



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*

Report from Austria

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Introduction

National courts are 'the guardians of the [EU] legal order and [its] judicial system', along with the European Court of Justice. The 'tasks' attributed to [the national courts] are indispensable to the preservation of the very nature of the law established by the Treaties'. Once again the Court of Justice (ECJ) confirmed herewith in Opinion 1/09 of March 2011, with force, the essential role national courts play in the Union's shared and integrated legal order.

The central topic of the *Eufje Conference in October 2012* is the role of national environmental courts in the EU legal order, and in particular their application of European environmental law. The 'application of European environmental law' refers to the ways by which Union law on its own authority has normative effect in the national legal orders of the Member States. The focus will be on the application of secondary Union law, in particular directives, as this is (still) the primary legal source of Union for environmental protection. The main question to be addressed is thus how national environmental judges view their role as Union judges and how do they fulfill this role? This question has been divided into four sub questions, on the basis of which the questionnaire was drafted:

- 1) How do national environmental courts perceive the interrelation between EU (environmental) law, national law and themselves?
- 2) How do they perceive and use the three traditional ECJ methods for the application of Union law (consistent interpretation, direct effect, state liability)?
- 3) How do they perceive and use the preliminary procedure (art. 267 TFEU)?
- 4) How do they perceive the interrelation between procedural autonomy, EU environmental law and themselves in 'EU law'-cases, with a focus on i) access to justice, and ii) legal remedies (legal effects of court decisions)?

Over the last four decades the formal and theoretical European legal framework on these topics was developed, mainly by the ECJ and in the legal doctrine. This theoretical framework may not, however, necessarily coincide with the way the national courts perceive and apply European (environmental) law in practice. The aim of the conference is to exchange information and experiences relating to the practices of

national environmental courts as Union judges: in a) their application of EU environmental law and b) in the (procedural) hurdles they then encounter.

To prepare for the conference a questionnaire was drawn up to attempt to get some insight in the current perception of the national environmental courts on their role in the EU legal order and on their experiences in applying EU environmental law. The answers to the questionnaire will provide an inventory of these perceptions and experiences, an overview of which will be presented at the conference.

Structure of the questionnaire

The questionnaire, covering the aforementioned sub questions, consists of 49 questions. You are requested to answer the questions according to your personal views. Please indicate wherever you are aware that this opinion deviates from the prevailing opinion of your court.

The questionnaire includes, as much as possible, closed questions, to be answered with yes/no, or by selecting limited options (multiple choice). Once more you are invited to provide additional information or give examples to illustrate the practice in your court or country. The questionnaire is in principle limited to secondary EU environmental law, in particular to directives, yet you may also address the other types of EU (environmental) law. During the conference the other types of EU law will be touched upon incidentally.

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

This part of the questionnaire deals with the view of national environmental courts on the interrelation between EU (environmental) law, national law and their role therein. In other words what is your view, as a national environmental court, of the EU legal order?

1.1 Introduction of the EU legal framework

It is settled case law of the ECJ that the EU forms an independent yet shared legal order. According to the European theoretical legal framework, the status of EU law 'versus' national law is dominated by three main principles: the principles of primacy, subsidiarity (art. 5(3) TEU) and of loyal cooperation (art. 4(3) TEU, also known as the general obligation of sincere cooperation). Any national (procedural) rule in conflict with Union law must be set aside or 'rendered inapplicable', also by the national courts (the so-called *Simmenthal*-duty (Case 106/77)). The role of a national court in the European legal order is that of a –supplementary- *juge du droit commune*. When legal redress is not possible before the ECJ, the national court will have to provide judicial protection of EU law in its Member State. As a European court and based on the principles of loyal cooperation and of effective legal protection, the national court has a dual task: a) to offer effective legal protection and b) to ensure the uniform application of EU law. The national court is obliged to give full effect to EU law provisions and protect rights conferred on individuals by these provisions, including if necessary the refusal of its own motion to apply any conflicting provision of national law. National courts have the responsibility to prevent the application of national law and decisions of administrative authorities when this is contrary to EU law. Although according to the legal fiction of the case law of the ECJ, it is for the ECJ to explain EU law and for the national courts to apply it, in practice national courts also explain EU law, if necessary assisted by the ECJ via the preliminary procedure.

