



EEL News Service

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CLEER/EEL Upcoming Conference:

**“EU environmental norms
and third countries:
the EU as a global role model?”**

T.M.C. Asser Instituut, The Hague, Friday 19 April 2013

Table of Contents

Case Law.....	2
Ireland fined for non-compliance with waste judgment	2
C-374/11, <i>European Commission v. Ireland</i> , 19 December 2012.....	2
Ireland fined for non-compliance with EIA judgment.....	2
C-279/11, <i>European Commission v. Ireland</i> , 19 December 2012.....	2
Precautionary aspects of Habitats Directive revisited.....	3
Opinion Advocate General Sharpston, C-251/11, <i>Peter Sweetman a.o.</i> , 22 November 2012	3
General.....	4
EU Environment Council December 2012 meeting	4
Environmental priorities of the EU Irish Presidency.....	5
Energy	5
Court of Auditors: Investment Targets in Energy Efficiency not achieved.....	5
Climate Change.....	5
Biofuels responsible for worse air quality and crop yields?	5
Proposal to update EU ETS registry rules.....	6
Events.....	6
World Forests Summit: “Achieving Sustainable Forest Management on a Global Scale”.....	6
Arctic Summit: A new vista for trade, energy and the environment	7
Colofon.....	7

Case Law

Ireland fined for non-compliance with waste judgment

C-374/11, [European Commission v. Ireland](#), 19 December 2012

In October 2009, Ireland was convicted of violating EU waste law. Because the country did not remedy all shortcomings, this time around the Commission asked the ECJ to order Ireland to pay a steep lump sum of over 5 million euros, and a daily penalty payment of 26 173 euro until the country complied with the earlier ECJ judgment. The opportunity to impose such monetary sanctions is laid down in Article 260 TFEU. The ECJ agreed that Ireland still was violating EU environmental law, but imposed a lower fine than the Commission demanded, while rejecting the country's complaint that it should have been given more time to remedy the situation.

The October 2009 case ([C-188/08](#)) had found Irish law in violation of the former Waste Framework Directive (WFD) [75/442/EC](#) (nowadays [Directive 2008/98/EC](#)), notably where that directive prescribes that waste is to be disposed of without endangering human health and the environment (art. 4), and that waste disposal establishments are to be subjected to appropriate periodic inspections (art. 8). In the present case, it was established that Ireland still was not complying with EU law, notably where disposal of domestic waste waters in the countryside through numerous septic tanks and other individual waste water treatment systems are concerned. Not all laws and regulations were in place, and an inspection plan still is lacking.

Ireland had claimed that the Commission's action was premature: the country needed more time to comply with the 2009 judgment. How much time a Member State has to comply with a judgement is not specified in Article 260(1) TFEU. The Court stressed that the importance of an "immediate and uniform application of European Union law" means that after a conviction, the compliance process is to be initiated "at once", and completed "as soon as possible". It judged that *in casu*, the Commission was entitled to lodge an application 21 months after the delivery of the judgement in case C-188/08, even where implementation of that judgment involved complex operations.

The Commission applied its intricate Communication on calculating lump sums and penalty payments ([SEC \(2010\) 923/3](#)). As usual, the ECJ stressed its wide discretion in the matter and uses several "rules of thumb" instead: a payment is to be appropriate to the circumstances and proportionate to the infringement established and the ability of the Member State concerned to pay, taking into account the duration and the degree of seriousness of the infringement and the public and private interests involved. As for the duration, it is noted that the WFD obligations should have been complied with already in April 1993, and that 19 years of non-compliance are "particularly lengthy". Given the objectives of protection of human health and the environment, the infringement is also a "matter of indisputable gravity". That the ECJ arrived at lower amounts than the Commission had to do with the steps taken already towards implementing the WFD correctly, and Ireland's capacity to pay at the time of Court's examination of the facts, taking the economic crisis into account. Hence, the ECJ imposed a lump sum of 2 million euro and a daily penalty payment of 12,000 euro for each day of delay in adopting the measures necessary to ensure full compliance with the judgment in Case C-188/08, with effect from the date on which judgment is delivered in the present case.

