European Union, CJEU, LZ, Judgment of 8 November 2016

Deciding bodies and decisions

CJEU, (Grand Chamber) LZ, Judgment of 8 November 2016 Case C?243/15, EU:C:2016:838

Area of law

Effective Judicial Protection

Subject matter

Access to justice - right to a tribunal - Environmental Law matters - Protected areas

The European Court of Justice was asked to decide whether and in which cases environmental NGOs are amongst the beneficiaries of the right to judicial protection under Article 47(1) CFR. CJEU also clarified the requirements of an effective remedy in the context of environmental litigation relating to protected areas.

Summary Facts Of The Case

Biely potok a.s. (BPAS) requested the competent District Authority of Tren?ín to authorise the construction of an enclosure for the purpose of extending an existing deer reserve. The projected extension affected land, owned by the applicant company, in Strážovské vrchy, a protected site forming part of a nature reserve which the Slovak Republic had included in the Natura 2000 network as a special protection area under the Birds Directive (directive 2009/147) and as a site of Community importance within the meaning of the Habitats Directive (directive 92/43).

Article 6(3) of the Habitats Directive, which is applicable also to bird protection areas designated under the Birds Directive (Article 7 Habitats Directive), requires an *ex ante* assessment of plans or projects likely to have a significant effect on such sites and provides that "*the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public*".

Lesoochranárske zoskupenie VLK (LZ), a Slovak public?interest NGO promoting the protection of forests, was informed by the District Authority of Tren?ín of the initiation of the administrative procedure for the granting of the requested authorisation.

After receiving information on the decision?making process, LZ requested to be accorded the status of party to the administrative authorisation procedure and, relying in particular on matters set out in the observations of the Slovak National Nature Conservation Authority, also requested

the staying of the administrative procedure, referring to matters which would preclude grant of a permit.

Under Slovak law, recognition as a party to the proceedings is a condition of the right to challenge the decision concluding those proceedings.

The District Authority of Tren?ín denied to LZ the status of party to the proceedings and observed that, as an association with legal personality, it was merely entitled under domestic law to the status of “interested person”.

The administrative appeal against this decision was dismissed on the same ground by the Regional Environment Authority of Tren?ín, whose decision became final on 10 June 2009.

By a decision of the same day, the District Authority of Tren?ín granted the authorisation requested by BPAS.

LZ challenged the denial of the status of party to the proceedings before the *Krajský súd v Tren?íne* (Tren?ín Regional Court), relying *inter alia* on Article 9 of the Aarhus Convention.

By a judgment of 23 August 2011, and in the light of the judgment delivered by the CJEU on 8 March 2011 (case C240/09 *Lesoochranárske zoskupenie*), the impugned decision was annulled.

By a judgment of 26 January 2012, the *Najvyšší súd Slovenskej republiky* (Supreme Court of Slovakia) set aside the decision of the lower tribunal on the basis that the case had become devoid of purpose following the conclusion of the proceedings to which the status of party was claimed. It also observed that, in such a case, the person concerned must be informed of the possibility of bringing an action as an “omitted party” under a different provision of the Code of civil procedure. Such action, if successful, would allow the applicant to obtain the notification of the administrative decision, the postponement of its execution, and the possibility to challenge its legality before the courts. The case was referred back to the *Krajský súd v Tren?íne* (Tren?ín Regional Court).

By a second judgment of 12 September 2012, the *Krajský súd v Tren?íne* (Tren?ín Regional Court) annulled the impugned administrative decisions for a second time. It observed that the decision granting the permit was premature, having been delivered before the conclusion of the legal proceedings relating to the request seeking the status of party to that administrative procedure.

By judgment of 28 February 2013, the *Najvyšší súd Slovenskej republiky* (Supreme Court of Slovakia) set aside the latter decision, essentially on the same grounds given for its first decision.

By a judgment of 23 November 2013, the *Krajský súd v Tren?íne* (Tren?ín Regional Court) rejected LZ’s request to be granted the status of party to the procedure and considered that it did not have to inform LZ of the possibility of pursuing this objective as an “omitted party”, since this action had become time?barred in the meanwhile.

