European Environmental Law Observatory

News

Issue of March 2015

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

The observatory 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, decisions of the European Ombudsman as well as other official decisions from EU institutions; and highlights questions raised in recent doctrinal contributions, hand-picked by the Observatory's staff from a selection of major legal journals.

This issue covers materials published between January 13, 2015 and March 15, 2015.

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ClientEarth

Section A: Aarhus Convention

Findings of the Aarhus Convention Compliance Committee

A.1 Findings and recommendations with regard to communication ACCC/C/2012/77 concerning compliance by the United Kingdom of Great Britain and Northern Ireland, 12 January 2015

Greenpeace (hereinafter 'the communicant') sought judicial review of the designation of the National Policy Statement for Nuclear Power generation in the UK. National policy statements are issued by the Secretary of State and set out national policy in relation to one or more specified descriptions of development. In the present case, it set the framework for future policy on applications for the construction of nuclear power stations. The Fukushima accident occurred before the Statement was adopted but after public consultation on the draft had closed.

The communicant's application for judicial review was refused by the Court and it was ordered to pay the UK government the amount of £ 11,813, later reduced to £ 8,000 after the communicant argued that the amount was excessive under Aarhus. The Court stated that "*the Aarhus Convention is itself irrelevant; it has only been incorporated into UK law to the extent that an EC Directive is involved; the Directives were not involved, other than as an element of background*".

The communicant submitted a communication to the Compliance Committee under the Aarhus Convention alleging failure of the UK to comply with the Convention's provisions on access to justice. The Communicant alleged that the UK failed to comply with Article 9, paragraphs 4 and 5 of the Convention because of the high costs ordered in the case of refusal of applications for judicial review in environmental cases. The Compliance Committee found that the amount of £8,000 the communicant had to pay makes the procedure prohibitively expensive. One of the elements the Committee took into consideration is that the communicant was seeking to defend the public interest in the protection of the environment and the only available option for doing so was the submission of an application for permission to apply for judicial review.

The Committee added that the fact that the communicant did not apply for a Protective Cost Order (PCO) nor exhausted all domestic remedies, namely to appeal the costs award or to seek the renewal of its application for permissions to apply for judicial review, was, contrary to what the UK argued, "entirely understandable". The Committee recalled that the Sullivan report estimated the cost of seeking a PCO to be in the order of £2,500-£7,500 with no certainty that after incurring such expense a PCO would actually be granted. The communicant's decision not to appeal the cost award or to seek the renewal of its application for permission to apply for judicial review for fear of facing even higher costs than the £8,000 they already had to pay was also accepted by the Committee.

The Committee also pointed out that the UK, being a party to the Convention, was bound by the Convention and that "*the nature of its national legal system or lack of incorporation of the*

Convention in national law are not arguments that it can successfully avail itself of as justification for improper implementation of the Convention".

To conclude, the Committee found that the UK failed to comply with Article 9, paragraph 4 of the Convention since the cost order awarded against the communicant made the procedure prohibitively expensive and recommended that the UK "*ensure that its new Civil Procedure Rules regarding costs are applied by its courts so as to ensure compliance with the Convention"*.

Anaïs Berthier

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

B.1 Case C-531/13, Marktgemeinde Straßwalchen and Others v Bundesminister für Wirtschaft, Familie und Jugend, 11 February 2015

(Environment - Directive 85/337/EEC - Assessment of the effects of certain public and private projects on the environment - Projects which must be made subject to an assessment - Exploratory drillings - Annex 1, No 14 - Concept of 'extraction of petroleum and natural gas for commercial purposes' - Obligation to conduct an assessment in the case of extraction of a certain quantity of gas -Annex II, No 2(d) - Concept of 'deep drillings' - Annex III, No 1 - Concept of 'cumulation with other projects'.)

In this judgment, the Court of Justice addresses the question of whether exploratory drilling for natural gas is an activity for which an environmental impact assessment must be carried out under Directive 85/337/EEC (now replaced by Directive 2011/92/EU). The case originated from a decision by an Austrian authority to authorise exploratory drilling to a depth of 4,150 metres without an environmental impact assessment.

An environmental impact assessment would be mandatory if such an activity constituted 'extraction of...natural gas for commercial purposes where the amount extracted exceeds... 500,000 m^3/day…' (Article 4(1) and Annex I, No 14, Directive 85/337/EEC).

The Court of Justice stated that exploratory drilling certainly is an activity carried out 'for commercial purposes', as it is intended to ascertain the feasibility – and therefore the profitability – of exploiting a deposit. Only drilling performed for research purposes, rather than in preparation of an economic activity, would not be 'for commercial purposes'.

