European Commission

Ad hoc meeting of national judges concerning Article 267 TFEU in relation to access to justice in environmental matters

Summary Report

Date and venue: 29 January 2019, DG ENV premises, Beaulieu 5, Brussels

Participants: European Commission services (DG ENV E.4, Legal Service); a legal secretary, Court of Justice of the European Union (CJEU); current or retired judges or court official from Austria, Belgium, Czech Republic, Germany, Estonia, Ireland, Lithuania, Portugal, Slovakia, Slovenia, Spain, Sweden and UK; experts from the European Judicial Training Network (EJTN). Participants were present in a personal capacity as experts rather than in a representative capacity.

Background: The meeting was organised in the context of the follow-up to findings of the Aarhus Convention Compliance Committee (ACCC) in compliance case ACCC/C/2008/32 concerning the European Union. In this case, the ACCC was, *inter alia,* unconvinced that Article 267 of the Treaty on the Functioning of the European Union (TFEU) provided a satisfactory means of challenging the legality of non-legislative acts of the EU institutions (the wording of Article 267 relates to both the validity and interpretation of such acts).

The principal aim of the meeting was to understand the perspectives of national judges on the use of Article 267 for validity references, including any factors that might operate as barriers or impediments to its use. Chatham House rules applied.

Presentations

The Commission services circulated a background paper in advance, mentioning the following as issues for discussion:

- Awareness of Article 267, in particular with regard to validity references;
- Identifying a respondent at national level;
- Challenging omissions;
- Legal standing;
- Filtering cases to determine whether a validity reference is justified;
- Other relevant issues.

At the outset, presentations were delivered by:

- **DG ENV**: on the background and context, notably the findings in case ACCC/C/2008/32 and the follow-up by the Commission and Council;
- **Milieu Consulting**: on the purpose and methodology of a study the Commission has ordered as part of the follow-up and initial findings and some points for exploration, including burdens and benefits for national courts;
- **XXX**: on the case-law of the CJEU and its interpretation with regard to validity references under Article 267 as well as related case-law on Article 263 and legal standing;
- **XXX**: on the general role of Article 267 and the key criteria governing its practical application by national judges.

The relevant PowerPoint slides, background paper, and the paper of Mr XXX are circulated separately to participants.

Topics covered

i) General

The CJEU has referred to the EU legal order having a complete system or remedies. This system includes Article 263 and Article 277 as well as Article 267. It was observed that the possibility to challenge EU regulatory acts under the provisions of Article 263 TFEU as revised by the Lisbon Treaty has not yet been fully tested.

As for Article 267, this accounts for two-thirds of CJEU decision-making, and is crucial to the rule-of-law machinery of the EU.

ii) Awareness of the Article 267 mechanism among national judges

The interpretative role of Article 267 is relatively well known among national judges, but familiarity does not necessarily extend to the provision's role with regard to challenges to validity. Validity references are far less common than interpretative ones and most participants were unaware of experience with such references in their own country.

In some Member States, general awareness of Article 267 has improved as a result of landmark references by supreme courts, which have signalled the role of the mechanism to other levels of the judiciary. In other Member States, use of Article 267 has still not emerged as important in practice.

As is demonstrated by XXX's paper, there is general scope for improving knowledge of the procedural aspects of Article 267.

The European Commission-funded courses provided by the Academy of European Law (ERA) for judges on environmental law topics always include at least one case-study regarding a preliminary ruling on interpretation. The next series of workshops planned will emphasize references on validity as well.

iii) Competence of national courts, legal standing and respondents

It was generally accepted that validity references should not present a problem for national courts where the EU regulatory act entails a national implementing measure of the kind that featured in Case C-281/16, *Vereniging Hoekschewaards Landscap* (mentioned in the Background Paper).

However, several participants pointed to problems where the EU regulatory act did not entail or was not linked to a national implementing measure.

First, there was an issue of competence of the national judge. In this regard, there is a difference between common law and continental jurisdictions. In continental jurisdictions, every court has an area of competence (e.g. criminal, civil, administrative) while in common law countries courts dealing with administrative law have full original jurisdiction (e.g. through declaratory judgments) and competence *ratione materiae* will not be an issue.

If a case is brought before a continental court, the first check made by the judge will relate to whether the judge is competent *ratione materiae*. In most Member States in continental Europe, it appears to be difficult to challenge "self-standing" EU acts before national administrative courts in the absence of related decisions at national level. As a general principle, a national administrative act appears necessary for an administrative court to decide on the matter.

