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*

Danish report by High Court Judge Karsten Bo Knudsen

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

1. I consider myself
   - ○ a European judge
   - **X 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
   - **X Fairly positive**
   - ○ No opinion (don't know)
   - ○ Fairly negative
   - ○ Very negative

……

3. What is your view of EU environmental law in general?
   - ○ Very positive
   - **X 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**
      ii. EU secondary law. **Yes**
   b. When judgments of the ECJ and the national supreme court conflict, I will follow the ECJ – unless the conflict relates to the Danish constitution **Yes**
   c. The principle of loyal cooperation is a guiding principle for the National court. **Yes**

……

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

If yes, please indicate how: All Danish Courts recognize the supremacy of EU Law – but no formal codification

……

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 *Simmenthal*-obligation)? **Yes**
   b. to offer effective legal protection of European law? **Yes**
   c. to ensure the uniform application of European law? **Yes**

……

1.3 <u>Questions on the role of EU law in national environmental cases</u>

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: ……

8. In how many of these cases:

   a. was EU (environmental) law at issue?

      0-1%;

   b. was this EU law actually applied (taken into account)?

      0-1%;

   c. was this EU law the basis of your court's decisions?

      0-1%; (the High Court assumed in the case on EIA and Natura 2000 site protection that the Danish implementation was correct – the disputes was partly on how ECJ case law should be interpreted)

9. Please provide insight in the type of cases in which the EU law was at issue:
   a. Civil cases: rarely
   b. Criminal cases: **rarely**
   c. Administrative cases (are dealt with as civil procedural cases) **rarely**
      i. general cases: **regularly**
      ii. environmental cases: **rarely**
      iii. planning law cases: (EIA because EIA is part of the planning act) **rarely**
   d. Differentially:

Please indicate your type of court:

- X civil court
- X criminal court
- X administrative court (administrative cases are dealt with as civil cases between two private parties)
  - o general administrative court
  - o environmental court
  - o planning law court

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 Environmental impact assessment (such as EIA)
- X Products
- X Chemicals
- X Nature protection
- X Waste management
- o Renewable energy (only in relation to EIA or Nature protection)

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

- o Procedural questions: **rarely**
  - X access to justice
  - X legal remedies (reparation) **- regarding suspension**
  - o differently, namely ……
- o Material norms: **rarely**
  - X legality of national law
  - X legality of decisions/actions/sanctions imposed by national authorities
  - o legality of EU law

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

- o individuals **never**
- X companies **rarely**
- X NGOs **rarely**
- o the legislature **never**
- o national public authorities **never**
- o official third parties to the dispute **never**
- o differently: …… **never**
  ……..

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 l 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 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 fails and a provision of a directive cannot 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 mate 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?

X	Transposition:	**never**
X	Application:	**rarely**
X	Enforcement:	**never**

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)

Comment: In Environmental cases the question of incorrect transposition has never been an issue, since the Lawyer of the State has never questioned whether the Danish Law should be interpreted in accordance with EU case Law. All national courts fully recognize the doctrine on EU-conformity interpretation and direct effect – but because the Lawyer of the State never disputed the binding impact of EU Law and EU case law – this is not an issue for the court to decide. Regarding the court's reasoning of correct application of EU-Environmental Law – often used formulation is that the Commission has not take infringement action against Denmark or that the decision of the authority in question of the case falls within the discretion left to national authorities in the Directive. From the last years three cases can be mentioned

Skodsborg Strandpark Case – Eastern High Court ruling 7 November 2008 (MAD 2008.1950): In this case a local NGO challenge the decision of the Minister of Transport and the Local Council to establishing a beach park at a coast site which before was regular used by bathers arguing that permit was in conflict with the EIA Directive. It was undisputed that no EIA screening was made before the decision. The Ministry of Transport argued that this wasn't required because the beach park was a modification of the existing use and that such a project falls under the exception in the Danish Statutory Order on EIA similar to the EIA Directive Annex II, 13 on modification of projects. The Eastern High Court acknowledge that the beach park will attract much more people and effect traffic and that the precautionary principle requires that a screening of project must take place in case of uncertainty about the environmental impact. The Eastern High Court however concluded that "*there was not a clear sufficient reason to set aside the decision of the Ministry not to make an EIA screening of the project*". Because the local NGO lost the case, the local NGO should pay 55.000 Euro in legal costs to the Ministry and the Local Council, which cause the local NGO to go bankrupt.

