8 D 58/08.AK

R u l i n g

In the administrative court proceedings

on immission control law (provisional and initial partial licence for a hard coal-fired power plant);

specifically: Suspension of the proceedings and submission to the European Court of Justice

the 8th Senate of the

HIGHER ADMINISTRATIVE COURT OF THE STATE OF NORTH RHINE-WESTPHALIA

on 5 March 2009

as represented by

the Presiding Judge at the Higher Administrative Court

the Judge at the Higher Administrative

the Judge at the Administrative

the Lay Judge

the Lay Judge

ruled as follows:

I.

The proceedings are to be suspended.

II. The following questions are submitted to the European Court of Justice in accordance with Article 234 of the EC Treaty:

1. Does Article 10a of Directive 85/337/EEC in the version of Directive 2003/35/EC require that non-governmental organisations seeking access to the courts of a Member State, whose administrative procedural law necessitates maintaining the impairment of a right, are able to maintain the impairment of all environmental provisions relevant to the authorisation of the project, i.e. also those provisions that exclusively serve the public interest and not also the protection of the legal interests of individuals?

2. If the answer to question 1 is not 100% affirmative:

   Does Article 10a of Directive 85/337/EEC in the version of Directive 2003/35/EC require that non-governmental organisations seeking access to the courts of a Member State, whose administrative procedural law necessitates maintaining the impairment of a right, are able to maintain the impairment of those environmental provisions relevant to the authorisation of the project that are directly established

in Community law or that implement Community environmental provisions into national law, i.e. also those provisions that exclusively serve the public interest and not also the protection of the legal interests of individuals?

a) If the answer to question 2 is affirmative in principle:
Do Community environmental provisions have to meet specific requirements as regards contents for the impairment of a right to be maintained?

b) If the answer to question 2a is affirmative:
What are these requirements (e.g. direct impact, protection purpose, objective)?

3. If the answer to question 1 or 2 is affirmative:
Does the Directive directly grant the non-governmental organisation the right to access to the courts above and beyond the provisions of national law?

R e a s o n i n g :

1

I. Facts

2

The summoned third party is planning to construct and operate a hard coal-fired power plant in M. The power plant is to be operated with a thermal output of up to 1,705 MW

and a net electrical output of 750 MW. The investment volume for the project is in the region of 1.4 billion euros. Commissioning of the power plant is scheduled for the year 2012.

3

The project is subject to the compulsory requirement to perform an environmental impact assessment.

4

There are five Special Areas of Conservation as defined by the Habitats Directive within a distance of up to 8 km of the planned site.

5

On 6 May 2008, the Defendant issued the summoned third party with an initial partial licence for the project. The provisional decision asserts that there are no legal objections to the project site.

6

On 16 June 2008, the Plaintiff, a recognised environmental organisation, instituted legal proceedings against the provisional decision and the initial partial licence.

7

The Plaintiff contended that there were substantive and procedural errors in the provisional decision and the partial licence, and outlined in detail the protective and

precautionary regulations under immission control law and the requirements under water and nature conservation legislation which it claimed the project violates.

8

The Plaintiff filed an application to reverse the Defendant's provisional decision and the initial partial licence of 6 May 2008.

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The Defendant and the summoned third party filed an application for the case to be dismissed.

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II. Reasoning and explanation of the questions submitted

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1. Relevant legal provisions

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a) Community law

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Article 10 a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ L 175 of 5 July

1985, page 40) in the wording of Article 3, no. 7 of Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ L 156 of 25 June 2003, page 17) – hereinafter referred to as the EIA Directive – states that:

"Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

a) having a sufficient interest, or alternatively,

b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

.....

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the

purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article. ..."

14 b) National law

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Article 42 of the Rules of Procedure of the Administrative Courts (Verwaltungsgerichtsordnung, FwGO) (Federal Law Gazette (BGBl.) I 1991, page 686) states that:

" (1) Legal proceedings may be instituted requesting the rescission of an administrative act (action for rescission) and a judgement to adopt a rejected or omitted administrative act (act to enforce the issuance of an administrative decision).

(2) Unless otherwise provided by statutory law, such legal proceedings shall only be considered admissible if the plaintiff asserts the impairment of his rights by the administrative act or the rejection or omission thereof."

