REVIEW OF EUROPEAN ADMINISTRATIVE LAW; VOL. 9, NR. 1, 35-47, PARIS LEGAL PUBLISHERS © 2016

C-71/14, *East Sussex County Council v Information Commissioner, Property Search Group, Local Government Association* (Judgment of 6 October 2015) – Case Note

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Abstract

This case note examines case C-71/14, East Sussex County Council v Information Commissioner. This case raises the central and unresolved question of what is the adequate scope of review that national courts should adopt when they assess decisions of public authorities applying Union law. The case note first summarises the facts of the case and provides for an explanation of the English scope of review and the problem underlying the reference for preliminary ruling. Next, the European requirements for the national scope of review are reconsidered, and it will be asked to what extent these existing requirements have been applied to the present case. It will be argued that despite the repetition of the principle of national procedural autonomy, the Court of Justice has set a new benchmark against which the national scope of review has to be tested. Thereafter, the case note will critically question why the Court of Justice omitted an assessment the applicable European rules in the light of the Aarhus Convention. Finally, it will be asked whether there is a discrepancy between the international and the European standard on the one hand, and the national standard on the other hand. In this context, it will be assessed to what extent national procedural competence is limited concerning questions relating to the scope of review where the application of Union law is at stake.

1. Introduction

This case raises the central and unresolved question of what is the adequate scope of review that national courts should adopt when they assess decisions of public authorities applying Union law. Concretely, the case concerns the interpretation of what is a reasonable charge for supplying infor-

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* DOI 10.7590/187479816X14628634027880

mation under Directive 2003/4/EC on public access to environmental information,[1] and the intensity with which the courts should review the reasonableness of the charge.

This case note will first summarise the facts of the case (2) and provide for an explanation of the English scope of review and the problem underlying the reference for preliminary ruling (3). Next, the European requirements for the national scope of review are reconsidered, and it will be asked to what extent these existing requirements have been applied to the present case. It will be argued that despite the repetition of the principle of national procedural autonomy, the Court of Justice has set a new benchmark against which the national scope of review has to be tested (4). Furthermore, it will be critically questioned why the Court of Justice omitted an assessment of the applicable European rules in the light of the Aarhus Convention (5). Finally, it will be asked whether there is a discrepancy between the international and the European standard on the one hand, and the national standard on the other hand. In this context, it will be assessed to what extent national procedural competence is limited concerning questions relating to the scope of review where the application of Union law is at stake (6).

2. A dispute over reasonable charges – *The facts of the case and the answer of the Court*

The case arose when a property search company (PSC) was imposed a charge of £ 17 by the East Sussex County Council ('The County Council') for the supply of environmental information. The relevant rules on the supply of environmental information and charges are based on Directive 2003/4/EC. This Directive aims at implementing the first pillar of the Aarhus Convention into the Union legal order.[2] It obliges the Member States *inter alia* to make environmental information available upon request.[3] According to the Directive, access to public registers and lists has to be free of charge (article 5 (1)); however, public authorities are allowed to 'make a charge for supplying any environmental information but such a charge shall not exceed a reasonable amount' (article 5 (2)). Moreover, according to article 6 of the Directive, Member States must ensure that applicants who consider that their requests have been inadequately dealt with, including a violation of the provisions of article 5, have access to justice. The Directive has been transposed into English law with the

1 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 of 14 February 2013 (*OJ* 2013 L 41, pp. 26-32).
2 Preamble Directive 2003/4, at 5.
3 Art. 3 Directive 2003/4/EC.

Environmental Information Regulations 2004 (EIR 2004).[4] According to article 8 (3) of the EIR 2004, 'a charge (...) shall not exceed an amount which the public authority is satisfied is a reasonable amount'.

