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

(New: preliminary program)

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Case Law

Access to urban planning decisions

C-416/10, Jozef Križan a.o., 15 January 2013

This preliminary ruling deals with the interpretation of EU law on public participation in projects with environmental effects in the light of the Aarhus Convention, and with some procedural questions, notably about lower judges who under national law are obliged to follow the opinion of higher judges even if this would bring about a violation of EU law. After a summary of the facts, first some of the procedural and then some of the substantial issues will be commented upon.

A Slovenian regulation establishing a location for a new landfill site. The company also received an urban planning decision from a municipality, and applied for an integrated IPPC permit. Local residents complained that the latter application did not include the urban planning decision on the location of the landfill site. In the following Slovak court cases, the Supreme Court turned to the ECJ for clarifications.

As for the admissibility of the case, the ECJ clarified that the national judge has the discretion to ask for a preliminary ruling, and the ECJ is obliged to reply as long as the questions relate to the interpretation of EU law. EU law related questions enjoy a “presumption of relevance”; the ECJ can deny to reply only if the questions are irrelevant to EU law, when the problem is hypothetical, or when the ECJ does not have enough “factual or legal material” to give a reply. Furthermore, the ECJ explained that under art. 267 TFEU a national court holds the right to make a preliminary ruling request to the Court “of its own motion”, even when there is a “ruling on a referral back to it after its first decision was set aside by the constitutional court of the Member State” or when a national rule obliges the court to follow the legal opinion of such a higher court. The ECJ stresses that the lower court is bound by its interpretation of EU law and must, if necessary, disregard the rulings of the higher court if it considers, in the light of that interpretation, that they are not consistent with EU law.

The Aarhus Convention was implemented in the EU through the EIA Directive 85/337/EEC and the IPPC Directive 96/61/EC as amended by Directive 2003/35/EC. Does the IPPC Directive require the interested public to have access to an urban planning decision on the location of a new landfill site? Art. 15 IPPC demands that Member States ensure that the public concerned is given “early and effective opportunities” to participate in the procedure for issuing permits for new installations in accordance with Annex V. Apparently these rules are insufficiently clear for the ECJ to answer the question. Quoting the preamble of Directive 2003/35/EC (stating that EU law should be ‘properly aligned’ with the Convention), the ECJ stresses that the EU rules on public participation must be interpreted in the light of the Aarhus Convention. The Convention demands that the public concerned must be able to have access to all information relevant to the decision-making relating to authorisation of activities like landfills. The ECJ thus concludes that under IPPC Directive the public concerned must “in principle, have access to all information relevant to that procedure”. It adds that the urban planning decision at stake here is to be considered such relevant information.

Art. 15(4) IPPC foresees that restrictions can be introduced, notably where disclosure of information would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by national or EU law in order to protect a legitimate economic interest. This exception cannot be invoked for urban planning decisions determining the location of a landfill like the one at stake here, the ECJ finds.

The ECJ also concluded that Art. 15a IPPC implies that member of the public concerned must be able to ask for interim measures like temporary suspending a decision, and that decisions of a national

court in national proceedings implementing obligations resulting from art. 15a IPPC Directive and art. 9(2) and (4) Aarhus Convention) annulling a permit due to the breach of these provisions does not, in itself, constitute an "unjustified interference with the developer's right to property" ex art. 17 of the Charter of Fundamental Rights of the European Union.

