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Case C-13/05, *Chacón Navas* v. *Eurest Colectividades SA*, judgment of the Grand Chamber of 11 July 2006, nyr

1. Introduction

Whilst the adoption of the two equality Directives in 2000[1] prompted a great deal of (academic) discussion,[2] case law of the European Court of Justice interpreting key provisions of the Directives has thus far been rather thin on the ground. However, such cases are now beginning to filter through, and 2005 and 2006 saw the first two judgments of the Court concerning the Employment Equality Directive – one relating to age[3] and the other, the subject of this case note, concerning disability/illness.

2. Factual background and preliminary reference

As a result of illness, Ms. Chacón Navas had not been able to work for her Spanish employer, Eurest Colectividades SA, for some time. She was dismissed after a period of absence. The nature of Ms. Chacón Navas' illness was not specified, although it is clear from the Advocate General's Opinion that she was awaiting an operation, and that she was not expected to be able to return to work in the short term. Ms. Chacón Navas challenged the decision to dismiss her *inter alia* on the grounds that it was incompatible with the

1. Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, O.J. 2000, L 180/22 (the Race Directive), and Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, O.J. 2000, L 303/16 (the Employment Equality Directive).

2. See e.g. Waddington, "Article 13 EC: Setting priorities in the proposals for a Horizontal Employment Directive", 29 *Industrial Law Journal* (2000), 176–181; Skidmore, "EC Framework Employment Directive on equal treatment in employment: Towards a comprehensive community anti-discrimination policy?", 30 *Industrial Law Journal* (2001), 126–132; Bell, "Article 13 EC: The European Commission's anti-discrimination proposals", 29 *Industrial Law Journal* (2000), 79–84; Lord Lester, "New European equality measures" (2000) *Public Law*, 562–567; Fredman, "Equality: A new generation?", 30 *Industrial Law Journal* (2001), 145–168; O'Hare, "Enhancing European equality rights: A new regional framework", 8:2 MJ (2001), 144–165; Waddington and Bell, "More equal than others: Distinguishing European Union equality directives", 38 CML Rev. (2001), 587–611; Bell and Waddington, "Reflecting on inequalities in European equality law", 28 EL Rev. (2003), 349–369.

3. Case C-144/04, *Mangold* v. *Helm*, [2005] ECR I-9981.

Employment Equality Directive. The Directive prohibits direct and indirect discrimination, as well as harassment and an instruction to discriminate, on the grounds of religion or belief, sexual orientation, disability and age. The date for transposition, namely December 2003, had already passed and Spain had not requested an extension of this deadline with regard to the disability provisions.

The national court, which seemed to have some sympathy for Ms. Chacón Navas' arguments, decided to stay the proceedings and referred two questions to the ECJ. In essence, the national court asked whether the provision of the Directive which prohibits disability discrimination, also included within its protective scope a worker who had been dismissed solely because she is sick. In the alternative, could sickness "be regarded as an identifying attribute in addition to the ones in relation to which Directive 2000/78 prohibits discrimination?"[4]

3. The Advocate's General Opinion

Advocate General Geelhoed considered the legal basis of the Directive, Article 13 EC, and concluded that, as a result of its drafting history and wording, the provision should not be given an extensive interpretation. This conclusion was bolstered by the "potentially far-reaching consequences, economic and financial, which such prohibitions of discrimination [age and disability LW] may have…" (para 50). In light of these concerns, the Advocate General favoured a "more restrained interpretation and application of Directive 2000/78 than adopted by the Court in *Mangold*" (para 56).

Turning to the matter in hand, the Advocate General argued that the concept of "disability" was "indeterminate"; given its reference in Article 13 EC and in the Directive, "a compelling argument [existed] for defining that concept as a matter of Community law" (para 57). He noted that the concept could be defined in various ways, in both a "medico-scientific" and a "social sense", and that it was evolving, leading to the risk of "major differences in the interpretation and application of the prohibition of discrimination" (para 59). As a result, he concluded that the "concept of disability in Directive 2000/78 is a Community legal concept which must be interpreted autonomously and uniformly throughout the Community legal system" (para 64). "The persons to be protected and the delineation of the functional limitations to be considered must not vary. Otherwise, the protection afforded by that

4. Judgment, para 25.

prohibition of discrimination would vary within the Community" (para 65). However, given the evolving nature of the concept of disability, the definition developed should not be fixed, but "provide the national court with Community law criteria and points of reference with whose aid it can find a solution to the legal problem it faces" (para 67).

