

Aarhus Convention Compliance Committee
United Nations
Economic Commission for Europe

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Dear Ms Marshall,

Subject: ACCC/C/2008/32 - Update case T- 312/14 Direct concern criterion

We hereby send you an update related to our communication on a very recent ruling from the General Court in case T- 312/14. The ruling is not available in English but is notably in French, Swedish, Polish, Italian, Bulgarian and Romanian on the website of the Court. I also attach the Court press release about the case in English.

In this case, the General Court clarifies the scope of the condition laid down in Article 236(4) TFEU requiring direct concern (hereafter 'the third option').

The facts of the case are as follows: The Commission adopted an action plan to rectify the shortcomings in the Italian fisheries control system. In particular, the plan comprised the adoption of measures in order to make up for the absence of satellite surveillance and a reporting requirement for certain vessels authorised to catch swordfish; the implementation of provisions relating to the minimum catch size for swordfish and the technical characteristics of longlines; and the strengthening of the deterrent nature of the financial penalties applied in the case of serious and repeated infringements. Several fishermen's associations, representing professionals in the fisheries sector and, in particular, the interests of fishermen authorised to catch swordfish, brought an action before the General Court seeking the annulment of the Commission's decision. The Court dismissed the action as inadmissible.

The General Court ruled that the third option granted by Article 263(4) TFEU to challenge regulatory acts which do not entail any implementing measures, only concerns acts which, by themselves, that is independently of any implementing measures, change the individual's legal position. Where the act being challenged does not by itself alter the applicant's legal position, the third option is not applicable.

The General Court explained that an act changes itself the legal position of an applicant where it restricts the rights of the applicant or imposes upon him obligations or where a decision bans the placing on the market of a substance as in the case *Microban*.¹

The General Court decided that the challenged decision did not by itself alter the legal position of professionals in the fisheries sector. According to the Court, the Commission's decision at issue does not alter itself the legal position of any natural or legal person other

¹ Para. 36

than the Member State concerned². It is to the Member State to implement the decision at national level.

The Court therefore concluded that the Applicant could not rely on the last sentence of Article 263(4)TFEU.

The Court then examined whether the applicant could rely on the second option provided by Article 263(4)TFEU. Under this option, the applicant must not only be directly concerned but also be individually concerned. First, the Court reasserted the *Plaumann* test and decided that the decision concerned the members of the association applicants only in their capacity of fishermen, in particular, fishermen fishing swordfish using certain fishing techniques, as any other economic operator actually or potentially in an identical situation³. The Court further ascertained that the fact that the list of Italian vessels authorised to fish swordfish comprised more than 7300 vessels confirmed that these could not be individually concerned by the challenged decision.

Second, the Court observed that the Commission, in adopting its decision, was not required to follow a procedure where fishermen were in a position to claim any rights.

The Court concluded that the applicants were not individually concerned.

This ruling demonstrates that the interpretation by the Court of the direct concern criterion is as unduly restrictive as the one of the individual concern. Even economic operators having their professional activity impacted by the Commission's decisions are not considered as legitimate to challenge such a decision. The large number of operators affected by the decision runs contrary to the interest of the applicants since as soon as the applicant is not the only stakeholder affected by the challenged decision the Court refuses to provide standing.

Given the lack of will from the EU courts to relax the standing rules for economic operators there is no likelihood that they will adapt their interpretation of these for NGOs. Were the Courts to interpret the direct concern criteria in the same way for NGOs, these would not be considered as directly concerned by any decisions of EU institutions. An EU institution's decision in an environmental matter does not restrict the rights of an environmental NGO nor does it impose obligations on them. An environmental NGO does not produce, manufacture, import or place on the market products or substances and will therefore not be concerned either directly or individually by decisions such as the one adopted in the *Microban* case. The environment is a diffuse interest that is the concern of millions of people not of a "closed circle of people determined at the moment" of the adoption of a Commission's decision⁴. If the reasoning of the Court was to be applied in environmental matters, it would be in violation of Article 9(3) of the Aarhus Convention. Regulation 1367/2006 designated NGOs having as their primary stated objective the promotion of environmental protection in the context of environmental law, as the appropriate stakeholders to represent the environment

² Para 52.

³ Para 66: "*la décision attaquée, notamment les actions n°13, 15, 16 et 17 figurant dans le plan d'action annexé à celle-ci, ne concerne les adhérents des requérantes qu'en raison de leur qualité objective de pêcheurs d'espadon utilisant certaines techniques de pêche, au même titre que tout autre opérateur économique se trouvant, actuellement ou potentiellement, dans une situation identique*".

⁴ Para 69: "La décision attaquée ne concerne pas un cercle fermé de personnes déterminées au moment de son adoption et dont la Commission aurait voulu régler les droits".

before the Courts. NGOs should therefore be considered as those concerned directly and individually by decisions of EU institutions in environmental matters.

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