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

Questionnaire

Introduction

Judicial cooperation between national judges and the Court of Justice of the European Union (hereafter CJEU or the Court) is essential for effective environmental protection. In this questionnaire we focus mostly on the functioning of the preliminary reference procedure with regard to national courts decisions once the CJEU has answered the question(s) posed in a preliminary ruling, so-called "follow-up judgments". The purpose of this questionnaire is to improve the mapping of follow-up judgments in environmental matters and to understand the underlying reasons, therefore building upon the work presented by Squintani and Kalisvaat recently published in the journal European Papers (link).

After a few introductory questions on the general level of knowledge of the functioning of the preliminary reference procedure, the questionnaire will focus on follow-up judgements in particular.

General remarks: The answers to the questionnaire have been provided by the Research and Documentation Service of the Supreme Administrative Court of the Czech Republic. Therefore, they do not present the opinions of a particular judge and must be considered accordingly.

A) Questions on general knowledge about functioning of preliminary reference procedure

1. How do you consider the knowledge that judges in your country have about the preliminary rulings procedures?

   There is no survey, which would examine the knowledge that judges in the Czech Republic have about the preliminary rulings procedures, available. In general, judges already involved in the preliminary rulings procedures and also judges specialised in legal matters affected by a considerable degree of harmonisation (such as taxes, asylum or environmental law) have a higher level of knowledge in this field.

   The referral of preliminary questions to the Court of Justice is not the sole preserve of the supreme courts. In fact, more than one third of the Czech preliminary questions have been referred by the lower-level courts, both civil and administrative.

Environmental cases are usually decided by administrative courts. The system of courts in the administrative justice system consists of both regional courts, where administrative justice is separated from other jurisdictions only by the internal organisation of the relevant court, and the Supreme Administrative Court, which is a judicial body specialised exclusively in the field of administrative justice. So far, the regional courts have referred preliminary questions to the CJEU in 11 cases, and the Supreme Administrative Court has been active in 38 cases, mainly concerning tax law. Solid knowledge of the preliminary reference procedure is demonstrated by the fact that only rarely has the CJEU found any issues with the procedural steps taken by the national courts or the content of the questions.[1]

2. Have you benefited from training courses either at national level or within the programme offered by DG Environment or ERA (Academy of European Law) about CJEU environmental case law and preliminary rulings? What is your estimation of the level of knowledge and specialisation of judges in (European) environmental law?

   Participation of Czech judges in environmental courses offered by DG Environment or ERA has been low in recent years. However, several judges from the Supreme Administrative Court and regional courts consider environmental law their specialty; some of them have even completed dedicated postgraduate studies in this field (Ph.D.) and publish their work in professional journals and as monographs.

3. Does your country have statistics showing in which subject-areas of EU environmental law are the majority of preliminary rulings requests? (If possible, please provide the link to such statistics.)

   Could you provide a short explanation for the fact that one or more areas of EU environmental law generate more preliminary questions then others? Does this have to do with the quality / clarity of the legislation or a specific focus on individual areas due to national peculiarities?

   There is only an overall list of questions referred for a preliminary ruling in all areas of the EU law (http://www.nssoud.cz/Predbezne-otazky-podane-ostatnimi-soudy/art/534?menu=255). However, only five preliminary questions in the field of environmental protection have been referred by the Czech courts, one of which was decided by the CJEU:

[1] In a recent Case C-520/19 (*Armostav Místek*), the CJEU refused to rule on a preliminary question raised by the Regional Court in Ostrava for manifest inadmissibility because the specification of the factual framework of the dispute in the original proceedings and the facts justifying the need to answer the preliminary questions were insufficient.

1) **Supreme Administrative Court**: C-43/14 (*ŠKO-ENERGO*), judgement of the CJEU of 26 February 2015, ECLI:EU:C:2015:120.