See also: Press Release: "The public must have access to an urban planning decision concerning the establishment of an installation having significant effects on the environment", Court of Justice of the European Union, 15.01.2013

Inadmissibility of action against seal products ban

Opinion Advocate General, C-583/11 P, *Inuit Tapiriit Kanatami a.o. v European Parliament and Council of the European Union*, 17 January 2013

In 2011, the General Court dismissed an action brought by the Canadian Inuit, producers and traders of seal products in the European Union (Case T-18/10). This case deals with the appellants' appeal against that order. The ban was imposed by Regulation No 1007/2009 on trade in seal products in the EU. The Regulation bans placing on the EU market of seal products with some exceptions. The challenge in this case is whether the Inuit communities and other interested parties are entitled to bring an action against this Regulation. The General Court said that they did not have such a right, in spite of the changes brought about by the Treaty of Lisbon to the provision on access to justice in Art. 263(4) TFEU. Advocate General (AG) Kokott gives her interpretation of the part of that provision which allows legal and natural persons to bring an action before the Court "against a regulatory act which is of direct concern to them and does not entail implementing rules". The term 'regulatory act' is not defined in the TFEU.

The AG explains that art. 263 TFEU deliberately distinguishes regulatory acts from legislative acts, that the difference between the two becomes clear in many of the 23 language versions of the TFEU, and that thus different legal remedies are available. She does note that this interpretation is opposed by about half of the legal literature.

The absence of easier direct legal remedies available against legislative acts is explained principally "by the particularly high democratic legitimation of parliamentary legislation" in the EU and at the national level – where individuals often also do not have direct legal remedies against parliamentary laws. She also points at the Constitutional Treaties clearer distinction between legislative and non-legislative acts.

The AG added that the appellants do have the right to bring legal actions before national courts in the EU for infringements stemming from the implementation of this Regulation. She added that a person did not even has to act unlawfully first and thus run the risk of a penalty in order to get the ECJ to answer a question by a national court, because "[a]n individual is (…) free to write to the competent authority (…) and to request confirmation that the requirement or ban in question is not applicable to him." Any negative decision must be open to review by national courts, which may or sometimes must refer the question of the validity of the underlying European Union act to the ECJ. Indeed, since Lisbon the duty for Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law has been expressly laid down in the second subparagraph of Article 19(1) TEU. Conditions for admissibility of actions before national courts, including possible preventive actions for declarations or injunctions, may thus not be excessively restrictive.

See also: "Seal Ban Dispute Debuts in Geneva" in Bridges Weekly Trade News Digest • Volume 17 • Number 6 • 20th February 2013 (about the WTO case started by Canada against the EU)

Runway extensions no violation of human rights

Applications nos. 3675/04, 23264/04, *Flamenbaum a.o. v France*, (in French), ECHR, 13 January 2013

The European Court of Human Rights (ECtHR) again dealt with a case concerning the extension of a runway, this time at the Deauville Airport, France. The applicants were house owners in the proximity of the airport arguing that this extension resulted into sound disturbance which violated art.8 of the European Convention of Human Rights (ECHR), i.e. the right to respect for private and family life, and to a market value decline of their properties in violation of art.1 Protocol No.1 ECHR on protection of property.

In regard to art.8, the ECHR concluded that the runway extension project was subject to numerous detailed impact assessment procedures with public participation. Also, the interested public had had reasonable access to justice for remedies and compensation. As for the argument that the decision-making process was fragmented and the public had had no chance to examine the overall project, the ECHR found that although the Government has to respect individual interests, it can choose "the ways and means of complying with that obligation". Having regard to the measures taken to limit the impact of the noise disturbance on local residents, the Court decided that a fair balance was struck between the competing interests of the local residents on the one hand and the region's economic well-being on the other hand. No violation of art. 8 ECHR was found.

As for art.1 Protocol No. 1, the ECHR explained that the article does not in principle vouch for the right to keep property in pleasant environment. The applicants argued that due to the runway extension, the value of their properties declined. Despite the ECHR's request for further clarifications to the real estate estimation report, the applicants failed to provide the proper information. Under these circumstances, the ECHR concluded that the applicants failed to prove that the airport runaway extension constituted any effect to their properties' value and therefore no violation of art.1 Protocol No.1 ECHR occurred.

