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?

In general, Estonian judges are rather well-informed about the preliminary ruling procedure and relatively active in referring to the CJEU. This might be best demonstrated by the number of references. From 2016 to 2020, Estonian courts made 16 references for a preliminary ruling[1]. Given the number of population it is roughly more than twice the EU average (12,1 and 5,4 per one million inhabitants respectively). Since Estonia's accession to the EU in 2004 only one preliminary reference has been found manifestly inadmissible. According to the feedback received by the judicial training center of the Supreme Court, there have been no complaints about the familiarity with the preliminary rulings procedure among judges dealing with administrative cases. Nevertheless, some issues appear to have been pointed out concerning criminal cases which need and will be addressed.

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?

[1] See the Annual Report 2020 of the CJEU – Judicial Activity, p 211.

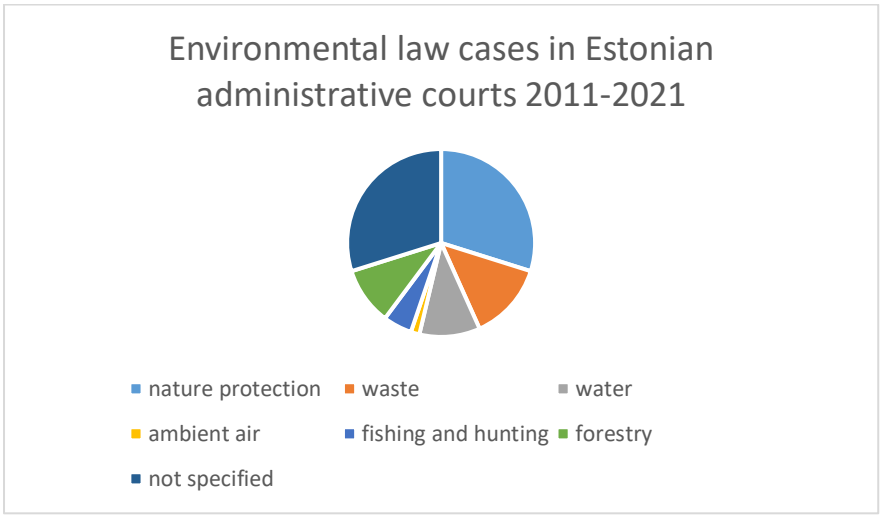
Not yet.

Estonian (administrative) courts are relatively small and narrow specialisation is not possible. To some extent, though, the judges have specialised in certain areas of law. That includes specialisation in environmental and spatial planning/construction cases. From the viewpoint of the Supreme Court, the level of knowledge about EU environmental law is rather good. Judges' knowledge of EU law is best in areas that occur in more cases, for example nature conservation law.

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?

All Estonian references for a preliminary ruling as well as links to the follow-up decisions of Estonian courts can be found on the web page of the Supreme Court of Estonia: https://www.riigikohus.ee/et/eesti-kohtute-eelotsusetaotlused. Unfortunately, the information is currently only available in Estonian. Due to the small number of preliminary references, an option to sort them according to the subject matter has not yet been added, but it is under consideration for the Supreme Court's new web page.

Only two Estonian preliminary references have dealt with environmental law (more specifically, waste management), and the corresponding preliminary rulings were C-60/18 - *Tallinna Vesi* (2019) and C-292/12 - *Ragn-Sells* (2013). Three other cases contained an element of environmental issues, namely C-470/20 - *Veejaam ja Espo* (state aid for environmental protection and energy), C-435/17 - *Argo Kalda Mardi Talu* (standards for agricultural and environmental conditions for beneficiaries of aid), and C-241/07 – *JK Otsa Talu* (support for agri-environmental production methods).



The diagram above (based on the information available on the website https://www.riigiteataja.ee/) shows that nature conservation (protection) law is the most often presented area of environmental law in Estonian court cases. Interestingly, no preliminary references from Estonia have dealt with this area. At the same time, there have been two preliminary references in the area of waste law, which otherwise is represented with far less cases. Although the total number of preliminary references in the area of environmental law is rather small, some reasons to this may be suggested. Nature conservation law, especially concerning Natura 2000 areas, has been quite thoroughly explained by the CJEU since C-127/02 - *Waddenvereniging and Vogelsbeschermingvereniging* (2004). Waste law, on the other hand, is more technical, rapidly developing and could pose more challenges to interpretation.

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?)

According to the available information there have been no deliberate breaches of the duty to ask for a preliminary ruling. There have probably been some borderline cases where a making of preliminary reference has been one of the alternatives. In those cases, the courts have finally argued that the law is clear enough or already sufficiently explained or that the case at hand could be solved without obtaining a definite answer to the potential problem of interpretation.

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

There is no such system in Estonia.

