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EEL News Service

Issue 2016/03 of 07 June 2016

Dear members of the EEL Network,

In this News Service you will find two summaries of recent judgments, one on free greenhouse gas emission rights and one on e-cigarettes. The latter case sheds light on the possibilities of the use of the precautionary principle by the EU legislator in cases of scientific controversies. That topic was also discussed at a workshop on the controversial active substance glyphosate, in which I participated recently. A link to the video of that workshop and more news on the voting by member states on the proposed renewal is presented in this News Service as well. Furthermore, the news is presented on the plan to drop the controversial mandatory 10% renewables target for transport.

Please make sure to take note of the upcoming EELF event 'The Preliminary Reference Procedure as a Compliance mechanism of the EU Environmental Law' taking place on Friday 17 June in Brussels; registration for this very interesting event is still possible and alternatively, you can participate and interact via a live streaming option.

Last but not least, we are very excited that we have had the confirmation of numerous very interesting speakers from practice and academia for our own Summer Programme on International and European Environmental Law: Making it Work (The Hague, 29 August – 2 September). More details will be online soon.

Wybe Douma

Case Law



CJEU Judgment: Joined Cases C 191/14, C 192/14, C 295/14, C 389/14 and C 391/14 to C 393/14 [Borealis Polyolefine](#) (28/04/2016)

This preliminary ruling was issued at the requests of three administrative courts from Austria, the Netherlands and Italy. The requests were made in proceedings between greenhouse gas emitting undertakings and the national authorities responsible for the EU greenhouse gas emission allowance trading scheme (EU ETS Directive 2003/87/EC). The ruling looks at the validity of two Commission Decisions on the free allocation of greenhouse gas emission allowances: of Article 15(3) Commission Decision 2011/278/EU, and of Article 4 and Annex II Commission Decision 2013/448/EU. Both decisions concern transitional rules on free allocations of emission allowances. The CJEU determined that nothing that was brought forward in any of the three cases affected the validity of Article 15(3) of Commission Decision 2011/278/EU. It did find that Article 4 and Annex II of Decision 2013/448/EC were invalid because the Commission took certain emissions generated by installations covered by the allowance trading scheme prior to 2013 into account, contrary to Article 10a(5)(b) of the amended EU ETS Directive. Addressing the temporal effects of this finding, the CJEU decided that the European Commission will have 10 months to adopt necessary measures by formulating a new calculation method for handing out free credits. Within these 10 months, the declaration of invalidity will not produce effects and any measures which are adopted within those 10 months on the basis of the invalidated provisions cannot be called into question.

CJEU Judgement: [Case C-477/18](#) (04/05/2016)

Case C-477/18 ('Pillbox 38') is not an environmental case, but its substance could be applicable to environmental cases in the future – the Court stated that the legislator has discretion to decide what shall be done against potential risks. This view could play an important part in future environmental cases, when restrictive measures are taken in order to protect the environment.

In the Pillbox 38 case, the CJEU was asked whether a provision in an EU directive regulating electronic cigarettes (e-cigarettes) and refill containers was valid in the light of, notably, the proportionality principle, read in conjunction with the principle of legal certainty. The Court examined the validity of the provision with regard to these principles in the light of the precautionary principle. It stated that in circumstances of contrasting scientific reports on the potential risks of e-cigarettes, the "EU legislature had to take account of the precautionary principle". What is more, it even underlined that "the identified and potential risks linked to the use of electronic cigarettes [...] required the EU legislature to act in a manner consistent with the requirements stemming from the precautionary principle."

