ALLEN & OVERY

"The People's Climate Case" Declared Inadmissible: Not All Climate Litigation Roads Lead To Rome

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In the past years (and months), there has been a growing wave of climate change litigation cases, and the cases where plaintiffs have (successfully) invoked fundamental rights are increasing. In our previous two articles (which can be found **here** and **here**), we made an in-depth analysis of the status of current climate litigation in courts around the world.

In a recent judgment dated 25 March 2021, the Court of Justice was asked to look into an appeal case against an order of the General Court, in which a number of individuals sought to force the EU to adopt more stringent greenhouse gas emission reduction targets, and annul the EU legislative package on greenhouse gas emission reductions.

Whilst the subject matter to the annulment case is the protection of fundamental rights in the context of climate change, the real issues at stake in this case are procedural in nature: the Court of Justice had to examine whether the General Court was entitled to find that the plaintiffs were not direct and individually concerned by the EU- legislative package on greenhouse gas emission reductions, and thus, had no *locus standi* to initiate an annulment request. The claim that the protection of fundamental rights of the plaintiffs were at stake, does not change that assessment.

The inroad may have been topical, the outcome is old wine in a new bottle.

Background

In 2018, 36 individuals from Germany, France, Italy, Portugal, Romania, Kenya, Fiji, as well as an association governed by Swedish law representing young indigenous Samis (the **Plaintiffs**) brought an action before the EU General Court with the aim of compelling the EU to make more stringent greenhouse gas (**GHG**) emission reductions.

They mainly argued that (i) the EU's legislative package regarding GHG emissions is unlawful[1] in so far as it permits the emission between 2021 and 2030 of a quantity of GHGs corresponding to 80% of 1990 levels in 2021, decreasing to 60% of 1990 levels in 2030, (ii) the General Court should annul the Legislative Package in so far as it sets targets to reduce GHG emissions by 2030 by 40% compared to 1990 levels, and (iii) the European Parliament and the Council of the EU should adopt measures under the Legislative Package regarding GHG emissions requiring a reduction in GHG emissions by 2030 of at least 50% to 60% compared to their 1990 levels (or any higher level deemed appropriate by the General Court).

In its order dated 8 May 2019[2] (the **Order**), the General Court dismissed the Plaintiffs' action as inadmissible, as it held that the Plaintiffs did not satisfy any of the *locus standi* criteria laid down in the Treaty on the Functioning of the European Union (**TFEU**). The General Court confirmed that the Plaintiffs were not the addressees of the acts at issue, and that the acts at issue could not be regarded as regulatory acts. Finally, the General Court ruled that the Plaintiffs were not individually concerned: the General Court considered that the fact that the effects of climate change may be different for one person than they are for another, does not mean that there exists standing to bring an action against a measure of general application (as is the case at hand).

The Court of Justice's Judgment dated 25 March 2021

The Plaintiffs lodged an appeal against the Order before the Court of Justice (the **Court**), claiming that the Court (i) should set aside the Order, (ii) declare the Plaintiffs' initial actions admissible, and (iii) refer back the case before the General Court.

The application was based on article 263 of the TFEU, which sets out the conditions under which a natural or legal person may initiate an application for annulment before the Court. This article creates the possibility to challenge, *inter alia*, acts which are of direct and individual concern to the applicant(s) and regulatory acts which are of direct concern to the applicant(s) and which do not entail implementing measures.

The Court has interpreted these requirements in the *Plaumann* case, when it held that an act is of individual concern to natural or legal persons *"where the measure in question affects specific natural or legal persons by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee"*.[3] This case law was subsequently galvanised into the Court's approach when determining if applicants are individually concerned by an act and coined the "Plaumann test". The Court has continued to refine its approach to admissibility of annulment actions in subsequent case law.[4] Concretely, the Plaumann test now requires the applicant to demonstrate, for an application for annulment against a legislative act (*sic*) to be admissible, that the act is of direct and individual concern to them (interpreted according to

1 The Plaintiffs sought to partially annul (i) Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814, in particular Article 1 thereof, (ii) Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013, in particular Article 4(2) thereof and Annex I thereto, and (iii) Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU, in particular article 4 thereof (the **Legislative Package**).

2 Order of the General Court dated 8 May 2019 in case T-330/18; a copy of the order can be found **here**.

3 Judgment of the Court of Justice dated 15 July 1963 in case C-25/62; a copy of the judgment can be found **here**.

4 Judgment of the Court of Justice dated 3 May 2002 in case T-177/01; a copy of the judgment can be found **here**.

the Plaumann case law), irrespective of whether the act requires further implementation.

In their **first ground of appeal**, the Plaintiffs argued that the General Court erred in law in finding that they were not individually concerned. The Plaintiffs put forward that the Legislative Package affects each of them, because of "attributes which are peculiar to them" (such as droughts, flooding, heatwaves etc.) and that they are all suffering in distinct ways as a result of climate change. They also claim that the interference of the Legislative Package with fundamental (human) rights (including the right to equality and non-discrimination, the right to pursue an occupation, the right to property and the rights relating to children) would give rise to individual concern.

