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

President Kari Kuusiniemi and Justice Mika Seppälä, the Supreme Administrative Court of Finland

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, we think the knowledge level is high, even though we cannot provide any surveys or statistical data to support the opinion.

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?

Training courses both at EU and national level have been available. Some judges have participated in CJEU and ERA training courses. A specific feature to be mentioned is that Finnish EU judges have been extremely active in taking part in occasions arranged in Finland and, hence, contributed to a considerable extent to raising the level of knowledge of national judges. Some judges working especially in the Supreme Administrative Court (SAC) and Vaasa Administrative Court (which is a nation-wide first-instance court under pollutiuon control and water law) have speacialised in environmental law, including EU environmental law, and their level of knowledge is 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.) 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?

Unfortunately not. However, during Finland´s EU membership since 1995, Finnish courts have referred 138 cases to the CJEU. Of them, 68 have been referred from SAC. Preliminary rulings concerning the environment have been divided as follows: green public procurement (Concordia Bus, C-513/99), waste (Palin Granit C-9/00; Avesta Polarit Chrome C-114/01; Lapin elinkeino-, liikenne- ja ympäristökeskus C-358/11, also chemicals), environment (environmental permit, coincineration of waste: Lahti Energia C-317/07 and again C-209/09), emissions trading (Yara, C-506/14), nature protection (Tapiola, C-674/17, hunting of wolf, derogation). No references from other Finnish courts in environmental cases have taken place.

It is a tricky question, why some areas generate more preliminary rulings than others. We think that e.g. unclarities concerning the concept of waste before reform of the Waste Directive made it necessary to refer many cases to the EUCJ. It the basic concepts of a legislative regime leave a wide margin of interpretation, courts under the CILFIT rule cannot help referring cases even if they would be convinced on the correct application. In Finland, the obligation to assess effects on Natura sites has been widely applied by Finnish courts, but we have been able to lean on the established case law by the CJEU, and base our application on the interpretations corfirmed by the CJEU. The only Finnish environmental case which did not concern the correct interpretation but the validity of an EU Act was Yara on emissions trading, where a Commission Regulation was seen partly invalid.

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 concern also courts of last instance?)

See the previous answer. Yes, but of course the courts of last instance always consider carefully, reflecting the issue in the light of CILFIT criteria, if the decision can be made on the basis of established CJEU case law. Especially concerning assessment of impacts on Natura 2000 sites, SAC has in several cases held that there is a solid line of interpretation, on which the national application can be based. Also in some waste cases, SAC has interpreted the concept of waste and other relevant criteria, such as end of waste, on the basis of existing case law without asking a prliminary ruling. Of note, it is always up to the national court to resolve the case, not the CJEU´s.

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

Not specifically. In theory, the supreme overseers of legality, the Chancellor of Justice and the Parliamentary Ombudsman, could react, even though they cannot, of course, overturn the decisions of independent courts.

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

Any party to a procedure can ask the court to refer the case to CJEU, but it is always in the discretion of the court to decide whether to ask a preliminary ruling or not. However, if a party at e.g. SAC can present weightly reasons for his/her claim that a preliminary ruling would be necessary to settle the interpretation of a relevant provision in law to be applied in the case, the court would, for sure, be inclined to refer the case.

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, both of us have. The latest example is the licence hunt for management of wolf population: decisions of SAC (2020:27-28; ECLI:FI:KHO:2020:27 and 28; unfortunately only in Finnish) were based upon CJEU judgment 10.10.2019, Luonnonsuojeluyhdistys Tapiola (C-674/17, ECLI:EU:C:2019:851).

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, we were both in the panel in emissions trading case SAC 2017:22, based on CJEU C-506/14 Yara Suomi Oy ym. (ECLI:EU:C:2016:799), and Kuusiniemi also in both Lahti Energia cases C-317/07 and C-209/09), decided by SAC after two preliminary rulings (SAC 2010:58), and in Lapin elinkeino-, liikenne- ja ympäristökeskus (C-358/11), decided by SAC 2013:102.

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?

All the other cases in which SAC has asked for a preliminary ruling are well-known inside the court (see under 3.). Concordia Bus case was decided by SAC 2003:41, Palin Granit by SAC 2002:82 and Avesta Polarit by SAC 2004:43.

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, in all of our cases.

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 wolf case, CJEU did rephrase the questions, but they represented correctly the ideas behind the reference.

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

Yes, absolutely. We were really curious if the derogation article of the Habitats Directive (Art. 16(1)(e)) would be interpreted so as to enable hunting of an endangered species to manage its population, especially in order to constrain poaching. The answer was yes, but the criteria to make sure that all the prerequisites for derogation are at hand, were strict and CJEU provided that the decisions shall be based on a robust scientific data.

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?

As we all know, CJEU does not and shall not decide the case. In the wolf case, it did set clear criteria, on the basis of which the provisions of the Directive shall be interpreted. Actually, in this very case the Court went rather long towards final decisions in the case, and after the first reading of the CJEU judgment, it was evident what the outcome of the SAC judgment would be.