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Article 113, paragraph (1), first sentence of the Rules of Procedure of the Administrative Courts states that:

“ (1) If the administrative act is unlawful and the rights of the plaintiff have thereby been impaired, the Court shall rescind the administrative act and any objection rulings”.

17

Article 1, paragraph (1), letter a of the Act Concerning Supplemental Provisions on Appeals in Environmental Matters Pursuant to EC Directive 2003/35/EC (UmwRG) (Federal Law Gazette [BGBl.] I 2006, page 2816) – hereinafter referred to as the Environmental Appeals Act – states that:

“(1) This Act shall apply to appeals against:

1. Decisions as defined in Article 2, paragraph (3) of the Federal Environmental Impact Assessment (Federal EIA Act) [Gesetz über die Umweltverträglichkeitsprüfung] concerning the admissibility of projects for which there may be an obligation to conduct an environmental impact assessment pursuant to .....
a) The Federal EIA Act”

18

Article 2, paragraph (1), no. 1 of the Environmental Appeals Act states that:

“ (1) A German or foreign association that is recognised pursuant to Article 3 may, without having to assert that its own rights have been violated, file appeals in accordance with the Rules of Procedure of the Administrative Courts against a decision

pursuant to Article 1, paragraph (1), first sentence or failure to take such a decision if the association:

1. Asserts that a decision pursuant to Article 1, paragraph (1), first sentence or failure to take such a decision violates statutory provisions that protect the environment, establish individual rights, and could be of importance for the decision ..."

19

Article 2, paragraph (5), first sentence, no. 1 of the Environmental Appeals Act states that:

“(5) Appeals in accordance with paragraph (1) shall be justified:

1. If the decision pursuant to Article 1, paragraph (1), or the failure to take such a decision, violates statutory provisions that protect the environment, establish individual rights, and are of importance for the decision, and the violation involves issues of environmental protection that are among the objectives that are to be promoted by the association according to its bylaws; ..."

20

Article 2, paragraph (1), first sentence of the Environmental Impact Assessment Act [Gesetz über die Umweltverträglichkeitsprüfung] (Federal Law Gazette (BGBl.) I 2005, page 1757) – hereinafter referred to as the EIA Act – states that:

“(1) The environmental impact assessment represents an integral part of procedures applied by authorities when deciding upon the approval of projects. ..."

21

Article 2, paragraph (3), no. 1 of the EIA Act states that:

“(3) “Decisions” within the meaning of paragraph (1), sentence 1, shall be

1. a concession [Bewilligung], permit [Erlaubnis], licence [Genehmigung], plan approval [Planfeststellungsbeschluss] or other official decision on the authorisation of projects that is taken by authorities within the framework of an administrative procedure, with the exception of notification procedures, ..."

22

Article 5, paragraph (1), first sentence of the Act on the Prevention of Harmful Effects on the Environment Caused by Air Pollution, Noise, Vibration and Similar Phenomena (Bundes-Immissionsschutzgesetz, BImSchG) (Federal Law Gazette (BGBl. I 2002, page 3830) – hereinafter referred to as the Federal Immission Control Act – states that:

“(1) Installations subject to licensing shall be constructed and operated in such a way that, in order to ensure a high level of environmental protection altogether,

1. harmful effects on the environment or any other hazards, significant disadvantages and significant nuisances to the general public and the neighbourhood are avoided;

2. precautions are taken to prevent any harmful effects on the environment or any other hazards, significant disadvantages or significant nuisances, in particular by such measures as are appropriate according to the best available techniques;
3. wastes are avoided, unavoidable wastes are recovered, and non-recoverable wastes are disposed of without impairing the public welfare; .....
4. economical and efficient energy use is ensured".

23

Article 8, paragraph 1, first sentence of the Federal Immission Control Act states that:

"(1) Upon application, a licence may be granted for construction of an installation or part of an installation or for construction and operation of part of an installation if

1. there is a legitimate interest in granting a partial licence;
2. the licensing requirements are fulfilled for the object applied for in the partial licence and
3. a preliminary assessment shows that there are no fundamental, unremovable obstacles to the construction and the operation of the entire installation with regard to fulfilling the licensing requirements".