The PSC brought a complaint against the charge to the Information Commissioner, i.e. the administrative authority which is in charge in the English legal system, to assess whether a request for information has been dealt with in accordance with the requirements of the EIR 2004.[5] The Information Commissioner found that the County Council did not comply with the applicable English legislation. The County Council appealed to the First-tier Tribunal[6] which referred two questions for preliminary ruling to the Court of Justice concerning the interpretation of article 5 (2) and 6 Directive 2003/4/EC. In its first question, the tribunal asked whether 'a charge of reasonable amount' under the Directive may cover a part of the costs which the authority incurs for maintaining the database and staff costs for replying to requests. In its second question, the tribunal wished to know whether the implementing legislation, providing essentially that a reasonable amount is what the public authority considers it to be a reasonable amount, was compatible with Union law, considering the limited scope of administrative and judicial review as it is traditionally exercised in the English legal system.

The answer of the Court on the first question is straightforward: costs for maintaining a database must not be part of the charge imposed, but overheads which are attributable to the time spent by the staff for supplying the information can be taken into account. However, the total amount of the charge must not be unreasonable.

As far as the second question is concerned, the conclusion of the Court of Justice is less clear. The Court found that there is no incompatibility of national law with Union law if the national judicial review is based on 'objective elements' and if the review ascertains that article 5 (2) of the Directive is complied with. So in essence, the Court only concludes that there is no violation of article 6 of the Directive as long as a review according to article 6 is possible, without making a concrete statement as to the English scope of review. This finding is in line with the constant repetition of the principle of national procedural autonomy, which means that the Court neglects to provide a clear general

4 Environmental Information Regulations 2004, SI 2004/3391.

5 Section 50 (1) Freedom of Information Art. 18 EIR 2004.

6 The Tribunals, Courts and Enforcement Act 2007 created a tribunal system which comprises two layers: the First-tier Tribunal and the Upper Tribunal. Where statute provides for a right to appeal, appellants can appeal to the First-tier Tribunal. Subsequently, the applicants can, if they receive permission, appeal from the First-tier Tribunal to the Upper Tribunal. The decisions of the tribunals can be subject to judicial review proceedings in the courts; see further: T. Endicott, *Administrative Law* (Oxford 2015), 449 ff.; Thompson & Jones, 'Administrative Law in the United Kingdom', in: R. Seerden (ed.), *Administrative law of the European Union, its Member States and the United States* (Cambridge 2012), 203 ff.

standard for the national scope of review where the enforcement of rules of Union law are at stake. However, taking a closer look at the argumentation of the Court of Justice, there is some guidance on the scope of review which might call into question the light scope of review as exercised in England and possibly other Member States with comparably limited judicial review powers. In the next section, the English scope of review will be examined.

3. The English scope of review – *Wednesbury reconsidered*

According to the reference for preliminary ruling, the review of administrative decisions under article 8 (3) EIR 2004 is limited 'to whether the decision itself was unreasonable, that is, irrational, illegal or unfair, with very limited scope for reviewing the relevant factual conclusions reached by the authority'.[7] Before examining this limitation in detail, some general remarks about the scope of review of tribunals and courts have to be made.

In the English legal system, a substantial part of disputes in administrative matters are resolved before tribunals.[8] These are bodies which are set up by statute and which are competent to review administrative decisions according to the power conferred upon them by statute.[9] Generally speaking, the intensity of review as adopted by the tribunals can be more far reaching than the review powers by the courts. Most importantly, tribunals can review facts to a (much) greater extent than courts are allowed to.[10] However, there is no overarching rule which would determine the precise scope of review of tribunals.[11] In the present case, the First-tier Tribunal seems to interpret article 8 (3) EIR 2004 as implying a restriction of its own review powers to the traditional powers under judicial review. This limited review power under judicial review is based on the premise that courts should not place themselves on the chair of the administrative authority which is the legitimate decision-making body.[12]

The traditional framework within which judicial review is exercised was summarised in the landmark case of *Council of Civil Service Unions v Minister for the Civil Service*, in which Lord Diplock classified the different grounds for

