



EEL News Service

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Case Law

Different treatment biomasses justified

ECJ Case C-195/12 [Industrie du bois de Vielsalm & Cie \(IBV\) SA v Region Wallone](#)
 In the context of the promotion of cogenerating plants using biomasses ex Directive 2004/8/EC, the ECJ has ruled that Member States have wide discretion in choosing to give enhanced support to cogenerating plants that do not use biomass consisting of wood or wood waste. The Walloon Region refused to grant double green certificates to the Industrie du bois de Vielsalm & Cie (IBV), on the grounds that the additional support was only destined to plants using biomass other than wood or wood waste. The grounds for this differentiation were connected to the necessity to preserve wood resources which are already exploited by the wood industry, and therefore based on the interest to preserve forests. The ECJ established that plants using biomass derived from wood or wood waste are not discriminated, as they are included in the list of plants benefiting from standard green certificates. The issue of additional support may well vary in the light of environmental considerations specific to the territory, allowing Member States to strengthen the preservation of scarce natural resources and favour the use of more easily regenerating products, such as household, industrial and agricultural wastes.

Notably, the ECJ ruled that *“the principle of equal treatment and non-discrimination [...] does not preclude the Member States, when introducing national support schemes for cogeneration and electricity production from renewable energy sources [...] from providing for an enhanced support measure, such as that at issue, capable of benefiting all cogeneration plants principally using biomass with the exclusion of cogeneration plants principally using wood and/or wood waste”*.

See also a [comment on the case](#) by prof. Geert van Claster.

French Court backs anti-fracking law [Constitutional Council decision n. 2013-346](#)

The French Constitutional Court has ruled on the constitutionality of Law 2011-835 which prohibits the exploration and exploitation of shale gas and shale oil by hydrofracturing (fracking). It has also found that the measures taken by the Government formed a proportionate means to effectively protect the environment. The case was brought before the Court by the American company Schuepbach

Energy LLC, after the French Government withdrew its exploration permits for fracking (issued before the 2011 law was approved). Schuepbach's lawyers argued the absence of sound grounds to impose the ban, without evidence of a negative environmental impact of fracking techniques, and claimed that the law inconsistently does allow for geothermal fracking. The case passed to the Council of State and then to the Constitutional Court, which rejected these arguments, clarifying the difference between shale gas and geothermal fracking and dismissing the alleged infringement of property rights. The French government now faces a potential obligation to pay Schuepbach compensation of [up to €1bn](#) for the withdrawal of the shale exploration permits.

See also:

[France uphold ban on hydraulic fracking](#), New York Times, 11 October 2013

Energy

Public participation without essential facts?

Commissioner Oettinger from DG Energy has had a reference to 26 billion Euro support to fossil & nuclear removed from an upcoming Communication "The internal energy market: Delivering the most of public participation", some say. An earlier draft explained that EU Member States in 2011 spent around EUR 26 billion on support for electricity from fossil fuels, and some EUR 30 billion for electricity from renewables (RES), but that information was deleted from a later draft. The question how much support nuclear energy receives ("*a recognised study assessing the current support to nuclear in the EU is not available*") was also deleted. According to the *Süddeutsche Zeitung*, this amounted to 35 billion in 2011, and another 40 billion was said to be presented to support energy from coal and gas. MEP Bas Eickhout did the math and tweeted to Oettinger "Why is the 100 billion support to fossil and nuclear an unwelcome message?" Commentators have already tried to downplay this news stating that references to support for renewable energy were also deleted. The fact remains that a debate on energy can only be held if it is made clear how much the different forms of energy actually cost. A communication on public participation on energy should therefore present such facts rather than hide them. The amended text of the draft Communication reads as follows: "The case for reviewing public intervention in the electricity market in particular is strong as it has a significant influence on the costs and prices of electricity. In 2050, the total costs of electricity supply is predicted to vary from EUR 100 to EUR 200 per MWh, depending on policy scenarios⁹. ~~In 2011, the various types of support of electricity production in the European Union amounted in accordance to some studies to far above EUR 60 billion: , Member States spent about EUR 26 billion for electricity generated from fossil fuels¹⁰, and EUR 30 billion for RES electricity¹¹. Support schemes for nuclear energy make up the remaining part and comprise support schemes for decommissioning, waste disposal, limitation of liabilities and investment aid¹². Member States shall devote between 12% and 20% of their~~

