EUFJE annual conference 2021: The cooperation between national judges and the Court of Justice of the European Union in environmental matters

Questionnaire

Introduction

Judicial cooperation between national judges and the Court of Justice of the European Union (hereafter CJEU or the Court) is essential for effective environmental protection. In this questionnaire we focus mostly on the functioning of the preliminary reference procedure with regard to national courts decisions once the CJEU has answered the question(s) posed in a preliminary ruling, so-called "follow-up judgments". The purpose of this questionnaire is to improve the mapping of follow-up judgments in environmental matters and to understand the underlying reasons, therefore building upon the work presented by Squintani and Kalisvaat recently published in the journal European Papers (link).

After a few introductory questions on the general level of knowledge of the functioning of the preliminary reference procedure, the questionnaire will focus on follow-up judgements in particular.

A) Questions on general knowledge about functioning of preliminary reference procedure

1. How do you consider the knowledge that judges in your country have about the preliminary rulings procedures?

   There is general knowledge in the lower courts but only few judges with practical experience; there is a lot of practical knowledge in the supreme courts (supreme administrative court, constitution court, supreme court) since they are obliged to ask for an opinion of the ECJ in case of doubts.

2. Have you benefited from training courses either at national level or within the programme offered by DG Environment or ERA (Academy of European Law) about CJEU environmental case law and preliminary rulings? What is your estimation of the level of knowledge and specialisation of judges in (European) environmental law?

   Yes, I´ve benefited from such courses. My estimation is that the level of knowledge and specialisation of judges in European environmental low is rather high.

3. Does your country have statistics showing in which subject-areas of EU environmental law are the majority of preliminary rulings requests? (If possible, please provide the link to such statistics.)

   I am not aware of such statistics but it could exist in some administrative entities like ministry of environment or universities. It is on the other hand very easy to draw such information from the website of the ECJ.

Could you provide a short explanation for the fact that one or more areas of EU environmental law generate more preliminary questions then others? Does this have to do with the quality / clarity of the legislation or a specific focus on individual areas due to national peculiarities?

There are two areas where NGOs and individuals challenge administrative decisions by launching complaints based an EU environmental law:

- Public participation and acces to justice according to the Aarhus Convention
- Ambient air quality

This has to do with the poor quality of the stipulations in the subject matter legislation (water protection, nature conservation, ambient air quality, forestry…) that do not or in a limited way provide full public participation or acces to justice.

4. Does the judiciary in your country engage in the practice of interpreting EU environmental law without asking for a preliminary ruling? (Does this practice concerns also courts of last instance?)

   Yes, the first instance courts often try to stay in the boundaries of already existing rulings in order to limit the length of their procedure. It is easier to leave the burdens of a preliminary ruling procedure to a last instance court.

   This practice logically does not concern last instance courts.

5. Does you country have a system to control whether national courts request preliminary references? (If yes, please include a link to the system)

   I am not aware of such a system, but ist may exist in those administrative bodies that have to represent our gonverment in preliminary ruling procedures.

6. Which are the fundamental/procedural rights of citizens to ask a national court to request a preliminary reference to the CJEU?

   Everybody who has the right to launch an appeal to a national court has the right to propose the court to ask the ECJ for a decision, and if the court does not follow this proposal the complainant can again make its demand part of a legal remedy against the decision of the court.

B) Questions on examples of follow-up judgments after CJEU preliminary rulings in environmental matters in the last 10 years (2011-2021)

7. Have you judged in (a) environmental case(s) in which you received an answer to a preliminary question that ***you*** had posed to the Court (i.e. in a "follow-up case")? If yes, could you provide the link to the judgment(s) or a copy thereof?

   No.

8. Did you sit in other environmental follow-up cases? If yes, could you provide the link to the follow-up judgment(s) or a copy thereof?

   Yes, C-348/15 (Stadt Wiener Neustadt), followed by a ruling of the Supreme Administrative Court (Ro 2014/07/0108) and a ruling of the Federal Administrative Court (myself - W104 2010407-1).

9. Are you familiar with environmental follow-up cases in your ***country*** other than those in which you were sitting as a judge? If yes, could you provide the link to (some of) the judgments or a copy thereof?

   Of course there is a lot of such cases, e.g.:

   - C-329/17 (Prenninger), followed by a ruling of the Supreme Administrative Court (Ro 2017/04/0002) and a ruling of the Federal Administrative Court (W113 2132042-1)
   - C-664/15 (Protect), followed by a ruling of the Supreme Administrative Court (Ra 2015/07/0055) and a ruling of the Lower Austrian Administrative Court (LVwG-AV-33/003-2014)
   - C-723/17 (Craynest), followed by a ruling of the Supreme Administrative Court (Ra 2018/07/0359), which had not asked for a reliminary decision itself but had interrupted ist own procedure in order to take the EJC ruling into account

C) Questions on the answers provided by the Court of Justice

10. Did the Court of Justice consider the question(s) ***admissible*** and did the Court ***answer*** it/them?

    Yes.

11. Did the Court of Justice ***rephrase*** the question(s) posed? If yes, do you consider the rephrased question(s) a ***proper*** representation of the question(s) originally asked?

