

European Environmental Law Observatory

News

Issue of January 2015

The January issue of the European Environmental Law Observatory is now available online.

This issue covers information about the application of the Aarhus Convention on access to information, participation in decision-making and access to justice in environmental matters; provides updates on judgments of the Court of Justice and the General Court; and highlights questions raised in recent doctrinal contributions, hand-picked by the Observatory's staff from a selection of major legal journals.

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Section A: Aarhus Newsletter

Judgments of the Court of Justice and of the General Court

A.1 Joined cases C-401/12 P to C-403/12 P, Council, European Parliament, Commission v Vereniging Milieudefensie, Stichting Stop Luchtverontreiniging Utrecht, 13 January 2015

[Appeals — Directive 2008/50/EC — Directive on ambient air quality and cleaner air for Europe - Request for internal review of that decision, submitted pursuant to Regulation (EC) No 1367/2006 — Commission decision declaring the request inadmissible — Measure of individual scope — Aarhus Convention — Validity of Regulation (EC) No 1367/2006 in the light of that convention]

Joined cases C-404/12 P and C-405/12 P, Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe, 13 January 2015

[Appeals — Regulation (EC) No 149/2008 — Regulation setting maximum residue levels for pesticides — Request for internal review of that regulation, submitted pursuant to Regulation (EC) No 1367/2006 — Commission decision declaring the request inadmissible — Measure of individual scope — Aarhus Convention — Validity of Regulation (EC) No 1367/2006 in the light of that convention]

In Joined Cases C-401/12 P to C-403/12 P the NGO applicants had submitted a request to the Commission for internal review, under Article 10 of Regulation 1367/2006 applying the Aarhus Convention to EU institutions, of the decision of the Commission to grant the Netherlands an exemption under Directive 2008/50 on ambient air quality. The Commission rejected the NGOs' request as inadmissible on the ground that its decision was not a measure of individual scope and that it could therefore not be considered an "administrative act" within the meaning of Article 2(1)(g) of Regulation 1367/2006. Only an administrative act could be the subject of an internal review procedure provided under Article 10 of Regulation 1367/2006. The NGOs sought the annulment of that decision.

In joined cases C-404/12 P and C-405/12 P, the decision the NGO applicants sought to annul was Regulation 149/2008 of 29 January 2008, amending Regulation 396/2005 by establishing Annexes II, III and IV setting maximum (pesticides) residue levels for products covered by Annex I. The Commission also rejected this request for the same reason given in Joined Cases C-401/12 P to C-403/12 P.

In all cases, the General Court annulled the Commission's decision.

The Applicants alleged that Article 10(1) of Regulation 1367/2006 was incompatible with Article 9(3) of the Aarhus Convention. Article 10 restricts the categories of acts that can be challenged within the administrative review procedure to "acts of individual scope" whereas Article 9(3) of the Aarhus Convention provides that members of the public can challenge "acts and omissions" by private persons and public authorities.

After noting that the Aarhus Convention prevailed over acts of secondary EU legislation, the General Court stated that the courts of the EU may examine the validity of a provision of a regulation in the light of an international treaty only where the provisions of the treaty are unconditional and sufficiently precise.

However, referring to the *Fediol* and *Nakajima* cases, the General Court also stated that where an EU regulation implements international law to impose obligations on EU institutions, the courts must be able to review the legality of that regulation in the light of the international agreement. This is the case even where the rules of that agreement are not capable of conferring on the individual concerned the right to invoke it before the courts.

It concluded that Regulation 1367/2006 had been adopted to meet the EU's obligations under Article 9(3) of the Aarhus Convention, as was clear from both Article 1(1) of Regulation 1367/2006 and recital 18 of its preamble. It followed that Article 10(1) of Regulation 1367/2006, in so far as it provides for an internal review procedure only in respect of acts defined as "measures of individual scope", is incompatible with Article 9(3) of the Aarhus Convention. It consequently annulled the Commission's decisions.

This ruling was welcome, as it would have brought the regulation in compliance with the Aarhus Convention by providing access to justice in line with Article 9(3) of the Convention. Much broader categories of decisions breaching environmental law could then have been challenged.

The Commission, the Council and the Parliament appealed the ruling. The three institutions unanimously claimed that the General Court erred in holding that Article 9(3) of the Aarhus Convention may be relied on in order to assess the compliance of Article 10(1) of Regulation 1367/2006 with that provision.

The Court referred to the case-law, according to which provisions of an international agreement need to be unconditional and sufficiently precise to be relied upon in support of an action for annulment of an act of secondary EU law. It held that Article 9(3) of the Aarhus Convention did not contain any unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals. Since only members of the public who "meet the criteria, if any, laid down in ... national law" are entitled to exercise the rights provided for in Article 9(3), this required the adoption of a subsequent measure and was not, therefore, unconditional and sufficiently precise. The Court rejected the application of the *Fediol* and the *Nakajima* cases, holding that "those two exceptions were justified solely by the particularities of the agreements [WTO and GATT] that led to their application". Article 10(1) of Regulation 1367/2006 neither made direct reference to specific provisions of the Aarhus Convention nor conferred rights on individuals to rely on Article 9(3). In addition, Article 10(1) did not implement specific obligations stemming from Article 9(3) of the Convention since the parties to the Convention had a broad

margin of discretion when defining the rules for the implementation of "the administrative or judicial procedures".

Finally, the Court ruled that it cannot be considered that, by adopting Regulation 1367/2006, the EU intended to implement obligations that derive from Article 9(3) of the Aarhus Convention "with respect to national administrative or judicial procedures, which as EU law now stands, fall primarily within the scope of member State law" and refers to *Lesoochranarske zoskupenie* case (EU:C:2011:125, paragraphs 41 and 47).

However, in the *Lesoochranarske zoskupenie* case, the Court had ruled that although Article 9(3) of the Convention does not have direct effect, national courts had to interpret national rules in accordance with Article 9(3) and the objectives of effective judicial protection to enable environmental NGOs to challenge before a court decisions liable to be contrary to EU environmental law. The Court thus adopted different standards in the implementation of the access to justice right, one for Member States' courts and one for itself.

This ruling is extremely disappointing and questionable from a legal point of view. The Court avoids tackling the legal issue at stake: the compatibility of the definition of the acts that can be challenged within the internal review procedure set out under Article 10(1) of Regulation 1367/2006 and before the Courts and, consequently, the compatibility of the regulation with the Aarhus Convention. As a result, only a very few decisions adopted in environmental matters can be challenged.

Moreover, Article 9(3) of the Aarhus Convention is unconditional as it does not require national measures to be adopted but simply refers to the possibility for the parties to the Convention to set these out. It is also sufficiently precise as to the types of acts that can be challenged: "acts and omissions by private persons and public authorities".