LZ appealed to the *Najvyšší súd Slovenskej republiky* (Supreme Court of Slovakia), which considered that two opposing views could be taken on the issue of whether the proceedings for the authorisation of the requested permit should have been stayed pending the legal proceedings on the determination of the right of LZ to be recognised as a party to those administrative proceedings. On the one hand, it could be considered that – by *de facto* denying the possibility for

arguments in favour of environmental protection to be taken into account ? this situation could be a breach of the principle of adversarial proceedings, could limit the possibility of judicial review at the initiative of the requesting party and, in the end, would impair the pursuance of the objective, which is common to the Habitats Directive and the Aarhus Convention, of ensuring a high level of environmental protection. On the other hand, it observed that staying the adoption of the decision on the authorisation until the final determination of the status of LZ as a party would hinder the expedite conclusion of the proceedings and could result in an unfair treatment of the applicant company.

In those circumstances, the *Najvyšší súd Slovenskej republiky* (Supreme Court of Slovakia) decided to stay the proceedings and to raise a question for preliminary reference before the CJEU, asking, in essence:

"*whether Article 47 of the Charter, read in conjunction with Article 9 of the Aarhus Convention, must be interpreted as precluding, in a situation such as that at issue in the main proceedings, an interpretation of rules of national procedural law to the effect that an action against a decision refusing an environmental organisation the status of party to an administrative procedure for authorisation of a project that is to be carried out on a site protected pursuant to Directive 92/43 does not necessarily have to be examined during the course of that procedure, which may be definitively concluded before a definitive judicial decision on possession of the status of party is adopted, and is automatically dismissed as soon as that project is authorised, thereby requiring that organisation to bring an action of another type in order to obtain that status and to secure judicial review of compliance by the competent national authorities with their obligations stemming from Article 6(3) of that directive*".

The CJEU observes at the outset that, in the domestic proceedings, LZ claims the status of party to an administrative authorization procedure, as this is necessary under domestic law to have standing to obtain judicial review of the decision relying on rights derived from EU law in the environmental field. Indeed, LZ considers that such authorisation has been granted in violation of the national authorities' obligations under Article 6(3) of the Habitats Directive.

The Court firstly observes the key role played by the obligation, under Article 6.3 of the Habitats Directive, to assess the implication of plans or projects having a bearing on a protected site in order to fulfil the environmental conservation and protection objectives of the said directive and to authorise such an activity only where no reasonable scientific doubt remains as to the fact that it will not adversely affect the integrity of that site.

Thus, in order to effectively preserve the binding effect of the directive under Article 288 TFEU, " *individuals [must] be able to rely on it in legal proceedings, and […] the national courts [must] be able to take that directive into consideration as an element of EU law in order, inter alia, to review whether a national authority which has granted an authorisation relating to a plan or project has complied with its obligations under Article 6(3) of the directive […] and has thus kept within the limits of the discretion granted to the competent national authorities by that provision*" (para. 44).

The Court further notes that the said provision stipulates for the prior obtainment of the opinion of the general public by the competent national authorities, if appropriate. That provision must be read in conjunction with Article 6(1)(b) of the Aarhus Convention, which sets out the obligation for Parties to the Convention to assess whether a proposed activity, other than those listed in Annex I of the Convention, may have a significant effect on the environment. A positive outcome of this assessment triggers the applicability of Article 6, thus subjecting the decision?making process to the public participation provisions extensively set forth in Article 6 itself. In particular, Article 6 of the Aarhus Convention confers a right to participate to public interest environmental NGOs, such as LZ, that – in accordance with the definition contained in Article 2(5) of the Aarhus Convention – are always to be considered as "public concerned".

The initiation by the competent authorities of an authorisation procedure under Article 6(3) of the Habitats directive necessarily implies that they considered necessary to assess the significance of the project's effect on the environment, within the meaning of Article 6(1)(b) of the Aarhus Convention.

"*It follows that an environmental organisation which, like LZ, meets the conditions specified in Article 2(5) of the Aarhus Convention derives from Article 6(3) of Directive 92/43, read in conjunction with Article 6(1)(b) of that convention, a right to participate […] in a procedure for the adoption of a decision relating to an application for authorisation of a plan or project likely to have a significant effect on the environment in so far as, within the framework of that procedure, one of the decisions envisaged in Article 6(3) of the directive is to be adopted*" (para. 49).