   Case concerning the scheme for greenhouse gas emission allowance trading, in particular the interpretation of Article 10 of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC. The referring court asked, in essence, whether Article 10 of Directive 2003/87/EC must be interpreted as precluding the imposition of gift tax such as that at issue in the main proceedings since that article requires Member States to allocate at least 90% of greenhouse gas emission allowances free of charge for the period 2008-2012 (for more information, see below).

2) **Municipal Court in Brno**: C-524/20 (*VÍTKOVICE STEEL*) – the case is still pending.

   Case concerning the scheme for greenhouse gas emission allowance trading. The referring court asks:

   1) *Does Article 10(8) of European Commission Decision 2011/278/EU 1 of 27 April 2011, read in conjunction with Annex I thereto, require emission allowances to be allocated free of charge for the period 2013 to 2020 to an installation operating a basic oxygen furnace process, where the input to that process is carbon-saturated liquid iron imported from another installation belonging to another operator, if at the same time it is ensured that there will be no double counting or double allocation of allowances in respect of the hot metal product?*

   2) *If the first question is answered in the negative, is Article 10(8) of European Commission Decision 2011/278/EU of 27 April 2011, read in conjunction with Annex I thereto, invalid with respect to the hot metal product on the grounds that it is incompatible with Article 2(1) of Directive 2003/87/EC of the European Parliament and of the Council, read in conjunction with Annex I thereto, or alternatively on the grounds that it is incomprehensible?*

   3) *If the second question is answered in the affirmative, is Article 1(1) of European Commission Decision 2013/448/EU 2 of 5 September 2013 also invalid in respect of the installation bearing the identifier CZ-existing-CZ-52-CZ-0102-05 given that it no longer has a legal basis?*

   4) *If the first question is answered in the affirmative, must Article 1(1) and the third subparagraph of Article 1(2) of European Commission Decision 2013/448/EU of 5 September 2013 be interpreted in respect of the*

installation bearing the identifier CZ-existing-CZ-52-CZ-0102-05 as permitting the allocation of allowances for the hot metal product to that installation on the basis of a new application from the Czech Republic if double counting and double allocation of allowances are excluded?

5) *If the fourth question is answered in the negative, is Article 1(1) of European Commission Decision 2013/448/EU of 5 September 2013 invalid in respect of the installation bearing the identifier CZ-existing-CZ-52-CZ-0102-05 on the grounds that it is incompatible with Article 10(8) of European Commission Decision 2011/278/EU of 27 April 2011, read in conjunction with Annex I thereto?*

6) *If the third, fourth or fifth question is answered in the affirmative, how should an authority of a Member State proceed under EU law where that authority has failed, contrary to EU law, to allocate free emission allowances to the operator of an installation which operates a basic oxygen furnace process if the installation concerned is no longer in operation and the period for which the allowances were allocated has already ended?*

3) **Supreme Court**: C-181/20 (*VYSOČINA WIND*) – the case is still pending.

Case concerning the interpretation of Directive 2012/19/EU 1 of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE). The reffering court asks:

1) *Must Article 13 of Directive 2012/19/EU 1 of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE) be interpreted such that it prevents a Member State from imposing the obligation to finance the costs of the collection, treatment, recovery, and environmentally sound disposal of WEEE coming from photovoltaic panels placed on the market prior to 1 January 2013 on their users, rather than their producers?*

2) *If the first question is answered in the affirmative, is the evaluation of the conditions for the liability of a Member State for damage caused to an individual due to a breach of EU law influenced by the fact — which was at issue in the original proceedings — that the Member State itself regulated the method of financing of waste from photovoltaic panels prior to the adoption of the directive, which newly included photovoltaic panels in the scope of EU regulation and imposed the obligation to finance the costs on producers, including in relation to panels placed on the market prior to the expiry of the directive's implementation period (and the adoption of regulation at European Union level)?*

4) **Supreme Administrative Court**: C-43/21 (*FCC Česká republika*) – the case is still pending.

