REPORT ON JUDICIAL COOPERATION IN FOLLOW UP JUDGMENTS IN ENVIRONMENTAL MATTERS

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Executive summary

Based on the national reports received from 16 Member States, the United Kingdom and Norway, the following main conclusions and recommendations can be made:

1) The national reports highlight a reasonable level of knowledge about EU law, in general, and Article 267 TFEU, in particular, among high courts, but also room for improvement of knowledge among judges at lower courts. The findings suggest that the level of knowledge could influence the behaviour of national courts in follow up judgments, mostly as regards lower courts. It also suggests that training courses should be targeted at lower courts in particular.

2) The main factor influencing the specialisation of judges in environmental law seems to be related to personal circumstances of individual judges and the national case allocation system. This makes it difficult to apply desk research to appreciate the effects of this variable on the behaviour of national courts in follow up judgments.

3) There seems to be a generalised lack of statistical data on preliminary references and follow up judgments. This makes it very difficult to track the behaviour of national courts in follow up judgments. It also alludes to the importance of the creation of systematic databases about follow up judgments. Besides, the Court of Justice could consider adding an ad hoc paragraph in her judgments recommending national courts to send their follow up judgments to the Court for administrative purposes, thus strengthening the visibility of the Court's recommendation on this matter.

4) It seems that CJEU's rulings in which the national question has been reformulated and/or answered by setting a series of open criteria to be applied by the referring court to solve a case create the most hurdles in national judgments. This variable thus seems to be very important in understanding the behaviour of courts in follow up judgments. It would be interesting to research whether extra guidance from the CJEU on the relevance of the rephrased question and/or open set of criteria for answering the case at national level, help improving the perception of national courts about the usefulness of the CJEU's ruling in these cases.

Judicial Cooperation in Follow up Judgments in Environmental Matters

Lorenzo Squintani* and Sjoerd Kalisvaart#

1. Introduction: Mapping and Unfolding Judicial Cooperation[1]

The recent developments coming from Poland, in which the Polish government decided not to comply with a ruling of the Court of Justice,[2] referring in this matter to the precedent established by the German Constitutional Court in May 2020,[3] place the judicial dialogue, or better said *cooperation*,[4] between national courts and the Court of Justice of the European Union in the spotlight.

Although there are various kinds of judicial cooperation,[5] the preliminary reference is one of the main instruments for the judicial cooperation between national Courts and the Court of Justice.[6] From an European Union (EU) law perspective, the national court referring the question is obliged to comply with the Court of Justice's answer.[7] Accordingly, it is through the correct application of preliminary references that the national courts are enabled to demonstrate a cooperative attitude towards the Court of Justice *par excellence*.[8] Yet judicial cooperation does not need to be based on mutual understanding: it can highlight conflicts and power struggles.[9]

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[1] This section reproposes parts of the text that we wrote for our publication in the European Papers journal, L. SQUINTANI and S. KALISVAART, *Environmental Democracy and Judicial Cooperation in Environmental Matters: Mapping National Courts Behaviour in Follow up Cases* (2020) 5 EP 931

[2] Case C-121/21, *Czechia v. Poland*; and specifically with the Order for interim measures of 21 May 2021, case C-121/21R, ECLI:EsU:C:2021:420, for account of this case and of the reaction of the Polish Government, see L. Krämer, *The EU battle on the last word and the environment*, *JEEPL* 2021 (in print).

[3] Bundesverfassungsgericht, 2 BVR 859/15, decision of 5 May 2020, ECLI:DE:BVerfG:2020rs20200505.2bvr085915.

[4] Lorenzo Squintani and Sjoerd Kalisvaart, *Environmental Democracy and Judicial Cooperation*, cit..

[5] A. ROSAS, *The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue*, in *EJLS*, 2007/1, pp. 125.

[6] F. JACOBS, *Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice*, in *TILJ*, 2003/38, pp. 547-556.

[7] Court of Justice, judgment of 24 June 1969, case 29/68, *Milch, Fett und Eierkontor GmbH* v *Hauptzollamt Saarbrücken*; See also H. SCHERMERS, *Judicial Protection in the European Communities*, Kluwer, 1976, who at page 392 showed that, at least until the 1970s, most national courts seemed to support this rule.

[8] S. PRECHAL, *Communication Within the Preliminary Rulings Procedure Responsibilities of the National Courts*, in *MJ*, 2014/21, pp. 754-762.

[9] E. PAUNIO, *Conflict, Power, and Understanding – Judicial Dialogue Between the ECJ and National Courts*, in No Foundations: Journal of Extreme Legal Positivism, 2010, p. 5 et seq.

Accordingly, a series of studies started *mapping* and *unfolding* follow up judgments,[10] i.e. judgments rendered by the national court referring a matter to the Court of Justice once it has received the answer from Luxembourg. Mapping refers to the building of a systematic catalogue of how preliminary rulings have been applied by the referring court in the various Member States. Unfolding means categorising the retrieved judgments in accordance with their characteristics, such as whether they show cooperative or uncooperative behaviours of the national court towards a full and correct implementation of the preliminary ruling of the Court of Justice.

Based on the findings presented so far, Figure 1 shows a map of different categories of judicial cooperation in follow up judgments in environmental matters.

Figure 1: Map of judicial dialogue in environmental matters in the EU (5 MSs). Derived from Council of the European Union; Lovell Johns © European Union, 2014. Reproduced with kind permission of Lovell Johns, Oxford, UK, www.lovelljohns.com. Although the United Kingdom is no longer a Member States, findings retrieved in that jurisdiction are still included in this map as they indicate how judicial cooperation could take place.

[10] S. BOGOJEVIĆ, *Judicial Dialogue Unpacked: Twenty Years of Preliminary References on Environmental Matters Initiated by the Swedish Judiciary*, in *JEL*, 2017,pp. 263-283; L. SQUINTANI, J. RAKIPI, *Judicial Cooperation in Environmental Matters*, in *Env.LR.*, 2018, pp. 89-108; L. SQUINTANI, D. ANNINK, *Judicial Cooperation in Environmental Matters: Mapping National Courts' Behaviour in Follow up Cases*, *JEEPL*, 2018/15, pp. 147-170; and Lorenzo Squintani and Sjoerd Kalisvaart, Environmental Democracy and Judicial Cooperation, cit.

Although most of the map still has to be drawn up, the unfolding exercise seems to have reached a level of saturation.[11] This means that no new category of judicial cooperation was retrieved in the last studies, whilst existing categories of judicial cooperation also re-emerged. In the next section, the known categories of judicial (un)cooperation are introduced and explained.

1.1. Known categories of judicial cooperation and uncooperation

Bogojević's findings all show varying degrees of judicial *un*cooperation.[12] Four different kinds of judicial interaction emerged from Sweden: interchanged, gapped, interrupted and silenced. *Interchanged* cooperation means that there is an interchange of values. The preliminary reference is absorbed into national law and applied as though it were national case law.[13] For example, in *Gävle Kraftvärme* the Court of Justice had clarified what 'incinerator' meant under the Waste Incineration Directive.[14] The Swedish Supreme Court tasked a lower court to apply the criteria set out by the Court of Justice. In doing so, the lower court only referred to the Swedish Supreme Court ruling and not to the Court of Justice's ruling.[15] The lower national court did not therefore treat the preliminary reference as though the information had been provided by the Court of Justice.[16] *Gapped* cooperation signifies that there is a lack of judicial dialogue between the Court of Justice and the national court. There can be instances where a national court questions the validity of the Court of Justice's ruling.[17] For example, in *Billerud* the national court considered after receiving the Court of Justice's ruling whether the Court of Justice's interpretation of the Emissions Trading System Directive complied with the European Convention of Human Rights.[18] This was done without further references to the Court of Justice. *Interrupted* cooperation means that national law may in the meantime have been revised and/or facts added, rendering the preliminary reference useless while the procedure remains ongoing.[19] For example, in *Jan Nilsson* the relevance of the Court of Justice's answer to the question of whether mounted specimens fell under the regulation transposing the Convention on International Trade in Endangered Species became moot as the criminal offence for trading in such species was abrogated, leading to the criminal charges against Mr Nilsson being dropped.[20] Finally *silenced* cooperation covers cases where the national court ignores the preliminary ruling.[21] For example, in *Mickelsson and Roos* the national court ultimately cleared Mr Mickelsson and Mr Roos of the criminal charges on grounds different from the ones considered in the Court of Justice's ruling, which was not even mentioned.[22]

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[11] C. SEALE, *Grounding Theory*, in C. SEALE (ed.), *The Quality of Qualitative Research*, SAGE Publications, 1999, pp. 87-105; G.A. BOWEN, *Naturalistic Inquiry and the Saturation Concept: A Research Note*, in *Qualitative Research*, 2008/8, pp. 137-152; and M. O'REILLY, N. PARKER, *'Unsatisfactory Saturation': A Critical Exploration of the Notion Of Saturated Sample Sizes in Qualitative Research*, in *Qualitative Research*, 2013/13, pp. 190-197.
[12] S. BOGOJEVIC, *Judicial Dialogue Unpacked*, cit.
[13] Ibid.
[14] Court of Justice, judgment of 11 September 2008, case C-251/07, *Gävle Kraftvärme*.
[15] S. BOGOJEVIC, *Judicial Dialogue Unpacked*, cit.
[16] Ibid.
[17] Ibid.
[18] Court of Justice, judgment of 17 October 2013, case C-203/12, *Billerud*.
[19] S. BOGOJEVIC, *Judicial Dialogue Unpacked*, cit.
[20] Court of Justice, judgment of 23 October 2003, case C-154/02, *Jan Nilsson*.
[21] S. BOGOJEVIC, *Judicial Dialogue Unpacked*, cit.
[22] Court of Justice, judgment of 4 June 2009, case C-142/05, *Mickelsson and Roos*.