See also:

- "Extension of main runway at Deauville Airport does not amount to violation of right to respect for private and family life of complainants or of right to peaceful enjoyment of possessions", Press Release ECtHR, 13.01.2013
- ECtHR 02.10.2001, Hatton a.o. v United Kingdom (case regarding expansion of Heathrow airport)

Poland sued over nitrates pollution

The Nitrates Directive aims at minimizing water pollution by the excessive use of nitrates from agricultural sources. Nitrates are used as fertilizers. The Directive established a framework for water and soil protection against nitrates and the promotion of "good farming practices". The Directive's provisions applied since 2004 for Poland but the country failed to determine enough zones vulnerable to nitrates pollution. Also, its implemented action plans were not accurate enough and had substantial flaws, according to the Commission. Almost all of Poland's water flows to the Baltic Sea which is already vulnerable to excessive nitrates pollution. Despite the Commission's reasoned opinion in 2011, Poland manifested "slow progress and insufficient proposed changes" and therefore was referred to the ECJ.

See also:

- "Environment: Commission takes Poland to Court over nitrates and water pollution". Europa Press release, 24.01.2013

Bulgaria, UK and Estonia sued over energy market rules

All three countries have failed to fully comply with Electricity and Gas Directives, according to the Commission. In September 2011, the Commission started by sending letters of formal notice and continued by sending reasoned opinions in 2012. Since the progress from the countries was

insufficient, the Commission is taking the Member States to the ECJ. For Bulgaria, the Commission asks for a daily penalty equal to € 8448, for Estonia € 5068 for the partial compliance with the Electricity Directive and of € 4224 for the partial implementation of the Gas Directive. As for the UK, the Commission asks for a daily penalty equal to € 148177 for only partially having implemented each of the Directives. If the ECJ imposes penalties, these will be paid from the date of the judgement until the Directives' full transposition.

See also:

- "Internal energy market: Commission refers Bulgaria, Estonia and the United Kingdom to Court for failing to fully transpose EU rules", Europa Press release, 24.01.2013

Dutch Judgements on Shell's liability

District Court of The Hague, *LJN BY9854, Friday Alfred Akpan and Vereniging Mileudefensie / Royal Dutch Shell Plc. and Shell Petroleum Development of Nigeria Ltd*, 30 January 2013 (in Dutch)

On 30 January 2013, the district Court of the Hague released its decision in the five cases that regarded Shell's liability for the oil spills that took place in Nigeria. As we reported previously in News Service 2012/09, Nigerian farmers and the Dutch environmental NGO Milieudefensie initiated proceedings against Shell's Nigerian subsidiary "Shell Petroleum Development Company" (SPDC) and Royal Dutch Shell Plc (Shell), asking that these companies both were to be held liable for failing to take care of four specific oil leakages in villages in Nigeria. During the interlocutory proceedings, the Dutch district court accepted the bundling of the parent company and its subsidiary in one case, that would be examined under the Nigerian law.

In four of the five cases the district court dismissed the claims and ruled that SPDC is not liable for these events. In particular the court accepted Shell's and SPDC's claims that the events were not caused by "defective maintenance by Shell, but by sabotage from third parties".

In the fifth case that regarded two other oil spills, the court ruled that SPDC violated a duty of care and shall be held liable for tort of negligence. The leakage event in these cases took place by sabotage as well, but this was made too easy as it could be accomplished with simple tools; this explains SPDC' liability. Moreover, SPDC neglected to take the necessary prevention measures up until the lawsuit was initiated in 2010. SPDC will pay damages for its negligence that will be decided under a separate damages assessment procedure.

Mileudefensie might have the right to defend environmental matters in the Netherlands but under Nigerian law "the oil spills in Nigeria do not infringe on Mileudefensie's rights". Hence, the NGO's lawsuit was dismissed. In relation to the claims against Royal Dutch Shell Plc., the court ruled that under Nigerian law "a parent company, in principle, is not obliged to prevent that its (sub-)sidiaries harm third parties abroad". Under these conditions, and since there are no evidence to the contrary, the court dismissed the claims against the parent company Shell.