On the basis of these findings the Advocate General advised: "Disabled people are people with serious functional limitations (disabilities) due to physical, psychological or mental afflictions" (para 76). He thereby seemed to confuse the concepts of impairment and disability. The latter is generally regarded as relating to the interaction between the impairment and environmental factors, and the disadvantages or restrictions accruing from such interaction, rather than simply being a matter of "functional limitations". He also stated that "the cause of the limitation must be a health problem or physiological abnormality which is of long-term or permanent nature" and "the health problem as cause of the functional limitation should in principle be distinguished from that limitation" (para 77). Applying these principles, he concluded that a sickness which may cause a disability in the future cannot be equated with a disability, although an exception should be made for a sickness which leads to permanent functional limitations.[5] Finally, the Advocate General argued that sickness, as a separate ground for prohibition of discrimination should not be added to the Directive.[6]

4. Judgment

The Court addressed three issues in its judgment. Firstly, it elaborated a definition of disability for the purposes of the Directive; secondly, it held that sickness could not be brought within the scope of the Directive by being added to the list of grounds already covered; and lastly, it addressed the obligation to make a reasonable accommodation for a worker with a disability, which is found in Article 5 of the Directive.

4.1. *A European definition of disability*

The Court stated that the Directive is designed to combat employment discrimination and defined disability in that context as "a limitation which results in particular from physical, mental or psychological impairments and

5. See Opinion, paras. 78 and 79.
6. See Opinion, para 84.

which hinders the participation of the person concerned in professional life" (para 43). For any limitation to be regarded as a "disability", "it must be probable that it will last for a long time" (para 45). In addition, the Court held that for the purposes of the Directive, "disability" is different from "sickness",[7] and that there is nothing in the Directive "to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness" (para 46). The Court further stated that its definition of disability was "autonomous and uniform".[8]

4.2. *Sickness is not covered as an additional ground under the Directive*

The Court held that sickness could not be added to the list of grounds covered by the Directive, since it was not explicitly mentioned in the Directive or the EC Treaty.[9]

4.3. *Protection of persons with disabilities as regards dismissal – Obligation to make a reasonable accommodation*

The Court recalled that Article 5 of the Directive required employers to make reasonable accommodations for persons with disabilities and noted: "That provision states that this means that employers are to take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, unless such measures would impose a disproportionate burden on the employer" (para 50). The Court continued by repeating that the Directive prohibits dismissal on the grounds of disability, and concluded that under the Directive an employer cannot dismiss an employee on the grounds of disability where the employee would be able to do the job (be "competent, capable and available to perform the essential functions of his post")[10] if a reasonable accommodation were made.[11]

7. Judgment, para 44.
8. Judgment, paras. 40 and 42.
9. Judgment, paras. 55–57.
10. Preamble, Recital 17 of the Directive; judgment, paras. 51–52.
11. Judgment, para 52.

5. Commentary: The limits of disability – defining disability for the purposes of EC equality law

5.1. *The Court's definition of disability*

> "A limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life" (para 43).

5.1.1. *A European definition based on the medical model of disability*

The definition of disability developed by the Court in *Chacón Navas* is based on the medical or individual model of disability.[12] According to the Court's definition, the cause of the disadvantage (or the "limitation") is the "impairment" which an individual has, and it is the "impairment" which hinders participation in professional life. Therefore, the problem lies in the individual, and not in the reaction of society to the impairment or in the organization of society. This model can be contrasted with a social model of disability. The social model is based on a socio-political approach which argues that disability stems primarily from the failure of the social environment to adjust to the needs and aspirations of people with impairments, rather than from the inability of people with impairments to adapt to the environment. The argument here is that it is discrimination, in the physical and attitudinal environment, prejudice, stigmatization, segregation and a general history of disadvantage, which is the major problem.

