Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

18 July 2013 *

(Public access to environmental information — Directive 2003/4/EC — Power of the Member States to exclude bodies acting in a legislative capacity from the definition of 'public authority' under that directive — Limits)

In Case C-515/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Berlin (Germany), made by decision of 22 September 2011, received at the Court on 3 October 2011, in the proceedings

Deutsche Umwelthilfe eV

v

Bundesrepublik Deutschland,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, G. Arestis, J.-C. Bonichot (Rapporteur), A. Arabadjiev and J. L. da Cruz Vilaça, Judges,

Advocate General: E. Sharpston,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 17 January 2013,

after considering the observations submitted on behalf of:

— Deutsche Umwelthilfe eV, by R. Klinger, Rechtsanwalt,

— the German Government, by T. Henze and A. Wiedmann, acting as Agents,

— the European Commission, by P. Oliver and D. Düsterhaus, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 March 2013,

gives the following

* Language of the case: German.

Judgment

1 This request for a preliminary ruling concerns the interpretation of the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 41, p. 26).

2 The request has been made in proceedings between Deutsche Umwelthilfe eV and the Bundesrepublik Deutschland concerning the former's request for access to information held by the Bundesministerium für Wirtschaft und Technologie (Ministry of Economic Affairs and Technology) in the Ministry's correspondence with representatives of the German automotive industry during the consultation which preceded the adoption of legislation on energy consumption labelling.

Legal context

The Aarhus Convention

3 Article 2(2) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters 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') defines the term 'public authority' as follows:

'(a) government at national, regional and other level;

…

This definition does not include bodies or institutions acting in a judicial or legislative capacity.'

4 Article 4 of the Aarhus Convention provides that, subject to a number of reservations and conditions, each party is to ensure that public authorities, in response to a request for environmental information, make such information available to the public, within the framework of their national legislation.

5 Article 8 of the Aarhus Convention, headed 'Public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments', stipulates the following:

'Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment …

…'

European Union law

6 The Declaration by the European Community concerning certain specific provisions under Directive 2003/4, appearing in the annex to Decision 2005/370, states:

'In relation to Article 9 of the Aarhus Convention, the European Community invites Parties to the Convention to take note of Article 2(2) and Article 6 of Directive [2003/4]. These provisions give Member States of the [European Union] the possibility, in exceptional cases and under strictly specified conditions, to exclude certain institutions and bodies from the rules on review procedures in relation to decisions on requests for information.

…’

7 Recitals 1, 5, 11 and 16 in the preamble to Directive 2003/4 state:

‘(1) Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.

…

(5) … Provisions of Community law must be consistent with [the Aarhus Convention] with a view to its conclusion by the European Community.

…

(11) To take account of the principle in Article 6 of the Treaty, that environmental protection requirements should be integrated into the definition and implementation of Community policies and activities, the definition of public authorities should be expanded so as to encompass government or other public administration at national, regional or local level whether or not they have specific responsibilities for the environment. The definition should likewise be expanded to include other persons or bodies performing public administrative functions in relation to the environment under national law, as well as other persons or bodies acting under their control and having public responsibilities or functions in relation to the environment.

…

(16) The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases. …’

8 The first subparagraph of Article 2(2) of Directive 2003/4 defines the term ‘public authority’ as follows:

‘“public authority” shall mean:

(a) government or other public administration, including public advisory bodies, at national, regional or local level;

…’

9 The first sentence of the second subparagraph of Article 2(2) of Directive 2003/4 provides:

‘Member States may provide that this definition shall not include bodies or institutions when acting in a … legislative capacity. …’

German law

10 Article 80 of the Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland) provides:

'(1) The Federal Government, a Federal Minister or the Land governments may be authorised by a law to issue statutory instruments. The content, purpose and scope of the authority conferred shall be specified in the law. Each statutory instrument shall contain a statement of its legal basis. If the law provides that such authority may be further delegated, such sub-delegation shall be effected by statutory instrument.

(2) Unless a federal law otherwise provides, the consent of the Bundesrat shall be required for statutory instruments issued by the Federal Government or a Federal Minister … issued pursuant to federal laws that require the consent of the Bundesrat or that are executed by the Länder on federal commission or in their own right.

(3) The Bundesrat may submit to the Federal Government drafts of statutory instruments that require its consent.

