

ORDER OF THE COURT (Eighth Chamber)

5 May 2009 (*)

(Appeal – Regulation (EC) No 2371/2002 – Consultation of Regional Advisory Councils concerning measures governing access to waters and resources and the sustainable pursuit of fishing activities – Regulation (EC) No 41/2007 – Fixing for 2007 of the total allowable catches for cod – Dissenting minority view recorded by members of a Regional Advisory Council in the RAC report on those total allowable catches – Action for annulment of Regulation No 41/2007 brought by such a member – Inadmissibility – Appeal clearly unfounded)

In Case C-355/08 P,

APPEAL under Article 56 of the Statute of the Court of Justice, lodged on 28 July 2008,

WWF-UK Ltd, established in Godalming (United Kingdom), represented by P. Sands and J. Simor, barristers, and by R. Stein, solicitor,

appellant,

the other parties to the proceedings being:

Council of the European Union, represented by M. Moore and A. De Gregorio Merino, acting as Agents,

defendant at first instance,

Commission of the European Communities, represented by P. Oliver, acting as Agent, with an address for service in Luxembourg,

intervener at first instance,

THE COURT (Eighth Chamber),

composed of T. von Danwitz (Rapporteur), President of Chamber, G. Arestis and J. Malenovský, Judges,

Advocate General: E. Sharpston,

Registrar: R. Grass,

after hearing the Advocate General,

makes the following

Order

1 By its appeal, WWF-UK Ltd ('WWF-UK' or 'the appellant') claims that the Court should set

aside the order of 2 June 2008 in Case T-91/07 *WWF-UK v Council* ('the order under appeal'), by which the Court of First Instance of the European Communities dismissed as inadmissible WWF-UK's action for the partial annulment of Council Regulation (EC) No 41/2007 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 and, for Community vessels, in waters where catch limitations are required (OJ 2007 L 15, p. 1; 'the contested regulation'), to the extent that it fixed the total allowable catches ('TACs') for the year 2007 in respect of the fishing of cod in the areas covered by Council Regulation (EC) No 423/2004 of 26 February 2004 establishing measures for the recovery of cod stocks (OJ 2004 L 70, p. 8).

Legal context

Regulation (EC) No 2371/2002

- 2 Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (OJ 2002 L 358, p. 59) provides for a number of measures in order to achieve its objectives, including the establishment of regional advisory councils ('RACs').
- 3 The first subparagraph of Article 2(1) of Regulation No 2371/2002, which sets out the objectives of that regulation, reads as follows:

'The Common Fisheries Policy shall ensure exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions.'
- 4 Article 4(1) and (2) of that regulation provides:

'1. To achieve the objectives mentioned in Article 2(1), the Council shall establish Community measures governing access to waters and resources and the sustainable pursuit of fishing activities.

2. The measures referred to in paragraph 1 shall be established taking into account available scientific, technical and economic advice and in particular of the reports drawn up by the Scientific, Technical and Economic Committee for Fisheries (STECF) ... as well as in the light of any advice received from [RACs] established under Article 31. ...'
- 5 Article 20(1) of Regulation No 2371/2002 provides:

'The Council, acting by qualified majority on a proposal from the Commission, shall decide on catch and/or fishing effort limits and on the allocation of fishing opportunities among Member States as well as the conditions associated with those limits. ...'
- 6 Article 31(1), (4) and (5) of that regulation defines the role of the RACs:

'1. [RACs] shall be established to contribute to the achievement of the objectives of Article 2 (1) and in particular to advise the Commission on matters of fisheries management in respect of certain sea areas or fishing zones.

...

4. [RACs] may be consulted by the Commission in respect of proposals for measures, such as

multi-annual recovery or management plans, to be adopted on the basis of Article 37 of the Treaty that it intends to present and that relate specifically to fisheries in the area concerned. They may also be consulted by the Commission and by the Member States in respect of other measures. ...

5. [RACs] may:

- (a) submit recommendations and suggestions, of their own accord or at the request of the Commission or a Member State, on matters relating to fisheries management to the Commission or the Member State concerned;
- (b) inform the Commission or the Member State concerned of problems relating to the implementation of Community rules and submit recommendations and suggestions addressing such problems to the Commission or the Member State concerned;
- (c) conduct any other activities necessary to fulfil their functions.

