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Case Law

Commission's authorisation for GM-potato cultivation annulled

Case T-240/10, *Hungary v Commission*, 13 December 2013

The General Court has annulled the Commission's authorisation for the cultivation and the placing on the market of genetically modified potato Amflora for infringement of procedural rules laid down in Directive 2001/18/EC (Deliberate Release Directive).

After the latest scientific assessment conducted by the European Food Safety Authority (EFSA) on the environmental and health impact of the GM-potato, the Commission amended its draft decision for the authorisation. Hungary challenged the Commission before the Court, alleging that the latter failed to submit the draft decision to the attention of the ad hoc committee of Member States. Under the Deliberate Release Directive, when some Member State raises objections over the authorisation of a GMO, the Commission has to request a scientific assessment by the EFSA and consult with the Committee, before granting consent.

The Court found that the Commission indeed did not forward the draft decision to the committee of Member States, while adding that "if the Commission had complied with those rules, the result of the procedure or the content of the contested decisions could have been substantially different".

BASF Plant Science GmbH, the chemical company who developed Amflora seeds, had already withdrawn its product from the European market in January 2012, mainly due to the large opposition of consumers, farmers and governments to the cultivation of GMOs.

The judgement is likely to have an impact on the ongoing authorisation procedure of Pioneer DuPont maize 1507 (see EEL News Service Issue 2013/08). In fact, the Commission has again failed to consult the Committee of Member States before referring to the Council for approval of this product. Environmental NGOs are now asking the Commission to retract its proposal, in accordance of the ruling of the General Court.

See also:

General Court, Press Release on Case T-240/10

Greenpeace Press Release, Commission should retract GM maize proposal after Court of Justice annuls authorisation of controversial GM potato, 13 December 2013

ITLOS orders release of Greenpeace ice-breaker and crew

Case 22/2013, *Kingdom of The Netherlands v Russian Federation*, 22 November 2013

On 22 November 2013, the International Tribunal for the Law of the Sea (ITLOS) decided that the 'Arctic Sunrise' ice-breaker and its crew should be released by Russia. ITLOS proceedings started on 6 November 2013 (see EEL News Service Issue 2013/08), after the Russian authorities seized the Arctic Sunrise vessel and arrested 28 Greenpeace activists, one freelance journalist and one freelance photographer who boarded a Gazprom oil rig in the Russian Exclusive Economic Zone to protest against Arctic oil drilling.

The Tribunal, after confirming its jurisdiction to issue provisional measures ex Article 290 of the United Nations Convention of the Law of the Seas (UNCLOS), ordered, by 19 votes to 2, the immediate release of the vessel and all the persons who had been detained upon the posting of a bond by The Netherlands in the amount of 3,600,000 euros. The Tribunal also prescribed that the vessel and the persons should be allowed to leave the territory and maritime areas under the jurisdiction of the Russian Federation.

In the subsequent week, all the activists were granted bail, although they are still currently forbidden to leave the country. Also, the Arctic Sunrise vessel has not been released yet, and the non-Russian activists have been refused a visa to leave the country, notwithstanding the finalisation of a bank guarantee for the whole sum of the bond from the Dutch Ministry of Foreign Affairs. The activists still face up to 7 years of imprisonment for hooliganism and the authorities have not scheduled the date of proceedings yet.

An amnesty law being discussed in Russian Parliament to mark the anniversary of the adoption of Russia's post-Communist constitution in 1993 might cover those convicted of hooliganism, and thus the Greenpeace activists might become eligible for this amnesty as well.

See also:

ITLOS, Case No. 22/2013, Kingdom of The Netherlands v Russian Federation, 22 November 2013

Greenpeace Press Release, chronology of facts and latest update

Murmansk court rejects appeal over arrest of ship Arctic Sunrise, 21 November 2013

The Guardian, Arctic 30 – Final Greenpeace activist bailed, 28 November 2013

Reuters, Russia amnesty could free Pussy Riot, benefit Greenpeace activists, 10 December 2013

WTO upholds EU ban on seal products

Cases WT/DS400/R and WT/DS401/R, *European Communities – measures prohibiting the importation and marketing of seal products*, 25 November 2013

