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[Case Law](#)
[Climate Change](#)
[Energy](#)
[Nature & Agriculture](#)
[Events](#)
[Colofon](#)

EEL News Service

Issue 2016/01 of 31 March 2016

Dear readers,

With some delay we are happy to present our first News Service of 2016. As promised in our last issue, it contains an inside view of the [Paris Agreement](#).

Furthermore, this News Service incorporates annotated case law from the CJEU - on habitats, chemicals and urban waste water treatment - and from the WTO's DSB in the Tuna-dolphin saga, finding that the new USA measures on dolphin-safe labels still discriminate against tuna from Mexico.

Moreover, this issue brings news on the evaluation of the EU Timber Regulation (EUTR), the surge of renewable energy sources and the threatened status of European ecosystems.

Finally, we have uploaded new information on our third [Summer Programme on International and European Environmental Law: Making it Work](#) which will take place in The Hague between 29 August and 2 September 2016. This year, there are 3 partial [scholarships](#) available for young professionals from non-OECD countries.

We hope you enjoy the read.

Wybe Douma

Case Law



CJEU Judgments

CJEU Judgment: C-399/14 Grüne Liga Sachsen eV e.a (14/01/2016)

This preliminary ruling concerns the interpretation of Article 6(2) to 6(4) of the [Habitats Directive \(HD\) 92/43/EEC](#). The questions came up in a dispute concerning the controversial Waldschlösschen bridge over the river Elbe in an area designated as a World Heritage Site by UNESCO and a Site of Community Importance (SCI) under the HD. The project was approved just before the SCI status was granted, and implemented afterwards. In case a project which does not satisfy the requirements of Article 6(3) is nevertheless granted a license, the CJEU finds that, in accordance with Article 6(2), the competent authority must investigate the possible effects the project might have on the site concerned. Such a review of the project in accordance with Article 6(2), must take into account the requirements of article 6(3). Furthermore, the assessment must consider the data of the SCIs list as well as the risks that significant deterioration has already occurred due to the partial or complete execution of the project. In case the assessment concludes that the project is causing or risks causing significant disturbance or deterioration to the objectives of the HD, recourse can be made to Article 6(4). The latter provision allows that a project is nevertheless carried out for imperative reasons, as long as the Member States ensures that an overall protection of Natura 2000 is maintained. UNESCO withdrew the World Heritage Status because of the construction of the bridge, by the way.

CJEU Judgment: [Case C-141/14 European Commission v Bulgaria](#)
(14/01/2016)

In this case the European Commission brings four complaints to the Court.

The first complaint alleges Bulgaria's infringement of Article 4(1) and 4(2) of the [Birds Directive](#) (BD) by lacking to classify the most suitable territories as special protection areas (SPAs). The Court explains that territories that meet the ornithological criteria of Articles 4(1) and (2) BD must be classified as SPAs. There is sufficient scientific evidence on the importance of the Kaliakra IBA area for a number of birds and their habitats, and therefore the first complaint is well founded.

The second complaint concerns the failure to comply with article 4(4) BD because of the approved projects in the Kaliakra IBA. The CJEU recalls that when an area should have been classified as SPAs but has not been classified as such, Article 4(4) must be complied with. The Court established the probability or risk that the projects will cause deterioration and disturbances to the Kaliakra IBA area, therefore Bulgaria fails to comply with article 4(4) of the BD.

The third complaint involves Bulgaria's failure to comply with Article 6(2) of the [Habitats Directive](#) due to a number of approved windpower and spa resort projects in the territories of Kaliakra, Belite Skali and the Kaliakra Kompleks Sites of Community Importance (SCIs). Similarly as in [C-399/14 Grüne Liga Sachsen eV e.a](#) the Court clarifies that article 6(2) HD applies to already approved projects, even when they were authorised before the accession of the Bulgaria to the EU and before the Birds and Habitats Directives applied to those authorisations. The complaint succeeds as the projects could cause significant disturbances and deterioration to the habitats of protected bird species - without there being a need for the Commission to establish the existence of a cause-and-effect relationship between the operation of installations resulting from a project and significant disturbance caused to the species concerned.