Case concerning the IPPC requirements and the interpretation of a *'substantial change' of a plant*. The reffering court asks:

Should Article 3(9) of Directive 2010/75/EU 1 of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) be interpreted such that a 'substantial change' of a plant includes an extension of the duration of waste disposal at a landfill without the maximum approved dimensions of the landfill or its total potential capacity changing at the same time?

5) **Supreme Administrative Court**: C-659/20 (*ET v Ministerstvo životního prostředí*) – the case is still pending.

Case concerning the interpretation of the CITES requirements and the interpretation of a *'breeding stock'*. The reffering court asks:

1) *Does 'breeding stock', as defined by Commission Regulation (EC) No 865/2006 (1) laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein, include specimens that are the parents of specimens bred by a given breeder, even though that breeder never owned or kept them?*

2) *If the answer to the first question is that such parent specimens do not constitute a part of the breeding stock, are competent bodies authorised to verify, in examining compliance with the condition set in Article 54(2) of Commission Regulation (EC) No 865/2006, consisting of the establishment of stock legally and, at the same time, in a manner not detrimental to the survival of wild specimens, the origin of those parent specimens and to infer on that basis whether the breeding stock has been established in accordance with the rules set out in Article 54(2) of the Regulation?*

3) *In examining compliance with the condition set out in Article 54(2) of Commission Regulation (EC) No 865/2006, consisting of the establishment of stock legally and, at the same time, in a manner not detrimental to the survival of wild specimens, can further circumstances of the case be taken into consideration (in particular, good faith in the transfer of the specimens and the legitimate expectation that trading in their potential offspring will be permitted, and potentially also the less stringent legislation applicable in the Czech Republic prior to the country's accession to the European Union)?*

4. Does the judiciary in your country engage in the practice of interpreting EU environmental law without asking for a preliminary ruling? (Does this practice concerns also courts of last instance?)

The judiciary engages in the practice of interpreting EU environmental law without asking for a preliminary ruling in line with the *acte clair* doctrine. In most environmental cases with an overlap with the EU law, the established case law of the CJEU already provides basic guidance, so it is not the case that the reasoning contained in the Czech court's decision completely ignores the EU dimension. It is also common practice for courts to base their decisions on thorough research of both CJEU case law and various soft-law and guidance documents (both EU and international such as The Aarhus Convention Implementation Guide). Typical cases concern, e.g. waste identification and related definitions, the definition of plans and projects for the purposes of EIA and protection of Natura 2000 sites, requirements of the EIA/SEA/Natura 2000 procedure, IED requirements including the application of BAT and BREF, derogatory regimes of protection of the endangered species and birds, access to information, participation in decision-making and access to judicial protection, etc.

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

   No, the Czech Republic does not have to control whether national courts request preliminary references.

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

   The right to ask a national court to request a preliminary reference to the CJEU might be subsumed under the right to a lawful judge. In its ruling of 8 January 2009, No. II. ÚS 1009/08, the Czech Constitutional Court stated the following: *"Although the asking of a preliminary question is a matter of Community law, in certain circumstances the failure to ask it in contravention of that law may result in a breach of the constitutionally guaranteed right to a lawful judge. It must be borne in mind that the prerequisite for the right to lodge a constitutional complaint is the exhaustion of all the means provided by law for the protection of the complainant's right. The right to a lawful judge is infringed in the case of the application of Community law if the Czech court (whose decision cannot be challenged by other remedies available under constitutional law) does not decide the preliminary question before the ECJ arbitrarily, i.e. contrary to the principle of the rule of law (Article 1(1) of the Constitution of the Czech Republic). The Constitutional Court states that it also considers as an exercise of arbitrariness the conduct of a court of last instance applying the norms of Community law, which completely fails to ask whether the court should raise the preliminary question before the ECJ and does not properly justify its failure to do so, including the assessment of the exceptions developed by the ECJ in its case law. In other words, this is a case where the court has no regard at all to the existence of mandatory rules binding on it in Article 234 of the Treaty establishing the European Communities."*

Later on, this approach was confirmed by the Constitutional Court in its rulings of 29 November 2011, No. II. ÚS 1658/11, and of 11 September 2012, No. II. ÚS 2504/10.