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

1. I consider myself
- a European judge
 - a national judge
 - equally a national and European judge
 - a European judge, first, and then a national judge
 - a national judge, first, and then a European judge.
-

2. What is your view of EU law in general?
- Very positive
 - Fairly positive
 - No opinion (don't know)
 - Fairly negative
 - Very negative
-

3. What is your view of EU environmental law in general?
- Very positive
 - Fairly positive
 - No opinion (don't know)
 - Fairly negative
 - Very negative

4. Propositions on the your view of the your role as EU court:
- a. I consider my constitution of a higher order than
 - i. EU treaties; **Yes/no***
 - ii. EU secondary law. **Yes/no**
 - b. When judgments of the ECJ and the national supreme court conflict, I will follow the ECJ. **Yes/no**
 - c. The principle of loyal cooperation is a guiding principle for the National court. **Yes/no**

* In the course of the Austrian accession to the EU, the fundamental principles of the constitution have undergone substantial change thus opening up the national legal order widely to supremacy and direct effect of EU law. However EU treaties that will substantially change fundamental principles of the Austrian constitution in future, have to be submitted for a referendum.

5. Is the relationship between EU environmental law and national law in your country
- a. codified in your national law? **Yes/no**
 - b. acknowledged via national case law? **Yes/no**

If yes, please indicate how:

.....Insofar as the supremacy of EU law over national law (including constitutional law) is established case law of the courts of last instance There is also case law i.a. on the direct applicability of directives and on the obligation of consistent interpretation. The supremacy of EU law, even over the national constitution, is

undisputed in Austria. It is also undisputed and has been confirmed time and again by the Austrian Constitutional Court, that national constitutional law still has to be taken into account as far as there is any scope for interpretation. In such situations, the Austrian Constitutional Court applies the 'principle of double scrutiny' (*Grundsatz der doppelten Bindung*). According to this principle, an act, transposing a directive etc, has to be in conformity with EU law as well as national constitutional law. According to the courts of last instance, the doctrine of supremacy of EU law over national law has to be applied only so far as necessary. In other words, decisions of the national legislator should be upheld so far as possible.

6. What do you consider your task(s) with regard to EU law *and* do you consider these task(s) 'workable' or difficult:

- | | | |
|----|---|----------------------|
| a. | to set aside any national rule that is in conflict with European law (the <i>Simmenthal</i> -obligation)? | Yes/no |
| b. | to offer effective legal protection of European law? | <u>Yes/No</u> |
| c. | to ensure the uniform application of European law? | <u>Yes/No</u> |

.....The tasks are workable in general but in practice they may be difficult to fulfill and they may raise difficult questions of interpretation. For example with regard to effective legal protection it may be difficult to ascertain the limits of national procedural autonomy. The decision to request for a preliminary ruling has to be taken with cost and duration of proceedings at the back of one's mind.

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

7. As an estimate, how many cases did your court decide in the period 1 January 2011 - 1 January 2012?
Please indicate the total number: About 40.....

8. In how many of these cases:

- | | | |
|----|--|--|
| a. | was EU (environmental) law at issue? | |
| | | 0-1%; 1-10%; 10-25%; 25-50%; 50-75%; <u>75-90%</u>; 90-100%; 100% |
| b. | was this EU law actually applied (taken into account)? | |
| | | 0-1%; 1-10%; 10-25%; <u>25-50%</u>; 50-75%; 75-90%; 90-100%; 100% |
| c. | was this EU law the basis of your court's decisions? | |
| | | 0-1%; 1-10%; 10-25%; 25-50%; 50-75%; 75-90%; 90-100%; 100% |

9. Please provide insight in the type of cases in which the EU law was at issue:

- | | | |
|----|--------------------------|---|
| a. | Civil cases: | Never, rarely, regularly, mainly, all |
| b. | Criminal cases: | Never, rarely, regularly, mainly, all |
| c. | Administrative cases: | Never, rarely, regularly, mainly, all |
| | i. general cases: | Never, rarely, regularly, mainly, all |
| | ii. environmental cases: | Never, rarely, regularly, mainly, <u>all</u> |
| | iii. planning law cases: | Never, rarely, regularly, mainly, all |
| d. | Differentially: | Never, rarely, regularly, mainly, all |

If differently, please specify

Please indicate your type of court:

- civil court
- criminal court
- administrative court
 - general administrative court
 - environmental court**
 - planning law court

- differentially:

10. Please provide insight in the *top 5 of the most relevant topics* in EU environmental legislation in the cases in which EU law was at issue:

