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

Questionnaire

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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 your country have about the preliminary rulings procedures?
   As far as I concern, depend on the judges and, also, the type of jurisdiction, all in all, preliminary ruling is more common in High Courts (Supreme Court and High Regional Courts) and at the administrative level.
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, ther are a lot, but as ammater of fact I only attend a course of the Spanish Councill of Judciary, to tell you the thruth, there were room to improve. But I only attend a single course, and, of course, it´s only my questionale opinion.
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?

Yes as a matter of fact the Spanish General Council publicize this information:

Jurisdicción	2020	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998
Tribunal Supremo	1	9	20	7	10	8	4	2	1	11	11	2	2	3	2	3	2	1	2	2	1	2	1
Audiencia Nacional	1		6	1			1		1		0	0	0	0	0	0	0	0	0	0	0	0	0
Audiencia Provincial	6	7	4		6	9	5	1	5	3													
Juzgado Central de Intrucción											0	0	0	0	0	0	0	0	0	0	0	0	0
Juzgado de Primera Instancia	3	4	5	2	8	3	9	4	1	1													
Juzgado de Instrucción	1		1																				
Juzgado de Primera Instancia e Instrucción	1	8	1				1	7	1														
Juzgado de lo Mercantil	4	3	3		1	2	6	2	1	6													
Juzgado de lo Social	3	4	4	3	4	2	7	4	3	1													
Juzgado de lo Contencioso	4	6	4	1	6	3	1	4	1	2													
Tribunal Superior de Justicia	6	21	15	9	10	7	5	2	2	2													
Tribunal Economico Administrativo Central			4				1																
Tribunal Constitucional										1													
Tribunal Català de Contractes del Sector Public							1																
Comisión Nacional de los Mercados y la Competencia		1																					
Órgano Administrativo de Recursos Contractuales. País Vasco		1			1																		
Otros tribunales											11	9	15	11	15	7	6	7	1	2	4	2	54
Letrado de la Admon. Justicia					1	2																	
Total España	30	64	67	23	47	36	41	26	16	27	22	11	17	14	17	10	8	8	3	4	5	4	55
Total Unión Europea	541	641	568	533	470	436	428	450	404	423	385	302	288	265	251	221	249	210	216	237	224	255	264
% que representa España	5,5%	10,0%	11,8%	4,32%	10,0%	8,26%	9,58%	5,78%	3,96%	6,38%	5,71%	3,64%	5,90%	5,28%	6,77%	4,52%	3,21%	3,81%	1,39%	1,69%	2,23%	1,57%	20,83%

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´s a fiddly question, as I see it, it´s quite difficult to know, my feeling it´s the preliminary ruling is something absolutely extraordinary, the last resort. Nevertheless, I can provide any data to confirm my point of view. I have the perception of my colleagues are a little be afraid to use this legal instrument, and they prefer to avoid using the preliminary rule.

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

   Sincerely, I have not idea regarding this point, I guess we have not any system of control because I have never heard about it, but I am not absolutely sure. On a voluntary basis, the Network of Specialists on the European Union (REDUE) asks for information from all judges who issue a preliminary ruling, to collect this valuable information. After this, they publish the most relevant preliminary ruling in the online page for the Judiciary.

6. Which are the fundamental/procedural rights of citizens to ask a national court to request a preliminary reference to the CJEU?
   The
   Citizens must be heard about this procedural incident . According to According to article 4 bis of the Organic Law of the Judicial Power (introduced by section two of the sole article of LO 7/2015, of July 21, which modifies LO 6/1985, of July 1):
   "1. The Judges and Courts will apply the law of the European Union in accordance with the jurisprudence of the Court of Justice of the European Union.
   2. When the Courts decide to raise a European question for a preliminary ruling, they will do so in accordance with the jurisprudence of the Court of Justice of the European Union and, in any case, by order, after hearing the parties ".

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?
   No, I haven`t.
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?
   I can´t remember any particular judgment.
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?
   I am afraid, I am not familiar because I do not apply in my Court on a daily basis, it´s something weird or a little bit extraordinary in a Criminal Court. As a matter of fact, I know more about the issue on a daily basis as a University Professor of European Law..

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?
    As I told you, I have not experience about this point.
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?
    As I told you, I have not experience about this point
12. Do you consider the answer given by the Court of Justice to be a legally correct answer to the question posed?
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?
    As I told you, I have not experience about this point
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.
    As I told you, I have not experience about this point.

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?
    As far as I know, there are not any type of theoretical barriers and it is very difficult to imagine one, but I guess you should examine case by case. Therefore, if the case

is extremely complex maybe there are a lot of actual barriers but I deem this type of handicap should be very similar to the rest of the multifaceted cases which involve a lot od difficulties. Regarding the Constitutional Court, according to the judgement of the European Union Court Melki and Abdelli of 22th June 2010, the preliminary reference procedure is preferent to the Constitutional Court. If you have doubts about who are you going to ask for clarification about one point the European Court is preferent to the Constitutional Court..

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.
    Depends on the circumstances, if it is not fully the case, I think it would be a clear case of uncooperative administration of justice..
17. Do you (still) ***agree*** with the manner in which the follow-up judgment applied the preliminary ruling?
    It's only my humble opinion but, all in all, I think that something is not working properly, because some Courts use this instrument frequently and others they never used in any way, shape or form, this instrument, and I guess all the cases are very similar, so something is not working properly..