The Tåsinge Windmill Farm case – Eastern High Court ruling 10 December 2010 (MAD 2010.2581): Local citizens challenge the decision of establishing 2 windmills 126 meters high about 500 metres from a Special Bird Protected Area. One of the neighbours claim was, that the permit and planning decision for the two windmills was in conflict with article 6(3) of the Habitat Directive, since there was not made an assessment before the permit was granted. It was in the case undisputed that there was not made an assessment in accordance with article 6(3). The Eastern High Court upheld the decision by the Nature Appeal Board that such an assessment wasn't necessary because the two new high wind mills replace some smaller old windmills because the High Court assumed that the benefit of closing the old windmills should be taking into account in assessing whether the project has such substantial impact on the SBO that an assessment under article 6(3) was necessary. Moreover, the High Court rejected that the court could take into consideration later information on protected species (to par of the white tailed eagle) and information on decline in number of birds in the area, since this information was first presented by witness testimony before the court.

The Carbrogrit case– Eastern High Court ruling 31 October 2007 (MAD 2007.1991): a local NGO challenge the permit and the planning decision to a facility for treating sludge from waste water sewage placed nearby Natura 2000 sites. It was undisputed that the permit and the planning decision were given before an assessment of the impact of the facility on the Natura 2000 site was made. Because of the missing assessment of Natura 2000 impact the Environmental Appeal Board in 2006 (MAD 2006.782) decided that the permit was limited to 2 year. In the case before the Eastern High Court, the Eastern High Court upheld that the needed local plan was sufficient as concluded by the Nature Appeal Board stating that there was no reason to expect that the later made assessment of the Natura 2000 impact of the project would have lead to another planning decision.

……

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%;

b. Direct effect (including the '*Kraaijeveld*-test'):
0-1%;

c. State liability:
0 %

d. During the transposition/ transitional periods: the '*Inter-Environnement* test'
0 %

e. Differently, namely ……

……..

15. In general, do you use one or more of these mechanisms within one case?
    - o One mechanism, or
    - o Multiple mechanisms

I am not familiar with this distinction

16. In general, if any, what is your court's order of preference:
    - X Consistent interpretation/direct effect
    - o Direct effect/consistent interpretation
    - o Consistent interpretation/direct effect/state liability
    - o Direct effect/consistent interpretation/state liability
    - o Differently, namely ……

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

Comment: Since the question of direct effect or State liability are never disputed, the court takes the view that the Danish legislation must be interpreted in line with the EU-legislation. Thus, in practice not even the question of consistent interpretation of EU Environmental Law appear before the court.

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 **no**
    b. During other transitional periods (such as extension periods) **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 – ***Observe: the discretion of the court is not related to consistent interpretation, direct effect or state liability – but the discretion on the court depend on the allegations presented by the parties***:

X to set aside (not apply) the conflicting national rule - YES
consistent interpretation; direct effect;(EU) state liability

X to declare that EU law was breached - YES
consistent interpretation; direct effect;(EU) state liability

- o to force the legislature to act - NO
consistent interpretation; direct effect;(EU) state liability
    - o give an order to adopt legislation - NO
consistent interpretation; direct effect;(EU) state liability
    - o give order to act in a specific way - NO
consistent interpretation; direct effect;(EU) state liability
- o to annul decisions - YES
consistent interpretation; direct effect;(EU) state liability
- o to revoke a consent already granted - YES
consistent interpretation; direct effect;(EU) state liability
- o to suspend a consent already granted - YES
consistent interpretation; direct effect;(EU) state liability
- o to award damages - YES
consistent interpretation; direct effect;(EU) state liability
    - o monetary compensation - YES
consistent interpretation; direct effect;(EU) state liability
    - o factual reparation - YES
consistent interpretation; direct effect;(EU) state liability
- o to offer interim relief **- YES**
consistent interpretation; direct effect/(EU) state liability
- o to alter (break through) national exhaustive mandatory assessment systems, for instance by widening an exhaustive number of grounds for refusing permits – Formally the court has such discretion, but rarely used – and never in EU Environmental Law cases
consistent interpretation; direct effect/(EU) state liability
- o differently
consistent interpretation; direct effect/(EU) state liability

If differently,

.....

<u>2.3 Questions on the application of consistent interpretation</u>

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

I strongly agree, agree, <u>neutral</u>, disagree, strongly disagree

20. Does your court also use the mechanism of consistent interpretation *ex officio* (when parties did not request this)? **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

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 %

- Use of interpretation by national courts of other Member States
  0 %

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**

…….

