

APPENDIX 1

DETAILED ANALYSIS OF THE COURTS' JURISPRUDENCE

1.1 The Plaumann case

In 1963, in the *Plaumann* case,¹ the ECJ interpreted for the first time the criterion of “individual concern” provided by the paragraph 2 of article 173 EEC Treaty (now paragraph 4 of article 230 EC Treaty). This interpretation has, since then, been referred to by the Courts in order to examine whether natural and legal persons are individually concerned by acts of EU institutions.

Plaumann and Co, a German corporation, sought the annulment of a decision of the Commission in which the latter refused to authorise the Federal Republic of Germany to suspend, in part, customs duties applicable to fresh mandarins and clementines imported from third countries. In order to determine whether Plaumann had standing, the ECJ had to decide whether the company was individually concerned by the Commission's decision. This interpretation of the “individual concern” is now known as the “*Plaumann* test”.

The Court had a paradoxical approach in that case since it started by stating that:

“...the second paragraph of article 173 does allow an individual to bring an action against decisions addressed to ‘another person’ which are of direct and individual concern to the former, but this article neither defines nor limits the scope of these words. **The words and natural meaning of this provision justify the broadest interpretation. Moreover, provisions of the Treaty regarding the right of interested parties to bring an action must not be interpreted restrictively. Therefore, the Treaty being silent on the point, a limitation in this respect may not be presumed.**”

From reading this interpretation, one might expect that the Court would have interpreted article 173(2) in a way to grant standing to the applicant.

However, on the contrary, the Court decided that:

“Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed. In the present case the applicant is affected by the disputed decision as an importer of clementines, that is to say, by reason of a commercial activity which may at

¹ *Plaumann & Co v Commission*, Case 25/62, 15 July 1963.

any time be practiced by any person and is not therefore such as to distinguish the applicant in relation to the contested decision as in the case of the addressee.”

The ECJ considered that Plaumann was not individually concerned, even though its commercial activity as an importer of clementines was affected by the decision of the Commission, because the company did not distinguish itself from any other person who could practice such commercial activity at any time. This interpretation of the Court of the criterion of the “individual concern” is, therefore, excessively restrictive and provides a very narrow standing to the persons who are not the addressees of the contested decision. It, however, has invariably been relied on by the CFI and the ECJ to determine whether natural or legal persons, other than those to whom community acts are addressed, have locus standi, as will be analysed below.

1.2 The Greenpeace case

The *Stichting Greenpeace Council* case² is the first case in which the Court dealt with the locus standi of an environmental NGO. In that case, Greenpeace International together with local associations and residents in Gran Canaria, were seeking the annulment of a decision adopted by the Commission to disburse to the Kingdom of Spain a certain sum by way of financial assistance provided by the European Regional Development Fund for the construction of two power stations in the Canary Islands without first requiring or carrying out an environmental impact assessment.

However, the CFI reasserted the *Plaumann* jurisprudence and did not set up an exception for environmental NGOs, interpreting the “*individual concern*” criterion in the same way.

Accordingly, there were two types of plaintiffs to whom locus standi was refused: individuals residing or working in the area of the proposed power stations and Greenpeace, an environmental association. However, the standing of the individuals is strictly linked to that of the association, in that the same type of test was imposed on all plaintiffs.

○ **Arguments of the individual applicants**

The individual applicants argued, in order to demonstrate that they were individually concerned that:

“all individuals who have suffered or potentially will suffer detriment or loss as a result of a Community measure which affects the environment have standing to bring an action under article 173 of the Treaty and, in the alternative, that all individuals who have suffered or potentially will suffer “particular” detriment or loss as a result of such a measure have that standing” (paragraph 30).

They added that:

“the requirement that in order to establish locus standi an applicant must show that he is affected in the same way as the addressee of a decision is not borne out by the case-law of the Court of Justice and [the applicants] cite, in that regard, its judgments in the field of State aids, recognising that competitors of beneficiaries of aid have standing to bring an action under article 173 of the Treaty although their interests are not affected in the same way as the addressee of a decision, which is the Member State concerned (Case C-198/91 *Cook v Commission* [1993] ECR I-2487)” (paragraph 31).

² *Stichting Greenpeace Council and Others v Commission*, T-585/93, 9 August 1995.

The applicants also asked the Court to adopt a liberal approach, recognising that their locus standi depended] “not on a purely economic interest but on their interest in the protection of the environment, abandoning the approach adopted in the past in cases concerning purely economic interests” (paragraph 32).

The applicants concluded that “they have each suffered particular and special harm as a result of the acts and omissions alleged against the Commission and thus, in a case relating to the environment, they meet the criteria for locus standi under article 173 of the Treaty” (paragraph 34).

The alleged harm invoked by the applicants was the harm resulting from the construction of the power stations which would adversely affect the livelihoods of local fishermen, of local farmers, the residents’ health and the tourist industry.

- **Arguments of Greenpeace and other associations**

Greenpeace and the two other associations, Tagoror Ecologista Alternativo (“TEA”) and Comision Canaria contra la Contaminacion (“CIC”), argued that “the relevant case-law of the Court appears to deny standing to such organizations only where their members are not themselves individually concerned by the Community measure challenged. Where one or more members of an association are entitled to bring annulment proceedings, therefore, the association representing their interests should also be so entitled” (paragraph 37).

They considered that those conditions were met. They argued that Greenpeace’s objective was to promote the conservation of nature and that “in addition, of the 61,828 members of Greenpeace Spain, which is responsible at the national level for the achievement of Greenpeace’s objectives at a local level, 1266 are resident in the Canary Islands and many of those are individually concerned by the contested decision” (paragraph 38).

TEA was an environmental association based in Tenerife and its statutory aims were “to promote, encourage and support studies on nature and the environment in general”. Further, many of its 154 members were also individually concerned by the contested act (loc.cit.).

CIC was an association based on Gran Canaria whose aim was “the protection and defense of historical, cultural, natural, scenic, ecological and environmental values and heritage” (loc.cit.).

The representative organisations concluded that they “should be considered to be individually concerned by reason of the particularly important role they have to play in the process of legal control by representing the general interests shared by a number of individuals in a focused and coordinated manner” (paragraph 39).

- **Findings of the Court**

The CFI did not grant standing to the environmental associations or to the residents potentially affected by the degradation of the environment due to the construction of the power stations.

The locus standi of the private individuals

The Court reasserted the *Plaumann* jurisprudence and specified that it:

“remains applicable whatever the nature, economic or otherwise, of those of the applicants’ interests which are affected” (paragraph 50).

Consequently, the Court held that

“the criterion which the applicants seek to have applied, restricted merely to the existence of harm suffered or to be suffered, cannot alone suffice to confer locus standi on an applicant, since such harm may affect, generally and in the abstract, a large number of persons who cannot be determined in advance in a way which distinguishes them individually in the same way as the addressee of a decision, in accordance with the case law...” (paragraph 51).

In order to illustrate this, the Court stated that:

“They do not, therefore, rely on any attribute substantially distinct from those of all the people who live or pursue an activity in the areas concerned and so for them the contested decision, in so far as it grants financial assistance for the construction of two power stations on Gran Canaria and Tenerife, is a measure whose effects are likely to impinge on, objectively, generally and in the abstract, various categories of person and in fact any person residing or staying temporarily in the areas concerned” (paragraph 54).

It concluded that:

“The applicants thus cannot be affected by the contested decision other than in the same manner as any other local resident, fisherman, farmer or tourist who is, or might be in the future, in the same situation” (paragraph 55).

Given all these considerations, the Court held that “the circumstances on which the applicants rely are not sufficient to differentiate them from all other persons and thus distinguish them individually in the same way as the addressee of the decision”, and that therefore their claims were inadmissible (paragraphs 57 and 58).

The locus standi of the associations

Concerning the locus standi of the associations, the Court started by recalling that:

“It has consistently been held that an association formed for the protection of the collective interests of a category of persons cannot be considered to be directly and individually concerned for the purposes of the fourth paragraph of article 173 of the Treaty by a measure affecting the general interests of that category, and is therefore not entitled to bring an action for annulment where its members may not do so individually...” (paragraph 59).

