EEL News Service

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Table of Contents

Case Law

Access to environmental information on regulatory instruments

Opinion Advocate General, C-515/11, *Deutsche Umwelthilfe v Federal Republic of Germany*, 21 March 2013

A German administrative court raised the question whether the executive branch of government is a body or institution acting in a legislative capacity within the meaning of Article 2(2) of Directive 2003/4 on public access to environmental information when it adopts regulatory instruments pursuant to a legal power conferred by enabling provisions contained in primary legislation. That provision defines "public authority" *inter alia* as government or other public administration, including public advisory bodies, at national, regional or local level, but allows Member States to provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity.

An environmental association (Deutsche Umwelthilfe), made a request to the Ministry under the German Environmental Information Law (*Umweltinformationsgesetz*). It sought access to information submitted by the German car industry during the preparatory stages of the process that led to the adoption of a regulation dealing with the provision of information to consumers regarding fuel consumption, carbon dioxide emissions and electricity consumption of new motor cars. The Ministry rejected the request on the grounds that it had been acting in a legislative capacity and was therefore not subject to an obligation to provide environmental information.

The Advocate General (AG) focuses on the interpretation of 'legislative capacity' and distinguishes between primary and secondary legislation. She explains that a feature of the process of adopting regulatory instruments (secondary legislation) is that, in general, the full democratic parliamentary process is less engaged. There may be little (or indeed no) procedural requirement for parliamentary debate. There is, in general, therefore less transparency and less opportunity for public scrutiny, AG Sharpston submits. She therefore suggests that an executive body is not excluded from the exception of Article 2(2) when adopting regulatory instruments pursuant to enabling powers contained in a legal rule of a higher rank, unless the procedure for adopting such instruments guarantees a right of access to environmental information in such a way that the objectives of the directive have been achieved in a way comparable to that provided by the procedure for adopting legislative acts. The burden of demonstrating lies with the executive body seeking to rely upon the exception. It is for the national court to verify that the objectives of Directive 2003/4 have been satisfied, taking account in particular of the objectives of transparency and public scrutiny.

Prohibitively expensive environmental legal proceedings

Case C-260/11, *David Edwards a.o. v Environment Agency a.o.* , 11 April 2013

The referring court asks the ECJ to clarify the meaning of the requirement laid down in the fifth paragraph of Article 10a of Directive 85/337 and in the fifth paragraph of Article 15a of Directive 96/61 that judicial proceedings covered by those provisions should not be prohibitively expensive. Notably, guidance was asked regarding the criteria for assessing 'prohibitively expensive', taking into account the latitude available to Member States in defining those criteria in national law. Advocate General (AG) Kokott delivered an opinion on 18 October 2012, as discussed in a previous newsletter (Opinion AG Kokott, C-260/11, David Edwards a.o. v Environment Agency a.o., 18 October 2012). The AG had stated among others that both an objective and a subjective test could be used when assessing whether the costs were 'prohibitive'. However, the subjective test would need to be based not on the individual's financial means but on whether they have an 'extensive' economic interest in the outcome, she advised.

The ECJ concluded that the requirement that judicial proceedings should not be prohibitively expensive means that the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by

reason of the financial burden that might arise. Account must be taken of all the relevant provisions of national law. Furthermore, the national court called upon to give a ruling on costs must satisfy itself that that requirement has been complied with, taking into account both the interest of the person wishing to defend his rights and the public interest in the protection of the environment. Therefore, the national court cannot act solely on the basis of that claimant's financial situation but must also carry out an objective analysis of the amount of the costs. It may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime. The fact that a claimant has not been deterred, in practice, from asserting his claim is not of itself sufficient to establish that the proceedings are not prohibitively expensive for him.

Ireland fails to fulfil legal obligation under IPPC Directive

Case C-158/12, *Commission v Ireland*, 11 April 2013

Article 5(1) IPPC Directive sets a deadline with respect to the authorisation and operation of existing installations. The Commission requested all the Member States to provide information on the total number of existing installations and on the number of new, reconsidered and, where appropriate, updated permits for existing installations. The Commission found that 13 pig- and poultry-rearing installations were continuing to operate in Ireland without valid IPPC permits, and consequently brought the present action to the Court. In its defence, Ireland essentially confines itself to pointing out the efforts undertaken by the Environmental Protection Agency (EPA) to ensure that operators of all the intensive pig- and poultry-rearing installations concerned are informed of their legal obligation to obtain a permit. Since Ireland does not dispute that the measures concerned had not been taken, the Court concludes that the Commission's application must be granted and that Ireland has failed to fulfil its obligations under Article 5(1) of the IPPC Directive.