24

Article 9, paragraph (1) of the Federal Immission Control Act states that:

"(1) Upon application, a provisional decision may be rendered with regard to particular prerequisites for issue of a licence and the choice of the site for the installation in question, provided that the implications resulting from the proposed installation can be adequately assessed and that there exists a legitimate interest in the issue of such a provisional decision".

25

Article 61, paragraphs (1) and (2) of the Federal Nature Conservation Act [*Gesetz über Naturschutz und Landschaftspflege, BNatSchG*] (Federal Law Gazette (BGBl.] I 2002, page 1193) states that:

"(1) Without having been subject to any violation of its rights, an association recognized … may lodge a legal remedy in conformity with the Rules of Administrative Courts (Verwaltungsgerichtsordnung) against

1. exemptions from prohibitions and orders relating to the protection of 'nature conservation areas' (Naturschutzgebiete), 'national parks' (Nationalparke) and other protected areas referred to in Article 33, paragraph 2 as well as against

2. decisions of 'plan establishment procedures' (Planfeststellungsbeschlüsse) relating to projects involving intervention in nature and landscape as well as 'plan approvals' (Plangenehmigungungen) where the involvement of the general public has been provided for in relevant provisions.

...

(2) Legal remedies pursuant to paragraph 1 above are only admissible if the association concerned

1. asserts that the adoption of an administrative act referred to in paragraph 1 first sentence is conflicting with provisions of this Act, legal provisions laid down on the basis of or within the framework of this Act or which continue to be applicable on the basis of or within the framework of this Act, or with any other legal provisions to be complied with/to be taken into consideration when adopting the administrative act concerned and which are at least also intended to serve the interests of nature conservation and landscape management,

2. is affected within the scope of activities set forth in its Articles of Association, to the extent that this is covered by the recognition granted, and

3. . ...."

26

2. Materiality of the questions on the basis of the German legal position

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The submitted questions regarding the range and interpretation of the right of non-governmental organisations to access to justice pursuant to Article 10 a of the EIA Directive are material to this Court’s decision in the proceedings in question.

28

a) Based on the national legal situation, the plaintiff environmental organisation would be unable to assert the violation of water and nature conservation law provisions or the infringement of the precautionary principle pursuant to Article 5, paragraph (1), first sentence, no. 2 of the Federal Immission Control Act, since neither the provisions of water and nature conservation law nor the precautionary principle establish individual rights as referred to in Article 2, paragraph (1), no. 1 and paragraph (5), first sentence, no. 1 of the Environmental Appeals Act.

29

aa) According to the aforementioned provisions of the Environmental Appeals Act, non-governmental organisations may only challenge the impairment of statutory provisions that establish individual rights, whereby they need not themselves be the owners of such rights.

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As per the explicit intent of the German legislators, the criterion “establish individual rights“ in Article 2, paragraph (1), no. 1 and paragraph (5), first sentence, no. 1 of the Environmental Appeals Act limits the appeal rights of non-governmental organisations to those statutory provisions that establish so-called subjective public rights.
Cf. the draft Act concerning Supplemental Provisions on Appeals in Environmental Matters Pursuant to EC Directive 2003/35/EC (Environmental Appeals Act), *Bundesrat* (Upper House of Parliament) document 552/06, pages 19, 20.

31

Hence, the appeal rights granted to non-governmental organisations are consistent in approach with the general administrative procedures applicable to actions for rescission in Article 42, paragraph (2) and Article 113, paragraph (1), first sentence of the Rules of Procedure of the Administrative Courts, which state that an appeal against an administrative act shall only be successful to the extent that the administrative act is unlawful, and the – subjective public – rights of the Plaintiff have been infringed.

32

Only those provisions which exclusively serve to protect the legal interests of individuals, or at least to do so as well as serving the public interest, shall establish subjective-public rights.

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Whether or not a provision serves to protect individual interests in this sense is a matter for interpretation. The decisive criterion for a provision which serves to protect third-party interests is the extent to which it adequately defines and delimits the protected interest or commodity, the nature of the violation, and the group of protected individuals. As such, the purpose of any such provision should also be a key consideration.