The Court also rejected the arguments of the associations in stating that:

“They do not... adduce any special circumstances to demonstrate the individual interest of their members as opposed to any other person residing in those areas. The possible effect on the legal position of the members of the applicant associations cannot, therefore, be any different from that alleged here by the applicants who are private individuals. Consequently, in so far as the applicants in the present case who are private individuals cannot, as the Court has held..., be considered to be individually concerned by the contested decision, nor can the members of the applicant associations, as local residents of Gran Canaria and Tenerife” (paragraph 60).

Comments

In reasserting the *Plaumann* jurisprudence, the Court firmly refused to allow associations whose aim is the protection of public interests, such as the protection of the environment, to challenge decisions of EC institutions in environmental matters. Indeed, public interests are by definition diffuse and collective and cannot therefore fulfill the conditions set out by the Court in the *Plaumann* case. Consequently, only private interests, economic interests of business groups and of individual products producers, can be invoked and protected before the European Court (see supra).

Requiring individuals and NGO applicants to distinguish themselves from any other persons who are affected in the same manner by the contested decision and are in the same situation as them is a prohibitively restrictive test. It implies that in order to fulfil the *Plaumann* test, the applicant should either be the addressee of the decision or should be the only one affected by the challenged decision.

Applying the Court’s reasoning, there would have to have been only one person on the Canary Islands to be affected by the construction of the power stations in order for a case to be brought before the Court, or alternatively more than one provided all were claimants before the Court, or (possibly) if all were members of a claimant NGO.

Yet, that is not the test article 173(4) of the Treaty set out at the time or the one that article 230(4) lays down nowadays, and even less what the Aarhus Convention provides for.

In our view, the interpretation of the criterion of the “individual concern” is doubtful: **to be individually concerned does not mean to be exclusively concerned** as the Court has held. An environmental NGO should be considered individually concerned by an act impacting on the environment. Moreover, numerous NGOs may each be individually concerned by the same act.

The reasoning of the Court in the Stichting Greenpeace Council case leads, therefore, to a real legal vacuum and a complete denial of justice, since neither the individuals who were directly affected by the EC institution’s decision to fund the construction of power stations where they live and work every day in circumstances where the Community’s environmental impact assessment laws had not been met, nor environmental NGOs had standing before the Court to challenge this decision. The result is that potentially unlawful decisions cannot be challenged, unless one recognises a form of collective action.

The Court’s interpretation in that judgment, which is the first judgment in which the Court took a position on the locus standi of individuals and associations in an environmental matter, leads inevitably to the total blocking of access to justice for environmental NGOs and for individuals.

However, the Court has reasserted this interpretation in all the subsequent cases in which individuals or environmental (or other) NGOs were the applicants.

This judgment would have contravened article 9, paragraphs 2, 3, 4 and 5 of the Aarhus Convention if it had been rendered after the entry in force of the Convention in the European Community.

1.3 The Greenpeace appeal case

Greenpeace and others appealed against the decision of the CFI before the ECJ³. However, the ECJ confirmed the judgment of the CFI and applied the criteria set up in *Plaumann*.

- **Arguments of the associations**

The appellants notably argued that the Court erred in its interpretation “by applying the case-law developed by the Court of Justice in relation to economic issues and economic rights, according to which an individual must belong to a “closed class” in order to be individually concerned by a Community act, the Court of First Instance failed to take account of the nature and specific character of the environmental interests underpinning their action” (paragraph 17).

In particular, the appellants claimed that “the approach adopted by the Court of First Instance creates a legal vacuum in ensuring compliance with Community environmental legislation, since in this area the interests are, by their very nature, common and shared, and the rights relating to those interests are liable to be held by a potentially large number of individuals so that there could never be a closed class of applicants satisfying the criteria adopted by the Court of First Instance” (paragraph 18).

They also submitted that “that legal vacuum [could not] be filled by the possibility of bringing proceedings before the national courts” since “such proceedings have in fact been brought in the present case, but they concern the Spanish authorities’ failure to comply with their obligations under Council Directive 85/337/EEC, and not the legality of the Commission measure, that is to say the lawfulness under Community law of the Commission’s disbursement of structural funds on the ground that that disbursement is in violation of an obligation for protecting the environment” (paragraph 19).

- **Findings of the Court**

The ECJ ruled as follows:

“the interpretation of the fourth paragraph of Article 173 of the Treaty that the Court of First Instance applied in concluding that the appellants did not have locus standi is consonant with the settled case law of the Court of Justice.

As far as natural persons are concerned, it follows from the case-law... that where, as in the present case, the specific situation of the applicant was not taken into consideration in the adoption of the act, which concerns him in a general and

³ *Stichting Greenpeace Council and Others v the Commission*, C-321/95 P, 2 April 1998.

abstract fashion and, in fact, like any other person in the same situation, the applicant is not individually concerned by the act.

The same applies to associations which claim to have locus standi on the basis of the fact that the persons whom they represent are individually concerned by the contested decision. For the reasons given in the preceding paragraph, that is not the case.

In appraising the appellants' arguments purporting to demonstrate that the case-law of the ECJ, as applied by the CFI, takes no account of the nature and specific characteristics of the environmental interests underpinning their action, it should be emphasised that it is the decision to build the two power stations in question which is liable to affect the environmental rights arising under Directive 85/337 that the appellants seek to invoke.

In those circumstances, the contested decision, which concerns the Community financing of those power stations, can affect those rights only indirectly.

As regards the appellants' argument that application of the Court's case-law would mean that, in the present case, the rights which they derive from Directive 85/337 would have no effective judicial protection at all, it must be noted that, as is clear from the file, Greenpeace brought proceedings before the national courts challenging the administrative authorisations issued to Unelco concerning the construction of those power stations. TEA and CIC also lodged appeals against CUMAC's declaration of environmental impact relating to the two construction projects...

Although the subject-matter of those proceedings and of the action brought before the Court of First Instance is different, both actions are based on the same rights afforded to individuals by Directive 85/337, so that in the circumstances of the present case those rights are fully protected by the national courts which may, if need be, refer a question to this Court for a preliminary ruling under Article 177 of the Treaty" (paragraphs 27 to 33).

The Court then concluded that the appeal must be dismissed.

Comments

One of the ECJ's grounds for upholding the CFI's judgment was to assert that remedies were available in the national courts. This, however, is inaccurate since the two actions are different in scope. While the actions brought before the national court and the action brought originally before the CFI both concerned rights conferred under Directive 85/337⁴, they are different in jurisdictional scope. The action brought before the CFI was

⁴ Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment

an action for annulment of the Commission's decision granting financial assistance under the European Regional Development Fund for the construction of the two power stations. The former actions before national courts concerned acts of national authorities funded by Community funds.

The difference is of high importance since while national courts could annul national administrative decisions, they would have no jurisdiction, for example, to declare a decision of the Commission invalid **or to order the Commission to withdraw funding from a project under any of the Structural funds.**⁵

Therefore, where, as in this case, the party complained of is a European Institution and not a Member State or a national authority, it is not possible to refer the plaintiff to the national courts. Moreover, the possibility of legal remedies before the national courts should not exclude the possibility of contesting a decision adopted by a Community institution before the Community courts.

It appears both from the decision of the CFI and of the ECJ, that harm to a collective interest as such, including the protection of the environment, denies standing to individual citizens and organisations which promote that interest. Accordingly, the claims of both individual citizens and associations are held inadmissible which results in a total vacuum of enforcement.

This judgment would have contravened article 9, paragraphs 2, 3, 4 and 5 of the Aarhus Convention if it had been rendered after the entry in force of the Convention in the European Community.

⁵ Diana L. Torrens, Locus Standi for Environmental Associations under EC law – Greenpeace – A Missed Opportunity for the ECJ, *RECIEL*, volume 8, issue 3, 1999, p.337.

1.4 The Danielsson case

In the Danielsson case⁶, three inhabitants of Tahiti sought interim measures before the president of the CFI, in addition to their main action for annulment of a decision of the Commission. In this decision, the Commission considered that article 34 of the Treaty establishing the European Atomic Energy Community (“EURATOM Treaty”)⁷, which obliges Member States where dangerous experiments take place in their territory to take additional health and safety measures on which it shall first obtain the decision of the Commission, did not apply to the French nuclear weapon tests carried out in the region, since those tests did not constitute a “particularly dangerous experiment” within the meaning of this article.