...'

Decision 2004/585/EC

7 The first and third recitals in the preamble to Council Decision 2004/585/EC of 19 July 2004 establishing Regional Advisory Councils under the Common Fisheries Policy (OJ 2004 L 256, p. 17) state that the creation of the RACs enables 'new forms of participation by stakeholders in the Common Fisheries Policy' and that, since RACs are stakeholder-led organisations, they should adapt their structure 'to the specific characteristics of the fisheries and regions concerned'.

8 Article 2(1) of Decision 2004/585 lists all the regions and fisheries for which an RAC is to be established, one such region being the North Sea.

9 Under Article 4(1) of that decision, each RAC is to consist of a general assembly and an executive committee. Under Article 4(3) of that decision, the executive committee is to be composed of up to 24 members.

10 Article 5(1) and (3) of Decision 2004/585 provides:

'1. The [RACs] shall be composed of representatives from the fisheries sector and other interest groups affected by the Common Fisheries Policy.

...

3. In the general assembly and executive committee, two thirds of the seats shall be allotted to representatives of the fisheries sector and one third to representatives of the other interest groups affected by the Common Fisheries Policy.'

11 Under Article 7(3) of that decision:

'The members of the executive committee shall, where possible, adopt recommendations by consensus. If no consensus can be reached, dissenting opinions expressed by members shall be recorded in the recommendations adopted by the majority of the members present and voting. Upon receipt in writing of the recommendations, the Commission and, where relevant, the Member States concerned shall reply precisely to them within a reasonable time period and, at

the latest, within three months.’

The contested regulation

12 The first paragraph of Article 1 of the contested regulation states:

‘This Regulation fixes fishing opportunities for the year 2007, for certain fish stocks and groups of fish stocks, and the associated conditions under which such fishing opportunities may be used.’

13 Article 5(1) of that regulation states that the TACs for Community vessels in Community waters or in certain non-Community waters are set out in Annex I to that regulation.

14 Annex I A to that regulation specifies, inter alia, the TACs for cod in the areas defined in Regulation No 423/2004.

Background to the case

15 WWF-UK is a member of the Executive Committee of the North Sea RAC. The latter sent a report to the Council and the Commission on the proposal for a Council regulation fixing for 2007 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where catch limitations are required (COM(2006) 774 final).

16 That report made reference to a minority viewpoint held by three environmental organisations, including WWF-UK, to the effect that they were unable to support the proposal in view of the fact that, for the fifth year in a row, the International Council for the Exploration of the Sea had recommended a zero catch for North Sea cod.

17 The contested regulation fixed the TACs for cod for the year 2007 at approximately 30 000 tonnes for all of the areas defined by Regulation No 423/2004.

The proceedings before the Court of First Instance and the order under appeal

18 By application lodged at the Registry of the Court of First Instance on 19 March 2007, WWF-UK brought an action claiming that the Court should:

- annul in part the contested regulation in so far as it fixes the TACs for cod for the year 2007;
- rule that the provisions in question are nevertheless to continue to have effect until replaced by a new measure;
- order the Council to pay the costs.

19 The Council, which had raised an objection of inadmissibility in respect of that action, contended that the Court of First Instance should declare the action manifestly inadmissible.

20 By order of the President of the Fifth Chamber of the Court of First Instance of 14 September

2007, the Commission was granted leave to intervene in support of the forms of order sought by the Council, and lodged a statement in intervention.

21 By the order under appeal, made under Article 114 of its Rules of Procedure, the Court of First Instance dismissed the action as inadmissible without initiating the oral procedure.

22 The Court of First Instance held that the contested regulation was not of individual concern to WWF-UK. In that regard, it recalled first of all, referring to settled case-law of the Court of Justice and of the Court of First Instance, that the fourth paragraph of Article 230 EC confers on individuals the right to challenge any decision which, although in the form of a regulation, is of direct and individual concern to them.

