
# EEL News Service – Issue 02/2014 of 26 February 2014

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## Case Law

### Energy performance of buildings directive incorrectly implemented

Case C-67/12, *Commission v Spain*, 16 January 2014

The ECJ held that, by failing to adopt, within the prescribed period, all the laws, regulations and administrative provisions necessary to ensure compliance with articles 3, 7 and 8 of Directive 2002/91 on the energy performance of buildings, the Spain has failed to fulfil its obligations under those provisions.
Notably, article 8 of the Directive requires Member States to lay down the necessary measures to ensure that all boilers fired by non-renewable fuels are inspected with specific time frames that shall be set in national provisions. It also requires Member States to ensure that independent experts provide advice to the users on the replacement of these boilers and/or on alternative solutions.
The Commission contested that the Spanish Royal Decree 1027/2007 transposed article 8 Directive only partially, as it directly set out the measures for regular inspection of boilers only in respect of boilers brought into service after that decree had entered into force, leaving it to the Autonomous Communities to establish timetables for inspections of boilers in already existing installations.
The ECJ held that Directive 2002/91 provides for the regular inspection of all boilers and must be interpreted as meaning that, even with regard to boilers in respect of which that directive does not set the minimum frequency of inspections, the Member States are required to set specific minimum frequency of inspections, and to notify the Commission of the measures adopted in order that the Commission can verify that those measures make it possible to realise the objectives laid down in that directive. The ECJ further ruled that the duty to provide advice requires regular inspections by independent experts, whereas the Royal Decree imposed that duty on maintenance companies.

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## Waste management and competition law

Case C-292/12, *Ragn-Sells AS v Sillamäe Linnavalitsus*, 12 December 2013

This preliminary ruling regarded the interpretation of EU competition rules in conjunction with Directive 2008/98/EC on waste (the Waste Framework Directive, WFD). A national case between Ragn-Sells AS ('Ragn-Sells') and Sillamäe Linnavalitsus (Municipality of Sillamäe) concerned the lawfulness of contractual clauses drawn up by the Municipality in the course of a procedure for awarding a service concession for the collection and transport of waste produced on its territory.

Notably, in 2007 and 2011 the Municipality launched two public procurement procedures: the first one was aimed at granting the management of the Sillamäe landfill site to a legal person governed by private law, whereas the second concerned the concession of collection and transport services of waste produced on its territory (municipal waste and industrial and building waste). The latter contract included a clause under which the waste management operator would be obliged to transport the mixed waste to the Sillamäe landfill facilities (located 5km from the town centre) and the industrial and building waste to the Uikala landfill site, located 25 km away.

The national court asked the ECJ to clarify whether the insertion of the clause at issue was liable to constitute abuse of dominant position within the meaning of article 106(1) TFEU and whether that clause would be compatible with the TFEU provisions on the free movement of goods and freedom of establishment and freedom to provide services, also in consideration of the proximity principle as laid down in Article 16(3) WFD.

The ECJ ruled that the provisions of Regulation 1013/2006 on the shipment of waste, read in conjunction with those laid down in the WFD allow a local authority to require waste collection and management operators to transport mixed municipal waste to the nearest appropriate treatment facility (in the same Member State as the authority). These rules, however, do not permit a local authority to impose the same limitations on waste collection and management operators in the case of industrial and building waste where that waste is intended for recovery, if the producers of that waste are themselves required to deliver the waste either to that undertaking or directly to that

facility. Finally, Articles 49 TFEU and 56 TFEU do not apply to a situation such as that in the main proceedings, which is confined in all respects within a single Member State.

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## Meaning of "public authority" to provide environmental information

Case C 279/12, *Fish Legal v Information Commissioner*, 19 December 2013

The request for preliminary ruling made by the Upper Tribunal (Administrative Appeals Chamber, England and Wales) concerned the interpretation of the meaning of 'public authority' in the context of Directive 2003/04/EC with regard to the public access to environmental information (implementing the Aarhus Convention in EU law).

Following the refusal of two water companies, United Utilities Water plc and Yorkshire Water Services Ltd, to grant access to information concerning discharges, clean-up operations and emergency overflow to an individual and an NGO, the appealed Information Commissioner held that no access could be granted because the companies concerned were not public authorities within the meaning of the national Environmental Information Regulation 2004. Article 2(2) Directive 2003/04/EC includes in the concept of 'public authority' "(b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment, and (c) any natural or legal person having public responsibilities or functions, or providing public services relating to the environment under the control of a body or person falling within (a) or (b)".