A WTO panel has sanctioned the legitimacy of the EU ban on seal products established in 2010, which prohibits the placing of seal products on the European market on grounds of public moral concerns on the welfare of seals.
Canada and Norway challenged the ban under WTO law, claiming that the EU regime violated the General Agreement on Tariffs and Trade (GATT) and the Technical Barriers to Trade (TBT) Agreement in that it would breach the non-discrimination obligations and create unnecessary obstacles to trade.
The Panel stated that "addressing the public moral concerns on seal welfare is legitimate under article 2.2 TBT Agreement" (para 7.3.4.3.2), thus recognising the possibility of restricting trade on this ground, which is not literally mentioned in the TBT Agreement. It found that the EU seal regime is not more trade restrictive than necessary and that, in the light of the object pursued by the legislation, no alternative (less restrictive measures) could be equally effective.
However, the Panel ruled that the exceptions provided under the EU regime (notably exempting hunting by Inuit and other indigenous people, and hunting for marine resource management purposes) are inconsistent with Article 2.1 TBT Agreements in that they give rise to a less favourable treatment for non-EU products.

See also:
WTO Panel report, EC – Seal Products, 25 November 2013
EU Observer, WTO backs EU seal fur ban over 'moral concerns', 26 November 2013

J.H. Jans, On Inuit and Judicial Protection in a Shared Legal Order, European Energy and Environmental Law Review, vol.21, August 2012, pp. 188-191.

Greenpeace granted access to information on glyphosate

Case T-545/11, *Stitching Greenpeace and PAN Europe v Commission*, 8 October 2013

The General Court has issued an important ruling in regard to the conflict between intellectual property/commercial interest and the public access to institutional documents relating to the release of emissions into the environment. In 2010, Greenpeace and Pesticide Action Network (PAN) Europe requested the EU Commission access to documents relating to the authorisation for the placing on the market of glyphosate for use in plant protection products under Directive 91/414. Notably, they wanted to access information on the degree of purity of the active substance, the identity and quantities of impurities and the tests undertaken by the applicant companies over the toxicity, carcinogenicity and mutagenicity of glyphosate. The Commission and Germany, the rapporteur Member State, refused the disclosure of the information sought on the basis of article 4(2) Regulation 1049/2001 (regulating public access to EU institutions documents) which, they alleged, provided an exception to the general regime of Regulation 1367/2006 (implementing the Aarhus Convention) in order to protect the commercial interest of a natural or legal person.
The General Court dismissed these arguments, stressing that Article 6(1) Regulation 1367/2006 "lays down a legal presumption that an overriding public interest in disclosure exists where the information requested relates to emissions into the environment, except where that information concerns an investigation" (para 37), "even if such disclosure is liable to undermine the protection of the commercial interests of a particular natural or legal person" (para 38).
The Court also dismissed the argument of the Commission that the information requested did not relate to emissions into the environment, considering that the glyphosate will be released into the environment and therefore the information requested on the identity and quantity of impurities contained directly relate to such a release.
If upheld by the ECJ, the decision might have an important impact on the access to information under other regulatory frameworks (for example, under REACH for the disclosure of chemicals used in fracking operations, under the EU's GMO regime or the Biocides Regulation).

See also:
Case T-545/11, *Stitching Greenpeace and PAN Europe v Commission*, 8 October 2013
Limits to calling upon intellectual property to justify non-disclosure of environmental information, 09 October 2013
EU Court requires EU authorities to disclose information on impurities, 25 October 2013

Commission sues Greece over poor waste water treatment

The European Commission has announced its intention to request the ECJ to impose fines over Greece's failure to comply with the requirements of the Urban Wastewater Treatment Directive Directive 91/271/EEC. Back in 2007, the ECJ ruled that Greece failed to adequately treat and dispose of urban waste water in 23 spots identified across the country. Six of these agglomerations still fail to comply with EU standards, which means part of the Greek territory faces potential damages to marine environment as well as contamination of waters and spread of diseases. The Commission proposed that the ECJ imposes a lump sum of €11 514 081 and a daily penalty payment of €47 462 until the obligations are fulfilled.
In 2000, Greece was the very first country that was fined after ignoring an earlier ECJ judgment in another environmental case, the Chania waste case C-387/97. The Treaty on European Union signed in Maastricht in 1992 introduced the possibility to impose such fines for Member States that do not comply with an earlier judgment of the ECJ.

