Latest developments of EU environmental law

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I – Court of Justice: Case-law decided and pending after the 2018 AEAJ Workshop in Salzburg

The Court of Justice delivered two judgments related to access to justice in environmental matters :

- 17 October 2018 case C-167/17, *Klohn* on not prohibitively expensive costs (NPE) in relation to an EIA procedure;
- 26 June 2019 case C-723/17, on air quality.

Another important judgment was decided by the Court (Grand Chamber) on 4 December 2018, case C-378/17. This confirms that national authorities must dis-apply national rules that are contrary to EU law.

Several pending cases are at different procedural stages.

II - Case C-167/17: Not prohibitively expensive costs in relation to an EIA procedure

The case relates to specific circumstances which may not arise in other countries, as such:

- In Ireland, the Court hearing the case rules only on *how* the costs are to be borne; the amount of costs is quantified in a *separate* decision by a different judge called the Taxing Master, in the light of the supporting documents provided by the successful party;

- The proceedings started when the NPE rule was already adopted (Directive 2003/35) but not yet applicable (before the end of the transposition period).

Three remarks: (i) Principles confirmed by the CJEU through this case-law; (ii) Application in time of a directive to the proceedings brought before the date on the time limit for transposition; (iii) Limits to the application of future effects of a directive to situations which arose under the old rule.

II- (2) Principles confirmed by the CJEU

NPE rule - included in EU law due to Article 9(4) of the Aarhus Convention - has **no direct effect**.

Confirmation of principles on NPE developed in case C-260/11, *Edwards and Pallikaropoulos* (judgment of 11 April 2013). See Commission Notice on Access to Justice in Environmental Matters, points 186-188.

II- (3) Application in time of a directive to proceedings brought before the date of the time limit for transposition

- Non-retroactivity of legal acts, unless special provisions dealing with the conditions of temporal application;

- Measures for transposing a directive apply to the future effects of situations which arose under the old rule, as from the date of the time limit for transposition, unless otherwise provided.

- As soon as the time limit for transposition expires and the Member State has not yet transposed the directive, national courts are required to interpret national law so as render the future effects of situations which arose under the old rule immediately compatible with the directive itself.

II- (4) Limits to the application of future effects to situations which arose under the old rule

Limits to this obligation for national courts:

- principle of **legal certainty** (corollary of the protection of legitimate expectations);
- ***res judicata***.

Legitimate expectations mean that the relevant authorities gave to an entity precise assurances causing them to entertain expectations which are justified.

Application to the reference case: When Mr Klohn started the proceedings, it was clear that a new rule would enter into force by virtue of Directive 2003/35 with effect from 25 June 2005. Therefore, the other party to the proceedings could not claim an infringement of the principle of the legal certainty.

II- (5) Limits to the application of future effects to situations which arose under the old rule

The CJEU points out the fundamental role of *res judicata* in EU and national legal systems (point 63 of the judgment).

Res judicata extends **only** to the legal claims on which the court has ruled.

Application to the reference case: Mr Klohn could not have been aware of the amount of the costs until the Taxing Master's decision was delivered – which was more than one year after the general decision awarding costs against him. Therefore, he could not challenge the first decision with full knowledge of the facts. On costs there was not *res judicata.*

III - Case C-723/17: Power to issue directions and intensity of the judicial review

The first question raised by a Belgian court seeks to clarify whether national courts may review the location of sampling points in order to check compliance with the limit values laid down in Directive 2008/50 (The Air Quality Directive) and which measures they may or must take, if the criteria for determining the location laid down in the directive have been infringed.

This question can be construed as asking **whether national courts must have certain powers in the enforcement of Union law, in particular the power to impose orders on the authorities** (1).

(1) This question arises even more acutely in a pending preliminary reference from Germany (case C-752/18) in which the Court is asked whether national courts may be obliged to impose measures of constraint on public officials in order to enforce the obligation to update an air quality plan (Article 23 of Directive 2008/50).

III- (2) Case C-723/17: Power to issue directions and intensity of the judicial review

The answer of the Advocate General Kokott is interesting:

In principle **EU law is not intended to create new remedies** in the national courts to ensure the observance of EU law **other than those already laid down by national law**. It would be **otherwise only if** it were apparent from the overall scheme of the **national legal system** in question that **no legal remedy existed** which made it possible to ensure, even indirectly, respect **for rights under EU law** (point 18 of the conclusions).

<u>No difficulties in the reference case</u>: According to the Belgian law, national courts have the competence to impose orders.

III- (3) Case C-723/17: Power to issue directions and intensity of the judicial review

The real issue at stake: **What standard of review must be applied by the national court in respect of the siting of sampling points?**

The competent authorities clearly infringe the rules of the directive if, against their better knowledge, they do not site sampling points where the highest concentrations occur or if there is no scientific basis for the locations determined.