- X Access to information/consultation/court
- X Environmental impact assessment (such as EIA)
- X Industrial emissions (IPPC/IED)
- Industrial accidents (post Seveso)
- X Water
- Air
- Noise
- Products
- Chemicals
- New technologies (Bio-/nanotechnology)
- Nuclear
- Nature protection
- X Waste management
- Climate change
- Renewable energy
- Differentially,

11. Please provide insight in the type of legal questions in which this EU (environmental) legislation was at issue in these cases:

- Procedural questions: **Never, rarely, regularly, mainly, all**
 - X access to justice
 - legal remedies (reparation)
 - differently, namely
- Material norms: **Never, rarely, regularly, mainly, all**
 - X legality of national law
 - legality of decisions/actions/sanctions imposed by national authorities
 - legality of EU law
- Differently, namely
 - Differently, **Never, rarely, regularly, mainly, all**

12. Please provide insight how the EU law entered the environmental case law. Was it relied on by:

- X individuals **never, rarely, regularly, mainly, all**
- companies **never, rarely, regularly, mainly, all**
- X NGOs **never, rarely, regularly, mainly, all**
- the legislature **never, rarely, regularly, mainly, all**
- national public authorities **never, rarely, regularly, mainly, all**
- X official third parties to the dispute **never, rarely, regularly, mainly, all**
- differently: **never, rarely, regularly, mainly, all**

Part 2. The use of the ECJ mechanisms of application of EU law

2.1 Introduction of EU legal framework

This part of the questionnaire specifically focusses on the application of **EU environmental directives in the cases your court decided in the period 1 January 2011 - 1 January 2012 in which EU law was at issue, as mentioned under 1.3.**

Contrary to regulations and decisions, EU directives are never directly applicable in the legal order of a Member State upon their coming into effect (art. 288 TFEU). Directives are binding for the Member States as to the result which they aim to achieve and in principle require national implementation measures (art. 288 (3) TFEU). The implementation obligation of the Member States for directives consists of the duty to **a)** transpose its provisions in national law; **b)** to apply and **c)** to enforce the application of the directive –or the national implementation law- (art. 288 TFEU) and **d)** to offer effective legal protection (art. 19 TEU). The ECJ developed three –by now traditional- mechanisms to **i)** remedy flaws in the implementation (solve –potential- conflicts between national and Union law), and **ii)** so ensure the application (full effectiveness) of the directives irrespective of their nature and **iii)** give redress to individuals who consider themselves wronged by conduct amounting to fault on the part of the Member States. These mechanisms are: **consistent interpretation, direct effect, and state liability**, each with its own set of criteria and restrictions, to be applied in this order.

Consistent interpretation: When applying national law, national courts are obliged to interpret the whole body of rules of national law as far as possible in consistency with Union law. Consistent means ‘in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive’. ‘[I]f the application of interpretative methods recognized by the national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law, or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive.’ This duty of consistent (or harmonious) interpretation applies:

- to all national law, whether adopted before or after the directive in question;
- to all Union law; and
- In all kinds of relationships involved (including horizontal, inverse vertical).

However, the ECJ has limited the application of consistent interpretation via general principles of law, in particular the principles of legal certainty and non-retroactivity and the interpretation of national law *contra legem*.

Direct effect: Direct effect means that individuals can directly invoke a provision of primary or secondary Union law in the national legal order, including before a court). Whether a provision has direct effect depends on three conditions: **1)** the EU legal instrument in which the provision is contained; **2)** the content of the provision; and **3)** the type of relationship involved.

Provisions of directives, as a rule, lack direct effect (ad 1), but they can have direct effect when they are sufficiently precise and unconditional (ad 2). Contrary to provisions of the Treaties and regulations, provisions of directives can only have direct effect in vertical relations and not in horizontal or inverse vertical relations (ad 3). However the latter was opened up for the so-called triangular relations in the case *Wells*, where Mrs. Wells (the plaintiff), appealed against a decision of a national public authority to grant a permit to a mining company (third party, here the permit holder), arguing that a provision of the EIA directive was breached by this decision (Case C-201/02). The ECJ decided that in such cases individuals can successfully invoke the direct effect of the provisions of directives, as they are then applied vertically and *not* horizontally or inverse vertically, as invoking the directive merely had adverse horizontal side-effects. The negative effects for the

mining company of the direct effect of the directive did not directly stem from the directive, but from the authorities' failure to fulfill its obligations under the directive.

