



EU FORUM OF JUDGES FOR THE ENVIRONMENT
UE FORUM DES JUGES POUR L'ENVIRONNEMENT

Questionnaire for the EUFJE Conference 2012 at the Council of State of the Netherlands
The application of European environmental law by national courts: Germany

Part 1: The interrelation between EU (environmental) law, national law and national environmental courts

1.2 Questions on the interrelation between EU (environmental) law, national law and national courts

Q 1

a. a national judge, first, and then a European judge

Q 2

fairly positive

Q 3

fairly positive_____

Q 4

- a.
 - i. generally no, but as far as Art. 23 par 1 and Art. 79 par 3 Basic law are concerned: yes
 - ii. generally no, but as far as Art. 23 par 1 and Art. 79 par 3 Basic law are concerned: yes
- b. generally yes
- c. yes

Article 23

[European Union – Protection of basic rights – Principle of subsidiarity]

(1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.

Article 79

[Amendment of the Basic Law]

(1) ...

(2) ...

(3) Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

Article 1

[Human dignity – Human rights –

Legally binding force of basic rights]

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

Article 20**[Constitutional principles – Right of resistance]**

(1) The Federal Republic of Germany is a democratic and social federal state.

(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.

(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

(4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.

Q5

The interrelation between national sovereignty and the EU is sketched out in art. 23 para. 1 basic law. Its details are laid down in the case-law of the Federal Constitutional Court.

Q6

a. yes (Simmenthal-obligation workable)

b. yes

c. in general yes, but knowledge of application of European law by other member states should be better

1.3 Questions on the role of EU law in national environmental cases**Q7**

According to the Federal Administrative Court's (FAC) statistic, 1.672 cases were finished in 2011. 1.420 decisions can be found in the largest German legal database, juris. However, of the fourteen panels of the FAC, only three (4th, 7th and 9th Senate) decide – in part among other matters – environmental law cases. The juris database lists 298 decisions of these panels. Of these, about 150 to 200 decisions raise problems of environmental or planning law. Only these decisions are the basis of the following survey.

Q8

| Subquestion EU environmental law... | Absolute Number** | Percentage of total FAC decisions in juris (1420) | Percentage of 4th, 7th and 9th Senate (298) | Percentage of environmental/ planning law cases (175) |
|---|----------------------|--|---|--|
| a. at issue* | 19 | 1,3% | 6,3% | 10,9% |
| b. applied* | 16 | 1,1% | 5,4% | 9,1% |
| c. basis of court's decision* | 3*** | 0,2% | 1,0% | 1,7% |

* I suppose that "at issue" means: raised by the parties, "applied" means: relevant, "basis of court's decision" means: administrative decision quashed because of breach of EU law.

** In 2 planning law cases, EU competition law but not EU environmental law was at issue (BVerwG 7 B 10.10, BVerwG 7 A 18.10). These cases are not included in this statistic.

*** BVerwG 9 A 31.10, BVerwG 7 C 21.09, BVerwG 9 A 12.10

The number of cases in which national environmental law was applied is higher. National environmental law is to a high degree transposition of EU environmental law.

Q9

The FAC is a general administrative court. However, this survey covers only the 4th, 7th and 9th Senate, which are specialized in environmental and planning law (see Q7). Thus, **all** cases in which the EU environmental law was at issue were administrative cases; they were **mainly** planning law cases and **rarely** (other) environmental law cases.

Q 10

There is no clear "top 5". The "top 3" are "access to court" (art. 10a EIA directive), "environmental impact assessment" and "nature protection". Some/few cases related to "industrial accidents", "noise" and "waste management".

Q 11

| | | |
|-------------------------------|--------|-----------|
| procedural questions | | |
| access to justice | | regularly |
| legal remedies | never | |
| material norms | | |
| legality of national law | | rarely |
| legality of decisions/actions | mainly | |
| legality of EU law | | never |

Q 12

| | | |
|-----------------------------|-------|-----------|
| individuals | | regularly |
| companies | | rarely |
| NGOs | | mainly |
| the legislature | never | |
| national public authorities | | rarely |
| official third parties | | never |

2.2 Questions on the application of the EU mechanisms to apply EU directives

Q 13

If the FAC can not be sure whether a directive is correctly transposed into national law it will refer the case to the ECJ. If it deems the transposition to be correct it will apply the national law only. In 2011 the FAC did not refer an environmental case to the ECJ.