Ireland fined for non-compliance with EIA judgment

C-279/11, [European Commission v. Ireland](#), 19 December 2012

On the same day that Ireland was ordered to pay 2 million euro plus a steep daily penalty payment in case C-374/11, the ECJ imposed yet another fine on the country for its failure to comply with the judgment of 20 November 2008 in case [C-66/06](#). The latter judgment found that Ireland had failed to comply with [Directive 85/337](#) on Environmental Impact Assessment (EIA) by not adopting all measures to ensure that certain projects listed in that Directive likely to have significant effects on the environment are required to be assessed where their effects on the environment are concerned and get development consent.

In this case, it was explained by the ECJ that the reference date for assessing whether there has been an infringement of the obligation to take the necessary measures to comply with an earlier judgment of the Court (Article 260(1) TFEU) is the date of expiry of the period prescribed in the Commission's letter of formal notice issued in accordance with the first subparagraph of Article 260(2) TFEU. In the present case, the letter was sent on 22 March 2010 and asked for a reaction within two months after its receipt.

The Commission asked for the imposition of two lump sums. The proposed first lump sum was to be imposed based on not complying with the earlier judgment case until 8 September 2011. The second proposed lump sum was to be imposed for failure to publish some of the new rules between 8 September and 21 September 2011 – so a remaining partial non-compliance with the judgment in case C-66/06. Using its intricate Communication on calculating lump sums and penalty payments ([SEC \(2010\) 923/3](#)), the Commission asked the Court to impose a fine of over 4 million euro, based *inter alia* on the economic situation in Ireland in 2008 where its ability to pay was concerned.

Ireland claimed that its national law was complying with the judgment in case C-66/06 by 8 September 2011, when several regulations entered into force. It also claimed that it demonstrated “utmost good faith” to fulfil its obligations and that the delays were caused by political and economic circumstances, and stressed that using 2008 as a base year where its economy had drastically declined afterwards was not fair.

The ECJ explained that a lump sum in the first place is to be based on the assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period after the judgment initially establishing it was delivered. Secondly, it must prevent similar infringements as a deterrent factor, and thirdly, it must reflect the particularly serious nature of the breach.

The Court acknowledged that Ireland finally complied with case C-66/06 almost three years after the delivery of the case (point 68). It accepted that the Irish authorities met the requirements of the judgment based on their consultation with the Commission, but stressed that this does not refute the fact that Ireland has been found breaching the EIA Directive several times before. It decided that Ireland's breach between 8 September and 22 December 2011 is “less serious” and that the Commission failed to identify specific instances in which landowners had not been made sufficiently aware of the extent of their obligations and had, as a result, undertaken projects likely to have significant effects on the environment. Lastly, the Court agreed to consider the current economic situation, and the Member State's ability to pay. It thus imposed a lump sum of 1.5 million euros, well below what the Commission had asked for.

Precautionary aspects of Habitats Directive revisited

Opinion Advocate General Sharpston, C-251/11, [Peter Sweetman a.o.](#), 22 November 2012

