EU- Access to environmental justice: Aarhus vs. Commission

Description

The organ which is in charge of seeing that the Aarhus Convention adopted by the European Union in 2005 is applied considers that the European Union law is not in accordance with the Convention as far as the access to justice is concerned. The European Commission rejects this statement. The battle between the two institutions has begun.

In order to make effective the right to "*live in an environment adequate to his or her health and well-being*", the Aarhus Convention imposes to guarantee the citizens' right to information, to public participation in decision-making and their access to justice in environmental matters. The current controversy between the European Commission and the Bureau of the Aarhus Convention lies in the concrete application of the right of the access to justice. The Bureau of the Convention considers that the European Union does not fulfill its obligations on this point, yet the European Commission does not share this analysis. The Aarhus Convention, that has been approved by the European Community through the Council decision of 17th February 2005, applies not only to the Member States but also to all the institutions and organs of the European Union.

Act I: EU law is accused of not being in accordance with the Aarhus Convention

The Compliance Committee of the Aarhus Convention has concluded twice [1] – in April 2011 [2] and in March 2017 [3] – that EU law is not in accordance with the provisions of the Convention as far as the access to justice is concerned. The European Union is blamed for not granting environmental organisations and "members of the public" [4] sufficient access to justice since neither the regulation 1367/2006 (the so-called Aarhus regulation) [5] nor the jurisprudence of the Court of justice of the European Union apply or respect the obligations that follow from the measures regarding the access to justice of the Aarhus Convention.

Indeed, paragraph 3 and 4 of article 9 of the Convention require the Parties to ensure that "*members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.*" These procedures are to be "*fair, equitable, timely and not prohibitively expensive*" as well as to "*provide adequate and effective remedies.*" [6]

According to the Committee, the judicial review measures of EU law fail to meet these requirements. The Committee considers that for environmental organisations and "members of the public", the access to the Court of justice of the European Union in order to request annulment of acts of general application adopted by the European Union institutions (such as a regulation for instance) is too restrictive, in particular because of the very strict jurisprudence of the Court.

The Committee judges that these shortcomings are not compensated by the mechanism of preliminary ruling on validity, and no more so by the Aarhus regulation. Of course, this regulation does enable non governmental organisations to request an internal review of an act adopted by a European institution. Nevertheless, the conditions of this procedure are defined in a narrow way and strictly interpreted by

the Court of justice.

The conclusion of non-accordance of EU law with the Aarhus Convention has been taken up in a draft decision that the Bureau of the Aarhus Convention has prepared. This draft decision will be submitted to the States during the sixth session of the Meeting of the Parties that will take place from 11th to 13th September 2017 in Montenegro [7].

Act II: The European Commission rejects the accusation

Although the draft decision does not once use the expression "*violation of the Aarhus Convention*", the European Commission has proposed the Council of Ministers of the European Union to reject it.

While claiming to be attached to the Aarhus Convention, the Commission has affirmed, in a proposal for a decision [8], that it was impossible for the European Union to implement the recommendations of the Committee. It declares that this impossibility derives from the specificity of the European Union's the legal order. Although the Council has not followed this proposition of the Commission the 17th July 2017 (see box), it is worth while explaining the Commission's point of view.

The European Commission refuses to acknowledge that the judicial review measures of the European Union are insufficient since it is convinced that the access to justice in environmental matters is satisfactory. It thus states that "The specific nature of the system of judicial review is indeed carefully drafted in the EU Treaties, so that every Union citizen has access to justice" [9].

It says that other judicial review measures guarantee the right of the access to justice such as the action for annulment, the preliminary ruling on validity, the plea of illegality and lastly the request for an internal review as provided for by the Aarhus regulation.

Act III: The Commission defends itself

The Commission notes that citizens can seek judicial review of annulment before the Court of justice of the European Union against acts adopted by the institutions of the European Union [10].

But the terms of this appeal are in fact very restrictive when it comes to contesting an act of general scope, such as a regulation for instance. In a case like that, in fact, the applicant has to prove that he is directly and individually concerned by the act he contests, and the way the Court of justice interprets this individual involvement is particularly restrictive [11].

However, when a private person contests a measure of general scope, judging it liable to entail damage to the environment, he does not defend his private interest but a general interest. By definition, damage caused to the environment is likely to affect a great number of people.

It is precisely for this reason that the Aarhus Convention gives applicants the right of the access to justice as "member of the public". Yet the specificity of environmental cases is taken into account neither by the Treaties, nor by the Court of justice. The Compliance Committee of the Aarhus Convention may already have pointed this out in its decision of 2011, yet the European Commission keeps on claiming until today, 2017, that the shortcomings are compensated by other judicial review measures.

The European Commission claims that individuals who do not fulfill the criterion of admissibility of the action for annulment nevertheless have an effective access to justice. Depending on the case, they can ask the national court to refer the matter for preliminary ruling from the Court of justice [12], or they can invoke the plea of illegality of an act of general scope before the Court of justice of the European Union during an on-going procedure [13].

