

Update on the WWF-UK case addressed by ClientEarth to the Compliance Committee in relation to Communication ACCC/C/2008/32

ClientEarth would like to inform the Committee of the fact that the European Court of Justice (ECJ) has rendered its judgment in case C-355/08 (WWF-UK) on 5 May 2009¹.

1. Background

WWF-UK appealed the judgment of the Court of First Instance (CFI) in case T-91/07 in which WWF-UK's action was dismissed as inadmissible.

WWF-UK claimed before the ECJ that the CFI was wrong in holding that WWF-UK did not enjoy procedural guarantees in its own right which would distinguish it 'individually' for the purposes of article 230(4) of the EC Treaty and that those guarantees were solely for the benefit of the RACs, and not of their members. WWF-UK also challenged the finding of the CFI according to which *"even supposing that the applicant (WWF-UK) did enjoy such guarantees, its action would not be aimed at safeguarding those guarantees and would therefore be inadmissible"*.

2. Findings of the European Court of Justice

The ECJ first confirmed the finding of the CFI according to which *"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"*².

It further specified that *"where such procedural rights were conferred on an entity composed of a number of members, only the entity expressly named in the Community provision conferring those rights may be regarded as individually concerned for the purposes of article 230(4) of EC Treaty and not its members taken individually"*³. However, the Court stated that *"a person or an entity enjoying such a procedural right will not, as a rule, where there is any type of procedural guarantee, have standing to bring proceedings contesting the legality of a Community act in terms of its substantive content"*⁴. And

¹ Case C-355/08, *WWF-UK v Council*.

² Case C-355/08, *ibid*, para 42.

³ Case C-355/08, *ibid*, para 43.

⁴ Case C-355/08, *ibid*, para 44.

that *“it was not apparent from the relevant legislative provisions that a RAC may be recognized as having the right to challenge the validity of the contested regulation in terms of its substantive content”*⁵.

Finally, the ECJ made clear that *“even assuming that the appellant did enjoy such procedural guarantees in its own right, that would not mean that it was entitled to challenge the substance of the contested regulation”*⁶.

The ECJ thus confirmed the decision of the CFI and dismissed the appeal brought by WWF-UK.

3. Implications in relation to the Aarhus Convention

In the view of the ECJ in this case:

Only the entities which have procedural rights specifically provided by the relevant Community provisions may be individualized for the purposes of article 230(4) of EC Treaty.

Where such rights are conferred upon an entity composed of different members, only the entity as a whole may be individualized for the purpose of article 230(4) of EC Treaty not its members individually.

These procedural rights enable their owners only to contest the infringement of these rights and in no way do they entitle them to challenge the substantive content of the Community act that has been adopted following the exercise of these rights.

It follows that the ECJ has violated articles 9(3) and 9(2) of the Convention.

3.1 Violation of article 9(3) of the Convention

Article 9(3) of the Convention does not specify whether access to judicial procedures entails the right to challenge the substantive content of an act or only its procedural legality. However, because the right is not limited, it should be read as implied that the Convention allows challenging both aspects of an act. In addition, the requirement under article 9(3) that the challenged act must contravene provisions of the “national law relating to the environment” demonstrates that any provisions of environmental law may be contravened and not only the procedural requirements imposed by it. The ECJ should therefore not restrict the right of NGOs by allowing them to challenge only the procedural legality of Community acts.

Also, neither article 9(3) of the Convention nor EU law subject the right of access to a judicial procedure to the ownership of particular procedural rights. Article 9(3) of the Convention only subjects this right to the “criteria, if any, laid down” in the national law of the Parties to the Convention. In EU law, the

⁵ Case C-355/08, *ibid*, para 46.

⁶ Case C-355/08, *ibid*, para 48.

relevant criteria are the ones laid down in article 230(4) of EC Treaty, to be directly and individually concerned by the contested act.

An NGO, such as WWF-UK, whose aim is notably the preservation of natural resources, including the fauna and flora, should be considered directly and individually concerned by an act fixing the fishing opportunities and associated conditions for certain fish stocks for the purposes of article 230(4) of the EC Treaty and be entitled to challenge this act. This should be the case independent of whether the NGO has specific procedural rights under this particular Community regulation.

In addition, when an NGO applicant has a special status, as a member of an official consultative body such a RAC, which allows it to participate in the decision-making process leading to regulations, that should only confirm its right of standing.

If an NGO such as WWF-UK does not have standing to contest an act relating to the sustainable use of certain species of fishes, no other NGO will be considered as having standing to bring proceedings contesting the substantive legality of such a Community act. Indeed, according to EU settled case law, which is reasserted in the present case, no member of the public will ever have standing to challenge community acts in environmental matters.

The other conditions required by article 9(3) of the Convention were also met in the present case.

The challenged Regulation was an act adopted by a public authority. Whether the other conditions required by the Convention were fulfilled, namely whether the contested act was adopted by the Council acting in a legislative capacity in the meaning of article 2 (2), subparagraph (d) of the Convention is not relevant in this case. Indeed, whether the Council was acting in a legislative capacity when it adopted Regulation 41/2007 does not relate to the admissibility of the case brought by WWF-UK and to its right of standing. Rather it relates to whether the action brought by WWF-UK was well founded or not. This requirement should therefore not be an obstacle to the access to the Courts. That is, standing should have been granted, even if the case was later judged against WWF-UK on the merits.

Moreover, it is settled EU case-law that "*all measures adopted by the institutions, whatever their nature or form which are intended to have legal effects*" can be challenged under article 230(4) of the Treaty⁷. That is a specific feature of EU law and of the EU judicial system which also exists in other countries such as Germany. The Parties to the Convention should thus be able to adopt more stringent rules than the ones of the Convention. At the very least, the Convention should not be interpreted in a way to restrict the categories of acts that can be challenged in national law and should not narrow the rights granted under EU law. The Convention is meant to increase access to justice not restrict it.

⁷ Case 22/70, *Commission v Council*, [1971] ECR 263, paras. 39-41. See also case C-309/89, *Cordoniu SA v Commission* [1994] ECR I-1853; Joined cases T- 172/98 and T-175/98 to T-177/98, *Salamander AG and others v European Parliament and Council* [2000] REC II 2487, paras. 27-30; Case T-84/01, *Association contre l'heure d'été v Council* [2002] ECR II-99, paragraph 23; Case T-94/04, *EEB and others v Commission* [2005] ECR II 4919, paras. 34-36 and para. 53.

Finally, the contested act was allegedly contravening EU law relating to the environment.

It follows that WWF-UK should have been granted standing and that the decision of the ECJ violates article 9(3) of the Convention.

3.2 Violation of article 9(2) of the Convention

In case the contested act was to be considered as a decision subject to article 6 (1) (b) or as a plan or a programme relating to the environment subject to article 7 of the Convention, WWF-UK should have been granted standing. As an environmental NGO meeting the requirements referred to in article 2(5) of the Convention, it should have been deemed to have a sufficient interest or to maintain impairment of a right for the purpose of article 9(2) subparagraph (a) and (b) of the Convention.

4. Conclusion

In this case, the ECJ confirmed its overly strict interpretation of article 230(4) of the Treaty. Even where an environmental NGO has the goal of sustainable use of natural resources and the protection of fauna and a special status, as a member of an official consultative body, to participate in the decision-making process of the contested act, the ECJ still does not regard the NGO as individually concerned for the purposes of article 230(4) of the Treaty.

It follows that the ECJ still denies NGOs' right of standing despite the entry into force of the Convention within the Community legal order.

The ruling of the ECJ in this case violates articles 9(3) and article 9(2) of the Convention.