See also:

- "Dutch judgements on liability Shell", De Rechtspraak, 30.01.2013
- Documents on the Shell legal case from Milieudefensie (including the full texts of the final judgements in English)
- "No big surprises in Dutch Shell Nigeria / Royal Dutch Shell ruling", Gavc Law, 31.01.2013

Waste

Report on the implementation of EU Waste legislation

The European Commission released a report "on the implementation of EU waste legislation" for the period 2007-2009 which manifests results, outcomes and conclusions by examining each directive separately.

As for the Waste Framework Directive 2008/98/EC (WFD) the report showed many inadequacies, like Member States still highly depending on landfilling. Austria, demonstrated the highest rate of recycling, followed by Germany. Countries that accessed after 2004 face considerable problems to follow up. Directive 91/689/EEC on Hazardous Waste was implemented into national legislation, but results are relatively discouraging. In particular, there are concerns about the enforcement of the mixing ban, the relevant exemptions and whether the Member States have sufficiently managed to comply with the requirements of the periodic inspections. Directive 75/439/EEC on waste oils showed varying results, but generally was oil waste combustion or regeneration were limitated. The Directive 86/27/EEC on Sewage Sludge that aims at promoting the use of sewage sludge in agriculture showed that Member States not only implemented the legislation but some imposed stricter rules. The results are encouraging, the goal has been attained; almost 8% more of sewage sludge is used in agriculture. The Packaging Directive 94/62/EC promotes prevention, re-use and recycle of packaging waste. The results indicated that the generation of packaging waste generally remained stable, but recovery and recycling varied among the Member States. The Landfill Directive 1999/31/EC is implemented in different ways. Member States like Belgium, Denmark, the Netherlands, Austria, Germany and Sweden have less that 5% of landfilling sites while others still have a long way to go. Lastly, as for the WEEE Directive 2002/96/EC on waste electrical and electronic equipment, the level of compliance was generally satisfying apart from Slovenia and Italy that were under the directive's set target.

Meanwhile, the European Courts of Auditors (ECA), released a report criticizing EU's waste management infrastructure. Notably, the ECA claimed that "the effectiveness of EU funding for municipal waste management infrastructures was limited due to the poor implementation of supporting measures" and poor provision of data by the Member States. The report claimed that "one quarter of the regions sampled significantly increased their separate collection rate resulting in a reduction of the reliance on landfilling and contributed to achieving EU targets". Among others, the ECA suggested that Member States should implement the measures before being granted EU financial support and the Commission should substantially examine the data provided by the Member States.

See also:

- Detailed reports for each Directive here
- "Auditors slam Europe's waste system-for waste", EurActiv, 05.02.2013

Climate Change

Subsidies to renewables cause distortion?

The European power association Eurelectric, responding to a public consultation on energy market integration, suggested that the European Commission must take the necessary measures and move towards the elimination of subsidies to mature renewables.

Particularly, Eurelectric, urged the Commission to try for a "reliable and clear roadmap with concrete deadlines for phasing out (the subsidies) as most technologies are gradually reaching maturity". The Eurelectric report enumerates the steps that the Commission should take to ensure energy market integration.

The association highlights that European Union should stick to the 20-20-20 Europa's objectives and develop a new approach for the post 2020 era. Notably, the association proposes the integration of different policies, like the CO2 reduction, the Renewable Energy Sources, and energy efficiency into one cohesive form. The EU Emissions Trading Scheme, the association claims, should be the "key driver" to obtain "carbon neutrality". Thus, the Commission should adopt new measures for greenhouse gas emissions targets up until 2050.

On the other hand, at the same public consultation, the European Renewable Energy Federation (EREF), opposed to the above suggestion that subsidies in RES distort competition and suggested that subsidies to other forms of energy sources should be eliminated. EREF emphasized that the subsidies to fossil fuels is four times higher than those offered to renewables. By the elimination of such subsidies, the renewable resources will gain an opportunity to develop competitive.