ICJ Judgement: [Costa Rica v Nicaragua](#), proceedings joined with Nicaragua v Costa Rica (15/12/2015)

In December 2015, the ICJ handed down a judgement on the Costa Rica v. Nicaragua case. In 2010, Costa Rica started proceedings against Nicaragua in Costa Rica v. Nicaragua. In the application, Costa Rica alleged breaches of its sovereignty by Nicaragua, and also alleged Nicaragua of breaching its obligations under international environmental law with regards to its activities (particularly dredging). Furthermore, Costa Rica also filed a request for provisional measures. A year later Nicaragua instituted proceedings against Costa Rica in Nicaragua v. Costa Rica. Nicaragua alleged that Costa Rica breached its obligation to carry out an environmental impact assessment (EIA) with regards to the construction of a road in the border area between the two countries. Nicaragua also alleged a breach of obligation to exercise due diligence in order to prevent transboundary harm and violations of Nicaraguan sovereignty. Then in 2013, the Court decided to join the two proceedings to be the Costa Rica v. Nicaragua case. That same year the Court also upheld and added new provisional measures to the Order of 8 March 2011 that was addressed to both Parties.

First, the Court addressed the Costa Rica v. Nicaragua issues and found that Costa Rica has sovereignty over the 'dispute territory', based on the examination of the Treaty of Limits (the 1858 Treaty), the Cleveland Award and the Alexander

Awards. The Court also found that the activities (both dredging and the establishment of military presence in the area) carried out since 2010 by Nicaragua constitute a violation of Costa Rica's territorial sovereignty. For this, Nicaragua has to compensate Costa Rica for any material damages caused by the unlawful activities on Costa Rican territory. It was also found that Nicaragua breached Costa Rica's rights of navigation on the San Juan River.

Second, the Nicaragua v. Costa Rica claims were addressed by the Court. The Court found that Costa Rica was under an obligation to conduct an EIA for the Route 1856 that was being constructed, because there was a risk of transboundary harm as a consequence of it but that Costa Rica had not complied with this obligation for the construction of the road. It was reiterated in the judgement that states have an obligation under general international law to conduct an EIA when there is risk of transboundary harm regardless of exceptions granted in national law. The Court also noted that Costa Rica remains under the obligation to carry out an EIA for any future works on the road.

All other submissions made by the two Parties were dismissed by the Court.

In a separate opinion, Judge Owada states that in the Judgement of Costa Rica v. Nicaragua (as well as in Pulp Mills) the Court takes a balanced approach to the EIA requirement insofar that the element of EIA is important in the context of the process of carrying out the obligation of due diligence. That is to say that while EIA is important, it is one of the various ways through which, when the circumstances of a case so require, "the ultimate legal objective that is binding upon States acting in the environmental field an obligation to act with due diligence in order to prevent significant transboundary harm" can be achieved. Judge Owada states that conducting an EIA is an important part of the process of fulfilling the obligation that States have to act with due diligence to prevent significant transboundary harm, but that EIA does not necessarily constitute "an indispensable obligation as such".

WTO Panel Report: [India - Solar Cells](#) (24/02/2016)

In 2013, the US brought a complaint before the WTO that argued that the domestic content requirements under India's national solar programme were in breach of the international trading rules under the WTO regime. The US specifically argued that India had violated its "national treatment" obligation by unfavourably discriminating between solar cells and modules that were 'like' products in all respects except for their 'origin', therefore clearly violating its trade commitment. In February of 2016, a WTO Panel ruled that by imposing the mandatory domestic content requirement, India had violated its national treatment obligation under international trade law.

As of April 20, 2016 the Panel Report is under appeal in front of the WTO Appellate Body.

General



European Commission Press Release: [The Urban Agenda for the EU: European cities get their say in EU policy making](#) (30/05/2016)

An informal Ministerial meeting on urban matters agreed on the "Pact of Amsterdam" - it sets out the principles of the Urban Agenda for the EU. The Urban Agenda in the EU will allow for European cities to have a say in EU policy making. The Urban Agenda will develop 12 partnerships on 12 identified urban challenges. The partnerships will allow cities to work together with other actors to improve EU urban areas. "The action plans designed by the partnerships will focus on a more effective and coherent implementation of existing EU policies in cities in the fields of environment, transport and employment, for example. "

International Cooperation and Development Consultation: [UN 2030 Agenda for Sustainable Development and Revising the European Consensus](#)