The Court's reasoning goes on by recalling that the EU legal system entrusts the courts of the Member States with the responsibility "*to ensure judicial protection of a person's rights under EU law*". That obligation stems not only from the principle of sincere cooperation (Article 4(3) TEU) and the provisions of Article 19(1) TEU, but also from Article 47 CFR.

Indeed, "[*w]here a Member State lays down rules of procedural law applicable to actions concerning exercise of the rights which an environmental organisation derives from Article 6(3) of Directive 92/43, read in conjunction with Article 6(1)(b) of the Aarhus Convention, in order for decisions of the competent national authorities to be reviewed in the light of their obligations under those provisions, that Member State is implementing obligations stemming from those provisions and must therefore be regarded as implementing EU law, for the purposes of Article 51(1) of the Charter*" (para. 51).

Article 9(2) of the Aarhus Convention grants access to legal proceedings to the members of the public satisfying certain conditions, in order to "*challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 [of the Aarhus Convention]*

". Article 9(2) of the Arhus Convention limits the discretion available to the Member States in two respects: firstly, standing to sue must always be granted to recognised public?interest environmental NGOs in accordance with Article 2(5); secondly, by promoting "*wide access to justice*" to the public concerned, it restrains Member States'freedom when determining the detailed rules for the legal actions which it envisages.

As already pointed out, decisions adopted by the competent national authorities within the framework of Article 6(3) of Directive 92/43 - regardless of their object and irrespective of whether they form part of a single or multiple decision?making procedures – fall within the scope of Article 6 of the Aarhus Convention by virtue of Article 6(1)(b). Therefore, they are also subject to Article 9(2) of the said Convention.

It follows that a public-interest environmental NGO such as LZ "*must necessarily be able to rely in legal proceedings on the rules of national law implementing EU environmental law and the rules of EU environmental law having direct effect" and "must be able to challenge, in such an action, not only a decision not to carry out an appropriate assessment of the implications for the site of the plan or project in question but also, as the case may be, the assessment carried out inasmuch as it is alleged to be vitiated by defects*" (paras 59-60).

Article 47 CFR, read in conjunction with Article 9(2) and 9(4) of the Aarhus Convention, requires the remedy afforded to be "effective". Although the respect of this requirement in the light of the procedural sequence of domestic proceedings is a question of fact, in principle reserved to the referring court, the CJEU may nevertheless rule on both the criteria that the referring court may or must apply within the framework of EU law and the application of those provisions in the case in point, provided, however, that the national court carries out the finding and assessment of the facts necessary for that purpose in the light of all the material in the file before it.

In the absence of EU rules governing the matter, the responsibility of laying down detailed procedural rules safeguarding the right to an effective judicial remedy and to a fair hearing enshrined in Article 47 CFR falls with the legal system of each Member State.

Having regard to the stringent standard for the authorisation of plans and projects set out by Article 6(3) of the Habitats Directive in accordance with the precautionary principle – which is designed to prevent specific adverse effects on the integrity of the sites protected – and in the light of the objective of ensuring wide access to justice as regards actions against environmental decisions, the Court observes that the status of "interested party" recognised to LZ is insufficient to enable its full participation to the administrative procedure and to challenge the legality of the ensuing decision. Therefore, if national law is interpreted in a way that allow a challenge to the decision to deny the status of party to a given administrative procedure to become moot because of the prior conclusion of that procedure, the effective judicial protection of the rights which an environmental organisation derives from Article 6(3) of the Habitats Directive, read in conjunction with Article

6(1)(b) of the Aarhus Convention is not secured.