○ Arguments of the applicants

The applicants claimed that they were individually concerned because they were “*particularly seriously affected by the Commission’s decision, in which it failed to take properly into account the serious impact which the nuclear tests could have on their health*” (paragraph 24). They also argued that, as members of the general public under article 30 of the EURATOM Treaty⁸, they were conferred a subjective right to have their health protected (paragraph 25), which was contravened by the contested decision of the Commission that considered that the French nuclear tests were not dangerous experiments under Article 34. Consequently, this subjective right should grant them *locus standi* to challenge the decision of the Commission.

The applicants also asserted that they had no means of challenging the decision in the national courts and that to deny them *locus standi* would constitute a breach of articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the ECHR”)⁹.

⁶ *Marie-Thérèse Danielsson, Pierre Largentéau, Edwin Haa v Commission of the European Communities*, T-219/95 R, 22 December 1995.

⁷ Article 34 of EURATOM Treaty: “(1) Any Member State in whose territories particularly dangerous experiments are to take place shall take additional health and safety measures, on which it shall first obtain the opinion of the Commission.

(2) The assent of the commission shall be required where the effects of such experiments are liable to affect the territories of other member States”.

⁸ Article 30 of EURATOM Treaty: “Basic standards shall be laid down within the Community **for the protection of the health of workers and the general public** against the dangers arising from ionizing radiations”.

⁹ Article 6 of the ECHR: Right to a fair trial; Article 13: Right to an effective remedy.

- **Findings of the Court**

The Court rejected the applicants' arguments and found the action manifestly inadmissible. It applied the *Plaumann* test in order to verify whether the contested decision was of individual concern to the Applicants.

It therefore recalled that, according to the *Plaumann* test, "persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are particular to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed" (paragraph 68).

The Court then provided that the arguments of the applicants could not be accepted since "*the decision concerns the applicants only in their objective capacity as residents of Tahiti, in the same way as any other person residing in Polynesia*" (paragraph 70).

It then provided that, "even on the assumption that the applicants might suffer personal damage linked to the alleged harmful effects of the nuclear tests in question on the environment or on the health of the general public, that circumstance alone would not be sufficient to distinguish them individually in the same way as a person to whom the contested decision is addressed, as is required by the fourth paragraph of article 146 of the Treaty, since damage of the kind they cite could affect, in the same way, any person residing in the area in question" (paragraph 71).

The CFI therefore concluded that "the applicants have not adduced any evidence capable of showing that, *prima facie*, the contested decision affects them by reason of certain attributes or circumstances which are peculiar to them. Nor do they allege that the decision encroaches on a right which is specific to them and which, with regard to that decision, differentiates them from all other persons residing in Polynesia" (paragraph 72).

Finally, the CFI rejected the arguments of the applicants according to which they had locus standi in order to fulfill their right to judicial protection. The Court provided that "the judicial protection of individuals is ensured, in the Community system of remedies, not only by the various rights of direct action which they enjoy before the Community judicature under the conditions laid down in the Treaty but also by the procedure for seeking a preliminary ruling under Article 150 of the Treaty in the context of actions brought before the national courts, which were the ordinary courts of Community law" (paragraph 77).

Comments

The Court also reasserted the reasoning it had used in the Greenpeace case, again making clear that even where the applicants would suffer harm they still have no right to judicial

review since they do not distinguish themselves from other people who might suffer equal harm.

Under this reasoning, neither individuals nor NGOs would ever be able to challenge Community Institutions' decisions before the Courts, however unlawful they may be, as long as the act potentially damages a large group of people beyond those bringing the action. The greater the scope of the harm, the more immune it is from judicial review.

This case is a classic judicial review case where the Court should supervise an administrative decision by the European Commission, which would otherwise be unaccountable even if it was acting unlawfully in its interpretation and application of the relevant provision.

As regards the possibility of seeking a preliminary ruling from the Court before the national courts, such a route must be regarded as insufficient legal protection of interested private parties against unlawful Community acts. Applicants cannot compel a national court to refer a preliminary question to the ECJ; moreover, the outcome of such a procedure is uncertain and costly in comparison with a direct action before the Court.

This case shows that the larger the number of people potentially affected by the act of a Community institution the less grounds there are to confer standing to challenge that act. Furthermore, as Diana Torrens underlines, if living near where nuclear tests are to be carried out is not sufficient to gain standing, what will be?¹⁰

In the light of all the foregoing, the Court still refuses to fill the legal vacuum preventing individuals and environmental associations from challenging EC institutions' decisions which have an impact on the environment.

This judgment would have contravened article 9, paragraphs 2, 3, 4 and 5 of the Aarhus Convention if it had been rendered after the entry in force of the Convention in the European Community.

¹⁰ Diana L. Torrens, loc.cit (see footnote 6).

1.5 The Union de Pequeños Agricultores (UPA) case¹¹

The *UPA* case, and the *Jégo-Quéré* case cited below, do not implicate NGOs or bear on environmental matters. However, they are central to our analysis in that they illustrate the reasoning of the CFI and the ECJ as regards standing at the European level. Moreover, the Court applied the decisions in these cases in two subsequent judgments which bear on environmental matters, the *European Environmental Bureau (EEB)* and *WWF-UK* cases discussed below.

The Union de Pequeños Agricultores (UPA), a trade association which represents and acts in the interests of small Spanish agricultural businesses and which has legal personality under Spanish law, brought an action before the CFI for annulment of a Council Regulation which reformed the common organisation of the olive oil market. According to UPA, the regulation abolished the previous intervention scheme, consumption aid and aid to small producers.

The CFI started by pointing out that in order for a legislative measure to be of individual concern to some of the economic operators to which it applies, certain circumstances had to be fulfilled:

“Actions brought by associations may, in this context, be held admissible at least in situations where a legal provision expressly grants a series of procedural powers to trade associations, where the association represents the interests of undertakings which would, themselves, be entitled to bring proceedings and where the association is distinguished individually because of the impact of the contested measure on its own interests as an association, in particular because its negotiating position has been affected by the measure whose annulment is being sought”(paragraph 47).

It then concluded that UPA could not rely on any of these three situations in order to establish the admissibility of its action.

The other test that the applicant had to meet is the one set up by the *Plaumann* jurisprudence. In relation to this, the CFI found that:

“The applicant has not established that its members are affected by the contested regulation by reason of certain attributes which are peculiar to them or by reason of factual circumstances in which they are differentiated from all other persons. **In that regard it need merely be pointed out that the fact that the regulation may, at the time it was adopted, have affected those of the applicant’s members then operating in the olive oil markets and, in some circumstances, caused them to cease trading, cannot differentiate them from all the other operators in the Community,** since they are in an objectively determined

¹¹ *Union de Pequeños Agricultores v Commission*, Case T-173/98, 23 November 1999.

situation comparable to that of any other trader who may enter those markets now or in the future... The contested regulation concerns the applicant's members only on the basis of their objective capacity as operators trading in those markets, in the same way as all the other operators who trade in them” (paragraph 50).

Finally, the CFI rejected UPA’s argument that it would not receive effective judicial protection because there are no legal remedies under national law which makes it possible enabling it to review the legality of the contested regulation by means of reference for a preliminary ruling under article 177 of EC Treaty (now 234EC):

“62. That the principle of equality for all persons subject to Community law in respect of the conditions for access to the Community judicature by means of the action for annulment requires that those conditions do not depend on the particular circumstances of the judicial system of each Member State. In this regard it should also be observed that, in accordance with the principle of sincere cooperation laid down in Article 5 of the EC Treaty (now Article 10 EC), the Member States are required to implement the complete system of legal remedies and procedures established by the EC Treaty to permit the Court of Justice to review the legality of measures adopted by the Community institutions (see, on this point, the judgment in [Case 294/83] *Les Verts v Parliament* [[1986] ECR 1339], paragraph 23).

63. However, these factors do not provide the Court of First Instance with a reason for departing from the system of remedies established by the fourth paragraph of Article 173 of the Treaty, as interpreted by case-law, and exceeding the limits imposed on its powers by that provision”.