Plans or projects “likely to have significant effect” on a nature protection site are only to be authorised if it is ascertained that they “will not adversely affect the integrity of the site concerned” (art. 6(3) [Habitats Directive](#)). In 2004 the ECJ explained that this means that no reasonable scientific doubt is to remain as to the absence of such effects, and that if such doubt does remain, the precautionary principle as imbedded in the aforementioned provision prevents the authorities from authorising the plan or project (case C-127/02 *Waddenzeevereniging*, discussed in [EEL News Service 2004/16](#)). This Opinion returns to the question in which way the precautionary principle is to guide the protection of special protected nature areas. The Irish authorities issued a development consent for a road that would destroy a part of a nature protection site called Lough Corrib that contains a rare priority habitats type (namely limestone pavement). After an extensive and highly interesting explanation of the Habitats Directive, AG Sharpston concludes that in order to establish whether a project has an adverse effect on the integrity of a site, it is necessary to determine whether it will have a negative effect on the constitutive elements of the site concerned, having regard to the reasons for which the site was designated and their associated conservation objectives (adding that the designation of this site was made, in part, because of the presence of limestone pavement – a natural resource in danger of disappearance that, once destroyed, cannot be replaced and which it is therefore essential to conserve). An effect which is permanent or long lasting must be regarded as an adverse one in her view. In reaching such a determination, the precautionary principle will apply, she added.

The AG stressed that the precautionary principle applies where there is uncertainty as to the existence or extent of risks. Remarkably enough, there does not appear to be any such uncertainty in the present case. If the road is constructed, 1.47 hectares of limestone pavement will be permanently lost – for certain. Allowing that to happen could result in what the Commission called the ‘death by a thousand cuts’ phenomenon, that is to say, cumulative habitat loss as a result of multiple, or at least a number of, lower level projects being allowed to proceed on the same site.

General

EU Environment Council December 2012 meeting

The Environment Council meeting of 17 December 2012 discussed the proposal for the [7th Environment Action Programme](#) (EAP7) (on which we reported in the previous EEL News Service [2012/11](#)). Some Member States expressed reservations about adding new targets or new legislation, recalling the “smart regulation” principle. The Commission underlined that “if it appeared necessary to do so, any legislative proposal or new targets should be based on solid evidence and rigorous impact assessments.” That seems a step away from following a precautionary approach where solid evidence is not yet available. Some Member States highlighted that the medium goal should be a non-toxic environment through the adoption of stricter air and water quality measures. A number of Member States characterised some of the 2020 targets of EAP7 as “quite ambitious”, particularly as regards land filling. The proposals regarding environmental inspections also raised some concerns. EAP7 submits that instead of the present non-binding guidelines, binding criteria for effective Member State inspections and surveillance to the wider body of EU environment law are to be adopted, and a complementary capacity at EU level is to address situations where there is due reason for concern, backed up by support for networks of professionals.

The Council also adopted [conclusions](#) on “[A Blueprint to safeguard Europe’s water resources](#)”. In November 2012, in line with the [Directive 2000/60/EC](#), the Water Framework Directive (WFD), the Commission introduced the Blueprint which aims at the proper implementation and integration of EU water policy targets and the recovering of potential inefficiencies and gaps. The Council’s conclusions stress the importance of better implementation of the WFD, but also the need to integrate it to other policy areas, like the Common Agriculture Policy (CAP) and the Cohesion Policy.

The Council discussed the [proposal](#) on a mechanism for monitoring and reporting greenhouse gas emissions and for reporting other information at national and Union level relevant to climate change (COM/2011/0789 final). The proposal is to update [Decision 280/2004/EC](#), taking account of new reporting obligations under the [UNFCCC](#) and the [2009 Climate and Energy Package](#). The informal discussions with the European Parliament were on-going; the Presidency intended to reach an agreement at first reading before the end of 2012. Parliament has set 12 March 2013 as indicative plenary sitting date for its 1st reading/single reading.

The Council also spoke about the Commission [proposal](#) COM(2012) 93 of March 2012 on accounting rules and action plans on greenhouse gas emissions and removals resulting from activities related to land use, land use change and forestry (LULUCF). The proposal’s objective is to establish comprehensive accounting rules for the effects of the LULUCF sector on GHG emissions. It does not provide for the inclusion of the LULUCF sector in the EU’s emission reduction commitments at this stage, but is presented as a first step towards this by establishing the appropriate policy context. The informal discussions with the European Parliament to reach an agreement at first reading were still ongoing. Finally, the Council took note of oral information from the Presidency and the Commission on the outcome of the Doha Conference on Climate Change (COP18), which took place in Qatar from 26 November to 7 December 2012 (discussed in our previous EEL News Service [2012/11](#)).