While Bogojević's categories represent cases of uncooperative dialogue, Squintani and Rakipi's categories, focusing on the UK judiciary, represent three different cases of cooperative dialogue.[23] First, they identified cases of *full* cooperation, i.e. cases where the national court applies the Court of Justice's judgment to the letter. This was the case for example in *R* v *Secretary of State for the environment* (*ex parte Society of Birds*).[24] Exactly in accordance with the Court of Justice's interpretation,[25] the House of Lords quashed the decisions handed down by the Court of Appeal and the High Court and declared invalid the Secretary of State's decision on the delineation of a special protection area under the Wild Birds Directive. Second, they identified cases of *fragmented* cooperation, where the Court of Justice decides to reformulate the question and the national court applies the Court of Justice's ruling inasmuch as it can be applied to the part of the answer it considers relevant. This category differs from Bogojević's *gapped* category in that in the latter the national court would omit certain parts of the issue when requesting a preliminary reference, and the Court of Justice would rule only on the other parts. In the former, the national court does not omit any part of the problem in its question, but instead choses to only engage with the parts of the preliminary reference response it deems helpful for its judgment, while ignoring the reasoning of the rest. This was done in *Client Earth*, concerning air quality management.[26] The Court of Justice rephrased the UK Supreme Court's question about a temporary exception under Article 22 of the Air Quality Directive. In turn, the UK Supreme Court considered the Court of Justice's answer to solve part of the case. The Supreme Court was willing to apply the Commission's reasoning and deem Article 22 non-mandatory, but the court consider this irrelevant as the legal deadlines had already expired.[27] Finally, Squintani and Rakipi introduced the *presumed* cooperation category, where the Court of Justice's judgment is not applied because the unsuccessful party before the Court of Justice withdraws from the proceedings, anticipating the decision being applied in full by the national judge. In such cases, the judicial cooperation chain breaks, and the national decision 'disappears', making it impossible to gauge the national court's degree of compliance.[28] However, these are examples of presumed *cooperation* rather than uncooperation, because the parties dropped their claims in the anticipation of full compliance by the national judges. This happened for example in *Seaport* v *Department of Environment*.[29] Seaport withdrew its claim on delivery of the judgment, which had gone against it, so the case was never considered further by the national court.[30]

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[23] L. SQUINTANI, J. RAKIPI, *Judicial Cooperation in Environmental Matters*, cit. Although after Brexit the UK no longer is an EU Member State, findings from this jurisdiction are still useful for unfolding the categories of judicial cooperation in follow up judgments and to set a follow up research agenda.

[24] *Ibid*., p. 99.

[25] For the CJEU ruling see Court of Justice, judgment of 11 July 1996, case C-44/95, *Regina v Secretary of State for the Environment, ex parte: Royal Society for the Protection of Birds*.

[26] UK Supreme Court, judgment of 29 April 2015, *R (on the application of ClientEarth)* v *Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC-28, 27.

[27] *Ibid.*

[28] This type of withdrawal must be distinguished from when, for instance, parties agree a settlement and the national court withdraws the reference request. In this case the CJEU will not rule on the matter, unless it has already given notice of a date on which its decision will be communicated. Article 100(1) Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012.

[29] Court of Justice, judgment of 20 October 2011, case C-474/10, *Department of the Environment for Northern Ireland* v *Seaport (NI) Ltd and Others*.

[30] As confirmed by email from the case counsel James Maurici, Landmark Chambers, 8 March 2017.

Squintani and Annink uncovered a fourth category of judicial cooperation when studying the behaviour in follow up cases in the Netherlands, that of *withdrawn* cooperation.[31] A peculiarity of the EU judiciary system is its unwritten *stare decisis* system, as stated in section II, *supra*. Consequently, preliminary questions which are similar to those in an earlier case will be answered by the Court of Justice recommending that the national court apply the Court of Justice's ruling in these earlier cases and withdraw its preliminary ruling request, as occurred in the *Stichting Greenpeace* case.[32] This case concerned a permit issued for the cultivation of genetically modified corn. As similar questions had already been asked, the Dutch Council of State (*Raad van State)* was asked to withdraw its preliminary reference and apply Case C-552/07 *Azelvandre* instead.[33] This is exactly what the Dutch Council of State did.[34] In doing so, the Dutch Council of State included the questions asked in the preliminary reference and a substantial account of the answers provided in *Azelvandre*. It also based its final decision on these findings, showing full cooperation.

Finally, Squintani and Kalisvaart unfolded the category of *suspended* cooperation. In this kind of cases, the application of the Court of Justice's ruling in such cases is suspended while further doubts requiring further clarification are resolved. The cases identified in Italy and Belgium led to a national court process to request further clarification from the respective national Constitutional Courts. Because these Italian and Belgian follow up procedures involving further references indicate the courts' willingness to cooperate with the Court of Justice, these postponed cooperation cases can be considered examples of judicial cooperation. However, such cases could result in *un*cooperation in future, or in other jurisdictions.

When the empirical studies performed, which considered a total of 64 follow up judgments in the jurisdictions investigated,[35] are subdivided according to the kind of interaction between the national courts and the Court of Justice, the following overview emerges:

Cooperation	**Cooperative behaviour**					**Uncooperative behaviour**			
Countries	**Full**	**Presumed**	**Fragmen-ted**	**Suspended**	**Withdrawn**	**Gapped**	**Inter-rupted**	**Silenced**	**Interchan-ged**
SE	-	-	-	-	-	2/9	2/9	2/9	3/9
NL	13/16	-	-	-	1/16	2/16	-	-	-
UK	5/8	2/8	1/8	-	-	-	-	-	-
IT	7/13	2/13[36]	2/13	1/13	-	0/13[149]	1/13	-	-
BE	16/18	1/18	-	1/18[37]	-	-	-	-	-
Total	41/64	5/64	3/64	2/64	1/64	4/64	3/64	2/64	3/64
Aggr. total	52/64					12/64			

[31] L. SQUINTANI, D. ANNINK, *Judicial Cooperation in Environmental Matters*, cit.
[32] Court of Justice, judgment of 2 April 2009, joined cases C-359/08, C-360/08, C-361/08, *Stichting Greenpeace*; follow up judgment Dutch Council of State, judgment of 9 september 2009, C-200702758/3/M1.
[33] Court of Justice, judgment of 17 February 2009, case C-552/07, *Azelvandre*.
[34] Dutch Council of State, C-200702758/3/M1, cit.
[35] It should be noted that this figure depends on how joined cases are considered.
[36] In addition to being a case of presumed cooperation, *Siragusa*, cit., could also be categorised as gapped cooperation.
[37] *Commune de Braine-le-Chateau*, cit., was a joined case. While the follow up for C-53/02 falls under full cooperation, the follow up for C-217/02 falls under suspended cooperation.

Table 1: overview of follow up cases per category of judicial cooperation.

1.2 Follow up questions and the present study

In light of these findings, Squintani and Kalisvaart wrote: *"Overall, a tendency in favour of judicial cooperation in the context of Article 267 TFEU in environmental matters seems to emerge. It could thus be argued that this aspect of the access to justice pillar is functioning effectively, at least in the majority of the cases. Environmental Democracy thus seems guaranteed, at least in this regard. This finding would however be premature."*

In light of these findings, Squintani and Kalisvaart wrote a tentative research agenda to further unravel judicial cooperation in environmental matters. The main features of the drafted agenda were:

1) Further chartering of judicial cooperation in those member states that have not been studied yet;
2) Contextualization of the case law in light of the national judicial cultures; with particular attention to the existence of a specific environmental law tradition different from the EU mainstream environmental law;
3) Contextualization of the case law in light of the characteristics and specificities of each case;
4) Mapping of the instrument and practices concerning the registration of follow up judgments; including whether specific databases for retrieving such judgments exist.

