

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.

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

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

In Italy knowledge is quite good. Judges in some cases activated the preliminary ruling procedure regarding to environmental laws

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?

Yes, I have. Some years ago I went with other Italian colleagues to visit the CJEU in Luxembourg (training arranged by the Italian Ministry of Justice) and we attended a procedure and exchanged some info with judges from other European countries. The level of knowledge and specialization of judges in (European) environmental law is good.

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 than others? Does this have to do with the quality / clarity of the legislation or a specific focus on individual areas due to national peculiarities?

I didn't find any statistic.

I think the most relevant area in Italy is waste management. This is due the economic interests of big industries and the low attention Italian legislators pay to the environment.

The history of Italian environmental legislation is a clear example of inadequate transposition of UE Directives as shown by the number of infringement procedures against Italy and many laws being changed based on the needs of industries

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?)

It does. There is a considerable effort in order to interpreter law according to EU directives. They are an important reference point especially when national law is ambiguous

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

Not specifically, but in these cases the decision to request preliminary references is generally well publicized in law journals, websites etc. because of its relevance.

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

A citizen can ask a national Court to request a preliminary reference to the CJEU as a part in a procedure through his lawyer

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?

Yes I did. It is the case C-487/17 - Verlezza and Others (Judgment of the Court, Tenth Chamber of 28 March 2019 Criminal proceedings against Alfonso Verlezza and Others. Requests for a preliminary ruling from the Corte suprema di cassazione).

As a judge in the Supreme Court I also wrote the request to the CJEU and the judgement after the CJEU's answer.

Link to the request:

<https://lexambiente.it/materie/rifiuti/155-cassazione-penale155/13137-rifiuti-voci-specchio-rinvio-pregiudiziale-alla-corte-di-giustizia.html>

Link to the judgement:

<https://lexambiente.it/materie/rifiuti/155-cassazione-penale155/14656-rifiuti-codici-a-specchio.html>

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

No, I did not

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?

Yes I do. These are links to some judgements

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=240548&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7092250>

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=228683&pageIndex=0&doclang=it&mode=lst&dir=&occ=first&part=1&cid=7092250>

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=231182&pageIndex=0&doclang=it&mode=lst&dir=&occ=first&part=1&cid=7092250>

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=226494&pageIndex=0&doclang=it&mode=lst&dir=&occ=first&part=1&cid=7092250>

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=239885&pageIndex=0&doclang=it&mode=lst&dir=&occ=first&part=1&cid=7092250>

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=213860&pageIndex=0&doclang=it&mode=lst&dir=&occ=first&part=1&cid=7092250>

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=219450&pageIndex=0&doclang=it&mode=lst&dir=&occ=first&part=1&cid=7092250>

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=216066&pageIndex=0&doclang=it&mode=lst&dir=&occ=first&part=1&cid=7092250>

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=206432&pageIndex=0&doclang=it&mode=lst&dir=&occ=first&part=1&cid=7092250>

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=199767&pageIndex=0&doclang=it&mode=lst&dir=&occ=first&part=1&cid=7092250>

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

I'd like to preface that the answers below refer to the "Case Verlezza and others" I judged.

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

Yes every question was considered admissible and the Court answered them

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?

No, the Court did not rephrase the questions

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

Yes, it is

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 Court formulated the answer by setting out criteria to be applied by the national court

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.

Yes it did, but the question remains partially unsolved.

It does not depend on the Court's answer but especially on the fact that there is still in Italy a lively debate about the classification criteria of waste as hazardous waste and the Court's answer has been read in different ways according to the needs of industry, investigators or others.

Anyway, the Court offered an authoritative point of view that really helped in every day hazardous waste law enforcement

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?

Yes it was. After the judgement of the Supreme Court the Tribunal of Rome substantially confirmed the preventive seizure previously ordered

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.

Yes, I do

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

Yes, I do

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.

(I am not sure I understood the question)

Yes it did. Substantially the Court of Justice explained how EU law should be read in the specific case.

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.

In Italy environmental law has its own identity. However, EU law obviously impacts a great part of the national environmental law system

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?

Judges have a "power-duty" to apply EU laws.

They have to apply national laws in accordance with EU laws and have the power to disapply national laws if they contrast EU law.

According to the EU Court (es. cases Köbler, Traghetti del Mediterraneo and Ferreira da Silva e Brito) there is a liability of a member State for infringements of Community law.

The State can retaliate against a judge who did not follow EU laws and for this reason Italy changed the national law on judge responsibility (l. 117\1988) considering the case of "undeniable EU laws infringement"

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 (NO₂) 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 NO₂ from all other sources of NO₂ 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.

I would like to preface that the case above concerns an administrative judge's jurisdiction (I am a criminal court judge).

Anyway, Directive 2008/50 has been implemented in Italy by national law (Legislative Decree n. 155\2010 <https://www.normattiva.it/eli/id/2010/09/15/010G0177/CONSOLIDATED/20180702>) in order to decrease air pollution.

The law transfers to local authorities (Regions) the specific aim to activate the procedure for reducing air pollution.

Regions have to "zone" their territories, which is the prerequisite for subsequent categorisation, evaluation and planning by procedures and criteria the same law establishes.

First of all, they have to locate "urban agglomerations" (considering urban structure and housing density) and after other "zones" (considering emission load, topography, meteo-climatic conditions, degree of urbanization) in order to select areas where one or more these data are predominant in determining levels of pollutants and unify homogeneous.

Divided territory has to be classified in order to evaluate ambient air quality.

If limit values are exceeded special measures could be applied.

It is clear that the national law pursues a specific objective: to control air pollution so other interests can be evaluated but they are not dominant.

An administrative judge should consider that and verify if the administrative actions taken in the case has been applied according to the principles established by national and EU law, nullifying the act in case of illegitimacy.

In the case above, considering Court of Justice's answer, the "withdrawal decision" should be, in my opinion, nullified.

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?

Yes, it does