

**AVOSETTA MEETING, MADRID, 27-28 January, 2012**

**QUESTIONNAIRE:**

**“NATIONAL COURTS AND EUROPEAN ENVIRONMENTAL LAW”**

**Context**

The main focus of the meeting is to explore the extent to which in the field of EU environmental law national courts apply in practice the various principles developed by the European Court of Justice designed to improve the implementation of EU law.

National courts will include any level of independent court or tribunal, but if you feel that another form of independent quasi-judicial body such as an Ombudsman plays a significant role in your country this area please feel to include them. If cases of this sort are lacking in your country you may also discuss prominent cases of licensing proceedings.

We will leave it to your discretion how to answer the questions which may be in part depend on the data on court decisions available in your country. You should focus on higher and last instance courts, as lower courts judgements are difficult to find in many countries. In large countries, regional or *Land* court rulings should also be considered.

You may, through the use of electronic search engines, be able as well to provide more numerically based information (e.g. how many times is the direct effect doctrine invoked in cases over the past five years?). If you have time, you might feel that interviews or even a questionnaire with specialist practitioners can provide useful data about the attitude of the judiciary and the value of these doctrines in practice. If you are able to detect any significant contrasts in the way that courts handle these issues in other areas of law (eg employment) that might be very useful.

**The Report**

We feel that the reports may well form the basis of a book.

As concerns point 1 (“direct effect doctrine”) please feel free to write more in the form of a reflective chapter than simply a formal answer to every sub-questions, and obviously elaborate on any cases and the judicial reasoning where this seems appropriate. The important thing is to cover the main themes. In any case, reply with an “Yes” or “No” answer to the different sub-questions.

To provide a boundary we suggest that you confine the report to court decisions of the last FIVE – TEN YEARS.

**Key Questions**

(if any of the cases involved a reference to the ECJ/CJEU please indicate)

## 1. DIRECT EFFECT DOCTRINE

Are there cases where direct effect doctrine has been raised in front of national courts in relation to EU environmental legislation?

Are there cases where national courts have held provisions of EU environmental directives to be insufficiently precise and unconditional to have direct effect?

Are there cases where national courts have held provisions in environmental treaties concluded by the Union to have direct effect? See for an example the *Pêcheurs de l'étang de Berre* case.

Are there cases where national courts have applied the so-called *Waddenzee/Kraaijveld* doctrine in environmental cases? According to *Waddenzee/Kraaijveld* the national court is required to examine whether the national legislature/administrative authority has remained within the limits of discretion allowed by the directive.

Are there cases where national courts have applied the so-called *Inter-Environnement* doctrine in environmental cases? In that case the Court of Justice ruled that during the transposition period of the directive Member States must refrain from taking any measures liable seriously to compromise the result prescribed.

Are there cases where the direct effect of Treaty environmental principles have been raised before the national courts?

Are there cases involving EU environmental law where the concept of the emanation of the state has been of significance. Especially in the context of increasing privatization in some countries of, eg, water and waste services.

Directives do not produce horizontal or third-party effect in the sense that, in the absence of national implementing measures, they directly result in obligations for private individuals. Are there environmental cases where national courts have applied this doctrine?

Apart from lacking horizontal effect, a directive also lacks 'inverse direct effect'. In other words, a public authority cannot invoke a directive against an individual and thereby require him to act in conformity with the directive, where the obligations contained in the directive have not yet been implemented in the national legal order. Are there environmental cases where national courts have applied this doctrine?

Are there cases where the potential direct effect of environmental directives has had "indirect horizontal" side-effects - eg where a third party such as a licence holder clearly potentially affected by the decision (see Case 201/02 *Wells* [2004] ECR I-723

In *Fratelli Costanzo* the Court decided that all national administrative authorities, including regional and local authorities, are under an obligation to apply directly effective provisions of Union law. Are there environmental cases where national courts have applied this doctrine?

## **2. CONSISTENT/SYMPATHETIC INTERPRETATION**

Are there cases where the national courts have used the doctrine of consistent interpretation of EU environmental law (see *Marleasing* [1990] ECR I-4135 and *Pfeiffer* [2004] ECR I-8835)?

The doctrine of consistent interpretation applies only “so far as possible” and the need for legal certainty in the field of criminal law generally displaces the doctrine (see *Arcaro* [1996] ECR I-4705). National law is also not to be interpreted *contra legem*.

Are there examples in the national courts where these principles have prevented the application of the doctrine in respect of environmental directives?

## **3. SUPREMACY OF EU LAW**

Are there cases where a national court has held that provisions of national environmental laws or regulations have no legal effect because of overriding EU law?

## **4. STATE LIABILITY**

Are there any examples of claims for state liability due a national failure to implement an environmental directive (*Francovich* [1991] ECR I-5357 *Brasserie du Pecheur* [1996] ECR I-1029)

## **5. NATIONAL COURTS CONSIDERING EU LAW ON THEIR OWN MOTION**

Are there examples in environmental cases where national courts have felt obliged to raise EU issues on their own motion, even though the parties have not raised them (see *Kraaijeveld* [1996] ECR I-5403)

## **6. NATIONAL COURTS AND PARALLEL INFRINGEMENT PROCEEDINGS BY THE EUROPEAN COMMISSION**

Are there examples in environmental cases where the existence of a parallel infringement proceeding by the European Commission has had a significant impact on a case involving defective implementation of EU law (eg staying the proceedings until the outcome of the Commission proceedings).

## **7. NATIONAL PROCEDURAL RULES**

Traditionally, EU principles have left a large degree of national autonomy when it comes to procedural rules but this is not always the case. Have you any examples of environmental cases where national procedural rules (eg limitation periods, standing) have been held contrary to EU principles (including those contained in EU Directives implementing Aarhus).

## **8. NATIONAL SUBSTANTIVE PRINCIPLES**

EU substantive principles of environmental protection have been framed on national models. This may have created tensions with other national traditions. This is, for instance, imaginable with regard to principles like protection of property and free

enterprise, precaution, proportionality, integration, subjective rights to environmental protection. Are there cases where a national court has discussed such tensions?

### **9. NATIONAL CHECKING OF “CONSTITUTIONALITY” OF EU LAW**

a) National courts may sometimes feel that an EU legal act is in breach of EU primary law. Have there been cases of this kind in your country? If so, how did they proceed in such cases? Did they perform their own preliminary check in order to decide whether to refer the question to the ECJ?

b) National courts may sometimes consider that an EU legal act is in breach of the national constitution. Are there cases of this kind in your country? If so, how did the court solve the question of supremacy of EU law?

### **10. SUBMISSIONS TO ECJ FOR PRELIMINARY RULINGS**

What is the practice of national courts concerning submissions of questions to the ECJ for preliminary rulings? How do they argue when asked by parties to submit questions? If easily identifiable: how often have submissions been made in environmental matters? What significant cases have been submitted?

What happened in reality after the ECJ ruling? Was it really useful or timely?

### **11.- GENERAL ASSESSMENT OF THE RECEPTION OF EU ENVIRONMENTAL LAW IN YOUR DOMESTIC JURISDICTIONS**

### **12.- NATIONAL REPORTS: RECENT AND NOTICEABLE DEVELOPMENT IN YOUR COUNTRY**

This heading has proved to be useful in previous meetings, but from a realistic point of view this should be considered only as optional, in the light of the efforts that should be already made to reply to the previous items.