Q 14

There are very few cases in which the FAC has found the transposition of EU-environmental directives incorrect. If so, it will use the mechanism of consistent interpretation or direct effect. If the directive is not transposed in time, it will – if possible – use the direct effect.

Q 15

One mechanism. Consistent interpretation is always tried first (see Q 16). Only if it is not possible because a national rule's content is obviously inconsistent with EU law, direct effect is used.

Q 16

Consistent interpretation/direct effect.

Consistent interpretation is preferred to direct effect. A similar order of preference has been made mandatory by the Federal Constitutional Court when questions of a rule's constitutionality are at issue; it is therefore most familiar to German judges. Questions of state liability are decided on by the civil courts (art. 34 basic law) and can therefore not be raised by the FAC.

Q 17

There is no example among the cases listed for answer 8. However, the Inter-Environment test is known to the court (see decision vom Sept. 29th 2010 – BVerwG 4 BN 23.10) and would be applied, should the question arise.

Q 18

in case of direct effect the FAC is allowed
- to set aside the conflicting national rule

In cases of consistent interpretation and direct effect the FAC is allowed
- to anul decisions
- to revoke a consent already granted
- to suspend a consent already granted
- to offer interim relief

2.3 Questions on the application of consistent interpretation

Q 19

I agree.

Q 20

Yes

Q 21

How often consistent interpretation non usable? rarely

Reason: The court's conclusion that a consistent interpretation is not possible is the result of the application of several techniques of interpretation. The textual interpretation (no contra legem interpretation) - which is mainly required by the principle of legal certainty - would certainly play a significant role, but the legislative process would play a role, too.

Example: With regard to the Trianel-Case (ECJ, 12 May 2011, C-115/09) the FAC ruled that the German law which provided that NGOs have access to court only as far as laws which confer rights to individuals are applied is not compatible with Art. 10a 85/337/EEC and, as long as the german law is not amended, the NGOs must have access to court in direct effect of Art. 10a 85/337/EEC (BVerwG 7 C 21.09, judgment of 29 Sept. 2011).

Q 22

- Use of interpretation by other courts of own country: 10 – 25%. Because the FAC is last instance it always takes the interpretation of EU law by the lower instances in the pending case into account.

- Use of interpretation by national courts of other Member States

Not in the cases listed for answer 8; it was used however by the 1st Senate in judgments concerning asylum law: judgment of 7 July 2011 – BVerwG 10 C 26.10 – , juris note 38; reference for a preliminary ruling of 9 December 2010 – BVerwG 10 C 19.09 – , juris note 34/35; in both cases British courts (Supreme Court, Court of Appeal, House of Lords) were quoted.

There is a need for information on the interpretations of EU law by other Member States, in particular for the CILFIT-test (acte claire).

2.4 Questions on the application of direct effect

Q 23

- The mechanism of direct effect is an advantageous principle: I agree.
- The criteria to establish whether or not a provision has direct effect are workable: I agree.

Q 24

Direct effect established by use of case law of

- | | |
|--|-------|
| - other courts of my country | never |
| - national courts of other Member States | never |

Information on the use of direct effect of EU environmental law by national courts of other Member States is helpful, but the criteria of direct effect are quite clear, the difficulties lie rather in the content of EU law and the possibility of consistent interpretation.

Q 25

Never in the period 1 January 2011-1 January 2012; the Kraaijeveld reasoning was last used by the court in a judgment of 20 August 2008 – BVerwG 4 C 11.07 – juris note 20.

Q 26

Never in that period.

Q 27

This question has never been raised. The national public authorities usually grant the environmental permit if the project meets the national law.

I would not limit the use of the mechanism of direct effect in such a case. In Germany the Administrative Courts can not grant the permit by themselves but only order that the national public authority shall do so. If third parties are not formally involved in the first court proceeding they have access to court after the permit has been granted by the national authority. If a second court proceeding is not workable the third parties have to be formally involved in the first court proceeding.

