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Case C-213/03, ECJ, 25 July 2004

Jason Chuah

School of Law

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EUROPEAN UNION

DIRECT EFFECT OF THE BARCELONA CONVENTION FOR THE PROTECTION OF THE MEDITERRANEAN SEA AGAINST POLLUTION AND ARTICLE 6(3) OF THE ATHENS PROTOCOL

Jason Chuah

*Syndicat professionnel coordination des pêcheurs de l'étang de Berre et de la région v
Électricité de France (EDF)*
Case C-213/03, ECJ, 25 July 2004

The European Court of Justice had occasion to deal with an interesting issue on the Convention for the Protection of the Mediterranean Sea against Pollution (Barcelona Convention) in the recent Case C-213/03 *Syndicat professionnel coordination des pêcheurs de l'étang de Berre et de la région v Électricité de France (EDF)*. The Convention and its Protocol, the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources signed in Athens on 17 May 1980, were approved for application by Council Decision 83/101/EEC.¹ It should be noted that the European Union was a party to the treaty. The question for the ECJ was whether Article 6(3) of the Protocol had direct effect so that any interested party may rely on it before the national courts in an action to halt polluting 'discharges which are not authorized in accordance with the procedure and criteria set out by the Protocol'.² Article 6 reads:

- (1) The Parties shall strictly limit pollution from land-based sources in the Protocol Area by substances or sources listed in Annex II to this Protocol.
- (2) ...
- (3) Discharges shall be strictly subject to the issue, by competent national authorities, of an authorization taking due account of the provisions of Annex III.

Article 6(3) is particularly important to *Syndicat professionnel coordination des pêcheurs de l'étang de Berre et de la région's* (Syndicat's) case. Syndicat had complained to EDF on several occasions of damage caused to the aquatic environment of the Étang de Berre, principally as a result of fresh water from the Durance being artificially discharged into the Étang whenever the turbines of the hydroelectric power station at Saint-Chamas are in operation. Syndicat took action against EDF before the Tribunal de Grande Instance de Marseille seeking an order that the hydroelectric power station be shut down and subject to a periodic penalty payment for non-compliance. The central thrust of the case was that EDF had been discharging water without having obtained the prior authorization required in Article 6(3) of the Protocol.

The regional court in Marseilles held that it had no jurisdiction to rule on the matter for two reasons:

- it was unclear whether the provision in question had direct effect entitling Syndicat to rely on it,
- the issues were too serious for a court hearing the application for interim measures to intervene and put an end to three decades of operations; such a decision was of great import and would have extremely serious consequences for the production and the security of the region's electricity system.

¹ 28 February 1983; OJ 1983 L67/1.

² Paragraph 25 of the Judgment.

An appeal was lodged before the Cour d'appel d'Aix-en-Provence. The appeal was dismissed on the basis that 'the various Articles [of the Protocol] are interdependent' and that Article 6(3) 'cannot be read in isolation, so that no authorization to discharge can legitimately and usefully be applied for by EDF on the basis of the Protocol as long as the French state has not defined the applicable technical criteria, since no response could be given'.³ As is immediately obvious, unless Article 6(3) has direct effect, Syndicat was bound to fail in its action because the French authorities are saying that as they had not fully implemented the criteria and procedure for the grant of authorization under the Protocol, there could not be any requirement laid on EDF to apply for authorization. If, on the other hand, the Article had direct effect, that means that despite the failure of France fully to implement the Protocol, Article 6(3) would apply with direct and mandatory effect rendering EDF's operations unlawful.

The secondary question was whether Article 6(3) actually prohibits the discharge into a saltwater marsh communicating with the Mediterranean Sea of substances which, although not toxic, adversely affect the oxygen content of the marine environment, without an authorization issued by the competent national authorities.

Direct effect of Article 6(3)

It was the contention of EDF that despite the fact that Article 6(3) lays down a clear and precise *general* stipulation, it cannot have direct effect because the Protocol is ambiguous as regards the *specific* standards and criteria to be applied for the monitoring and prevention of pollution from land-based sources and the grant of authorization by national authorities. In particular, they assert that the obligation in Article 6(3) to 'take due account' was vague and could, in the absence of details, lead to *all* discharges being subject to an authorization merely because they involve one of the substances listed in Annex II to the Protocol. It was argued that it could certainly not be the intention of the law to permit such a disproportionate approach to meeting the objectives of the Protocol. EDF also pointed out that Article 7(1) required that the common standards and criteria be formulated before an authorization system is put in place. Those standards and criteria have not been defined for the present circumstances. Thus, it could not be said that the application of Article 6(3) was unconditional. Furthermore, inasmuch as the Community is party to the Convention and the Protocol, the standards to be laid down for their implementation may principally be at Community level; however, there is as yet no directive relating to discharges of fresh water and silt into a saltwater marsh.