In conclusion: “*inasmuch as Article 47 of the Charter, read in conjunction with Article 9(2) and (4) of the Aarhus Convention, enshrines the right to effective judicial protection, inconditions ensuring wide access to justice, of the rights which an environmental organisation meeting the conditions laid down in Article 2(5) of that convention derives from EU law, in this instance from Article 6(3) of Directive 92/43, read in conjunction with Article 6(1)(b) of that convention, it must be interpreted as precluding, in a situation such as that at issue in the main proceedings, an interpretation of rules of national procedural law to the effect that an action against a decision refusing such an organisation the status of party to an administrative procedure for authorisation of a project that is to be carried out on a site protected pursuant to that directive does not necessarily have to be examined during the course of that procedure, which may be definitively concluded before a definitive judicial decision on possession of the status of party is adopted, and is automatically dismissed as soon as that project is authorised, thereby requiring that organisation to bring anaction of another type in order to obtain that status and to secure judicial review of compliance by the competent national authorities with their obligations stemming from Article 6(3) of that directive*”.

Relation to the scope of the Charter
Article 47 (1) EU Charter - Right to an effective remedy and to a fair trial – Right to a tribunal

The case clarifies that, when procedural issues not directly governed by EU law are at stake, a situation may nevertheless fall within the scope of the Charter if a right conferred by EU law is at stake in the main proceedings.

In environmental matters the issue is further complicated, on the one hand, by the diffuse nature of the interests protected by the law and, on the other, by the existence of a mixed agreement forming integral part of EU law (the Aarhus Convention) with respect to which is not always easy to draw a line between matters falling within the EU competence and those falling solely within the competence of Member States.

As to the first issue, in the present case, the Court states that whenever EU law requires an assessment of the environmental significance of a project, even outside the EIA Directive, the relevant domestic procedures are subject to the requirements of public participation under Article 6 of the Aarhus Convention as EU law. Indeed, this has the consequence that public?interest environmental NGOs derive a wide array of rights under EU law to which the guarantees of Article 47 of the Charter apply. It is important to stress that not only procedural rights are concerned. Rather, any provisions of national law applying EU environmental law and EU environmental rules with direct effect are to be deemed as conferring "rights" to this purpose.

As to the second issue, the judgment has to be read in the light of the previous judgment in case C-240/09 *Lesoochranárske zoskupenie*, in which the Court had found that, notwithstanding a declaration of competence seemingly excluding the EU competence for the implementation of

Article 9(3) of the Aarhus Convention (which aims at loosening standing criteria in order to widen the enforcement of environmental law through purely public?interest litigation), the matter was nevertheless within the EU competence since the main proceedings regarded a matter (nature conservation) “largely covered” by EU law, hence the Charter shall apply.

Relation between the Charter and EHCR

Article 13 ECHR - Right to an effective remedy

The right to an effective remedy enshrined in Article 47(1) CFR corresponds to Article 13 ECHR. However, in Union law the protection is more extensive because it guarantees that that right is exercised before a court (whereas Article 13 ECHR grants the right to an effective remedy before a “national authority”, which can encompass also nonjudicial authorities).

Insofar as Article 47(1) CFR and Article 13 ECHR overlaps, Article 52(3) CFR requires that the former is interpreted as providing at least the same protection as granted by the latter, taking into account also the case law of the ECtHR. This obligation of parallel interpretation also extends to the issue of limitations: accordingly, any conditions concerning access to a court that is contrary to Article 13 ECHR, as interpreted by the ECtHR, must be regarded as being incompatible also with Article 47(1) CFR. On the contrary, the CJEU may embrace a more restrictive approach towards such conditions, thus granting broader protection to the person concerned.

Article 52(3) CFR indeed allows Union law to provide more extensive protection than that ensuing from the ECHR.

Impact on Legislation / Policy

Impact at the EU level

The judgment is important since it highlights how the combination between EU environmental law and the Aarhus Convention may lead to extensive reliance by environmental NGOs on the right to judicial protection under Article 47 of the Charter in order to promote public interest environmental litigation at the domestic level, thus contributing to enhancing the effectiveness of EU environmental law.

Sources - EU and national law

National Law

- Paragraph 13(2) and 82(3) of *zákon ?. 543/2002 Z.z. o ochrane prírody a krajiny* (Law No 543/2002 on the protection of nature and the landscape)
- Paragraph 14 of the *Správny poriadok* (Code of Administrative Procedure)
- Paragraph 250b(2) and (3) of the *Ob?iansky súdny poriadok* (Code of Civil Procedure)

EU Law

- Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1; 'the Aarhus Convention').

- Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) as amended by Council Directive 2006/105/EC of 20 November 2006 (OJ 2006 L 363/368) ('Directive 92/43');

- Commission Decision 2008/218/EC of 25 January 2008 adopting, pursuant to Directive 92/43, a first updated list of sites of Community importance for the Alpine biogeographical region (OJ 2008 L 77/106).

Sources - CJEU Case Law

C?240/09, *Lesoochranárske zoskupenie*, EU:C:2011:768

Comments

Additional relevant cases of CJEU on access to justice in environmental matters

So far, LZ is the only case in which the Court has explicitly applied Article 47 to environmental NGOs. However, the reasoning of the Court in a previous case, concerning the same NGO, may be of some relevance to fully understand the potential of this provision.

- CJEU, Judgment of 8 March 2011, *Lesoochranárske zoskupenie Lesoochranárske zoskupenie,* Case C-240/09, EU:C:2011:125

VLK ("Zoskupenie") is a Slovak association whose objective is the protection of the environment. It sought judicial review of administrative decisions relating, inter alia, to derogations to the system of protection for certain species such as the brown bear. Having been denied the status of party in those administrative procedures, it had in principle no standing to sue in accordance with domestic law. However, it argued that it had standing on the basis of Article 9(3) of the Aarhus Convention, on the basis of the direct effect, under EU law, of that provision.

Article 9(3) of this Convention provides that Parties to the Convention "shall ensure that, wheret 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".

In those circumstances, the court of final appeal in this case (*Najvyšší súd Slovenskej republiky*) decided to stay the proceedings and refer questions to the Court of Justice, in particular on the direct effect of the said provision of the Aarhus Convention.

Essentially, the CJEU was asked to decide whether Article 9(3) of the Aarhus Convention, which was the relevant conventional provision in the case since the decision at stake was not one coming within the scope of Article 6 of the sad convention, could provide an NGO with standing before a tribunal to enforce EU environmental law.

In order to deal with the question, the Court must firstly decide whether Article 9(3) of the Convention (a mixed agreement) comes under the competence of the Union or that of the Member States. Indeed, in the declaration of competence made upon accession, it was specified that responsibility for the implementation of this provision would lie solely with Member States “ *unless and until the Community (…) adopts provisions of Community law covering the implementation of those obligations” and such provision have not been adopted yet*”.

This notwithstanding the Court concludes that the dispute in the main proceedings falls within the scope of Union law, on the basis of a very loose criterion: an issue is part of Union law – even if it has not yet been the subject of legislation – where that issue is regulated in agreements concluded by the Union and the Member States and it concerns a field in large measure covered by Union law. Since the object of the administrative procedure at stake was a derogation under the Habitats Directive, this is sufficient to establish the competence of the Union.

As regards the direct effect of Article 9(3) of the Aarhus Convention, the Court observes that its provisions do not contain any clear and precise obligations capable of directly regulating the position of individuals. In fact, according to this provision, only members of the public who meet certain criteria laid down by national law are entitled to take part in the proceedings in question. This provision therefore requires the adoption of a subsequent measure for its application. However, the Court points out that the national courts must interpret their national law in accordance with the objectives of this provision to widen access to justice and that of effective judicial protection of the rights conferred by Union law, so as to enable an organisation, such as Zoskupenie, to challenge a decision taken following administrative proceedings liable to be contrary to Union law.

ECtHR cases relevant for access to justice in environmental matters

- Judgment of 26 April 2004, *Gorraiz Lizarraga and others v. Spain*, n. 62543/00, ECHR 2004?III
- Judgment of 29 January 2004, Ta?k?n and others v. Turkey, n. 46117/99, ECHR 2004?X
- Judgment of 26 August 1997, *Balmer-Schafroth and others v. Switzerland*, n. 22110/93, Reports of Judgments and Decisions 1997?IV
- Judgment of 6 April 2000, *Athanassoglou and others v. Switzerland [GC]*, n. 27644/95, ECHR 2000?IV
- Decision of 10 July 2006, *Sdružení Jiho?eské Matky v. Czech Republic*, n. 19101/03, ECHR 2006
- Decision of 29 February 2000, *Association des Amis de SaintRaphaël et de Fréjus v. France*, n. 45053/98, ECHR 2000