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.

Norway is not a member of the EU, and hence not included in the preliminary reference procedure and judicial cooperation with the CJEU described above. Norway is however an EFTA State part to the EEA Agreement, where EU rules concerning the single market in large has been transposed to the EEA legal order, and where the EFTA Court has been given jurisdiction that largely corresponds to the CJEU within this area. In accordance with the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice, national judges may, when considering a case that concerns the interpretation of EEA law, refer a question on the interpretation to the EFTA Court. The decisions given by the EFTA Court in such cases are called Advisory Opinions, and are, as the name indicates, not legally binding for the national court. However, national courts will normally place great emphasis on what the EFTA Court has stated on how the EEA law is to be understood.

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?

Under Section 51a of the Norwegian Court of Justice Act, it is within the national court's discretion to decide on whether there is a need for an interpretation question to be referred to the EFTA Court or not. My impression is that the national courts, in all instances, have become more aware and familiar of this opportunity over the recent years and that more cases are referred to the EFTA Court now than before.

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?

I have not attended training courses on environmental law nationally or offered by the DG Environment or ERA. I have however attended many of the meetings held by EUFJE and other international meetings about environmental 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?

To my knowledge, there are no statistics on the subject areas of the EEA law that are referred to the EFTA Court for an Advisory Opinion. Nor do I have knowledge of cases regarding environmental law that have been referred to the EFTA Court from a Norwegian court for an advisory opinion.

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?)

As mentioned, it is within the national court's discretion to decide on whether there is a need for an interpretation question to be referred to the EFTA Court or not. To my knowledge, there has been no cases regarding the interpretation of environmental law referred to the EFTA Court from a Norwegian Court.

5. Does you 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?

It is within the national court's discretion to decide on whether there is a need for an interpretation question to be referred to the EFTA Court or not. A party may initiate that the national court requests an advisory opinion from the EFTA Court, but the court's decision whether or not to refer a question, may not be challenged. If the case is appealed to a higher instance, the party may put forward a new request to the appellate 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?

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?

To my knowledge, there has been no cases regarding the interpretation of environmental law referred to the EFTA Court from a Norwegian Court, and hence no follow-up judgements.

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?

Not applicable, see Question B.

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?

Not applicable, see Question B.

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

Not applicable, see Question B.

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?

Not applicable, see Question B.

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.

Not applicable, see Question B.

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?

Not applicable, see Question B.

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.

Not applicable, see Question B.

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

Not applicable, see Question B.

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.

Not applicable, see Question B.

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.

The environmental law in Norway consists of both purely national rules and implemented EEA law. It is therefore not a mere representation of EEA law, but a good mixture.

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?

Not to mye knowledge.

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.*

(The question submitted presupposes that the environmental non-governmental organization has legal interest in challenging the withdrawal decision under Section 1-3 of the Norwegian Civil Act.)

The national follow-up ruling would be based on the following assumptions:

- Directive 2008/50 is implemented into the EEA Agreement, and into Norwegian law through the Regulation relating to pollution control [Pollution regulations/forurensningsforskriften].

- Provisions in law that serve to fulfil Norway's obligations under the EEA agreement shall, in the event of a conflict, take precedence over other provisions that regulate the same matters. The same applies if a regulation that serves to fulfill Norway's obligations under the Agreement is in conflict with another regulations, cf. Section 2 of the EEA Act.

- An advisory opinion from the EFTA Court is not legally binding for the national court reviewing the request for annulment of the withdrawal decision, but in accordance with case law, national courts will place great emphasis on what the EFTA Court has stated on how the EEA law is to be understood.

- The advisory opinion in this case suggests that the withdrawal decision may be in conflict with Article 13 of the Directive. It will however be up to the national court to access the facts of the case and whether there is such conflict.

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?

Norway is not a member of the EU and the preliminary ruling procedure is therefore not available to Norwegian judges.

The EFTA Court only has jurisdiction with regard to the EFTA States which are parties to the EEA Agreement (Iceland, Liechtenstein and Norway). In 2020 the EFTA Court gave 11 rulings, whereas 10 were advisory opinions. None of these were related to environmental law issues. I am aware of cases from the EFTA Court regarding environmental law (case E-3/15 is an example), but none of these were referrals from Norwegian courts. Even though advisory opinions from the EFTA Court would contribute to achieving uniform application of EEA law in environmental matters, the procedure will only be effective if enough EEA relevant environmental cases are brought before the national courts. Up until now, this has not been the case.

I mention that even though Norway is not part of the EU, judgments from the CJEU are still an important source of law when applying corresponding EEA regulations. Judgements and clarifications that come from the CJEU with regard to EU environmental law and obligations, will therefore also be relevant for for national courts when considering equivalent EEA relevant rules.