General Sharpston:

Credit: Marshmallow <http://www.flickr.com/photos/tmarschner/2728816091>



The brown bear cannot go to court!



The CJEU split the gordian knot by stating in its **Brown Bears I Judgment (C-240/09)**:



Credit: Marshmallow <http://www.flickr.com/photos/tmarschner/2728816091>

The national court has to **interpret, to the fullest extent possible, the procedural rules** relating to the conditions to be met in order to bring administrative or judicial proceedings

in accordance with the objectives of Art. 9 (3) AC and the objective of effective judicial protection of the rights conferred by European Union law

in order to enable the claimant (environmental protection organisation) such as to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.



Read more about **Brown Bears I (C-240/09) and
Brown Bears II (EU:C:2016:838)**
and other Case law in:

COMMUNICATION FROM THE COMMISSION
of 28.4.2017

Commission Notice on Access to Justice in Environmental Matters

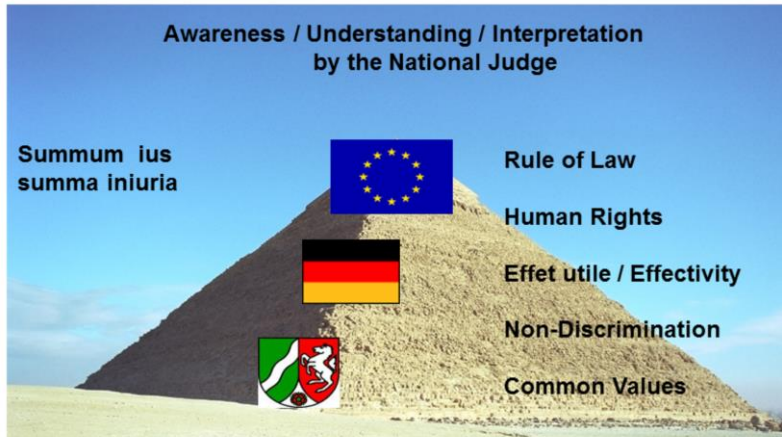


The bigger picture



The Bigger Picture ... and its Gaps and Inconsistencies:

The dark and the bright side of the legal pyramid



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 the national law is to be interpreted in this or that way“.
- **EU Directive with transposition deficits may have “Direct Effect”:**
„A public entity should not win a case by relying on its own illegal behaviour, which are the transposition deficits.
The claimant should win the case and be able to require the application of those provisions which are unconditional and sufficiently precise.“



Preliminary Reference 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



Need any help?

INFORMATION NOTE

on references from national courts
for a preliminary ruling

2009/C 297/01



Directives and the National Judge (I)



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Question of a domestic judge:

„Is there still any need to apply the the Habitats Directive and/or the Birds Directive if my MS has it already transposed into domestic water law ?“

Legal nature of the EU Directive under Art. 288 (3) TFEU:

“A directive shall be binding,
as to the result to be achieved,
upon each Member State to which it is addressed,
but shall leave to the national authorities
the choice of form and methods.”



In the daily routine, applying a directive is not as easy as it seems. Art. 288 (3) TFEU is a good starting point for a sound legal understanding. The obligation “as to the result” is not very common as a legal feature. Therefore, it should be explained thoroughly.

Directives and the National Judge (II)



Paris 2010 - La premiere CC 81-84, 10, 11 et 12
David Stockman/Flickr - Paris 2010 Day 19

National Judge:

„That does not answer my question:
Is it really necessary to read and apply the two
Directives in the national court room?“

Only in a “Brave New Legal World” there would be no need to apply a transposed Directive!

However, in the real world things are different:

For some reason or other MS can get lost in the transposition process ...
Transposition delayed might mean rights of EU citizens denied ...
Any “precise” provision can become highly unclear if confronted
with a specific case no one ever thought of.

The eternal problem of texts, their meaning and their gaps ...



This slide tries to raise a (general) awareness as regards possible incoherences between the WFD and national law.

Directives and the National Judge (III)



Paris 2010 - Le premier CC BY-SA 3.0 Credit:
Daniel Stockman-Picker Paris 2010 Day 5/8

What are the conditions of a direct application of the Directives?

Direct effect? What does it mean in a nutshell?

Direct effect :
"Van Gend&Loos"

Generally, an individual can invoke any EU provision in a national court room which is "**sufficiently precise + unconditional**" (e.g. fundamental freedoms)

Vertical direct effect:
"Van Duyn"

Directives: Against a MS or its "emanation" (vertical)
an individual can invoke those provisions of a directive that are **not timely transposed + "sufficiently precise + unconditional"**.

Horizontal direct effect:
"Faccini Dori"

Directives: Against another private party (horizontal)
an individual cannot use direct effect of a directive.

However, **interpretation of domestic law in the light of EU law** ("consistent interpretation") is always possible and even required ("as far as possible") from the national courts to reach the result to be achieved by an EU directives, cf. Art. 288 TFEU.

Good guidance by the CJEU in "Pfeiffer, C-397/01 , 116": "National methods of interpretation".



Practitioners are not always familiar with the direct effect of EU law. The slide gives an overview on the topic. The importance of consistent interpretation is mentioned.

Do's and Don'ts

(Direct Effect of Directives)

Do consider that an „unconditional and sufficiently precise“ provision of any EU Directive is to be applied directly.
(CJEU C-431/92 - Großkrotzenburg -)

Don't allow national authorities to apply such a provision when they want to impose an obligation on the citizen.
(CJEU C-91/92 - Faccini Dori -, para. 20)

Do consider that national authorities have to apply such provisions in triangular situations: If a building permit is quashed on behalf of a neighbour, the builder affected by the decision is not confronted „with an obligation“. It is only a negative effect.
(CJEU C-201/02 - Delena Wells -)



Some typical scenarios of direct effect and the references to the jurisprudence.

Conclusion (Directives and the National Judge):



Paris 2010 - la premiere CC 01/04/2010 Court
Daniel Stockman Flickr: Paris 2010 Day 3/8

The Birds Directive and the Habitats Directive,
especially with its provisions that are

„sufficiently precise + unconditional“

should be read
in a **synoptical way** with domestic
legislation.



Synoptical reading as an advice for a better understanding of water law in the EU.

Practitioner's Corner



Practitioner's Corner

„The missing appropriate assessment (AA)“:
A question to be raised ex officio?

- Scenario:
The neighbour brings an action against the repowering of a windfarm.
The judge of Memberland studies the files and discovers that the appropriate assessment (AA) under Art. 6 (3) of the Habitats Directive was not carried out during the administrative proceedings.

Can he or she raise this question ex officio?



Source: www.gegenwind-vogelsberg.de



Practitioner's Corner

„The missing AA: 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.



Source: www.gegenwind-vogelsberg.de

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
Art. 6 (3) Habitats Directive



Practitioner's Corner

„The missing AA: 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

Aarhus Convention,

Environmental Impact Directive and the

principle of equivalence

and the

principle of effectiveness.

(Cf. inter alia: C-312/93 - Peterbroek -)

Source: www.gegenwind-vogelsberg.de



Practitioner's Corner
„The missing AA:
A question to be raised ex officio?



Source: www.gegenwind-vogelsberg.de

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 AA 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“)

Where there is no harmonisation,
there is diversity!



Thank you
for your kind attention!