The CFI therefore concluded, in the light of all these considerations, that UPA was not individually concerned, by the regulation challenged, within the meaning of paragraph 4 of article 173.

This case illustrates the extent to which unfair situations and a patent denial of justice ensue from the *Plaumann* test: according to this reasoning, the fact that the contested regulation resulted in some members of the association applicant ceasing their economic activity was not a criteria justifying granting standing.

1.6 The UPA appeal case¹²

○ Arguments of UPA

On appeal, UPA claimed essentially that the dismissal of its application as inadmissible infringed its right to effective judicial protection for the defence of its own interests and those of its members.

¹² *Union de Pequenos Agricultores v Council*, C-50/00P, 25 July 2002.

UPA demonstrated the existence of such a lack of judicial protection by explaining that the disputed provisions of the contested regulation did not require any national implementing legislation and did not occasion the taking of any measures by the Spanish authorities. Consequently, the appellant could not, under the Spanish legal system, seek annulment of a national measure relating to the disputed provisions. A reference to the European Court for a preliminary ruling to assess their validity was therefore precluded.

Furthermore, the appellant argued that neither it nor its members could even infringe such provisions so as to be in a position to challenge the validity of any sanction that might, if appropriate, be imposed on them. In other words, given that UPA were affected by a Regulation with direct effect (i.e. not requiring the enactment of any further legal provisions to give effect to its requirements at member state level), they were not even in a position to commit a deliberate breach of any such rules laid down at the national level in order to obtain a forum in the national courts to challenge the validity of those rules. The appellant in that regard submitted that:

“The right to effective judicial protection requires a specific examination of the particular circumstances of the case. A right cannot be truly effective unless consideration is given to its effectiveness in practice. In reality, such an examination necessarily entails an inquiry into whether, in the particular case, there is an alternative legal remedy” (paragraph 28).

○ **Findings of the Court**

As a preliminary point, the ECJ recalled “that the appellant has not challenged the finding of the CFI... to the effect that the contested regulation is of general application. Nor has it challenged the finding... that the specific interests of the appellant were not affected by the contested regulation or the finding... that its members are not affected by the contested regulation by reason of certain attributes which are peculiar to them or by reason of factual circumstances in which they are differentiated from all other persons” (paragraph 32).

The Court therefore considered that “in those circumstances, it is necessary to examine whether the appellant, as representative of the interests of its members, can none the less have standing, in conformity with the fourth paragraph of Article 173 of the Treaty, to bring an action for annulment of the contested regulation on the sole ground that, in the alleged absence of any legal remedy before the national courts, the right to effective judicial protection requires it” (paragraph 33).

It then reaffirmed that if a natural or a legal person does not fulfil the *Plaumann* test, it does not “under any circumstances, have standing to bring an action for annulment of a regulation” (paragraph 37).

The Court then adopted what seems to be a more liberal position, affirming that:

“38. The European Community is, however, a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights.

39. Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (see, in particular, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18, and Case C-424/99 *Commission v Austria* [2001] ECR I-9285, paragraph 45).

40. By Article 173 and Article 184 (now Article 241 EC), on the one hand, and by Article 177, on the other, the Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the Community Courts (see, to that effect, *Les Verts v Parliament*, paragraph 23). Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 173 of the Treaty, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Article 184 of the Treaty or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid (see Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 20), to make a reference to the Court of Justice for a preliminary ruling on validity.”

However, the Court’s position is paradoxical since it concluded that:

“41. Thus it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection”.

The Court therefore rejected any responsibility to ensure that effective judicial protection is provided to natural or legal persons at European level and places all the responsibility on the Member States. As already explained, this reasoning does not stand up to scrutiny, notably because the national courts and the European courts do not have the same jurisdictions and powers as regards the Community acts.

The Court wrote that:

“43. It is not acceptable to adopt an interpretation of the system of remedies... to the effect that a direct action for annulment before the Community Court will be available where it can be shown, following an examination by that Court of the particular national procedural rules, that those rules do not allow the individual to bring proceedings to contest the validity of the Community measure at issue. Such an interpretation would require the Community Court, in each individual case, to examine and interpret national

procedural law. That would go beyond its jurisdiction when reviewing the legality of Community measures”.

Furthermore, the Court reasoned that although the individual concern criterion “must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually... such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community Courts” (paragraph 44).

This interpretation is once again paradoxical since the Court first adopts a purposive interpretation of article 173(4), by taking into account its intended purpose of securing effective judicial protection on a case-by-case basis, whilst refusing to depart from its interpretation of the article.

The Court finally concluded that “while it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force” (paragraph 45).

Comments

Even though the lack of remedies at national level should not automatically imply a right to have standing at European level, natural and legal persons should have the opportunity to contest Community acts before the European Courts, particularly because national courts are not competent to review the legality of such acts and because the possibility of seeking a preliminary ruling from the ECJ before national courts does not provide effective judicial protection to individuals, NGOs and associations at European level (see conclusion in the Greenpeace and Danielsson cases).

The Court further stated in the UPA case that the only way to relax the standing rules would be to reform the current system: that is to amend the Treaty. We disagree with this interpretation. First, article 173(4) of the Treaty (now article 230(4)) provides access to natural and legal persons to the Courts as long as they are directly and individually concerned by the challenged decision of the EC institution. Article 230(4) of the Treaty may be construed in a way to grant standing to members of the public. Therefore the Treaty could allow for a genuine access for these persons, which would include NGOs as legal persons in appropriate cases.

It is rather the narrow interpretation of the Courts of article 230(4) in the cases discussed above which leads to the lack of access to justice at the European level for members of the public and for environmental NGOs in particular.

1.7 The Jégo-Quééré case¹³

Jégo-Quééré et Cie SA (“Jégo-Quééré”) is a fishing company established in France which operates on a regular basis in the waters of the south of Ireland. It fishes mainly for whiting and uses nets having a mesh of 80 mm. Jégo-Quééré sought the annulment of certain provisions of Regulation 1162/2001¹⁴ which requires fishing vessels operating in certain defined areas to use nets of a minimum mesh size for the different techniques employed when fishing with nets (prohibits nets of less than 100 or 120mm), therefore affecting Jégo-Quééré’s activities.

○ Arguments of Jégo-Quééré

In order to demonstrate that it was individually concerned by the contested regulation, Jégo-Quééré claimed that it was the largest fishing company operating in the area covered by the regulation and that it was the only operator fishing for whiting in the waters of south of Ireland with vessels over 30 meters in length, and that the application of the contested provisions had greatly reduced its catches.

The applicant also claimed that “a finding that its action for annulment is inadmissible would leave it without any remedy, since no act has been adopted at national level against which legal proceedings can be brought. Relying on Article 6 of the ECHR, it requested the Court, in the light of that provision, to apply a broad interpretation to Article 230 EC” (paragraph 21).

○ Findings of the Court

The Court notably reasserted the *Plaumann* jurisprudence and considered that the fact that Jégo-Quééré was the only operator fishing in this particular area and concerned by the regulation in question did “not differentiate the applicant within the meaning of [the *Plaumann* jurisprudence], since the contested provisions are of concern to it only in its objective capacity as an entity which fishes for whiting using a certain fishing technique in a specific area, in the same way as any other economic operator actually or potentially in the same situation” (paragraph 30).

Accordingly, the CFI held that the applicant could not “be regarded as individually concerned within the meaning of the fourth paragraph of Article 230 EC, on the basis of the criteria hitherto established by Community case-law” (paragraph 38).

¹³ *Jégo-Quééré et Cie SA v Commission*, T-177/01, 3 May 2002.

¹⁴ Commission Regulation (EC) No 1162/2001 of 14 June 2001 establishing measures for the recovery of the stock of hake in ICES sub-areas III, IV, V, VI and VII and ICES divisions VIII a, b, d, e and associated conditions for the control of activities of fishing vessels.

However, reversing the previous jurisprudence of the European Courts, the CFI upheld the applicant's argument that to dismiss its action as inadmissible would be to deny it any opportunity to challenge the legality of the contested provisions (paragraph 39).