The questionnaire provided to the members of the European Union Forum of Judges for the Environment (EUFJE) represents a first step in the further refinement of these agenda points.

In the rest of this report, we present the answers and main findings extracted from the 16 filled-in questionnaires which were received from individual members of the EUFJE coming from a Member State of the European Union and the single filled-in questionnaire from a representative of the judiciary in an EFTA Member State, Norway.[38]

1.3: Research design

The questionnaire consisted of six parts. The first part dealt with the general knowledge about the functioning of the preliminary reference procedure. This first part of the questionnaire was included to attain an understanding of the level of knowledge dealing with the preliminary reference procedure and EU environmental law in particular. The extent of knowledge might correlate with the ability to identify whether EU law is at stake and unclear, the willingness to refer questions to the CJEU for a preliminary ruling and the willingness to cooperate fully with the CJEU.

The second part dealt with examples of follow up judgments after CJEU preliminary rulings in environmental matters in the last 10 years. The third part dealt with the answers provided by

[38] The responses are perusable via the site of the EUFJE < https://www.eufje.org/index.php?lang=en>.

the CJEU. The fourth part dealt with the follow up cases, following a judgment by the CJEU. The fifth part dealt with the environmental law background of the disputes. The second through fifth part of the questionnaire were included to collect experiences of the respondents with preliminary reference procedures they were a part of, which provides the authors with an 'insider perspective'.

The sixth part concerned a mock case[39], in respect to which the respondents were asked to rule. The sixth part of the questionnaire was included to better understand the way in which judges respond in fact to answers by the CJEU. The seventh part dealt with the overall stance towards the preliminary reference procedure. The seventh part was included to leave room for judges to present their own opinion, in addition to the previous more strictly formulated questions.

1.4 Research design limitations

The answers to the questionnaire were coded and looked at from a quantitative perspective. The codification of the answers to the open question involves an interpretation process, inherently. Similarly, the qualification of the quantitative data by means of extracts from the national reports comports a decontextualisation of the extracted passages.

Accordingly, a full account of the position expressed in the national reports requires reading the full country reports and should not be based exclusively on the information extracted from them and presented in this report.

2: Overview of results

The analysis of the results consists of several parts. First, the authors will discuss the respondents' knowledge of and willingness to apply the preliminary reference procedure.[40] Second, the authors will provide an overview of actual CJEU cases, follow up cases and the background to those rulings as provided by the respondents.[41] Third, the authors will look into the general stance towards the preliminary reference procedure.

It is important to note that the questions in the questionnaire were intentionally formulated openly. As such, in analyzing the results, the authors have coded the responses into several categories per question. Still, it is noted that the analysis in this paper will be of a qualitative nature.

2.1: Knowledge of and willingness to apply the preliminary reference procedure

In this section two distinct topics will be discussed. First, it will be assessed what the level of knowledge on the preliminary reference procedure is amongst environmental judges in the MS,

[39] The mock case closely resembles the ClientEarth case, see: CJEU Case C-404/13, ECLI:EU:C:2013:805 (ClientEarth).

[40] We should note that the response by the United Kingdom is included, despite them no longer being part of the European Union. Regardless, the response gives insight in the experiences of the English judiciary during its membership period.

[41] The received responses landed the authors numerous examples of follow up cases and background to those decisions. In the interest of readability, a few illustrative cases will be discussed.

according to the respondents. Second, it is assessed whether countries appear keen to submit questions for a preliminary ruling and whether there is a control mechanism in place.

2.1.1: Knowledge of the preliminary reference procedure

It is recalled that good knowledge of EU law in general, and of the preliminary ruling procedure in particular, is required to sincerely cooperated in general, and in the context of follow up judgments in particular.

Accordingly, the first question was '**How do you consider the knowledge that judges in their country have about the preliminary rulings procedures?**'. Although posed as an open question, six different levels of knowledge can be distinguished. The results are included in brackets:

A: Expert/high level of knowledge of preliminary reference (3);[42]
B: Sufficient/good knowledge of preliminary reference (9);[43]
C: Adequate/average knowledge of preliminary reference (3);[44]
D: Lackluster/basic knowledge of preliminary reference (0);[45]
E: Fragmented knowledge of preliminary reference (3);[46]
F: No specific knowledge of preliminary reference (0).

The results show an overall high level of knowledge about the preliminary reference procedure. Three 'supreme court' judges noted they had an expert level of knowledge of the preliminary reference procedure, ten noted that they had good knowledge, two noted that they had adequate knowledge[47] and three noted the knowledge of the procedure was fragmented.[48] As a whole, the majority of judges has a good or expert level of knowledge of the preliminary reference procedure. This is different with the lower courts, as respondents note that knowledge there is more fragmented. Yet, even in countries in which the level of knowledge about the preliminary ruling was considered low, at least among the lower courts (as in the Swedish case), it has been indicated that such a level is rising thanks to young judges. The rising level of knowledge among national courts was noted also in the Slovak and Norwegian reports, where the level of knowledge about the preliminary ruling procedure is considered adequate/average. The French

[42] This concerned the Estonian, Finnish and Polish respondents.
[43] This concerned the Belgian, British, Cypriot, Czech, French, German, Italian, Romanian and Slovenian respondents. Some respondents make a distinction between lower and higher courts in relation to the posed question. The Austrian, Spanish and Swedish respondents have noted that higher courts have sufficient/good knowledge of the preliminary reference. That would bring the result of this question to 10.
[44] This concerned the Hungarian, Slovak and Norwegian respondents.
[45] Again, a distinction should be made between the lower and higher courts. The Austrian, Spanish and Swedish respondents made note of basic/lackluster knowledge of the preliminary reference procedure amongst the lower courts.
[46] As noted, there is a distinction between higher and lower courts. This is meant by 'fragmentation' of knowledge. This concerns the Austrian, Spanish and Swedish respondents.
[47] The Norwegian respondent also noted that they had an adequate level of knowledge, but is, as an EFTA-MS, not included.
[48] This concerned the Austrian, Spanish and Swedish respondents. They note that the higher courts have a higher level of knowledge than the lower courts. As such, knowledge about the preliminary reference procedure is fragmented.

respondents did note, however, that the mechanism of the preliminary reference is reserved for exceptional cases only. In a similar vein, the Swedish respondent also made note of a certain hesitancy to refer questions for a preliminary ruling.

Related to the level of knowledge about the preliminary reference procedure, we also asked: '**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?" As regards the first part of question 2, we codified the answers in (results in brackets):

A: Participated in national and DG Environment and ERA training programs (11);[49]
B: Participated solely in DG Environment and ERA training programs (3;)[50]
C: Participated solely in national training programs (2);[51]
D: No participation (2).[52]

The results further show that the majority of judges actively partake in training programs on the subject of CJEU environmental case law and preliminary rulings, either on an EU or on a national level. Eleven judges note that they have participated in national and European training programs, three judges mention participation in European programs alone, two judges mention participation in national programs alone and only two judges note that they have not participated in such training programs.

The second limb of the above question concerned the level of knowledge and specialization of judges in the area of (European) environmental law. Not all respondents included information on whether judges were specialized in environmental law. As such, it was not possible to code the responses in relation to specialization.

The results show that specialization in the field of environmental law takes mostly place through rather practical arrangements. For example, in relation to this question, the Slovak respondent noted: *"Official judicial specialization is not possible in Slovak courts. Therefore, Slovak judges do not specialize in the field of environmental law either. However, some judges in higher courts become voluntary lecturers and leaders at training sessions for judges from lower courts. Only this informal initiative creates the basis for better application of environmental law."* Similarly, the Belgian respondent notes: *"The knowledge about environmental law and thus EU environmental law is not spread among the whole judiciary, but is concentrated with those judges that have a significant environmental law caseload."* Practical circumstances, such

[49] This concerned the Austrian, Belgian, Cypriot, Czech, Finnish, French, Hungarian, Italian, Romanian, Slovenian and Swedish respondents. The Czech respondent noted, however, that participation is low, which means that in many cases, Czech judges only participate in national training programs.
[50] This concerned the British, German and Polish respondents.
[51] This concerned the Slovak and Spanish respondents. Again, due to the stated low participation rate in European training programs, the Czech respondent could – in many cases – also fall within this category.
[52] This concerned the Estonian and Norwegian respondents.

as a high environmental law case load or a personal interest thus seem to influence whether a specialization in environmental law exists in a given jurisdiction.