7 C-71/14, *East Sussex County Council* (judgment of 6 October 2015), para. 25.
8 T. Endicott, *Administrative Law* (Oxford 2015) 449 f.; P. Cane, *Administrative Law* (Oxford 2011), 318 f.
9 P. Cane, *Administrative Law* (Oxford 2011), 326.
10 P. Cane, *Administrative Law* (Oxford 2011), 328, Thompson & Jones, 'Administrative Law in the United Kingdom', in: R. Seerden (ed.), *Administrative law of the European Union, its Member States and the United States* (Cambridge 2012), 203.
11 From a comparative perspective: Kleve & Schirmer, England and Wales, in: J.P. Schneider (ed.), *Verwaltungsrecht in Europa* (Göttingen 2007), 150.
12 P. Craig, *Administrative Law* (London 2012), 646 f.

review under the headings of 'illegality', 'irrationality' and 'procedural impropriety'.[13] The ground of review of 'illegality' refers to situations in which public authorities exceed or abuse the power which they are vested with (principle of *ultra vires*). 'Irrationality' as a ground of review implies a test called '*Wednesbury* unreasonableness', according to which courts only intervene if the administrative decision is 'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'.[14] Taken literally, this test is extremely light and courts would only intervene if there was a manifest or blatant error. However, it should also be noted that in practice this test has been applied with a different intensity depending on the subject matter of the case.[15] Next, the heading of 'procedural impropriety' refers to procedural errors which the authority made when taking the administrative decision. It should be emphasised that this traditional classification does not constitute a strict separation between the different concepts, but that in practice, the grounds of review can overlap. Finally, it is debated to what extent the concept of 'proportionality' should be introduced as a new ground of review.[16] This test involves a more intense standard of review, as it requires a thorough balancing of the different interests involved. Today, it is mainly agreed that the test of proportionality has to be applied in cases with a European and a human rights dimension.[17]

In the case of the PSG, the question was with what intensity the tribunal should assess the reasonableness of the charge imposed for the supply of information. As the AG has pointed out, however, neither the tribunal, nor the British government has clearly explained which ground of review was at stake and could conflict with the requirements of Union law in the present case, nor explained what the English scope of review actually entails. Furthermore, the question for preliminary ruling on the scope of review as phrased by the tribunal essentially asks whether the implementation of the Directive is correct in light of the English standard of review and not whether the standard of review as such is adequate. These are probably two reasons why the Court of Justice did not provide for a clear answer on the national scope of review.[18]

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13 *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985], 1 AC 374 (410).

14 *Ibid.*

15 Laws, 'Wednesbury', in: C. Forsyth, I. Hare, *The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade QC* (Oxford 1998), 185 ff.

16 *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1998], 1 AC 69 (80); *R. v Secretary of State for the Home Department ex parte Daly* [2001], UKHL 26 [2001], AC 532; *R. (Alconbury Developments Ltd) v Secretary of State for Transport, Environment and the Regions* [2001] UKHL 23; [2003] 2 AC 295 at 51; J. Goodwin, 'The Last Defense of Wednesbury' (2012) *Public Law* 445-467.

17 Lord Hon. J. Woolf, J. Jowell, A. Le Sueur, C. Donnelly & I. Hare, *De Smith's Judicial Review* (2013) at 11-09.

18 Opinion of AG Sharpston in C-71/14 delivered on 16 April 2015, para. 84.

It seems to the authors of this case note that, by subsuming the current problem under the ground of irrationality and applying the *Wednesbury* test, the standard of review of the English courts and tribunals would be light when they would assess the reasonableness of the charge. According to the traditional English approach, choosing the method for calculating the charge is the primary task of the administrative authority, and the amount of £ 17 is certainly not 'outrageous in its logic'. Hence, according to the traditional grounds of review, the English tribunal would leave the calculation of the charge to the public authority and it would not interfere with the decision in the first place.

The question asked by the English tribunal is whether this limited scope of review complies with the requirements of effective judicial protection established in the case law of the Court of Justice. The following section will analyse these requirements and consider whether and to which extent they have been applied in the present case.