As regards this argument, the CFI reasoned as follows:

“41. In that regard, it should be borne in mind that the Court of Justice itself has confirmed that access to the courts is one of the essential elements of a community based on the rule of law and is guaranteed in the legal order based on the EC Treaty, inasmuch as the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of acts of the institutions (Case 294/83 *Les Verts v European Parliament* [1986] ECR 1339, paragraph 23). The Court of Justice bases the right to an effective remedy before a court of competent jurisdiction on the constitutional traditions common to the Member States and on Articles 6 and 13 of the ECHR (Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18).

42. In addition, the right to an effective remedy for everyone whose rights and freedoms guaranteed by the law of the Union are violated has been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1).

43. It is therefore necessary to consider whether, in a case such as this, where an individual applicant is contesting the lawfulness of provisions of general application directly affecting its legal situation, the inadmissibility of the action for annulment would deprive the applicant of the right to an effective remedy.

44. In that regard, it should be recalled that, apart from an action for annulment, there exist two other procedural routes by which an individual may be able to bring a case before the Community judicature - which alone have jurisdiction for this purpose - in order to obtain a ruling that a Community measure is unlawful, namely proceedings before a national court giving rise to a reference to the Court of Justice for a preliminary ruling under Article 234 EC and an action based on the non-contractual liability of the Community, as provided for in Article 235 EC and the second paragraph of Article 288 EC.

45. However, as regards proceedings before a national court giving rise to a reference to the Court of Justice for a preliminary ruling under Article 234 EC, it should be noted that, in a case such as the present, there are no acts of implementation capable of forming the basis of an action before national courts. The fact that an individual affected by a Community measure may be able to bring its validity before the national courts by violating the rules it lays down and then asserting their illegality in subsequent judicial proceedings brought against him does not constitute an adequate means of judicial protection. Individuals cannot be required to breach the law in order to gain access to justice (see point 43 of the Opinion of Advocate General Jacobs delivered on 21 March 2002 in

Case C-50/00 P *Unión de Pequeños Agricultores v Council*, not yet published in the European Court Reports).

46. The procedural route of an action for damages based on the non-contractual liability of the Community does not, in a case such as the present, provide a solution that satisfactorily protects the interests of the individual affected. Such an action cannot result in the removal from the Community legal order of a measure which is nevertheless necessarily held to be illegal...

47. On the basis of the foregoing, **the inevitable conclusion must be that the procedures provided for in, on the one hand, Article 234 EC and, on the other hand, Article 235 EC and the second paragraph of Article 288 EC can no longer be regarded, in the light of Articles 6 and 13 of the ECHR and of Article 47 of the Charter of Fundamental Rights, as guaranteeing persons the right to an effective remedy enabling them to contest the legality of Community measures of general application which directly affect their legal situation**".

The CFI went on to recognise that "it is true that such a circumstance cannot constitute authority for changing the system of remedies and procedures established by the Treaty, which is designed to give the Community judicature the power to review the legality of acts of the institutions. In no case can such a circumstance allow an action for annulment brought by a natural or legal person which does not satisfy the conditions laid down by the fourth paragraph of Article 230 EC to be declared admissible".

Nevertheless, the CFI was prepared to reverse the Court's case law and particularly the *Plaumann* test:

"49. However, as Advocate General Jacobs stated in point 59 of his Opinion in *Unión de Pequeños Agricultores v Council* (cited in paragraph 45 above), there is no compelling reason to read into the notion of individual concern, within the meaning of the fourth paragraph of Article 230 EC, a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee.

50. In those circumstances, and having regard to the fact that the EC Treaty established a complete system of legal remedies and procedures designed to permit the Community judicature to review the legality of measures adopted by the institutions (paragraph 23 of the judgment in *Les Verts v Parliament*, cited in paragraph 41 above), **the strict interpretation, applied until now, of the notion of a person individually concerned according to the fourth paragraph of Article 230 EC, must be reconsidered.**

51. In the light of the foregoing, and in order to ensure effective judicial protection for individuals, **a natural or legal person is to be regarded as individually concerned by a Community measure of general application that**

concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard”.

On this basis, the CFI held that the contested provisions were of individual concern to the applicant, as the contested regulation subjected it to detailed obligations (paragraphs 52 and 53). It therefore ordered for the action to proceed on the substance.

Comments

This CFI’s decision is of fundamental importance since it demonstrates that the Court may interpret the notion of individual concern differently than it, and the ECJ, had done for years to relax the standing conditions applicable before the European Courts. Furthermore, the CFI reversed the *Plaumann* test and the whole of the Court’s case-law on standing with it, while paying due respect to the masters of the Treaty and to the wording of paragraph 4 of article 230, by stressing that it did not intend to modify the system set up by the Treaty.

However, the new criterion adopted by the CFI still required that an applicant must show that the contested act affects its legal situation in an adverse manner. This implies that an act which affects an applicant only in a factual way, without affecting its legal rights or obligations, could not be challenged by that applicant. This new criterion still does not seem to give access to the Courts to interests groups or associations seeking judicial review of Community acts affecting collective interests, such as protection of the environment. Indeed, if such interests are affected by a Community measure, but not the legal rights or obligations of associations or representative bodies protecting them, these legal persons would still not be able to bring an action. In addition, the effect of the measure on the applicant must be “definite”, which seems to exclude cases in which effects of a measure are only potential ones.

However, the CFI’s judgment was quashed by the ECJ following the appeal by the Commission.

1.8 The Jégo-Quééré appeal case¹⁵

The Commission appealed the CFI’s judgment and claimed that the Court should declare the action for annulment brought by Jégo-Quééré to be inadmissible.

¹⁵ *Commission v Jégo-Quééré & Cie SA*, C-263/02P, 1 April 2004.

Jégo-Quéré cross-appealed, claiming that the Court should set aside the contested judgment in so far as it held that Jégo-Quéré was not individually concerned for the purpose of article 230(4) EC.

The ECJ reasserted the UPA jurisprudence according to which the Treaty has established a complete system of remedies designed to ensure the review of the legality of the Community acts through article 230(4) but also article 241 and through the possibility to ask to national courts for a preliminary ruling from the Court.

It concluded that it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection.

Just as in the UPA case, it held that an action for annulment should not be available even where the national procedural rules do not allow the individual to contest the validity of the Community measure through a preliminary ruling from the Court. The Court reasoned that:

“35 ... the fact that Regulation n° 1162/2001 [the regulation under challenge] applies directly, without intervention by the national authorities, does not mean that a party who is directly concerned by it can only contest the validity of that regulation if he has first contravened it. It is possible for domestic law to permit an individual directly concerned by a general legislative measure of national law which cannot be directly contested before the courts to seek from the national authorities under that legislation a measure which may itself be contested before the national courts, so that the individual may challenge the legislation indirectly. It is likewise possible that under national law an operator directly concerned by Regulation No 1162/2001 may seek from the national authorities a measure under that regulation which may be contested before the national court, enabling the operator to challenge the regulation indirectly”.

The reasoning of the Court is rather difficult to follow. In any event, to require members of the public to “seek from the national authorities a measure” which could be contested before the Courts to be able to challenge regulations seems very remote from what constitutes effective judicial protection as required under the Aarhus Convention.

On the interpretation of the individual concern strictly speaking, the Court completely rejected the position of the CFI and refused to depart from the interpretation of this notion provided in UPA (i.e. it reinstated the *Plaumann* test):

“36. Although the condition that a natural or legal person can bring an action challenging a regulation only if he is concerned both directly and individually must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually, such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty. The Community Courts would otherwise go beyond the jurisdiction conferred by the Treaty (see *Unión de Pequeños Agricultores v Council*, paragraph 44).

37. That applies to the interpretation of the condition in question set out at paragraph 51 of the contested judgment, to the effect that a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him.

38. Such an interpretation has the effect of removing all meaning from the requirement of individual concern set out in the fourth paragraph of Article 230 EC’.

Therefore, as regards Jégo-Quéré’s request, the Court reasserted the *Plaumann* jurisprudence and dismissed the cross-appeal.

Conclusion

It is clear from the ECJ’s judgment that it is unwilling to provide access to judicial review of Community acts to natural or legal persons, other than Member States. It only accepts indirect actions aiming at challenging Community acts before national Courts, even in circumstances where the possibility of such actions in fact being available to the applicant seems very remote.