See also:

EC Press Release, 20 November 2013
Case C-440/06, *Commission v Greece*, 25 October 2007

Climate Change

COP19 make small steps forward in climate talks

The nineteenth session of the Conference of the Parties (COP 19) was held from 11 to 23 November 2013 in Warsaw. The main results of the Warsaw Climate Change Conference include the following two points.

In the first place, the establishment of the Warsaw international mechanism for loss and damage will provide most vulnerable populations as of next year with better protection against loss and damage associated with extreme weather events and slow onset events in developing countries, such as rising sea levels.

Secondly, COP19 adopted the Warsaw REDD+ Framework (reducing emissions from deforestation and forest degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries). The Framework contains a package of decisions on REDD+ finance, institutional arrangements and methodological guidance allowing for immediate implementation of REDD+ activities in developing nations, provided that adequate and predictable financial and technological support is made available by developed countries.

Little progress has been recorded under the ad hoc Working Group on the Durban Platform for Enhanced Action (ADP), where Parties discussed the working plan for the next two years (agreeing on intensifying domestic preparation for their intended national contributions towards that agreement, which will come into force from 2020) as well as measures to close the pre-2020 mitigation ambition gap (scheduling the submission of clear and transparent plans well in advance of COP 21, in Paris, and by the first quarter of 2015).

Parties were not able to achieve consensus on several other matters, including common rules for all mitigation efforts, market and non-market based, to ensure environmental integrity.

A more extensive report on the Warsaw Climate Change Conference by the EEL News Service editor-in-chief Leonardo Massai is presented on the EEL website.

EC revises inclusion of non-EU airlines under ETS

The European Commission recently put forth a proposal for another amendment of the ETS Directive, this time providing for the re-inclusion of non-EU airlines under the ETS scheme for the period 2014-2020, limiting the application of the legislation to the emissions that occur inside European airspace. An exception is provided for flights from and to 'low and lower-middle income countries' which have a share of less than 1% in international aviation activities.

The proposal has been followed by opposite and strong reactions. MEP Korhola from the Committee on Industry, Research and Energy has criticized the stance of the Commission, as it does not take account of the outcome of the recent progress in the ICAO process and it would jeopardise the success of future talks on a global agreement. Germany, UK and France uphold this argument, proposing that the 'stop the clock' clause be in force at least until 2016, when talks within the ICAO are hoped to bring out an agreement.
EU Climate Commissioner Hedegaard stresses the legitimacy of the proposal, underlining the urgency of taking action to effectively tackling the increasing GHG emissions, and keeps underlining that the EU forms a global example in the fight against climate change. In the meantime, the European Environment Agency warns over the increasing contribution of aviation to the total GHG emissions, pointing at the fact that international flights have contributed to a 2.3% increase of sulphur oxide emissions in 2011.

See also:
EU Parliament – Committee on Industry, Research and Energy, Draft Opinion on the Commission proposal, 2013/0344 (COD), 28 November 2013
EU Commission, Information Note to the Council, 3 December 2013

EEA, Transport indicators tracking progress towards environmental targets in Europe, Report No 11/2013
Reuters, EU Commission proposes airline carbon charge for EU airspace, 17 October 2013
ENDS Europe, MEP opposes new airline emissions plan, 4 December 2013

Air Pollution

Particulate matter below EU thresholds still hazardous

A new study published in the medical journal The Lancet has warned over the alarming low level of the European (and global) air quality. Researchers have analysed the effects of exposure to different levels of particulate matter (PM) and other pollutants (such as nitrous oxide and dioxide) concentrations on the health and mortality of residents in over 13 countries across Europe. They concluded that "long-term exposure to fine particulate air pollution was associated with natural-cause mortality, even within concentration ranges well below the present European annual mean limit value" (25 micrograms per cubic meter).
Back in October 2013, the European Environment Agency had already issued a report which warned on the alarming levels of fine PM in European cities (see issue 2013/08 of the EEL News Service). Following this, Commissioner Potočnik stressed the urgency of closing the gap between EU legal limits for air pollution and those recommended by the World Health Organization Air Quality Guidelines (which are currently set at 10 micrograms per cubic meter). Potočnik alluded to the forthcoming revision of the EU Air Policy Package 2013, which will propose a revision of the National Emission Ceilings Directive, the ratification of the Gothenburg Protocol and new air pollution and resource efficiency standards for medium scale combustion installations.

