EUROPEAN LAW BLOG
NEWS AND COMMENTS ON EU LAW

ELB Blogpost 42/2023, 24 October 2023
Tags: consistent interpretation, Case C 873/19 Deutsche Umwelthilfe, Article 9 (3) Aarhus Convention, Article 47 CFR
Topics: External Relations, Environmental Law, EU Constitutional Law, Fundamental Rights

Case C-873/19 *Deutsche Umwelthilfe*: the Aarhus Convention secures enforcement of EU vehicle emission rules before national courts

By Laurens Ankersmit

In Case C-873/19 *Deutsche Umwelthilfe*, the Grand Chamber of the Court of Justice interpreted Article 9 (3) of the Aarhus Convention so as to provide access to justice before national courts for environmental organizations challenging approval of cars fitted with defeat devices. The case is particularly noteworthy for the way the Court approaches the legal effects of international law in the EU's legal order and the fairly receptive interpretation of the Aarhus Convention (even though it reiterated its stance that Article 9 (3) does not have direct effect). It is also an important precedent for environmental NGOs seeking to enforce EU vehicle emission standards before national courts.

The case concerned a preliminary reference brought by a German administrative court in proceedings between Deutsche Umwelthilfe (an environmental NGO) and the German federal Motor Transport Authority, the 'KBA'. Deutsche Umwelthilfe had challenged the KBA's decision to approve Volkswagen's amended software for its Golf TDI car. Volkswagen had installed a so-called 'defeat device' that ensured much lower emissions of NOx among others when the vehicle recognized it was being tested for emissions. After the emissions scandal broke out, Volkswagen subsequently updated its software. The KBA approved this software, despite the fact this software still allowed the emissions control system to be altered during typical driving conditions in Germany. When Deutsche Umwelthilfe challenged this decision before a German administrative court arguing that the decision violated Article 5 (2) of Regulation 715/2007 (the EU's type approval system for emissions from cars), the KBA argued that Deutsche Umwelthilfe lacked standing to do

so under German law. The administrative court subsequently referred the case to the Court asking whether EU law (Article 9 (3) of the Aarhus Convention read in conjunction with Article 47 of the Charter) precludes such a situation where an environmental NGO does not have standing.

The post first covers the main aspects of the judgment before offering some commentary on the legal effects of international law in the EU legal order and in particular the Aarhus Convention. It will also offer some commentary on how the judgment is relevant for ongoing battles in the EU legislative process to secure access to justice in environmental matters.

Judgment

The Court approached its answer by first interpreting a number of key concepts in Article 9 (3) of the Aarhus Convention before considering its legal effects in the EU's legal order. Article 9 (3) provides, in essence:

'each Party shall ensure that, ***where they meet the criteria, if any, laid down in its national law, 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***.'

This provision is part of the third 'pillar' of the Convention (access to justice) intended to ensure that members of the public including environmental NGOs have access to justice to enforce provisions of domestic environmental law. It is a crucial provision for individuals and environmental NGOs in allowing them to take authorities to court for violating environmental law and (as most EU lawyers would know) for the private enforcement of that law.

In this case, the Court essentially had to determine whether the EU's internal market rules for type approval could be (1) 'national law', (2) 'relating to the environment' and (3) whether Germany could lay down 'criteria' for members of the public that ensured that substantive areas of environmental law would be excluded from review.

Is the approval of a defeat device by the KBA contrary to Article 5 (2) of Regulation 715/2007 an 'act' that contravenes national law 'relating to the environment'?

The Court first rejected a narrow understanding of the concept of national law 'relating to the environment'. KBA had argued that EU internal market measures such as Regulation 715/2007 (adopted under the current Article 114 TFEU) had as their object the

improvement of the functioning of the internal market and therefore could not relate to the environment. The Court maintained that the Regulation has an environmental objective: its purpose is to ensure a high level of environmental protection. The fact that the Regulation "was not adopted on the basis of a specific legal basis relating to the environment, such as Article 175 EC, now Article 192 TFEU, is not such as to exclude the environmental objective of that regulation and its belonging to the 'law relating to the environment'." (paras. 51-53). The Court supported its interpretation by referring to definition of 'environmental law' in the (old) EU's Aarhus Regulation (para. 54) and by the UNICE's implementation guide of the Aarhus Convention (paras. 55-56).

Is to Article 5 (2) of Regulation 715/2007 'national law'?

Second, the Court maintained that because Article 288 (2) TFEU provides that regulations are directly applicable in all the Member States, Article 5 (2) of the Regulation 'must be regarded as forming part of 'national law' within the meaning of Article 9(3) of the Aarhus Convention.' (para. 58). The Court did not dwell into the autonomy of EU law and the fact that EU law operates independently from national or international law here. Originally (at least in *Costa/ENEL*), the instrument of a regulation was part of the argument for finding the special nature of EU law and its primacy *over national law*. Here the Court simply sticks to the TFEU definition of 'regulation' to find that EU law is *part of* the law of the Member States without explaining how this relates to autonomy of EU law.