(4) In so far as Land governments are authorised by or pursuant to federal laws to issue statutory instruments, the Länder shall also be entitled to regulate the matter by a law.'

11 Paragraph 2(1) of the Law on environmental information (Umweltinformationsgesetz) of 22 December 2004 (BGBl. 2004 I, p. 3704), which implemented Directive 2003/4 in German law, provides:

'The authorities required to provide information are:

1. the government and other public administrative bodies … The following shall not be required to provide information:

(a) the highest Federal authorities, when acting in the framework of the legislative process or in the adoption of regulations …'

12 Paragraph 1 of the Law on energy consumption labelling (Energieverbrauchskennzeichnungsgesetz) of 30 January 2002 (BGBl. 2002 I, p. 570), in the version applicable to the main proceedings, authorises the Bundesministerium für Wirtschaft und Technologie to issue regulatory acts in the following terms:

'(1) In order to reduce the consumption of energy and other important resources, to reduce CO_2 emissions and to provide the consumer with information in that regard, the Bundesministerium für Wirtschaft und Technologie can, by regulatory means and with the consent of the Bundesrat:

1. make it compulsory for equipment and components of equipment, and for motor vehicles to display information on the consumption of energy and other important resources, and on CO_2 emissions, and to display additional information (labelling);

2. lay down permitted thresholds for the energy consumption of appliances (consumption thresholds);

…

(3) The executive regulations referred to in paragraphs 1 and 2 may be applied in particular to:

1. the intended types of appliances and motor vehicles;

…

3. as regards motor vehicles, the content and form of the labelling such as:

…

4. the applicable measurement standards and procedures;

5. the designation and the powers of the competent authorities;

…'

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 Deutsche Umwelthilfe eV is an environmental and consumer protection association.

14 By decision of 27 October 2010, the Bundesministerium für Wirtschaft und Technologie refused to grant that association's request for disclosure of information contained in correspondence between the Ministry and representatives of the German automotive industry during the consultation which preceded the adoption of legislation on energy consumption labelling. The Ministry relied on the provision of the Law on environmental information of 22 December 2004 which exempts public authorities from the requirement to provide environmental information where they are engaged in the preparation of a regulatory instrument.

15 An action for annulment of that refusal having been brought before it, the referring court is uncertain whether that law is compatible with Directive 2003/4, and in particular it raises the question of whether the first sentence of the second subparagraph of Article 2(2) of the directive, which refers to public authorities acting in a legislative capacity, can be applied to public authorities when they are preparing and adopting a regulatory instrument such as the one at issue in the main proceedings.

16 Should that be the case, the referring court is uncertain whether that exception can still operate once the process of preparing the act in question has been completed.

17 In those circumstances, the Verwaltungsgericht, Berlin decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the [first sentence of the second subparagraph of Article 2(2) of Directive 2003/4/EC] to be interpreted as meaning that bodies and institutions are acting in a legislative capacity when their activities relate to legislation by the executive on the basis of authorisation given by a law enacted by parliament?

(2) If Question 1 is to be answered in the affirmative, are such bodies and institutions permanently excluded from the term "public authority", or only until completion of the legislative process?'

Consideration of the questions referred

The first question

18 By its first question the referring court asks, in essence, whether the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4 must be interpreted as meaning that the option given to Member States by that provision of not regarding 'bodies or institutions acting in a … legislative

capacity' as public authorities, required to allow access to the environmental information which they hold, may be applied to ministries when they prepare and adopt normative regulations under enabling legislation.

19 As a preliminary point, it should be noted that the Court has held that this provision can apply to ministries to the extent that they participate in the legislative process *stricto sensu*. However, the Court has not ruled on whether the same provision could also apply to ministries when they participate in a process that could lead to a norm of a lower rank than a law (Case C-204/09 *Flachglas Torgau* [2012] ECR, paragraphs 34 and 51).

20 In that regard, it must be stated that it is for the referring court to assess whether that is the case for the norms at issue in the main proceedings.

21 In order to determine whether the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4 also refers to ministries when they participate in a process that could lead to a norm of a lower rank than a law, it must be recalled that, according to settled case-law, the need for the uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the purpose of the legislation in question (see *Flachglas Torgau*, paragraph 37).

22 Moreover, the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4, which permits Member States to derogate from the general rules laid down by that directive, may not be interpreted in such a way as to extend its effects beyond what is necessary to safeguard the interests which it seeks to secure, and the scope of the derogations which it lays down must be determined in the light of the aims pursued by the directive (see *Flachglas Torgau*, paragraph 38).