When provisions in directives are not sufficiently precise and unconditional due to leaving a discretion to the Member States, they still can be applied by the national courts. The national court then must examine whether the national public authority/legislator stayed within the margin of discretion left to the Member States in the EU law when exercising its powers (the so-called *Kraaijeveld*-test or legality review (Case C-72/95)). This test can be perceived as a form of direct effect

During the implementation period: One final remark with regard to the mechanisms of consistent interpretation and direct effect is that they only apply with regard to directives once the period for transposition has expired. During the implementation period Member States 'must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive'. The courts are to apply this test (the so-called *Inter-Environnement*-test (Case C-129/96)). The ECJ has applied it also for other transitional regimes in directives.

State liability: When the former two mechanisms fail and a provision of a directive cannot be used by the national court via consistent interpretation or direct effect, state liability is the mechanism of last resort. But the European principle of state liability (also known as *Francovich*-liability (Joined Cases C-6/90 and C-9/90)) can also be used as a separate mechanism to remedy infringements of Union law, such as the failure to implement directives correctly (transpose, apply, enforce). State liability of a Member State covers infringements by all the national authorities, including violation of EU law by the highest national courts (*Köbler*, Case C-224/01). The ECJ has set minimum criteria, under which a Member State is to be considered liable before a national court. The criteria of the European principle of state liability for failure to implement directives are three-fold. Required are **a)** a sufficient serious breach of Union law; **b)** of a rule intended to confer rights on individuals; and **c)** a direct causal link between breach and damage. Except for the criteria as such (the right to reparation when the criteria are met), the EU mechanism of state liability must be applied (given effect) within the national procedural framework, including how an action for a breach of EU law is classified, the exact nature or degree of the infringement required for state liability, and the extent of reparation. Yet this national procedural framework is subject to the EU limitations of equivalence and effectiveness (see par. 4). When found liable, Member States are required to make good damages caused to individuals through implementation failures. Although reparation must cover the loss or damage sustained so as to ensure effective protection, the national law on liability provides the framework within which the State must make reparation for the consequences of the loss and damage caused, provided this is in accordance with the aforementioned EU limitations

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

13. Please estimate how often your court considered an EU environmental directive not or incorrectly implemented, differentiating between the 3 elements of implementation (transposition/application/enforcement) in the cases in which EU law was at issue in the period 1 January 2011-1 January 2012?

- Transposition: **never, rarely, regularly, mainly, all**
- Application: **never, rarely, regularly, mainly, all**
- Enforcement: **never, rarely, regularly, mainly, all**

If possible, please illustrate the judicial practice and reasoning used to verify the implementation of EU law (for example via a sketch of a typical national environmental case)

.....

14. Please indicate as an estimate over the total number of cases of your court where EU law was at issue in the period 1 January 2011-1 January 2012, which of the three mechanisms was/were applied by your court in case of a non or incorrect implementation of (environmental) directives?

- a. Consistent interpretation:
 - 0-1%; 1-10%; 10-25%; 25-50%; 50-75%; 75-90%; 90-100%; 100%**
- b. Direct effect (including the 'Kraaijeveld-test'):
 - 0-1%; 1-10%; 10-25%; 25-50%; 50-75%; 75-90%; 90-100%; 100%**
- c. State liability:
 - 0-1%; 1-10%; 10-25%; 25-50%; 50-75%; 75-90%; 90-100%; 100%**
- d. During the transposition/ transitional periods: the 'Inter-Environnement test'
 - 0-1%; 1-10%; 10-25%; 25-50%; 50-75%; 75-90%; 90-100%; 100%**
- e. Differently, namely

.....

15. In general, do you use one or more of these mechanisms within one case?

- One mechanism, or
- Multiple mechanisms

Please explain: Often more than one directive will be relevant for the case. So e.g. the Kraaijeveld test may be applied with regard to transposition of the EIA directive as well as consistent interpretation with regard to the transposition of another environmental directive

16. In general, if any, what is your court's order of preference:

- Consistent interpretation/direct effect
- Direct effect/consistent interpretation
- Consistent interpretation/direct effect/state liability
- Direct effect/consistent interpretation/state liability
- Differently, namely

If possible, please indicate what the particular legal & practical arguments are for your court's order of preference

17. Does your court use directives when the transposition period or transitional period in these directives have not yet passed (including when the case concerns 'infringements' of these directives during these periods)?

- a. During the transposition period **Yes/no**
- b. During other transitional periods (such as extension periods) **Yes/no**

If yes, please explain, if possible, why and how (by illustrating the line of reasoning used in such cases:

Why:.....How:.....