~~allocations from the European Regional Development Fund (hereinafter: ERDF) to support the shift towards a low carbon economy. This includes the promotion of RES electricity. Support schemes for nuclear energy make up the remaining part and comprise support schemes for decommissioning, waste disposal, limitation of liabilities and investment aid¹². Member States shall devote between 12% and 20% of their allocations from the European Regional Development Fund (hereinafter: ERDF) to support the shift towards a low carbon economy. This includes the promotion of RES electricity”.~~

9 KEMA study for levelised cost of electricity over the five scenarios selected

~~10 <http://www.oecd.org/site/tadffss/>; data covers direct budgetary transfers and tax expenditures that provide a benefit or preference for fossil fuel production or consumption. It does not contain indirect subsidies of conventional fuels in terms of their social and health costs that have been estimated at a further annual EUR40bn for the EU health systems.~~

~~11 International Energy Agency XXX please indicate the precise study XXX.~~

~~12 A recognised study assessing the current support to nuclear in the EU is not available.”~~

See also:

Cerstin Gammelín, [Oettinger schönt Subventionsbericht](#), Süddeutsche Zeitung, 14 October 2013

Rob Savelberg, Eurocommissaris verzwijgt energiesubsidies, Telegraaf 16 October 2013

Rypke Zeilmaker, [Telegraaf tuint in nepcomplot Oettinger die niet bestaande fossiele subsidies wegstreept](#), Climategate.nl

Ron Wit, Achterhoedegevecht, NRC Handelsblad 18 October 2013 (also referring to the 100 billion support)

EP wants mandatory EIA for all fracking projects

The European Parliament (EP) has proposed to amend the key legislation on exploration and exploitation of oil and gas in order to leave greater room to environmental protection and biodiversity issues. It proposes the introduction of a mandatory environmental impact assessment (EIA) for any project of exploration and exploitation of oil and gas by fracking. Currently, natural gas projects only fall under the scope of the EIA Directive if the total daily extraction activity exceeds 500,000 cubic meters.

The proposal is the result of long and complex debates between the EP and Member States, oriented at finding a compromise between the right of Member States to exploit their own energy resources and the necessity of ensuring that extraction activities are in line with both fair competition rules and environmental protection requirements (see the comment published on the [EEL website](#)).

The proposal includes provisions as to avoid the creation of conflict of interests between applicants and people carrying out the assessment. Should the amendments be adopted, this would enhance the transparency of the whole project and the adequate involvement of third parties and citizens interested in the process. Moreover, it would guarantee that all environmental issues and specific ecosystem and biodiversity features, as well as social and economic implications are taken into account through an *ad hoc* assessment.

See also:

European Parliament [Press Release](#), 9 October 2013

EP wants cap on traditional biofuels

On 11 September 2013, the European Parliament has voted on a 6% cap on the use of biofuels in road transport, 2.5% of which must be constituted by second generation biofuels (derived from non-crop based products like seaweeds and some types of waste). However, the Parliament failed by one vote to approve the draft of the Plenary Session, which means that the draft legislation will have to undergo a second reading before being sent to the Council for discussion. The vote was controversial. Environmentalists were calling for a quicker shift to more sustainable second generation biofuels. The vote delays a decision over the gradual phasing-out of crop-based biofuels as well as the inclusion of indirect land use change (ILUC) in the assessment of biofuels impact on GHG emissions and food security. On [17 October](#) the EP Environment Committee has denied MEP Lepage the mandate to negotiate with Member States, therefore showing the great uncertainty surrounding the ILUC and the presence of contradictory views within the institutions. Chances are that the second reading will be delayed until the new Presidency and the new Parliamentary elections next year. Although there is still uncertainty over their actual impact, first generation biofuels are likely to pose a serious threat to the future of sustainable agriculture and influence food prices in developing and non-developed countries. These are among the major concerns expressed during the last meeting of the Committee on World Food Security of the United Nations Food and Agriculture Organization (FAO), where it was stressed that *“biofuel development encompasses both opportunities and risks in economic, social and environmental aspects, depending on the context and practices”*. However, the [CFS failed to take action on the issue](#), despite their [High Level Panel recommending](#) that *“governments should adopt the principle that biofuels shall not compromise food security and therefore should be managed so that food access or the resources necessary for the production of food, principally land, biodiversity, water and labour are not put at risk”*.

See also:

[EU Parliament Press Release](#), 11 September 2013

[FAO Press Release](#), 10 October 2013

Marie Brill and Timothy A Wise, [Fiddling in Rome while our food burns](#) (opinion), 17 October 2013

Climate Change

ICAO agreement on global Emission Trading Scheme?

The International Civil Aviation Organization (ICAO) and the European Union have reached an agreement to start discussions on a global market-based mechanism for international aviation by 2016, after a long awaited meeting that took place on 4th October 2013. Reactions to the outcome are, however, mixed and the actual consequences thereof still unclear. Although it is the first time that ICAO has committed to take actions to concretely tackle GHG emissions from the aviation sector, there is still uncertainty over the application of the EU ETS to overseas airlines who operate flights from or to European destinations, at least until the final scheme will be drafted. The EU [had already exempted flights from and to Europe from the ETS](#) system, notwithstanding the fact that the ECJ in case C-366/10 dismissed the arguments of the Air Transport Association of America regarding a potential inconsistency of the EU ETS Directive with principles of international customary law and a number of international treaties, in December 2011. The ICAO resolution might stand in the way of applying unilaterally market based mechanism to non-EU airlines until a global or other form of agreement is reached. The EU has reiterated the importance of including external flights in the scheme to consistently reduce the level of GHG emissions.

See also:

[Global consensus on emission deal](#), EurActiv, 4 October 2012

Case C-366/10 [Air Transport Association of America and Others v Secretary of State for Energy and Climate Change](#) in EEL News Service Issue 2011/11

Transport

EU to enhance the use of waterways

On 10 September 2013, the NAIADES II Action programme was adopted. It aims at boosting transport through waterways, reducing the load on roads and rail, while enhancing the potential for a more energy-efficient and green transport. Using Europe's up to 37,000 kilometres navigable inland waterways would reduce CO2 emissions from transport (and thus help to achieve the emission reduction target from the road transport sector), and boost the development of the inland navigation sector. Inland waters are severely under exploited, counting for only 6% of total EU transportation. The programme comprises measures to improve transport of waterborne, reduce barriers and build new infrastructures making the inland waterways traffic more efficient and smooth, fostering connections between seaports and most internal

areas of Europe. Consultations with Member States in order to review technical requirements for vessel and encourage a shift from the use of fossil fuels to Liquid Natural Gas (LNG) as a greener alternative are also taking place. The Commission works on a [proposal for the replacement of Directive 2006/87/EC](#) on technical requirements for inland waterway vessels, resolve the overlap of competencies and legislation in this transport sector and adopt uniform standards. The EU and Member States will provide the inland waterway transport sector with more funding and support for investments in the green economy by linking the NAIADES II package with other measures, such as the TEN-T Network and the Connecting Europe Facility programme.