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.
    Speaking out, I have not any idea about the concrete case that you are referring.
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.
    I suppose in Spain we do the things in our own way, but my feeling consists of all my colleagues are very involved in the European Union law, and they behave thinking more in the way that Luxembourg want to solve the problem than in the jurisprudence of our national courts.
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?
    As far as I know, in Spain there are no internal control systems. In general, in Spain we limit ourselves to applying the doctrine established in the Da Costa judgment on March 27, 1963 and, above all, in the Cilfit judgment on October 6, 1982 - the cases in which we find ourselves have been defined. it has come to be called a clear act or clarified act.

Thus, national judges would not have to raise the question for a preliminary ruling, despite the fact that an interpretation of European rules had to be made in their dispute:

a) If the interpretation necessary to resolve the lawsuit or the doubt about the scope of European Union law coincide and are materially identical to a question that was previously the subject of a preliminary ruling in an analogous matter.

b) If the answer is already found in the jurisprudence of the Court of Justice, established through any of the procedures for which it is competent, even if the issues discussed are not strictly identical.

c) When the correct application is imposed with such evidence that it leaves no room for any reasonable doubt about the solution to the question raised, with the understanding that the judge must reach the conviction that the solution would also be imposed with the same evidence to the judicial bodies of the other Member States, as well as to the Court of Justice itself.

The first two assumptions make up the so-called clarified act doctrine, according to which there is no duty to raise the question if the dubious European standard applicable to the case has already been interpreted by the CJEU on more than two occasions, be it in preliminary rulings, be it in other types of procedures.

This doctrine has been recalled by the CJEU itself in its 2012 Recommendations and has been included in article 99 of the Rules of Procedure of the Court of Justice as a cause that allows the CJEU to issue a reasoned order (not of inadmissibility, but of termination) of the procedure .

Regarding this point, it would be interesting to remember that as of the Kucukdeveci judgment, the power granted to the national court to request a preliminary interpretation from the Court of Justice before leaving the national provision contrary to Union law without application cannot be transformed into an obligation due to the fact that the National law does not allow said judge to refrain from applying a national provision that it deems contrary to the Constitution without said provision having been previously declared unconstitutional by the Constitutional Court. But in Spain we do not have any similar regulation. In fact, I declare, for my own, invalid Law 25/2007, of October 18, on the conservation of data related to electronic communications and public communications networks. concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications). But this Directive was declared void by the Court of Justice in the famous case “Digital Rights versus Ireland”, 8.4.2014 holding that legally mandated communications meta-data retention can only be a justified

interference with the right of privacy and the right to data protection under EU law if the retention is done for the purpose of fighting ‘serious crime’, on the basis of objective criteria and where there are clear substantial and procedural conditions laid down by law. So, I understand thar I can not apply a law that is based on an overruled normative.

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*

To understand my answer, you have to start from the most basic ideas. In the words of Robert Lecourt, Fourth President of the Court of Justice of the European Union, the preliminary ruling must be understood as the "cornerstone" of European integration, since it is a norm interpreted and applied in the same way throughout the entire extension of the same territory by all of the Courts of all Member States. Subject to the principle of the primacy of Community

law, and the art. 4 BIS of the Organic Law of the Judicial Branch, in Spain is mandatory to apply the judgment and we have not any legal obstacles. Ultimately, the only interpreter of European law is the CJEU, and according to national regulations we judges have the obligation of national judges to make an interpretation in accordance with the objectives set by the Community Directive. The jurisprudence of our Constitutional Court (e.g judgement 26/2014, 13th february) emphasizes the role of national judges in the enforcement of European Union Law with special reference to the doctrine of the Constitutional Court regarding the duty in which judges must put the «preliminary ruling» to the Court of EU Law in Luxemburg, as an obligation also of ourinternal legislation. However, the ruling of the Constitutional Court 78/2010, of 20 October, adopted by

The decision of the Plenary of the TC rectifies the doctrine of the previous STC 194/2006 that allowed the Spanish national judge not to apply an internal law if it was in direct contradiction with European regulations. The case analyzes whether the Supreme Court of the Canary Islands had acted correctly when extending the doctrine established in a Judgment of the Supreme Court of Luxembourg to a similar case, with the practical consequence that the

The court itself failed to apply a national law giving priority to the law of the European Union. The Spanish Constitutional Court begins by saying that the question of unconstitutionality and the question referred for a preliminary ruling by the European Union they adjust to different requirements. The first is required in relation to post-Constitution legal norms if the judge understands that it is not possible an interpretation of these norms in accordance with the Constitution.

The judge cannot, therefore, by himself, overrule a post-constitutional law. If you doubt its constitutionality you have to raise the question. Yes no doubt, he will apply it. But you cannot simply waive it.

The regime for the preliminary ruling of EU law is different, says the TC. The judge is not always obliged to raise it, not even - he specifies - "in the case of decisions of jurisdictional bodies nationals who are not susceptible to judicial recourse pursuant to the internal law ". Also in these cases, it may not apply the domestic rule and not raise the question for a preliminary ruling when the question raised is materially identical to another that has been the subject of a decision prejudicial in an analogous case (doctrine of the clarified act) and, also, when the applicability of Community law is so obvious that no leave room for any reasonable doubt (clear act doctrine). So that, just in these cases, a current legal norm may be discontinued due to its contradiction with European law, that is, when 'the budgets set for this purpose by community law itself, whose concurrence corresponds to assess to the judges and courts of the ordinary jurisdiction »

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?

As far as I concern, I strongly believe that the preliminary ruling procedure supports national judges to achieve uniform application of EU environmental law and it contributes to effective environmental justice on the ground. Nevertheless, currently, preliminary ruling depends on too much in the subjective criteria of the national judges and maybe it would be interesting to implement more harmonize and objective criteria.