In its judgment dated 25 March 2021[5] (the **Judgment**), the Court acknowledges that it is true that every individual is likely to be affected in one way or another by climate change. However, the fact that the effects of climate change may be different for one person than they are for another, does according to the Court not mean that, for that reason, there exists standing to bring an action against a measure of general application. The Court further rejects the Plaintiffs' argument that the General Court did not take into account the characteristics that are specific to the Plaintiffs to determine whether they were individually concerned. Finally, the Court confirmed the General Court's view that the claim that the acts at issue infringe fundamental rights, is not sufficient in itself to establish that the action brought by an individual is admissible.

In their **second ground of appeal**, the Plaintiffs claimed that the General Court erred because of the failure to adopt settled case law on *locus standi* in order to guarantee the legal protection of human rights. The Plaintiffs argued *inter alia*, that the Court should alter the so-called "Plaumann test"[6] for establishing the existence of "individual concern", to ensure adequate judicial protection against serious infringements of fundamental rights.

The Court rejects the Plaintiffs' request to amend the Plaumann test/case law, as the request is contrary to the provisions of the TFEU regarding the admissibility of actions for annulment set out in article 263 of the TFEU: the Court confirms that it cannot set aside conditions which are laid down in the TFEU, and adapt the criterion of individual concern as put forward in the Plaumann test, so that the Plaintiffs may have access to an effective remedy.

In their **third ground for appeal**, the Plaintiffs alleged that the General Court erred in finding that the association representing young indigenous Samis (the association Sáminuorra) did not have *local standi.*

The General Court had found that (like the other Plaintiffs), the association Sáminuorra had not shown that it was individually concerned, and that it had not established any of the conditions under which case law allows associations to bring an action for annulment.[7]

The Court confirms the General Court's view and holds that, in as far as the Plaintiffs, as natural persons, were considered not to be individually concerned for the purposes of article 263 of the TFEU, the same consideration applies to the members of the association Sáminuorra.

Finally, in their **fourth ground of appeal**, the Plaintiffs alleged that the General Court should not have rejected their claim for damages, and that the General Court wrongfully concluded that the non-contractual liability of the EU was excluded.

In this regard, the Court acknowledges that, according to settled case law, the action for damages is an autonomous form of action, and

5 Judgment of the Court of Justice dated 25 March 2021 in case C-565/19P; a copy of the judgement can be found **here**.

6 This test is derived from Case 25/62, Plauman v. Commission. In this case, the Court held that, in order to have the right to bring an action for annulment of a decision which is not addressed to a person, such person must show that it is individually concerned, if the decision affects it by reason of certain attributes which are peculiar to it or by reason of circumstances which are differential from all other persons and by virtue of these factors, distinguishes him/her individually.

7 According to (settled) case law, an action for annulment brought by an association is admissible in three types of situations, i.e. (i) where a legal provision expressly grants a series of procedural powers to trade associations, (ii) where the association represents the interests of its members, who would themselves be entitled to bring proceedings, and (iii) where the association is distinguished individually because its own interest as an association is affected, in particular because its negotiating position has been affected by the act in respect to which annulment is sought.

hence, a declaration of inadmissibility of the application for annulment, does not automatically render the action for damages inadmissible. However, the action for damages must be declared inadmissible if by such claim, the applicant seeks to obtain the same result as he would have obtained in case he had been successful in the action for annulment. The Court confirms the General Court's finding that, in the case at hand, the Plaintiffs' claim for damages is not intended to obtain damages for harm attributable to an unlawful act or omission, but instead to amend the act at issue: by their claim for annulment and their claim for damages, the Plaintiffs seek to obtain the same result, i.e. the replacement of the Legislative Package by new measures that are more severe than those currently laid down in terms of reducing GHG emissions.

For those reasons, the Court rejects all four grounds of appeal invoked by the Plaintiffs.

Looking Ahead - New Human Rights Based Climate Challenges: the ECtHR case *Duarte Agostinho and Others v. Portugal and Others*

Whilst climate litigation is picking up speed within the EU, an appeal has also been lodged before the European Court of Human Rights (**ECtHR**) operating at the level of the Council of Europe. This application, brought by six Portuguese children on the basis of articles 2 and 8 of the European Convention on Human Rights (**ECHR** - which protect the right to life and the right to respect for family and private life respectively), challenges 33 Member States of the Council of Europe, including all 27 Member States of the European Union and is reminiscent of the Dutch *Urgenda* case.

Interestingly, the ECtHR's communication of the case also invoked article 3 of the ECHR, which contains the prohibition of torture and inhumane and degrading treatment. Nevertheless, having been initiated without exhausting the domestic legal recourses in the respondent jurisdictions (as is generally required for admissibility of a claim before the ECtHR), this begs the question how the ECtHR will respond to the claim on its procedural aspects. As with a fine wine, the maturing of climate litigation remains a gradual and long-lasting process.