The Constitutional Court has taken the view that whether a preliminary question must be asked is a matter of European law and not a question of constitutionality. For example, it could be a violation of the right to a fair trial if the court did not deal with a party's request for a preliminary ruling. It follows from the settled case-law of the Constitutional Court that the mere fact that a general court has not dealt with a party's objection which is also relevant to the case at hand in principle renders the decision in question unconstitutional (cf. the Constitutional Court's rulings of 3 October 2010, No. I. ÚS 74/06, of 26 September 2017, No. II. ÚS 4255/16).

However, the Constitutional Court emphasises that it is decisive whether the court in question has given convincing reasons for its decision not to raise the preliminary question (see the ruling of the Constitutional Court of 11 March 2008, No. IV. ÚS 2435/07, or the resolution of the Constitutional Court of 6 March 2014, No. III. ÚS 3400/12).

B) Questions on examples of follow-up judgments after CJEU preliminary rulings in environmental matters in the last 10 years (2011-2021)

7. Have you judged in (a) environmental case(s) in which you received an answer to a preliminary question that ***you*** had posed to the Court (i.e. in a "follow-up case")? If yes, could you provide the link to the judgment(s) or a copy thereof?

   So far, there is only one follow-up environmental case, following the judgement of the CJEU of 26 February 2015, *ŠKO-ENERGO* (C-43/14, ECLI:EU:C:2015:120).

   Subsequent decision in the case: judgment of the Supreme Administrative Court of 30 January 2015, No. 1 Afs 6/2013-184: http://www.nssoud.cz/files/SOUDNI_VYKON/2013/0006_1Afs_1300184_20150709125443_prevedeno.pdf

8. Did you sit in other environmental follow-up cases? If yes, could you provide the link to the follow-up judgment(s) or a copy thereof?

   See above (*there is only one follow-up environmental case*).

9. Are you familiar with environmental follow-up cases in your ***country*** other than those in which you were sitting as a judge? If yes, could you provide the link to (some of) the judgments or a copy thereof?

   See above (*there is only one follow-up environmental case*).

C) Questions on the answers provided by the Court of Justice

10. Did the Court of Justice consider the question(s) ***admissible*** and did the Court ***answer*** it/them?

    Yes, the question of admissibility was not even raised, and the CJEU thoroughly answered the preliminary question.

11. Did the Court of Justice ***rephrase*** the question(s) posed? If yes, do you consider the rephrased question(s) a ***proper*** representation of the question(s) originally asked?

    The CJEU did not copy the question posed word by word but rephrased it.

    The original question:

    > *"Must Article 10 of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC be interpreted as preventing the application of provisions of national law which make the allocation free of charge of emission allowances in the relevant period subject to gift tax?"*

    The question rephrased:

    > *"By its question, the referring court asks, in essence, whether Article 10 of Directive 2003/87 must be interpreted as precluding the imposition of gift tax such as that at issue in the main proceedings since that article requires Member States to allocate at least 90% of greenhouse gas emission allowances free of charge for the period 2008-2012."* (para 17)

    We consider the rephrased question a proper representation of the question originally asked. The wording of the question was only simplified and seemingly adjusted in line with the linguistic formulation frequently used by the CJEU (*must be interpreted as precluding*) while respecting the *ratio* of the question.

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

    The answer differs from the interpretation advocated by the Czech Government. However, it seems to be in line with the principles of the ETS embodied in Art. 10 of Directive 2003/87/EC and the previous case law of the CJEU (in particular judgment in *Iberdrola and Others*, C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11, EU:C:2013:660).

13. Did the Court of Justice formulate the answer by setting out ***criteria*** to be applied by the national court or did the Court of Justice provide a binary answer, e.g. an unconditional ***affirmative/negative*** answer?