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

According to Article 27 (1) 4) of the Code of Administrative Court Procedure, a participant in proceedings has the right to file applications. There is no more detailed requlation for an application to request the national court to make a reference for a preliminary ruling to the CJEU. If a participant in proceedings files such an application, the national court can either grant the application by requesting a preliminary reference by an order[2] or refuse to grant the application[3]. Even if the participant does not file an application for a preliminary ruling request

[2] See, for example, the judgment of the Administrative Law Chamber of the Supreme Court, 29 May 2019, 3-18-637/11.
[3] See, for example, the judgment of the Administrative Law Chamber of the Supreme Court, 20 January 2021, 3-19-569/27, para 3 of the resolution, para 23.

to be made to the CJEU, it is the court itself who may consider it and to ask the participants to express their position on the matter.[4]

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?

No.

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?

In the case C-60/18 - *Tallinna Vesi*, the follow-up judgment 3-14-52974 of the Tallinn Circuit (appellate) Court closed the proceedings because the action was withdrawn. In the case C-292/12 - *Ragn-Sells*, the Tartu Circuit (appellate) Court made the follow-up decision 3-12-52.

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?

In the *Tallinna Vesi* case the two questions posed by the Estonian court were declared admissible and merged into one. The CJEU answered it by giving an interpretation of the relevant article in the light of the question.

In the *Ragn-Sells* case the national court had formulated four questions. As to the first three of them, the CJEU found that the request did not include any specific indication in respect of the applicability of the competition rules of the TFEU. Consequently, as far as they referred to those rules the questions were deemed inadmissible. The CJEU considered admissible and provided an answer only to the first question as far as it related to Articles 35 TFEU and 36 TFEU, and the fourth question.

[4] See, for example, the judgment of the Administrative Law Chamber of the Supreme Court, 29 March 2021, 3-18-1247/50, para 19.

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?

In the *Tallinna Vesi* case the CJEU decided to examine the two questions posed by the Tallinn Circuit Court together and merged them into one. Both questions were slightly rephrased without changing their substance.

In the *Ragn-Sells* case the CJEU rephrased the relevant part of the first question as well as the fourth question posed by the Tartu Circuit Court. When reformulating the questions the CJEU had included some provisions of EU law not mentioned by the national court in order to provide the court with elements of interpretation which might be of use in deciding the case finally. Given the admissibility issue, it is difficult to say whether the result was a 'proper' representation of the initial questions posed by the national court. As the national court was able to make a judgment based on the preliminary ruling, the CJEU's reinterpretation of the questions must be deemed useful.

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

I see no reason to doubt that the answer given by the Court of Justice was legally correct. After all, the ECJ has a final word in interpreting EU law.

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?

In the *Tallinna Vesi* case the CJEU provided a binary answer, explaining that EU law did not preclude certain national legislation, and did not allow a waste holder to make demands on the competent authority.

In the *Ragn-Sells* case the CJEU's answer was also binary in essence as it provided an interpretation of an article which either permitted or did not permit a local authority to require a specific action from the undertaking responsible for the collection of waste.

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.

In the *Tallinna Vesi* follow-up decision 3-14-52974 of the Tallinn Circuit Court the applicant withdrew the case.

In the *Ragn-Sells* case the Tartu Circuit Court was able to make the follow-up judgment 3-12-52. A large part of the judgment revolved around the local government's power to decide whether one or more waste treatment facilities could be designated in the process of a public procurement. The national court relied on the interpretation of the CJEU on several occasions by referring to the principle of proximity and to the fact that the CJEU did not find any evidence of the undertaking in question holding any particular position in the Estonian market for waste recovery, and by asserting that one part of the public procurement documents was unlawful as the local government was not allowed to make a certain request.

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?

In the *Tallinna Vesi* case the applicant withdrew the case.

In the *Ragn-Sells* case it was possible for the Tartu Circuit Court to make the follow-up judgment 3-12-52.

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.

In the *Tallinna Vesi* case the applicant withdrew the case.

In the *Ragn-Sells* case the follow-up judgment was cooperative.

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

No observations.

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 *Tallinna Vesi* case concerned Articles 2 and 2^1 of the Waste Act, in force in 2014. It was not an one-on-one transposition of EU law as the national legislation prescribed that if the criteria had not been set at EU level for determining end-of-waste status as regards a specific type of waste, such end status depends on the existence of criteria laid down in a generally applicable national legal act concerning that type of waste.

The *Ragn-Sells* case concerned, among others, Art 67 of the Waste Act, in force in 2012. The national legislation was not a one-on-one transposition of EU law either, as can be seen from the CJEU conclusions that an obligation imposed by a local authority under Estonian law on the undertaking responsible for the collection of waste on its territory to deliver industrial and building waste to a treatment facility situated in the same Member State was such a measure of general application which was not permitted under Regulation 1013/2006 in so far as it related to recoverable waste, where the producers of the waste in question were themselves required to deliver the waste either to that undertaking or to that facility.