    Yes, yes.

12. Do you consider the answer given by the Court of Justice to be a legally correct answer to the question posed?

    Yes.

13. Did the Court of Justice formulate the answer by setting out ***criteria*** to be applied by the national court or did the Court of Justice provide a binary answer, e.g. an unconditional ***affirmative/negative*** answer?

    The Court provided an unconditional negative answer.

14. Did the answer given by the Court of Justice ***enable*** to solve the national case and did the answer make it ***clear*** how it had to be applied? Please provide a short explanation for your answer.

    Yes, the Court enabled the national courts to solve the case by making clear that a certain legislative provision (which stipulated that a retroactive EIA could not be carried out after 3 years) could not be applied. Therefore a case-by-case evaluation had to be carried out whether an existing installation needed an EIA or not.

D) Questions on the follow-up case

15. Was it ***possible*** for the national court to render a judgment after it received the answer from the Court of Justice, or did (new) elements arise that complicated this, *such as* the withdrawal of the case, the need for further clarifications from the national Constitutional Court or the Court of Justice, constitutional or factual barriers, or the political sensitivity of the subject matter?

    No, there were no new elements.

16. Do you consider the follow-up judgment a case of ***cooperative*** or ***uncooperative*** administration of justice? With cooperative administration we refer to a follow-up judgment that complies with the contents of the answer received from the Court of Justice. When this is not (fully) the case we refer to uncooperative administration of justice.

    It was a case of cooperative judgement.

17. Do you (still) ***agree*** with the manner in which the follow-up judgment applied the preliminary ruling?

    Yes.

E) Questions on the environmental law background of the disputes

18. Did the national environmental legal framework applicable to the follow-up judgment represented a **one-on-one transposition** of the EU law framework at stake? If no, in which manner (a brief explanation will suffice)? Please provide a link to the relevant regulatory framework.

    The Austrian EIA act represents an transposition of its own character with a lot of stipulations not foreseen in the EIA directive or other directives, e.g. substantive criteria for development consent.

19. In your subjective opinion, do you consider that environmental law in your country has its own ***identity*** or do you see it as a mere representation/implementation? of EU environmental law? A mixture of the two is possible, of course.

    It has its own identity.

20. Is there any ***remedy/monitoring*** in case the judges do not ask the CJEU (ruling as last instance) or on how they follow up on preliminary rulings of CJEU (possibly also in other cases, not only in their own, since clarifications given by CJEU are valid in all similar cases)? Could you provide a link to any such regime, if present?

    See answer to question 6.

F) Case

Consider the following situation and provide an answer about how it would be solved in your country. When doing so please provide reference to the normative framework relevant for answering the question.

Article 13 of Directive 2008/50 sets limit values for nitrogen dioxide ($NO_{2)}$ which must be respected throughout the territory of the Member States. In case the limit values are not respected to an extent that exceeds the margin of tolerance set out under the Directive, Article 23 of the Directive requires that Member States set up an Air Quality Plan ensuring that exceedances are ended in the shortest time possible.

Assume that in an agglomeration in your country the limit values are trespassed and that scientific evidence shows that this is due to the emissions coming from Euro 0-4 diesel vehicles. The cumulative level of NO_2 from all other sources of NO_2 in the agglomeration does not lead to an exceedance of the EU limit values. The authorities competent for adopting the plan under Article 23 of the Directive, as transposed into national law, announce the adoption of a series of restrictions to the use of diesel vehicles in the agglomeration. However, at the same time, an already existing ´low emission zone´ prohibiting the use of whichever vehicle in the centre of the agglomeration is withdrawn on request of a diesel vehicles auto club (so-called "withdrawal decision"). The use of diesel vehicles in this zone surely leads to a further worsening of air quality in the agglomeration on the short term. The restrictions to the use of Euro 0-4 diesel vehicles in the Air Quality Plan are estimated to bring about compliance with the limit values in one year from the moment of adoption of the restrictions.

An environmental non-governmental organization starts proceedings against the withdrawal decision of the competent authority.

The national court hearing the case has doubts about whether the adoption of restrictions to the use of Euro 0-4 diesel vehicles in the Air Quality Plan is enough to ensure compliance with the Directive or whether Article 13 of the Directive requires the annulment of the withdrawal decision. It therefore poses, among others, the following question to the Court of Justice of the European Union:

> *3. To what extent (if at all) are the obligations of a Member State which has failed to comply with Article 13 of Directive 2008/50 affected by Article 23 (in particular its second paragraph)?*

The Court of Justice answers this question in the following manner:

> ***The third question***
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> *36 By its third question, the referring court asks, in essence, whether, where it is apparent that conformity with the limit values for nitrogen dioxide established in Annex XI to Directive 2008/50 cannot be achieved in a given zone or agglomeration of a Member State by 1 January 2010, the date specified in that annex, and that Member State has not applied for postponement of that deadline under Article 22(1) of Directive 2008/50, the fact that an air quality plan which complies with the second subparagraph*

of Article 23(1) of the directive has been drawn up permits the view to be taken that that Member State has nevertheless met its obligations under Article 13 of the directive.

