Communication ACCC/C/2008/32 (Part II) – Note to the Compliance Committee for the meeting of 1 July 2015

1. Introduction

In 2011, the Compliance Committee decided to postpone adoption of its findings with regard to the second part of Communication ACCC/C/2008/32 concerning the compatibility of Articles 2(1)(g)(h) and 10 of Regulation 1367/2006 (the Aarhus Regulation) with Article 9(3) of the Aarhus Convention until the Court of Justice of the European Union adopted its ruling in Joined Cases C-401/12 P to C- 403/12 P1 and Joined Cases C-404/12P and C-405/12P.

The Court of Justice adopted its ruling on 13 January 2015. In the light of these developments, the Committee has decided to consider the second part of Communication ACCC/C/2008/32 in its meeting of 1 July 2015.

In this note, we provide the Committee with our analysis of this ruling and of the compatibility of Articles 2(1)(g)(h) and 10 of the Aarhus Regulation with Article 9(3) of the Aarhus Convention in the light of Commission's interpretation of the relevant provisions of the Regulation.

2. Our analysis of the ruling in Joined Cases C-401/12 P to C- 403/12 P1 and Joined Cases C-404/12P and C-405/12P

Despite the General Court's opposite opinion, in Joined Cases C-401/12 P to C- 403/12 P and Joined Cases C-404/12P and C-405/12P, the Court of Justice denied to review the compatibility of Articles 2(1)(g)(h) and 10 of the Aarhus Regulation with Article 9(3) of the Aarhus Convention.

In order to justify its decision, the Court rejected the applicability of the *Fediol* and the *Nakajima* case law, which would have allowed the Court to review the compatibility of the EU transposition of an international agreement also in lack of direct effect of the relevant EU provision at stake. The Court, in particular, considered that the exceptions created by the *Fediol* and the *Nakajima* case law were justified solely by the particularities of the international agreements (WTO and GATT) at stake and could not be extended to the case of the Aarhus Convention. This was the case, according to the Court, since Article 10(1) of the Aarhus Regulation does not make direct reference to specific provisions of the Aarhus Convention and, at the same time, Article 9(3) of the Aarhus Convention leaves a broad margin of discretion to the Contracting Parties as to its implementation.

In our view, this is an overly restrictive interpretation of the *Fediol* and the *Nakajima* case law. First of all, while it is true that Article 10(1) of the Aarhus Regulation does not make direct reference to specific provisions of the Aarhus Convention, it is evident that the Aarhus Regulation has the purpose to transpose the Aarhus Convention, and that Article 10(1) creates an 'administrative procedure' for the purposes of transposing that requirement under Article 9(3) of the Aarhus Convention. Recital 18 of the preamble and Article 1(1) explicitly provide that the aim and objective of the Regulation is to implement the Convention and the concept appears in the title of the Regulation. Therefore, requiring a *specific* mention of the underlying international agreement in order to 'unblock' the review of compatibility of the EU transposition of an international agreement amounts to a formalism without comprehensible reason which creates an unreasonably high threshold for this review, and ends up immunizing the EU behavior under international law from judicial control in a vast amount of cases. This seems, incidentally, not in accordance with Article 3(5) TEU, pursuant to which the aim of the EU is to contribute 'to the strict observance and the development of international law'.

Secondly, while it is true that Article 9(3) of the Aarhus Convention leaves a broad margin of discretion to the Contracting Parties as to its implementation, this margin of discretion only relates to the criteria which NGOs have to fulfill in order to bring administrative or judicial proceedings to challenge environmental violations. Article 9(3) does *not* provide for a margin of discretion when it comes to the material scope of the challenge, requiring that NGOs be able to challenge 'acts and omissions' contravening environmental law, without any further qualifications to be made under domestic law. Article 9(3) is thus sufficiently precise and unconditional as to the types of acts that can be challenged i.e. 'acts and omissions by private persons and public authorities'. Therefore it is not justifiable for the Court to consider, in general terms, that Article 9(3) leaves discretion to Contracting Parties as to how to transpose this provision.

We also find it regrettable that, unlike what it did in the *Lesoochranárske zoskupenie VLK* case, the Court of Justice did not consider the possibility to endow Article 9(3) of the Aarhus Convention with indirect effect. While it reiterated its findings in this ruling concerning the lack of direct effect of Article 9(3), it inexplicably did not make the further step to consider the possibility of a 'Convention-friendly' interpretation of this provision. This is regrettable because it could have impeded the application of *Fediol* and the *Nakajima* case law and opened the road to the review of compatibility of Articles 2(1)(g)(h) and 10 of the Aarhus Regulation with Article 9(3) of the Aarhus Convention. It is also surprising considering that, in several prior rulings, the Court of Justice consistently held that EU law needs to be interpreted, as far as possible, in light of international law and the international obligations of the EU.