23 After recalling the criteria set out in the settled case-law of the Court of Justice and the Court of First Instance concerning the concept of a person individually concerned, the Court of First Instance went on to state 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 in his own right. However, any possible procedural guarantees accorded by Regulation No 2371/2002 and Decision 2004/585 would exist solely for the RACs and not for their members. WWF-UK's legal position is in no way affected by the fact, mentioned by WWF-UK, that a minority view was expressed in the report drawn up by the North Sea RAC. Moreover, the Commission had taken the consultations with the RACs into account.

24 Consequently, according to the finding made by the Court of First Instance in paragraph 77 of the order under appeal:

‘[E]ven supposing that the applicant enjoyed procedural guarantees ..., which is not the case, this action would not be aimed at safeguarding those guarantees. Even were that to be the case, judicial protection of the applicant's interests would not require that the contested regulation be regarded as being of individual concern to the applicant (see, to that effect, Case C-70/97 P *Kruidvat v Commission* [1998] ECR I-7183, paragraph 43; Case C-176/06 P *Stadtwerke Schwäbisch Hall and Others v Commission* [2007] ECR I-0000, paragraph 22, and Case T-12/93 *CCE de Vittel and Others v Commission* [1995] ECR II-1247, paragraph 59).’

25 The Court of First Instance therefore held that WWF-UK had not demonstrated that it was individually concerned by the TACs at issue.

26 Lastly, the Court of First Instance stated that, since the two conditions laid down in the fourth paragraph of Article 230 EC were cumulative, it was not necessary to consider whether WWF-UK was directly concerned by the TACs at issue or whether it had any legal interest in bringing proceedings.

Forms of order sought

27 By its appeal, WWF-UK claims that the Court should:

- set aside the order under appeal;

- declare its action before the Court of First Instance admissible, and
- order the Council and the Commission to pay the costs.

28 The Council contends that the Court should:

- dismiss the appeal as unfounded, and
- order the appellant to pay the costs.

29 The Commission contends that the Court should:

- dismiss the appeal as clearly inadmissible, and
- order the appellant to pay the costs.

The appeal

30 Under Article 119 of its Rules of Procedure, where the appeal is, in whole or in part, clearly inadmissible or clearly unfounded, the Court may at any time, acting on a report from the Judge-Rapporteur and after hearing the Advocate General, dismiss the appeal by reasoned order without initiating the oral procedure.

31 In support of its appeal, the appellant relies on three pleas in law, alleging as to the first two pleas, infringement of the fourth paragraph of Article 230 CE, and as to the third plea, that the Court of First Instance misapplied Article 116(5) of its Rules of Procedure.

32 It is appropriate to examine the first and second pleas together.

The first and second pleas: incorrect identification of the persons enjoying procedural guarantees under Regulation No 2371/2002 and Decision 2004/585, and the scope of their right of action

Arguments of the parties

33 By its first plea, the appellant claims that the Court of First Instance wrongly held that WWF-UK was not entitled in its own right to procedural guarantees enabling it to be distinguished individually for the purposes of the fourth paragraph of Article 230 EC and that those guarantees were solely for the benefit of the RACs, and not of their members. According to the appellant, as a member of the North Sea RAC Executive Committee, it is entitled, in its own right, under Article 4(2) of Regulation No 2371/2002 and Article 7(3) of Decision 2004/585 to have its opinion taken into consideration by the Council, as a matter of obligation, before the adoption of the decision relating to the TACs.

34 The Council and the Commission maintain in that regard that the legislative process leading to the adoption of the TACs does not confer any procedural rights on RACs, let alone their members.

35 By its second plea, the appellant submits that the Court of First Instance misconstrued the concept of *locus standi* and wrongly held in paragraph 77 of the order under appeal – by

incorrectly interpreting the case-law cited therein – that, even assuming that WWF-UK did enjoy some procedural guarantees, its action would not be aimed at safeguarding those guarantees and the judicial protection of its interests did not require it to be regarded as individually concerned.

36 The appellant argues that if an applicant can show that it is directly and individually concerned by the contested measure, it is entitled to challenge the legality of that measure in terms of its substantive content and not merely to assert its procedural rights, which is what the appellant is seeking to do in the present case. That is clear, inter alia, from Case C-191/82 *Fediol v Commission* [1983] ECR 2913 and from *CCE de Vittel and Others v Commission*.