34

In the field of immission control legislation, the provision contained in Article 5, paragraph (1), first sentence, no. 1 of the Federal Immission Control Act, aimed at avoiding hazards, could be described as having an individual protective effect. By contrast, the regulation outlined in Article 5, paragraph (1), first sentence, no. 2 of the

Federal Immission Control Act on taking precautions to prevent hazards has only objective legal significance, based on the purpose of Article 5, paragraph (1), first sentence, no. 2 of the Federal Immission Control Act. Risk aversion is practised in the general public interest, rather than to make acceptable living conditions more pleasant or risk-fee for neighbours. Moreover, given the long-distance effects of such precautions, the group of potentially affected individuals is very difficult to delimit, which likewise tends to preclude the protection of third parties.

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By the same token, the provisions of water and nature conservation law do not have an individual protective effect, since they are aimed primarily at public welfare rather than at protecting the legal interests of individuals.

36

bb) In this particular case under immission control law, the plaintiff organisation cannot derive appeal rights from Article 61 of the Federal Nature Conservation Act, which provides for legal remedies for associations for certain narrowly defined constellations within the context of nature conservation and landscape management. The disputed provisions from the contested decision fall outside the scope of application of § 61 of the Federal Nature Conservation Act, which only covers legal remedies against exemptions from prohibitions and orders relating to the protection of ‘nature conservation areas’ (*Naturschutzgebiete*), ‘national parks’ (*Nationalparke*) and other protected areas, cf. Article 61, paragraph (1), first sentence, no. 1 of the Federal Nature Conservation Act, and against decisions of ‘plan establishment procedures’ (*Planfeststellungsbeschlüsse*)

relating to projects involving intervention in nature and landscape as well as 'plan approvals‘ (*Plangenehmigungen*) where the involvement of the general public has been provided for in relevant provisions; cf. Article 61, paragraph (1), first sentence, no. 2 of the Federal Nature Conservation Act. According to the Federal Immission Control Act, the construction and operation of installations which, on account of their nature or operation – as is the case here – are particularly likely to cause any harmful effects on the environment is subject to licensing, but not to plan approval.

37

b) The appeal would only be likely to be successful if, in addition to the guarantees provided for in Article 2, paragraph (1), no. 1 and paragraph (5), first sentence, no. 1 of the Environmental Appeals Act, Article 10 a of the EIA Directive were to additionally to grant non-governmental organisations the direct right to challenge before a court of law the impairment of environmental provisions decisive for licensing of the project which, according to the aforementioned principles, exclusively serve the public interest, and not also the protection of the legal interests of individuals.

38

The Senate believes that the rulings in the contested decision currently contravene such legal provisions. They violate the national guidelines of nature conservation law to implement Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206 of 22 July 1992, page 7) (hereinafter referred to as the Habitats Directive). According to Article 6, paragraph (3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the

site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. With due regard for the results of the environmental impact assessment, the competent national authorities will only approve the plan or project having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

39

As far as we are currently aware, the conclusion drawn by the Defendant, as competent authority, that the summoned third party's project was not expected to cause any significant impairments to the affected Special Areas of Conservation, is unjustified. The results of the preliminary investigation carried out by the project initiator do not support this assertion. The required analysis of the basic and anticipated total load of nitrogen deposits in those areas of the protected site with nitrogen-sensitive habitat types, with due regard for cumulative effects from other projects and plans, has not yet been carried out. This is particularly true in the case of area "M1.", which was characterised, *inter alia*, by habitat type 6510 "lowland hay meadows". As such, the avoidance of eutrophication has explicitly been defined as a protection target.

40

Additionally, the Plaintiff has asserted numerous violations of water legislation, species conservation and the precautionary principle as defined in Article 5, paragraph (1), first sentence, no. 2 of the Federal Immission Control Act (also with reference to the best

available techniques). The Senate is only required to address these challenges if Article 10 a of the EIA Directive is to be interpreted within the meaning of the questions.

41

3. The legal problems raised by the questions submitted

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Ultimately, the crucial issue in this dispute is whether or not Article 10 a of the EIA Directive has been adequately implemented in national law by the German legislators with the Environmental Appeals Act, even though nongovernmental organisations are unable to assert before the courts that an environmentally relevant project violates environmental regulations which exclusively serve the public interest and not also the protection of the legal interests of individuals.