Both the Commission and the Council recognized the need to base policy on the social model of disability as early as 1996. In July of that year, the Commission adopted a Communication on Equality of Opportunity for People with Disabilities.[13] The Communication notes that the way in which society is organized serves to exclude citizens,[14] and speaks of the evolution towards "an equal opportunities model in the field of disability policy" within the Member States of the EU.[15]

In December of the same year, the Council also approved a Resolution on Equality of Opportunity for People with Disabilities.[16] In this document, the

12. There is a wealth of literature addressing theoretical models of disability. See e.g. Oliver, *Understanding Disability: From Theory To Practice*, (Macmillan Press Ltd., 1996); and Priestley, "Constructions and creations: Idealism, materialism and disability theory", 13:1 *Disability and Society* (1998), 75–94.

13. Communication of the Commission on "Equality of Opportunity for People with Disabilities" of 30 July 1996, COM(96)406 final.

14. Ibid., para 2.

15. Ibid., para 20.

16. Resolution of the Council and of the Representatives of the Governments of the Mem-

Council, like the Commission, reaffirmed its commitment to the principles and values of the United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities[17] and the principles of equality of opportunity and eliminating negative discrimination on the sole grounds of disability.

The Community institutions continue to refer regularly to the philosophical underpinning of disability policy and stress the commitment to the social model of disability. In 2003, for example, the European Commission reiterated its commitment to the model by stating: "The EU's long-standing commitment towards its disabled citizens goes hand in hand with a new approach to disability: from seeing people with disabilities as the passive recipients of compensation, society has come to recognize their legitimate demands for equal rights and to realize that participation relates directly to insertion."[18]

It is questionable how a definition of disability exclusively based on the medical model and which determines access to one of the key EC human rights instrument which regard to people with disabilities, fits into this bigger picture. At the very least, it could have been expected of the Court that it would refer to the position of the other EU institutions in its judgment and recognize the importance of the social model of disability.

5.1.2. *Focus on the health status / disability of the individual and not on the act of discrimination*

The focus of this definition is on the health status or impairment of an individual, and not the (alleged) act of discrimination. As a consequence, individuals first have to prove that they meet the criteria set in the definition, i.e. that they qualify as "disabled", before they can begin to argue that they have been the victim of discrimination. If they cannot meet this first hurdle, they will not qualify for protection under the law. This has been the experience in the United Kingdom and the United States, where many individuals have failed to meet this first requirement before the courts, and have therefore been denied the chance to argue that they have been the victim of discrimination. Furthermore, experience tells us that applying any such definition is an unpredictable process, which borders on arbitrariness when it comes to deciding whether any specific individual qualifies as "disabled" or not.[19]

ber States meeting within the Council of 20 Dec. 1996 on equality of opportunity for people with disabilities, O.J. 1997, C 12/1.

17. UN General Assembly Resolution 48/46 of 20 Dec. 1993.

18. EU Disability Action Plan; Equal opportunities for people with disabilities: A European Action Plan, COM(2003)650 final, 4.

19. See Hendriks, "Different definitions – Same problems – One way out?", in Breslin and Yee (Eds.), *Disability Rights Law and Policy, International and National Perspectives*, (Transnational Publishers, 2002), pp. 195–220.

A second problem is related to the requirement that an individual must "*prove*" that they have a disability. This may necessitate the provision of extensive medical evidence, which may well consume a lot of time and resources. In addition, an individual is required to first prove what s/he cannot do (that s/he has an impairment which hinders professional activity) in order to be allowed to later argue that they are qualified for a job or position and able to carry out the essential functions, and should not be discriminated against. This rather contradictory approach makes applying the law all the harder. Instead, one could argue that the key question should be whether discrimination has occurred, and not whether an individual is "disabled enough" to qualify for protection under the Directive.