1.9 The European Environmental Bureau (the “EEB”) case

In the EEB and Stichting Natuur en Milieu case,¹⁶ the EEB and Stichting Natuur en Milieu (“SNM”) sought the annulment of some provisions of two Commission decisions which allowed the Member States to maintain in force authorisations to use dangerous plant protection products named atrazine and simazine (referred to as “the atrazine and the simazine decisions”).

The EEB is an association under Belgian law whose goals according to its articles of association include promoting the protection and the conservation of the environment within the context of the countries of the European Union¹⁷. The EEB, whose Brussels office was established in 1974, is a federation of over 145 environmental citizens’ organisations based in the 27 EU Member States, most candidate and potential candidate countries and in several neighbouring countries.

SNM is a foundation under Dutch law whose goals according to its statutes include “giving a voice to things which are voiceless” and ensuring vital nature and a healthy environment for current and future generations. SNM is a member of the EEB.

○ Arguments of the EEB and SNM

The two environmental NGOs claimed that the contested decisions particularly affected them because they entailed “a setback in terms of the protection of the interests they defend”.

They further claimed that they were individually concerned because “they pursue their activities in the field of environmental protection and conservation of nature, including wildlife, in the context of Directive 92/43 and that, in that capacity, the EEB has a special consultative status with the Commission and other European institutions. Natuur en Milieu, moreover, has a similar status with the Netherlands authorities” (paragraph 45).

Moreover, they argued that the admissibility of their action was required by the need to afford them effective judicial protection at European level. They argued this on the grounds that:

“if they had to apply to the national courts, they would have to identify authorisations for atrazine and simazine in all Member States, study the legal systems of the States where marketing authorisations have been applied for and bring proceedings before the competent national courts” and that this was not “merely a question of convenience because it is in practice impossible for a

¹⁶ *EEB and Stichting Natuur en Milieu v Commission*, T-236/04, 28 November 2005.

¹⁷ EEB Articles of Association, 2001, available at http://www.eeb.org/how_the_eeb_works/statuts-EN_AGM_2001.pdf.

national court to adjudicate on the validity of the atrazine and simazine decisions” (paragraph 46).

The applicants also referred to the statement of reasons in the Proposal for a Regulation of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies (“the Aarhus Regulation Proposal”)¹⁸ in which the Commission considered that it was not necessary to amend Article 230 EC to provide standing to European environmental protection organisations which meet certain objective criteria, which were met by the applicants in the instant case (paragraph 49).

○ Findings of the Court

The Court started by reasserting the *Plaumann* jurisprudence.

Then the Court reasoned that “it is clear that those provisions [of the Commission’s decisions] affect the applicants in their objective capacity as entities whose purpose is to protect the environment, in the same manner as any other person in the same situation. As is apparent from the case law, that capacity is not by itself sufficient to establish that the applicants are individually concerned by the atrazine and simazine decisions” (paragraph 56).

It further stated that “it should be borne in mind that the fact that a person participates, in one way or another, in the process leading to the adoption of a Community act does not distinguish him individually in relation to the act in question unless the relevant Community legislation has laid down specific procedural guarantees for such a person” (paragraph 58).

It also refused to take into consideration that, under the national law of some Member States environmental protection associations are directly and individually concerned by acts which adversely affect the interests which they defend, which is the case for SNM under Netherlands law. In relation to this, the Court held that “the standing conferred on those applicants in some of the legal systems of the Member States is irrelevant for the purposes of determining whether they have standing to bring an action for annulment of a Community act pursuant to the fourth paragraph of Article 230 EC (see, to that effect, the order in Case T-585/93 *Greenpeace and Others v Commission...*)” (paragraph 61).

Concerning the special consultative status of the EEB and of SNM with European institutions the Court held that:

“...The Community legislation applicable to the adoption of the atrazine and simazine decisions does not provide for any procedural guarantee for the

¹⁸ COM(2008) 229 final – Proposal for a Regulation regarding public access to European Parliament, Council and Commission documents.

applicants, or even for any form of participation by the Community advisory bodies established within the framework of Directive 92/43, be they national or supranational, to which the applicants claim to belong. Therefore, in accordance with the case-law referred to in paragraph 56 above, the alleged advisory status relied on by the applicants does not support the finding that they are individually concerned by the atrazine and simazine decisions” (paragraph 62).

On this basis, the court concluded that:

“Community law, as it now stands, does not provide for a right to bring a class action before the Community courts, as envisaged by the applicants in the present case” (paragraph 63).

As to the right to effective judicial protection, the Court then reasserted the UPA jurisprudence and concluded that the lack of remedies before a national court did not justify the admissibility of their action.

Finally and importantly, the Court asserted that the Aarhus Regulation Proposal did not grant standing for environmental NGOs before the ECJ. Indeed, the Court stated that:

“71 ... the principles governing the hierarchy of norms (see, inter alia, Case C-240/90 *Germany v Commission* [1992] ECR I-5383, paragraph 42) preclude secondary legislation from conferring standing on individuals who do not meet the requirements of the fourth paragraph of Article 230 EC. A fortiori the same holds true for the statement of reasons of a proposal for secondary legislation.

72 Accordingly, the statement of reasons relied on by the applicants does not release them from having to show that they are individually concerned by the atrazine and simazine decisions. Moreover, even if the applicants were acknowledged as qualified entities for the purposes of the Aarhus Regulation Proposal, it is clear that they have not put forward any reason why that status would lead to the conclusion that they are individually concerned by those decisions”.

Consequently, the applicants were not considered as individually concerned by the atrazine and the simazine decisions and their actions were dismissed.

Comments

When the Court adopted its judgment in the *EEB* case, the Aarhus Convention was in force in the European Community. However, as it had not been in force when the action was initiated, the Court could not apply it. However, the Court could have been guided by the provisions and the spirit of the convention to reconsider the standing rules and widen

the access to justice for members of the public in light of article 9 of the Aarhus Convention. The Court did not choose that route since it does not depart from the traditional case-law as regards standing of individuals and environmental NGOs before European Courts. On the contrary, it considered that the European Courts could not base their interpretation on the criteria laid down by what was at the time the Commission's proposal for the Aarhus Regulation. Obviously, the Court could not apply what was at the time only a proposal, however, that is not the reason invoked by the Court for not applying it. Indeed, it did not apply the conditions set forth by the Aarhus Regulation Proposal because it considered that according to the principles of the hierarchy of norms, secondary legislation could not confer standing to environmental NGOs when the EC Treaty, paragraph 4 of article 230, did not.

Following the Aarhus Regulation Proposal, Regulation 1367/2006¹⁹ ("the Aarhus Regulation") was adopted on 6 September 2006, entered into force on 28 September 2006 and took effect as from 17 July 2007.

We are aware of the fact that to have the certitude that the Court will indeed not depart from its traditional jurisprudence and continue to refuse access to members of the public to justice, one would have to wait for a decision of the Court under the Aarhus Regulation. However, the *EEB* case already demonstrates that despite the fact that the Aarhus Convention requires the European Community to provide members of the public access to courts and that this Convention has been transposed at the European level by the Aarhus Regulation, the Court is not willing to grant members of the public, including environmental NGOs, access to justice. We therefore have serious concern that the Court will continue to interpret article 230(4) EC Treaty, and particularly, the notion of the individual concern, the same way as it did in the case-law aforementioned.

This result is even more likely given the fact that the Aarhus Regulation refers specifically to the provisions of the Treaty. Indeed, article 12 of the Regulation provides that:

"The non-governmental organisation which made the request for internal review pursuant to article 10 may institute proceedings before the Court of justice **in accordance with the relevant provisions of the Treaty**". Yet, the relevant provisions of the Treaty are, notably, paragraph 4 of article 230. The circle is now complete: the Court has already read these provisions to preclude standing. In the light of all the foregoing, it is very doubtful that the Aarhus Regulation will be interpreted by the Courts in a way to grant locus standi to NGOs, associations or individuals seeking to protect environmental interests.

