Access to justice falling outside of the scope of EIA, IPPC/IED, access to information and ELD

1.1. Decisions, acts or omissions concerning specific activities falling within the scope of EU environmental legislation outside the scope of the EIA and IED Directives[1]

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the procedures for adopting the decision, act or omission and its content (in particular, the conditions to be fulfilled and any time-limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

It should first be noted that the distinction made by the model questionnaire has little reality in French law, which was constructed prior to the adoption of the Environmental Impact Assessment Directive. The environmental impact assessment initially constituted a procedural document complementary to the administrative police mechanism of prior authorisation, the primary mechanism for implementing the prevention principle.

In environmental matters, French legislation that is not covered by European EIA and IED legislation is therefore still covered by the same substantive and litigation rules. They result from the same instruments developed before the implementation of these two European directives, whether in the field of water, nature protection or risks.

The applicable rules are therefore the same as those described above (see section 1.4).

The level of effectiveness of access to national courts is rather satisfactory with regard to the requirements of the case law of the CJEU.

However, some difficulties remain in practice:

- As mentioned above, one of the main limits of judicial review regarding procedural defects is the theory of substantial requirements. According to Conseil d'Etat case law, a defect affecting the conduct of a prior administrative procedure is liable to render the decision taken unlawful only if that defect was capable of influencing the meaning of the decision taken or deprived the persons concerned of a guarantee[2]. This theory is notably applied to environmental impact assessment and public participation procedures[3]. Such case law may be considered to be contrary to the CJEU decision *Commission vs Germany* of 15 October 2015[4] (paragraphs 55-57). However, the judge makes an *in concreto* assessment as to whether the defect may have had the effect of prejudicing the information to the population concerned by the operation or whether it was such as to influence the results of the investigation and, consequently, the decision of the administrative authority[5]. With regard to public inquiries, the Conseil d'Etat ruled that the absence of mention, in the order opening the public inquiry and in the notice of inquiry, of the presence of an impact study in the file was not likely, in the absence of other circumstances, to hinder effective public participation in the inquiry and thus to deprive the public of a guarantee or to influence the results of the inquiry[6]. The Conseil d'Etat also ruled that by signing a ministerial order that was challenged the day after the public consultation closed, without respecting the minimum four-day period set by Article L. 123-19-1 of Environmental Code and without a summary of the observations and proposals gathered during the consultation having been drawn up, the author of the order could not be regarded as having taken into consideration all the comments expressed by the public. Consequently, the contested order was issued after an irregular procedure. This procedural irregularity, which deprived the persons who participated in the consultation of the guarantee that their opinion would be duly taken into account with regard to a decision having a direct and significant impact on the environment, renders the decision unlawful[7].

- Injunctive relief procedures are often ineffective in practice. It is very rare to obtain the suspension of an administrative act in the environmental field. A systematic review of case law would be necessary to understand why the “référé suspension” procedures are not working as it should, whereas it exists specific provisions in environmental matters.
- It is rare for the administrative judge to agree to refer a question to the Court of Justice of the European Union for a preliminary ruling on environmental matters.
- CJEU case law is very often produced in support of NGO appeals. While the case law of the CJEU prevails before the judge, it often struggles to be properly implemented in regulatory administrative acts until it has been "translated" into a national court decision.

2) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

The applicable rules are the same as those described above. They cover both procedural and substantive legality.

3) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

All applicable environmental rules have been described above. There is however a specificity regarding appeals challenging decisions to oppose a prior declaration in the field of water. When the petitioner wishes to contest the opposition to a prior declaration, he must obligatorily refer the matter to the prefect, before any referral to the administrative judge[8].

4) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure – to make comments, participate at hearing, etc.?

Legally, it is never necessary to participate in the public consultation phase of the administrative procedure in order to have standing.

In practice, however, the development of a legal argument during the public consultation phase obliges the author of the decision to respond to it and may therefore constitute essential elements for discussions during the litigation phase. The judge will take a positive view if an applicant has previously developed his claims in the participation phase. This shows that he has applied to the judge as a last resort and that he has made good use of the prior democratic procedures available to him.