The fourth complaint alleges the non-compliance with Articles 2(1), 4(2) and 4(3) of EIA [Directive 2011/92](#) and point 1(b) of Annex III. Since Bulgaria failed to assess possible cumulative effects of the windpower projects on the relevant areas and none the less authorized their implementation this complaint also succeeded.

CJEU Judgment: [Case C-398/14 European Commission v Portugal](#)
(28/01/2016)

The Portuguese Republic did not fulfill its obligation to ensure an adequate level of treatment of urban waste water, in accordance with Article 4 [Directive 91/271/EEC](#), in 44 Agglomerations. The Commission suggested that the obligations laid down in Article 4 entail the performance of monitoring and evaluation controls as provided in Annex I.D, according to which samples must be collected over the period of a full year. The CJEU stresses that Article 4 makes no reference to Annex I.D, but instead refers to Annex I.B, and thus contains an obligation of result regarding compliance of discharges from urban waste water treatment with the terms laid down in the latter annex. As a result, the Annex I.D requirement of collecting samples over a full year does not apply in the present case. The Court notes that the failure of a Member State to fulfill obligations must be examined in alignment with the situation existing in that Member State by the end of the period presented by the reasoned opinion. As Portugal did not ensure an adequate level of treatment to the discharge from urban waste water within the period set out by the reasoned opinion, the CJEU found Portugal in breach of the obligations of Article 4 [Directive 91/271/EEC](#).

CJEU Judgment: [Case C-472/14 Sweden Canadian Oil Company Sweden and Rantén](#) (17/03/2016)

This request for a preliminary ruling involves the interpretation of [Regulation No. 1907/2006](#) concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH). The first question referred to the CJEU inquires whether REACH should be interpreted as such as to preclude national provisions that require importers to register chemical products nationally. The CJEU determined that the obligation to register in accordance with REACH does not preclude the registration required by national legislation. However, such national registration must contribute to the fulfillment of the objectives of REACH, particularly those that involve securing the protection of human health and the environment. The second question inquires whether the interpretation of Articles 34 and 36 TFEU should preclude the requirements to notify and register set by national legislation. The Court stated that similarly to the first issue, these provisions do not preclude the prerequisite of national legislation of notification and registration.

WTO Appellate Body

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Report WTO Appellate Body WT/DS381/AB/RW: United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (20/11/2015)

According to the WTO Appellate Body, the original US legislation on labelling tuna as dolphin safe had been found to violate Article 2.1 TBT as it accorded treatment less favourable to Mexican tuna products than to US tuna products and tuna products originating in other countries. The US adopted new legislation, but Mexico complained this amended tuna measure did not remedy the flaws and asked for an arbitral award under Article 21.5 DSU to establish this. A Panel decision was appealed by both parties, and the Appellate Body now came to the conclusion that the amended US tuna measure still modifies the conditions of competition to the detriment of Mexican tuna products in the US market; that such detrimental impact does not stem exclusively from a legitimate regulatory distinction; and, thus, that the amended tuna measure accords less favourable treatment to Mexican tuna products as compared to like tuna products from the United States and other countries and is therefore inconsistent with Article 2.1 of the TBT Agreement. Furthermore, it finds that the amended tuna measure is inconsistent with Article I:1, and with Article III:4, of the GATT 1994; and that it has not been demonstrated that the amended tuna measure is applied in a manner that does not constitute arbitrary or unjustifiable discrimination and, thus, that the amended tuna measure is not justified under Article XX of the GATT 1994. As it seems that the US cannot prove that distinguishing between tuna caught in the area where Mexican fishermen operate and tuna caught elsewhere is justified, it seems that it will be forced to radically alter its labelling system which up to today in practice stands in the way of Mexican tuna being marketed in the US.

Climate Change



The Paris Agreement: some comments and its main elements

Leonardo Massai

The latest climate summit ended in the afternoon of 13 December 2015, almost two days behind schedule, with the approval of the Paris Agreement. The 21st session of the Conference of the Parties (COP 21) to the 1992 UN Framework Convention on Climate Change (UNFCCC) successfully concluded the mandate that had been agreed upon at COP17 in Durban, South Africa in 2011. There, the Ad-hoc Working Group on Enhanced Action under the Durban Platform (ADP) was created and the year 2015 was set as last possible deadline to establish a new climate regime for the post 2020 period.

