

The Vuosaari case

For the first I would like to quote some sentences from the communication from the commission of 5.9.2007 "A Europe of results – applying community law". According to that

"The timely and correct application of Community law is essential to maintain a strong foundation for the European Union and ensure that European policies have intended impacts, bringing benefits to citizens. The European institutions and Member States share an interest in keeping this foundation strong and need to make an even stronger commitment to assign high priority to the correct application of law."

In the following, I am going to present a case which describes the current reality and raises challenging questions from the viewpoint of legal remedy.

This case represents an interesting example, which, in fact would appear to set a problematic precedent as regards the implementation of community environmental law in at least two respects:

- Firstly, neither the Council of State nor SAC apparently respected the principles laid down in Article 6 (3) in habitats directive and guidelines concerning it (published by Commission).

I say apparently because their interpretation has not been controlled by ECJ. And let it be stated clearly that our interpretation reflects the view of the complainant.

- Secondly, the Supreme Administrative Court of Finland, according to our interpretation, apparently failed to comply with its obligations under Article 234 EC and the ruling from ECJ in the Cilfit and Others Case (C-283/81).

This case involves the question whether the Vuosaari Port project had a significant negative effect on the conservation values of the Natura 2000 site located next to it, and whether the derogation procedure (Article 6(4)) was needed.

According to the Article 6(3) the derogation procedure under Article 6 (4) is needed when the project adversely affects the Natura-site. The Commission states in the guidelines of the Article 6 of the Habitats Directive that also in case of doubt, the precautionary principle should be applied and procedures under Article 6(4) followed.

In this case, the original assessment of the impacts of the port project on the conservation values of the Natura site concluded that there was a risk for a significant adverse effect on these. Three out of four experts subsequently heard came to the same conclusion (see e.g. appendix 1, statement by PhD Heikki Hirvonen). The Finnish Ornithological Society has verified, on request

of the petitioner, that the experts who came to said conclusion represented the best national scientific expertise in the field - a fact recollected, i.a., in a letter by Birdlife International to the Presidents of the Committee on Petitions and the Environment Committee, dated 5 October 2004. The assessments of the most competent scientific experts were ignored by the Ministry of the Environment.

In this precedent the Finnish Association for Nature Conservation did precisely, what the Court of Justice – and the European Commission - recommends, that is, turned to the national judicial system, and ultimately brought the case before the Supreme Administrative Court of Finland (SAC). However, the SAC refused to accept, as sufficient evidence, the opinion of the best available scientific expertise, thus acting in clear contravention of the jurisprudence of the ECJ Case C -209/02 and C-127/02. These cases give the most relevant guidelines to the application of the article 6 (3) of the habitats directive. They concern the same questions, which are essential also in the Vuosaari case, i.e. incorrect assessment of the impacts of the projects and neglecting of the precautionary principle (see passages 22-29 and 44-45 of the judgment). According to the ECJ “Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field.”

Remarkably, the SAC considered that it could deviate from the Commission's published guidelines on the application of article 6 of the Habitats Directive and, nevertheless, consider its own interpretation clear and unquestionable.

The SAC also refused to request a preliminary ruling from the ECJ on the application of the provision on cumulative effects of two or more projects or plans on site, although all the conditions set by the Court of Justice concerning a situation when a supreme national court is obliged to refer an issue to the ECJ were fulfilled: there was no jurisprudence by the ECJ, the interpretation would significantly have affected the outcome of the case and the question was not clear. Even the Commission was considering the interpretation for several years.