2.1.2: Monitoring of preliminary references and explanation behind them

In order to understand whether judges in fact make proper use of the instrument, it can be useful to keep track of certain statistics. Accordingly, we asked: '**Does your country have statistics showing in which subject-areas of EU environmental law are the majority of preliminary rulings requests?**' Answers to these questions were coded in (results in brackets):

A: Country has specific statistics on references in environmental law (2);[53]
B: Country has a list with preliminary references (5);[54]
C: Country has no specific statistics on environmental law references (10).[55]

The results show that only 7 out of 17 respondents make note of a list with all preliminary references that is kept by domestic institutions. Only 2 out of these 7 respondents note that specific statistics are being kept on preliminary references dealing with EU environmental law. 10 respondents note that no statistics on preliminary references are held domestically. The French respondents note that this is due to the limited number of references in environmental matters, the Austrian and Belgian respondents note that they rather make use of the statistics kept by the CJEU directly.[56]

Despite the lack of statistics, multiple respondents note that specific areas of environmental law seem to dominate the preliminary references in the country. This concerns, however, only a limited number of respondents, as 2 out of 9 respondents note that there are too few cases to draw conclusions and another 2 respondents note that there are no specific fields of environmental law that dominated the preliminary references submitted.

Following up to the question on the presence of statistics, we asked: '**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?**' This question was aimed at ascertaining also whether the presence of preliminary questions is related to domestic circumstances. It was not possible to code the answers to this question.

In this regard, the Austrian respondent for example notes poor quality of the legislation surrounding ambient air quality as a reason for the prevalence of preliminary references dealing with that subject matter. The Belgian respondent on the other hand notes that cases dealing with the environmental impact assessment (EIA), the Birds and Habitats Directive are most prevalent

[53] This concerns the Estonian and Slovak respondents.
[54] This concerns the Czech, Finnish, Romanian, Slovenian and Spanish respondents.
[55] This concerns the Austrian, Belgian, British, Cypriot, French, German, Italian, Polish, Swedish and Norwegian respondents.
[56] Such statistics are kept on: <https://curia.europa.eu/juris/recherche.jsf?language=en> (last accessed 24 August 2021).

due to their major impact on plans and permits. The Belgian respondent argues that the presence of many active environmental non-governmental organizations underlies the many preliminary questions on the above topics. From the results, it is thus not possible to deduce defining factors behind the prevalence of environmental preliminary references in general nor as regards specific environmental themes.

2.1.3: The nature of environmental law regimes in the various Member States

EU environmental law harmonizes the applicable legal regimes between the Member States concerning a plethora of issues but leaves room for legal regimes with a distinct 'national flavor'. In order to assess the degree of harmonization of EU environmental law, we asked: **'Did the national environmental legal framework applicable to the follow up judgment represent a one-on-one transposition of the EU law framework at stake?'** Although the question related to follow up judgments, the answers to the posed question appeared to deal more with the nature of the distinct legal systems. Therefore it is useful to discuss the results at this time. We coded the responses as follows (results in brackets):

A: The national legal framework represented a one-on-one transposition of EU environmental law (5);[57]
B: The national framework (partially) has its own distinct flavor (7);[58]
C: No comment (2).[59]

The above results show that EU law has penetrated national environmental law regimes to a very large degree. Still, in certain areas, separate national approaches to certain issues persist, likely interlinked to certain cultural, political and factual circumstances.

2.1.4: Tendency to refer questions for a preliminary ruling

The system of the preliminary reference procedure is reliant on the cooperation of domestic judges. It is up to the MS to ensure that domestic judges make proper use of the instrument of article 267 TFEU.[60] This requires a certain degree of willingness on the part of the domestic judiciary of the MS. When focusing on the uploading phase of the preliminary ruling procedure, we asked: **'Does the judiciary in your country engage in the practice of interpreting EU environmental law without asking for a preliminary ruling?'** Answers to these questions were coded as follows (results in brackets):

[57] This concerned the British, Finnish, French, Hungarian, and Polish responses. The Italian response could also be understood to fall within this category, The Italian response could also be understood to fall within this category. The Italian respondent later stated this was because it was a case of presumed cooperation. They stated: *"In fact, based on the Court of Justice's judgment, the ENGO withdrew the point in its appeal based on the Directive, and continued proceedings only on the remaining points. Presumably, the ENGO expected the Italian court to follow the Court of Justice's judgement and to conclude accordingly. The ENGO presumed therefore the national court's full cooperation with the Court of Justice."*
[58] This concerned the Austrian, Belgian, Czech, Estonian, German, Romanian and Slovenian responses.
[59] This concerned the Slovakian and Spanish responses.
[60] CASE LAW.

A: Tendency to refer questions for a preliminary ruling (3);[61]
B: Tendency to interpret EU environmental law themselves (3;)[62]
C: No clear preference; *act claire/act éclairé* (5);[63]
D: Unclear (2).[64]

The results do not show a clear tendency amongst MS to interpret EU environmental law themselves. The majority notes that they have no clear preference, often citing the *act clair/act éclairé*-doctrines. The response by the Czech respondent is illustrative in this regard:

> *"The judiciary engages in the practice of interpreting EU environmental law without asking for a preliminary ruling in line with the acte clair [sic] doctrine. (...) 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)."*

The Slovenian respondent notes, equally illustrative:

> *"According to Art. 267 of the TFEU the CJEU has exclusive competence to decide on the interpretation of the Treaties and on the validity and interpretation of EU legal acts. As a rule, national courts have discretion to request preliminary rulings. However, if an issue of EU law is raised before a national court against whose decisions there is no judicial remedy under national law, then it is obliged to request a preliminary ruling. If an issue arises before a national court regarding the validity of EU law, the duty to refer a question for a preliminary ruling, according to the Foto-Frost doctrine, also extends to lower courts.[65] There are certain reasons where a national court of last instance is relieved from its obligation to refer questions for a preliminary ruling to the CJEU (see the criteria in C.I.L.F.I.T., C-283/81)."*

The above does not, however, mean that the decision whether to refer or not is a simple one.

The French respondents, seemingly conversely, note that there is a tendency to interpret EU environmental law themselves before resorting to the issuance of a reference for a preliminary ruling. In their interpretation of EU environmental law, the respondents note that they make use of settled case law by the CJEU. This also appears to be the case for the Finnish respondents.

[61] This concerned the Italian, Romanian and Slovenian respondents. The Estonian response corresponds both with this category as well as category C.
[62] This concerned the French, Slovak and Norwegian respondents. The Finnish, Spanish and Austrian responses correspond both with this category as well as category C.
[63] This concerned the Belgian, British, Czech, German, Polish and Swedish respondents. The Estonian response corresponds both with this category as well as category A. The Finnish, Spanish and Austrian responses correspond both with this category as well as category B.
[64] This concerned the Hungarian and Cypriot respondents.
[65]VEINGERL, Mateja, 2013, DOLŽNOST POSTAVITI VPRAŠANJE ZA PREDHODNO ODLOČANJE SODIŠČU EU [na spletu]. Univerza v Mariboru, Pravna fakulteta. [5 july 2021]. Available at https://dk.um.si/IzpisGradiva.php?lang=slv&id=43320.

Moreover, the respondents appears to consider this tendency in line with the *act clair*/*act éclairé*-doctrine.

Two cases are more interesting. The Spanish respondent notes that the preliminary ruling is sometimes "*something absolutely extraordinary, the last resort.*" The Spanish respondent goes on to note they have the perception that at times there is hesitation to make use of the instrument. Conversely, the Italian respondent notes that the practice of asking for a preliminary ruling improved in order to avoid accountability. Instead of being afraid to make use of the instrument, the instrument is seemingly used there out of fear of a being held accountable for a ruling.

Finally, according to the Austrian respondent, the willingness to refer questions for a preliminary ruling differs between the lower courts and the higher courts, with lower courts seeming to prefer to interpret EU environmental law themselves. The other respondents did not note this, so it is hard to draw conclusions. The perception by the Austrian respondent would be in line however with the obligations under article 267 TFEU. It is recalled that this article only requires a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law to submit a request for a preliminary reference.

Further on, we asked: **'Does your country have a system to control whether national courts request preliminary references?'** This question was posed to ascertain whether there is a system to identify a possible absence of preliminary references. The answers were coded as follows (results in brackets):

A: Yes (1);[66]
B: No (11);[67]
C: Unclear (3).[68]

While in no report the presence of clearance systems, i.e. system under which the asking of a preliminary ruling needs to be approved by a certain instance, were mentioned, the Hungarian report indicated that all requests of a preliminary ruling are sent to the Supreme Court. This notification system seems to be of an administrative nature and thus has no controlling function. The same holds for Poland, where, according to the Polish respondent, a central administration of referred questions is held. In Italy, according to the Italian respondent, an unofficial registry is kept.

The Slovenian respondent took a more European law-centered approach to the question and noted that:

[66] This concerns the Romanian respondent. The Polish respondent noted that *"the Supreme Administrative Court keeps statistics on all questions (regarding all areas of administrative law) posed by administrative courts, i.e., regional administrative courts and the Supreme Administrative Court."* It is possible to qualify this as an affirmative answer to the question.
[67] This concerned the Belgian, Cypriot, Czech, Estonian, Finnish, French, German, Italian, Slovak, Swedish and Norwegian respondents.
[68] This concerned the Austrian, United Kingdom and Spanish respondents.