Interpretation of Article 6(3) Habitats Directive

Case C-258/11, *Peter Sweetman and Others v An Bord Pleanála*,11 April 2013

An Bord Pleanála (the Irish Planning Board) decided to grant development consent for the N6 Galway City Outer Bypass road scheme. Part of the proposed road was planned to cross the Lough Corrib site of Community importance (SCI). Mr Sweetman was of the opinion that An Bord Pleanála had erred in its interpretation of Article 6 of the Habitats Directive in concluding that the effect of the road scheme on the Lough Corrib protected site would not constitute an 'adverse effect on the integrity of the site'. The Supreme Court observed that it had doubts as to when and in what circumstances, where an appropriate assessment of a plan or project is carried out pursuant to Article 6(3) of the Habitats Directive, such a plan or project is likely to have 'an adverse effect on the integrity of the site' and therefore referred the question to the ECJ.

According to the ECJ, Article 6(3) of the Habitats Directive must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the list of sites of Community importance, in accordance with the directive. In line with the advice by AG Sharpston (discussed in EEL News Service 2013/01), and earlier case law (notably the Waddenzeevereniging case C-127/02), the ECJ stresses that the precautionary principle should be applied for the purposes of that appraisal.

Exemption of building plans from environmental assessment

Case C-463/11, *L v M*, 18 April 2013

This case concerns a preliminary ruling regarding the interpretation of Articles 3(4) and (5) of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment. M decided to prepare a building plan under the standard procedure provided for in the German Planning Code (*Baugesetzbuch - BauGB*). In the course of the public consultation, L and others raised objections, in particular on environmental protection grounds. M decided upon a project for a smaller area and prepared a building plan under an accelerated procedure provided for in the BauGB. L and others repeated their objections and called for an environmental report in accordance with Directive 2001/42/EC. The building plan was adopted without carrying out an assessment. The lawfulness of the plan was challenged by L in the Administrative court (*Verwaltungsgerichtshof*) Baden-Württemberg, which asked the ECJ for a preliminary ruling. The question was whether a Member State exceeds the limits of its discretion under Art. 3(4) and (5) of Directive 2001/42/EC if, in respect of a municipality's development plans which determine the use of small areas at local level but do not fall within the scope of Art. 3(2) of the Directive, it determines by specifying a particular type of development plan, that when drawing up such a plan the procedural provisions on environmental assessment are to be waived. According to the ECJ the referring Court must apply the provisions of EU law and must refuse to apply any provision of the BauGB which would deliver a decision contrary to Directive 2001/42/EC. It can be concluded that Art. 3(4) and 3(5) of the Directive must be interpreted as precluding national legislation which exempts the adoption of a particular type of building plan from an environmental assessment as required under the Directive.

Commission refers Poland and Cyprus to Court

The European Commission is referring Poland and Cyprus to the Court for failing to transpose the Renewable Energy Directive. The Directive aims at ensuring a 20% share of renewable energy in the EU by 2020. By 5 December 2010 the Directive had to be transposed by the Member States.

The Commission has addressed the issue of non-transposition of the Directive by sending a letter of formal notice to Poland (January 2011) and Cyprus (November 2011). A reasoned opinion was sent to Poland in March 2012 and to Cyprus in June 2012. Despite these actions transposition is still pending in these two Member States.

Under the Lisbon Treaty, the Commission may ask the Court to impose financial sanctions when referring a case regarding a failure of implementation to court. The Commission proposes a daily penalty of € 133 228,80 for Poland and € 11 404,80 for Cyprus.

The Commission is also examining the process on transposition of this Directive in other Member States to which it has addressed letters of formal notice and/or reasoned opinions for failing to transpose the Renewable Energy Directive.

See also:

- "Renewable Energy: Commission refers Poland and Cyprus to Court for failing to transpose EU rules", Europa Press Release, 21.03.2013.