43

If Article 10 a of the EIA Directive requires non-governmental organisations to also be granted a right of appeal before the courts regarding the impairment of those environmental provisions that do not confer subjective public rights, then the German legislators have failed to meet their obligation of comprehensive implementation. Whether and to what extent this is the case can only be answered via the interpretation of Article 10 a of the EIA Directive.

44

a) 1st and 2nd question

45

The Senate cannot reach an unequivocal decision based on the Court of Justice's previous judgements; ultimately, however, it concedes the possibility that, if interpreted according to the sense and purpose of this provision, rather than just its wording, and in view of the purpose of the EIA Directive, Article 10 a of the EIA Directive could require the establishment of farther-reaching rights of appeal for non-governmental organisations than has been implemented in German law. However, it is also unable to conclusively assert the required scope of any such right of appeal.

46

This opinion is based on the following considerations:

47

aa) The Senate believes that the interpretation chosen by the German legislators in implementing Article 10 a of the EIA Directive is consistent with the wording of this provision in the Directive, which grants non-governmental organisations the right of appeal (viewed here in isolation) as defined in Article 10 a, paragraph 1, first sentence, letter b of the EIA Directive, in respect of the impairment of a right where national administrative procedural law requires this as a precondition. In German law, these are confined to subjective public rights. Furthermore, the wording of this Article does not prevent the Member State from autonomously regulating the requirements for access to the courts. Article 10 a, paragraph (3), first sentence of the EIA Directive, which states that the Member States shall determine what constitutes an impairment of a right,

affords the Member States suitable discretionary scope. Under paragraph (3), third sentence, non-governmental organisations are granted certain privileges over other concerned members of the general public insofar as they are considered to have a sufficient interest irrespective of any other requirements imposed by the Member State in respect of maintaining the impairment of a right.

48

bb) However, it is doubtful whether the German legislators' chosen interpretation of Article 10 a of the EIA Directive would also withstand a functional analysis of this provision. To this extent, the principal objectives pursued by the Community and the EIA Directive must be taken into account (under (1)). In a subsequent step, it is necessary to investigate whether these objectives can be effectively realised via access to the courts as granted under national law (under (2)).

49

(1) According to Article 2 of the Treaty Establishing the European Community (OJ C 325 of 24 December 2002, page 39) – hereinafter referred to as the EC Treaty – it is the task of the Community to promote a high degree of environmental protection and the improvement of environmental quality. The Community's environmental policy is aimed at preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems, and overall, to ensure a high level of protection – cf. Article 174, paragraphs (1) and (2) of

the EC Treaty. When interpreting secondary law, high importance is attached to the objective cited in Article 174, paragraph (2) of the EC Treaty.

Cf. e.g. ECJ, judgements of 18 April 2002 – case C-9/00 (Palin Granit Oy) –, [2002], I-3533, and of 11 November 2004 – C-457/02 (Niselli) –, [2004], I-10853, each on the interpretation of the term “waste”.

50

The EIA Directive should be viewed in this context. According to Article 2, paragraph (1), one of the main aims of the EIA Directive is to ensure that projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location are made subject to an assessment with regard to their effects before consent is given. According to the 11th recital of the EIA Directive, the environmental effects must be assessed in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life.

51

According to the 3rd recital of Directive 2003/35/EC, effective public participation in respect of plans and programmes relating to the environment as defined by the EIA Directive increases the accountability and transparency of the decision-making process, and contributes to public awareness of environmental issues and support for the decisions taken.

The EIA Directive in the wording derived from Directive 2003/35/EC also aims to improve the enforcement, implementation and – particularly through Article 10 a – control of Community environmental provisions via the involvement of a general public which has been sensitised to environmental issues in the decision-making process.

52

(2) Whether or not the right of appeal for concerned members of the general public intended by Article 10 a has been effectively realised at national level in relation to these objectives must be measured primarily according to whether and to what extent a Member State's procedural law subjects these environmental provisions to a judicial review.