5.1.3. *Status of people with (long-lasting/chronic) illnesses under the Directive*

In paragraph 46 of the judgment, the Court stated: "There is nothing in Directive 2000/78 to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop *any type of sickness*".[20] It is worth noting that, in deciding this, the Court seemed to fail to follow the advice of its Advocate General who argued that individuals who had sicknesses which caused long-term or permanent limitations, should be regarded as disabled.[21]

The Court's apparently more simplistic approach raises questions. For some types of "sicknesses", it will be clear from the early stages that the effects will be long lasting (e.g. MS, depression, diabetes, cancer (assuming those conditions are regarded as "sicknesses")). The judgment makes no distinction between conditions which, by definition are long lasting and this is known as soon as a diagnosis is made (which could potentially be covered by the Directive if they were (re-)defined as disabilities), and conditions which may develop into long lasting illnesses (which could be re-defined as disabilities where it has been established that they are long lasting) and conditions which are never long lasting (which will never be covered). It is worth noting in this respect that there are many examples of domestic law that define a disability as a condition which has lasted, or which is expected to last for, a minimum of 12 months (or some other period).[22]

In light of the above, one can argue that the difference between illness and disability is not as clear cut as the Court's judgment suggests. Arguably the difference is quantitative rather that qualitative. In general the impact of, for

20. Emphasis added.
21. Opinion of A.G. Geelhoed , para 85.
22. See, for example, the UK Disability Discrimination Act 1995, Schedule 1.

example, an illness such as influenza, will be far greater on a specific individual at a given moment than will be the impact of a long standing disability such as blindness, inability to walk, or the loss of a limb. However, the reason why influenza is not classified as a disability is because it is expected to be of limited duration.

It is therefore submitted that a long lasting illness (chronic illness), which leads to functional limitation, should be regarded as a disability for the purposes of the Directive. Indeed, the Court may have left itself some room to reach this conclusion in the future. Its chosen phraseology, which excludes "a person who has been dismissed solely on account of illness",[23] may allow the Court to argue that adverse treatment in response to sicknesses which lead to long-term or permanent limitations which hinder professional activity does fall within the Directive's scope, because such treatment is not based "solely" on sickness. It is unfortunate that the Court did not clarify if this was its intention, as its judgment can only lead to speculation and doubt on this point.

5.1.4. *An "autonomous and uniform" definition of disability*

The Court stated that its definition of disability was "autonomous and uniform".[24] The definition is therefore not dependent on definitions found in national law, and it should be applied across the EU for the purposes of interpreting the concept of disability in the context of employment discrimination. Where States have no definition of disability in the relevant transposition legislation, courts and covered parties are now obliged to interpret the concept in line with the definition developed in *Chacón Navas.* Where Member States have provided for a broader personal scope in their transposition legislation which explicitly covers (chronic) illness, and which therefore goes beyond that elaborated by the ECJ in *Chacón Navas,* the "additional" personal scope is now established as a matter of purely national law.[25] However, the situation is more complicated where States have incorporated a definition of disability in their transposition legislation, or pre-existing disability non-discrimination law, which may not be in line with that developed by the ECJ. This may be the case, for example, in both the United Kingdom[26] and

23. Judgment, para 47.

24. Judgment, paras. 40 and 42.

25. This is the case, for example, in the Netherlands, where the relevant non-discrimination legislation covers both discrimination on the grounds of disability and chronic illness (Wet van 3 april 2003 tot vaststelling van de Wet gelijke behandeling op grond van handicap en chronische ziekte.)

26. See The UK Disability Discrimination Act 2005 (DDA), c. 50, s. 1(1) which states:

"Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect

Ireland,[27] where detailed definitions of disability for the purposes of non-discrimination legislation exist and preceded the adoption of the Directive. Under UK law, a person is regarded as having a disability for the purposes of the Disability Discrimination Act "if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities". The test is therefore based on the existence of a limitation in carrying out "normal day-to-day activities", rather than the European requirement that the impairment hinders participation in professional life. Many impairments will be regarded as disabilities under both tests, but some, such as HIV-positive status,[28] may only meet the broader UK test, whilst others, such as stuttering leading to problems with making presentations, may only meet the ECJ test. Furthermore, the UK and Irish definitions have been the subject of extensive case law[29] – and in both ju-

on his ability to carry out normal day-to-day activities." This is elaborated in Schedule 1 – Provisions supplementing Sec.1 c. 50 which provides:

"2. – (1) The effect of an impairment is a long-term effect if –

(a) it has lasted at least 12 months;

(b) the period for which it lasts is likely to be at least 12 months; or

(c) it is likely to last for the rest of the life of the person affected. ...