General

Enhancing transparency on social and environmental matters

On 16 April 2013 the Commission adopted a proposal for a directive enhancing the transparency of certain large companies on social and environmental matters. This Directive amends the Accounting Directives (Fourth and Seventh Accounting Directives on Annual and Consolidated Accounts, 78/660/EEC and 83/349/EEC) aiming to increase EU companies' transparency and performance on environmental and social matters, and, therefore, to contribute effectively to long-term economic growth and employment. Under the current proposal, large companies with more than 500

employees would be required to disclose relevant and material environmental and social information in their annual reports. According to the Commission the approach taken ensures that administrative burdens are kept to a minimum. Concise information which is necessary for understanding a company's development, performance or position would be made available rather than a fully-fledged and detailed "sustainability" report.

On 6 February 2013, the European Parliament adopted two resolutions ("Corporate Social Responsibility: accountable, transparent and responsible business behaviour and sustainable growth" and "Corporate Social Responsibility: promoting society's interests and a route to sustainable and inclusive recovery"), acknowledging the importance of company transparency on environmental and social matters. In these resolutions the Parliament among others emphasises the need for any regulatory measures to be drawn up within a robust legal framework and in line with international standards, in order to avoid disparate national interpretations.

See also:

- "Commission moves to enhance business transparency on social and environmental matters", Europa Press Release, Brussels, 16.03.2013.
- Non-Financial Reporting, European Commission, 19.04.2013.

Climate Change

EC consultation climate and energy framework and CCS

On the 27 March 2013, the European Commission adopted a Green Paper which launched a public consultation on the content of the 2030 policy framework on climate and energy. Topics addressed in the consultation relate to the type, nature and level of potential climate and energy targets for 2030, but also on other important aspects of EU energy policy in a 2030 perspective. Reactions are welcome until 2 July 2013.

The Commission also published a Consultative Communication on the future of carbon capture and storage (CCS) in Europe and a report assessing Member States' progress towards their 2020 renewable energy targets and reports on the sustainability of biofuels and bioliquids consumed in the EU. The Communication identifies the barriers that have prevented CCS from developing at the pace foreseen in 2007. In addition, the Communication discusses options to further promote the timely demonstration and early deployment of CCS and invites contributions on the role of CCS in Europe.

See also:

- Commission moves forward on climate and energy towards 2030, Europa Press Release, 27.03.2013
- Debate rages as Brussels fires starting gun on 2030 energy strategy, EurActiv, 22.03.2013
- Green Paper "A 2030 framework for climate and energy policies", European Commission, cited on 28/03/2013.
- Consultative Communication on the future of Carbon Capture and Storage in Europe, Europa Press Release, 27.03.2013

2015 Global Climate Change Agreement

The European Commission adopted a consultative paper that launches a public debate on how best to design a new international agreement to combat climate change. The Consultative Communication raises key questions and invites the views of stakeholders on the new agreement, which is to be completed by the end of 2015 and to apply from 2020. The Consultative Communication invites input from stakeholders, Member States and EU institutions. The public consultation runs online until 26 June. At the initiative of the European Union and the most vulnerable developing nations, the Durban climate conference in December 2011 launched negotiations to develop a new international climate change agreement that covers all countries. The agreement will take the form of a protocol, another

legal instrument or an agreed outcome with legal force applicable to all Parties. It will be adopted in 2015 and implemented from 2020 and will have to bring together the current patchwork of binding and non-binding arrangements under the UN climate convention and the Kyoto Protocol into a single comprehensive regime.

See also:

- Climate action: Designing the 2015 Global Climate Change Agreement, Europa Press Release, 26.03.2013.

Accounting rules for the land use, land use change and forestry

On 22 April 2013 the Council adopted a decision on accounting rules and information on actions concerning greenhouse gas emissions and removals resulting from activities related to land use, land use change and forestry (LULUCF). The aim of the decision is to establish a harmonised legal framework for comprehensive and robust accounting rules for this sector which are consistent with relevant decisions adopted within the United Nations Framework Convention on Climate Change (UNFCCC) framework. The decision represents a first step towards the inclusion of LULUCF activities in the EU's greenhouse gas emission reduction commitments. The EU's draft law was tabled by the Commission in October last year and signalled the end of the EU's support for so-called first generation biofuels, which are considered the most polluting and have been blamed for displacing food crops in developing countries.

The circumstances under which the EU law was tabled are now coming to the surface following an 'access to information' application by EurActiv. According to unofficial minutes of a cabinet coordination meeting, biofuels companies and associations sent EU cabinet members three e-mails an hour, many containing catastrophic warnings. As a result of the lobbying the biodiesel industry was saved from the demise it feared by an EU decision not to include feedstock-specific values measuring its default greenhouse gas emissions.

