On the Advocate General

• Member of the Court
• Advises the Court by preparing Opinions
  • Opinion is not a Judgment
  • Only the Judgment has the authority of the Court
  • Opinions can illuminate the background
Structure of the Presentation

- Why is EU law important for the domestic judge?
  - Precedence
  - Direct Effect
  - ...

- How is the domestic judge linked to the CJEU?
  - Preliminary reference procedure
  - Infringement procedure (?)

- Perhaps a practical example
The relevance of EU law

- Precedence (also: primacy, supremacy)
- Direct effect (including Directives)
- Indirect effect (interpretation in conformity)
- Flanked by the principles of effectivity & equivalence / effective judicial protection
- Effet utile / practical effect
Precedence of EU law

• Precedence
  • Provisions of EU law render inapplicable any conflicting provision of national law
  • This applies to all types of national law, including constitutional law
  • Precedence aims to ensure the uniform application of EU law
Direct Effect of EU law

• EU law is intended to give rights to citizens
  • Common Market
  • Supranational Powers
  • Union of States and peoples
  • Supervisory Function of Individuals

• Provisions must be sufficiently clear and unconditional
Direct Effect of Directives

- EU environmental law mostly comes in the form of Directives.
- Art. 288 TFEU: Directives are binding with regard to the result but leave MS the choice of form and methods.
- Apparently there's a condition! No direct effect?
The Van Duyn case

- Directives are binding with regard to the result
- Directives can be the object of a preliminary reference
- Failure to transpose in time cannot justify failure to apply *after the time limit expired*.
- But: No obligations of private parties can result from the direct application of Directives
Indirect Effect

- Domestic law must be interpreted, so far as possible, in order to achieve the result sought by the relevant EU law.
- Courts must take the whole body of domestic law into consideration and apply all interpretative methods recognised by in their legal system.
- But this obligation cannot serve as the basis for an interpretation of national law contra legem.
Effective judicial protection

- If EU law creates rights MS must provide access to courts
- Without EU harmonization MS determine procedural conditions
- But they must respect the principles of *equivalence* and *effectiveness*
Effet utile / practical effect

- **Principle of interpretation**
  - All provisions of EU law aim to have a practical effect
  - Exceptions must therefore be interpreted restrictively

- **EU Environmental law**
  - Aims at a high level of protection (Art. 191 TFEU)
  - Is not a (narrow) exception to general permit procedures, on the contrary
And now to the Court

- Brussels: most important seat of the political EU institutions (Council, Commission, important parts of the Parliament)
- Strasbourg: most of the plenary sessions of Parliament + Council of Europe and the European Court of Human Rights (ECtHR)
- Luxembourg: Court of Justice of the European Union (CJEU)
Access to the CJEU in environmental matters

- Preliminary reference procedure (Art. 267, MS courts)
- Infringement procedure (Art. 258 – 260, mostly EU Commission)
- Direct actions against EU bodies (Art. 263, individuals, institutions or MS, rare, but increasing)
The Preliminary Reference Procedure

• Dual Objective:
  o Uniform interpretation of EU law
  o Effective judicial protection

• Nature: Co-operation between courts
Subject matter of the reference

• Doubts
  o with regard to the interpretation of EU law or
  o with regard to the validity of secondary EU law

• Must be relevant for the outcome of a pending procedure before the referring court.
Power to make a Reference

- Lower courts may use the procedure (discretion), courts of last instance are obliged to make a reference.
- No reference by other bodies: eg. competition authorities, equal treatment commissions, towns, private parties.
- Parties to the procedure can suggest, but not request or prevent a reference.
- Higher courts cannot restrict the right to make a reference.
Obligation to make a Reference

- A national court against whose decisions there is no judicial remedy
- Question is relevant to the outcome of a pending case
- Exceptions
  - Acte claire (correct application is obvious)
  - Existing cases of the CJEU
Sanctions for a failure to refer (EU)

- No direct EU remedy for the parties of the domestic procedure, but
  - Infringement procedure (C-129/00, COM/Italy, theoretical)
  - Damages (C-224/01, Köbler, manifest violation)
  - Obligation to review a final administrative decision (C-453/00, Kühne & Heitz, stringend conditions)
Sanctions for a failure to refer (ECHR & MS)

• There are remedies against an *arbitrary* refusal to make a reference,
  o under Art. 6 of the ECHR - the right to a fair trial (Ullens de Schooten, 3989/07 and 38353/07) or
  o Member State constitutional law (Germany, Austria, Spain).
Formal requirements

- An identifiable question on EU law
- Factual and legal background
- Optional: necessity of the reference and proposed response
Infringement Procedures

Legal Basis

- Art. 17 (1) 2\textsuperscript{nd} sentence TEU
- Art. 258 to 260 TFEU
Art. 17 TEU

[The Commission] … shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them.
Art. 258 TFEU – Object I

Failure by a MS to comply with EU law:

- Treaty
- Regulation
- Directive
- International law obligations of the EU

Not: Infringements by private parties, but insufficient enforcement against them
Art. 258 TFEU – Object II

Failure by a MS to comply with EU law:

- Non-Transposition of Directives
- Non-Conformity of Transposition
- Bad Application of EU provisions
Art. 258 TFEU – Procedural Steps

- “Letter of formal notice” – opportunity of MS to submit observations
- “Reasoned Opinion” + final time-limit
- Application to the Court
Art. 259 TFEU

- MS can also initiate infringement proceedings against other MS
- Case must be brought before the Commission
- COM shall hear both MS and issue a reasoned opinion
- Then a court case is possible
Art. 260 TFEU

- MS must comply with a judgment and transpose it
- COM can bring a second case to the CJEU if the MS has not complied
- CJEU can impose
  - a lump sum for non-compliance in the past and
  - a periodic penalty payment until compliance is achieved
An example in the field of the environment

Case 201/02, Wells of 7 January 2004

- reopen an old quarry
- plaintiff lives directly between two parts of the quarry
- site is environmentally sensitive
- no environmental impact assessment
Wells – direct effect

- Project listed in annex II of the EIA Directive
- Likely to have significant impact
- Neither old project nor „pipeline-project“
Wells – effective judicial protection

- Member State must nullify the unlawful consequences of a breach of Community law.
- Every organ of the Member State, including courts, are responsible to:
  - assess the necessity of EIA
  - if need be, order EIA
  - may require revocation or suspension of a consent already granted
Thank you for your attention!