4. – (1) An impairment is to be taken to affect the ability of the person concerned to carry out normal day-to-day activities only if it affects one of the following- (a) mobility; (b) manual dexterity; (c) physical co-ordination; (d) continence; (e) ability to lift, carry or otherwise move everyday objects; (f) speech, hearing or eyesight; (g) memory or ability to concentrate, learn or understand; or (h) perception of the risk of physical danger ..."

27. See the Irish Employment Equality Act 1998–2004, Part I,2(1) which provides:

"'disability' means —

(*a*) the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body,

(*b*) the presence in the body of organisms causing, or likely to cause, chronic disease or illness,

(*c*) the malfunction, malformation or disfigurement of a part of a person's body,

(*d*) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or

(*e*) a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgment or which results in disturbed behaviour, and shall be taken to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person".

28. British law has been recently amended and HIV-positive status is now specifically covered under the DDA.

29. See e.g. the English cases *Murray* v. *Newham Citizens Advice Bureau Ltd. (no.2)*, [2003] IRLR 340 (EAT) (person with paranoid schizophrenia not *per se* excluded from protection of DDA); and the Irish cases *Fernandez* v. *Cable & Wireless*, DEC E/2001/052, Equality Officer, 11 Dec. 2002, (kidney infection may be a disability); *A Civil Servant* v. *The Office of Civil Service and Local Appointments Commissioners*, DEC E/2004/029, Equality Officer, 1 June 2004, (asthma and irritable bowel syndrome may be a disability).

risdictions individuals with long-term illnesses have been brought within the definition of disability.

Should the Court's judgment be interpreted as requiring, on occasions, a more restrictive definition of disability in such jurisdictions, this would seem to clash with the "non-regression" clause in the Directive.[30] In addition, the Directive emphasizes that it only establishes minimum standards, which Member States are free to exceed.[31] A "uniform" European definition of disability, which is more limited than some pre-existing national definitions, would again seem to undermine this principle.

5.1.5. *Evaluation*

Chacón Navas was perhaps not the most suitable case for the ECJ to use to develop a definition of disability for the purposes of the Employment Equality Directive. The illness of Ms. Chacón Navas was not specified and, as a consequence of this illness, she was completely unable to work for some time. The Court could arguably have quickly decided the case by referring to recital 17 of the Directive, which states that it does not require the "maintenance in employment … of an individual who is not competent, capable and available to perform the essential functions of the post", thereby deferring the difficult discussion of the limits of the concept of disability until it was faced with a more suitable set of facts. However, having decided to elaborate a (first) European definition of disability in the context of the equality directives, the Court should have responded more cautiously. It described its definition in *Chacón Navas* as "uniform and autonomous", thereby seemingly limiting the opportunities for Member States to develop or maintain their own definitions which deviate from the set standard. Furthermore, by embracing the medical model of disability, and focusing on the limitation caused by impairment and the need to prove such limitation, the Court's decision flies in the face of values underlying the Directive and Community disability policy, and may thereby create barriers to achieving the goals of the Directive. A more considered approach, recognizing a broad social model of disability, would have set a valuable precedent, whilst still giving Member States leeway to define the limits of disability within that model. Further preliminary references could have revealed whether this approach was sufficient, or whether, as a result of (significantly) different levels of protection,[32] further guidance was necessary.

30. Art. 6(2) of Directive 2000/78/EC.

31. Art. 6(1) of Directive 2000/78/EC.

32. In the sense that individuals in similar situations were falling within the scope of non-discrimination law in some Member States but not others, thereby thwarting the aims of the Employment Equality Directive.