See also:

[European Commission – Press Release](#). Making better use of Europe’s waterways, 10 September 2013

[Making better use of Europe's waterways](#), EUbusiness, 11 September 2013

Nature

EU adopts a new forest strategy

After 15 years the EU adopts a new, holistic approach for the preservation and management of forests in the EU. The new strategy recognises the key role that forests play in the sustainable development of rural areas, and aims at enhancing the competitiveness and the better management of activities in the forest sector. It also acknowledges that forests constitute a pillar for the protection of the environment and the preservation of biodiversity, as well as in the fight against climate change. The role of agro-forestry systems and the control of the value chain is also emphasized and directly linked to the sustainable development of rural areas.

See also:

[Commission Staff Working Document](#), 20 September 2013

The new [EU Forest Strategy](#), 20 September 2013

EU and Indonesia against illegal timber

The Government of Indonesia and the EU signed a [Voluntary Partnership Agreement \(VPA\)](#) to curb illegal logging on 30 September 2013. The VPA constitutes an important step for the fight against the black market of illegally harvested timber. Once the agreement will be ratified, Indonesian timber and timber products falling under the scope of the VPA can be exported to the EU as Forest Law Enforcement Governance and Trade (FLEGT) licensed timber, which means they will be automatically considered legal under the 2013 EU Timber Regulation. Timber and timber products produced for the EU export market will undergo a number of systematic controls and will be monitored through a traceability system which ensures that they are produced in compliance with relevant legislation and

agreements.

See also:

European Commission [Press Release](#), 30 September 2013

Upcoming Events

Environmental Law Network International (ELNI) forum 2013: Environmental footprint – key issues and practical experiences

The ELNI forum 2013 will offer the opportunity to discuss environmental footprinting issues in environmental law from different point of views. Professor Arjen Hoekstra presents key issues on the concept and developments on the water footprint. Imola Bedo will provide the point of view of the EU Green products policy (PEF, OEF, PCRs, product passport). Furthermore there we will be the possibility to discuss the topic from a NGOs and business perspective.

Date: 7 November 2013, 18.00 to 20.30

Location: EU Liason Office of the German Research Organisations (KoWi), Rue de Throne 98 (8th Floor), 1040 Brussels, Belgium.

EU and US environmental policy: convergence, divergence and cooperation

The United States led the development of ambitious environmental policy in the 1970s and 1980s. In recent decades, the European Union has pioneered a number of environmental policies. Prof. David Vogel compares and explains the transatlantic shift in environmental leadership in his award-winning book “The Politics of Precaution: Regulating Health, Safety, and Environmental Risks in Europe and the United States” (Princeton University Press). He will present the main findings in his presentation. Patrick Ravillard will contribute a practitioner’s perspective on EU and US environmental policy and transatlantic cooperation.

Date: 23 October 2013, 12.00 to 14.00

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

Recent Publications

J.H. Jans, R. Macrory and A.M. Moreno, National Courts and EU Environmental Law, Europa Law Publishing, 2013.

This highly interesting book analyses the role of Member States’ National Courts in the effective implementation of European environmental law. Through a comparative approach, it undertakes a systematic analysis of the application of fundamental principles and tools such as state liability, consistent interpretation

and direct effect in relation to environmental cases. A country-by-country analysis make it easier for practitioners and experts to access the relevant information on case law and interpretative issues in each jurisdiction. This work further explores the outstanding different approaches of National Courts in evaluating the role of judicial cooperation and judicial competition, and the extent to which judges have handled fundamental tools such as public participation and access to justice. The analysis reveals an extremely fragmented picture that results in an inconsistent application of EU environmental legislation and principles across the Union. The outcome reflects the urgent need for a greater cooperation between the ECJ and national Courts as well as among Member States' judicial bodies. In that respect, it acknowledges the important role of the European Union Forum of Judges for the Environment (EUFJE) in further improving the contact and exchange on information in the field of environmental law. The book forms an indispensable read for those interested in European environmental law. It is available on paper and as e-book. A preview can be accessed via this [website](#).

Colofon

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