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

BELGIAN REPORT

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

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

In general the knowledge of judges about the EU preliminary rulings procedure is good, certainly as the higher and highest courts are concerned.

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?

Most of the Belgian EUFJE members have benefited from such courses on the national and EU level and or often also involved as trainers or organisers of such training activities at the national level. The knowledge about environmental law and thus EU environmental law is not spread among the whole judiciary, but is concentrated with those judges that have a significant environmental law caseload.

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.)
   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?

No, there are no such national statistics. A search in the Curia case law database showed 32 references for a preliminary ruling in environmental matters by Belgian courts. Nine cases are

dealing with SEA, while seven with EIA and another seven with Waste Management. Other cases are dealing with Bird Protection (2), Habitat Protection (1), Air Quality (1), Renewable Energy (1), Fuel Quality (1), CITES (1), Access to Environmental Information (1) and Fishing (1). The 3 areas with most references for preliminary ruling can be explained by the unclear scope of the directive, together with an extensive interpretation of the scope by the CJEU, opening all the time new fields of application (SEA), by insufficient or incorrect implementation at different levels of government (EIA) and uncertainties about basic notions in the first decades of application (waste management). Most of the cases are cases initiated by ENGOs in areas where there is a presumed flaw in correct application of EU Environmental Law, while cases initiated by industry resulting in cases referred to the CJEU are rather seldom.

We believe the number of preliminary questions regarding EIA, the Birds and Habitats Directive can be explained in view of their major impact on plans and permits.

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, of course, as most domestic environmental law has an EU origin this is unavoidable. As far as can be seen, the CILFIT case law is applied by the highest courts in a correct way, both the acte clair *as the* acte éclairé *approach*. *In the latter case one can observe that especially the Council of State and the Constitutional Court are following closely the jurisprudence of the CJEU and not only the cases they have referred themselves.* In recent years e.g. in around 12 to *15 % of the judgments of the Constitutional Court there is reference to the case law of the CJEU*[1]*, while that percentage was even double in environmental cases.*

The Council for Permit Disputes (that is not a court of last instance, since there is a cassation appeal at the Council of State) is also following the jurisprudence of the CJEU. Where appropriate it will stick to the case law of the CJEU or the Guidance Documents of the European Commission). (e.g. Guidance Document on Natura 2000).

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

No.

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

There are no other conditions than those provided for in Article 267 TFEU. In case, an ordinary or administrative court is confronted with a case in which also a reference for a preliminary

[1] Lavrysen, Luc, et al. "Belgium" in 2019 Global Review of Constitutional Law, edited by Richard Albert et al., I·CONnect-Clough Center, 2020, pp. 34

ruling to the Constitutional Court is necessary, Art. 26, § 4 of the Special Act of 6 January 1989 on the Constitutional Court is applicable:

"Where it is invoked before a court of law that a statute, decree or rule referred to in Article 134 of the Constitution infringes a fundamental right which is guaranteed in an entirely or partly similar manner by a provision of Title II of the Constitution and by a provision of European or international law, said court of law shall first refer the question of compatibility with the provision of Title II of the Constitution to the Constitutional Court for a preliminary ruling.

Where only the infringement of the provision of European or international law is invoked before the court of law, said court of law shall, even ex officio, investigate whether Title II of the Constitution contains an entirely or partly similar provision.

These obligations shall not prejudice the right of the court of law, at the same time or at a later date, to refer a question to the Court of Justice of the European Union for a preliminary ruling."

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?

Yes.

Constitutional Court Judgments:

2012-095n (const-court.be)
2012-095f (const-court.be)

2012-144n (const-court.be)
2012-144f (const-court.be)

2013-094n (const-court.be)
2013-094f (const-court.be)

2014-027n (const-court.be)
2014-027f (const-court.be)

2020-034n (const-court.be)
2020-034f (const-court.be)

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. Indirect follow-up of Case C-24/19 - A and Others (Wind turbines at Aalter and Nevele)*, after legislative intervention and many similar cases concerning wind turbines.*

2021-030n (const-court.be)
2021-030f (const-court.be)

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?

Case C-290/15, *D'Oultremont and Others* - Conseil d'État

239886.pdf (raadvst-consetat.be)

Joined Cases C-387/15 and C-388/15, *Orleans and Others* - Raad van State

238186.pdf (raadvst-consetat.be)

Case C-671/16, *Inter-Environnement Bruxelles and Others* - Conseil d'État

Microsoft Word - 249479.docx (raadvst-consetat.be)

Case C-723/17, *Craeynest and Others* - Nederlandstalige rechtbank van eerste aanleg Brussel

Brussels-Air-pollution-judgement_29-January-2021.pdf (politico.eu)

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, most of them. Some subsidiary questions have not been answered.

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?

No.

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

Most of the time yes. The more recent answers concerning the SEA cases are believed to expand the scope of the Directive beyond what was the intention of the EU and the consequences of those judgments are far reaching. See: 2021-030n (const-court.be)

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?