4. The European scope of review – *Upjohn reconsidered*

To begin with, the question may be raised whether specific European requirements on the intensity of judicial control can be deduced from the guarantee of effective judicial protection contained in article 47 of the Charter. However, the wording of the article does not provide for any concrete guideline on the standard of review. Moreover, the Court of Justice did not explicitly deduce any generally applicable standard of control that should be adopted in the Union courts or the national courts from this article. Arguments according to which the intensity of review depends on the weight of the alleged infringement[19] appear plausible at first sight, but are as such not very telling. Hence, so far, there are no concrete Union rules on the scope of review for national courts when the enforcement of Union law is at stake. According to the principle of national procedural autonomy, the Member States remain competent to create and to apply their own rules on the scope of review as long as the principles of effectiveness and equivalence are complied with.[20] These two principles only designate the 'outer limits'[21] of the national competence with the consequence that Member States retain rather large manoeuvring room with respect to rules on administrative litigation.[22]

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19 H.D. Jarass, *Charta der Grundrechte der Europäischen Union* (München 2013), Art. 47 at 30.

20 C-71/14, *East Sussex County Council* (judgment of 6 October 2015), para. 52, 58.

21 S. Prechal & R. Widdershoven, 'Redefining the Relationship between "REWE- effectiveness" and Effective Judicial Protection' (2011/2) *REALaw* 31-50.

22 F. Grashof, *National Procedural Autonomy Revisited* (Groningen 2016), 215 ff.

The Court of Justice stressed this approach in the case of *Upjohn* which concerned the scope of review of English courts concerning the revocation of medical marketing authorisations.[23] Pursuant to this case, Union law does not require that national courts be empowered to substitute the assessment by the public authority with their own assessment of the facts of the case.[24] The benchmark which the Court of Justice applied in this case was its own scope of review in cases concerning decisions by Community authorities. Accordingly, the Union courts are restricted to

'examining the accuracy of the findings of fact and law made by the authority concerned and to verifying, in particular, that the action taken by that authority is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion'.[25]

The test of the 'manifest error' is a rather light test, and is it comparable to the light test applied by the English courts. According to the Court of Justice, the Member States are not required to adopt a more intense standard of review than the standard which the Court adopts.[26]

The Court of Justice has repeated this line of argumentation in other cases,[27] and it referred to *Upjohn* also in the case under consideration.[28] In the case of the PSG, the Court of Justice started by stressing the competence of the Member States to apply their own rules on the scope of review and by finding that neither the principle of equivalence, nor the principle of effectiveness have been violated.

Taking however a closer look, it appears that the review which the Court of Justice applies when assessing the 'reasonableness' of costs is actually more intense than applying a test of 'manifest error' or of a clear exceedance of the boundaries of discretion. In fact, the test that is proposed is more intense, involving a balancing exercise of different interests involved.

Based on the opinion delivered by AG Sharpston,[29] the Court of Justice divides the answer to the first question into two steps. First, it examines which factors need to be taken into account when calculating the charge for the supply of information, and in a second step, different interests involved have to be weighed against each other. Both steps are meant to answer the question of what a charge of a reasonable amount for supplying a particular type of environmental information comprises.

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23 C-120/97, *Upjohn*, ECLI:EU:C:1999:14.
24 C-120/97, *Upjohn*, para. 33.
25 C-120/97, *Upjohn*, para 34.
26 C-120/97, *Upjohn*, para. 35.
27 Joint cases C-211/03, *HLH Warenvertriebs GmbH*, C-299/03, C-316/03 to C-318/03, *Orthica BV v Bundesrepublik Deutschland* [2005], ECLI:EU:C:2005:370, para. 75 f.
28 C-71/14, *East Sussex County Council* (judgment of 6 October 2015), para. 58.
29 Opinion of AG Sharpston in C-71/14 delivered on 16 April 2015, para. 44 ff.