.....

If yes, please also indicate, as an estimate, how often this occurred in the total cases of your court in the period 1 January 2011- 1 January 2012 in which EU law was at issue?

0-1% ; 1-10%; 10-25%; 25-50%; 50-75%; 75-90%; 90-100%; 100%

18. What concrete legal options (judicial decisions/remedies) does your court have at its disposal when, it concludes, on the basis of the EU mechanisms, that a EU directive was breached, in particular in view of the EU obligation to set aside any national rule that conflicts with EU law? Please select the options available to you and indicate for which EU mechanism they are available.

Your court is allowed to:

- X to set aside (not apply) the conflicting national rule
consistent interpretation; direct effect;(EU) state liability
- o to declare that EU law was breached
consistent interpretation; direct effect;(EU) state liability
- o to force the legislature to act
consistent interpretation; direct effect;(EU) state liability
 - o give an order to adopt legislation
consistent interpretation; direct effect;(EU) state liability
 - o give order to act in a specific way
consistent interpretation; direct effect;(EU) state liability
- o to annul decisions
consistent interpretation; direct effect;(EU) state liability
- X to revoke a consent already granted
consistent interpretation; direct effect;(EU) state liability
- o to suspend a consent already granted
consistent interpretation; direct effect;(EU) state liability
- o to award damages
consistent interpretation; direct effect;(EU) state liability
 - o monetary compensation
consistent interpretation; direct effect;(EU) state liability
 - o factual reparation
consistent interpretation; direct effect;(EU) state liability
- o to offer interim relief
consistent interpretation; direct effect/(EU) state liability
- X to alter (break through) national exhaustive mandatory assessment systems, for instance by widening an exhaustive number of grounds for refusing permits
consistent interpretation; direct effect/(EU) state liability
- o differently
consistent interpretation; direct effect/(EU) state liability

If differently,

.....

2.3 Questions on the application of consistent interpretation

19. Proposition: the mechanism of consistent interpretation is an advantageous principle.

I strongly agree, agree, neutral, disagree, strongly disagree

20. Does your court also use the mechanism of consistent interpretation *ex officio* (when parties did not request this)? **Yes/no**

21. How often, as an estimate, was the mechanism of consistent interpretation considered non usable by your court in the cases where EU law was at issue in the period 1 January 2011-1 January 2012?

Never, rarely, regularly, mainly, always

When the mechanism of consistent interpretation was considered *non usable* in these cases, this was due to:

- the principle of legal certainty **Never, rarely, regularly, mainly, always**
- other general principles of law **Never, rarely, regularly, mainly, always**
- *contra legem* interpretation **Never, rarely, regularly, mainly, always**

- the parties involved:
 - because the national public authority relied on consistent interpretation of the directive to the detriment of a citizen, where there was no formal third party:
Never, rarely, regularly, mainly, always
 - because the national public authority relied on consistent interpretation of the directive to the detriment of a citizen, where there was a formal third party:
Never, rarely, regularly, mainly, always
 - in criminal proceedings, when consistent interpretation would have had the effect of determining of aggravating, directly the liability in criminal law:
Never, rarely, regularly, mainly, always
- differentially, namely

If possible, please illustrate the reasons *why* consistent interpretation was *not usable* (the limitations)

.....

22. As an estimate, in how many of the cases of your court where EU law was at issue in the period 1 January 2011-1 January 2012, did your court use interpretations of EU law by other national courts, including those of other Member States?

- Use of interpretation by other courts of your country
0-1% ; 1-10% ; 10-25% ; 25-50% ; 50-75% ; 75-90% ; 90-100% ; 100%
- Use of interpretation by national courts of other Member States
0-1% ; 1-10% ; 10-25% ; 25-50% ; 50-75% ; 75-90% ; 90-100% ; 100%

Please, if possible, illustrate when in particular the *latter* was the case.

.....

Please indicate whether there is a *need for information* on the interpretations of EU law by national courts of other Member States? **Yes/No**

.....

2.4 Questions on the application of direct effect

23. Propositions:

- The mechanism of direct effect is an advantageous principle.

I strongly agree, agree, neutral, disagree, strongly disagree.

- The criteria to establish whether or not a provision has direct effect are workable?

I strongly agree, agree, neutral, disagree, strongly disagree.