COP21 concluded years of intense negotiations. The Kyoto Protocol, adopted under the 1992 UNFCCC and setting out greenhouse gas emissions reduction obligations only for developed states, is nowadays left to a handful of developed countries and currently covering the period 2013-2020. According to COP13 in Bali, a new global climate agreement should have been adopted by 2009, in order to continue efforts to stop the climate from changing too much. The Copenhagen deadline was missed, however, notably because of the failure by COP15 to adopt the Copenhagen Accord. The new deadline agreed upon by COP17 in Durban mandated the ADP “to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties” at the latest by COP21.

The ADP held several inter sessional meetings in the four years between Durban and Paris, and concluded its work during the first week of COP21. It did so by launching a contact group to consider crosscutting issues and to unlock the work on the text of individual articles in the draft agreement and decision text.

By the closure of the ADP on 5 December 2015, its outcome was transmitted to the COP that established the Comité de Paris under the COP 21 Presidency to continue work on the draft agreement and decision text. The Comité de Paris convened for the last time in the evening of Saturday 12 December 2015 to forward the final text of the Paris Agreement and associated decision to COP 21 that successfully adopted both instruments at 7:29 pm of the same day. The Paris Agreement annexed to decision 1/CP.21 includes 16 preambular clauses and 29 operative clauses (annexed to FCCC/ CP/2015/L.9/Rev.1).

The main elements of the Paris Agreement are summarized here below:

- Global objective (article 2): Parties agreed to strengthen ‘the global response to the threat of climate change’ by ‘holding the increase in global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the increase to 1.5°C’, since this would significantly reduce risks and the impacts of climate change;
- Nationally Determined Contributions (NDCs) (article 3): the concept and

rationale behind the 185 Intended Nationally Determined Contributions (INDCs) presented by all Parties before Paris is confirmed and remain the skeleton of the fight against climate change for the period after 2020. The NDCs also represent the strongest difference of the new regime compared to the Kyoto Protocol and the Copenhagen Accord, because of its voluntary nature and the complete lack of common parameters to verify their actual implementation;

- Mitigation and ambition (article 4):

- o global peaking of greenhouse gas emissions to be reached as soon as possible
- o NDCs to be communicated every five years with the view to represent a progression beyond the Party's current NDC and reflect the highest possible ambition

- o NDCs to be recorded in a public registry

- o Parties' accounting for their NDCs to be determined by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA)

- REDD+ (article 5): Parties are encouraged to take action to implement and support REDD+ activities

- Market (article 6):

- o Parties can use cooperative approaches that involve the use of internationally transferred mitigation outcomes to achieve their nationally determined contributions

- o A mechanism to contribute to the mitigation of greenhouse gas emissions and support sustainable development is established

- Adaptation (article 7):

- o A global goal is set on adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change

- o 'Each Party should, as appropriate, submit and update periodically an adaptation communication'

- Loss and damage (article 8):

- o The 'Warsaw International Mechanism for Loss and Damage may be enhanced and strengthened', which means that negotiations will continue on the extent to which the Mechanism created in Warsaw will be operationalised

- o Countries also acknowledge the need to cooperate and enhance the understanding, action and support in different areas such as early warning systems, emergency preparedness and risk insurance.

- Finance (article 9):

- o Developed countries will continue to support climate action to reduce emissions and build resilience to climate change impacts in developing countries;

- o Developed countries intend to continue their existing collective goal to mobilise USD 100 billion per year until 2025 when a new collective goal will be set.