    The CJEU set out criteria to be applied by the national court:

    > *"It is for the referring court to determine, in the light of those considerations, whether the gift tax at issue in the main proceedings may be regarded as complying with the ceiling of*

10% applicable to the allocation of emission allowances for consideration laid down in Article 10 of Directive 2003/87." (para. 29)

14. Did the answer given by the Court of Justice ***enable*** to solve the national case and did the answer make it ***clear*** how it had to be applied? Please provide a short explanation for your answer.

The answer provided by the CJEU was helpful but – at the same time – set out criteria to be applied by the national court which were not applied before (by the lower courts). As a result, the national referring court (the Supreme Administrative Court) could only quash the decision of the lower (regional) court since it was completely contradicted by the conclusions of the CJEU on the preliminary question.

The Supreme Administrative Court could not solve the case without ascertaining the facts not yet examined, namely the total number of emission allowances distributed in the energy sector in the five-year period beginning in 2008 and the number of allowances taxed. The Supreme Administrative Court, as a cassation court, could not skip the regional court to address the key question, whether the Czech legislature respected the 10 % threshold for the allocation of emission allowances against payment.

Moreover, the national referring court (the Supreme Administrative Court) also had to fill some gaps in the reasoning of the CJEU, which held that the limitation of the quantity of allowances that may be allocated against payment to 10%, be assessed in relation to the operators in each sector concerned and not in relation to all allowances issued by the Member State.

Therefore, while setting aside the judgement of the lower court, the Supreme Administrative Court also elaborated on the criteria provided by the CJEU and considered which sectors must be assessed. It concluded that the logic of the Directive implies that the sectors concerned are the energy sector and industrial sectors. In the Czech Republic, producers of electricity by burning fuels were subject to the tax, which fall within the energy sector. However, it may be disputed which all (other) installations, for which emission allowances have been allocated in the relevant department belong to the energy sector. In this respect, the court held, it is necessary to refer to Annex I of the Directive ('Categories of activities listed in Article 2(1), Articles 3 and 4, Article 14(1) and Articles 28 and 30'), which specifies the list of activities, which fall under the different areas covered by the Directive.

D) Questions on the follow-up case

15. Was it ***possible*** for the national court to render a judgment after it received the answer from the Court of Justice, or did (new) elements arise that complicated this, *such as* the withdrawal of the case, the need for further clarifications from

the national Constitutional Court or the Court of Justice, constitutional or factual barriers, or the political sensitivity of the subject matter?

The new elements (criteria provided by the CJEU) complicated rendering of a judgement after the answer from the Court of Justice was received. The Supreme Administrative Court could not solve the case without ascertaining the facts not yet examined and could only set aside the judgement of the lower court (see above).

16. Do you consider the follow-up judgment a case of ***cooperative*** or ***uncooperative*** administration of justice? With cooperative administration we refer to a follow-up judgment that complies with the contents of the answer received from the Court of Justice. When this is not (fully) the case we refer to uncooperative administration of justice.

    The follow-up judgment is a case of cooperative justice. The referring court followed the instructions provided by the CJEU.

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

    Yes, since it fully respects the logic and the ratio behind the judgement of the CJEU.

E) Questions on the environmental law background of the disputes

18. Did the national environmental legal framework applicable to the follow-up judgment represented a **one-on-one transposition** of the EU law framework at stake? If no, in which manner (a brief explanation will suffice)? Please provide a link to the relevant regulatory framework.

    The national legal framework applicable does not represent a one-on-one transposition because the requirement to allocate at least 90% of the allowances free of charge is transposed indirectly via restrictions of a specific tax regime (and a combination of other similar regimes applicable to allocation and use of the allowances).

19. In your subjective opinion, do you consider that environmental law in your country has its own ***identity*** or do you see it as a mere representation/implementation of EU environmental law? A mixture of the two is possible, of course.