37 According to the Council, the appellant is distorting the reasoning of the Court of First Instance. The latter held, in fact, that even in the event – postulated for the sake of argument – that the appellant enjoyed procedural rights and had been unable to assert them, it would be entitled to bring an action strictly for the purpose of safeguarding those rights and there would be no need to consider the existence of individual interest. As it is, in the present case, the action brought by WWF-UK was designed not to safeguard its purported procedural rights but to challenge certain provisions of the contested regulation in terms of their substantive content.

38 The Commission contends that the conferral of a procedural right on a party does not necessarily mean that the latter has standing to challenge the contested measure: that depends on the nature and extent of the procedural right at issue. In reality, therefore, the Court of First Instance held that, even if the appellant had enjoyed the rights conferred on the North Sea RAC, it would still not have been individually concerned by the contested regulation.

Findings of the Court

39 By its first two pleas, the appellant claims that the Court of First Instance was wrong in holding that it did not enjoy procedural guarantees in its own right sufficient to distinguish it ‘individually’ for the purposes of the fourth paragraph of Article 230 EC, and challenges the finding in paragraph 77 of the order under appeal that, even supposing that the applicant did enjoy such guarantees, its action would not be aimed at safeguarding those guarantees and would therefore be inadmissible.

40 Under the fourth paragraph of Article 230 EC, any natural or legal person may institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

41 According to settled case-law, persons other than those to whom a decision is addressed may claim to be individually concerned only 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 those factors, distinguishes them individually just as in the case of the person addressed (see, inter alia, Case 25/62 *Plaumann v Commission* [1963] ECR 95, p. 107; Case C-198/91 *Cook v Commission* [1993] ECR I-2487, paragraph 20; Case C-225/91 *Matra v Commission* [1993] ECR I-3203, paragraph 14; and Case C-260/05 P *Sniace v Commission* [2007] ECR I-10005, paragraph 53).

42 As the Court of First Instance rightly pointed out in paragraph 69 of the order under appeal, 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 (order of 16 September 2005 in Case C-342/04 P *Schmoldt and Others v Commission*, paragraph 39).

43 Moreover, where a provision of Community law requires, for the adoption of a Community act, a procedure to be followed under which a person may claim rights, such as the right to be heard, the particular legal position in which that person is thereby placed sets him apart for the purposes of the fourth paragraph of Article 230 EC (see, to that effect, Case 26/76 *Metro SB-Großmärkte v Commission* [1977] ECR 1875, paragraph 13, and order in *Schmoldt and Others v Commission*, paragraph 40 and the case-law cited). Where such procedural rights are 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 the fourth paragraph of Article 230 EC, and not its members taken individually (see the order in *Schmoldt and Others v Commission*, paragraphs 41 and 42).

44 However, the fact remains that a person or 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. The precise scope of an individual's right of action against a Community measure depends on his legal position as defined by Community law with a view to protecting the legitimate interests thus afforded him (see, to that effect, *Metro SB-Großmärkte v Commission*, paragraph 13, and *Fediol v Commission*, paragraph 31). It follows that the line of argument put forward by the appellant is at variance with the letter and the spirit of the fourth paragraph of Article 230 EC (see, to that effect, the order of the President of the Court of 12 October 2000 in Case C-300/00 P(R) *Federación de Cofradías de Pescadores de Guipúzcoa and Others v Council* [2000] ECR I-8797, paragraph 39).

45 As it is, it is clear from the relevant provisions applicable in the present case, and in particular from Article 31(4) and (5) of Regulation No 2371/2002 and the third sentence of Article 7(3) of Decision 2004/585, that the RACs have the right to be heard by the Commission prior to the adoption of the measures provided for in Article 4(1) of that regulation. That right implies that the Commission must take into account recommendations issued by the RACs during the legislative process leading to the adoption of the TACs, and that the RACs have a right to receive a reply to those recommendations under the third sentence of Article 7(3) of Decision 2004/585, but does not impose on the legislature an obligation to implement proposals made in those recommendations. That is confirmed, moreover, by the absence of any reference to the RACs and their recommendations in Article 20(1) of Regulation No 2371/2002, which lays down the procedural rules for the adoption of measures fixing catch limits.