5) Are there some grounds/arguments precluded from the judicial review phase?

The applicable rules are the same as those described above (section 1.2.4)).

Certain pleas which have not been raised by the applicants may be raised *ex officio* by the judge.

6) Fair, equitable - what meaning is given to equality of arms in the national jurisdiction?

There are no specific provisions on equality of arms. Equality of arms is essentially ensured by the application of the principle of adversarial proceedings before the courts.

7) How is the notion of “timely” implemented by the national legislation?

There are no specific provisions on the speed of procedures.

8) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

All applicable environmental procedures have been described above (section 1.7.2. 6)). There are no more specificities.

9) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive, and do these include express statutory reference to a requirement that costs should not be prohibitive?

The applicable rules are the same as those described above (section 1.7.3). There is no statutory reference to a

requirement that costs should not be prohibitive.

In addition, if one loses a case, there is a fairly low risk of being fined. In fact, under Article R. 741-12 of the Code of Administrative Justice, “the judge may impose a fine of up to 10,000 euros on the author of an application which he considers to be abusive”. However, the application of this provision is quite rare in environmental matters.

1.2. Decisions, acts or omissions concerning the administrative procedures to be followed to comply with national implementing legislation for the Strategic Environmental Assessment (SEA) Directive 2001/42/EC[9]

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the procedures for adopting the decision, act or omission (in particular, the conditions to be fulfilled and any time limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

Rules on standing for both individuals and NGOs are the same as those described above (section 1.4. 3)).

The screening decision regarding plans and programmes can be challenged by the petitioner. However, under Article R. 122-18 of the Environmental Code, such judicial appeal against the screening decision must obligatorily be preceded by an administrative appeal (“RAPO” i.e. “recours administratif préalable obligatoire”).

It cannot be challenged by the public or by an NGO. The Conseil d’Etat decided that a decision to exempt a plan from SEA is not directly challengeable[10]. Anyway, the decision to exempt a project from SEA can be contested when challenging the final plan.

Remarks regarding the effectiveness of the level of access to national courts in light of the CJEU case law are the same than previously provided.

2) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

The scope of the administrative review and the judicial review is the same as for EIA. This covers both procedural and substantive legality.

3) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

There is no requirement for exhaustion of administrative review procedures prior to recourse to judicial review procedures. The only exception is under Article R. 122-18 of the Environmental Code, which requires the petitioner to seek an administrative remedy before challenging the decision to submit its plan or program to SEA.

4) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure – to make comments, participate at hearing, etc.?

It is not necessary to participate in the public consultation phase of the administrative procedure in order to have standing.

In practice, however, the development of a legal argument during the public consultation phase obliges the author of the decision to respond to it and may therefore constitute essential elements for discussions during the litigation phase. The judge will take a positive view if an applicant has previously developed his claims in the participation phase. This shows that he has applied to the judge as a last resort and that he has made good use of the prior democratic procedures available to him.

5) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

As mentioned previously, several procedures can lead to orders on interim measures (section 1.7.2. 6)).

Inparticular, the “référé-suspension” procedure can be used, after having filed an appeal, in order to obtain a suspension of the administrative decision, pending the judge's decision on the merits. Two conditions must be met to obtain a suspension of the administrative decision: in case of urgency and if there is, at the stage of the investigation, a serious doubt as to the legality of the decision[11]. The suspension of the administrative decision shall end at the latest when the judge renders a decision on the merits. These decisions in summary proceedings may be appealed to the Conseil d’Etat within 15 days. Then the Conseil d'Etat decides within 48 hours.

Under Article L. 122-11 of the Environmental Code, there is a special kind of “référé-suspension” procedure for strategic environmental assessments. In fact, where an administrative decision has been adopted without a strategic environmental assessment when it should have been preceded by such an assessment, the court will find that there was no environmental impact assessment and suspend the administrative decision without requiring the condition of emergency [12].