2.4 Questions on the application of direct effect

23. Propositions:

- The mechanism of direct effect is an advantageous principle.

I strongly agree, agree, <u>neutral</u>, disagree, strongly disagree.

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

I strongly agree, <u>agree</u>, 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

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

Never

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?

Y**es**

……

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

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

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 - the C-201/02 Wells case law is recognized**

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?

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

Comment*: Under Danish case law the public authority could be liable for damage caused by procedural as well as material error of the authority. The standard for liability is stricter than EU (sufficiently serious) and this standard does also apply regarding none compliance with EU procedural as well as material requirement.*

 # 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 %

 # 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
- X More clarity criteria
- Experience
- Request parties
- Differentially, ……

Please explain:

The Danish courts and lawyers are familiar with the Danish standard for liability and this is sufficient to ensure protection. In this respect three cases from the last years can be mentioned in which the state liability doctrine has been tested regarding environmental law by Danish courts. Because the Ministry in the first case (Sumitomo) was found liable under Danish Law (and the case later was closed) and causation was rejected in the two next cases it never came to a more detailed review of the conditions for state liability.

Sumitomo Chemical Agro Europe SA v. Ministry of the Environment relates to the directive 91/414 on marketing of pesticides. The reason for the case was that the Environmental Ministry by Ministerial order has prohibited pesticides containing active substances *esfenvalerat* which by the Commission decision 2000/67 was accepted on the positive list of active substances which can be used in pesticides under directive 91/414. The chemical company Sumitomo Chemical Agro Europe SA (a major producer of the chemical) took in challenged the decision of the Environmental Ministry claiming that the ban was invalid, that the legal action should have suspension effect of the ban and that the Ministry was liable for the economic loss to the company caused by the ban. The Ministry of the environment claimed that the company didn't have standing to challenge a Ministerial Order and rejecting suspension effect of the case. In 2002 the Supreme Court recognized standing but rejected suspension effect of the pleading case.[1] In 2005 the Eastern High Court by a majority in a preliminary ruling concluded that the ministry has acted liable under Danish Law for the economic loss (so no reference to EU law on State liability was needed).[2] In 2007 the Eastern High Court concluded that the Ministry should pay about 900.000 Euro in damage to the company, which was appealed by the Ministry to the Supreme Court. After the Supreme Court decided to bring a preliminary question before the ECJ, the case was settled and the Supreme Court withdraw the preliminary question and the case was closed.[3]

The second case was the ***Marius Pedersen case*** regarding the former regulation 259/93 on shipment of waste. The company Marius Pedersen claimed that the Environmental Ministry was liable because the Ministry for no valid reasons rejected to grant a permit for export of electronic waste for recovery in Germany. Based on the answers from the ECJ to the preliminary questions in C-215/04 *Marius Pedersen* the Danish Supreme Court concluded that the application for at permit for export was insufficient and for this reason the causation requirement was not complied with. However, since the ECJ ruling also illuminated that the environmental ministry's interpretation of the shipment regulation was wrong, Marius Pedersen shouldn't pay legal cost to the ministry.[4]

The third case relates to the earlier ***Danish can ban*** which in 1999 was met by an infringement procedure against Denmark for not complying with the packaging waste directive. Because the ban was abolished after the advocate general gave his opinion,[5] the Commission on request from the Danish government withdraw the infringement case in 2002. In 2003, Bjørn Hansen who is importing foreign beer initiated a case against the Ministry of the Environment claiming that the ministry was

[1] Supreme Court ruling of 19 March 2002 – published in UfR 2002.1253.
[2] Eastern High Court ruling of 18 January 2005 – published in MAD 2005.116.
[3] Supreme Court ruling of 4 November 2009 – not published.
[4] Supreme Court ruling of 20 May 2009 – published in UfR 2009.2203.
[5] Case C-246/99 Commission v. Denmark.

liable for the economic losses caused by preventing Bjørn Hansen from selling foreign beer on cans. The Supreme Court find in its ruling in 2010 that the Danish can ban didn't cause any economic losses for Bjørn Hansen arguing that "based on the information on competition on the beer market it could be assumed that even if Bjørn Hansen had been able to sell beer in cans, such introduction of foreign can beer could be expected to be met immediately by the dominating actors on the beer market (Carlsberg and Unibrew) also selling beer on cans." For this reason the Supreme Court rejected that the ban caused economic loss and find no reason to asses the application of the state liability doctrine more careful.[6]

……

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?