Even if that was not the case, the Court could still have relied on the *Biotech* case referred to by the Advocate General in his opinion. However, the ruling completely ignores the opinion of the Advocate General, which supported the ruling of the General Court as to the non-compatibility of Article 10(1) of Regulation 1367/2006 with Article 9(3) of the Aarhus Convention. He had proposed another legal basis for a decision than the *Fediol* and *Nakajima* cases, which he agreed were specific to the WTO agreements. He had proposed to rely instead on the *Biotech* case, in which the Court had also ruled that the lack of direct effect of a provision of an international agreement did not prevent the EU courts from examining the validity of EU secondary legislation with that international agreement. The Court did not address this point.

This ruling also raises a question about the way the EU applies international conventions it ratifies. One might wonder, what is the strength of Article 216(2) TFEU, which provides that international conventions are binding upon the EU institutions? And what about settled case-law, which states that these conventions prevail over EU secondary law? Refusing to review the legality of EU secondary legislation in the light of provisions of international conventions ratified by the EU seems in direct contradiction with these rules.

We can only regret that this ruling is in line with the spirit of the Plaumann case in that it clearly prevents NGOs from having access to justice. The Court missed the opportunity to bring about compliance of EU law with the Aarhus Convention, to ensure access to justice to NGOs and thus increase environmental protection. As long as citizens and NGOs are unable to challenge decisions of EU institutions before the EU courts, the EU will not be fully democratic .

Anaïs Berthier

A.2 Case T-476/12 Saint-Gobain v. Commission, judgment of 11 December 2014

[Access to documents – Regulation (EC) n° 1049/2001 – Regulation (EC) n° 1367/2006 – Partial refusal of access – Environmental information – Article 6, paragraph 1, second indent, of Regulation n° 1367/2006 – Exception on decision-making process – Documents from a Member State – Opposition from a Member State – Article 4, paragraphs 3 and 5, of Regulation n° 1049/2001]

Some of the plants of the company Saint-Gobain are subject to Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the EU. Saint-Gobain sought to have access to some information that the German Government had transmitted to the European Commission regarding the emission capacity of different plants. The Commission refused disclosure and Saint-Gobain appealed to the Court.

The General Court dismissed the application. It held that the information requested did constitute environmental information. However, the Court applied the exception in Article 4(3) of Regulation 1049/2001 on access to documents held by EU institutions, according to which disclosure of information which "relates to a matter where the decision has not been taken by the institution" shall be refused if disclosure would seriously undermine the institution's decision-making process. It held that the information had been sent to the Commission by the German authorities in order to allow the Commission to take a decision on whether emission quotas could be attributed to the plants free of charge (Article 10(b) of Directive 2003/87). Overall, the Commission had received information on 12,000 plants. Its decision-making process was still on-going. Disclosure of the requested information could give rise to criticism as regards the calculation of the emission capacity and disturb the Commission's decision-making process. The Court considered that this would seriously undermine the Commission's decision-making process.

The reasoning of the Court is not convincing. There is a legitimate interest for Saint-Gobain to know what information about its plants the German authorities had conveyed to the Commission. The information on the plants can be distinguished from the Commission's decision-making process. It can be disclosed without undermining the decision on which rights free of charge are to be apportioned. One can wonder whether the German authorities would have refused access had Saint-Gobain asked them directly. If not, why should it be different at EU level?

Ludwig Krämer

Section B: Judgments of the Court of Justice and the General Court

B.1 Case C-99/14 P, Federación Nacional de Empresarios de Minas de Carbón (Carbuni3n) v Council, Order of the Court of 11 December 2014

(Appeals - State aid - Decision 2010/787/EU - Aid to facilitate the closure of uncompetitive coal mines - Conditions for considering that aid compatible with the internal market - Article 181 of the Rules of Procedure of the Court)

Council Decision 2010/787/EU concerns the grant of State aid to facilitate the closure of uncompetitive coal mines. As it emerges from the recitals to the act, the Council took the view that the promotion of renewable energy and the objective of moving towards a low-carbon economy do not justify the indefinite granting of aid to uncompetitive coal mines. Therefore, aid to uncompetitive coal mines must be gradually phased out. More particularly, according to the Council Decision, State aid may only be granted, in an amount which decreases over time, as part of a plan for the closure of the coal mine, which must take place no later than 31 December 2018 (failure to meet the deadline triggers the obligation to recover the aid).

Carbuni3n – a national federation of coal-mine enterprises – brought an action before the General Court for partial annulment of the Council Decision. Carbuni3n sought the annulment of the provisions of the Council Decision that require a closure plan, impose the closure by the deadline, provide for the amount of aid to decrease over time, and oblige Member States to recover the aid where the deadline for closure is not met. The General Court declared the action inadmissible, notably because the contested provisions are not severable from the rest of the Council Decision, so that they could not be annulled without altering the substance of the act.

Carbuni3n appealed the General Court’s ruling. Essentially, Carbuni3n claimed, based on the recitals to the Council Decision, that the Council Decision pursued the objective of promoting the protection of the environment and renewable energy sources, rather than the closure of uncompetitive coal mines. The General Court, Carbuni3n argued, should have considered the question of severability in light of the objectives thus identified.

The Court of Justice, considering the appeal manifestly unfounded, and adopted a reasoned order. It dismissed Carbuni3n’s interpretation of the objectives of the Council Decision as deriving ‘from a confusion between the purpose of that decision and the justifications justifying its adoption’ as set out in the recitals. It thus confirmed that the goal of the Council Decision is to facilitate the closure of uncompetitive coal mines. In this light, it upheld the General Court’s finding that the contested provisions cannot be severed from the rest of the act, as doing so would have the effect that uncompetitive coal mines would not have to cease operations by 31 December 2018, but could continue to operate and receive state aid indefinitely. The appeal was thus dismissed in its entirety.

Giuseppe Nastasi

B.2 Case T-57/11, Judgment of the General Court (Second Chamber) of 3 December 2014, Castelnou Energia SL v European Commission

[State Aid - Electricity - Article 11, paragraph 4 of Directive 2003/54/CE – Free circulation of goods – Protection of the environment – Directive 2003/87/CE]

At the end of last year the Court of Justice issued a ruling in a case concerning the Commission's approval of a Spanish state aid measure which benefits the production of electricity from domestic coal. In its ruling, the Court dismissed the applicant's (Castelnou Energia, the Spanish owner of a combined cycle plant) request for annulment of the Commission decision.

From a procedural point of view, the Court's judgment confirms a less restrictive stance with regard to complaints against state aid decisions. In the past it was very difficult to obtain standing to challenge a state aid decision of the European Commission. In the last few years, the Court relaxed the conditions somewhat. As confirmed once more by this judgment, a competitor can obtain standing if he can demonstrate that he is a "concerned party" under Council Regulation No 659/1999 (the Procedural Regulation), and that his procedural rights under the state aid procedures were violated by the Commission's decision not to open a formal investigation procedure. It should be noted, however, that this only concerns standing with regard to the procedural question. If a competitor also wishes to challenge the merits of the Commission decision, it does not suffice that the applicant qualifies as a "concerned" party. In that case, he also needs to prove that he is individually and directly concerned by the Commission's decision for the purpose of Article 263(4) TFEU.