Article L. 414-4 IX of the Environmental Code brings Natura 2000 impact assessments within the scope of Article L. 122-11 and allows the suspension of an administrative decision relating to a project that may significantly affect the conservation objectives of a Natura 2000 site without an assessment of these impacts. The same provisions apply in the event of a decision taken without a public inquiry when such an inquiry was required, or in the event of an unfavourable opinion from the investigating commissioner[13].

6) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive and do these include express statutory reference to a requirement that costs should not be prohibitive?

Those rules are the same as described above (see section 1.7.3). There is no statutory reference to a requirement that costs should not be prohibitive.

In addition, if one loses a case, there is a fairly low risk of being fined. In fact, under Article R. 741-12 of the Code of Administrative Justice, “the judge may impose a fine of up to 10,000 euros on the author of an application which he considers to be abusive”. However, the application of this provision is quite rare in environmental matters.

1.3. Decisions, acts or omissions concerning the administrative procedures to be followed to comply with the public participation requirements of Article 7 of the Aarhus Convention in respect of plans and programmes not submitted to the procedures set out in the Strategic Environmental Assessment (SEA) Directive 2001/42/EC[14]

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the procedures for adopting the decision, act or omission (in particular, the conditions to be fulfilled and any time limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

Rules on standing for both individuals and NGOs are the same as those described above (see section 1.4 1) and 3)).

2) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

The scope of the administrative review and the judicial review is the same as described above (sections 1.2 4) and 1.8.1 5)). This invocation of pleas includes pleas of external legality (incompetence or defect in form and procedure) and pleas of internal legality (violation of the law or misuse of power or procedure).

3) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

There is no requirement for exhaustion of administrative review procedures.

4) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure – to make comments, participate at hearing, etc.?

It is not necessary to participate in the public consultation phase in order to have standing.

In practice, however, the development of a legal argument during the public consultation phase obliges the author of the decision to respond to it and may therefore constitute essential elements for discussions during the litigation phase. The judge will take a positive view if an applicant has previously developed his claims in the participation phase. This shows that he has applied to the judge as a last resort and that he has made good use of the prior democratic procedures available to him.

5) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

The “référé-suspension” procedure can be used, after having filed an appeal, in order to obtain a suspension of the administrative decision, pending the judge's decision on the merits (see also section 1.7.2. 6)). Two conditions must be met to obtain a suspension of the administrative decision: in case of urgency and if there is, at the stage of the investigation, a serious doubt as to the legality of the decision[15]. The suspension of the administrative decision shall end at the latest when the judge renders a decision on the merits. These decisions in summary proceedings may be appealed to the Conseil d’Etat within 15 days. Then the Conseil d'Etat decides within 48 hours.

6) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive and do these include express statutory reference to a requirement that costs should not be prohibitive?

Those rules are the same as described above (section 1.7.3). There is no statutory reference to a requirement that costs should not be prohibitive.

In addition, if one loses a case, there is a fairly low risk of being fined. In fact, under Article R. 741-12 of the Code of Administrative Justice, “the judge may impose a fine of up to 10,000 euros on the author of an application which he considers to be abusive”. However, the application of this provision is quite rare in environmental matters.

1.4. Decisions, acts or omissions also concerning plans and programmes required to be prepared under EU environmental legislation[16]

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the content of the plan (in particular, the conditions to be fulfilled and any time limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

Rules on standing for both individuals and NGOs are the same as those described above (sections 1.4 1) and 3)).

Remarks concerning the effectiveness in the light of the CJEU case law are the same as those described above (section 2.1 1)).

2) Does the form in which the plan or programme is adopted make a difference in terms of legal standing (see also Section 2.5 below)?

The plans are usually adopted by means of a regulatory administrative act. In this case, rules are the same as described above (section 1.4 3)) and legal standing is assessed in a flexible way.

In this section, we therefore focus on regulatory administrative acts.

3) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

The scope of the administrative review and the judicial review is the same as described above (sections 1.2 4)). This covers both procedural and substantive defects.

4) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

There is no requirement for exhaustion of administrative review procedures.

5) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure – to make comments, participate at hearing, etc.?

It is not necessary to participate in the public consultation phase in order to have standing.

In practice, however, the development of a legal argument during the public consultation phase obliges the author of the decision to respond to it and may therefore constitute essential elements for discussions during the litigation phase. The judge will take a positive view if an applicant has previously developed his claims in the participation phase. This shows that he has applied to the judge as a last resort and that he has made good use of the prior democratic procedures available to him.

6) Are there some grounds/arguments precluded from the judicial review phase?

There are no specific grounds precluded from judicial review, compared to other areas (see section 1.2.4)).

7) Fair, equitable - what meaning is given to equality of arms in the national jurisdiction?

There are no specific provisions on equality of arms. Equality of arms is essentially ensured by the application of the principle of adversarial proceedings before the courts.

8) How is the notion of “timely” implemented by the national legislation?

There are no specific provisions on the speed of procedures.

9) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

In particular, the “référé-suspension” procedure can be used, after having filed an appeal, in order to obtain a suspension of the administrative decision, pending the judge's decision on the merits (see also section 1.7.2. 6)). Two conditions must be met to obtain a suspension of the administrative decision: in case of urgency and if there is, at the stage of the investigation, a serious doubt as to the legality of the decision[17]. The suspension of the administrative decision shall end at the latest when the judge renders a decision on the merits. These decisions in summary proceedings may be appealed to the Conseil d’Etat within 15 days. Then the Conseil d'Etat decides within 48 hours.

In the event that the plan was submitted to SEA, there is a special kind of “référé-suspension” procedure. In fact, where an administrative decision has been adopted without a strategic environmental assessment when it should have been preceded by such an assessment, the court will find that there was no environmental impact assessment and suspend the administrative decision[18].

10) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive and do these include express statutory reference to a requirement that costs should not be prohibitive?

Those rules are the same as described above (section 1.7.3). There is no statutory reference to a requirement that costs should not be prohibitive.

In addition, if one loses a case, there is a fairly low risk of being fined. In fact, under Article R. 741-12 of the Code of Administrative Justice, “the judge may impose a fine of up to 10,000 euros on the author of an application which he considers to be abusive”. However, the application of this provision is quite rare in environmental matters.

1.5. Executive regulations and/or generally applicable legally binding

normative instruments used to implement EU environmental legislation and related EU regulatory acts[19]

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the procedure for adopting or the content of the decision, act or omission of the national regulatory act (in particular, the conditions to be fulfilled and any time limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

In this section, it is important to distinguish parliamentary legislative acts from government decrees:

- Regarding parliamentary legislative acts transposing European Union law: it is not possible to directly challenge the legal validity of a legislative act before a judge. However, this is possible in a trial. If the outcome of the dispute depends on it, it is then possible either to challenge the validity of a legislative act in relation to European Union law (“exception d’inconventionnalité”) or to submit a priority question of constitutionality (QPC). The conditions of admissibility are those of the main appeal (section 1.4 3)). Concerning the QPCs, there are specific conditions for obtaining the transmission of this question to the Conseil constitutionnel (section 1.3 5)).
- Regarding government decrees, they are challenged directly before the Conseil d’Etat. Access to the judge is widely accepted. All those who have an interest in maintaining or annulling the contested decision may intervene[20]. Associative approval under the Environmental Code will make admissibility easier but is not an indispensable prerequisite. This type of appeal is not subject to the obligation to have recourse to an “avocat”.

Regarding actions for failure to act, i.e. in the absence of a government decree, the rules on admissibility of access to the courts require the existence of a prior administrative decision. If there is no administrative decision, it is up to the applicant to submit a prior request to the Government. The reply or the absence of a reply will constitute the prior decision that can be challenged before the Conseil d’Etat. This decision may be challenged under the same conditions as a decree.