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.

Estonian environmental law certainly has its own identity but EU environmental law has shaped it during the last few decades. At the beginning of the restoration period of Estonia's independence at the end of 1980s, environmental problems were widely raised and discussed (*eg* public protests against the Soviet plans to mine phosphorite in Estonia). In 1992, the Constitution of the Republic of Estonia entered into force, including a rare basic duty to preserve the environment (Art 53: *"Everyone has a duty to preserve the living and natural environment and to compensate for damage he or she causes to the environment."*). On the other hand, the constitution does not stipulate a basic right to clean environment. Although it was discussed by the Constitutional Assembly, the final agreement was to not include it to the constitution.

Estonian environmental law has also been shaped by the high respect given to private property after the Soviet era. Especially the private owners of forests have felt that the restrictions to their property deriving from nature conservation have not been adequately compensated. In this regard the Supreme Court of Estonia found in a recent case that there is a strong public interest that justifies the restrictions due to nature conservation, and an individual's duty to tolerate these restrictions is therefore far-reaching. Compensation for the restrictions to private property should thus be provided only in cases exceeding a certain level of intensity (case no 5-21-3: *Rohe Invest*, 15 June 2021).

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?

There is no such monitoring regime in Estonia. Courts are independent in their activities. Given that the Estonian court system consists of three instances (county and administrative courts as courts of first instance, circuit courts as the second instance, and the Supreme Court serving as the third instance as well as the court of constitutional review), the following of preliminary rulings and case law of the CJEU can be examined by courts of upper instances.

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***
>
> *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.*

1) The NGO has standing to challenge the withdrawal decision: according to §-s 30 and 31 of the General Part of the Environmental Code Act (GPECA), where an environmental organisation contests an administrative decision, it is presumed that its rights have been

violated where the contested administrative decision is related to the environmental protection goals or the current environmental protection activities of the organisation.

2) The withdrawal decision is unlawful:

a) The limit values of NO_2, as set out in § 47 of the Atmospheric Air Protection Act (AAPA) and the regulation no 75 (01/01/2017) of Minister of the Environment are trespassed in the air of the agglomeration (see also Art 13 of the Directive 2008/50).

b) The evidence presented by the Parties shows that this is due to the emissions coming from Euro 0-4 diesel vehicles.

c) The local government has drawn up a plan for improving air quality. This plan is not contested in the current proceedings, therefore it must be assumed that it meets the requirements set out in AAPA and Directive 2008/50 Art 23 para 2.

d) As explained by the CJEU, the fact that an appropriate air quality plan has been drawn up does not, in itself, permit the view to be taken that that a Member State has met its obligations under Art 13 of the Directive 2008/50. Thus, it can be concluded that the competent authorities are in breach of their obligations arising from the Directive and AAPA. The breaching authority has the duty to bring the air quality level in conformity with the air quality limit values or target values, so that the period during which the NO_2 level exceeds the limit values will be as short as possible (AAPA § 25, Directive 2008/50 Art 23 para 2). The reason for this obligation is the protection of human health: the objective of establishing the limit value is to prevent, preclude or reduce the adverse impact of the pollutant to human health or the environment (AAPA Art 10(1); Directive 2008/50 Art 2(5)).

e) The withdrawal decision is in breach of the competent authorities' obligation to keep the exceedance period as short as possible. The evidence presented demonstrates that the use of diesel vehicles in the centre of the agglomeration leads to a further worsening of air quality in the agglomeration. As the local authority has not presented evidence of the contrary, it can be reasonably assumed that the higher the exceedance of the limit values, the longer it takes to lower the level of NO_2 and reach the limit values. The exceedance should also be kept as low as possible, keeping in mind Art 23 of the GPECA, according to which everyone is entitled to expect that the environment concerning them directly meets their health and well-being needs. The applicant NGO can rely on this provision (GPECA Art 30).

The withdrawal decision must therefore be annulled.

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?

Yes it does. Based on personal observations it may be said that Estonian administrative judges study carefully ECJ judgments in the field of environmental law, though mainly *via* the Estonian Supreme Court judgments. In this light the main challenge for Estonian judges seems to be how to quickly and efficiently find the relevant CJEU case-law and to distill out the CJEU "doctrines" which are needed to resolve individual cases at hand. In this respect it would be very useful if thematic case-law fact sheets could be produced on more subjects of environmental law and then continuously updated. The fact sheet on public access to environmental information produced by the Research and Documention Directorate of the CJEU constitutes a very positive example (https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-05/fiche_thematique_-_environnement_-_en.pdf).