The Finnish Association for Nature Conservation filed a complaint to the Commission and a petition to the EP. Three years later the Commission decided to close the case without detailed justifications. The petition in EP is still pending. During the meeting of the Petitions Committee of 19 June 2006, the president of the Committee asked the Commission to provide details and clarifications in writing on certain points which have been raised during the debate. The Commission answered 25.1.2007 with the Communication, where it just repeated its former conclusion still not without justification. The commission stated concerning the Vuosaari Port that there were no significant negative effects on the site and that the assessment carried out by Commission was based, on one hand, on the judgments handed down by the Finnish Supreme Administrative Court and other hand, on its own assessment of the situation (see appendix 2). The Commission did not express, based on

what kind of scientific analysis the assessment made by leading ornithological experts was evaluated to be untrue.

The Vuosaari issue has been processed in several procedures for several years. The Committee sent a fact-finding mission to Helsinki on 24 - 26 March 2004. The report from the mission found that "by minimising the impact of the project and ignoring the precautionary principle and by failing to proceed along the path set out by Article 6 of the Habitats Directive the Finnish authorities may have placed themselves in infringement with EU law. The report, i.a., called on the Commission "with a reference to findings of this report, to conduct an urgent review of the Vuosaari project with the Finnish authorities in order to ensure that the provisions of the Habitats Directive (92/43/EEC) and the Birds Directive (79/409/EC) have been properly complied with, particularly as regards the application of Articles 4, 5 and 6 of the Habitats Directive, and to report back to the Committee on Petitions no later than July 1st 2004."

In this case the delays in the procedures have already resulted in the death of the patient. The environmental changes have largely been implemented. It is, however, essential for the future that interpretation questions of the petition will be assessed carefully and thoroughly, as European environmental organisations hardly have the resources to go through these interpretation questions a second time.

From the point of view of individual citizen and NGOs, the open question is what can be done in order to improve Access to Justice in conditions discussed above.

As you know, the Court of Justice has consistently dismissed attempts to challenge the Commission's handling of the infringement procedure, by referring to Commission's discretion pursuant to section 2 of Article 226 vis-à-vis opening court procedures and, as regards the opening of infringement proceedings, as such (sending a reasoned opinion) by reference to the fact that this stage of the procedure does not produce legal consequences.

Even the Commission's discretion as regards bringing an action before the ECJ is fairly clear – one might agree with the European Ombudsman that also this discretion should be exercised with respect for such general principles of good administration, as objectivity, impartiality and proportionality.

The Court of Justice has repeatedly stated that it is up to the courts, and only to the courts, to interpret Community Law. In the last instance, it is the prerogative of the ECJ itself. It would, therefore, appear to be a paradox if the ultimate power to interpret Community Law in reality would lie with the European Commission. Nevertheless, this is the precise consequence, if one accepts that no action can ever be brought against the Commission for in correct use of its powers over the infringement proceedings - not even in cases, where a supreme national court has refused to request a preliminary ruling on a question, which, as in the Vuosaari case, fulfils the criteria laid down by the ECJ.

Article 230 of the EC Treaty gives the Member States and the three European institutions the right to challenge acts of, among others, the European Commission. As neither the Member States nor Council are likely to take action before the Court of Justice in the general interest of ensuring that Community environmental law is correctly implemented and respected, one might hope that the European Parliament, as the only European institution constituted by directly elected members, would exercise democratic control in this respect. In bringing an action against the Commission before the Court of Justice parliament would, obviously, not in any way set itself in the place of the Court or the Commission, but would simply assume its responsibilities and seek to guarantee that the ultimate decision, when there is a serious conflict with the Commission, would be up to the ECJ.

I would like to finish with a reference to the above mentioned recent Communication of the Commission:

“Laws do not serve their full purpose unless they are properly applied and enforced. To maintain Europe’s competitiveness in a fast changing world, it is important that policy-making is responsive to citizens’ and business interests.”

Brussels, 14 September 2007

Sakari Niemelä
Attorney-at-law
Environmental Law, Attorneys Ltd.
P.O. Box 208, FIN-00131 Helsinki, Finland
Tel. +358-(0)40 505 8064, fax +358-(0)9-2511 1621, www.ymparistolaki.fi
sakari.niemela@ymparistolaki.fi