"the Commission could initiate infringement proceedings under Article 258 TFEU. As the mere breach of the referral duty does not result in the infringement of substantive individual rights, nor in material damage, it is not sufficient in itself to trigger liability for the state (Koebler case). It is however not excluded that the breach of the referral duty be considered as violation of the fair trial principle enshrined under Art. 47 of the Charter. Liability for the state may theoretically incur for violation of this fundamental procedural right.[69]"

2.2: The contentious existence of a 'right to a preliminary reference'

At its core, article 267 TFEU '*constitutes the essence of the EU system of judicial protection.*'[70] The national courts fulfill a crucial role in this. It is up to the national courts to signal *lacunae* in the interpretation and application of EU law and to refer such cases to the CJEU. As such, the national judges can be seen as decentralized European judges.[71]

The position of the parties to the dispute underlying a preliminary reference is more contentious. Although there is clarity on the position of the involved parties before the CJEU, there is no clear CJEU guidance on the position of parties prior to a request for a preliminary reference being submitted. It is thus up to the Member States to structure the rights of these parties in relation to the preliminary reference procedure. In this regard, we asked: '**Which are the fundamental/procedural rights of citizens to ask a national court to request a preliminary reference to the CJEU?**' The answers to this questions were coded as follows (results in brackets):

A: Each party to the dispute may request the court to request a preliminary reference from the CJEU (procedural rights approach) (12);[72]
B: Right is included in the right to a 'lawful judge' (human rights approach) (3);[73]
C: No such right exists (2).[74]

The results show that MS take different approaches. In essence, there are three approaches: a procedural law approach, a human rights approach and a refusal to offer such a right to the parties.

[69] See Varga, Z., Remedies for violation of EU law by Member State courts what place for the Köbler doctrine? (doctoral dissertation), Faculty of Law and Political Sciences, Eötvös Loránd University, Budapest, 2016, p 8.
[70] Clelia Lacchi, *Preliminary references to the Court of Justice of the European Union and effective judicial protection* (Larcier 2020) 132.
[71] A prime example of this view forms CJEU Case C-137/08, ECLI:EU:C:2010:659 (*VB Pénzügyi Lízing Zrt. V. Ference Schneider*) in which the CJEU declared in consideration 37: *"(…) it must be borne in mind that the procedure provided for in Article 267 TFEU is an instrument of cooperation between the Court of Justice and national courts by means of which the former provides the latter with interpretation of such European Union law as is necessary for them to give judgment in cases upon which they are called to adjudicate."*
[72] This concerned the Austrian, British, Cypriot, Estonian, Finnish, German, Italian, Polish, Romanian, Spanish, Swedish and Norwegian respondents.
[73] This concerned the Czech, Slovakian and Slovenian respondents.
[74] This concerned the Belgian and French respondents.

Under the procedural law approach, MS consider the preliminary reference procedure as a part of the proceedings before the national courts, to which domestic procedural law applies. In these cases, parties can lodge a procedural request to refer questions to the CJEU, on which the presiding judge will decide. The results show that this approach is the most common, with 11 out of 16 judges noting that such a system is in use. Minor differences exist, though. In Norway, for example, there is no right of challenge to the decision by the presiding judge on a request to refer questions to the EFTA Court. In Spain, parties must be heard before a judge submits questions for a preliminary reference to the CJEU (both *ex officio* and on the application of a party), according to the Spanish respondent.

Under the human rights approach, parties are considered to be deprived of their right to a lawful judge in cases where a domestic judge refuses to refer questions to the CJEU for a preliminary reference where such questions should have been referred. In the Slovak Republic, this is a matter of domestic constitutional law (i.e. article 48(2) of the Constitution of the Slovak Republic). The same goes for Germany, where article 101(1) second sentence of the German Constitution is understood to hold that a party seeking legal protection may be deprived of a legally designated judge in cases where a German court does not comply with its obligation to refer a matter to the CJEU for a preliminary ruling.

The Czech Republic takes a different approach. The question whether a preliminary ruling should be asked is regarded to be a matter of European law and not a question of constitutionality (under domestic law), according to the Czech respondent. The Czech Constitutional Court, in its ruling of 8 January 2009, No. II. ÚS 1009/08, ruled as follows:

> *"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. (…) 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 (…) 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."*[75]

According to the Czech respondent, this was later confirmed and expended by *inter alia* the ruling of the Czech Constitutional Court of 26 September 2017, No. II ÚS 4255/16, which stated that the mere fact that a general court has not dealt with a party's objection which is also

[75] Translation was provided by the Czech respondent.

relevant to the case at hand in principle renders the decision in question unconstitutional. Decisive, though, is whether the court in question has given convincing reasons for its decision not to raise the preliminary question.

The Slovenian response appears to be quite similar to the Czech response, as Slovenia also has a domestic constitutional law approach to the 'right to a preliminary reference'. The Slovenian approach does differ from the Czech approach though, as a refusal by the Supreme court or any other court against whose decision there are no legal remedies where this should have happened can constitute a breach of the fair trial principle under Article 22 of the Slovenian Constitution. The Slovenian respondent, further notes: *"However, the fact that a constitutional challenge may be brought against the judgments of the Supreme Court does not deprive that latter court of its status as a court against whose decisions there is no judicial remedy.*[76]*"*

In contrast to the above human rights approach, a small number of MS do not consider a right to a preliminary reference to be subsumed in the European Treaties. The French respondents note that no such right can be identified under the Treaties. The Belgian respondent equally notes that there are *"no other conditions than those provided for in Article 267 TFEU".* Rather, the question of whether a request for a preliminary reference should have been made is subject to an obligation to refer a question to the Belgian Constitutional Court (i.e. article 26(4) of the Special Act of 6 January 1989 on the Constitutional Court). This does not infringe upon the right of the domestic judges to refer questions for a preliminary ruling, though.

The above concerns the higher courts. In cases where lower courts refuse to refer questions to the CJEU for a preliminary ruling, it is of course possible for the Courts of Appeal and Supreme Courts of the Member States to set aside those rulings and decide to refer questions to the CJEU, all within the ambit of domestic procedural law.

2.3: Supervisory regimes relating to wrongful refusal to refer questions for a preliminary ruling

In the previous paragraph, we focused on the right parties have to request questions be referred to the CJEU for a preliminary ruling. This has shown that parties – in some jurisdictions – have certain remedies against a refusal to refer questions. It is also important to assess whether MS have in place certain supervisory regimes relating to wrongful refusals to refer questions for a preliminary ruling, irrespective of the position of parties to the dispute. In this regard, we asked: **'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)?'** The results were coded as follows (results in brackets):

A: There is a remedy/monitoring regime in place (2);[77]

[76]See opinion of Advocate General Tanchev delivered on 9 February 2017 in the Case C-578/16 PPU (paragraph 33). Regarding the obligation to refer for a preliminary ruling see also C-3/16.
[77] This concerned the Hungarian and Polish respondents.

B: There is no remedy/monitoring regime in place (2);[78]
C: There is a remedy that is reliant on the parties to the dispute and the limits of domestic procedural law (11);[79]
D: There is a remedy that is reliant on the parties to the dispute and domestic constitutional law (3).[80]

The results show that the majority of countries have no monitoring regime in place relating to the question of wrongful refusal by domestic courts to refer questions for a preliminary ruling. In the countries where a remedy is offered by procedural law, a remedy is only offered to parties to the dispute in so far as appeal against the ruling is still possible. Interesting is the Polish approach, where no appeal is possible, but the possibility of a disciplinary ruling against the judge who wrongfully refused is mentioned.

This is different in the MS where constitutional law offers for a separate possibility of constitutional appeal or a constitutional complaint. According to the Slovenian respondent, the following is the system is Slovenia: *"To my knowledge there is no active monitoring in case the judges do not ask the CJEU for a preliminary ruling nor is there any active monitoring on the follow up judgements. This matter remains in the hands of the parties. They have the possibility to challenge the decision (of a court of last instance) not to request a preliminary ruling before the Constitutional court if this decision was arbitrary (for example see the Decision of the Constitutional Court Up-561/15-18)."* The German respondent noted: "*If a German court does not comply with its obligation to refer a matter to the CJEU for a preliminary ruling or makes a reference for a preliminary ruling even though the CJEU does not have jurisdiction, the party seeking legal protection in the main proceedings may be deprived of the legally designated judge (infringement of Article 101 (1) second sentence of the German Constitution). This is controlled by the Federal Constitutional Court in Karlsruhe in response to a constitutional complaint. (established jurisprudence, see only Federal Constitutional Court, decision of 6 October 2017 – 2 BvR 987/16 – (...)."*

2.4. Questions on specific follow up cases

2.4.1. Follow up judgments in practice

Once the national context surrounding the application of the preliminary ruling procedures was brought into picture, respondents were asked to focus on their own direct or indirect experience with follow up judgments. Furthermore, they were asked whether they were familiar with such cases. Specifically, we asked: **'Have you judged in (an) 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")? Did you sit in other environmental follow up cases? Are you familiar with environmental follow up cases in your country other than those in which you were sitting as a judge?'** Responses were binary. As such, there was no need to code the responses.