24. Please estimate how often your court establish the direct effect of provisions in a directive on the case law of other courts, in the case law where EU law was at issue in the period 1 January 2011-1 January 2012,

- Use of case law of other courts of your country

Never, rarely, regularly, mainly, always

- Use of case law of national courts of other Member States

Never, rarely, regularly, mainly, always

Please, if possible, illustrate when in particular *the latter* is the case.

.....

Please indicate whether there is a *need for information* on the use of direct effect of EU environmental law by national courts of other Member States?

Yes/no

.....

25. How often, as an estimate, did your court apply the mechanism of the *Kraaijeveld*-test (to examine whether the national public authorities stayed within the margin of discretion of provisions of directives) in the cases where EU law was at issue in the period 1 January 2011-1 January 2012?

Never, rarely, regularly, mainly, always

26. How often, as an estimate, was the mechanism of direct effect considered non usable by your court in the cases where EU law was at issue in the period 1 January 2011-1 January 2012?

Never, rarely, regularly, mainly, always

If the mechanism of consistent interpretation was considered non usable in these cases, please indicate the reasons *why*:

- Reason of legal certainty: **never, rarely, regularly, mainly, always**

- Prohibition of inverse direct effect (national public authority *versus* individual (incl. company/NGO)): **never, rarely, regularly, mainly, always**

- Prohibition of horizontal direct effect (individual *versus* individual): **never, rarely, regularly, mainly, always**

- Adverse horizontal side-effects of direct effect (*Wells*) **never, rarely, regularly, mainly, always**

- Differentially, namely

If possible, please illustrate these reasons (the limitations) , in particular of restrictions related to triangular situations (e.g. where the plaintiff (an individual) appeals, relying on EU law, against a decision of a national public authority granting a permit to another individual (the (in-) formal third party)

.....

27. Would you limit the use of the mechanism of direct effect by a national public authority in a case between this authority and a company, regarding the refusal of this authority to grant an environmental permit to this company, based -ex officio- directly on a provision in a directive, when there are potentially, but not formally third parties, involved? **Yes/no**

28. Would your court ex officio apply a provision of a directive that has direct effect (is sufficiently clear and precise) in a case where there are potentially third parties (such as NGOs protecting general interest of the environment) but none of these parties is formally party to the case? **Yes/no**

2.5 Questions on the application of State liability

29. Proposition: the mechanism of EU state liability is an advantageous mechanism.

I strongly agree, agree, neutral, disagree, strongly disagree

.....

30. Is there also a national instrument of state liability for violations of EU law? **Yes/no**

If yes, how often, as an estimate, was the national instrument of state liability used by your court in the cases where EU law was at issue in the period 1 January 2011- 1 January 2012?

0-1%; 1-10%; 10-25%; 25-50%; 50-75%; 75-90%; 90-100%; 100%

If yes, please respond to the following proposition: I prefer the national instrument of state liability over the EU mechanism.

I strongly agree, agree, neutral, disagree, strongly disagree.

Please indicate *why*:

- Less stringent criteria
- More stringent criteria
- More clarity criteria
- Experience
- Request parties
- Differentially,

Please explain:

.....

31. In general, has the EU mechanism (or national instrument) of state liability ever been used for infringements of EU law by national courts for their judicial decisions (*Köbler*) in your country? **Yes/no**

If yes,

- did these judicial decisions concern environmental cases? **Yes/no**
- did they ever concern your court's judicial decisions? **Yes/no**

If possible, please illustrate.....

32. Has an action based on the EU mechanism of state liability for an infringement of EU law ever been successful in the environmental case law of your court? **Yes/no**

If no,

- has an action based on the *national* instrument of state liability for an infringement of EU law ever been successful in the environmental case law of *your court*? **Yes/no/don't know**
- by your knowledge, has an action based on the *EU* mechanism of state liability ever been successful in the environmental case law of *your country*? **Yes/no/don't know**
- by your knowledge, has as an action based on the *national* instrument of state liability for infringements of *national law* in environmental case law ever been successful in *your country*? **Yes/no/don't know**

33. Does your court require from individuals (incl. companies/NGO's) that they minimize the damages they claim via a state liability action, meaning that they first should have relied on directly effective provisions of EU law in for instance an administrative procedure (make use of the legal remedies available)? **Yes/no**

Part. 3. The (non)use of the preliminary procedure

3.1 Introduction of EU legal framework

The relationship between the EU courts, the ECJ and the national (environmental) courts, is codified in art. 267 TFEU (art. 234 TEC) on the preliminary procedure. When national courts encounter problems with the application of EU law they can or must request the ECJ for an interpretation of EU law, when the national court 'deems such an interpretation [of primary or secondary EU law] necessary for deciding a specific case'. The preliminary procedure may also concern the legality of secondary EU law as national courts are not allowed to rule on the legality of secondary EU law. Courts whose decisions can be appealed, have discretion to use the preliminary procedure, but national courts of last resort must refer. The national courts of last resort are merely relieved from this obligation to refer in case of: an *acte clair* or *acte éclairé*, being if the EU law is sufficiently clear respectively the legal issue has already been addressed by the ECJ (*Cilfit*, Case 283/81). Non-reference by the national court in last resort can result in EU state liability (*Köbler*).