Q 28

This question has never arisen. Usually NGOs benefit from the direct effect of environmental directives.

Q 29

The mechanism of EU state liability is an advantageous mechanism: I agree.

2.5 Questions on the application of State liability

Due to art. 34 basic law, cases of State liability fall within the jurisdiction of the civil courts, not in that of the FAC. Questions 30 – 33 will therefore not be answered.

3.2 Questions on the application of the preliminary procedure

Q 34

The preliminary procedure is a very useful instrument: I agree

Q 35

7 references, 2 of them were made by the FAC.

- VG Berlin, Beschl. v. 22.9.2011 – 2 K 174.10 <2003/4EEC>
- VGH Mannheim, Beschl. v. 27.7.2011 – 8 S 1712/09 <2001/42/EC>
- BVerwG, Beschl. v. 3.12.2009 – BVerwG 4 C 5.09 <Art. 12 82/96/EEC, Seveso-II, ECJ 15.9.2011, C-53/10
- VGH München, Beschl. v. 26.10.2009 – 22 BV 08.1968 <regulation 1829/2003/EC>
- BVerwG, Beschl. v. 30.4.2009 – BVerwG 7 C 17.08 <2003/4/EC; ECJ, 14.2.2012, C-204/09>
- OVG Münster, Beschl. v. 5.3.2009 – 8 D 58/08.AK <85/337/EEC, 2003/35/EC; ECJ 12.5.2011, C-115/09, Trianel>
- VG Oldenburg, Beschl. v. 13.5.2008 – 1 A 510/08 <93/43/EEC, ECJ 14.1.2010, C-226/08>

Q 36

One reference dealt with material and procedural aspects of the Seveso directive, one with directive 2003/4/EC.

Q 37

How many requests of parties for preliminary ruling?

6 out of 19, i.e. 25-50%

[9 A 8.10, 4 B 77.09, 7 B 79.10, 9 A 12.10, 9 A 14.10, 7 C 21.09]

When turned down, are the reasons always stated in the ruling?

Yes

Q 38

Ever withdrawn preliminary references?

No

Questions

- | | |
|--------------------|----|
| - left unanswered? | no |
| - rephrased? | no |

Q 39

No. The Court does not wait for the "perfect" case, but for a case, in which a preliminary question is not only raised by the parties, the EU law concerned has to be the basis of the court's decision.

Q 40

(proceedings stayed during preliminary ruling procedure?)

- | | |
|--|---|
| - In that certain case | yes |
| - In all other cases pending where this question is relevant | optional, but will most probably be done |
| - in case of references by other courts of our country | probably yes |
| - in case of references by other nations' courts: | It depends. Usually our national law is different from the referred case. |

Q 41

yes

Q 42

Yes

Q 43

Yes

Q 44

no

State liability? no

Able to repair? The unsuccessful party could complain at the Federal Constitutional Court on the grounds of a violation of art. 101 basic law (right to the statutory judge). However, this has to happen within one month after his receipt of the incorrect decision. When the ECJ decides on the matter, it will usually be too late.

Q 45

9 cases out of 19 (25-50%)

Q 46

national procedural rule not 'EU-proof':

2 cases out of 19 (10-25%)

[judgments of. 29.9.2011 – BVerwG 7 C 21.09 – and 20.12.2011 – BVerwG 9 A 31.10, both judgments following the Trianel-Case]]

Restrictions that played a role:
both times directive 2003/35

Relevant generally used legal considerations in our case law:
The FAC followed the Trianel- judgment (C-115/09) in other pending cases where the same question was relevant.

Q 47

Sorry, I do not understand the question.

Q 48

Current national procedural law possibly infringing EU law:

The FAC used to quash a planning act because of a flaw in the planning procedure (for example EIA) only, if – regarding the circumstances of the specific case – the planning authority would possibly have come to a different decision if the planning procedure had been correct (s FAC, preliminary ruling of 10.1.2012 – BVerwG 7 C 20.11]

Future national procedural law possibly infringing EU law:

No

Q 49

fairly big