The applicant in the case at hand challenged the Commission's decision both for violating its procedural rights as well as on the merits of the Commission decision. Although the Court found that the applicant had standing for challenging the procedural issues and for challenging the merits of the Commission decision, it dismissed all of the applicant's pleas.

One of these concerned the question whether the Commission, when dealing with a state aid measure, has to assess whether the measure under investigation does not violate other provisions of the Treaty or of secondary EU legislation, including environmental regulations. Although the Court agreed that, in most cases, such an assessment needs to be carried out by the Commission, it did not see this need when it comes to compliance with environmental regulations. The Commission only needs to concern itself with assessing a state aid measure's compliance with environmental policies if the state aid measure has an environmental aim. For all other measures the Commission will only have to take into consideration the rules that could have a negative impact on the internal market. Environmental rules seem not to fall within this category because, according to the Court, environmental protection is not part of the internal market. A breach of environmental rules can therefore be the subject of a separate investigation concerning non-compliance, but it does not need to be taken into consideration within the context of the state aid investigation.

The Court's ruling with regard to this question is very disappointing and legally incoherent. First, it seems to be at odds with the principle of environmental integration as provided in Article 11 TFEU, or at least seems to limit its applicability considerably. The Court admittedly acknowledged that this principle requires environmental protection to be integrated into the drafting and implementation of other EU policies, including the creation of the internal market. But, since this does not make environmental protection a part of the internal market, state aid investigations do not have to concern themselves with those rules. In our view, this reasoning is contradictory and renders the principle completely obsolete.

Second, as guardian of the Treaties, the Commission acts as one entity and, as such, every DG has to ensure, in all circumstances, that the entire body of EU policies and legislations is adhered to. It seems, therefore, very strange that the Court suggested that compliance of a national measure with the environmental protection policy of the EU does not need to be assessed in state aid investigation procedures.

Maria Kleis

B.3 Case C-378/13 Commission v. Greece, judgment of 2 December 2014

[Failure of a Member State to fulfill obligations - Directive 75/442/EEC - Waste management - Judgment of the Court establishing a failure to fulfill obligations - Non-compliance - Article 260(2) TFEU - Financial penalties - Lump sum payment and penalty payment]

In 2002, the Commission started an infringement procedure under Article 258 TFEU against Greece because a number of uncontrolled landfills were in operation in that country. The number of such landfills was 1125 in February of 2004. In 2005, the Court of Justice found that Greece was in breach of its obligations under EU waste law (case C-502/03).

In 2009 the Commission started a new procedure under Article 260(2) TFEU, as a number of uncontrolled landfills continued to be in operation and those that had been closed had not been cleaned up. In 2013 the Commission appealed to the Court, which found that in May 2014, 70 uncontrolled landfills were still in operation, while 223 landfills had been closed but not cleaned up. In its judgment in the present case, the Court thus fixed financial sanctions against Greece. The Court declared that it was not bound by the Commission's considerations regarding how to calculate the financial sanctions but took into consideration the seriousness of the infringement, its duration and the capacity of Greece to pay. It fixed the penalty payment per operational landfill at 40,000 Euros and at the same sum for each landfill which was not cleaned up, to apply every six months that the landfill was not closed down or cleaned up. The penalty amounted to 14,520,000 Euros to be paid every six months, and for each landfill closed down or cleaned up it allowed Greece to deduct 40,000 Euros.

In addition, the Court decided that Greece had to pay, for the past non-compliance with the judgment in case C-502/03, a lump sum of 10 million Euros, about half the sum which the Commission had suggested. The Court did not detail how it reached this amount but applied the same criteria - seriousness and duration of the infringement, capacity to pay - as when fixing the penalty payment.

It should be noted that proceedings under Article 258 TFEU in case C-502/03 had started in 2002. Between the beginning of those proceedings and the judgment of the Court in the present case, not less than 12 years elapsed. This considerably diminishes the deterrent function of Article 260(2) TFEU. It should also be noted that all information on the number of landfills which were in question came from the Greek Government alone. Neither the original number nor the closing-down and cleaning-up process were verified by the Commission as the Commission has no inspection powers in the environmental area.

Ludwig Krämer

B.4 Case C-196/13 Commission v. Italy, judgment of 2 December 2014

[Failure of a Member State to fulfil obligations — Directives 75/442/EEC, 91/689/EEC and 1999/31/EC — Waste management — Judgment of the Court establishing a failure to fulfil obligations — Non-compliance — Article 260(2) TFEU — Financial penalties — Penalty payment — Lump sum payment]

In 2002, based notably on a report from the Italian Corpo Forestale dello Stato, which stated that in 2002 there were 4866 unauthorised landfills in Italian forestry regions, the European Commission started infringement proceedings under Article 258 TFEU against Italy. It did not focus on specific landfills but claimed that there was a general and persistent failure of Italy to comply with EU waste law. In a 2007 judgment (case C-135/05) the Court found in favour of the Commission.

As Italy had not complied with all its obligations under the judgment in case C-135/05, the Commission brought a new action under Article 260(2) TFEU, which led to the present judgment. Of particular relevance was the number of unauthorised landfills, which were not closed or not cleaned up since the first judgment. Several figures were advanced, ranging from 37 to 368 and 422 landfills. The Court did not go into details regarding this factual problem. It relied on a statement made by the Commission during the Court hearing that the number was 200, declaring that its second judgment meant to enforce the general and persistent failure by Italy. The Court thus fixed the amount to pay at 42,800,000 Euros every six months, from which 400,000 Euros for any closing down or cleaning up of a non-hazardous waste landfill and 800,000 Euros for a landfill containing hazardous waste could be deducted. Furthermore, the Court ordered Italy to pay a lump sum of 40 million Euros.

The judgment suffers from the uncertainty about the number of illegal landfills. All information in this regard came from the Italian authorities and one might well wonder whether the figures are really reliable. Clearly, the Court was driven by the figure of 200 illegal landfills when it fixed the financial penalty. Italy probably does not know itself, how many illegal landfills exist on its territory. The problem remains, however, that Italy might notify the Commission of the cleaning-up of landfills and, when the number of 200 (or 220) is reached, it will not have to pay any more, even though the biggest or most hazardous landfills might continue not to be cleaned up.

Why the closing down or a cleaning up of a landfill in Italy is worth 400,000 Euros, while it is worth only 40,000 Euros in Greece (see judgment in case C-378/2013) is unclear. With regard to the payment of the lump sum, the Court explicitly mentioned that it also took into consideration that more than 20 cases against Italy in waste matters had already been brought before the Court. The amount of the penalty sanction may also have been influenced by this.

Overall, the Commission's approach of bringing a "horizontal" case to the Court, without specifying precisely which landfills are covered by the procedure, is questionable. In a similar case against France, the responsible Minister declared some time after the Court judgment under Article 258 TFEU (case C-423/05) that all landfills had been closed and cleaned up. In that case, the Commission did not even start a procedure under article 260 TFEU, probably for lack of evidence to contradict the Minister.