The legality of a decree may also be raised by way of exception before the judges of first instance in the context of litigation against individual or regulatory decisions taken by local administrative authorities on their basis. The classic rules of admissibility set out above apply.

2) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

- Regarding parliamentary legislative acts transposing European Union law, the control exercised through the exception of unconventionality (“exception d’inconventionnalité”) does not relate to the procedure of adoption of the law by the Parliament. It relates only to the substance. The judge examines the compatibility of the law with European Union law (Article 267 of the Treaty on the Functioning of the European Union).
- The grounds raised directly or by way of exception against a government decree cover both procedural and substantive legality (see also section1.2.4)). Grounds of “public order” may be raised *ex officio* by the judge. The administrative lawsuit conforms to the idea that the litigation debate must be "without traps and without surprise" for the parties. The grounds of public order, i.e. pleas raised of their own motion, are obligatorily communicated to the parties if they are raised by the judge.

The judge's role can be relatively varied and can become very technical in environmental matters. For example, the Conseil d'Etat was led to rule on the implementation of the Habitats Directive by examining the legality and conformity of the Decree establishing the list of protected animal species. Here it checks the proportionality of the rules for the protection of species enacted, which cannot legally consist of a general and absolute prohibition on modifying a natural habitat and must on the contrary be adapted to the needs that the protection of these species imposes in certain places[21].

3) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

There is no requirement for exhaustion of administrative review procedures.

4) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure – to make comments, participate at hearing, etc.?

It is not necessary to participate in the public consultation phase in order to have standing.

In practice, however, the development of a legal argument during the public consultation phase obliges the author of the decision to respond to it and may therefore constitute essential elements for discussions during the litigation phase. The judge will take a positive view if an applicant has previously developed his claims in the participation phase. This shows that he has applied to the judge as a last resort and that he has made good use of the prior democratic procedures available to him.

5) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

- Regarding parliamentary legislative acts transposing European Union law, there is no procedure for obtaining a suspension of the application of a parliamentary legislative act. In the context of an exception of unconventionality, the legislative provision contrary to European Union law is not annulled. Its application is simply set aside in the course of the proceedings. Finally, the judge does not have a power of injunction vis-à-vis the legislature. He cannot order the legislature to amend a legislative act. In the context of a priority constitutionality question, the constitutional judge may annul a legislative provision or postpones the effects in time of a declaration of unconstitutionality in order to give the legislator the option to remedy the unconstitutionality found[22].
- Regarding government decrees, the “référé suspension” procedure described above can be used to obtain a suspension of this act.

Other types of injunction may result from the action for annulment brought against the decree. In the context of an appeal against a government decree, the judge has the possibility to modulate in time the effects of his annulment decision[23]. The effects of the jurisdictional decision may lead either to the immediate annulment of the disputed decree, or to the modulation in time of the effects of the recognition of its illegality, or to an injunction to supplement the regulatory provisions recognised as illegal. However, the modulation decision does not apply to contentious actions initiated on the date of the reading of the decision which deeply respects vested rights as much as the exercise of the right of remedy[24] and the Conseil d'Etat may not modulate in time the effects of a contentious annulment if the Court of Justice of the European Union has refused to vary the effects of its reply to a preliminary question from the Conseil d'Etat[25].

French environmental NGOs are increasingly using the method called "en tant que ne pas" to challenge the provisions of a ministerial order or a decree in order to ask the judge to enjoin the government to restore the legality of the challenged regulatory provisions.

For example, in a case of litigation against the conditions of placing on the market and use of pesticides, the NGOs requested and obtained, on the basis of Articles L. 911-1 et seq. of the Code of Administrative Justice, that the judge issue an injunction to supplement the provisions of the disputed order within a period of 6 months[26].