Both models have been applied in the cases mentioned above

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.

That was the case for the cases dealt with by the Constitutional Court. The latest SEA cases are however not easy to apply because the boundaries of the scope of the Directive are not clear at all and the SEA is covering much more than the legislators and regulators have expected. See also: 2019-033n (const-court.be); 2019-033f (const-court.be); 2019-145n (const-court.be); 2019-145f (const-court.be)

It was also clear in the Case C-24/19 - A and Others (Wind turbines at Aalter and Nevele) - Raad voor Vergunningsbetwistingen. The CJEU made clear that "an order and a circular, both of which contain various provisions concerning the installation and operation of wind turbines, including measures on shadow flicker, safety, and noise level standards, constitute plans and programmes that must be subject to an environmental assessment".
The answer should lead to the annulment of the contested permit (but a new decree has emerged to validate the order and the circular for a period of three years).

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?

Yes, it was possible and there were no further complications as the Constitutional Court is concerned.

As the Council for Permit Disputes is concerned there was a legal 'complication': a new decree of the Flemish Region to validate the order and the circular for a period of three years + this validation decree is being challenged in the Constitutional Court, so the Council is waiting for the final judgment of the Contitutional Court.

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 is cooperative administration of justice.

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.

As the Constitutional Court cases are concerned this is not the case, as the reason why the references for a preliminary ruling were made were precisely because the Constitutional Court was not sure that the federal or regional legislation at stake was compatible with EU primary or secondary law, and invited the CJEU to give the correct interpretation of EU law so that the Constitutional Court could check without doubt if there was a violation.

The legal framework at stake can be found in the judgements concerned (see links above). In judgment n° 95/2012, it was the Brussels Code on Land Use Planning that provided the possibility to abolish a local land use plan without a prior SEA. In judgment n ° 144/2012, it was a Decree of the Walloon Region providing for the ratification by the Walloon Parliament of a series of permits for projects subject to EIA, so that judicial review by the administrative and ordinary judges was excluded. In judgment n ° 94/3013, it was the Federal Act containing an obligation to blend a certain percentage of biofuels in gasoline and diesel fuels. In that case, no violation has been found. In judgment n° 27/2014 it was the Walloon Decree regulating the award of green certificates for renewable energy production. In this case, no violation was found either. In judgement n° 34/2020 it was the federal act providing the life span extension of some nuclear power plants without prior EIA and proper assessment.

As the Council for Permit Disputes is concerned, there is indeed a transposition of the Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment in the Flemish decree on general environmental policy provisions.

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 is a mixture, with strong influence of EU law, with variations according the subject matter and the question of that matter is heavily regulated by EU law or not.

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

In principle the possibility to appeal and introduce an appeal for cassation should be sufficient to secure that the CILFIT case law is followed. As the highest courts are concerned there are no other remedies than those provided for by the ECtHR (ECtHR, 10 April 2012, *Vergauwen et autres c. Belgique*, §§ 89-92, http://hudoc.echr.coe.int/eng?i=001-110889; 20 September 2011, *Ullens de Schooten and Rezabek v. Belgium*, §§ 54-67, http://hudoc.echr.coe.int/fre?i=001-108382) or state liability of the judiciary for breaches of EU law (CJEU, 9 September 2015, C-160/14, *Ferreira da Silva e Brito and Others*).

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.

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.*

As there are three different regional legislations concerning Low Emission Zones, we have chosen to answer the question under the legislation of the Brussels Capital Region[2]. That LEZ is regulated by the Articles 3.2.16 – 3.2.27 of the Brussels Capital Code on Air, Climate and Energy Efficiency (as amended in particular by the Ordinance of 7 December 2017)[3]. It is the Brussels Capital Government that decides about the instauration of such zone and which type of vehicles are in principle prohibited in those zones. According to the Executive Order of 25 January 2018 concerning the Brussels LEZ (as amended) the whole territory of the region is a LEZ (except the Brussels Ring Highway and some related access routes). The Executive Order provides a progressive ban of diesel vehicles[4], as follows: 2018: euro 0 and 1; 2019: euro 2; 2020: euro 3 and 2022: euro 4. A "withdrawal decision" should thus be taken by an executive order of the Brussels Capital Government amending the Executive Order of 25 January 2018 that can be challenged before the Council of State within 60 days of publication.

Given the judgment of the CJEU of 19 November 2014 in Case C-404/13, ClientEarth, and in particular having regard to the answer to the fourth question, the Council of State should annul the "withdrawal decision".

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

That is indeed the case. There seems no need to changes for the moment.

However, a close monitoring of the application / follow up on preliminary rulings of CJEU at national level seems important.

[2] Low Emission Zone (lez.brussels)

[3] A demand for annullment of that Ordinance has been rejected by the Constitutional Court: 2019-037n (const-court.be)

[4] Cars (category M1), (mini)buses (category M2), buses and coaches (category M3) or vans (category N1, with the exception of N1 vehicles with body code BC).