But, in our view, the fourth paragraph of article 230 does not prevent such persons from having standing before the Courts. It is the Court's interpretation of that provision which has led to the blocking of the access to justice for the NGOs and individuals in

¹⁹ Regulation 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

environmental matters. As already explained, numerous NGOs could be considered as being individually concerned by an EC decision. Therefore, the Court *could* apply the Aarhus Regulation in a way to grant standing to environmental NGOs since there is neither a contradiction between the Treaty and the Aarhus Regulation nor a violation of the principles governing the hierarchy of norms.

Furthermore, paragraph 3 of article 9 of the Aarhus Convention provides that:

“In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.”

Even though this provision refers to the criteria laid down in national law, it should not be construed as allowing the Parties to establish any criteria regarding standing. Indeed, the Compliance Committee of the Aarhus Convention has already interpreted that provision of the convention:²⁰

“35. While referring to “the criteria, if any, laid down in national law”, the convention neither defines these criteria nor sets out the criteria to be avoided. Rather, the Convention is intended to allow a great deal of flexibility in defining which environmental organizations have access to justice. On the one hand, the Parties are not obliged to establish a system of popular action (“action popularis”) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On the other hand, the Parties may not take the clause “where they meet the criteria, if any, laid down in its national law” as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging act or omissions that contravene national law relating to the environment”.

36. Accordingly, the phrase “the criteria, if any, laid down in national law” indicates a self-restraint on the parties not to set too strict criteria. Access to such procedures should thus be the presumption, not the exception. One way for the Parties to avoid a popular action (“action popularis”) in these cases, is to employ some sort of criteria (e.g. of being affected or of having an interest) to be met by members of the public in order to be able to challenge a decision. However, this presupposes that such criteria do not bar effective remedies for members of the public. This interpretation of article 9, paragraph 3, is clearly supported by the Meeting of the Parties, which in paragraph 16 of Decision II/2 (promoting effective access to justice) invites those parties which choose to apply criteria in the exercise of their discretion under article 9, paragraph 3, “to take fully into account the objective of the Convention to guarantee access to justice”.

²⁰ Findings and recommendations of the Compliance Committee with regard to compliance by Belgium with its obligations under the Aarhus Convention in relation to the rights of environmental organisations to have access to justice, ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006.

It appears from that decision that the European Courts cannot justify their refusal to grant access to judicial review to NGOs by invoking either paragraph 4 of article 230 of the EC Treaty or the existence of case-law interpreting paragraph 4 of article 230 of EC Treaty in an excessively restrictive fashion, or the principles governing the hierarchy of norms.

Consequently, in the same way that the Committee concluded in the case aforementioned concerning the jurisprudence of the Belgian Council of State, if the jurisprudence of the European Courts is not altered, it will not comply with the Aarhus Convention and therefore the European Community will be in breach of the Convention.

Interestingly, the Court refuses to consider the statutory aim of the environmental association as a criterion determining whether they are individually concerned by the contested decision. Yet, we consider, as many national legal systems do, that the formal goals of NGOs constitute a pertinent if not the pertinent criterion to adopt in order to determine if an NGO should have standing before the Courts. Indeed, the analysis of these statutory aims would enable the courts to determine whether the NGO is affected or concerned by the decision challenged.

1.10 The WWF-UK case

The *WWF-UK* case²¹ is of particular importance since, when the Court rendered its judgment, the Aarhus Convention was already in force in the European Community.

In the *WWF-UK* case, WWF-UK sought the annulment in part of Council Regulation of 21 December 2006 fixing for 2007 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks applicable in community waters before the CFI.

WWF-UK is member of the Executive Committee of the North Sea Regional Advisory Council (the North Sea RAC) which advises the Commission on matters of fisheries management in respect of certain sea areas or fishing zones. The North Sea RAC sent to the Council and the Commission a report on the latter's proposal which resulted in the adoption of the contested regulation. The report referred to a minority viewpoint of the environmental NGOs which included WWF-UK.

○ Arguments of WWF-UK

WWF-UK argued that when a person is entitled to submit observations, as WWF-UK is since it is a member of the North Sea RAC, and does lodge observations in order to attempt to influence the relevant decision, that entitlement and action may be sufficient to establish that there is an individual interest for the purposes of the fourth paragraph of article 230 EC Treaty.

The organisation also claimed that it had a particular status in relation to the adoption of the contested regulation as a result of the entitlements it derives from the Aarhus Convention:

“55 Referring to Article 2(5) and Article 6(2) of the Aarhus Convention, the applicant maintains that it was entitled to be informed early in the decision-making procedure and to be involved in the adoption of the contested regulation. That entitlement gives to the applicant a particular status with regard to the adoption of the contested regulation, with the result that the disputed TACs [total allowable catch] are of direct and individual concern to it within the meaning of Article 230 EC”.

○ Findings of the Court

The Court reasserted the *Plaumann* jurisprudence, stating that “if that condition is not fulfilled, a natural or legal person does not, under any circumstances, have standing to bring an action for annulment of a regulation...” (paragraph 66).

²¹ *WWF-UK Ltd v Council of the European Union* (T-91/07), 2 June 2008

As to the involvement of WWF-UK in the procedure which resulted in the adoption of the disputed decision, the Court stated that “it must be borne in mind that the fact that a person is involved in the procedure leading to the adoption of a Community measure is capable of distinguishing that person individually in relation to the measure in question only if the applicable Community legislation grants him certain procedural guarantees” (paragraph 69).

It argued that only the North Sea RAC would be entitled to claim that the procedural guarantees under Regulation 2371/2002 which allows a regional advisory council to submit its own recommendations and suggestions to the Commission on matters relating to fishery management, is capable of distinguishing it individually for the purposes of the fourth paragraph of article 230 EC Treaty. Thus the Court considered that WWF as a mere member of the North Sea RAC could not rely on those guarantees.

The Court also rejected the argument of WWF-UK that the members of the North Sea RAC form a closed and identifiable group of persons recognised by Member States as having a personal interest in the contested decision of the Council. It stated that this fact was not sufficient to differentiate the members of the North Sea RAC or the members of its Executive Committee from any other person and to distinguish them individually in the same way as an addressee.

Furthermore, the Court dismissed the argument of WWF-UK that claimed that the Aarhus Convention and the Aarhus Regulation entitled it to be informed early in the decision-making procedure leading to the adoption of the contested decision and that entitlement to be involved in the adoption of such measures thereby confers to WWF-UK a particular status.

The Court stated that:

“81. On that point, it should be noted that Article 6(2) of the Aarhus Convention provides that the public concerned is to be informed early in an environmental decision-making procedure. In accordance with Article 9(1) of Regulation No 1367/2006, which transposes the provisions of the Aarhus Convention into the Community legal order, Community institutions or bodies are to provide early and effective opportunities for the public to participate during the preparation, modification or review of plans or programmes relating to the environment, when all options are still open.

82. It must be pointed out that **any entitlements which the applicant may derive from the Aarhus Convention and from Regulation No 1367/2006 are granted to it in its capacity as a member of the public. Such entitlements cannot therefore be such as to differentiate the applicant from all other persons within the meaning of [the *Plaumann* jurisprudence]**”.

Finally, the Court did not accept the arguments of WWF-UK that claimed that it should have locus standi in order to fulfil the right to effective judicial protection regarding the

environmental damages caused by the contested decision. The Court referred to the *Greenpeace* and the *EEB* cases and held that the environmental damages caused by the contested regulation, affect WWF-UK “in its objective capacity as an entity whose purpose is to protect the environment, in the same manner as any other person in the same situation. As is apparent from the case-law, that capacity is not by itself sufficient to establish that the applicant is individually concerned by the contested regulation.”

The Court concluded that the applicant was not individually concerned and dismissed the action.

Comments

Again, neither the statutory aim of the applicant NGO to protect the environment, nor its special status allowing it to participate in the decision-making process of the contested regulation are criteria considered by the Court as making the applicant individually concerned by the challenged act.

Moreover, the Court’s interpretation of the Aarhus Convention and of the regulation which transposes the convention into the Community legal order is, as in the *EEB* case, worrying. It demonstrates that the Court continues to apply the *Plaumann* test notwithstanding the Aarhus Convention and the Aarhus Regulation.

Furthermore, according to article 9, paragraph 2 of the Aarhus Convention, members of the public concerned do not have to have a special consultative status, as WWF-UK has, to have standing in order to challenge a decision, they must either have a sufficient interest or maintain an impairment of a right. We are of the opinion that WWF-UK had a sufficient interest.