[78] This concerned the United Kingdom and Norwegian respondents.
[79] This concerned the Austrian, Belgian, Czech, Estonian, Finnish, French, German, Italian, Polish, Spanish, and Swedish responses.
[80] This concerned the Czech, German, and Slovenian responses.

Out of the 9 respondents that judged in environmental follow up cases, 3 respondents both judged in follow up cases where they themselves had posed the questions that were referred to the CJEU and in cases where another judge had posed the questions that were referred to the CJEU.[81] 2 respondents only judged in cases where another judge had posed the questions that were referred to the CJEU.[82] Another 4 respondents were only involved in follow up cases where they themselves had posed the questions that were referred to the CJEU.[83]

As such, several respondents have experience in fact with the preliminary reference procedure and follow up cases.

Specifically focusing on the cases in which the respondents were directly or indirectly involved or simply familiar with, we asked: '**Did the Court of Justice consider the question(s) admissible? Did the Court of Justice answer it/them? 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?'** We further asked: **'Do you consider the answer given by the Court of Justice to be a legally correct answer to the question posed?'**

First, in relation to twelve cases[84] respondents noted their questions were deemed admissible by the CJEU, although in only two of such cases the issue of admissibility of the question was explicitly assessed by the Court of Justice.[85] The Slovak respondent makes note of three Slovakian cases that did not pass the admissibility test. In one case this was due to the posed questions not being specified enough, according to the said respondent.

Second, in relation to 6 cases[86] respondents noted that all their questions were answered. In 4 cases not all questions were answered, as the CJEU combined multiple questions.[87] Only in 1 case did the CJEU erroneously fail to answer a question, presumably due to a lack of understanding, according to the respondent.[88]

Third, in the cases where the CJEU rephrased certain questions, a majority of 7[89] out of 11[90] respondents thought the rephrased question(s) were a proper representation of the question(s) originally asked. Only in 1 case, a respondent noted that the Court missed elements of the

[81] This concerned the German, Belgian and Finnish respondents.
[82] This concerned the Italian and Romanian respondents.
[83] This concerned the Czech respondent, one of the French respondents, the Hungarian respondent and the Slovakian respondent.
[84] This concerned individual Austrian, Belgian, Czech, Estonian, Finnish, French, German, Hungarian, Italian, Polish, Romanian and Slovak cases.
[85] This concerned one Estonian case and one French case.
[86] This concerned individual Austrian, Czech, Estonian, Finnish, French and Hungarian cases.
[87] This concerned individual Belgian, Italian, Polish and Slovak cases.
[88] This concerned a German case.
[89] This concerned the Austrian, Czech, Estonian, Finnish, French, Italian and Polish respondents. The Estonian respondent however notes that in relation to a different case, it was difficult to say "*whether the result was a 'proper' representation of the initial questions posed by the national court*".
[90] This concerned the Austrian, British, Czech, Estonian, Finnish, French, German, Italian, Polish and Slovakian respondents.

questions in its rephrasing of the original question[91] and in another case the CJEU incorrectly rephrased the question, thus not providing the referring court with an answer.[92]

Fourth, 10[93] out of 12[94] respondents consider the answer given by the CJEU to be a legally correct answer to the question posed. It is important to understand that a legally correct answer might not necessarily be a direct answer to the question(s) posed and might not directly prove applicable by the follow up judge in the case over which they are presiding. It is noted that in 13[95] out of 14[96] cases, the answer given by the CJEU enabled the national judges to resolve the national case. The respondents note that this is reliant on a number of factors. It is interesting to investigate these factors more closely.

Once the basic aspects of the manner in which the Court of Justice dealt with the preliminary question were established, we focused on the distinction between binary answers (i.e. affirmative negative answers), on the one hand, and answers in which the Court of Justice provides criteria to be applied by the national court to reach a conclusion in light of the facts of the case pending before the referring court, on the other. This distinction could indeed influence the work of the national court receiving the answer, as it is easier to assess compliance in case of binary answers than answers setting out criteria that the national court needs to apply.

Specifically, we asked multiple questions. It is important to look at the responses to these questions in tandem. We asked, in order: '**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 responses were coded as follows (results in brackets):

A: The CJEU set criteria (margin of appreciation) (10);[97]
B: The CJEU gave a binary response (6);[98]
C: Unclear (1).[99]

'Did the answer given by the Court of Justice enable to solve the national case?' The responses were coded as follows (results in brackets):

[91] This concerned an Estonian case.
[92] This concerned a Slovakian case.
[93] This concerned the Austrian, British, Czech, Estonian, Finnish, French, Hungarian, Italian, Polish and Romanian respondents.
[94] This concerns the Austrian, British, Czech, Estonian, Finnish, French, German, Hungarian, Italian, Polish, Romanian, and Slovakian respondents. This means that the German and Slovakian respondents did not consider the answer given by the CJEU to be a legally correct answer to the question posed.
[95] This concerned individual Austrian, Belgian, Czech, Estonian, Finnish, Hungarian, Italian, Polish and Slovakian cases. Additionally, this concerns two French cases.
[96] This concerns individual Austrian, Belgian, Czech, Estonian, Finnish, German, Hungarian, Italian, Polish and Slovakian cases. Additionally, this concerns two French cases and two United Kingdom cases.
[97] This concerns individual Belgian, Czech, Finnish, German, Hungarian, Italian, Polish, Romanian and Slovakian cases, one per MS, and two United Kingdom cases.
[98] This concerns individual Austrian, Belgian, Estonian, Hungarian, Polish and Romanian cases, one per MS with the exception of Estonia, where the CJEU gave a binary response in response to questions from two cases.
[99] This concerned one French case.

A: The response was sufficiently clear (12);[100]
B: The response was insufficiently clear (1).[101]

'Did the answer make it *clear* how it had to be applied?' The responses were coded as follows (results in brackets):

A: The CJEU ruling made clear how the ruling should be applied in the national ruling (11);[102]
B: The CJEU ruling did not make clear how the ruling should be applied in the national ruling (1);[103]
C: The procedure was dropped before a final ruling by the domestic court was issued (1).[104]

'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 responses were coded as follows (results in brackets):

A: It was possible to render a final judgment without issues (13);[105]
B: Following a change of facts (caused by the parties following the CJEU ruling), further questions were submitted (to the CJEU or the constitutional court) (2);[106]
C: Following the CJEU judgment, the applicant dropped the case (1);[107]
D: National courts refused to apply the judgment (2);[108]
E: Unclear.[109]

In cases where the CJEU issued a binary answer, *i.e.* an unconditional affirmative or negative answer, it prove relatively easy to apply the ruling by the CJEU in the follow up judgment. This is apparent from looking at the above results. For example, the Polish respondent notes: "*These*

[100] This concerns individual Austrian, Belgian, Czech, Estonian, Finnish, French, Hungarian, Italian, Polish, Romanian cases, one per MS. Furthermore, this concerned two United Kingdom cases. The Slovakian response is open to multiple interpretations and can be categorized both as sufficiently clear as well as insufficiently clear.
[101] This concerns a German case. Again, the Slovakian response is open to multiple interpretations and can be categorized both as sufficiently clear as well as insufficiently clear.
[102] This concerned individual Austrian, Belgian, Estonian, Finnish, French, Hungarian, Italian, Polish, Romanian cases, one per MS, with the exception of France and Poland, that both had two cases in which the response was clear on how it should be applied. The Slovakian response is open to interpretation and can be categorized both as category A as well as category B.
[103] This concerned a Czech case. Again, the Slovakian response is open to interpretation and can be categorized both as category A as well as category B.
[104] This concerned an Estonian case.
[105] This concerned individual Austrian, Belgian, Czech, Finnish, French, German, Hungarian, Italian, Polish and Romanian cases, one per MS. Additionally, this concerned three United Kingdom cases.
[106] This concerned a Belgian and a Finnish case.
[107] This concerned an Estonian case.
[108] This concerned two Slovakian cases.
[109] This concerns the Spanish response.

answers enabled to solve this case and they were clear because in two examples these were binary answers (yes/no) (…)". In other cases, the CJEU refrained from providing the referring court with a binary answer, but rather provided criteria for the referring court to assess in light of the concrete circumstances at hand. Such an assessment can relate to concrete facts, or domestic legislation.