See also:
R. Beelen, O. Raaschou-Nielsen *et al.*, Effects of long-term exposure to air pollution on natural-cause mortality: an analysis of 22 European cohorts within the multicentre ESCAPE project, 9 December 2013, The Lancet.
NHS, 'Safe' levels of air pollution could still be harmful, 9 December 2013
Europa Nu, Gebruik geavanceerde Europese methode voor meten luchtkwaliteit in beleid besproken
Medical News, Air pollution 'kills at levels well below EU guidelines', 9 December 2013

Transport

EP backs draft Directive for more alternative fuels stations

On 26 November 2013, the European Parliament Transport Committee agreed to strengthen the Commission's proposal for a new Directive aiming at curbing CO_2 emissions from road transport through the increase of refuelling infrastructure for alternative fuels. The rationale of the directive would be to break up the vicious circle that impedes investments in new refuelling infrastructure due to the absence of demand and deters consumers from purchasing 'greener' cars because of the lack of fuelling points.
The proposed rules would require Member States to implement national plans, by 2020, for building a minimum number (different for each MS) of electric vehicle recharging points, as well as hydrogen refuelling points in countries where such infrastructure already exist (by 2030). The draft also contains provisions regarding the deployment of LNG infrastructure for vessels in maritime and inland ports.

See also:
EP Committee on Transport and Tourism, Draft Report on the proposal for a Directive on the development of alternative fuels infrastructure, 2013/0012 (COD), 30 July 2013
EP Press Release, 26 November 2013

Agriculture

Labelling or no labelling – the dilemma of GM pollen in honey

The European Parliament ENVI Committee has voted against a Commission's proposal, put forth in September 2012, for the amendment of Directive 2001/110/EC (Honey Directive) through which pollen contained in honey would be regarded as a 'natural constituent' rather than an 'ingredient', meaning that pollen traces would not need to appear in the list of ingredients. The proposal of the Commission followed the much debated Bablok case of 2011, concerning the adventitious contamination of honey produced on a Bavarian farm with GM pollen for a neighbour experimental crop. In that case, the ECJ ruled that pollen must be regarded as an *ingredient*, rather than a component of honey. This confirmed that, where the amount of GM pollen is more than 0.9% (legal threshold) of the total pollen detected in honey, the final product has to be labelled as 'containing GMOs'.

The Commission then proposed to amend the Honey Directive in order to reclassify pollen as a natural constituent and escape the labelling requirement. The proposal was backed by the EP Agriculture Committee. The Environment Committee has strongly opposed it, however, and presented a substitute impact assessment of the amendments to the Honey Directive, clarifying the economic, social and environmental implications of the change of the status of GM pollen in honey and highlighting the great impact that such change could have on beekeepers and consumers rights. The Parliament is expected to vote on the proposal in February 2014, during the plenary session.

See also:
European Parliament's Committee on the Environment, Public Health and Food Safety, Substitute impact assessment of EC Directive amending Council Honey Directive 2001/110/EC – Clarifying the status of pollen in honey, September 2013
ECJ Case C-442/09, Karl Heinz Bablok and others v Freistaat Bayern, and opinion of Yves Bot AG.
L. Nimmo, Are there GMOs in your honey?, 28 October 2013
EurActiv, The imaginary EU GM-Honey crisis is resolved, 5 November 2012

Energy

Ministers stuck on biofuels ILUC proposal

During the Council Environment of 12 December 2013, Member States failed to reach a political compromise on the proposed amendment of Directive 2009/28/EC (the Biofuel Directive). All the Ministers agreed on the urgent need of improving the Directive to take into account the most recent studies on the effects of first generation biofuels (i.e. crop-based biofuels) and gradually move towards more sustainable, second generation (not crop-based) biofuels. However, an agreement could not be achieved on the adoption of crucial sustainability criteria such as a cap on the use of first generation biofuels, the provision of minimum thresholds for second generation ones and the accounting of Indirect Land Use Change (ILUC) impact of crop-based biofuels.