The ECJ was called to clarify whether, when considering if a natural or legal person is one performing public administrative functions under national law (for the purposes of Directive 2003/04/EC), the applicable law and analysis is a purely national one. The referring Court further asked what criteria should be followed when determining whether a company performs public administrative functions and whether national law invested such a function in that company.

The ECJ ruled that, in order to determine whether a company performs public administrative functions, it should be examined whether those entities are vested, under national law, with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law. Undertakings, such as the water companies concerned, which provide public services relating to the environment are under the control of a body or person falling within Article 2(2)(a) or (b) of Directive 2003/4, and should therefore be classified as 'public authorities' by virtue of Article 2(2)(c) of that directive, if they do not determine in a genuinely autonomous manner the way in which they provide those services since a public authority covered by Article 2(2)(a) or (b) of the directive is in a position to exert decisive influence on their action in the environmental field. The ECJ concluded that a person falling within Article 2(2)(b) of Directive 2003/4 constitutes a public authority in respect of all the environmental information which it holds. Commercial companies, such as the water companies concerned, which are capable of being a public authority by virtue of Article 2(2)(c) of the directive only in so far as, when they provide public services in the environmental field, they are under the control of a body or person falling within Article 2(2)(a) or (b) of the directive are not required to provide environmental information if it is not disputed that the information does not relate to the provision of such services.

See also:
Opinion of Advocate General Cruz Villalon, 5 September 2013

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# Nature

## The environmental legacy of Sochi

The Sochi Olympic Games have drawn to a close. Many facets of these Games have come under fire from critical commentators: the price tag, the climate, the human rights violations, the low attendance, the quality of the hotels, the list goes on… At the closing ceremony, however, IOC President Bach complimented Russia for "delivering on all that it promised." Considering environmental promises and the actual damage to the environment in Sochi, a different point of view on the environmental legacy of these Olympic Games is set out by Antoine Duval, Senior Researcher at the T.M.C. Asser Institute in The Hague, on the EEL website. Notably, he recommends that it is time to take the Olympic Charter seriously.

# Energy

## EP pushes for 2030 binding targets

The European Parliament has given a strong signal in the context of the 2030 Climate & Energy Package, voting against the strategy proposed by the EU Commission. On 5 February 2014, just a couple of weeks after the Commission presented the 2030 framework, the Parliament has approved a Resolution through which it calls the Commission to adopt three binding targets. Besides the 40% GHG emission reduction, MEPs are pushing for a 40% energy efficiency target as well as a minimum share of 30% of total energy consumption from renewable sources. They also stress the importance of involving all the industries and sectors in a common effort towards the decarbonisation of the economy. Furthermore, the Resolution points out that a fair and effective strategy would require individual national binding targets which take account of the position and the potential of each Member State.

Although non-binding, the Parliamentary Resolution sends an important message to the Commission and the Council, who will discuss the adoption of the 2030 Climate & Energy Package next March.

See also:

EU Parliament Report on a 2030 framework for climate and energy policies, (2013/2135(INI)), Plenary Session of 27 January 2014

European Green Party, EU Parliament backs binding EU climate and energy targets for 2030, 5 February 2014

Reuters, EU Parliament calls for three binding climate targets for 2030, 5 February 2014.

# Agriculture

## Commission to authorise GM maize despite opposition

The conflict over the approval of Pioneer-DuPont genetically modified maize remains open, as 19 Member States voted against the authorization of maize 1507 at the last Council of Ministers meeting of 11 February 2014. Despite this important opposition, the Council again failed to reach the qualified majority necessary to bind the Commission not to adopt the proposed decision for authorization. Spain, the UK, Sweden, Estonia and Finland were the only Member States to express their support to the Commission, whereas Germany, Belgium, Portugal and the Czech Republic abstained.

The vote comes after the ECJ ruling of September 2013 establishing the undue delay of the Commission in adopting a decision on the application of Pioneer-DuPont for the cultivation of maize 1507. On 19 January 2014, 385 MEPs adopted a Resolution asking the Council to reject the authorisation proposal and urging the Commission to withdraw its draft decision on the basis of the high uncertainties surrounding the assessment of the risks for human health and the environment. Importantly, the Parliament has also objected that the Commission exceeded its implementing powers and acted in breach of procedural rules. In fact, since the first proposal in 2009, the European Food Safety Agency (EFSA) issued two new opinions, which highlighted the scientific uncertainties and the lack of specific studies on the *Bt* toxin contained in maize 1507 (deemed highly toxic for certain species of important pollinators). On this basis, the Commission issued a new proposal which, following the comitology rules and the provisions of Directive 2001/18/EC, was to be sent to the Regulatory Committee for vote. Instead, the Commission forwarded the proposal directly to the Council.