Now, concerning the preliminary ruling, it consists of a judicial procedure that only takes place between Courts and the question whether a preliminary ruling should be requested lies in the hands of the national Court. In other words, an applicant maintaining that there is a doubt concerning the validity of an act of the European Union is not enough for the national Court to request a preliminary ruling to the Court of justice. Besides, depending on the Member States, the courts may be more or less reluctant to seek a preliminary ruling from the Court of justice. Regarding the plea of illegality, it may have as a goal to "*ensuring that every person has or will have had the opportunity to challenge a Community measure which forms the basis of a decision adversely affecting him*" [14], yet if it succeeds, there will be no annulment of the act of general scope but simply an inapplication in the case in point.

Finally, both mechanisms are not autonomous forms of action but are to be added to another action for which conditions of admissibility have to be fulfilled as well.

Besides the action for annulment, the preliminary ruling on validity and the plea of illegality, there is also the internal review request of an act adopted by a European institution. This procedure is accessible to non governmental organisations that fulfill a certain number of criteria. As far as GMOs are concerned, this procedure can for instance be used to request the European Commission to review a marketing authorization of a GMO [15].

But the administrative acts that can be the object of an internal review are defined in a narrow way and have been interpreted by the Court of justice in a similar way to acts that can be the object of an action for annulment [16].

If the internal review request is not successful, the NGO has the possibility to bring an action for annulment before the Court of justice according to the conditions set out by the Treaty… but not in order to ask the annulment of the measure whose review had been requested: the NGO will have to ask the annulment of the decision that rejects its internal review request. In an incidental manner, the NGO can invoke the illegality of the measure it had requested to review. The narrow definition of the administrative act that the European Union law gives in the Aarhus regulation stands in sharp contrast with the one that should be adopted under the Aarhus Convention. Indeed, even if the Aarhus Convention does not define the term "administrative act", it is evident that it is not limited to acts of individual scope.

Act IV: Why the Commission fears being overwhelmed

The draft decision prepared by the Bureau of the Aarhus Convention thus in particular advises the European Union to modify the Aarhus regulation or to adopt another act "*so that it is clear to the Court of Justice of the European Union that that legislation is intended to implement article 9, paragraph 3, of the Convention*« [17]. The Bureau of the Convention would like the EU to grant review of acts of general scope under the Aarhus regulation, currently these acts cannot be the object of an internal review request. In other words, the Bureau wants to prod the Court into not limiting its definition of

administrative acts to acts of individual scope – which is what the Aarhus regulation currently does – because the Aarhus Convention does not contain such a restriction. The Bureau of the Convention also advises the Court of justice of the European Union to interpret EU law as much as possible in the light of the objectives set out in paragraph 3 and 4 of article 9 of the Aarhus Convention, and as much as possible in a way that is compatible with this article. Behind this advice lies the Bureau's wish to see the Court of justice of the European Union establish a distinction between the actions for annulment in environmental matters, and those relating to other matters – in other words, it would like the Court of justice of the European Union to have a more flexible interpretation of the criteria of admissibility concerning the action for annulment when the action aims at annulling an act which entails damage to the environment.

Modifying the Aarhus regulation in order to make the internal review request cover acts of general scope? Never! It would (only) obstruct EU courts since it would lead to indirectly authorizing the annulment of these acts before the European Court of justice. How is one to explain this fear of the European Commission? In order to define the term "administrative act" in the sense of the Aarhus regulation, the Court of justice of the European Union so far based its understanding on its own narrow interpretation of an act that can be challenged by an action for annulment. In other words, a sort of parallelism established itself between the two procedures because the Court has almost the same definition of acts that can be the object of these procedures. Consequently, the Commission fears that if NGOs are authorized to request an internal review of an act of general scope under the Aarhus regulation, it would result in modifying the interpretation that the European Court of justice has of acts that can be challenged by an action for annulment…

And as to remind the Court of justice that the Aarhus Convention is an integral part of the legal order of the Union and that it is to interpret EU law in the light of and in accordance with the Convention? That is out the question in the name of the separation of powers! Of course, but if the Court of justice has adopted a very strict line of jurisprudence it is also and above all because it is tied to the dispositions of the Treaty on the Functioning of the European Union. Interpreting these dispositions in a flexible way could have raised criticism on the part of the Member States, whose will is expressed in the Treaty. And while a quarrel between Courts has already led to a small modification of the Treaty in 2002, the Commission obviously does not consider following that path again. The Committee appears to be hoping for a dynamic interpretation on the part of the European Court of justice so as to relax the conditions of admissibility for the action for annulment. The Court does so perfectly when it comes to the construction of a domestic market, so why would it not do the same in matters of environmental justice, if only to make primary law compatible with the international commitments of the Union?

The Council does not follow the Commission's proposal

The Agriculture and Fisheries Council that met 17th July 2017 has not followed the proposal of the European Commission. Draft decisions submitted to the Meeting of the Parties had so far always been ratified by the States, whether the draft decision pointed out a correct or an incorrect implementation of the Convention. The proposal of the Commission, had it been followed, would have damaged the

legitimacy and authority of the Compliance Committee.

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