The most emblematic example is the "list of estuarine municipalities" needed for the application of the law on the protection of the coastline[27]. The national federation *France Nature Environnement* challenged before the Conseil d’Etat the Prime Minister's implicit refusal to implement a provision of the coastal legislative act protecting certain sectors located in estuarine municipalities. As these provisions were conditional on the publication by decree of the list of *communes* located in the estuary zones, they were inoperative as long as the decree was not issued. Noting the illegality of the lack of intervention of this decree more than ten years after the intervention of the coastal legislative act, the Conseil d’Etat enjoined the State to publish the decree specifying the list of estuarine municipalities within 6 months on penalty of € 15 per day of delay.

More recently, the Conseil d'Etat enjoined the Minister of Ecology to complete the regulatory provisions for combating light pollution within nine months and subject to a fine of € 500 for each day of delay[28].

6) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive and do

these include express statutory reference to a requirement that costs should not be prohibitive?

Those rules are the same as described above (section 1.7.3). There is no statutory reference to a requirement that costs should not be prohibitive.

In addition, if one loses a case, there is a fairly low risk of being fined. In fact, under Article R. 741-12 of the Code of Administrative Justice, “the judge may impose a fine of up to 10,000 euros on the author of an application which he considers to be abusive”. However, the application of this provision is quite rare in environmental matters.

7) Is it possible to bring a legal challenge before a national court concerning any related EU regulatory act with a view to a validity reference under Article 267 TFEU, and if so how[29]?

Pursuant to Article 267 of the Treaty on the Functioning of the European Union, French courts may request the Court of Justice of the European Union to give a ruling on the validity of EU acts.

The request for a preliminary ruling may be raised by the applicant in his written submissions.

In the event of serious difficulties concerning the assessment of the validity of an act of European Union law, it is for the Conseil d'Etat to stay proceedings and refer a question to the Court of Justice of the European Union for a preliminary ruling. However, this is not an obligation, but merely an option in the case of the lower courts.

With regard to the application for an assessment of validity, the Conseil d’Etat considers that it is required to refer only in cases where the validity of the act is questionable and "having regard to the serious nature of the challenge raised"[30].

To our knowledge, in the field of the environment, the Conseil d’Etat has on only three occasions referred a preliminary ruling for an assessment of validity[31].

[1] This category of case reflects recent case-law of the CJEU such as Protect C-664/15, the Slovak brown bear case C-240/09, see as described under the Commission Notice C/2017/2616 on access to justice in environmental matters.

[2] Conseil d’Etat, 23 décembre 2011, *Danthony*, n° 335033: “if administrative acts must be taken in accordance with the forms and procedures laid down by legislative acts and regulations, a defect affecting the conduct of a prior administrative procedure, whether mandatory or optional, is such as to render the decision taken unlawful only if it appears from the documents in the file that it was likely to influence the meaning of the decision taken in the case in question or that it deprived the persons concerned of a guarantee; that the application of this principle is not excluded in the event of an omission of a mandatory procedure, provided that such omission does not affect the competence of the author of the act”.

[3] Conseil d’Etat, 14 octobre 2011, *Société OCREAL*, n° 323257: “inaccuracies, omissions or inadequacies in an environmental impact assessment are only likely to vitiate the procedure and thus lead to the illegality of the decision taken on the basis of that study if they could have had the effect of prejudicing the complete information of the population or if they were such as to influence the decision of the administrative authority”.

[4]*Commission vs. Germany*, 15 October 2015 (C-137/14, ECLI:EU:C:2015:683).

[5] Cour administrative d’appel de Marseille, 18 mars 2016, n°14MA03823; Conseil d'Etat, 3 juin 2013, *Commune de Noisy-le-Grand*, n° 345174.

[6] Conseil d'Etat, 27 février 2015, *Ministre de l’intérieur*, n°382502

[7] Conseil d'Etat, 12 juillet 2019, *Fédération nationale des chasseurs*, n° 424600; see also CE, 29 janvier 2018, *Société Marineland, société Safari Africain de Port St Père et a.*, n° 412210, 412256, rec. p. 14; CE, 17 avril 2013, *Commune de Ramatuelle*, n° 348311.

[8] Article R. 214-36 of the Environmental Code.