23 In that regard, it is clear from paragraph 43 of *Flachglas Torgau* that the purpose of the exception provided for in the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4 is to allow Member States to lay down appropriate rules to ensure that the process for the adoption of legislation runs smoothly, taking into account the fact that, in the various Member States, the provision of information to citizens is, usually, adequately ensured in the legislative process.

24 The Court has also stated that, having regard to the differences that could exist between the legislative procedures in Member States, a functional interpretation of the term 'bodies or institutions acting in a legislative capacity' is justified by the need to ensure a uniform application of Directive 2003/4 in those States (*Flachglas Torgau*, paragraph 50).

25 The Court concluded from this that it is necessary to adopt a functional interpretation of the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4, according to which the option provided for under that provision may be applied to ministries to the extent that they participate in the legislative process (*Flachglas Torgau*, paragraph 51).

26 None the less, the reasons behind the Court's adoption of such an interpretation cannot a priori justify a broad interpretation of the term 'legislative capacity' under which the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4 is taken to refer to all procedures for the preparation of general abstract norms, including those of a lower rank than a law.

27 Indeed, whereas the question referred in *Flachglas Torgau* concerned the identification of bodies and institutions acting within the context of a procedure the legislative nature of which was not at issue, the case in the main proceedings specifically concerns the separate question of whether other procedures are potentially covered by the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4.

28 Consequently, it is clear that both the wording of the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4 and the aim pursued by the Aarhus Convention and by that directive of guaranteeing the right of access to environmental information held by public authorities and ensuring that, as a matter of course, the information is progressively made available and disseminated to the public (*Flachglas Torgau*, paragraph 39) lead to the adoption of a narrow interpretation, according to which only those procedures that could result in the adoption of a law or a norm of an equivalent rank are covered by the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4.

29 Indeed, it is the specific nature of the legislative process and its particular characteristics that justify the special rules relating to acts adopted by bodies acting in a legislative capacity in connection with the right to information, as provided for both by the Aarhus Convention and Directive 2003/4.

30 It follows that the nature of the act in question, and in particular the fact that it concerns an act of general application, is not, in itself, capable of exempting a body which adopts that act from the obligations to provide information under that directive.

31 As regards the aims of the directive, only the smooth running of the process for the adoption of legislation and the particular characteristics of the legislative process which ensure that the public is usually adequately informed justify the fact that those bodies acting in a legislative capacity or participating in the legislative process should be exempt from the obligations to provide information imposed by that directive.

32 That interpretation is supported by the wording and the scheme of the Aarhus Convention, in the light of which Directive 2003/4 must be interpreted (see, by analogy, Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* [2011] ECR I-3673, paragraph 41).

33 The Aarhus Convention distinguishes between the rules for legislative acts and those for regulatory acts. Thus, while the second sentence of Article 2(2) of that convention allows Party States to refuse access to documents held by the public authorities acting in a 'legislative capacity', Article 8 thereof, by contrast, requires them to promote effective public participation during the 'preparation of executive regulations'.

34 That limitation on the power to derogate provided for by the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4 applies, however, without prejudice to the right of the institution or body concerned to refuse to disclose environmental information for other reasons, and in particular to rely, if appropriate, on one of the exceptions laid down in Article 4 of that directive.

35 In the absence of any specific provision of European Union law with regard to what falls within the scope of a law or norm of equivalent rank for the purposes of applying the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4, it should also be added that that assessment is subject to the law of the Member States, provided that the effectiveness of the directive is not undermined.

36 Consequently, the answer to the first question is that the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4 must be interpreted as meaning that the option given to Member States by that provision of not regarding 'bodies or institutions acting in a … legislative capacity' as public authorities, required to allow access to the environmental information which they hold, may not be applied to ministries when they prepare and adopt normative regulations which are of a lower rank than a law.

The second question

37 Given the answer to the first question, there is no need to answer the second question.

Costs

38 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

The first sentence of the second subparagraph of Article 2(2) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC must be interpreted as meaning that the option given to Member States by that provision of not regarding 'bodies or institutions acting in a … legislative capacity' as public authorities, required to allow access to the environmental information which they hold, may not be applied to ministries when they prepare and adopt normative regulations which are of a lower rank than a law.

[Signatures]