See also:

- Greenhouse gas emissions: The Council adopts the accounting rules for the land use, land use change and forestry sector, Europa Press Release, Luxembourg, 22.04.2013.
- Greenhouse gas emissions: Council and European Parliament reach a provisional agreement on the accounting rules for the land use, land use change and forestry sector, Europa Press Release, Luxembourg, 21.12.2012.
- Biofuels industry sent 'three mails an hour' in ILUC lobby offensive, EurActiv, 07.05.2013.

EU-Canada trade agreement threatens fracking bans

Canada is close to finalising a long-delayed free-trade deal with the European Union. Canadian and EU officials say the deal could generate around €21 billion in trade. However, a new briefing by Corporate Europe Observatory (CEO), the Council of Canadians and the Transnational Institute shows that the proposed Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada would grant energy companies far-reaching rights to challenge bans and regulations on fracking for shale gas. The document would establish a 'fair and equitable treatment' obligation that outlaws any 'breach of legitimate expectations of investors' according to text proposed by the EU. The CEO warns that the proposed investment protection clauses in the agreement would jeopardise governments' ability to regulate or ban fracking.

Currently, EU member states are studying the environmental and public health risks of this newly popular technology to extract hard-to-access natural gas or oil. "CETA will empower big oil and gas companies to challenge fracking bans and regulations through the back door. They would just need to have a subsidiary or an office in Canada", warned Timothé Feodoroff (Transnational Institute).

With this in mind it is interesting to note that the EU's chief scientific advisor has said that evidence allows the go-ahead for extracting shale gas. A green paper was launched on 27 March 2013, setting out Europe's energy and climate aims for 2030 with Energy Commissioner Günther Oettinger taking a favourable position on shale gas. Climate Commissioner Connie Hedegaard however has adopted a

less favourable tone regarding shale gas. At the moment Member States remain divided on their approach regarding this issue.

See also:

- Canada moving closer to trade deal with EU, EurActiv, 08.05.2013.
- Draft EU-Canada trade treaty threatens Europe's fracking bans, EurActiv, 08.05.2013.
- EU-Canada trade agreement threatens fracking bans, Corporate Europe Observatory, 06.05.2013.
- EU's chief science advisor gives shale gas go-ahead, EurActiv, 16.04.2013.

Temporary derogation ETS for international flights

As a gesture of good faith the EU will "stop the clock" on the implementation of the international aspects of its ETS aviation. At a meeting of the International Civil Aviation Organisation's (ICAO) Council on 9 November 2012 significant progress was made towards the goal of global regulation of aviation emissions. Aiming to reinforce the positive momentum within the ICAO the Council adopted on 22 April 2013 the decision to derogate temporarily from directive 2003/87/EC establishing the EU scheme for greenhouse gas emission allowance trading. The decision temporarily defers enforcement of the obligations of aircraft operators in respect of incoming and outgoing international flights under the EU emissions trading system for 2012. It will temporarily exempt airlines from the ETS requirement to report carbon emissions for flights between EU airports and third countries, and sanctions will not be imposed for failure to report. The EU/ETS directive will continue to apply in full to intra-EU flights and flights between the EU and a number of closely connected areas and territories.

See also:

- The Council adopts decision on temporary derogation from the EU emissions trading system directive, Council of the European Union, 22.04.2013.
- Stopping the clock of ETS and aviation emissions following last week's International Civil Aviation Organisation (ICAO) Council, Europa Press Release, 12.11.2012.
- The Council and the European Parliament reach informal agreement on temporary derogation from the EU emissions trading system directive, Council of the European Union, 20.03.2013.

EP not in favour of interfering in EU's carbon market

On 16 April 2013 the European Parliament has rejected proposals for 'backloading' to postpone the auctioning of 900 million carbon allowances for 2013-2015, in a bid to help boost the price of 'polluters permits'. It is believed that any interference in the EU's carbon market could undermine confidence in the emissions trading scheme (ETS). Others feel that the temporary backloading solution would give the ETS a much needed boost, increasing carbon prices and in turn stimulating investment and innovation. Immediately following the vote, the carbon market fell to a record of €2.63 per tonne, far below the €50/tonne that analysts consider necessary for the ETS to be effective.