Finally, it should be mentioned that between the beginning of the procedure against Italy under Article 258 TFEU and the present judgment under Article 260(2) TFEU, 11.4 years passed - much too long a time.

Ludwig Krämer

B.5 Case C-66/13, Green Network SpA v Autorità per l'energia elettrica e il gas, Judgment of 26 November 2014

[Reference for a preliminary ruling - National support scheme for the consumption of electricity produced from renewable energy sources - Obligation of electricity producers and importers to feed into the national grid a certain quantity of electricity produced from renewable energy sources or, failing that, to purchase 'green certificates' from the competent authority - Directive 2001/77/EC - External competence of the Community - Cooperation in good faith]

This judgment addresses the question of whether a Member State may lay down provisions requiring the guarantee of origin for renewable energy issued by a non-EU state to be subject to the conclusion of an agreement between the two countries. The concern being that this may invade the exclusive external competence of the EU.

Italian law (Legislative Decree No 387/2003) allowed operators that import electricity produced from renewable sources to be exempt from the obligation (imposed by Legislative Decree No 79/1999) to purchase green certificates by presenting a copy of the guarantee of origin of that electricity. In the case of green electricity imported from third countries (in this case, Switzerland), the exception was conditional upon the conclusion, between Italy and the third country, of an agreement for the recognition of guarantees of origin.

As the facts of the case occurred before the entry into force of the Lisbon Treaty, the Court of Justice answered the question in light of previously applicable rules, i.e. the EC Treaty and the ERTA case law. It recalled its jurisprudence to the effect that the Community has exclusive external competence where the agreement in question is liable to affect, or alter the scope of, the common provisions of relevant EU law – in this case, Directive 2011/77/EC on the promotion of renewable energy, now replaced by Directive 2009/28/EC. The Court considered that an agreement such as that envisaged by the national law would confer on guarantees of origin issued by third countries an equivalent status, on the internal market, to those issued by EU Member States. Therefore, it would alter the scope of the provisions on guarantees of origin contained in Directive 2011/77/EC, and thus invade the exclusive external competence of the Community.

It has yet to decide whether the guarantees of origin issued by the non-EU State could be used for the limited purposes of the Italian green certificate scheme. The Court noted that Directive 2011/77/EC does not lay down any detailed requirement on the type and content of schemes that Member States introduce to support renewable energy. Member States thus retain significant discretion in this field. However, the Court observed that several provisions of the Directive indicated that its objective is to spur the national production of green electricity – therefore, national support mechanisms must in principle lead to an increase in national production of green electricity. In addition, the Court cited the Directive's provisions on the possible future introduction of Community-wide support schemes as relevant for concluding that the policy area in question is largely covered by EU law. On these grounds, it concluded that this matter also falls within the exclusive external competence of the Community.

Giuseppe Nastasi

B.6 Joined Cases C 103/12 and C 165/12, European Parliament (C 103/12), European Commission (C 165/12) v. Council of the European Union of 26 November 2014

[Actions for annulment - Decision 2012/19/EU - Legal basis - Article 43(2) and (3) TFEU - Bilateral agreement authorising utilisation of the surplus of allowable catch - Choice of the third country that the European Union authorises to utilise living resources - Exclusive economic zone - Policy decision - Fixing fishing opportunities.]

Since the late 1970s, vessels flying the flag of Venezuela have been fishing in the exclusive economic zone off the coast of French Guiana and hence in EU waters on the basis interim measures. Although there were negotiations in the 1990s, no international agreement between the EU and Venezuela was concluded, even though EU and international law require this.

In 2011, the European Commission proposed a Council decision to rectify this. The proposal adopted Articles 43(2) and 218(6)(a)(v) of the Treaty on the Functioning of the European Union (TFEU) as its legal basis. However, the Council of the European Union, after seeking the opinion (but not the consent) of the European Parliament, adopted by Decision 2012/19, a declaration addressed to Venezuela on the granting of fishing opportunities in EU waters to Venezuelan fishing vessels, subject to a number of conditions, including compliance with certain provisions of the EU's Common Fisheries Policy. The Council used Articles 43(3) and 218(6)(b) as the legal basis of the decision and declaration.

The European Parliament (in Case C 103/12) and the European Commission (in Case C 165/12) lodged proceedings seeking an annulment of the decision and declaration on the following grounds:

- (i) incorrect legal and procedural basis (due mainly to errors in regarding the contested decision as an external action fixing fishing opportunities);
- (ii) failure to state adequate reasons for the contested decision;
- (iii) failure to respect the European Parliament's institutional prerogatives; and
- (iv) the distortion of the Council's proposal for a decision.

The Court only ruled on the first of the grounds of complaint listed above (the latter ones not needing examination after the first was decided). It concluded that, the declaration was subject to an area of competence in which the decision-making power lay with the EU legislature and that therefore the contested decision fell within the scope of Articles 43(2) (and Article 218(6)(a)(v) TFEU).

As a preliminary issue, the Court held that an agreement (in international and EU law) had been reached through the 'offer' contained in the declaration and Venezuela's acting to accept it, for

example through applications for fishing authorisations. This agreement was subject to compliance with a number of conditions, including compliance with provisions of the CFP.

The Court explained its reasoning with regard to the application of Article 43(2) and 43(3) TFEU as follows:

“The adoption of the provisions referred to in Article 43(2) TFEU necessarily presupposes an assessment of whether they are ‘necessary’ for the pursuit of the objectives of the common policies governed by the [TFEU], with the result that it entails a policy decision that must be reserved to the EU legislature. By contrast, the adoption of measures on the fishing and allocation of fishing opportunities, in accordance with Article 43(3) TFEU, does not require such an assessment since such measures are of a primarily technical nature and are intended to be taken in order to implement provisions adopted on the basis of Article 43(2).”

It held that the aim and content of the contested decision and declaration, and the conditions contained in it, were more important than any title or words used in the declaration. Therefore the objective of the declaration was not to ensure ‘the fishing and allocation of fishing opportunities’ within the meaning of Article 43(3) TFEU. Rather, the Court said that the purpose of the declaration was “to establish a general framework, with a view to authorising fishing vessels flying the flag of Venezuela to fish in that zone”, meaning that the offer made to Venezuela was “not a technical or implementing measure but, on the contrary, a measure which entails the adoption of an autonomous decision which must be made having regard to the policy interests of the European Union pursued through its common policies, in particular its [C]ommon [F]isheries [P]olicy.”

Particularly in view of the long-standing political (and legal) paralysis surrounding multiannual plans, which is caused by disagreement between the co-legislators on the application of these two legal bases, this case is potentially very helpful to finally help pave the way to progress.

Note: The fishing activities of Venezuelan vessels in EU waters contribute considerably to the social and economic development of the processing industry in French Guiana, which is dependent on these landings. The Court of Justice admitted that a sudden disruption of the long-standing practice of granting access to those waters would be likely to have negative consequences on this industry. It may also interfere with the management of fisheries in EU waters. Therefore the Court of Justice decided that the effects of the decision in question should be maintained until the entry into force, within a reasonable period of time, of a new decision adopted on the proper legal basis.