[9] The SEA Directive relates to plans and programmes. These are also covered by Article 7 and Article 9(3) of the Aarhus Convention.

[10] Council of State, Opinion, 6 April 2016, No 395916: 'While a decision requiring an environmental impact assessment to be carried out is, under Article R. 122-18(IV) of the aforementioned Environmental Code, an act with an adverse effect that can be referred to the court reviewing the validity of an administrative decision after a prior administrative appeal has been lodged, this is not the case for an act by which the State environmental authority decides to waive the environmental impact assessment requirement for a plan, programme or other planning document referred to in Article L. 122-4 of the Environmental Code. Such an act constitutes a measure preparatory to drawing up this plan, programme or document, and cannot be referred to the court reviewing the validity of an administrative decision, either as regards its purpose or the specific rules laid down in Article R. 122-18(IV) of the Environmental Code for challenging decisions requiring an environmental impact assessment to be carried out. However, a decision to waive the obligation to carry out an environmental impact assessment may be challenged when lodging an appeal against the decision approving the plan, programme or document.'

[11] Article L. 521-1 of the Code of Administrative Justice.

[12] Article L. 122-11 of the Environmental Code.

[13] Article L. 123-16 of the Environmental Code.

[14] See findings under ACCC/C/2010/54 for an example of a plan not submitted to SEA but subject to the public participation requirements of Article 7 of the Aarhus Convention.

[15] Article L. 521-1 of the Code of Administrative Justice.

[16] These fall within the scope of both Article 7 and Article 9(3) of the Aarhus Convention. See also relevant case-law of the Court of Justice of the European Union such as Case C-237/97, Janecek and cases such as Boxus and Solvay C-128/09-C-131/09 and C-182/10, as referred to under the Commission Notice C/2017/2616 on access to justice in environmental matters.

[17] Article L. 521-1 of the Code of Administrative Justice.

[18] Article L. 122-11 of the Environmental Code.

[19] Such acts come within the scope of Article 8 and Article 9(3) of the Aarhus Convention. An example of such an act concerns the decision of the national administration that featured in Case C-281/16, *Vereniging Hoekschewaards Landschap*, ECLI:EU:C:2017:774

[20] Conseil d'Etat, 29 février 1952, *Chambre syndicale des détaillants en articles de sports et camping de France*, rec. p. 143; Conseil d'Etat, 11 décembre 1988, *Association Greenpeace France*, n° 194348; Conseil d'Etat, 29 septembre 2010, n° 319481; CE, 25 juillet 2013, *OFPRA*, n° 350661.

[21] Conseil d'Etat, 13 juillet 2006, *Fédération nationale des syndicats de propriétaires forestiers sylviculteurs,* n° 281812.

[22] Conseil constitutionnel, 7 mai 2014, n° 2014-395 QPC.

[23] Conseil d'Etat, 11 mai 2004, *Association AC !*, n° 380091.

[24] Conseil d'Etat, 16 mai 2008, *Département du Val-de-Marne*, n° 290416.

[25] Conseil d'Etat, 28 mai 2014, *Association Vent de colère !*, n° 324852.

[26] Conseil d'Etat, 26 juin 2019, *Associations Générations Futures et Eaux et Rivières de Bretagne*, n° 415426.

[27] Conseil d'Etat, 28 juillet 2000, *Association France Nature Environnement*, n° 204024.

[28] Conseil d'Etat, 28 mars 2018, *France Nature Environnement*, n° 408974.

[29] For an example of such a preliminary reference see Case C-281/16, *Vereniging Hoekschewaards Landschap*,

ECLI:EU:C:2017:774

[30] Conseil d'Etat, 22 avril 1988, *Association générale des producteurs de blé*, rec. p. 151.

[31]*Arcelor*, 16 December 2008 C-127/07, ECLI:EU:C:2008:728; *Eco-Emballages SA*, 10 November 2016, C-313/15 and C-530/15, ECLI:EU:C:2016:859; *Confédération paysanne*, 25 July 2018 C-528/16, ECLI:EU:C:2018:583.

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