N**o**

 # 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? N**o**

 # 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*?

  N**o**
- 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*?

  N**o**
- 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

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)?

N**o**

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

[6] Supreme Court ruling of 19 January 2010 – published in MAD 2010.137.

'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 éclaire*, 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? - No preliminary questions before the ECJ in environmental cases from Danish courts in that 4 years period

How many of these references where made by your court?

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

Questions on:

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

When these requests are turned down, are the reasons always stated in the ruling (for instance in a separate court decision)? **Yes**

Comment: two cases illustrates how the rejection of preliminary question are reasoned to be rejected

The Metro case - Eastern High Court ruling 11 January 2008 (MAD 2008.109) on whether the establishment of Metro (underground train) was in accordance with the EIA Directive: In the case it was undisputed that the environmental impact assessment was insufficient since the project was

later changed, but the Nature Appeal Board by majority ruling did conclude that the failure was not so serious that the regional plan was invalid (the regional plan at that time replaced the EIA-permit). The high court upheld this decision rejecting preliminary question to the ECJ stating without further argument that, '*the High Court finds no reason to conclude that the EIA-Directive including the procedure for public hearing were not implemented correct in Danish Law*.'

The Grønlund case – Eastern High Court ruling 8 August 2008 (MAD 2008.1381) concerns regulation 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers. Under the regulation, farmers can receive subsidies if the farmer voluntary accept the abandonment of agricultural land. According to the Danish Nature Protection Act section 24, the public has free access to farming land which is not cultivated. In the case the farmer Søren Grønlund, who has received subsidises under the EU-regulation, challenged a decision of the Nature Appeal Board that his land was open for public access since it was not cultivated arguing that such supplementary restrictions on his use of his farming land was contrary to the EU-regulation and asked for a preliminary question before the ECJ. His request was rejected by the Eastern High Court which stated the interpretation of "not cultivated farming land" was an internal Danish matter and not a question of EU Law.

……

38. Has your court ever withdrawn preliminary references in environmental cases in the period 1 January 2008-1 January 2012? N**o**

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

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

 # 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?

N**o**

……

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**

Comment: it differs at what time in the proceedings the court decide on preliminary question, but if a question is raised before the ECJ, the case will be on stand still waiting for the answer – and similar cases will be on stand still.

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**
- by courts of other countries: Yes

Comment: based on how the Supreme Court decided to act in a criminal case on jet-ski – it is expected that the High Court will follow the same avenue in the future. In that case the defended claimed that the Danish ban on use of jet-ski was in conflict with EU law. Despite an almost similar case on the Swedish legislation was pleading before the ECJ (C-142/05 *Mickelsson & Ross*), the lower court and later the Western Higher Court with majority find the defendant guilty and rejected to wait for the ECJ ruling. The High Court conviction was appealed to the Supreme Court, which decided to wait for the ECJ ruling. After the ruling of the ECJ, the Supreme Court concluded that the Danish ban was invalid and therefore no crime was committed.[7]

the supreme court is case

……

41. Can the national (environmental) court always use the preliminary ruling in the referring case? **Yes**

42. Does your court use are the preliminary rulings beyond the referring cases? N**o**

43. Does your court use the preliminary rulings based on referrals by other courts, including those of other Member States? N**o**

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*? N**o**

*# If yes, d*id 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,

……

<u>Part 4. The interrelation between national procedural autonomy and EU (environmental) law</u>

<u>4.1 Introduction of the EU legal framework</u>

[7] Supreme Court 19 November 2010 – published in MAD 2010.2497.

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%

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 %

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*
- Aarhus **(**including the Aarhus-case law by the ECJ
- Secondary legislation:
  - Directive 2003/4 (Access to info)
  - 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% …….? (no question 57)

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:
- standing requirements: **maybe – Aarhus-Conv. Art 9(3) unclear**
- time limits: - **a case is pleading on this regarding Human Right Conv. Art. 6**
- court fees: - **Denmark has interfered in Commission against UK regarding legal costs and Denmark has the same system as UK**
- length of proceedings: no
- ex officio application of EU law **no**

- the intensity of judicial review and **no**
- burden of proof **no**
- legal remedies (use of suspension) **no**
  - 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?

no

 # If yes, please explain ……

Comment:

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

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