Agata Szafraniuk and Sandy Luk

B.7 Case C-404/13 The Queen, on the application of ClientEarth v The Secretary of State for the Environment, Food and Rural Affairs; Reference for a preliminary ruling: Supreme Court of the United Kingdom - United Kingdom; judgment of 19 November 2014.

[Reference for a preliminary ruling - Environment - Air quality - Directive 2008/50/EC - Limit values for nitrogen dioxide - Obligation to apply for postponement of the deadline by submitting an air quality plan – Penalties]

This was a reference from the UK Supreme Court for a preliminary ruling on the UK's obligations under Directive 2008/50/EC on ambient air quality and cleaner air for Europe (the Directive).

The Directive sets limit values for ambient levels of various pollutants. Article 13 requires member states to achieve nitrogen dioxide limits by 1 January 2010. However, Article 22 provides that Member States could apply to the Commission to extend this deadline up to 1 January 2015, provided their application was supported by a plan demonstrating that limits would be achieved by the extended deadline. Article 23 separately provides that where limit values are breached after the deadline, Member States must prepare a plan containing “all appropriate measures so as to keep the exceedance period as short as possible.”

In 2011, ClientEarth issued proceedings against the Secretary of State for Environment, Food and Rural Affairs (the competent authority in the UK) on the following grounds. First, the UK was in breach of Article 13 of the Directive for failing to achieve limit values for nitrogen dioxide by the deadline of 1 January 2015. Second, the UK was in breach of Article 22 and/or Article 23 for failing to prepare plans to achieve compliance by 1 January 2015, because Article 22 was a mandatory procedure and, in any event, a plan under Article 23 had to achieve the limits in “the shortest time possible”, which could not be any later than 1 January 2015.

Although both the first instance and appeal courts agreed that the UK was in breach of Article 13 of the Directive, neither accepted that the Article 22 procedure was mandatory or that article 23 required plans to achieve limits by 1 January 2015. Nor did either court exercise their discretion to award a remedy. A further appeal was heard by the UK Supreme Court in 2013, which referred four questions to the European Court of Justice (ECJ) in accordance with the preliminary reference procedure under Article 267 TFEU:

1. Were Member States obliged to apply for a time extension under article 22 where they could not achieve limit values by the original deadline of 1 January 2015?
2. If so, were there any exceptions?
3. What obligations arise out of Article 23, in particular the requirement that plans contain all appropriate measures so as to keep the exceedance period “as short as possible”?
4. What was the role of national courts in providing effective remedies where there had been a breach of the Directive?

The ECJ ruled that Member States are required to apply for a time extension and that there were no circumstances which would justify a failure to comply with this obligation. In doing so it reiterated that limit values impose an obligation of result, which requires them to take all necessary measures to secure compliance.

The ECJ offered little elaboration as to the meaning of “as short as possible”, leaving this for national courts to determine. However, it confirmed that merely producing a plan under article 23 did not postpone the 1 January 2010 deadline.

Finally, the Court held that natural or legal persons have the right to go before national courts to demand that an air quality plan is drawn up in accordance with the Directive, thereby applying the principles first established in Case C-237/07 *Janecek* to the Directive. However, unlike in *Janecek*, which related to plans under a previous directive only requiring a gradual return to compliance with limits, the Court held that: “while member states have a degree of discretion in deciding which measures to adopt, those measures must, in any event, ensure that the period during which the limit values are exceeded is as short as possible.”

The judgment marks a significant step forward in establishing a right to clean air in EU law, reaffirming the right of EU citizens to go before national courts to demand that action is taken to achieve air quality limits. Further, it makes clear that Member States’ discretion to choose what measures to take is limited by the need to achieve limits in the shortest time possible. While it will fall to national courts to determine exactly what “as short as possible” means, the ECJ has made clear that protection of human health must be the overriding consideration, rather than the balancing of competing interests envisaged in *Janecek*.

The case will now return to the UK Supreme Court in 2015 for a second hearing. It is highly unlikely that the UK courts will deem current plans as adequate given that they are not projected to achieve limits until after 2030.

Alan Andrews

B.8 Case C-443/13, Ute Reindl v Bezirkshauptmannschaft Innsbruck, Judgment of 13 November 2014

[Reference for a preliminary ruling - Approximation of laws on animal health - Regulation (EC) No 2073/2005 - Annex I - Microbiological criteria applicable to foodstuffs - Salmonella in fresh poultry meat - Failure to comply with microbiological criteria found at the distribution stage - National legislation imposing a penalty on a food business operator active only at the stage of retail sale - Compatibility with EU law - Effective, dissuasive and proportionate nature of the penalty]

Regulation (EC) No 2073/2005 contributes to protecting public health by laying down rules to prevent microbiological hazards in foodstuff – a major source of food-borne diseases. It includes a microbiological criterion concerning salmonella contamination of fresh poultry meat.

This judgment answers two main questions: (a) whether the requirements of EU food law, notably the microbiological criterion, apply fully at all stages of the food supply chain, including retail distribution, and (b) whether it is lawful for Member States to impose penalties for failure to comply with the microbiological criterion only upon operators at the distribution stage.

The Court of Justice answered the first question by stating that the requirement to comply with the microbiological criterion applies to foodstuff held for the purpose of sale, distribution or other forms of transfer, during a period before their ‘use by’ date or minimum durability date - therefore, at all stages of distribution, including retail sale.

In answering the second question, the Court recalled that the Regulation at issue does not contain rules on liability. Therefore, reference must be made to another act – Regulation (EC) No 178/2002 – which sets out general principles and requirements of food law. That Regulation provides that food business operators at all stages of production, processing and distribution must ensure that foods comply with food law requirements. It also requires that Member States must lay down rules on penalties, and that those penalties must be – in accordance with the usual formula – effective, proportionate and dissuasive. The Court therefore answered the second question by holding that, in principle, Member States are free to penalise food business operators active only at the distribution stage. Doing so may result in a system of strict liability, which – according to the Court – is not, in itself, disproportionate to the objectives of public interest pursued, provided it encourages persons concerned to comply with the rules. It was left to the national court to determine whether the penalty imposed under national law is in line with the principle of proportionality.

Giuseppe Nastasi

B.9 Case C-385/13P Italie v. Commission, judgment of 6 November 2014

[Regulation (EC) No 1260/1999 — Article 32(3)(f) — Infringement procedure in respect of the Italian Republic concerning waste management in the Campania region — Decision not to make interim payments in connection with the ROP measure concerning waste management and disposal]

The Commission had given Italy financial support from the Structural Funds in order to put into practice its operational programme for the Campania region. This programme provided for, among other things, the support of waste management and treatment in the region. Subsequent to several complaints, the Commission opened a procedure under Article 258 TFEU against Italy, because the waste management in the Campania region was not in compliance with EU waste legislation. The Commission informed the Italian government of its intention not to proceed to payments under the Structural funds Regulation 1260/99, as it considered that there was a sufficiently direct link between the operational plan for Campania and the infringement procedure. It refused to pay around 30 million Euros. The Commission took the case to the Court (case C-297/08), which held that Italy was not in compliance with EU waste legislation as regards the Campania region.