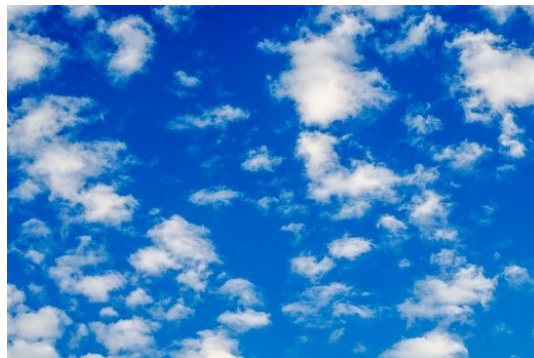
From 30 May 2016 to 21 August 2016, a public consultation will take place on revising the European Consensus on Development, in line with the UN 2030 Agenda for Sustainable Development. All citizens and organizations are able to participate in this public consultation.

CLEER Paper 2016/01: [Tiptoeing to TTIP: What Kind of Agreement for What Kind of Partnership?](#)

With contributions from: Wybe Douma, Davor Jančić, Pieter Jan Kuijper, Joana Mendes, Luca Pantaleo, Tamara Takács, and Ingo Venzke

This CLEER Paper collects some of the contributions that were presented during the roundtable organised by the T.M.C. Asser Institute in September 2015, in cooperation with the Dutch Ministry of Foreign Affairs. The paper focuses on some of the most debated issues that are under negotiation, and it touches upon the protection of the environment, which fits under sustainable development - a chapter in the negotiations.

Air



EurActiv Article: [20 cities challenge relaxation of EU air pollution standards](#) (04/05/2016)

EU's confusing position on air pollution has angered the major cities in the Union. They have been ordered to cut air pollution levels; however, car emission standards are being relaxed at the same time. Consequently, a group of 20 EU cities are taking the Commission to court because their requirement to cut air pollution levels is becoming very hard to attain since more freedom to pollute has been given to car makers.

Chemicals



Reuters Article: [EU countries refuse to back new license for glyphosate weed-killer](#) (06/06/2016)

EU member states failed to reach the qualified majority required to agree to the proposal of the Commission to renew the controversial glyphosate license with several years, leaving the issue in a political deadlock. Thereupon, the Commission proposed a temporary (12 to 18 months) extension of the authorization in order to break the deadlock on the use of the active ingredient in pesticides like Roundup in the EU. Again, no necessary majority was reached. The renewal could still be decided upon by the Commission itself, as it is entitled to adopt its own proposal if the Member States fail to reach a decision.

The Workshop "EU's pesticide risk assessment system: the case of glyphosate" on 24 May 2016 at the European Parliament highlighted the differences of opinion on glyphosate, which according to the WHO is potentially carcinogenic.

[Full video of the workshop](#)

See also:

[Weedkiller fight drags on amid EU deadlock](#)

[EU fails to reach weed-killer deal, again](#)

Climate Change



European Council Press Release: [Climate change: EU signs the Paris Agreement](#) (22/04/2016)

The EU and its 28 Member States signed the Paris Agreement in a high-level ceremony in New York City.

EurActiv Article: [Forestry carbon credit loophole could be used to game climate commitments](#) (27/04/2016)

A loophole in the EU's forestry sector oversight has exposed it to the risk of being used to game government climate commitments. Member states could overstate their "business as usual" logging and scoop up millions of euros worth of carbon credits. This would also leave the possibility open that the Union would not hit its emission targets under the 2030 Framework.

Climate Action News: [Commission team wins Ozone Protection Award](#) (25/05/2016)

The Commission's ozone layer protection team won the Ozone Protection Award 2016 of the United Nations Environment Programme's Regional Ozone Network for Europe and Central Asia. The award is an acknowledgement of the team's commitment to fighting trade in ozone-depleting substances that are illegal.

UNFCCC statement: [G7 Leaders' Declaration Addresses Paris Agreement](#) (30/05/2016)

At the G7 meeting Japan at the end of May, G7 countries stated that they would take the necessary steps to secure rapid ratification, acceptance or approval of the Paris Agreement.