3.2 Questions on the application of the preliminary procedure

34. Proposition: the preliminary procedure is a very useful.

I strongly agree, agree, neutral, disagree, strongly disagree

.....

35. How many references for preliminary rulings were made in environmental cases in your country in the period 1 January 2008-1 January 2012? ...3....

How many of these references were made by your court? ...1.....

36. What type(s) of preliminary questions were referred by your court?

Questions on:

- the interrelation between procedural law (procedural autonomy) and EU law
- the use of the EU mechanisms of application of EU law
- material (environmental) EU law (for instance on interpretation, the interrelation between EU legal provisions)
- differently namely,

.....

37. Please estimate in how many of the cases of your court where EU law was at issue in the period 1 January 2011-1 January 2012, did the parties ask your court to request a preliminary question?

0-1%; 1-10%; 10-25%; 25-50%; 50-75%; 75-90%; 90-100%; 100%

When these requests are turned down, are the reasons always stated in the ruling (for instance in a separate court decision)? **Yes/no**

Reasons are given in the decision but not in a separate ruling.....

38. Has your court ever withdrawn preliminary references in environmental cases in the period 1 January 2008-1 January 2012? **Yes/no**

In this period have your court's preliminary questions been:

- left unanswered by the ECJ? **Yes/no**
- rephrased your court's preliminary questions in such a way that they were no longer relevant for the referring case? **Yes/no**

If yes, please indicate the number of cases where this occurred, and, if possible, illustrate

.....

39. Does your court wait for the 'perfect' case to refer a (number of) specific preliminary question, although the legal questions concerning EU law are already raised in other (earlier) national cases?

Yes/no

If possible, please explain,

.....

40. When a question requiring preliminary ruling is raised in a certain case does your court stay the proceedings:

- In that certain case: **Yes/no**
- In all other cases pending, where this question is relevant: **Yes/no**

Does your court stay the proceedings in a case when there are—for that case relevant- preliminary questions referred:

- by other courts of your country: **Yes/no**
- by courts of other countries: **Yes/no**

.....

41. Can the national (environmental) court always use the preliminary ruling in the referring case? **Yes/no**

42. Does your court use are the preliminary rulings beyond the referring cases? **Yes/no**

43. Does your court use the preliminary rulings based on referrals by other courts, including those of other Member States? **Yes/no**

44. Did you ever in hindsight incorrectly decide not to refer a preliminary question to the ECJ because you considered the Union law was irrelevant for the case or the relevant Union law was and *acte clair* and/or *acte éclairé*? **Yes/no**

If yes, did it give rise to an (EU) action of state liability (*Köbler*-claim)? **Yes/no**

Would you be able, according to national (procedural) law to repair such a court decision? **Yes/no**

#If possible, please explain,

.....

Part 4. The interrelation between national procedural autonomy and EU (environmental) law

4.1 Introduction of the EU legal framework

The application of EU (environmental) law by national courts occurs within the context of national procedural law. National procedural law regulates *inter alia* the access to the court, the burden of proof, the intensity of judicial review, and the remedies offered by these courts. National procedural law however faces EU restrictions, as the national procedural law of 27 Member States –potentially – distorts the application of EU law.

These restrictions can be found in formal harmonization in EU law, for instance the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus), and in case law of the ECJ. The proposed directive to implement the so-called third-pillar of Aarhus, on access to justice, has (still) not been adopted, but it has been implemented in part, particularly in the context of the EIA and IPPC-directives (2003/35/EC and 2003/4/EC). Recently landmark cases on Aarhus clearly limited the procedural autonomy on access to justice in environmental law. Specific harmonization can also be found in the Eco crime- and Eco liability-directives (2008/99/EC and 2004/35/EC).