Italy brought an action against the Commission, requesting the annulment of the decisions to refuse payment of the 30 million Euros. The General Court dismissed its actions (cases T-99/09 and T-309/99). On appeal, the Court of Justice confirmed this judgment and dismissed the appeal.

The Court of Justice found that it was not necessary that the alleged activity by a Member State itself constituted an infringement of EU law as at the time that the Commission suspended the payment, the Court had not yet adopted its ruling. A direct link between the activity and the infringement action was sufficient for the Commission to suspend payments.

Regulation 1260/99 was, in the meantime, replaced. The present provisions on the suspension and final refusal of payments are found in Articles 142ss. of Regulation 1303/2013.

Ludwig Krämer

B.10 Opinion 2/13 of the Court of Justice of 18 December 2014 concerning the accession of the EU to the European Convention on Human Rights

Article 6 TEU provides that the EU is to adhere to the European Convention on Human Rights and Fundamental Freedoms. To prepare the EU's accession to the European Convention of Human Rights, negotiations took place between the Council of Europe and the EU, represented by the Commission. This led to the elaboration of a draft agreement between the two institutions. According to Article 218(11) TFEU, the European Commission then asked the European Court of Justice (ECJ) whether the draft agreement was compatible with the EU Treaties. The Opinion of 18 December 2014 constitutes the Court's answer to this request.

According to Article 218(11) TFEU, the Opinion of the Court is binding on the EU institutions. This means that if the Court finds incompatibilities between two texts, either the EU Treaties are amended, the EU does not adhere to the Convention, or all points that were alleged by the Court are amended to correspond to the Opinion of the Court – an almost impossible undertaking. The future will show how this problem will be solved.

The ECJ sees seven points of incompatibility:

(1) Decision of the European Court on Human Rights (ECtHR) would be binding on EU institutions, including the ECJ. "[I]t should not be possible for the ECtHR to call into question the ECJ's findings in relation to the scope *ratione materiae* of EU law."

(2) EU Member States accepted in mutual trust that relations between them are governed by EU law, to the exclusion, if EU law so requires, of any other law. The Convention would require Member States to check whether another Member State observes fundamental rights; this contradicts the principle of mutual trust.

(3) The ECtHR may be asked by supreme national courts to give advisory opinions on the Convention. EU law requires that such requests be addressed to the ECJ, Article 267 TFEU.

(4) Article 344 TFEU requests that all disputes between Member States be brought before the ECJ. Disputes under the Convention could oppose Member States to Member States and the EU. Article 344 "precludes any prior or subsequent external control" (of ECJ judgments).

(5) Under the Convention, the EU, or one of its Member States, may be treated under certain circumstances, as co-respondents for breach of the Convention. The ECtHR can then decide that only one of them is to be held responsible for the violation. This decision on the apportionment of responsibilities implies an assessment of the division of powers between the EU and its Member States. However, that is the responsibility of the ECJ.

(6) When a case is brought before the ECtHR which involves EU law, prior involvement of the ECJ is necessary. Only the ECJ may decide whether the ECJ has already given a ruling on the same question of law; this decision should be binding on the ECtHR. In addition, the ECJ must have exclusive competence on the definite interpretation of secondary EU law; otherwise the ECJ right of exclusive competence on the interpretation of EU law is disregarded.

(7) Some decisions under the EU Common Foreign and Security Policy do not come under the jurisdiction of the ECJ. It is not allowed that the ECtHR has jurisdiction on such cases.

This is not the place to make a detailed comment on this Opinion. However, it is worth noting that in Germany, for example, there is a human rights catalogue in the national constitution and also in some Länder constitutions. Most of the objections the ECJ raises could thus also be raised by German constitutional national or regional courts; similar situations are likely to exist in other States. Yet until now, such issues did not prevent the functioning of the Convention.

Ludwig Krämer

European Ombudsman decisions

B.11 European Ombudsman's decision closing her own-initiative inquiry OI/10/2014/RA concerning TTIP

The European Ombudsman launched an inquiry into transparency in negotiations over the Transatlantic Trade and Investment Partnership (TTIP) in July 2014. Over 6000 stakeholders contributed to the public consultation that ensued. On 6 January this year, the Ombudsman adopted her decision, setting out ten ways for the Commission to improve transparency in the TTIP negotiations.

The European Ombudsman's decision in relation to transparency in TTIP roundly confirms not only the right of the public to participate in TTIP, but indeed the democratic function that transparency and public debate serve. The Ombudsman's decision underlines that the traditional style of trade negotiations – confidential and with limited public participation – is ill-equipped to give legitimacy to TTIP. Public participation, the decision observes, will lead to heightened trust, an educated debate, and a better agreement.

The Ombudsman has set out ten suggestions to improve transparency in the negotiations. These include assessing whether a TTIP document can be made public as soon as it is finalised internally – and proactively publishing it where no transparency exception applies.

The other nine Ombudsman suggestions include:

- informing the US of the importance of making common negotiating texts available to the EU public before the TTIP agreement is finalised;

- publishing an extended list of EU officials who must disclose meetings they hold on TTIP;
- publishing documents it has already released;
- ensuring that all submissions from stakeholders made in the context of TTIP are published.

The Commission has until 6 March to follow up.

In parallel, and under increased pressure to be more transparent, the Commission has published additional documents relating to TTIP on its website. Textual proposals – or legal texts that have been tabled for discussion at previous negotiating rounds – are particularly welcome, as they provide real substance that can be assessed by the public. It also means their implications – for issues ranging from investment protection, to chemicals and climate change – can be considered.

This is a first, self-initiated step and follows on from the Commission's promise made in November 2014 for a “fresh start” in relation to transparency in TTIP.

The ball is now in the Commission's court.

Julia Salasky

B.12 Case 1869/2013/AN, decision of 3 November 2014

An applicant submitted 18 requests for information to the Commission, which concerned around 300 documents. The Commission invoked Article 6(3) of Regulation 1049/2001 on access to documents held by EU institutions, according to which a fair solution should be found when the application concerned a very long document or a very large number of documents. Discussions with the applicant on a fair solution - the Commission proposed a staggered disclosure - failed. The Commission disclosed the documents, but did not respect the time limits provided under Regulation 1049/2001.

The Ombudsman stated that according to the Court of Justice (case C-127/13P), a fair solution could only concern the content or the number of documents, but not the time limits. However, in view of the specific circumstances of the case - the application had referred to "all" documents, 69 of those documents originated from third persons, for some documents other exceptions for disclosure applied - she did not see a case of maladministration in the non-respect of the time limits.

Ludwig Krämer

B.13 Case 216/2009/(TN)(DK)TN, decision of 4 November 2014

In November 2007, an NGO asked the Commission for access to background material concerning a communication of the Commission on the application of EU law. The Commission granted partial access, but refused access to 21 documents that concerned the role of Member States and the proposal for prioritisation of complaints.