3. The compatibility of Articles 2(1)(g)(h) and 10 of the Aarhus Regulation with Article 9(3) of the Aarhus Convention

As the Court of Justice has refused to deal with this question, it is necessary for the Aarhus Compliance Committee to decide whether the Aarhus Regulation is in accordance with the Aarhus Convention. We consider that Articles 2(1)(g)(h) and 10 of the Aarhus Regulation cannot be regarded as an adequate transposition of Article 9(3) of the Aarhus Convention. It is clear from the wording of Article 9(3) of the Convention that its material scope extends to 'acts and omissions' without restrictions, except for decisions adopted within the legislative and judicial capacity of public authorities. This broad material scope stands in contrast with the scope of Articles 2(1)(g)(h) and 10 of the Aarhus Regulation which limits the possibility of internal review to acts of individual scope.

The consequence of the application of Articles 2(1)(g)(h) and 10 of the Aarhus Regulation, coupled with the restrictive interpretation of these provisions given by the Commission, ends up excluding from internal review a vast amount of environmental measures taken by the European institutions.

Regulations are systematically excluded from internal review, because they are, under the TFEU and clearly in the Commission's interpretation, measures of general application. Even requests for internal review concerning Regulations covering one specific substance have not been considered as measures of individual scope, because they are considered applicable to all operators placing on the market or selling that substance. Commission Decisions addressed to Member States, like decisions on the postponement of the deadline to comply with air quality standards for one single Member State have also been considered as acts of general scope and therefore not subject the internal review procedure.

The concrete result of this interpretation is that measures such as the ones at stake in cases C-401/12 setting maximum limits for pesticides residues and C-404/12 exempting a State from complying with emission limit values, are not subject to the internal review procedure. As Article 9(3) of the Convention allows Contracting Parties to provide for administrative *or*

judicial proceedings to challenge environmental violations, we now move to analyse whether judicial review at EU level may compensate for the limited material scope of the internal review procedure.

Measures such as those at stake in the cases decided the Court of Justice, as well as all other measures of 'general application' taken through a non-legislative procedure (as defined in Article 289 TFEU), qualify as 'regulatory acts' for the purposes of an action for annulment under Article 263(4) TFEU. If these acts do not entail implementing measures, they could be challenged by environmental NGOs who can prove to have 'direct concern'. The latter concept is defined by the Court as being met when a measure is capable to 'directly affect the legal situation of the individual' and 'leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules'. In application of this criterion an NGOs would never be able to show that its own legal sphere is affected by the challenged measure and would therefore automatically be denied standing.

Environmental 'regulatory acts not entailing implementing measures' can, therefore, neither be contested by an NGO in an internal review procedure, because of their 'general scope', nor before the European Court of Justice, for lack, on the side of the NGO, of 'direct concern'. This creates a situation of 'denial of justice' which can hardly be considered in line with the aim of the Aarhus Convention to ensure 'wide access justice'.

Measures such as those at stake in the cases decided by the Court of Justice, however, do entail implementing measures taken by national authorities, so that it is in principle open to NGOs to challenge the national implementing measures and thereby plea the invalidity of the underlying EU legislation in national proceedings. National courts before which this question is raised, if they doubt the validity of such EU measure, have the duty to refer a preliminary question of validity to the Court of Justice pursuant to Article 267 TFEU. In this way, therefore, environmental NGOs could use an indirect route to challenge a EU environmental violation. While this situation does not lead to the 'denial of justice' scenario seen in the previous paragraph, it cannot be considered an effective substitute to a direct action. First of all, because an indirect challenge of a EU measure is more costly and takes longer for an NGO. Furthermore, national courts are free to decide whether they doubt the validity of the EU measure at stake and are not bound by the assessment of the parties. Moreover, practice has shown that many national courts are reluctant, for a variety of reasons, to send preliminary questions. If the question is sent, national courts are free to rephrase questions and NGOs have no formal role in the preliminary ruling proceedings. In light of these considerations an indirect challenge of a EU environmental measure can hardly be considered as an 'adequate and effective' remedy as mandated by the Aarhus Convention.

4. Conclusion

On 1 July, the Compliance Committee will adopt its findings with regard to the second part of Communication ACCC/C/2008/32 concerning the compatibility of Articles 2(1)(g)(h) and 10 of Regulation 1367/2006 with Article 9(3) of the Aarhus Convention.

In light of our analysis above, we encourage the Compliance Committee to find Articles 2(1)(g)(h) and 10 of Regulation 1367/2006 incompatible with Article 9(3) of the Aarhus Convention.

The incompatibility derives from the overly restrictive material scope of Articles 2(1)(g)(h) and 10, which limits the internal review procedure only, basically, to Decisions addressed to operators, with Decisions addressed to Member States as well as all kinds of Regulations falling outside of the scope of application of the procedure. These measures cannot be reviewed in the internal review procedure and, because of the definition of 'direct concern',

they can also not be reviewed by the Court of Justice, in case they do not entail implementing measures. This is a violation of Article 9(3) of the Convention. When national implementing measures exists and EU measures can be challenged indirectly before national courts, a violation of the requirement to ensure 'adequate and effective remedies' occurs given the limitations that the preliminary question procedure entails for NGOs.

For these reasons, the Compliance Committee should find Articles 2(1)(g)(h) and 10 of Regulation 1367/2006 incompatible with Article 9(3) of the Aarhus Convention.

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