See also:

- [Press release - 3211th Environment Council meeting – Brussels, 17 December 2012](#)
- [“Council and European Parliament reach a provisional agreement on a mechanism for monitoring and reporting greenhouse gas emissions”](#), Council of the European Union, Press release 18112/12 of 21.12.2012

Environmental priorities of the EU Irish Presidency

At the start of 2013, the Irish Presidency of the Council of the European Union commenced. The new Presidency announced, inter alia, its environmental key priorities during its presidency, identifying three key areas of interest. Firstly, adoption of the [7th Environmental Action Plan](#) (EAP) and the promotion of a new [EU Climate Change Adaptation Strategy](#). Secondly, supporting the legislative efforts in areas like [Priority Substances](#), [Ship Recycling](#), [Batteries Directive](#), [CO2 from Cars and Vans](#), [Emissions Trading Scheme](#), [Environment and Climate Action](#) (LIFE), [Fluorinated Greenhouse Gases](#) (F-Gases), and [Environmental Impact Assessments](#). Thirdly, supporting and representing the EU at the international arena (notably where it concerns Rio +20 follow-up, UNEP, Mercury, UNFCCC and UN Waste & Chemical Conventions).

As usual, the EEB closely follows presidencies. In an [EEB Memorandum to the Irish Presidency](#), it sets out the organisation's ideas as to what Ireland should focus on. Meanwhile, the outgoing Cyprus Presidency was evaluated on its contributions in the area of environment in an [assessment](#).

See also:

- EEB, [EEB Memorandum to the Irish Presidency](#), Brussels, 21 January 2013
- EEB, [Assessment of the environmental results of the Cyprus Presidency of the EU, July – December 2012](#), Brussels, 21 December 2012
- [“ENVI:Environment”](#), Irish Presidency of the Council of European Union, 2013, www.eu2013.ie

Energy

Court of Auditors: Investment Targets in Energy Efficiency not achieved

The European Court of Auditors (ECA) presented a [special report](#) No. 21/2012 entitled Cost-effectiveness of Cohesion Policy Investments in Energy Efficiency. Research was carried out in Czech Republic, Italy and Lithuania as those countries had received the highest amounts of funds. The results were rather disappointing. In the investigated countries, only 10 to 20% of the investments were actually used directly for the purpose of energy efficiency. Instead, project funds were mostly used for renovation and refurbishment. The average planned payback period for the investments was around 50 years, which ECA described as far too long considering the lifetime of the refurbished components and even of the buildings themselves.

ECA recommended the Commission to make the Cohesion Policy funding for energy efficiency measures subject to a proper needs assessment, regular monitoring and the use of comparable performance indicators as well as the use of transparent project selection criteria and standard investment costs per unit of energy to be saved, with a maximum acceptable simple payback period.

See also:

- Press Release [“EU Energy Efficiency: investment targets not achieved; average pay back period exceeds 50 years \(in extreme cases 150 years\)”](#), European court of Auditors, 14.01.2013
- [“Bulk of EU energy efficiency funds misused, says auditor”](#), EurActiv, 15.01.2013

Climate Change

Biofuels responsible for worse air quality and crop yields?

A newly released study once again stirs up the biofuels controversy. The researchers of the Lancaster Environment Centre concentrated on the consequences of the EU's renewable resources policies in the European Union itself. These policies stimulate producing biofuels, which could result in worse air

quality. In particular, poplar, willow or eucalyptus trees that can grow fast and are extensively used for renewable wood fuel, emit large amounts of the chemical isoprene. When mixed with other air pollutants in sunlight, this chemical creates toxic ozone. The researchers claim that “large-scale production of biofuels in Europe would have small but significant effects on human mortality and crop yields”. In particular, they claim that such policies could result in 1,400 premature deaths per year. In addition to that, ozone weakens crop growth, resulting in the reduction of the value of maize and wheat production. The research proposed placing biofuel plants far from polluted population centres as well as the application of genetic engineering that could possibly reduce isoprene emissions.