Some Member States like Denmark, Luxembourg and The Netherlands have asked for more ambitious provisions. Italy highlighted that the revision of the current Directive is a great chance to promote a positive evolution of the more sustainable biofuels, phasing out the crop-based ones, who have proved unsustainable in terms of impact on soil and food security. Other Member States such as Ireland and the UK showed more flexibility in adopting the current draft at the condition that multiple-counting provisions were adopted, allowing to weigh second-generation biofuels heavier in reaching the 10% biofuels target for transport fuels in 2020.

The Commission had put forth its proposal last year, and the Parliament adopted its position in September 2013. Member States now suggest that the Parliament keeps working on the approximation of divergent positions in view of a decision that will only be taken in second reading. The delay means that ILUC effects of biofuels will not be regulated for quite a while, in spite of the many reports that these effects are not

only causing detrimental effects notably in developing countries, but also mean that a part of the biofuels used in the EU is probably worse than conventional fuels where it concerns their CO2 footprint.

See also:

Council of the European Union, 3282nd Council Meeting Energy - webcast

Greenpeace Press Release, Energy ministers delay reform of EU biofuel rules, 12 December 2013

ENDS Europe, EU ministers fail to agree on biofuels reform, 12 December 2013

EurActiv, EU governments fail to agree limits on food-based biofuels, 12 December 2013

EU anti-dumping measures against Argentina and Indonesia

On 26 November 2013, the EU imposed anti-dumping measures on imported raw materials used for the production of biodiesel from Argentina and Indonesia to offset subsidies that, according to the Commission, resulted in a structural distortion of trade. The Council has adopted a decision after a request made in 2012 by the European Biodiesel Board. The measures entail a five-year tariffs on biodiesel imported from Indonesia and Argentina with a margin, respectively, of 8.8/20.5% and 22/25.7%, which corresponds to levies ranging from €25 to €250 per ton.

The Indonesian Biofuel Producers Association (Aprobi) has announced it will consider ECJ and WTO proceedings to challenge the decision.

See also:

EC Press Release, 21 November 2013

Council implementing Regulation No 1194/2013 imposing definitive anti-dumping duty on imports of biodiesel originating in Argentina and Indonesia, OJ L 315/2, 26 November 2013

The Jakarta Post, RI to challenge EU's anti-dumping duties, 21 November 2013

Nature

Germany seizes Congolese illegal logging

An important move in the action against illegal timber has recently been made by Germany, whose authorities have seized two batches of illegal timber shipped from Congo to the port of Antwerp. The sized timber is an endangered tropical tree called wenge, and was logged by a Lebanese-owned company, Bakri Bois Corporation, under an illegal concession. The batches were meant for the Eastern European market, and were placed on the EU market by three German companies.

Illegal logging still represent a raw nerve of EU forest policy, but this action shows clear signs of the commitment of Member States to minimise the risk of illegal trade, and it is one of the most significant moves since the adoption of the Forest Law Enforcement, Governance and Trade (FLEGT) action plan 2003 and the EU FLEGT Regulation that came into effect earlier this year (as discussed in EEL News Service 2013/03).

See also:

Greenpeace, Germany seizes Congolese wood in strongest EU action yet against illegal timber trade, 27 November 2013

Illegal Logging Portal, Germany seizes illegal timber in the DRC, 3 December 2013

Eel News Service 2013/03, New EU timber import rules, 5 April 2013

Upcoming Events

EU Environmental Law for non-lawyers

The European Institute of Public Administration welcomes applications for the upcoming two days programme targeted for non-lawyer parties who have nevertheless an interest in understanding the dynamics of European environmental legislation. The programme will offer a combination of presentations, active discussions and practical case-studies based on case-law from the Court of Justice of the European Union. Recent legislative and jurisprudential developments in the relevant areas will also be presented and discussed. For more information please visit http://seminars.eipa.eu/en/activities09/show/&tid=5175#

Date: 28-29 January 2013

Location: European Centre for Judges and Lawyers, EIPA Luxembourg
Building of the Chambre des Métiers, 4th Floor – Master Room (411)
2 Circuit de la Foire Internationale,1347 Luxembourg

Summer Programme on International and European Environmental Law

The EEL Network and the T.M.C. Asser Institute will organise a summer course on International and European Environmental Law in The Hague, The Netherlands.

Date: 25-29 August 2014

Location: T.M.C. Asser Institute, R.J. Schimmelpennincklaan 20-22, The Hague, The Netherlands

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The EEL News Service team wishes you happy holidays and a successful 2014!

Colofon

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