In 2009, the NGO appealed to the Ombudsman. The Ombudsman took note of the Commission's arguments for non-disclosure. In her draft recommendation, she refuted these arguments and recommended disclosure of the documents. The Commission then argued that it had already provided extensive reasons justifying the application of the exceptions to disclosure. The Commission did not even try to refute the Ombudsman's arguments. The Ombudsman noted "a flagrant unwillingness to engage in a constructive dialogue on how best to apply" the provisions of Regulation 1049/2001. She concluded:

"The Commission has not provided sufficient substantive and convincing argument to justify the application of the exceptions to public access which it has invoked. In its disregard for the principle of transparency and for the fundamental right of public access to its documents, the Commission has contributed to a further undermining of public trust in the European Union and its institutions.

The Commission has failed to comply with its obligation to give a detailed opinion on the Ombudsman's draft recommendation, as laid down by Parliament in the statutes of the European Ombudsman.

The above constitute instances of maladministration".

After seven years, the NGO still has not obtained access to the documents. And it is not very likely that the Commission lets itself be swayed by the Ombudsman's remarks.

Ludwig Krämer

National courts' decisions

B.14 UK Department for Environment, Food and Rural Affairs v The Information Commissioner and The Badger Trust. [2014] UKUT 526 (AAC)

This was an appeal by the UK Department for Environment, Food and Rural Affairs (DEFRA) against a 2013 decision by the UK's Information Commissioner. The case concerned four risk and issue logs (RILs) relating to meetings in 2010 of a project board established by DEFRA as part of a project to oversee the delivery of the policy on badger culling. The badger cull policy has been controversial.

Other documents requested by The Badger Trust in May 2012 had been made available by DEFRA in June 2012 but the RILs had been withheld on the grounds of two exceptions in the Environmental Information Regulations 2004: the 'internal communications exception' and the 'confidential proceedings exception'. Both exceptions may be invoked only if the public interest in maintaining the exception outweighs the public interest in disclosing the information. In June 2013 the Information Commissioner had held that the former did not apply and that, although the latter applied, the balance of the public interest was in favour of disclosure. In this appeal the judges also concluded that disclosure of the RILs did not give rise to a significant risk of damage to the public interest.

A noteworthy feature of this judgment is that the judges explicitly acknowledged that they would not be following the 'orthodox' approach of deciding first whether a particular exception is engaged and subsequently balancing the public interests in favour of and against disclosure. Instead they proceeded directly to consider the public interest balance.

In considering the appeal the judges made the following interesting remarks in relation to determining the balance of the public interest:

- While there may be a need for space for public authorities to 'think in private' while policies are being worked out, the need to maintain that privacy diminishes over time. However, it is not always the case that, once a policy has been announced, there could be no further public interest in withholding information. The state of the policy and the thinking at the time are among the relevant factors to consider when weighing up the public interest in disclosing or withholding the information requested.
- There is no 'breach of trust' when a public authority fulfils its statutory obligations under the Freedom of Information Act or Environmental Information Regulations. The legislation must be taken to intend that in certain cases it will be in the public interest for an authority to disclose information provided in confidence.
- The judges noted a mismatch between the arguments for non-disclosure advanced by DEFRA and the content of the disputed information. In their analysis, the RILs contained 'nothing that an intelligent reader would not expect to see' and did not reveal any significant information to those minded to bring legal challenges to the badger cull.

- The judges also noted inconsistency in the approach by the First-Tier tribunal to the date (date of the information request, date of the public authority's final decision on the request or other date) that should be considered when examining the balance of public interest. However, they chose not to rule on this question in this case for procedural reasons.

The fact that similar documents to the RILs are published by DEFRA seems to have been persuasive in bringing the judges to the conclusion that disclosure of the disputed information would not jeopardise robust discussion on present or future project boards. In fact, they concluded that in the case of the badger cull policy, the disclosure of the RILs would either demonstrate a proper and robust analysis or a flawed one, and (either way) would inform and promote sound decision-making now and in the future.

Catherine Weller

B.15 *The Secretary of State for Communities and Local Government v Venn* [2014] EWCA Civ 1539

The UK's costs protection in environmental cases is not Aarhus Convention compliant says the Court of Appeal

The Claimant, Ms Venn, applied to quash a planning inspector's decision to allow the owner of the land next door to her London property to build another dwelling in his garden. Her challenge was by way of statutory appeal under s.288 of the Town and Country Planning Act 1990. Mrs Justice Lang in the court below granted a Protective Costs Order (PCO) of £3,500. The Secretary of State appealed.

The first question was whether the Claimant's s.288 application fell within Article 9(3) of the Aarhus Convention, which states that members of the public should have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment. The Court of Appeal (CA) agreed with the previous judge's conclusion that it did, rejecting an argument by the Secretary of State that the Claimant was not challenging a public authority's contravention of a provision of national law relating to the environment because this case involved a policy. Article 9(3) would be deprived of much of its effect in the UK if such a distinction between law and policy was drawn.

The second, more difficult, question concerned the principles upon which the Court should exercise its discretion to grant a PCO in an Aarhus case in which directly enforceable EU environmental Directives are not engaged. Under Article 9(4) of the Convention, the procedures for bringing a challenge under Article 9(3) are to be adequate and effective and "not prohibitively expensive". On this basis, when someone brings a judicial review "all or part of which is subject to the provisions" of the Aarhus Convention, they may not be ordered to pay costs exceeding £5,000 for individuals and £10,000 for others (CPR 45.41, 45.44 and Practice Direction 45). Ms Venn conceded that statutory appeals are not subject to these provisions but said the court

should exercise its inherent jurisdiction to make a PCO on the basis that the case involved an environmental challenge within Article 9(3) Aarhus. Mrs Justice Lang recognised the CPR 45.41 provisions did not apply but granted a PCO on the basis that “the Corner House criteria [which set out the guidelines for making a PCO] should be relaxed to give effect to the requirements of the Aarhus Convention.”

Sullivan LJ in the CA was persuaded that the Secretary of State’s appeal must be allowed, finding that once it is accepted that the exclusion of statutory appeals and applications from CPR 45.41 was not an oversight, but a deliberate expression of legislative intent, it necessarily follows that it would not be appropriate to exercise a judicial discretion so as to sidestep its deliberate limitation to judicial review. On top of that, exercising this discretion would give effect to an international Convention which was not made directly effective by the EU and which has not been incorporated into UK domestic law. However, Sullivan LJ was reluctant in allowing the appeal, recognising that confining CPR 45.41 to judicial review means that it is not Aarhus compliant. He stated that “[a] costs regime for environmental cases falling within Aarhus under which costs protection depends not on the nature of the environmental decision or legal principles upon which it may be challenged, but upon the identity of the decision-taker, is systematically flawed in terms of Aarhus compliance”.