What does the concept of 'criteria laid down in … national law' (to qualify as a 'member of the public') mean?

Lastly, and crucially, the Court had to determine whether the Aarhus Convention permitted parties to the Convention to lay down criteria that environmental organisations such as Deutsche Umwelthilfe needed to meet that were linked to the subject matter of the action. Thus, the Court had to determine how much latitude Article 9 (3) gave to Germany in limiting access to justice by laying down 'criteria' and in particular whether those criteria could go beyond criteria relating to those persons entitled to bring an action.

While the Court noted that the Member States have 'discretion' in establishing procedural rules setting out conditions for review procedures, 'such criteria relate to the determination of those persons entitled to bring an action, not to the determination of the subject matter of the action in so far as the latter concerns infringement of provisions of national environmental law.' Therefore,

> '[i]t follows that Member States may not reduce the material scope of Article 9(3) by excluding from the subject matter of the action certain categories of provisions of national environmental law' (para. 64).

What if German law is not in line with the interpretation given by the Court?

The Court subsequently proceeded with the question whether EU law precluded such a situation where German law would deny standing of Deutsche Umwelthilfe before national courts. While the Court reiterated its stance that Article 9 (3) of the Aarhus Convention lacked direct effect, it did give effect to Aarhus in this case in two (tried-and-tested) ways. First, in accordance with the duty of consistent interpretation, the 'primacy of international agreements' concluded by the EU requires national law to be interpreted 'to the fullest extent possible' in accordance with the Aarhus Convention (para. 66).

Second, it interpreted Article 47 of the Charter (right to an effective remedy) in light of the Convention (paras. 65-69). This technique has already allowed the Court to give effect to the Aarhus Convention in the past (see for instance *Brown Bears II* and a comment on that case here). The Court therefore had to establish that, in a situation like in the present case, the Member State was implementing EU law within the meaning of Article 51 (1) Charter (otherwise Article 47 Charter could not apply). This was the case because Germany was laying down

> 'rules of procedural law applicable to the matters referred to in Article 9(3) of the Aarhus Convention concerning the exercise of the rights that an environmental organisation derives from Article 5(2) of Regulation No 715/2007, in order for decisions of the competent national authorities to be reviewed in the light of their obligations under that article' (para. 65).

In other words, Member States are implementing the Aarhus Convention when laying down the procedural rules for the enforcement of EU 'rights' (the EU's type approval regulation). Accordingly, Article 47 Charter imposes an obligation to ensure effective judicial protection of the rights conferred by EU law, in particular the provisions of environmental law (para. 66).

Applying Article 47 Charter to this case, the Court held that the Aarhus Convention 'would be deprived of all useful effect' if it would be possible to deny access to justice to members of the public that meet the requirements under that Convention (paras. 67-69). In particular, the German procedural rules that do not allow challenges of approval of products even where the person involved is recognised as an environmental organisation

is contrary to a combined reading of Article 9 (3) of the Aarhus Convention and Article 47 of the Charter (paras. 69-71).

Legal effects of the Aarhus Convention

The Court's judgment on the reception of an international agreement (the Aarhus Convention) in the EU's legal order fits within a wide body of case-law that is fairly receptive to international law. The Court's approach to the reception of international law is of great importance given the fact that international agreements binding on the EU are an 'integral part' of EU law and that EU law itself operates autonomously in the Member State legal orders. Because the Court considers such agreements to be part of EU law, it is also for the Court to determine its legal effects (whenever parties to the agreement have not explicitly agreed on the issue themselves) and its interpretation.

This has profound consequences for the reception of international agreements in Member States. A Member State with a dualist tradition (Germany, for instance) might find international agreements to bite more where the Court assumes jurisdiction over an international agreement than would be the case under German constitutional law. Conversely, litigants in Member States with a more monist tradition might find international agreements under the jurisdiction of the Court less effective than those governed under national law. In the Netherlands, for instance, litigants would likely more easily be able to rely directly on Article 9 (3) of the Aarhus Convention (or the WTO Agreements for that matter) if it were not up to the Court of Justice to determine the legal effects of these agreements. This has consequences for the separation of powers in Member States by empowering or disempowering the national legislature, executive or judiciary. It is also of great consequence for the effectiveness and enforcement of international law. As EU lawyers are well-aware, direct effect can have a significant effect on the enforcement of directly effective law at the Member State level.