The day before the vote, a group of 36 NGO's published the report "EU ETS myth busting: why it can't be reformed and shouldn't be replicated". They want the ETS to be scrapped; this contrary to the Irish government holding the presidency of the Council of the European Union. Ireland hopes that the Council will approve holding back allowances from the market. The near-critical state of the ETS was an urgent priority for environment ministers from the EU's member states when they meet in Dublin on 22 April 2013. Member States will hold emergency meetings to clarify their positions. 7 May 2013 group leaders in the European Parliament's environment committee agreed to hold a second vote in July on the European Commission's proposal. This decision comes just after several energy and environment ministers releasing a joint statement calling for an agreement on the issue by July 'at the latest'. Uncertainty exists over Germany's position on the backloading proposal.

See also:

- Controversial 'backloading' proposal rejected by MEPs, Parliament.com, 16.04.2013.

• Commissioner Hedegaard's statement on today's vote by the European Parliament on the backloading proposal, Europa Press Release, 16.04.2013.

• Ministers reiterate support for ETS, new vote scheduled, EuropeanVoice, 07.05.2013.

• EU climate policy in crisis after ETS rejection, EuropeanVoice, 16.04.2013.

• NGOs call for ETS to be scrapped, EuropeanVoice, 15.04.2013.

Chemicals

Bees, pesticides and lobby

Dramatic bee population decline has been a top issue in media and political debate in Europe. The Corporate Europe Observatory (CEO) exposed a fierce lobby campaign against the proposed partial ban of specific substances by the European Commission following the European Food Safety Authority's (EFSA) opinion. New scientific evidence was published early 2012 suggesting that neonicotinoids pesticides in particular might be one of the main causes of the negative impact on wild bumble bee populations across the developed world. The three most important neonicotinoids pesticides – imidacloprid, clothianidin and thiamethoxam – are used to coat seeds before germination, and are added to soil or sprayed on plants. They are produced mainly by Germany's Bayer and Switzerland's Syngenta. The question raised by the CEO was whether the pesticide lobby would succeed in convincing Member States to vote no to a ban proposed by the Commission as a reaction to the new research and EFSA reports. At the Standing Committee on the Food Chain and Animal Health the proposal of the Commission already failed to reach a qualified majority supporting the proposal. Also in the Appeal Committee on 29 April 2013 EU Member States did not reach a qualified majority – either in favour or against. As a result the decision now lies with the Commission. The Commissioner for Health and Consumer Policy stated that since the necessary qualified majority was not reached, the Commission will issue only a temporary ban. The Commission will go ahead with its text in the coming weeks.

See also:

• Bees & Pesticides: Commission to proceed with plan to better protect bees, Europa Press Release, 29.04.2013.

• Green NGOs hail 'historic' victory in pesticides vote, EurActiv, 30.04.2013.

• Pesticides against pollinators - Private letters reveal Syngenta and Bayer's furious lobbying against EU measures to save bees, Corporate Europe Observatory, 11.04.2013.

• Bees & Pesticides: Commission goes ahead with plan to better protect bees, European Commission, 30.04.2013.

Events

Green Week 2013: Air quality

Despite progress in recent years, several air quality standards are still widely exceeded in the EU's most densely populated areas, especially from pollutants such as particulate matter, ground-level ozone, and nitrogen dioxide. 2013 will be a year in which the Commission's current air policy is reviewed, with a focus on finding ways to improve the quality of the air we breathe. Green Week offers a unique opportunity for debate and exchanges of experience and best practice.

Date: 4 - 7 June 2013
Location: The Egg Conference Centre in Brussels

World Environment Day

The 2013 theme for the event, the single biggest day for positive action on the environment worldwide, is Think.Eat.Save. Reduce Your Foodprint **–** building on the global campaign of the same name to reduce food waste and loss launched earlier this year by UNEP, the Food and Agriculture Organization (FAO) and partners.

Date: 5 June 2013
Location: Mongolia

Citizen's initiative

A European Citizens' Initiative to give the Earth Rights

"End Ecocide in Europe" is a European Citizens' Initiative aimed at prohibiting, preventing and pre-empting ecocide. The term 'ecocide' means the extensive damage to, destruction of or loss of ecosystems of a given territory. The Initiative wants ecocide to be considered a crime for which both, companies and private persons, can be held accountable according to criminal law and the principle of superior responsibility. In order to make that happen, at least one million signatures need to be collected to persuade the European Commission to consider proposing the legislation and to have a public hearing in the European Parliament.

Date: before 21/01/2014
Location: www.endecocide.eu

Colofon

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