In a first step, the Court of Justice undertakes a rather detailed examination of what constitutes a 'supply of information' and whether the costs for maintaining the database used for requests and the overheads attributable to staff working hours have to be taken into account when calculating the charge for the supply. The Court of Justice decides on the basis of the systematic placement of article 5 (2) of the Directive[30] and its *telos*[31] that the costs for maintaining the database cannot be taken into consideration when calculating the charge. The argument is that according to article 5 (1), the access to public registers, which the Member States must establish, should be free of charge.

In a second step, the Court finds - based on an earlier decision in an infringement procedure against Germany[32] - that the expression of a 'reasonable amount' means that the charge must not have a deterrent effect on the applicant when requesting environmental information.[33] For the purpose of assessing whether there is such a deterrent effect, the economic situation of the person requesting the information has to be taken into account and additionally, the public interest in the protection of the environment has to be considered. The Court sets out that 'the charge must not exceed the financial capacity of the person concerned, nor in any event appear objectively unreasonable'.[34]

But the Court of Justice could have adopted different arguments. To begin with, the Court might have argued that article 5 (1) only means that there should be no fee for accessing a national database. However, this does not necessarily exclude the possibility to take maintenance costs into account when calculating the charge for supplying the information upon request. Moreover, in the absence of any specification on the calculation of the charges under article 5 (2), the Court might have applied the test of the 'manifest error' and it might have ultimately left the decision on the calculation of the charge to the national authorities. However, this light test was not applied.

The two-step test as applied by the Court is more intense than delimiting national courts' review powers to testing whether there was a 'manifest error'. In applying this test to the facts of the case, the Court of Justice concluded that the charge imposed on the PSG did not 'exceed what is reasonable'. So, even though the Court explicitly reiterated the principle of national procedural autonomy and the 'manifest error' threshold as 'outer limit' of an acceptable scope of review before national courts, in answering the first of the two questions submitted to it (i.e. the criteria to assess the reasonableness of a charge), the Court seems to have gone itself further than this threshold. The question thus

30 C-71/14, *East Sussex County Council* (judgment of 6 October 2015), para. 32 f.
31 C-71/14, *East Sussex County Council* (judgment of 6 October 2015), para. 35.
32 C-217/97, *Commission v Germany*, ECLI:EU:C:1999:395, para. 47.
33 C-71/14, *East Sussex County Council* (judgment of 6 October 2015), para. 42.
34 C-71/14, *East Sussex County Council* (judgment of 6 October 2015), para. 43.

arises as to what consequences should be drawn from the use by the Court of test that goes beyond the 'manifest error' threshold.

In the opinion of the authors, combining this conclusion with the '*Upjohn* equivalence test' (according to which the national scope of review needs to be at least as deep as the European one) would seem to require that the review adopted in the national litigation system to assess the reasonableness of a charge in the context of the supply of environmental information must be more intense than simply examining whether there was a manifest error or a clear exceedance of discretion. This move towards a 'heightened' standard of review is not completely new.

For example, in the field of immigration, the Court of Justice held that national courts should be able to 'review the merits' of the decisions taken by the national authorities to reject asylum requests.[35] This case in itself does not indicate what standard of review is necessary to comply with EU law, but seems to suggest that a review limited to a legality check would be in violation of the principle of effective judicial protection. In the field of public procurement, the Court of Justice has been more explicit and held that EU law does not permit Member States 'to limit review of the legality of a decision to withdraw an invitation to tender to mere examination of whether it was arbitrary'.[36] The authors of this case note agree with Caranta, who comes to the conclusion that 'very peripheral judicial review is against EU public procurement law'.[37]

This case law seems to shows that, depending on the concrete case before the Court, the standard of *Upjohn* is no longer applied, but a different, more intense, standard is applicable. However, it is not possible to deduce from these cases, nor from the case under review, a *general* standard for the judicial enforcement of *any* rule of Union law in the national courts from the case law of the Court of Justice. In the absence of such a general standard in the case law, the question arises, whether a more intense standard could be deduced from other sources. In this regard, the rules of the Aarhus Convention need some further consideration.