In so far as there is no harmonization the general restrictions of the national procedural autonomy apply. These three general restrictions, which are principles based on standard ECJ case law, form the outer boundaries of national procedural law in ‘EU law’- cases. There are the two ‘mild’ *Rewe*-principles, consisting of a) **the principle of equivalence**: national rules cannot be applied if they are less favorable if applied to cases involving the application of EU law than to comparable cases concerning only national law; and b) **the principle of effectiveness**: national rules cannot be applied if they make it (practically) impossible or excessively difficult

to exercise rights conferred by EU law (Case 33/76). Violations of the principle of effectiveness can be justified by general principles of law such as legal certainty and the rights of defense (the so-called procedural ‘rule of reason’ or balancing test). The third restriction is **the principle of effective legal protection**, which requires an effective access to a court *as well* as an adequate system of remedies in place in the Member States in order to give effect to EU law (codified in article 47 of the Charter of Fundamental Rights of the European Union and art. 19 TEU). This final principle has on occasion also resulted in new types of legal remedies.

National courts will have to check whether these principles restrict the application of national procedural rules in the cases before them (check if ‘EU-proof’). The case law of the ECJ on the restrictions of national procedural law covers a wide range of procedural rules, varying from the access to justice (*e.g.* standing requirements, time limits, ex officio application of EU law), the burden of proof, the intensity of judicial review, and the remedies (types of court procedures and the types of legal effects). Several uncertainties however still remain with regard to the aforementioned restrictions, for instance on the relationship between the *Rewe* principles and the ‘intensive’ principle of effective legal protection; the role of the procedural rule of reason, as well as legal consequences of a breach of the restrictions, except for the *Simmenthal*-duty to set them aside.

4.2 Questions on the application of EU restrictions of the procedural autonomy

45. Please estimate in how many of the cases of your court in the period 1 January 2011-1 January 2012 where EU law was at issue, did the EU restrictions of the national procedural autonomy play a role:

0-1%; 1-10%; 10-25%; 25-50%; 50-75%; 75-90%; 90-100%; 100%

46. Please estimate in how many of the cases of your court in the period 1 January 2011-1 January 2012 where EU law was at issue did you consider any national procedural rule **not** to be ‘EU-proof’

0-1%; 1-10%; 10-25%; 25-50%; 50-75%; 75-90%; 90-100%; 100%

If possible, please specify which of following restrictions played a role in this case law:

- The *principle of equivalence*
- The *principle of effectiveness*
- The *principle of effective legal protection*
- X Aarhus (including the Aarhus-case law by the ECJ)
- X Secondary legislation:
 - Directive 2003/4 (Access to info)
 - X Directive 2003/35 (Public participation)
 - Eco-liability directive 2004/35
 - Eco-crime directive 2008/99
- European Convention on Human Rights
- Differently,

Please illustrate the relevant generally used legal considerations in your case law:

.....

47. As an estimate in how many of the cases referred to in question 57 did you find a justification for the use of the procedural rule?

0-1%; 1-10%; 10-25%; 25-50%; 50-75%; 75-90%; 90-100%; 100%

Please specify the justification you found (use)?

- the *procedural rule of reason (general principles of law)*
 - *legal certainty*
 - *rights of defense*
- differently,

48. What is your knowledge of *current* national (procedural) law that is/could be infringing the EU restrictions, with regard to:

- a. access to justice: **Yes/no/maybe**
- X standing requirements:
 - time limits:
 - court fees,
 - length of proceedings:
 - X ex officio application of EU law
 - X the intensity of judicial review and **Yes/no/maybe**
 - burden of proof **Yes/no/maybe**
 - legal remedies: **Yes/no/maybe**
 - types of judicial review (legal review or claims solely based on breach of Union law)
 - the judicial competences (the types of judgments/decision national courts may deliver (sanctioning/legal redress) & aim of judicial review: for instance dispute settlement ?
 - differently,

To your knowledge is there any *future* national (procedural) law that could infringe the EU restrictions?

Yes/no

If yes, please explain

49. According to the ECJ case law on the national procedural law a *national competence = an European obligation*. In your view what has the impact been of this case law on your court's environmental case law?

None/little/moderate/fairly big/very big

If possible, please illustrate.....

If judges from different courts from the same member state are participating each of them can fill in the questionnaire as his or here court is concerned

Please send your answers to the general rapporteur Ms. Liselotte Smorenburg-van Middelkoop as soon as possible and **on September 10th at the latest** (answers received after that date cannot be incorporated in het general report): L.vanMiddelkoop@uva.nl