How large should be the intensity of judicial review required by EU law, that is to say, **the margin of discretion enjoyed by the competent authorities in applying the criteria for the siting decision.** In other words, to what extent does Directive 2008/50 permit the national principle of the division of powers to restrict the power to review administrative action in connection with the siting of sampling points.

III- (4) Case C-723/17: Power to issue directions and intensity of the judicial review

The CJEU confirms its case-law: In absence of rules of EU law on procedures for bringing actions before national courts, **and in order to determine the rigour of judicial review of national decisions adopted pursuant to an act of EU law**, it is necessary to take into account the purpose of the act and to ensure that **its effectiveness is not undermined.**

While the choice of the location of sampling points requires technical and complex assessments, **the discretion of the competent national authorities is limited by the purpose and objectives pursued by the relevant rules in this respect** (point 52).

See Notice of the Commission of 28 April 2017 – section 3.3.

In addition, see CJEU judgment of 6 October 2015, case C-71/14 points 53 and 58. **The level of scrutiny is determined by the objectives of the substantive EU law (point 58).** This approach was confirmed by the judgment of the CJEU (Grand Chamber) of 16 May 2017, in Case C-682/15 in administrative co-operation between Member States in fiscal matters and, indirectly, by Case C-664/15 *Protect Natur*.

III- (5) Case C-723/17: Power to issue directions and intensity of the judicial review

Since individuals can request a national court to verify whether the location of sampling points complies with the directive, **this court** also has jurisdiction to take all necessary measures **in respect of the national authority concerned, such as an order** to ensure that such points are sited in accordance with the criteria of the directive.

In the absence of EU rules, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, in compliance with the principles of equivalence and effectiveness.

No need for the CJEU to go further: Belgian law confers on national courts a power to issue orders in respect of national authorities.

IV - Case C-378/17: Primacy of EU law – Duty to dis-apply national legislation contrary to EU law owed by courts and by all organs of the State, including administrative authorities

Question: Is the principle of primacy of EU law to be interpreted as precluding national legislation, under which a national body established by law in order to ensure enforcement of EU law in a particular area, lacks jurisdiction to decide to dis-apply a rule of national law that is contrary to EU law ?

Context of the preliminary reference: An employment law rather than environmental law matter. Under Irish law, there is a division of jurisdiction between the Workplace Relations Commission (WRC) and the courts designated as such by national law. The WRC is an administrative body which has jurisdiction to rule on complaints against Directive 2000/78 and the Equality Acts but only the High Court has jurisdiction where the upholding of a complaint would require a national provision contrary to EU law to be dis-applied or struck down.

IV – (2) Case C-378/17 : Primacy of EU law – Duty to dis-apply national legislation contrary to EU law owed by courts and by all organs of the State, including administrative authorities

The CJEU makes a distinction between the power to dis-apply, in a specific case, a provision of national law contrary to EU law and the power to strike down such a provision (which is no longer valid for any purpose). It is up to each Member State to designate the court or institution empowered to this effect.

However, the primacy of EU law means that the national courts called upon, in the exercise of their jurisdiction, to apply provisions of EU law must be under a duty to give full effect to those provisions, if necessary refusing on their own to apply any conflicting provision of national law, and without requesting or awaiting the prior setting aside of that provision of national law by legislative or other constitutional means.

IV - Case C-378/17 : Primacy of EU law – Duty to dis-apply national legislation contrary to EU law owed by courts and by all organs of the State, including administrative authorities

It would be incompatible with the essence of EU law if, in the event of a conflict between a provision of EU law and a national law, the solution of the conflict were to be reserved to an authority with a discretion of its own, other than the court called upon to apply EU law.

The CJEU confirms its case-law: '*duty to dis-apply national legislation that is contrary to EU law is owed not only by national courts, but also by all organs of the State - including administrative authorities, within the exercise of their respective powers, to apply EU law*' (point 38).

The primacy of EU law requires not only the courts but all the bodies of the Member States to give full effect to EU rules.

V- Pending case-law

The duty of confidentiality applies. However, some pieces of information are in the public domain.

Case C-280/18: Referring court: Greek Council of State

EIA: information of the public concerned. Hearing held on 27 March 2019; Conclusions of the Advocate General Kokott delivered on 23 May 2019;

Case C-535/18: Referring court: Bundesverwaltungsgericht

EIA: Access to justice for individuals – Participation of the public: scope of the obligation;

Case C- 752/18: Referring court: Bayerischer Verwaltungsgerichtshof

Enforcement of EU law. Hearing to be held on 3 September 2019 (Grand Chamber);

Case C-826/18: Referring court: Rechtbank Limburg (Netherlands)

EIA: Article 9(2) of the Aarhus Convention - Access to justice for public;

V- (2) Pending case-law

Case C-470/19: Referring court: High Court of Ireland

Interpretation of Article 2.2 Directive 2003/4/EC *'bodies or institutions acting in a judicial capacity'* – case received by the Court in June 2019.

Thank you!