This decision is therefore not in compliance with article 9(2) of the Aarhus Convention which provides that “what constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of **giving the public concerned wide access to justice...**”.

This judgment contravened article 9, paragraphs 2, 3, 4 and 5 of the Aarhus Convention as the action has been initiated after the entry in force of the Convention in the European Community.

1.11 The *Região autonoma dos Açores* case²²

The autonomous region of the Azores sought the annulment in part of a regulation on the management of the fishing effort relating to Community fishing areas and resources.

The environmental associations: Seas at risk, WWF and Stichting Greenpeace Council (collectively “SWG”), sought leave to intervene in the case in support of the form of order sought by the applicant.

The applicant claimed that it was individually concerned by all the contested provisions because the environmental and economic impact of the contested provisions was more serious on its territory than on the territories of the other regions concerned. But it also submitted that the action should be declared admissible because of the absence of other remedies and the obligations of the Community under the Aarhus Convention.

Indeed, the applicant argued that the only effective remedy available to it was an action for annulment before the Community judicature. The request for a reference for a preliminary ruling before national courts would not enable it to obtain the provisional suspension of operation of the contested provisions.

SWG also claimed that the Court should interpret the fourth paragraph of article 230 EC in such a way as to render it compatible with paragraph 3 of article 9 of the Aarhus Convention.

The Court reasserted the *UPA* jurisprudence on the need for effective judicial protection and rejected the argument of the applicant according to which only the Community judicature is competent to annul and suspend a Community regulation. It also asserted that:

“92. ...direct control of the lawfulness of Community acts of general application is entrusted to the Member States and to the Community institutions. **Since other subjects of law, regional authorities of the Member States included, cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 230 EC, directly challenge Community measures of general application,** they are able, depending on the case, either indirectly to plead the unlawfulness of such acts before the Community judicature under Article 241 EC or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures unlawful, to make a reference to the Court of Justice for a preliminary ruling as to lawfulness (*Unión de Pequeños Agricultores v Council...*)” (paragraph 92).

The Court also reasserted that to change the system of judicial review of the legality of Community acts, it is for the Member States to reform the system currently in force.

²² *Região autonoma dos Açores v Council*, T-37/04, 1 July 2008.

As to the Aarhus Convention, the Court held that:

“93 ...it should be noted that that Convention had not been approved by the Community when the present action was brought – the date by reference to which admissibility falls to be assessed – and that Decision 2005/370 approving that Convention has not provided for its retroactive application. In addition, it should be recalled that Article 9(3) of the Aarhus Convention refers expressly to ‘the criteria, if any, laid down in [the] national law’ of the contracting parties which are laid down, with regard to actions brought before the Community judicature, in Article 230 EC. Although it is true that the conditions for admissibility laid down in that provision are strict, the fact remains that the Community legislature adopted, in order to facilitate access to the Community judicature in environmental matters, Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention... Title IV (Articles 10 to 12) of that regulation lays down a procedure on completion of which certain non-governmental organisations may bring an action for annulment before the Community judicature **under Article 230 EC**. Since the conditions laid down in Title IV of that regulation are manifestly not satisfied in the present case, it is not for the Court to substitute itself for the legislature **and to accept, on the basis of the Aarhus Convention, the admissibility of an action which does not meet the conditions laid down in Article 230 EC**. That argument, also, must therefore be rejected” (paragraph 93).

The Court dismissed the action as it considered the applicant not to be individually concerned by the contested act.

Comments

The Court recognised that the Community legislature adopted the Aarhus Regulation “in order to facilitate access to the Community judicature in environmental matters”. It further stated that “this regulation lays down a procedure on completion of which certain NGOs may bring an action for annulment before the Community judicature **under article 230 EC**”. The reference to “annulment” makes clear that the Court considers it would be open to an environmental NGO to challenge not merely any procedural failing in dealing with the internal review (provided by the Aarhus Regulation) but also to challenge the underlying substantive matter about which an internal review was originally brought.

However, the reference to the condition “under article 230 EC” removes any possibility of such an action for annulment, due to the Court’s interpretation of article 230 EC, as set out at the end of paragraph 93 of the judgment (quoted above). This reinforces the status quo: as long as article 230 EC is applicable, and it is since the Aarhus Regulation explicitly refers to it, the Court will not depart from its jurisprudence on the interpretation

of that article and particularly of the “individual concern” criterion, **even though the EU has ratified the Aarhus Convention**. This sentence means that the Court considers that only the legislature could decide that article 230 EC should be interpreted differently or could amend it.

The Court recalled that article 9(3) of the Aarhus Convention mentions “the criteria, if any, laid down in national law”. However, it did not acknowledge the findings and recommendations of the Compliance Committee of the Aarhus Convention²³, on the Belgian Council of State, in which it stated that:

“...the Parties may not take the clause “where they meet the criteria, if any, laid down in its national law” as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organisations from challenging act or omissions that contravene national law relating to the environment” (paragraph 35).

The position of the Court therefore cannot be accepted since it appears from all the case law cited that the criteria imposed by it are so strict that they bar all environmental organisations from challenging acts that are not in compliance with European law relating to the environment.

Moreover, when the Court explained that since other subjects of law than Member States and EC institutions “**cannot by reason of conditions for admissibility laid down in the fourth paragraph of article 230 directly challenge Community measures of general application**”, they should bring cases before national courts, **the Court expressly recognised that entities other than the Member States and the EC institutions do not have standing under article 230(4)**.

Finally, in reasserting its UPA jurisprudence, the Court reaffirms implicitly that article 230(4) of the Treaty, as interpreted by the Courts, effectively blocks all access for entities other than Member States to judicial review of EC institutions’ acts, since according to the Court, the only solution to change this situation is to amend the EC Treaty.

This judgment would have contravened article 9, paragraphs 3, 4 and 5 of the Aarhus Convention had the action been initiated after the entry in force of the Convention in the European Community.

²³ See footnote 21, supra.

APPENDIX 2

List of Jurisprudence of the European Courts Referred to in this Communication

Plaumann & Co v Commission, Case 25/62, 15 July 1963

Stichting Greenpeace Council and Others v Commission, T-585/93, 9 August 1995

Stichting Greenpeace Council and Others v the Commission, C-321/95 P, 2 April 1998

Marie-Thérèse Danielsson, Pierre Largeteau, Edwin Haa v Commission of the European Communities, T-219/95 R, 22 December 1995

Union de Pequenos Agricultores v Commission, Case T-173/98, 23 November 1999

Union de Pequenos Agricultores v Council, C-50/00P, 25 July 2002

Jégo-Quéré et Cie SA v Commission, T-177/01, 3 May 2002

Commission v Jégo-Quéré & Cie SA, C-263/02P, 1 April 2004

EEB and Stichting Natuur en Milieu v Commission, T-236/04, 28 November 2005

WWF-UK Ltd v Council of the European Union, T-91/07, 2 June 2008

Regiao autonoma dos Açores v Council, T-37/04, 1 July 2008

Grandes Sources, T-96/92, 15 December 1992

CFI, Comité Central d'Entreprise de la Société Anonyme Vittel and Comité d'Etablissement de Pierval and federation Générale Agroalimentaire v Commission, T-12/93, 27 April 1995

Metropole Télévision SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v Commission, joined cases T-528/93, T-542/93, T-543/93 and T-546/93, 11 July 1996

Extramet Industry SA v Council, C-358/89, 11 June 1992

Codorniu SA v Council, C-309/89, 18 May 1994

Commission v Council, C-22/70, 31 March 1971

Parti écologiste “les Verts” v European Parliament, C-294/83, 23 April 1986

European Parliament v Council, C-70/88, 22 May 1990

Hellenic Republic v Council, C-62/88, 29 March 1990

European Parliament v Council, C-70/88, 22 May 1990

Hellenic Republic v Council, C-62/88, 29 March 1990

Interprorc v Commission, Case T-124/96, 1998

Svenska Journalistförbundet v Council, case T-174/95, 1998

Aasociazione lettori di lingua straniera in Italia v Commission, case T-191/99, 2001

Foto-Frost, Case 314/82, 1987