53

Such an approach is consistent with the Court of Justice's judgements on the relationship between the Member States' procedural autonomy and the Community principle of effectivity. According to these judgements, if there is a lack of relevant Community provisions, when applying the Member State's procedural law, it is necessary to ensure that the procedural modalities for legal actions relating to Community law are not less favourable than equivalent legal actions under national law (principle of equivalence), and that it does not become impracticable or significantly more difficult to exercise the rights conferred by Community law (principle of effectivity).

Cf. in this regard e.g.: ECJ, judgements of 16 December 1976 – Case 33-76 (Rewe) – , [1976], page 1989, of 16 December 1976 – Case 45-76 (Comet) – , [1976], page 2043,

of 14 December 1995 – C-312/93 (Peterbroeck) – , [1995], I-4599, of 20 September 2001 – C-453/99 (Courage Ltd.) –, [2001], I-6297, of 9 March 2004 – C-397/01 et al. (Pfeiffer) – , [2004], I-8835, of 13 March 2007 – C-432/05 (Unibet) – , [2007], I-2271, of 7 June 2007 – C-222/05 et al. (Van der Weerd) – , [2007], I-4233, and of 15 April 2008 -C-268/06 (Impact) -.

54

On this basis, the Senate has doubts over whether Article 2, paragraph (1), no. 1 and paragraph (5), first sentence, no. 1 of the Environmental Appeals Act adequately implement the requirements of Article 10 a of the EIA Directive in German Law. Given the requirement for the practical effectiveness of Community law, the fact that, under national law, the rights of appeal of non-governmental organisations are restricted to the assertion of subjective-public rights raises some concerns, since for the bulk of environmental law it is virtually impossible for an independent office to control the enforcement of environmental regulations. This means that non-governmental organisations are unable to act on behalf of the environment to counteract possible enforcement deficits.

55

cc) Should the Court of Justice consider these doubts to be justified, however, this would then raise the question as to which other environmental regulations should additionally be included in the right to appeal from an effectivity viewpoint.

56

The answer to this question will depend largely on the extent to which Community legislation grants legal rights in the field of environmental law, an aspect which has not yet been conclusively clarified in the Court of Justice's judgements.

57

(1) In its established legal precedents, however, the Court of Justice has upheld the rights of individuals to invoke the provisions of Directives before the public offices and national courts of a Member State, provided such provisions are unconditional in their content and sufficiently precise.

58

This is always the case if a Member State fails to adequately implement a Directive in national law or to do so on time.

Cf. e.g. ECJ, judgements of 9 March 2004 – C-397/01 inter alia (Pfeiffer) – , loc. cit. of 17 July 2008 - C-226/07 (Flughafen Köln/Bonn) – , and of 12 February 2009 – C-138/07 (Cobelfret NV) – .

59

Moreover, i.e. even if the Directive has been comprehensively implemented in national law, this is always applicable in the case of Directives designed to protect human health, according to the legal precedents set by the Court of Justice. According to the Court of Justice, in all cases where failure to observe the measures stipulated in Directives governing the quality of air and drinking water designed to protect human health could

endanger the health of individuals, affected individuals are entitled to invoke the compulsory regulations contained in these Directives.

Cf. e.g. ECJ, judgements of 25 July 2008 – C-237/07 (Janacek) – , of 30 May 1991 – C-361/88 (Commission vs. the Federal Republic of Germany) – , [1991], I-2567, and of 12 December 1996 – C-298/95 (Commission vs. the Federal Republic of Germany) – , [1996], I-6747.

60

In this connection, the Court of Justice has ruled that it would be incompatible with the binding nature of the Directive as defined in Article 249 of the EC Treaty to prevent an obligation imposed by such a Directive from being asserted by the affected individuals.

61

Based on these judgements by the Court of Justice, the term “individual rights" in Article 2, paragraph (1), no. 1 and paragraph (5), first sentence, no. 1 of the Environmental Appeals Act could be interpreted more widely and in conformity with Community law

cf. in this regard e.g.: ECJ, judgements of 14 December 1995

– C-312/93 (Peterbroeck), loc. cit, of 9 March 2004

– C-397/01 inter alia (Pfeiffer) – , loc. cit., and of 25 July 2008

– C-237/07 (Janecek) – ,

to mean that, as well as cases of inadequate implementation of a Directive, this should also include any sufficiently precise and unconditional provisions of the Directive that serve to protect human health, where failure to observe such provisions could endanger the health of individuals.