See also:

- "Renewables subsidies 'increasingly disruptive"", ENDS, 08.02.2013
- "European Commission Consultation Paper on generation adequacy, capacity mechanisms and the internal market in electricity", Eurelectric response, February 2013
- "EREF KEY Messages on a European Renewable Energy Strategy for 2020 and beyond", EREF response to the public consultation on the Renewable Energy Strategy, 16.02.2013

General

The DG Env launches report about access to justice in environmental matters

The study under the title "Possible initiatives on access to justice in environmental matters and their socio-economic implications" was conducted by the Maastricht University, Faculty of Law. It aims at presenting and evaluating the likely "socio-economic effects of changes in the regulation of public access to justice in environmental matters". The backbone for this research is article 9 of the "UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters" (Aarhus Convention). This Convention establishes the rights and fair and reasonable conditions of public participation in environmental matters. Particularly, the researchers were asked to examine the next best legislative step. Three Member States (Latvia, United Kingdom and Germany) constituted the empirical part of the research.

The report examines the current situation of access to justice by taking a closer look at the case law of the ECJ. The most important turn in access to justice was established by the Slovak Brown Bear case, C-240/09. It obliges national courts to interpret law in such a way that NGOs are able to challenge administrative environmental decisions. In this way, art. 9(3) is safeguarded; however there is a variety of conformity among the Member States. Nevertheless, the report stipulates that Member States would be forced, eventually, to follow.

From a law and economics perspective, the researchers concluded that the most optimal choice would be the option of drafting a new legislative proposal. This option provides more "legal certainty" for NGOs who will feel less deterrent to file lawsuits instead of following a "strategic behaviour". Also, a new legislative proposal will clear out the existing problems with the definitions.

Similarly, from a societal perspective, the report concluded that a new legislative proposal would be the best option. The issue necessary to be addressed is the *locus standi*, the right to stand before a court. A draft legislative proposal could therefore result into more legal certainty and the Member States will retain some "regulatory autonomy" by implementing relevant case law.

The empirical part of the research demonstrated that there was a general agreement that a definition of "environmental matters" would be useful. The report also concluded that the quality and effectiveness of NGOs varies. Only Germany is ahead by establishing requirements for their official recognition. Interestingly, based on the interviews, Member States also agree that a new legislative proposal would be the best option that can safeguard their rights.

See also:

- Executive Summary of the report
- C-240/09, "Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky", Summary, September 2011

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

Envecon 2013: Applied Environmental Economics Conference

This conference is organised by the UK environmental economists (UKNEE), where economists from public and private sector, academia and consultancy will be brought together to share and discuss issues related to the practical application of environmental economics in the world. Eight parallel sessions will take place with different issues under discussion. These will relate to climate change policy, economic valuation, water management, ecosystem services, the marine environment, analysing individual behaviour and others.

Date: 15 March 2013

Location: the Royal Society, 6-9 Carlton House Terrace, SW1Y 5AG, London, United Kingdom

Workshop on "Nitrates, Environment and Vegetables"

The European Commission, DG Environment and the University of Torino organise a workshop for providing support to the implementation of the Nitrates Directive (91/67/EEC). The workshop is suitable for policy makers, researchers, farmers and extension professionals. The necessity to keep up with crop demands has intensified the need to make nitrogen fertilizer more effective and at the same time reduce the negative effects to the environment and human health. The workshop will focus on the "critical issues of the Nitrates Directive in vegetable crops in European Countries". Topics under discussion are nitrogen fertilization management, best strategies for nitrogen and water use efficiency, the interrelation of nitrogen and other nutrients, crop rotation and monitoring of the environmental pollution that is caused by nitrogen losses.

Date: 15-17 April 2013

Location: Provincia di Torino, 'Auditorium' room, Corso Inghilterra, 7, 10138, Torino, Italy

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Colofon

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