A further matter which the Court did not address at all – and it was not explicitly called to do so in this case – was whether individuals who experience discrimination on the grounds that they have an assumed disability (but where no such disability actually exists), or on the grounds that they are expected to develop a disability in the future (e.g. discrimination based on a genetic predisposition), or on the grounds that they had a disability in the past, are covered by the Directive. Under a social model of disability – which focuses on the interaction between the individual and society – such situations would be covered, and this is indeed the case in some domestic disability non-discrimination laws; however, under a purely medical approach – which requires an actual impairment – they would be excluded. One can expect that the Court will be asked to consider such issues in the future.

5.2. *Sickness is not covered separately by the Directive*

The Court was correct in finding that sickness, illness or chronic illness were not explicitly covered either by Article 13 EC or by the Directive. However, as Quinn argues,[33] the Court's approach in *Chacón Navas* in this respect differed from its more generous approach in *Mangold*. In the latter case, the Court held that the Employment Equality Directive "does not itself lay down the principle of equal treatment in the context of employment"; rather, the purpose of the Directive is to "lay down a framework for combating discrimination [on the various covered grounds]".[34] The Court identified the source of the non-discrimination principle as various international instruments and constitutional traditions common to the Member States. Quinn concludes, in the context of *Chacón Navas*, that the Court refused to consider that the general principle of non-discrimination in EU law – a principle that encompassed and transcended the Directive – could or should result in an additional ground (sickness) being added to the Directive by analogy.

5.3. *Protection of persons with disabilities as regards dismissal: Obligation to make a reasonable accommodation*

This element of the decision was completely in line with the Directive. However, since the judgment was made in the context of a dismissal, it is only of direct relevance to employed persons. In practice, this means that it is of relevance to the following two groups:

33. Quinn, "Disability discrimination law in the European Union", paper currently unpublished on file with author.

34. *Mangold* cited *supra* note 3, para 74.

– Individuals who already have a disability and whose disability changes to such an extent as to make it impossible for them to carry out their work in the standard way or in the manner that they previously carried it out, e.g. individuals with conditions that are prone to deterioration.
– Individuals who previously did not have a disability but become disabled as a result of an illness or accident (although, where the cause is illness, the individual will have to prove that they are not (just) sick, but also disabled).

The judgment clarifies that, with regard to these two groups, employers are not entitled to dismiss such workers where they could carry out the job if a reasonable accommodation were made (unless, the employer can rely on the disproportionate burden defence, and therefore not make the accommodation).

6. Conclusion

In *Chacón Navas*, the Court failed to demonstrate caution when addressing a sensitive and complicated field. The definition of disability elaborated in the case is arguably too narrow, in that the Court adopted a restrictive definition based on the medical model of disability, and too broad, in that Member States' freedom to deviate from the Court's approach seems limited.

Furthermore, the Court's ruling may have already been overtaken by events occurring elsewhere in the world. In December 2006, after some four years of negotiation, a UN Convention on the Rights of Persons with Disabilities was adopted by the General Assembly. That treaty, which covers *inter alia* employment discrimination, does include guidance on the concept of disability. This embraces the social model and recognizes both the role of impairments and their interaction with society in creating disability: Persons with disabilities include those who have long-term physical, mental, intellectual, or sensory impairments, which in interaction with various barriers may hinder their full and effective participation on society on an equal basis with others.[35] Ratification (by at least some EU States, and possibly the EC itself) should follow.[36] Ironically, the *Chacón Navas* decision may have indirectly influenced this UN text. Throughout the negotiation process, the EC representative had insisted that no definition of disability was required within the Convention, referring to the absence of a definition in the Employment Equality Directive,

35. Art. 1. The Convention is available at: www.un.org/esa/socdev/enable/rights/convtexte.htm (last checked 28 Dec. 2006).

36. Quinn, op. cit. *supra* note 33.

and arguing that a definition was inappropriate in a human rights instrument. However, at the last session in New York in August 2006, the EC withdrew its opposition, in part, it seems, as a consequence of the *Chacón Navas* ruling, and the limited (medical based) definition developed therein.

In conclusion, *Chacón Navas* is probably only the beginning of the Court's reflections on the concept of disability within EC equality law, and one can only hope that the Court will catch up quickly with the other European institutions and the UN.

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