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35 C-69/10, Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration, ECLI:EU:C:2011:524, para. 70.

36 C-92/00, *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Stadt Wien* [2002], ECLI:EU:C:2002:379, para 63. See also C-440/13, *Croce Amica One Italia Srl v Azienda Regionale Emergenza Urgenza* (*AREU*), ECLI:EU:C:2014:2435.

37 R. Caranta, 'Remedies in EU Public Contract Law: The Proceduralisation of EU Public Procurement Legislation' (2015/1) *REALaw* 93.

5. The international standard – *Art. 9 Aarhus Convention reconsidered*

As mentioned above, Directive 2003/4/EC transposed the first pillar of the Aarhus Convention, concerning access to environmental information. The relevant provisions concerning access to environmental information, contained in article 9 (1) and (4) of the Aarhus Convention are of relevance for the present case. Article 9 (1) requires the Member States to provide for administrative and judicial review procedures where a request for information has been inappropriately dealt with. This requirement has been transposed with article 6 (1) and (2) Directive 2003/4/EC. However, the directive is silent on the requirements of article 9(4) of the Aarhus Convention, which provides that procedures should ensure 'adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive'. This does not necessarily mean that there is a lack of transposition of article 9 (4) concerning the requirement of 'adequate and effective remedies': Directive 2003/4/EC provides in Article 6(1) that courts should be able to consider whether the access request was 'ignored, wrongfully refused or inadequately answered or otherwise not dealt with' in accordance with the provisions of the Directive itself. Furthermore, article 6 (3) clearly states that the review decisions have to be binding on the public authority. This means that the court's review can cover both procedural and substantive errors in the handling of the access request and will force national authorities to comply with the Directive.[38]

In this present case however, the Court of Justice does not engage in an analysis of the requirement of an 'adequate and effective remedy'. In para. 56, the Court simply states that the Directive in question aims at implementing the Aarhus Convention, but the Court does not examine the detailed requirements that are posed by this international treaty. Instead, the Court simply restricts itself to finding that article 6 of the Directive does not determine the scope of administrative and judicial review under the Directive.[39] The Court did not further debate whether article 9 (4) of the Aarhus Convention is sufficiently implemented by Directive 2003/4/EC and, in case it is not, whether and to what extent article 6 of the Directive should be read in the light of the Aarhus Convention.

As such, the wording of Article 9 (4) Aarhus Convention does not provide for a specific scope of review, which the courts have to adopt. In this regard, it should also be noted that the Aarhus Compliance Committee could so far not detect any breach of the Convention as regards the light English standard of

38 M. Eliantonio, 'The Proceduralisation of EU Environmental Legislation: International Pressures, Some Victories and Some Way to Go' (2015/1) *REALaw* 105.

39 C-71/14, *East Sussex County Council* (judgment of 6 October 2015), para. 53.

review.[40] However, one might argue that considering the purpose of the Aarhus Convention, which is to improve the protection of the environment through the 'three pillars', a more intense standard of review than the 'manifest error' would be appropriate. The requirement of an 'effective remedy' means that the remedy is able to reach the goal for which it was created. The goal is the full enforcement of environmental legislation. More specifically, in the case at stake, the goal is the full enforcement of the relevant provisions on access to information as a prerequisite for meaningful participation in environmental procedures and as an element of environmental democracy. If the judge is not empowered to review the administrative action, it might happen that the goal cannot ultimately be reached. In the opinion of the authors of this case note, an 'effective remedy' is thus only available when courts are able to interfere with the public authority to a greater extent than in cases in which there is a 'manifest error'.

6. Conclusion

After these observations on the scope of review under the national, European and international legal systems the question arises whether and to what extent there is a discrepancy between the different approaches and what conclusions can be drawn with regard to the scope and application of the principle of effective judicial protection.

To begin with, it can be argued that the standard of review which the Aarhus Convention requires seems to be more thorough than requesting a check of 'manifest errors'. Insofar, one can be critical about a light standard of review if it is adopted at the European and the national level.