In December 2013, the ECJ annulled the authorisation of another GM crop, the potato Amflora (which had already been withdrawn from the EU market by the producing company BASF), alleging that the Commission should have re-started the authorization procedure because its last decision was substantially amended in consideration of the scientific studies and the new EFSA opinions.

Health Commissioner Borg has declared that the Commission will now be obliged to adopt the proposal it submitted to the Council, despite the opposition of Member States, but this move will most likely lead to new Court proceedings. Furthermore, article 8 of Decision 1999/468/EC (on the comitology rules) provides that, should the Parliament object that the Commission exceeded its implementing powers, the latter would need to re-examine the new draft measures and, if necessary, submit a new proposal.

See also:

EU Commission Proposal for a Council decision on the authorisation of maize 1507 for cultivation, COM(2013) 758 Final, 6 November 2013

EU Parliament Resolution of 16 January 2014 on the proposal for a Council decision concerning the placing on the market for cultivation, in accordance with Directive 2001/18/EC of the European Parliament and of the Council, of a maize product (Zea mays L., line 1507) genetically modified for resistance to certain lepidopteran pests (2013/2974 (RSP))

General Court, Press Release on Case T-240/10, *Hungary v Commission*, 13 December 2013

Case T-164/10 Pioneer Hi-Bred International, Inc. v European Commission, 26 September 2013

Greenpeace press briefing, Predominant majority of EU governments set to oppose approval of GM maize, 10 February 2014

EuropeanVoice, Legal fights loom on GM crops, 13 February 2014

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## EP backs the Commission to avoid GM honey labels

In spite of an advice to the contrary from its Environment Committee, the Plenary Session of the EU Parliament has decided to agree with the Commission's proposal on the amendments to Directive 2001/110/EC (Honey Directive) as regards the unintended presence of GM pollen in honey products.

In September 2012, the Commission proposed to amend the Directive so that pollen would be regarded as a constituent, rather than an ingredient of honey. As explained in our EEL News Service

Issue 2013/09, this would have implications in the context of cross-pollination and unintended presence of GM pollen in honey; notably, such honey would have to be labelled as 'containing GMOs' if the amount of GM pollen is more than 0.9% (legal threshold) of the total pollen detected in the honey. Parliament has now confirmed it will side the Commission and go against the ruling of the ECJ in September 2011.

The report of the rapporteur Julie Girling was adopted by 430 votes to 224, with 19 abstentions.

See also:

EU Parliament Press Release, Parliament clarifies labelling rules for honey if contaminated by GM pollen, 15 January 2014.

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.

EuropeanVoice, MEPs reject GM labelling on honey, 15 January 2014

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## Upcoming Events

### Policy Forum: European energy and industrial policy realigned

In its latest Communication on energy prices the European Commission describes an unfavourable development of energy prices in the EU that threatens the competitiveness of energy intensive industry. According to this assessment, the increasing energy price gap between the EU and other regions is one of the main impediments for a renaissance of Europe's industry; weaknesses in the Internal Energy Market and Member States' policies on network costs and taxes/levies are pointed out as responsible factors. EU energy policy has not entirely succeeded in securing competitiveness of energy intensive industries. The Commission therefore sees the need to readjust European industrial and energy policy.

In view of the latest Commission assessment on energy prices, the following question arises: what could be done in order to realign the two policies in a manner that suits energy intensive sectors? Moreover, in view of the 2030 goals for a competitive, secure and low carbon economy, it should be discussed how such an agenda could go together with European climate and energy ambitions. This IES Policy Forum therefore debates European energy policy as a means of industrial policy, and ask how it could be adjusted in order to support energy intensive industries, without compromising the EU's eco-innovation strategy.

Date: 27 February 2014, h 12:00-14:00

Location: Institute for European Studies, Karel Van Miert Building, Conference Room Rome (Floor -1), Pleinlaan 5, 1050 Brussels

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## 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. Schimmelpenningclaan 20-22, The Hague, The Netherlands

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## Colofon

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