Energy



European Implementation Assessment: [Implementation of the Energy Efficiency Directive \(2012/27/EU\): Energy Efficiency Obligation Schemes579327_EN.pdf](#) (04/2016)

Science Alert Article: [Portugal just ran for 4 straight days entirely on renewable energy](#) (19/05/2016)

In May, Portugal ran on renewable energy alone for four days straight (107 hours in total)

Nature & Agriculture



European Commission Press Release: [Commission refers POLAND to the Court of Justice of the EU over inadequate assessment of exploratory mining drillings](#) (28/04/2016)

Poland has been referred to the CJEU over its failure to ensure that the Environmental Impact Assessment for exploratory mining drillings has been properly conducted and assessed.

Agriculture and Rural Development News: [Organic production: authorisation 39 substances in line with principles of organic production](#) (03/05/2016)

The list of substances which can be used in the EU for organic farming has been amended. In addition, the rules for approving substances to be added to the list have been simplified to establish efficiency and transparency in the process.

EU Observer Article: [EU to scrutinise environmental action](#) (27/05/2016)

The European Implementation Review (EIR) has been launched on the 27th of May, through which the Commission will be able to evaluate implementation of the EU environmental acquis. Country-specific recommendations will also be included in the review. The initiative is meant to strengthen coordination between the different authorities involved in implementation.

EurActiv Article: [Poland approves logging in primeval forest](#) (27/05/2016)

Polish environmental authorities have given the green light for substantive logging in Europe's last primeval forest for "protective" measures, against the protests of ClientEarth, several NGOs and the European Commission.

Transport



EurActiv Article: [Green transport target will be scrapped post-2020, EU confirms](#) (05/05/2016)

Marie C. Donnelly, Director for Renewables at the European Commission, has confirmed that the "at least 10%" renewable energy used in transport by 2020 requirement for Member States will be dropped post-2020. The 10% was controversial because of the Indirect Land Use Change effects that EU demand for biofuels could cause, leading to more rather than less climate change, loss of biodiversity, land grabbing etc. as we reported earlier in the EEL News Service. A recent study for the Commission confirmed that the indirect land use change of biofuels to be bigger than previously thought.

European Commission Press Release: [Commission refers Poland to Court of Justice of the EU because of restrictions to some imported biofuels and biofuel raw materials](#) (26/05/2016)

Polish law has now established restrictions against certain imported biofuels, as well as raw materials for biofuels. Hence, it is not longer in line with EU law so the Commission is referring Poland to the CJEU.

Water



European Commission Press Release: [Commission refers GERMANY to the Court of Justice of the EU over water pollution caused by nitrates](#) (28 /04/2016)

Figures submitted by Germany to the Commission show worsening nitrate pollution in both groundwater and surface waters, yet Germany is not taking the additional measures necessary to deal with the nitrates pollution. Hence, the Commission is referring Germany to CJEU for their failure to take measures to deal with the increasing pollution levels.

Events



29 August- 2 September 2016

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

Title: Making it Work

Organisation: T.M.C. Asser Instituut

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

[Draft programme & registration](#)

14 June, 2016

Event: seminar on Brexit

Topic: 'To Brexit or not to Brexit? Legal implications of the UK's EU referendum'

Start time: 3pm

Entrance fee: Free

Organisation: T.M.C. Asser Instituut

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

17 June, 2016

Event: workshop ' Commission meets Academia'

Topic: The Preliminary Reference Procedure as a Compliance mechanism of the EU Environmental Law

Organisation: European Environmental Law Forum (EELF)

Venue: Royal Winsor Hotel, 5 Rue Duquesnoy, 1000 Brussels

[Draft programme & registration](#)

It is still possible to enrol for this highly interesting workshop! Alternatively, a Live Streaming Option is available for Euro 20. Besides following the presentations, this options allows you to interact with the participants to the workshop by means of a chat room.

Colofon

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