    Despite several attempts, Czech environmental law has not been codified. The individual legal acts (regulations) share common premises and their application contributes to the same goal, yet they differ from each other due to different systematics, the use of different regulatory instruments, and ultimately fragmented state administration.

Czech environmental law arguably retains a greater degree of its own identity where it uses its own specific, well-established protective instruments. This applies, for example, to the use of natural resources, which balances the requirements of both management and sustainable development. This is typically the case in the regulation of traditional special protection areas (national parks, protected areas, etc.). Legal regulation of water management or forest management is even considered a separate legal sub-sector. On the other hand, in areas subject to a higher degree of harmonisation, as well as in areas that rely on "technical" regulation (typically the regulation of pollution and the conditions of operation of industrial facilities), it is difficult to identify a distinctive identity of Czech environmental law.

20. Is there any ***remedy/monitoring*** in case the judges do not ask the CJEU (ruling as last instance) or on how they follow up on preliminary rulings of CJEU (possibly also in other cases, not only in their own, since clarifications given by CJEU are valid in all similar cases)? Could you provide a link to any such regime, if present?

    There is no monitoring or remedy outside the protection of constitutional rights provided by the Constitutional Court.

F) Case

Consider the following situation and provide an answer about how it would be solved in your country. When doing so please provide reference to the normative framework relevant for answering the question.

Article 13 of Directive 2008/50 sets limit values for nitrogen dioxide ($NO_{2)}$ which must be respected throughout the territory of the Member States. In case the limit values are not respected to an extent that exceeds the margin of tolerance set out under the Directive, Article 23 of the Directive requires that Member States set up an Air Quality Plan ensuring that exceedances are ended in the shortest time possible.

Assume that in an agglomeration in your country the limit values are trespassed and that scientific evidence shows that this is due to the emissions coming from Euro 0-4 diesel vehicles. The cumulative level of NO_2 from all other sources of NO_2 in the agglomeration does not lead to an exceedance of the EU limit values. The authorities competent for adopting the plan under Article 23 of the Directive, as transposed into national law, announce the adoption of a series of restrictions to the use of diesel vehicles in the agglomeration. However, at the same time, an already existing ´low emission zone´ prohibiting the use of whichever vehicle in the centre of the agglomeration is withdrawn on request of a diesel vehicles auto club (so-called "withdrawal decision"). The use of diesel vehicles in this zone surely leads to a further worsening of air quality in the agglomeration on the short term. The restrictions to the use of Euro 0-4 diesel vehicles in the Air Quality Plan are estimated to bring about compliance with the limit values in one year from the moment of adoption of the restrictions.

An environmental non-governmental organization starts proceedings against the withdrawal decision of the competent authority.

The national court hearing the case has doubts about whether the adoption of restrictions to the use of Euro 0-4 diesel vehicles in the Air Quality Plan is enough to ensure compliance with the Directive or whether Article 13 of the Directive requires the annulment of the withdrawal decision. It therefore poses, among others, the following question to the Court of Justice of the European Union:

> *3. To what extent (if at all) are the obligations of a Member State which has failed to comply with Article 13 of Directive 2008/50 affected by Article 23 (in particular its second paragraph)?*

The Court of Justice answers this question in the following manner:

> ***The third question***
>
> *36 By its third question, the referring court asks, in essence, whether, where it is apparent that conformity with the limit values for nitrogen dioxide established in Annex XI to Directive 2008/50 cannot be achieved in a given zone or agglomeration of a Member State by 1 January 2010, the date specified in that annex, and that Member State has not applied for postponement of that deadline under Article 22(1) of Directive 2008/50, the fact that an air quality plan which complies with the second subparagraph of Article 23(1) of the directive has been drawn up permits the view to be taken that that Member State has nevertheless met its obligations under Article 13 of the directive.*
>
> *37 At the outset, it should be recalled that the second subparagraph of Article 23(1) of Directive 2008/50 specifies that it applies when the limit values for pollutants are exceeded after the deadline laid down for attainment of those limit values.*
>
> *38 In addition, as regards nitrogen dioxide, application of that provision is not made conditional on the Member State having previously attempted to obtain postponement of the deadline under Article 22(1) of Directive 2008/50.*
>
> *39 Consequently, the second subparagraph of Article 23(1) of Directive 2008/50 also applies in circumstances such as those arising in the main proceedings, in which conformity with the limit values for nitrogen dioxide established in Annex XI to the directive is not achieved by 1 January 2010, the date specified in that annex, in zones or agglomerations of a Member State and that Member State has not applied for postponement of that date under Article 22(1) of the directive.*
>
> *40 It follows, next, from the second subparagraph of Article 23(1) of Directive 2008/50 that where the limit values for nitrogen dioxide are exceeded after the deadline laid down for their attainment, the Member State concerned is required to establish an air quality plan that meets certain requirements.*
>
> *41 Thus, that plan must set out appropriate measures so that the period during which the limit values are exceeded can be kept as short as possible and may also include specific measures aimed at protecting sensitive population groups, including children. Furthermore, under the third subparagraph of Article 23(1) of Directive 2008/50, that plan is to incorporate at least the information listed in Section A of Annex XV to the directive, may also include measures pursuant to Article 24 of the*

directive and must be communicated to the Commission without delay, and no later than two years after the end of the year in which the first breach of the limit values was observed.

42 However, an analysis which proposes that a Member State would, in circumstances such as those in the main proceedings, have entirely satisfied its obligations under the second subparagraph of Article 13(1) of Directive 2008/50 merely because such a plan has been established, cannot be accepted.

43 First, it must be observed that only Article 22(1) of Directive 2008/50 expressly provides for the possibility of a Member State postponing the deadline laid down in Annex XI to the directive for achieving conformity with the limit values for nitrogen dioxide established in that annex.

44 Second, such an analysis would be liable to impair the effectiveness of Articles 13 and 22 of Directive 2008/50 because it would allow a Member State to disregard the deadline imposed by Article 13 under less stringent conditions than those imposed by Article 22.

45 Article 22(1) of Directive 2008/50 requires that the air quality plan contains not only the information that must be provided under Article 23 of the directive, which is listed in Section A of Annex XV thereto, but also the information listed in Section B of Annex XV, concerning the status of implementation of a number of directives and on all air pollution abatement measures that have been considered at the appropriate local, regional or national level for implementation in connection with the attainment of air quality objectives. That plan must, furthermore, demonstrate how conformity with the limit values will be achieved before the new deadline.

46 Finally, this interpretation is also supported by the fact that Articles 22 and 23 of Directive 2008/50 are, in principle, to apply in different situations and are different in scope.

47 Article 22(1) of the directive applies where conformity with the limit values of certain pollutants 'cannot' be achieved by the deadline initially laid down by Directive 2008/50, account being taken, as is clear from recital 16 in the preamble to the directive, of a particularly high level of pollution. Moreover, that provision allows the deadline to be postponed only where the Member State is able to demonstrate that it will be able to comply with the limit values within a further period of a maximum of five years. Article 22(1) has, therefore, only limited temporal scope.

48 By contrast, Article 23(1) of Directive 2008/50 has a more general scope because it applies, without being limited in time, to breaches of any pollutant limit value established by that directive, after the deadline fixed for its application, whether that deadline is fixed by Directive 2008/50 or by the Commission under Article 22(1) of the directive.

49 In the light of the foregoing, the answer to the third question is that, where it is apparent that conformity with the limit values for nitrogen dioxide established in Annex XI to Directive 2008/50 cannot be achieved in a given zone or agglomeration of a Member State by 1 January 2010, the date specified in that annex, and that Member State has not applied for postponement of that deadline under Article 22(1) of Directive 2008/50, the fact that an air quality plan which complies with the second subparagraph of Article 23(1) of the directive has been drawn up does not, in itself, permit

the view to be taken that that Member State has nevertheless met its obligations under Article 13 of the directive.