The Commission argued that the absence of measures or guidelines adopted jointly should not and could not have the effect of paralysing implementation of the Protocol or preventing the issue of discharge authorizations. It simply enlarges the discretion that Member States have in issuing those authorizations.

The question is significant because the doctrine of direct effect had originally been confined largely to directives issued by the EU. Here it is about the extension of the doctrine to an international multi-lateral treaty acceded to by the EU and approved for implementation by the EU for Member States. This is not the first time the issue has been addressed but previous cases have been confined mainly to bilateral agreements between the EU and a non-Member State.⁴ The importance of extending the doctrine of direct effect to the provisions and protocols of the Barcelona Convention should be of particular interest to maritime lawyers. The Barcelona Convention, as will be recalled, requires Contracting States individually or jointly to take all appropriate measures to prevent, abate and combat pollution of the Mediterranean Sea area. Four types of pollution given special emphasis are:

³ Paragraph 23.

⁴ See Case C-171/01 *Wählergruppe Gemeinsam* [2003] ECR I-4301 and Case I2/86 *Demirel* [1987] ECR 3719 (para 14). Both cases involve the EU-Turkey Association Agreement on free movement of workers, services and establishment between the EU and Turkey.

- pollution caused by dumping from ships and aircraft
- pollution from ships
- pollution resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil
- pollution from land-based sources.

The Convention has been slow in achieving its objectives – only one Contracting State (Tunisia) has signed up to all its protocols. If the ECJ extended the doctrine of direct effect to the convention rules, to the Commission, that would strengthen the environmental protection regime. The arguments against direct effect being extended to the Convention, however, are powerful. The provisions of the Protocol/Convention are couched in general and indistinct terms given the political nature of the obligations. It is difficult to justify the conference on indistinct terms direct applicability or effect in Member States.⁵

In order to determine whether Article 6(3) satisfies the criteria for direct effect, it is necessary to examine its wording. The provision, according to the ECJ, clearly, precisely and unconditionally lays down the obligation for Member States to subject discharges of the substances listed in Annex II to the issue by the competent national authorities of an authorization taking due account of the provisions of Annex III. The court held that the fact that national authorities have discretion in issuing authorizations under the criteria set out in the Protocol does not diminish the clear, precise and unconditional nature of the prohibition. The ECJ referred to the general purpose and nature of the Protocol in substantiating its finding that the terms were clear, precise and unconditional. It found that Articles I and 4 of the Protocol made it plain that contracting parties were to take 'all appropriate measures' to combat and eliminate pollution of the Mediterranean Sea area caused by discharges from rivers, coastal establishments or outfalls, or emanating from any other land-based sources within their territories. The court held that recognition of the direct effect of the provision (Article 6(3)) could only serve the purpose of the Protocol. It is obvious that the court preferred the so-called purposive approach here to a more literal reading of the provision in question. Although it is arguably a step in the right direction for the ECJ to hold that the Protocol (and the Convention) has direct effect, it is not made clear in the judgment as to who has the appropriate interest to bring an action in reliance on the Protocol/Convention against a polluter. That was deliberate, as the question of standing is normally one for the national tribunal seeking a preliminary ruling from the ECJ. Nonetheless, it remains a question of some significance. That is not the only factor which can render the Convention/Protocol less effective: the doctrine of direct effect cannot remedy the more fundamental defects of the failure in implementation. The EU, in not clarifying the application of the Convention/Protocol to Member States, has left the issue of remedies and protective measures to the Member States' discretion. That cannot be an entirely satisfactory means of achieving the purposes of the Convention.

Does Article 6(3) prohibit the discharge of substances which are non-toxic but adversely affect aquatic life?

On the substantive issue as to whether Article 6(3) prohibits the discharge into a saltwater marsh communicating with the Mediterranean Sea substances which are not toxic but can adversely affect the oxygen content of the marine environment, the ECJ held that toxicity was not the sole determinant before an authorization is issued. The court relied on paragraph II of Annex II which refers specifically to 'substances which have, directly or indirectly an adverse effect on the oxygen content of the marine environment, especially those which may cause eutrophication'. Indeed, it may be pointed out that paragraph I3 refers to 'substances which, though of a non-toxic nature, may become harmful to the marine environment or may interfere with any legitimate use of the sea owing to the quantities in which they are discharged'.

⁵ Case C-192/89 *Service* [1990] ECR I-3461; Case C-262/96 *Sürül* [1999] ECR I-2685 and Case C-63/99 *Gloszczuk* [2001] ECR I-6369.

Conclusion

The preliminary ruling given by the ECJ is intended to buttress the application of the Barcelona Convention and its protocols in EU Member States. However, the doctrine of direct effect is a blunt instrument. It will render the activities of EDF in discharging fresh water into the marshes unlawful but it does not clarify the criteria under which authorizations might be issued by the French state. Its justification lies in the greater good it is intended to achieve, but it cannot be dismissed as irrelevant, the problems caused by the lack of certainty for an establishment such as EDF which is responsible for the production of electricity for a large area.