As regards other kinds of national court, while challenges to EU acts could not be brought before a criminal court (other than through a plea of illegality by an accused), there is potentially more leeway before civil courts, but then the question of legal standing, and in particular that of NGOs, may be questioned. Enlarged legal standing is generally recognized for environmental NGOs before administrative courts, not civil ones. Legal standing in civil claims would more easily be granted to companies suffering a tangible damage as a result of the EU act, although some participants raised doubts as to the viability of this type of claim.

The fact that the EU implementing acts are often adopted via comitology, i.e. involving the Member States, does not have an impact. The decision remains an EU decision, and such procedural aspects are not relevant at national level.

The issue of the absence of an obvious defendant – and grievance vis-à-vis the Member State - in such cases was also raised. Some participants saw the lack of any unlawful conduct at national level as an impediment to bringing a validity challenge.

It was suggested that, in civil cases (which seem in at least some Member States to be the most promising route for a validity reference), the litigation could be brought against the state.

In administrative cases, since a national angle is needed, a potential scenario is that the NGO would ask the authorities to take a decision on the basis of the EU act and then challenge that decision (action or omission) before the administrative court.

Some participants observed that some possible solutions, and in particular civil claims, would be an artificial means to challenge the legality of EU acts, as the examination of validity would only be an uncertain side-effect of another claim. Whether these would constitute effective remedies was therefore questionable.

On the other hand, it was noted that national practice could evolve, taking as an example the practice and case-law regarding state aid (see case C-622/16, *Montessori*). Mention was also made of a case currently before the Irish courts on data protection initiated by the Irish Data Protection Commissioner. Faced with doubts on the validity of a series of Commission decisions, the Commissioner had initiated proceedings in the Irish High Court, seeking a declaration on validity. This in turn had resulted in a High Court order to make a validity reference to the CJEU (currently under appeal to the Irish Supreme Court).

iv) Legal standing

Legal standing (or *locus standi*) was raised as an issue to bring a claim before national courts. The recent CJEU case-law on legal standing, particularly for NGOs, was noted. However, there are still significant discrepancies between Member States.

v) Filtering by national courts

It was noted that, in general, references were unnecessary and inappropriate where the subject-matter was *acte clair* or *acte éclairé*. As for validity references, Case C-314/85, *Foto Frost,* confirms that national judges can reject arguments of the parties to litigation that EU measures are invalid[1], but they cannot themselves declare such measures invalid[2]. If they have doubts about validity, national judges must refer, i.e. there is less discretion than there is with interpretative references.

Mention was made of the possibility for national judges to make a validity reference of their own volition, without being requested to do so by parties to the litigation.

Several practitioners referred to considerations which might influence use of the validity reference mechanism in practice: the extra burden for the national judge entailed in preparing an order for reference; disconnection of the judge from the subject-matter of the dispute (since the review of validity is made by the CJEU); a desire by some judges to resolve matters themselves; the delay that a reference will bring to the judge's determination; the extra costs involved in the reference stage for some or all of the parties. These factors may in practice result in references being made only in very serious circumstances. On the other hand, the duty of loyal co-operation that national judges owe to the EU legal order was also stressed (national courts being an integral part of that order).

vi) Other relevant issues

It was observed that in some countries citizens and NGOs are reluctant to bring a case to national administrative courts.

There was an exchange on the role of interim relief in relation to validity references. It was noted that there is CJEU case-law on this (Case C-143/88, *Zuckerfabrik Süderdithmarschen).* In this context, it was also noted that Article 267 litigation might be multi-polar in its effects, with other interests apart from those of the plaintiff and the respondent needing to be taken into account.

[1] Paragraph 14
[2] Paragraph 15

Annex 1: Agenda

Time	Agenda item
10.30	Welcome and introduction *Chair, XXX, DG Environment*
10.50	Aarhus Convention - case ACCC/C/2008/32 *Presentation by XXX, DG Environment*
10.50	The context: Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters *Presentation by XXX, Milieu Consulting*
11.00	The reference on the validity of EU legal acts under Art. 267 TFEU – sufficient access to justice to comply with the Aarhus Convention? *Presentation by XXX, Court of Justice of the European Union*
11:30	Article 267 TFEU references: from a national judge's perspective *Presentation by XXX, Queen's Bench and Judicial Review*
12:30	First round of discussions
13.30	Lunch break
14.15	Second round of discussions
16:00	Conclusions *XXX, DG Environment*
16:15	End of meeting