62

However, based on the established legal precedents by the Court of Justice, it is impossible to deduce whether these constitute conclusive requirements establishing rights of appeal under Community law. In particular, it is impossible to ascertain whether, under which conditions, and in whose favour, comprehensively implemented Directive provisions not aimed at the protection of human health might also establish individual rights. However, the formulation chosen by the Court of Justice that its considerations would be “particularly” applicable to Directives designed to protect the public health of individuals would appear to refute the assumption that such requirements are conclusive.

63

(2) Secondly, based on the established legal precedents by the Court of Justice, it is impossible to determine whether, under which conditions, and in whose favour, Community law also demands rights of appeal that are linked solely to the impairment of a comprehensively implemented Directive provision, rather than the extent to which an individual is affected.

64

For reasons of practical effectiveness, the Senate considers it conceivable that Community law would in any case grant a right of appeal to non-governmental organisations that have made it their mission to champion environment-related general interests and commodities, which would also extend to those environmental provisions established in Community law whose stated protection purpose makes no reference to individuals, such as provisions designed to conserve nature and biological diversity. If this were the case, non-governmental organisations would have the right to challenge the impairment of all Community environmental provisions. This assumption is supported by the fact that the enforcement and control deficit in environmental law is not dependent on the protection purpose of the respective environmental provision.

65

(3) Against this background, this furthermore poses the question of whether such appeal rights granted to non-governmental organisations by Article 10 a of the EIA Directive should also include maintaining the impairment of purely national environmental provisions, irrespective of their direction of protection, for reasons of practical effectiveness.

66

The answer to this question would have to be negative if we assume that regulating the control of purely national environmental legislation falls outside the competence of the Community. If Articles 174 and 175 of the EC Treaty refer solely to Community environmental law and the enforcement and implementation thereof, then decisions

regarding the nature and manner of enforcement of national law are the sole responsibility of the Member State.

67

Conversely, the answer would be different if we assume that the Treaty implies a general competence on the part of the Community in all cases concerning the adoption of administrative procedural regulations in the field of environmental legislation at Community and Member State level, i.e. if Articles 174 and 175 of the EC Treaty were to make reference to the environment as a whole within the Treaty's scope of application rather than just to Community secondary legislation. Apart from the broadly formulated objective of Article 174, paragraph (2) of the EC Treaty, other factors supporting such an assumption are, firstly, the fact that Articles 174 and 175 of the EC Treaty essentially ascribe comprehensive competence to the Community for the adoption of regulations in the environmental sector. Secondly, differentiation between whether a certain aspect is regulated by national or Community law could be considered arbitrary, and it is almost impossible to distinguish whether an aspect is regulated by Community law or purely at national level, given that Community and national environmental law are so closely interlinked.

68

b) 3rd question

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If the answers to the 1st and 2nd questions are affirmative, this poses the additional question as to whether the Directive directly grants non-governmental organisations the right to access to the courts above and beyond the guarantees cited in Article 2 of the Environmental Appeals Act, because Article 10 a of the Directive as such contains an unconditional and sufficiently precise obligation on the part of the Member State.

70

The fact that Article 10 a, paragraph 1 of the EIA Directive leaves it to the discretion of the Member States whether access to the courts should be made dependent upon a sufficient interest and maintenance of impairment of a right does not necessarily preclude a direct effect. As such, it should be noted that, based on the established legal precedents by the Court of Justice, the powers granted to the Member States to choose between several potential means of achieving the objective prescribed by the Directive does not preclude the individual from asserting his rights before the national courts, the content of such rights already having been determined with adequate precision on the basis of the Directive.

Cf. with further references: ECJ, judgement of 12 February 2009 – C-138/07 (Cobelfret NV) – .

71

c) Decision-making competence of the ECJ

According to Article 234 of the EC Treaty, the Court of Justice has the jurisdiction to decide how Article 10 a of the EIA Directive is to be interpreted. As far as we are aware, the Court of Justice has not yet ruled on this matter.