On the other side of the Atlantic new research, conducted by the University of Illinois in collaboration with the [Energy Biosciences Institute](#), reached positive conclusions about perennial biofuels. Perennial biofuels stem from plants that have lives longer than two years. The research claimed that such crops can decrease the nitrogen emissions in the air. In particular, miscanthus, switchgrass and mixed prairie species were compared with soybean and corn crops. The first two years the nitrogen remained high. After that, when the miscanthus vegetation became luxuriant, the nitrogen emissions decreased substantially. Miscanthus biofuel crops are considered as alternative biofuels to produce ethanol instead of corn. The extensive use of fertilizers in corn production, leads to emissions of nitrous oxide and nitrate leaching. Nitrous oxide is a greenhouse gas and nitrate can pollute drinking water and the sea.

See also:

- [“Impact of biofuels cultivation on mortality and crop yields”](#), (abstract available), Nature Climate Change, 06.01.2013
- [“Biofuel production threatens air quality and crop yields, study finds”](#), The Guardian, 07.01.2013
- [“Reduced Nitrogen Losses after Conversion of Row crop Agriculture to Perennial Biofuel Crops”](#), (abstract available), Journal of Environmental Quality, 07.01.2013
- [“Research show perennial biofuel reduce nitrogen loss”](#), Ethanol Producer Magazine, 11.01.2013

Proposal to update EU ETS registry rules

At the start of 2013, the Commission submitted to the Climate Change Committee the draft Proposal [“establishing a Union Registry pursuant to Directive 2003/87/EC of the European Parliament and of the Council, Decision No 280/2004/EC of the European Parliament and of the Council and Decision No 406/2009/EC of the European Parliament and of the Council and repealing Regulations\(EU\) No 920/2010 and No 1193/2011”](#). The proposal relates to an update of the EU ETS registry substructure. The use of international credits will be possible from the third trading period by exchanging eligible trading allowances. New provisions in the international credits scheme, the Emissions Reduction Units (ERUs), will also take place in accordance with the Kyoto Protocol, [Directive 2003/87/EC](#) and the [EU ETS Directive](#). The provisions on ERUs refer only to those of the first Kyoto commitment period. The ERUs of the second commitment period will probably start only after 2016. Lastly, an important alteration concerns new developments in the banking rules of the aviation allowances.

See also:

- Press Release: [“Proposal to update EU ETS registry rules”](#), DG Climate Action, 10.01.2013

Events

[World Forests Summit: “Achieving Sustainable Forest Management on a Global Scale”](#)

The Economist will host the World Forest Summit which will focus on sustainable forest management. The Conference concentrates at the importance of forests and their impact on the environment. Issues to be covered are the role of forests in mitigating climate change, the interaction between forests, global warming, population growth and the evolution of technology, government mechanisms to improve land-use planning and ensure sustainable development and lastly, the role of regulation in combating deforestation.

Date: 5-6 March 2013

Location: The Grand Hôtel, Södra Blasieholmshamnen 8, SE 103 27, Stockholm, Sweden

Arctic Summit: A new vista for trade, energy and the environment

The Arctic is subject to substantial changes. The ice in the Arctic is shrinking because of climate change and global warming. This area is of vital importance for our survival but of high economic interest, too. To deal with this controversial issue, the Summit will host 150 policymakers, CEOs and influential commentators who will debate these concerns. The key issues for discussions will be the hunt for natural resources, the impact of climate change, the presence of new trading routes and the need for responsible governance.

Date: 12 March 2013

Location: Hotel Bristol, Kristian IVs gate 7, 0164 Oslo, Norway

Colofon

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