37 At the outset, it should be recalled that the second subparagraph of Article 23(1) of Directive 2008/50 specifies that it applies when the limit values for pollutants are exceeded after the deadline laid down for attainment of those limit values.

38 In addition, as regards nitrogen dioxide, application of that provision is not made conditional on the Member State having previously attempted to obtain postponement of the deadline under Article 22(1) of Directive 2008/50.

39 Consequently, the second subparagraph of Article 23(1) of Directive 2008/50 also applies in circumstances such as those arising in the main proceedings, in which conformity with the limit values for nitrogen dioxide established in Annex XI to the directive is not achieved by 1 January 2010, the date specified in that annex, in zones or agglomerations of a Member State and that Member State has not applied for postponement of that date under Article 22(1) of the directive.

40 It follows, next, from the second subparagraph of Article 23(1) of Directive 2008/50 that where the limit values for nitrogen dioxide are exceeded after the deadline laid down for their attainment, the Member State concerned is required to establish an air quality plan that meets certain requirements.

41 Thus, that plan must set out appropriate measures so that the period during which the limit values are exceeded can be kept as short as possible and may also include specific measures aimed at protecting sensitive population groups, including children. Furthermore, under the third subparagraph of Article 23(1) of Directive 2008/50, that plan is to incorporate at least the information listed in Section A of Annex XV to the directive, may also include measures pursuant to Article 24 of the directive and must be communicated to the Commission without delay, and no later than two years after the end of the year in which the first breach of the limit values was observed.

42 However, an analysis which proposes that a Member State would, in circumstances such as those in the main proceedings, have entirely satisfied its obligations under the second subparagraph of Article 13(1) of Directive 2008/50 merely because such a plan has been established, cannot be accepted.

43 First, it must be observed that only Article 22(1) of Directive 2008/50 expressly provides for the possibility of a Member State postponing the deadline laid down in Annex XI to the directive for achieving conformity with the limit values for nitrogen dioxide established in that annex.

44 Second, such an analysis would be liable to impair the effectiveness of Articles 13 and 22 of Directive 2008/50 because it would allow a Member State to disregard the deadline imposed by Article 13 under less stringent conditions than those imposed by Article 22.

45 Article 22(1) of Directive 2008/50 requires that the air quality plan contains not only the information that must be provided under Article 23 of the directive, which is listed in Section A of Annex XV thereto, but also the information listed in Section B of Annex XV, concerning the status of implementation of a number of directives and on all air pollution abatement measures that have been considered at the appropriate local, regional or national level for implementation in connection with the attainment of air quality objectives. That plan must, furthermore, demonstrate how conformity with the limit values will be achieved before the new deadline.

46 Finally, this interpretation is also supported by the fact that Articles 22 and 23 of Directive 2008/50 are, in principle, to apply in different situations and are different in scope.

47 Article 22(1) of the directive applies where conformity with the limit values of certain pollutants 'cannot' be achieved by the deadline initially laid down by Directive 2008/50, account being taken, as is clear from recital 16 in the preamble to the directive, of a particularly high level of pollution. Moreover, that provision allows the deadline to be postponed only where the Member State is able to demonstrate that it will be able to comply with the limit values within a further period of a maximum of five years. Article 22(1) has, therefore, only limited temporal scope.

48 By contrast, Article 23(1) of Directive 2008/50 has a more general scope because it applies, without being limited in time, to breaches of any pollutant limit value established by that directive, after the deadline fixed for its application, whether that deadline is fixed by Directive 2008/50 or by the Commission under Article 22(1) of the directive.

49 In the light of the foregoing, the answer to the third question is that, where it is apparent that conformity with the limit values for nitrogen dioxide established in Annex XI to Directive 2008/50 cannot be achieved in a given zone or agglomeration of a Member State by 1 January 2010, the date specified in that annex, and that Member State has not applied for postponement of that deadline under Article 22(1) of Directive 2008/50, the fact that an air quality plan which complies with the second subparagraph of Article 23(1) of the directive has been drawn up does not, in itself, permit the view to be taken that that Member State has nevertheless met its obligations under Article 13 of the directive.

Imagine that you are the judge in the follow-up case that has to apply the answer provided by the Court of Justice. How would you judge about the request of annulment of the withdrawal decision? *Please provide reference to the normative framework relevant for answering the question.*

Air quality measures like the installation of a "low emission zone" would be imposed by an ordinance (= a legal provision issued by an administrative body). Also the withdrawal of such an ordinance would have to be realized by way of an ordinance ("contrarius actus"). It is not possible for an administrative court to "annul" such a legal provision. An annulment of a legal

provision lies in the competence of the constitution court, but this court is not entitled to decide about conformity of legal provisions with EU law.

What a judge of a lower court can do is to apply only provisions which do not contradict EU law. So in this case we would have to ignore the withdrawal ordinance and to apply the original ordinance that installed the low emission zone.

G) Conclusion

In your view, does the preliminary ruling procedure support national judges to achieve uniform application of EU environmental law and does it contribute to effective environmental justice on the ground?

Of course, yes.

If not, which changes should be considered internally or at EU level?