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, it did. See also above. The judgment included clear standpoints concerning all the criteria for derogation according to the Directive, i.e. no alternative solution, no weakening of the (favourable) conservation status, a legal basis in Article 16(1)(a-e), and selectivity etc. It was unequivocally written and it was easy to understand and accept CJEU´s reasoning. The case was decided by SAC unanimously and leaning explicitly on CJEU´s judgment. (Just to mention, Kuusiniemi has also been sitting in a panel in a case which was decided by the Grand Chamber of CJEU, and the answers given were incoherent, unclear and not very helpful. It was not an environmental case, and for sure an exeption in my career).

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?

See above: yes it was. There are a couple of examples of cases pending in SAC, where the appeals have been withdrawn, but not in environmental cases. I cannot think the political sensitivity of the case could have any impact on an independent court, at least in Finland. E.g. the wolf issue is politically very hot and for sure, the decision to declare the permits illegal probably has not been popular among many people especially living in the countryside. But, the court is bound by national and EU law and its task is to apply it independently and impartially, neglecting eventual political pressure.

One example of a case with complications was Lahti Energia. As presented above, SAC asked for a preliminary ruling twice in the same case. CJEU´s answer to the first reference was a little bit surprising, and after it the operator – counting on its success after having learnt the standpoint of CJEU – informed that it will realise the filtering of the gas differently than in the original plan. Therefore, SAC had to ask a preliminary reference again, and now the contents of the second judgment were, as expected.

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.

We are absolutely of the opinion that the wolf case was a paradigm example of cooperative administration of justice.

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

Yes, no question about that (the wolf case).

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.

Yes, the national law (section 41 a of the Hunting Act) to be applied had exactly the same wording as Article 16(1)(e), and, hence, it was transposed correctly.

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 without doubt an identity of its own, but it has gained from certain impacts of EU environmental law. In our opinion, it would have been – for political reasons – challenging to pass strict nature conservation legislation without the push from the EU.

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 system in Finland. Of course, also SAC as a supreme instance is fully aware of the risk of an infringement action from the European Commission, if courts do not fulfil their duties in referring cases to CJEU and in applying EU law in general.

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.*

According to Article 13(1) of the Directive Member States shall ensure that throughout their zones and agglomerations limit values are not exceeded. In Article 23(1) first subparagraph it is stated that when limit values are exceeded, Member States shall ensure that air quality plans are established and if deadline to achieve the limit values has expired, the air quality

plans shall set out appropriate measures to ensure that exceedance period can be kept as short as possible (Article 23(1) subparagraph 2).

In its decision (paragraph 42) the CJEU has stated that it is not enough to meet the obligations of the MS that the air quality plan has been merely established. The main purpose of the Directive is stipulated in Article 13 and the Directive permits only exception laid down in Article 22 to postpone the deadlines provided. If the deadlines are expired, according to the Article 22(1) subparagraph 2 the air quality plans shall contain measures to keep the exceedance of limit values as short as possible. The CJEU emphasized in its decision (paragraphs 46 and 47) that Article 22 and 23(1) subparagraph 2 are to be applied in different situations and are different in scope. When Article 23(1) subparagraph 2 is applied it is not possible to exceed the deadlines to fulfill the limit values. As the CJEU said in its conclusion (paragraph 49), when it is apparent that limit values still can be exceeded, the air quality plan is not in line with Article 13 and then the Member State neglects its obligations.

According to all facts of the case it is possible that the limit value of NOx can be exceeded if the use of vehicles in the centre area of the agglomeration is allowed by the Withdrawal decision. When considering if the probability is apparent, it should be taken into account the precautionary principle as it is interpreted in the EU environmental policy in general. Furthermore, the preamble of the Directive should be taken into account. The main purpose of the NOx limit values is to protect human health (recital paragraph 2) and the idea is to improve air quality and, when it is in good status, to maintain the quality (recital paragraph 9). According to recital paragraph 30, the Directive respects fundamental rights and observes the principles recognized in particular by the Charter of Fundamental Rights (e.g. Articles 2, 35 and 37). Consequently, the interpretation of the derogation from the obligations of the Directive should be restrictive. Taken into account all these matters the Withdrawal decision is not under these circumstances in line with the requirement of Article 13 of the Directive because the air quality plan does not guarantee that the limit value of NOx will not be exceeded in the future. **

**The Disclaimer: When interpreting this answer, it should be noted that it was not clear if the Withdrawal decision was part of the Air Quality Plan. Also, the data about the Air Quality Plan was missing, and it was not possible to assess how accurate is the estimation to achieve the limit values.

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?

In all, the system of preliminary rulings is of paramount importance in harmonising interpretation and application of EU Law. Generally, it functions very well, and the discourse

between national supreme instances and the CJEU is working well. Only rarely the ruling of the CJEU has been not quite clear, but in these kinds of cases a discourse between the CJEU and the referring court might have been useful while the case was still pending at the CJEU.

Sometimes, however, it is not easy to decide if the case can be solved based on existing case law or if it includes features not addressed properly in established case law. Even if the duration of solving of cases in the CJEU has decreased recently, the time lapse is still a challenge in many cases, where big investments may depend on the outcome of the case.