- Technology development and transfer (article 10):

- o Parties are to 'strengthen cooperative action on technology development and transfer'

- o A Technology mechanism is established
- Capacity building (article 11): Parties should cooperate to enhance activities in this domain through appropriate institutional arrangements
- Transparency (article 13): 'an enhanced transparency framework for action and support, with built-in flexibility which takes into account Parties' different capacities and builds upon collective experience is established'
- Global stocktake (article 14): in 2023, the first global stocktake assesses the collective progress towards achieving the purpose of this Agreement and its long-term goals
- Compliance (article 15): a mechanism to facilitate implementation of and promote compliance with the provisions of this Agreement is established
- Institutional framework (articles 16 – 19): CMA, secretariat, SBI and SBSTA
- Final clauses (articles 20 -29): signature, entry into force, amendments, settlement of disputes, voting, withdrawal, languages

COP 21 also launched several work programs and activities to be conducted by the subsidiary bodies. Those activities will define many important details of the functioning of the new regime for the coming years, until 2020 when the Paris Agreement will have to come into force.

The Paris Agreement undoubtedly forms a milestone in the fight against climate change. It sets the framework for the first global common action against greenhouse gas emissions, by both developed and developing countries. The upcoming period will tell whether the structure and rules of the new treaty form a workable framework to tackle climate change and keep the global temperature rise well below 2C above pre-industrial levels. One of the first challenges in this respect will be to strengthen the commitments of the parties, as the combined effect of their current contributions would bring up the temperature far more than 2C.

Other Climate News

European Commission Climate Action: [Europe readies next steps to implement the Paris Agreement](#) (02/03/2016)

The European Commission presented an assessment on the implications for the European Union of the Paris Agreement. The assessment looks at implementation of the Paris Agreement in the European Union.

[Civil society leaders have criticized the European Union's climate action plan](#). It is claimed that the Action Plan did not refer to commitments regarding transfer of finance and technology to developing countries, did not address 'loss and damage' nor how to deal with the impacts of climate change in vulnerable communities. Moreover, the proposal is alleged to restate the existing 2030 climate pollution target that has been widely criticized as being insufficient to meet the objective of limiting temperature rise to 2C.

Energy



EuroActiv Article: [Surge in Renewable Energy stalls world Greenhouse Gas Emissions](#) (17/03/2016)

It appears possible to grow economies without increasing climate emissions according to a study of the International Energy Agency (IEA).

Nature & Agriculture



European Environment Agency: [Europe's grasslands, woodlands, and marine areas face increased threats](#) (22/02/2016)

The European Environment Agency (EEA) has found the health of Europe's ecosystems to be increasingly pressured by rising pollution, overexploitation, urban sprawl and the effects of climate change.

European Commission Report: [EU Timber Regulation: More effort needed from Member States and private sector](#) (01/03/2016)

The first evaluation of the EUTR by the European Commission shows great disparities between Member States. A wide variation in human and financial resources available for the application and enforcement of the EUTR was reported. Available human resources range from approximately 1 to 200 person/month. As for the scope of the EUTR, it is highlighted that some timber-based products, such as musical instruments (CN 92), wooden coffins (CN 4421) or wooden seats (CN 94), are not covered. Furthermore, it is explained that none of the VPAs has entered into force yet.

European Parliament Press Release: [Glyphosate herbicide: don't renew its authorisation, urge MEPs](#) (22-03-2016)

European Parliament's Environment Committee finds that as long as serious concerns remain on the disruptive properties of the herbicide glyphosate, used in many farm, forestry, urban and garden applications, the European Commission should not renew its authorization - and certainly not for the next 15 years. Instead, an independent review is necessary as well as disclose of the scientific evidence used by the European Food Safety Authority (EFSA) used to assess glyphosate.

EurActiv Article: [Organic farming in the EU](#) (23/03/2016)

The role of organic farming on the world's agricultural stage becomes increasingly important : the use of organic agricultural land in the European Union has almost doubled in recent years.

EurActiv Article: [EFSA confirms cause of Italian olive crop destruction](#)
(30/03/2016)

A study published by the European Food Safety Authority (EFSA) establishes that the *Xylella fastidiosa* bacterium caused the large-scale destruction of Italy's olive crop.

Events



29 August- 2 September 2016

Event: [Summer Programme on International and European Environmental Law: Making it Work](#)

Topic/Title: Making it Work

Organisation: T.M.C. Asser Instituut

Venue: T.M.C. Asser Instituut, R.J. Schimmelpennincklaan 20-22, The Hague

[Summer Programme is now available on the website](#)

[Three partial scholarships are available for young professionals from non- OECD countries](#)

Colofon

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