So where does that leave the UK in terms of its future compliance with Aarhus? EU case law (in particular *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*, case C-240/09 – European Court Reports 2011 I-01255 – the ‘Brown Bear’ case) tells us that Article 9(3) of the Aarhus Convention does not have direct effect. However, international conventions entered into by the European Union are binding on Member States under Article 216(2) of the Treaty on the Functioning of the European Union (TFEU). As the EU has signed the Aarhus Convention, it is therefore settled EU case law that its provisions form an integral part of the legal order of the EU (as also recognised in the Brown Bear case).

It follows from the Venn case that the UK is still failing to comply both with international and EU law with regard to access to justice under Article 9(3) and 9(4) of the Aarhus Convention. In the case itself, the court was told that the UK government is currently looking at the costs regime for environmental cases. According to Sullivan LJ, the government will now be able to take the Court of Appeal’s own conclusions on this appeal “into account in the formulation of a costs regime that is Aarhus compliant”. If the UK does not change its rules, further legal challenges are likely to follow.

Heather Hamilton

EU institutions' decision

B.16 New Qualified Majority Voting (QMV) rules from 1 November 2014

Since the Treaty of Nice voting in the Council of Ministers was based on 'weighted votes': votes proportionate to a Member State's size and population, with small Member States over-represented. While Germany, France, UK and Italy had 29 votes, Malta, having only a small fraction of French, German or Italian population, had 3 votes. This system was criticised for its complexity and unfairness.

Starting from 1 November 2014 the new rules based on the Lisbon Treaty came into force. They are now better taking into account the population, reflecting its size and influence and are strengthening the position of larger countries (e.g. Germany). In the new system Council decisions require a 'double majority' meaning:

- 55% of the Member States'
- 65% of the population of the EU
- a 'blocking minority' might be created with at least 4 Member States and 35% of the EU population (~177 million)

However, from 1 November 2014 until 31 March 2017 there will be a transitional period: a Member State will have the right to use the 'weighted vote' (old) rule.

This double system (i.e. Nice and Lisbon based) until 2017 will make it more difficult for lobbying since the power balance may change while the voting system changes. The main obstacle being that it is difficult to predict how often the Nice system will continue to be used. Also uncertain is whether the old Nice system will apply automatically when requested, or justification will have to be provided and when it will be possible for requests to be made..

Oskar Kulik

Section C: Legal journal articles

C.1 Finck M., *Above and Below the Surface: The Status of Sub-National Authorities in EU Climate Change Regulation*, *Journal of Environmental Law*, 2014, Vol. 26, Issue 2, pp. 443-472

This article discusses the perceived mismatch between the letter of the Treaties, which distributes law-making competences to the EU and Member States in a seemingly zero-sum game, and the reality in which a plethora of sub-national authorities (regions, municipalities and the like) act not as mere implementers of higher-ranking rules, but as autonomous regulators.

The article starts by reviewing the allocation of legislative competences under the Treaties, which would suggest that climate change should be regulated at EU level, rather than national or sub-national level. It then examines climate change regulation in Germany's federalist system and notes the many actions taken by sub-national authorities in a variety of related fields. Examples include green public procurement, awareness-raising and renewable energy. These actions are sometimes based on express provisions of secondary EU law, which for example provide for local conditions to be taken into account when implementing relevant rules.

In other instances, they are made possible by EU funds or funding from national authorities. Together, they provide evidence of a regulatory environment which the author characterises as both polycentric – regulation originates from several, not only two, centres of authority – and porous – the different levels of authority intertwine in a dynamic process of mutual learning, experimentation and innovation. In this environment, sub-national authorities emerge as autonomous regulators with regard to climate change. EU law, for its part, appears capable of accommodating this reality to a larger extent than it appears at first sight from the letter of the Treaties.

This article sheds light onto the importance of regulatory actions by authorities at sub-national level in relation to climate change. This is a policy area governed by several pieces of EU secondary law, which set objectives that those authorities' initiatives can help achieve. However, the fact remains that, in practice, the approach usually taken by the European Commission in assessing whether or not a Member State complies with secondary EU law focuses on rules adopted at national level (if nothing else for the difficulty inherent in assessing the combined effects of sub-national actions), with the result that the myriad initiatives taking place at sub-national level may hardly be taken into account in that assessment.

Giuseppe Nastasi

C.2 "What role for administrative courts in granting effective legal protection in the energy sector?"

Prof. Dr. S. Lavrijssen, European Energy and Environmental Law Review, 2014, Vol. 23, Issue 6, pp. 219-232

This article deals essentially with two problems. The first is the issue of the role of national regulatory authorities in the application of the EU energy directives in the EU Member States, and consequently of the scope of judicial review undertaken by EU and national courts when assessing the actions of such regulators. The second is the issue of judicial review conducted by the competent Dutch court in light of its activity in cases concerning energy sector regulation.

As to the first issue, the author states that in light of applicable EU law, the National Regulatory Authorities (NRAs) should be able to exercise their regulatory powers. Implying therefore the power to make economic and legal choices in an autonomous way, and that EU directives explicitly provide that Member States have to ensure that energy authorities are granted the powers which should enable them to perform the tasks entrusted to them in an efficient and timely manner. This independence and scope of powers granted to the NRAs on the basis of EU legislation may be, according to the author, at odds with national constitutional principles.

In order to deal with the issue of variation in giving effect to the principle of legal protection by the member states and their judiciaries, the author attempts to set forth a normative legal framework to assess how the national administrative courts should review regulatory decisions of the NRAs.

According to the author, in principle it is the Member States that decide which standard of review should be applied by the courts, provided that the EU law principles of effectiveness and equivalence are met. The author invokes the "sliding scale" method of review, ranging from a very marginal, restrained test to a very intensive review, between which there is a large middle area. This sliding scale, combined with the relevant ECJ case law and applicable EU law, means that the courts – both at EU and national levels – must fully review:

- (i) whether the correct procedures have been followed;
- (ii) whether the administrative decisions comply with the principles of good administration;
- (iii) whether the facts are accurate, reliable and consistent;
- (iv) whether the facts are complete and cover all relevant information for the assessment of the situation;
- (v) whether the law was interpreted correctly;
- (vi) whether the decision was reasonable.

The author then goes on to assess the conduct of the competent judicial authority in the Netherlands, i.e. the Trade and Industry Appeals Tribunal (CBB) in cases concerning the regulation of the national gas transmission grid between the regulatory period 2006 – 2009 and 2009 – 2012.

Based on an analysis of such cases, the author states that during the period between 2002 and 2013, the CBB reviewed a number of crucial regulatory decisions of the Dutch Authority for Consumers and Markets, (ACM) the authority responsible for ensuring implementation of the European energy directives in the Netherlands. The decisions were reviewed in a restrained way, without fully reviewing the establishment, completeness and the accuracy of the facts. According to the author, the CBB awarded a large degree of discretion to the ACM when weighing relevant interests and, in so doing, allowed the ACM to give priority to the interests of the investors, without explaining and motivating this in the light of the goals and provisions of EU law. The author recommends, therefore, that the CBB conduct in future a more thorough review of the appellants' legal arguments and of the correctness and soundness of the facts underlying the ACM's legal and economic choices.

Bolek Matuszewski

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