2011-08-14

Case Summary posted by the Task Force on Access to Justice

A. Boxus and W. Roua, Nr. 191.950

1. Key issue	Aarhus Convention – Permit ratified by Parliament - Applicability The question arises if the Aarhus Convention and the European Directives to implement the Convention are applicable or not to a permit that is ratified by Parliament given that the definition of "public authority" does not include bodies or institutions "acting in a legislative capacity" (art. 2 (2)). The Council of State refers different questions on the interpretation of the Aarhus Convention and the related European Directives to the ECJ and the Belgian Constitutional Court.
2. Country/Region	Belgium (Walloon Region)
3. Court/body	Council of State
4. Date of judgment /decision	27 March 2009
5. Internal reference	Conseil d'Etat, n° 191.950, 27 mars 2009, A. Boxus et W. Roua
6. Articles of the Aarhus Convention	Art. 2(2) – Art. 9 (2)
7. Key words	Access to Justice – Public Participation – Projects – Permits ratified by Act of Parliament

8. Case summary

A Decree (Act of the Regional Parliament) of 17 July 2008 of the Walloon Region introduces a procedure sui generis whereby at the end – after having first followed the normal administrative procedure, including EIS and public consultation - building permits, environmental permits and combined (building/environmental) permits for a whole series of concrete projects (regional airports, regional train express net, missing links of motorways, ..), that are deemed to be of overriding public interest, are granted by the Parliament and not, as is normally the case, by the competent administrative authorities. Furthermore the Decree of 17 July 2008 ratifies also 13 permits for different projects that were delivered by the competent administrative authorities before. The result of all this is that these permits are (the new ones) or are transformed in (the ratified ones) Decrees, that are Acts of Parliament. They cannot or cannot not longer be challenged before the Council of State. They can only be challenged before the Constitutional Court. As the competence of the Constitutional Court is limited to review the constitutionality of (the substance) of Acts of Parliament, taking into account relevant international of European law, but is not expanding to the (administrative) procedure that has been followed before the adoption of the Decree, nor to the broader "legality" of the act vis à vis (environmental) legislation and regulations, the legal protection offered by the Constitutional Court to interested parties in more limited that that of the Council of State while checking the legality (including procedural legality) of administrative acts, like that is the case with "normal" permits.

In the Boxus and Roua case, these neighbours of Liége Airport demand the annulment of de building permit for the extension of the main runway of the airport. After the case was introduced before the Council of State (on 17 November 2006), this permit was ratified by art. 6 of the Decree of 17 July 2008. The consequence of this is that the Council of State is no longer competent to handle the case. The parties however argue that the Decree violates different provisions of the Belgian Constitution, the Aarhus Convention and European Directives. Given that argumentation the Council of State decides to refer the case both to the Constitutional Court (see case M. -N. Solvay c.s. v. Walloon Region) and the ECJ. The questions put to the Constitutional Court are dealing with the validity of the Decree in the light of Art. 10,11 en 23 of the Constitution, combined with provisions of the Aarhus Convention, the ECHR and various European Directives and with the observance of the repartition of competences between the region and the federation.

The following questions were referred for a preliminary ruling by the ECJ (case C-128/09 Boxus and Roua)

“1. Can Article 1(5) of Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment 1 be interpreted as excluding from its application legislation - such as the Decree of the Walloon Region on certain consents for which there are overriding reasons in the general interest of 17 July 2008 - which merely states that 'overriding reasons in the general interest have been established' for the grant of town planning consents, environmental consents and combined town planning and environmental consents relating to the acts and works listed therein and which 'ratifies' consents in respect of which it is stated that 'overriding reasons in the general interest have been established'?

2. (a) Do Articles 1, 5, 6, 7, 8 and 10a of Directive 85/337/EEC, as amended by Council Directive No 97/11/EC 2 and Directive No 2003/35/EC 3 of the European Parliament and of the Council, preclude a legal regime in which the right to implement a project subject to an environmental impact assessment is conferred by a legislative act against which no review procedure is available before a court of law or another independent and impartial body established by law which makes it possible to challenge, both in terms of the substance and the procedure followed, the decision granting the right to implement the project?

(b) Must Article 9 of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters, concluded on 25 June 1998 and approved by the European Community by Council Decision 2005/370/EC of 17 February 2005, 4 be interpreted as requiring the Member States to provide for the possibility of seeking a review before a court of law or another independent and impartial body established by law in order to be able to challenge the legality, in relation to any issue of substance or procedure relating to the substantive or procedural rules governing the authorisation of projects subject to an impact assessment, of decisions, acts or omissions subject to the provisions of Article 6?

(c) In the light of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters, concluded on 25 June 1998 and approved by the European Community by Council Decision 2005/370/EC of 17 February 2005, must Article 10a of Directive 85/337/EEC, as amended by Directive 2003/35/EC, be interpreted as requiring the Member States to provide for the possibility of seeking a review before a court of law or another independent and impartial body established by law in order to be able to challenge the legality of decisions, acts or omissions in relation to any issue of substance or procedure relating to the substantive or procedural rules governing the authorisation of projects subject to an impact assessment?”

Later on, the Council of State referred the same questions in 5 other cases. These cases were joined both by the Constitutional Court (see case M. -N. Solvay c.s. v. Walloon Region) and the ECJ.

9. Link address	**Council of State** http://www.raadvst-consetat.be/Arrets/191000/900/191950.pdf **Court of Justice of the European Union:** http://www.curia.europa.eu/ - Case C-128/09 Boxus and Roua Joined Cases C-128/09, C—129/09, C-130/09, C-131/09, C-134/09 and C-135/09 See the Opinion of Advocate General Sharpston delivered on 19 May 2011 in Joined Cases C‑128/09, C‑129/09, C‑130/09, C‑131/09, C‑134/09 and C‑135/09 (Antoine Boxus and Willy Roua (Case C‑128/09), Guido Durlet and Others (Case C‑129/09), Paul Fastrez and Henriette Fastrez (Case C‑130/09), Philippe Daras and Bernard Croiselet (Case C‑131/09), Association des Riverains et Habitants des Communes Proches de l'Aéroport B.S.C.A. (Brussels South Charleroi Airport) ASBL – A.R.A.Ch and Bernard Page (Case C‑134/09), Association des Riverains et Habitants des Communes Proches de l'Aéroport B.S.C.A. (Brussels South Charleroi Airport) ASBL ‑ A.R.A.Ch, Léon L'Hoir and Nadine Dartois (Case C‑135/09) v Région wallonne)