The response to the CJEU setting criteria is somewhat mixed. The German respondent notes: *"Often they [the criteria] are even so open to interpretation that their meaning is disputed in essays and commentaries. This means that instead of settling disputes, the Court's decision creates new ones."* The French respondents note: *"La Cour de justice a énoncé les critères à appliquer par la juridiction nationale, en lui laissant tout latitude d'appréciation du litige au regard de ces critères (...) mais cela pose une question de la marge d'appréciation très limitée donnée au juge national pour moduler dans le temps les effets d'une annulation."*

These responses show that it can be hard for the CJEU to strike a balance between answering the question, leaving an adequate margin of appreciation for the referring judge and steering the follow up judgment in the right direction. It is recalled that referring judges are rarely involved in the proceedings before the CJEU, and that the view of – and subsequent interpretation of the questions posed by – the referring judge is represented by an agent to the CJEU of the respective MS. This can – *ipso facto* – create issues of interpretation. According to the Slovak respondent, the clarity of the answer of the CJEU interlinks with the nature of the questions posed by the referring judge. The Slovak respondent noted: *"(...) the comprehensibility of the answers laid down by the CJEU depends directly on the nature of the questions referred by the national court. The meaning of the posed question determines the quality of the reasoning of the CJEU that consequently enhances the legitimacy of its ruling."*

Still, the majority of respondents (12 out of 17/18) note that they were able to render a final judgment without issues. In 2 cases, following a change of circumstances, further questions were submitted to the CJEU. In 1 case, the applicant dropped the suit, following the judgment by the CJEU. Only in 1 case, the national court asking the question refused to apply the judgment. In another case, the referring court did follow the judgment, but other national courts did not. This example concerns a Slovak case, which will be discussed in the next paragraph. Furthermore, 13 out of 14 respondents thought the follow up judgment was a case of cooperative administration of justice. Only the Spanish respondent thought the administration of judgment was at times not fully cooperative.[110] Interestingly, the Slovak respondent thought the two cases mentioned above resembled a cooperative administration of justice.

2.4.2. Examples of follow up procedure in fact

A number of cases show an interesting dynamic between the domestic courts and the CJEU. This concerns – *inter alia* – the 2013 case *Lesoochranárske zoskupenie VLK v. Ministry of the Environment of the Slovak Republic* (VLK v. Ministry of the Environment of the Slovak

[110] Still, the Spanish response was very openly worded and not related to a specific case. The Spanish respondent noted: "*Depends on the circumstances, if it is not fully the case, I think it would be a clear case of uncooperative administration of justice*."

Republic).[111] The case dealt with the interpretation of article 9(3) of the Aarhus Convention.[112] More specifically, the case concerned the question whether the association *Lesoochranárske zoskupenie VLK* should be admitted as a party to the administrative proceedings relating to the grant of derogations to a system for the protection of certain animals.[113] The Slovak judge referred to the CJEU three questions, primarily dealing with the question whether Article 9(3) of the Aarhus Convention has direct effect (so-called "self-executing effect") in a situation where the European Union has not adopted Community legislation for the transposition of the international treaty in Community law and, subsequently, essentially, whether the right of public access to judicial hearings intrinsically also includes the right to challenge the decision of an administrative body, the unlawfulness of which lies in its effect on the environment.[114]

The CJEU interpreted the above questions as essentially the question whether individuals, and in particular environmental protection associations, where they wish to challenge a decision to derogate from a system of environmental protection, may derive a right to bring proceedings under EU law, having regard to the provisions of Article 9(3) of the Aarhus Convention on direct effect. The CJEU interpreted the question referred for a preliminary ruling in such a way that the national court was essentially asking whether Article 9(3) of the Aarhus Convention had direct effect. The CJEU concluded that Article 9(3) of the Aarhus Convention had no direct effect and thus that it was for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) and the objective of effective judicial protection of the rights conferred by EU law to challenge before a court a decision, such as the contested decision.[115].

According to the Slovak respondent, the CJEU, in this interpretation, answered a question, which the national court had not asked. Where the referring judge had asked not only if Article 9(3) of the Aarhus Convention had direct effect, but also whether – in the absence of transposition in Community law – a right of challenge could be deduced from this article. The CJEU only focused on the first part, much to the dismay of the referring judge.

That such a misunderstanding can occur, might have to do with the nature of the relationship between the referring judge and the CJEU. The Slovak respondent notes: *"It should be noted that CJEU, in the context of its legal reasoning in its decisions, provides an interpretation of the questions referred in the broader context of each case. The Court offers interpretation of the questions referred in that it often gives a subjective view on the merit of the questions."* The subjective view of the CJEU is thus not always accepted by the referring judge.

[111] Case no. 5Sžp/41/09 is the follow up judgment. Case C-240/09 is the ruling by the CJEU.
[112] Convention on access to information, public participation in decision-making and access to justice in environmental matters approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124 1).
[113] Case C-240/09, cons. 2.
[114] *ibid*, cons. 23.
[115] *ibid*, cons. 48-52.

When looking at the follow up judgment, remarkably, the referring judge did follow the line of the CJEU and brought about *"a ground-breaking shift in case law at the national level from the point of view of statutory requirements of the environmental protection associations for bringing up administrative or court proceeding in the field of environmental protection"*, according to the Slovak respondent. This shift in case law was, however, not respected by other national courts[116], which means that in the long run, the CJEU-ruling has not been respected.

According to the Slovak respondent, the above case can be considered to be a case of cooperative administration of justice. This is understandable when solely considering the actual follow up judgment. It is, however, equally important to look at later judgments. There, it is possible to deduce an uncooperative stance towards the contested CJEU-ruling.

Another interesting interplay is seen in the Finnish *Lahti Energia* cases.[117] These subsequent preliminary rulings concerned the same underlying dispute. The dispute concerned the question whether combustion in a main boiler of gas purified and refined in a separate gas production plant was to be regarded as co-incineration within the meaning of Directive 2000/76.[118] The Finnish Supreme referred to the CJEU a number of questions, as it was unsure to the qualification of such production plants in light of Directive 2000/76.

In the interpretation of the Court, the questions pertained to, firstly, the question whether the definition of 'waste' in Article 3(1) of Directive 2000/76 also covers gaseous substances, secondly, the question whether the existence of an incineration line is a necessary condition of the classification of a unit, such as a plant producing gas from waste, as an 'incineration plant' within the meaning of Article 3(4) of Directive 2000/76 and, thirdly, the question – essentially – how to classify how to classify, in the light of Article 3 of Directive 2000/76, a power-generating complex in which a gas plant, sited next to a power plant, provides the latter with purified gas which is obtained by the gasification of waste and used in the power plant as a fuel alongside fossil fuels.[119] There was no need to answer the fourth question, according to the Court.[120]

The Court first noted that Directive 2000/76 does not cover gaseous substances.[121] In response to the second question, the Court ruled that the definition of 'incineration plant' in Article 3(4) of Directive 2000/76 *"relates to any technical unit and equipment in which waste is thermally treated, on condition that the substances resulting from the use of the thermal treatment process are subsequently incinerated and that, in that connection, the presence of an incineration line is not a necessary condition for the purposes of such classification."*[122] In response to the third question, the Court first ruled that a co-incineration plant constitutes a particular form of

[116] https://www.nsud.sk/data/files/875_stanovisko-snj-72-2013.pdf
[117] Case C-317/07, ECLI:EU:C:2008:684 (*Lahti Energia I*), and C-209/09, ECLI:EU:C:2010:98 (*Lahti Energia II*).
[118] *Lahti Energia I*, cons. 7-9.
[119] *ibid.*, cons. 13, 18, 23.
[120] *ibid.*, cons. 44.
[121] *ibid*., cons. 17.
[122] *ibid,* cons. 22.

incineration plant and that it is on the basis of the main purpose of a plant that the assessment of whether it is an incineration plant or a co-incineration plant is to be made.[123] The Court then goes on to qualify a gas plant whose objective it is to obtain products in gaseous form, by thermally treating waste as a 'co-incineration plant' within the meaning of Article 3(5) of Directive 2000/76, whereas it does not consider a power plant which uses as an additional fuel, in substitution for fossil fuels used for the most part in its production activities, a purified gas obtained by the co-incineration of waste in a gas plant to fall within said definition.[124]

This response by the CJEU was, according to the Finnish respondents, "*a bit surprising*". Interestingly, the response by the CJEU had an immediate effect on the parties involved. Having learnt of the standpoint of the CJEU, the operator of the industrial plant altered its procedure for filtering of gas (by not purifying the gas conducted for combustion after the gasification process), before a final ruling was given by the Finnish Supreme Administrative Court, which prompted the Supreme Administrative Court to refer further questions to the CJEU for a preliminary ruling, taking into account the new facts.[125] As such, activities by a party to the proceedings appeared to interfere with the cooperation between the CJEU and the Finnish Supreme Administrative Court.