While the Court has often shied away of granting direct effect to international agreements binding on the EU, it has used two techniques of consistent interpretation to give meaning and effect to international obligations of the EU within the EU's legal order: aiding the effectiveness of international agreements yet also giving both the EU institutions and the Member States some leeway in the implementation of international agreements. The *Deutsche Umwelthilfe* judgment uses both techniques. On the one hand, national courts are required to interpret national law 'to the fullest extent possible' in accordance with the Aarhus Convention. On the other hand, the Court interprets EU law itself (in this case, Article 47 of the Charter) in line with the Aarhus Convention to allow individuals to directly

invoke the Charter before national courts and effectively secure access to justice in environmental matters as foreseen in the Aarhus Convention.

Perhaps as significant in this case, is that the Court does not interpret Article 9 (3) restrictively. As an authoritative interpretation of EU law, this judgment now carries weight in courts throughout the EU. A noteworthy additional feature of this case in this respect is the tools the Court uses to interpret the Aarhus Convention. On the one hand, and in a demonstration of openness to international law, it makes use of guidance given by UNICE on the Aarhus Convention. The Court has done so previously. On the other hand, it also seeks guidance in EU secondary law intended to implement the Aarhus Convention. This is perhaps a somewhat more unusual technique, given the Court's proclaimed 'primacy of international agreements'. Indeed, in the past, the Court would interpret secondary EU law as much as possible in light of EU international obligations (similar to the instruction to Member State courts to interpret their national law as much as possible in line with EU international agreements). This new technique (in para. 54) takes the reverse approach: the international agreement is interpreted in light of domestic law intending to implement it. This technique is not foreseen in Article 31 VCLT and might be prone to look askance by international lawyers, but for the EU institutions at least it has the additional advantage that it brings international agreements and EU implementing measures more in line with each other. In addition, this approach also ensures a more consistent implementation of the Aarhus Convention by EU institutions and the Member States. Given that there is no general access to justice in environmental matters directive that would harmonise the implementation of the Aarhus Convention by Member States, the Court's approach contributes to this consistency in the absence of such a directive.

The battle to secure access to justice in EU environmental matters

Turning to the political context of the judgment, the most immediate and important effects of the judgment are that environmental NGOs are in a better position to enforce EU vehicle emission rules before national courts. The referring German administrative court has already ruled in favour of Deutsche Umwelthilfe, following the Court's judgment (although Volkswagen has appealed that judgment). Environmental NGOs will be in a better position to claim standing in other countries where authorities have approved car types containing defeat devices in violation of Article 5 (2) of Regulation 715/2007.

More broadly, the judgment is likely to aid environmental NGOs in Central and Eastern European countries where standing is restricted contrary to Article 9 (3) of the Aarhus Convention. To the extent that EU law grants them 'rights' in rules that protect the environment, Article 47 of the Charter gives them a directly effective right to a remedy.

At the same time, access to justice barriers persist in many Member States and requiring this type of satellite litigation on access rights like in the case discussed here is cumbersome and slow. One may even wonder if the EU is abiding by its obligations under the Aarhus Convention by not providing a clear legal framework ensuring that members of the public can challenge national authorities' acts and omissions when they contravene EU environmental law (see Article 3(1) of the Aarhus Convention). The lack of such a clear EU legal framework pushes the responsibility for abiding by Article 9 (3) back to the Member States. Given that the Court assumes jurisdiction over the interpretation of that provision and thus considers the EU to have exercised its powers to conclude that part of the Convention, pushing this responsibility back to the Member States is hardly a satisfactory solution.

This was understood by the Commission back when the EU was preparing to ratify the Convention. In 2003, the Commission proposed a Directive on access to justice in environmental matters, but the Council's refusal to engage in the legislative process meant that it was officially withdrawn in 2014. In 2020, the Commission changed its position by adopting a Communication on access to justice in the Member States, committing to include access to justice provisions in all sectoral EU environmental legislation and calling on the co-legislators to approve them in the final text. Since then, the Commission has proposed access to justice provisions in the Deforestation Regulation, the Corporate Sustainable Due Diligence Directive (CSDDD), the Nature Restoration Law, the recast of the Air Quality Directive, the amendment of the Urban Waste Water Treatment Directive, the Green Claims Directive and the Soil Monitoring Law.

The Parliament has also proved to be in favour of this approach, even inserting access to justice provisions in its first reading position when the Commission has failed to do so in the proposal (notably the European Climate Law, the amendment to the Water Framework Directive and the classification, labelling and packaging Regulation). While the Council continues to drag its feet by watering down or deleting access to justice provisions, it should be noted that the Deforestation Regulation was the first piece of Green Deal legislation to emerge from trilogue discussions with a clear access to justice provision. This, in itself, is a significant step forward for EU implementation of Article 9(3) at the Member State level. We are now waiting to see if the other legislative files mentioned above will do the same.