However, if one follows the logic of the ruling in *Upjohn* according to which the national courts have to take the approach of the Court of Justice on the scope of review as a benchmark, it appears that the national courts have to apply a more intense test than the test of a 'manifest error' when assessing the reasonableness of a charge for the supply of environmental information. Hence, if this is the standard that the Court requires national courts to apply, one cannot detect a violation of Article 9(4) of the Aarhus Convention.

The question remains whether any general conclusions can be drawn from this case. Being an answer to a question for preliminary ruling, this judgment only provides for a concrete solution for a specific case. This piecemeal approach is in principle inapt to provide for a general statement on the scope of review where questions of Union law are at stake. However, this case and the previous case law in the fields of immigration and public procurement seems to indicate that the Court of Justice may be willing to adopt a more intense standard of

40 ACCC/C/2007/27.

review than the test of a 'manifest error' and it will be interesting to observe whether and in which cases the Court will apply this enhanced standard of review and whether one may expect a more general departure from *Upjohn* in the future.

Secondly, this case shows once more that Member States are only *in principle* free to determine their national procedural rules and, that, in practice, the Court of Justice goes even further then applying the principles of effectiveness and equivalence. Even though the Court of Justice is very eager to state that the Member States have the principal competence to delineate the rules governing the enforcement procedures, in this case the Court created, in practice, a model standard of review for the assessment of the 'reasonableness of a charge' under the Directive. One could legitimately wonder whether national procedural autonomy has by now become a 'paradise lost'.[41]

Thirdly, it should be noted that the Court of Justice did not really answer the second question that was posed by the tribunal: Does the English implementing legislation infringe Union law? Although the Court of Justice provides for a model path of argumentation which can serve as an orientation for the national courts, it does not give any concrete reply on the compatibility of the national rule with Union law. Instead, the Court finds that the national scope of review needs to be based on 'objective factors' and ensure 'full compliance' with article 5 (2).[42] However, the terms 'objective factors' and 'full compliance' are nothing but empty words, which are as imprecise as the term of 'reasonableness'. The tribunal might now question: what are these 'objective factors' on which national judicial review should be based and what is meant by 'full compliance'?

From this perspective, the answer of the Court needs to be criticised, since in an enforcement system which is to a large extent based on the co-operation between the national and the supranational level, clear communication between the different courts is of utmost importance. If no clear answers to clear questions are given, this jeopardizes the usefulness of the preliminary ruling procedure, the unique dialogue mechanism aimed at ensuring uniform interpretation and application of EU law. In this context, it is even doubtful whether the Court rephrased the problem on the scope of review correctly. The question for preliminary ruling concerns the interpretation of the scope of review on a question of law (i.e. how to assess the 'reasonableness' of a charge), but the Court of Justice refers to limited review competences as regards 'factual conclusions'.[43] One might wonder whether the Court was actually aware of the English distinction between a review of law and of fact.

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41 D. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?* (Berlin 2010).

42 C-71/14, *East Sussex County Council* (judgment of 6 October 2015), para. 59.

43 C-71/14, *East Sussex County Council* (judgment of 6 October 2015), para. 57.

Finally, one may argue that it should not be the task of the Court of Justice to determine the generally applicable adequate scope of review for the enforcement of Union law in the national courts. Instead, it would be desirable that a concrete standard for the scope of review in Union matters was found through democratic processes.[44] Although in times of high Euroscepticism it is unpopular to mention the possibility of more and more far-fetching European legislation, this might legitimately be seen as an avenue to be taken in order to agree on a common standard. This would imply the final expulsion from the 'paradise' of national procedural autonomy. However, it would also provide for a higher degree of legal certainly, equal treatment amongst litigants across the EU and, last but not least, avoid lengthy (and, one may suppose, for the national courts, frustrating) litigations like in the case of the PSG.

44 F. Grashof, *National Procedural Autonomy Revisited* (Groningen 2016), 231 ff.