The second set of preliminary questions were aimed – essentially – at ascertaining whether the newly proposed production process was to be regarded as an operation within the meaning of Article 3 of Directive 2000/76/EC and, in case of a response in the negative, whether the quality of the waste for incineration, or the particle content of the gas conducted for incineration had any bearing on the matter when making an assessment. Eventually, according to the Finnish respondents, the Court ruled in line with expectations by the Finnish Supreme Administrative Court. It did so by ruling that a power plant which uses as an additional fuel, in substitution for fossil fuels used for the most part in its production activities, gas obtained in a gas plant following thermal treatment of waste is to be regarded, jointly with that gas plant, as a 'co-incineration plant' within the meaning of Article 3(5) of Directive 2000/76 when the gas in question has not been purified within the gas plant.[126]

Although the Finnish respondents do not make clear whether this final answer enabled to make a definitive judgment, it appears likely that the Finnish judges were satisfied with the response by the CJEU. This appears to be the case because they noted that the response by the CJEU was in line with expectations.

2.5. Behaviour in a fictitious case

To gather better insights on how the respondents would have dealt with the preliminary ruling of the Court of Justice in a specific case in which they were sitting on the bench of the referring national court, we wrote a fictitious case modelled on the *Client Earth*, concerning air quality

[123] *ibid*, cons. 28.
[124] *ibid,* cons. 43.
[125] *Lahti Energia II*, cons. 14-15.
[126] *ibid,* cons. 31.

management.[127] The Court of Justice rephrased the UK Supreme Court's question about a temporary exception under Article 22 of the Air Quality Directive. In turn, the UK Supreme Court considered the Court of Justice's answer non-suitable to solve part of the case. It turned thus to the Commission's reasoning and deem Article 22 non-mandatory, but the court considered this irrelevant as the legal deadlines had already expired.[128]

Accordingly, after reproducing the main facts, the relevant parts of the preliminary question and of the findings and related answers provided by the Court of Justice, we asked the respondent to explain how they would have handled the case.

All respondents engaged with the substance of the case, i.e. whether the air quality plans complied with EU law, without raising concerns about the manner in which the Court of Justice had rephrased the preliminary question. From the answers it is thus not possible to establish whether this behaviour is due to the conviction that the provided answer was useful to solve the case or otherwise.

2.6. General stance towards the preliminary reference procedure

The previous paragraphs dealt with particular areas of the preliminary reference procedure and made clear certain concerns that exist in relation to this procedure. Overall, however, an overtly positive image is shown. This is especially shown in response to a direct question on our part in this regard. We asked: '**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?'** It was not possible to code the answers to the question, as there was an identical response to the first limb of the question and too much variance in the responses relating to the second limb of the question.

As was noted, the respondents from all MS (and the Norwegian respondent) agreed that the preliminary ruling procedure supports national judges in the uniform application of EU environmental law. This is not remarkable, as, according to the Slovak respondent: *"The CJEU is the only institution of the European Union eligible to give a legally binding interpretation of Union Law. Decisions of the CJEU are one of the sources of law."*

The response to the second limb of the question provides us with several areas of improvement. Several specific responses should be listed.

First, in relation to the upload-phase, the Swedish respondent notes: *"The awareness and knowledge of the institute of preliminary rulings amongst judges could however improve as quite a few judges would consider it difficult to formulate relevant questions."* It is recalled that

[127] Case C-404/13, *The Queen on the application of ClientEarth v The Secretary of State for the Environment, Food and Rural Affairs*, ECLI:EU:C:2014:2382.
[128] UK Supreme Court, judgment of 29 April 2015, *R (on the application of ClientEarth)* v *Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC-28, 27.

the willingness of national courts to refer questions for a preliminary ruling is not monitored in many of the EU MS.

Second, the Czech respondent notes the following: "(…) *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*." The Hungarian respondent concurs and notes: "(...) *the timeliness should be improved*." Also the Finnish respondent notes that timeliness should be improved.

Third, the Czech respondent notes: "*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*."

Fourth, the Spanish respondent notes: *"Nevertheless, currently, preliminary ruling depends too much in the subjective criteria of the national judges and maybe it would be interesting to implement more harmonized and objective criteria."*

In a similar vein, the German respondent refers to earlier responses to questions. It is recalled that the German respondent noted: "*Often they* [the criteria] *are even so open to interpretation that their meaning is disputed in essays and commentaries. This means that instead of settling disputes, the Court's decision creates new ones*". Equally, the Estonian respondent notes: *"In this light the main challenge for Estonian judges seems to be how to quickly and efficiently find the relevant CJEU case-law and to distil out of the CJEU "doctrines" which are needed to resolve individual cases at hand."* The way in which the CJEU responds to questions, specifically by setting criteria, is thus not considered by all judges to be the most effective and successful manner.

In this light, the Belgian respondent notes that *"(…) a close monitoring of the application / follow up on preliminary rulings of CJEU at national level seems important."*

3. Conclusions and recommendations: refining the research agenda on follow up judgments

When we look at the answers given to the various questions posed in our questionnaire in light of the research agenda about follow up judgments introduced in section 1, above, we can notice the following.

As regards the existing national *judicial culture* in the various Member States, it seems that although the level of knowledge of EU law in general – and Article 267 TFEU in particular – is considered high among high(est) courts, still, there seems to be room for improvement at the level of lower courts. This suggests that a low understanding of EU law in general and of Article 267 TFEU in particular could influence national courts behaviour in follow up cases only as regards lower courts. **As regards the high(est) courts this variable seems less relevant.** More

generally, from the perspective of the organisation of training for judges, the findings suggests that the main target audience of those courses should be on lower courts judges.

Besides, any specialisation in environmental law seems to be more the consequence of *ad hoc* circumstances, such as personal interest of case load, than the result of a systematic division of cases based on competences in national law. When looked at from the perspective of further research in follow up judgments, this means that the specific judges sitting in the follow up judgment under scrutiny should remain in focus. Accordingly, **without the use of meta-juridical research methods, such as interviews, it seems very difficult to account for this variable when researching follow up judgments**.

Interestingly, national environmental law seems to be mostly a representation of EU environmental law, with specific national characteristics being present as regards specific environmental matters. When looked at from the perspective of further search in follow up judgments, the findings suggest a need for close scrutinization of the presence of national peculiarities, on a case-by-case basis. **A country wide approach could be misleading in this regard**.

Further, there seems to be a generalised lack of statistical systems or recording of preliminary references and follow up judgments. The findings confirm the earlier cases of cooperation as presented in the European Papers publication mentioned in section 1 above. For the research of follow up judgments, this means that **a manual research is the only way to retrieve the relevant data**. From the perspective of the function of the preliminary reference mechanism, it seems thus important to create a systematic database about follow up judgments. Besides, the Court of Justice could consider adding an ad hoc paragraph in her judgments recommending national courts to send their follow up judgments to the Court for administrative purposes, thus strengthening the visibility of the Court's recommendation on this matter.

As regards other variables, namely, the tendency to refer, the national approach to 267 TFEU (procedural based versus right based), the presence of remedy/monitoring systems vis-à-vis the work of judges, the answers to the questions have not highlighted elements that suggest the presence of relevant variables for further research on follow up judgments.

When we focus on the *specific follow up cases*, it seems that the most relevant variables are whether a question was reformulated by the CJEU in a correct way and whether the CJEU's answer provided a binary task to the national court or whether the Court set out criteria to be applied by the referring court. Especially the former variable seems to have led to cases in which national courts were not at ease with the answer given by the CJEU. The latter can also generate problems in the follow up judgment when the criteria are too openly formulated and thus open to diverging interpretations, thus not providing the much-needed clarity in a certain field of law. From the perspective of further research in follow up judgments, **this means that each follow up case analysis must include an analysis of the EU dimension of the follow-up case** in which the manner in which the CJEU reformulated the preliminary question and how it answered it must be under close scrutiny. From the perspective of the functioning of the

preliminary reference mechanism, the findings suggest the use of caution with the rephrasing of the posed question, and with the use of guidance judgments by means of a set of criteria widely formulated. It would be interesting to research whether posing extra attention in the CJEU's ruling to explain the relevance of the rephrasing and of the established criteria for answering the posed question can increase the perception that national judges have about the usefulness of the answer of the CJEU.

From the concluding remarks made by the respondents about the functioning of the preliminary ruling procedures, no extra variable of potential relevance for the further study of follow-up judgments has emerged.

A final remark concerns the findings emerging from the *Lesoochranárske zoskupenie VLK* follow up case presented in Section 2.4.2. While the court in the follow up judgment adhered to the answer received from the CJEU, the other national courts in later rulings did not. This finding highlights the importance of extending the mapping of national courts behaviour following a preliminary ruling beyond the behaviour of the court that posed the preliminary question.