Imagine that you are the judge in the follow-up case that has to apply the answer provided by the Court of Justice. How would you judge about the request of annulment of the withdrawal decision? *Please provide reference to the normative framework relevant for answering the question.*

The judgement of the CJEU implies that there are two separate obligations stemming from the Directive 2008/50: To ensure that the limit values for the protection of human health are achieved and to establish action plans for zones or agglomerations, where the levels of pollutants in ambient air exceed limit value or target value.

The national court would probably consider whether the action plan reflects the existing measures and provides reasons why the low emission zone must be withdrawn (as a part of alternative or more complex measures which are ultimately more effective) or kept (so that the requirements of the action plan are complementary to the low emission zone).

Nevertheless, the withdrawal decision seems to jeopardise the ability of the measures set out in the action plan to ensure that the exceedance period can be kept as short as possible, in contrast with the requirement of Art. 23(1) of Directive 2008/50 (*In the event of exceedances of those limit values for which the attainment deadline is already expired, the air quality plans shall set out appropriate measures, so that the exceedance period can be kept as short as possible*). At the same time, the withdrawal decision contributes, at least in the short term, to a further worsening of air quality in the given agglomeration, which contradicts the obligation set in Art. 13(1) of Directive 2008/50 to ensure that the limits of nitrogen dioxide are not exceeded.

Consequently, the national court would probably not hesitate to annul the withdrawal decision, in particular given the legal circumstances and the guidance provided by the CJEU.

On the other hand, the court may also conclude that the withdrawal decision is legal and that the action plan should be challenged since it brings about compliance with the limit values (only) in one year from the moment of adoption of the restrictions.

There is a relatively large number of Czech court decisions dealing with the adoption of action plans, even though they do not deal with this particular issue. Before the action plans were adopted for the most polluted agglomerations, the authorities competent for adopting the plan argued that there is no need for a (new) action plan since the existing individual measures can be considered as an action plan (in the material sense). However, the Supreme Administrative Court concluded that the EU law explicitly requires the adoption of an action plan as a (single) comprehensive document with clearly defined content. It does not allow for the incorporation of

short-term air protection measures into several (fragmented) air protection instruments. As regards the definition of specific measures in the action plans that Member States are granted a certain degree of discretion (judgment of the Supreme Administrative Court of 11 June 2015, No. 2 As 48/2015-60). Later on, in a series of similar cases, the individuals aided by the NGOs challenged the action plans adopted for several highly polluted regions – Ústí nad Labem region and agglomerations of Prague, Brno and Ostrava. The courts quashed the plans (or their parts) because they did not provide effective measures, contrary to Directive 2008/50/EC and the Czech Air Protection Act, which both require that the plans reassure the achievement of the legal air pollution limits *"in the shortest time possible"*. The courts basically held that the plans should contain not only measures contributing to better air quality, but also the timeframe for their implementation, which would assure that the plans meet their goals in a given time. According to the courts, the plans should also contain methods to evaluate the individual measures and to quantify their contribution to the air quality improvement (cf. judgment of the Czech Supreme Administrative Court of 20 December 2017, No. 6 As 288/2016-146).

G) Conclusion

In your view, does the preliminary ruling procedure support national judges to achieve uniform application of EU environmental law and does it contribute to effective environmental justice on the ground? If not, which changes should be considered internally or at EU level?

The preliminary ruling procedure serves as an effective tool in achieving to uniform application of the EU law. However, given the specific needs of environmental protection, the CJEU should perhaps be more willing to apply accelerated procedure under Article 105(1) of the Rules of Procedure to environmental cases. We are also rather sceptical regarding the effectiveness of the preliminary ruling procedure to challenge the validity of the EU acts concerning environmental matters directly or indirectly (as in C-281/16, *Vereniging Hoekschewaards Landschap*; C-313/15 and C-530/15, *Eco-Emballages*; or C-293/97, *Standley*).