46 In addition, it is not apparent from the relevant legislative provisions that a RAC may be recognised as having the right to challenge the validity of the contested regulation in terms of its substantive content.

47 Thus, the mere fact of relying on the existence of a procedural guarantee before the Community judicature does not mean that an action will be admissible where it is based on pleas alleging the infringement of substantive rules of law.

48 In the light of the foregoing and in so far as the appellant seeks in the present case not to protect its procedural rights but to challenge the legality of the contested regulation in terms of its

substantive content, the answer to the question whether or not it enjoys in its own right procedural guarantees under Regulation No 2371/2002 and Decision 2004/585 is not relevant to the outcome of the dispute. 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.

49 The Court of First Instance was right therefore to declare WWF-UK's action inadmissible in so far as it did not seek to ensure protection of its procedural guarantees.

50 Consequently, the first and second pleas in law are clearly unfounded.

Third plea: misapplication of Article 116(5) of the Rules of Procedure of the Court of First Instance

Arguments of the parties

51 By its third plea, the appellant claims that the Court of First Instance infringed its rights of defence by failing to take into account its observations on the Commission's statement in intervention.

52 The appellant states that the Court of First Instance closed the written proceedings after receiving the Commission's statement in intervention and did no more than provide WWF-UK with a copy of that statement seven days later, without giving it the opportunity to respond to it, despite assurances received earlier by WWF-UK's legal adviser from an employee of the Court of First Instance, as evidenced by the record of a telephone conversation appended to the application. The Court of First Instance ultimately made the order under appeal without taking into account the observations which the appellant had nevertheless sent it. Furthermore, WWF-UK had earlier expressly stated that it would not object to the application to intervene provided that it was given an opportunity to respond to it. Lastly, that response ought to have been taken into account as a matter of obligation, since in its statement the Commission relied on new case-law which was then referred to by the Court of First Instance in its findings.

53 The Council responds, first, that only the President of the Court of First Instance has the authority to allow a reply to be submitted to a statement in intervention, and any other guidance – the existence of which is doubted by the Council – provided in that regard by an official or employee of the Court of First Instance is irrelevant. Secondly, the President enjoys a broad discretion for the purposes of taking such a decision. Lastly, the case-law relied on by the Commission is not new and had no influence on the conclusions reached by the Court of First Instance.

54 The Commission maintains that this plea also is unfounded.

Findings of the Court

55 First, it is clear from Article 116(5) of the Rules of Procedure of the Court of First Instance, which states that after the statement in intervention has been lodged the President will, where necessary, prescribe a time-limit within which the parties may reply to that statement, that the decision whether or not to grant the parties the right to reply to a statement in intervention falls within the discretion of the President of the Court of First Instance and there is no requirement that the parties be heard beforehand.

- 56 Secondly, as regards the appellant's statement that it would not object to intervention by the Commission if it was allowed to respond to it, suffice it to say that the Court of First Instance cannot be bound by such a statement either as regards its decision whether or not to allow an application to intervene or, *a fortiori*, as regards its decision to allow a reply to a statement in intervention. Nor can it be bound by an informal conversation on the matter with one of its employees.
- 57 That finding is not affected by the appellant's argument that the Commission relied on new case-law which was referred to by the Court of First Instance in the order under appeal.
- 58 In the light of the foregoing, the third plea must be rejected as clearly unfounded.
- 59 It follows from all the above considerations that the appeal must, in accordance with Article 119 of the Rules of Procedure, be dismissed in its entirety.

Costs

- 60 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has applied for costs against the appellant and the latter has been unsuccessful, it must be ordered to pay the costs.
- 61 Under the first subparagraph of Article 69(4) of the Rules of Procedure, also applicable by virtue of Article 118 thereof, institutions which intervene in the proceedings must bear their own costs. The Commission must therefore be ordered to pay its own costs.

On those grounds, the Court (Eighth Chamber) hereby:

- 1. Dismisses the appeal;**
- 2. Orders WWF UK Ltd to pay the costs;**
- 3. Orders the Commission of the European Communities to bear its own costs.**

[Signatures]

* Language of the case: English.