However, the Court took the view that, in the light of 'the context and objective' of the Directive's provision, the requirement does not extend to exploratory drillings. The reason for this, argued the Court, is that the provision aims at projects of a certain duration which involve 'relatively large-scale quantities of hydrocarbons to be extracted'.

Nonetheless, the Court continued, exploratory drilling still falls under the scope of the Directive as it represents a form of 'deep drilling' – an activity for which Member States can decide whether or not to require an environmental impact assessment based on certain conditions (Article 4(2) and Annex II, No 2(d), Directive 85/337/EEC).

In the opinion of this author, the Court's reasoning is open to question. The Court reaches the conclusion that exploratory drilling does not require a mandatory environmental impact assessment based on a reference to 'the context and objective' of the relevant provision of the Directive. However, the Court does not explain its understanding of that context and objective. The recitals to the Directive provide useful clarifications in this regard. They state that 'the best environmental policy consists in preventing the creation of pollution or nuisances' and refer to 'the need to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes' (Recital 1, Directive 85/337/EEC). Isn't environmental protection 'the context and objective' of the Directive? Wouldn't this goal be better pursued by requiring that an environmental impact assessment must be carried out? The interpretation endorsed by the Court in this judgment appears to run counter to the objective of the Directive. Such a position deserves a more developed explanation. This is particularly true because the Court has never been reluctant to interpret EU law provisions in a way that effectively ensures EU policy objectives are achieved (or do environmental objectives come second to worthier causes?).

It is certainly true that the Directive's requirements apply to projects which have significant effects on the environment (e.g. Recital 5 refers to a 'major effect on the environment', Recital 6 mentions 'significant environmental effects'). This fact translates into the threshold expressly laid down in the Directive's provision quoted above. Counter-intuitively, the Court does not refer to this threshold to determine whether or not the requirement for an environmental impact assessment applies. It states that 'the context and objective' of the provision indicate that it applies to projects concerning 'relatively large-scale quantities of hydrocarbons', but it doesn't see fit to use the threshold set out in the law to determine just what a 'large-scale quantity' is.

Had the Court applied the threshold laid down in the Directive, a mandatory environmental impact assessment might have been required, as the authorisation concerned a quantity of natural gas (1,000,000 m^3) which exceeds the threshold (500,000 m^3/day). It is true that the Directive's threshold is expressed in daily quantities, but there is no suggestion in the judgment that a daily figure was set out in the authorisation that would have placed the project below the threshold. The judgment does mention that the referring national court expressed the belief that daily quantities would not exceed the threshold. But this is, at best, a question of fact. Compliance with EU law must also be guaranteed in law – that is, in the terms of the authorisation. If the project had indeed been below the threshold, then the Court of Justice could have safely concluded that a mandatory environmental impact assessment was not required. But this conclusion would have been based on the threshold set out in the Directive – not on a questionable reading of 'the context and objective' of the Directive's provisions and on the supposed character of the activity 'exploratory drilling'.

Giuseppe Nastasi

B.2 Case C-48/14, European Parliament v Council of the European Union, 12 February 2015

(Action for annulment — Directive 2013/51/Euratom — Choice of legal basis — EAEC Treaty — Articles 31 EA and 32 EA — FEU Treaty — Article 192(1) TFEU — Protecting human health — Radioactive substances in water intended for human consumption — Legal certainty — Sincere cooperation among the institutions)

In this case the Court of Justice dismissed the European Parliament's application for annulment of Directive 2013/51/Euratom laying down requirements for the protection of the health of the general public with regard to radioactive substances in water intended for human consumption. The Parliament's main arguments were driven by its role in the legislative process of the contested Directive, which was adopted on the basis of Articles 30 and 31 of the EURATOM Treaty. These provisions allow for the adoption of basic standards for the protection of public health against the dangers arising from ionizing radiations, and include the Parliament in a consultative role only. The alternative legal basis of Articles 191(1) and 192(2) TFEU on public health in general, includes the Parliament as a co-legislator.

The Parliament's first argument was that the choice of legal basis was incorrect because the Directive fits within the regulatory framework already established by EC Directive 98/83 on the quality of water intended for human consumption, which also regulates minimum standards for radioactive substances in water. The Court of Justice reaffirmed that the choice of legal basis must rest on objective factors that are amenable to judicial review, including the purpose and content of the measure. The fact that a different legal basis was chosen for other EU measures which display similar characteristics is irrelevant in that regard. The Court agreed with the Council that Articles 30 and 31 EA constituted the correct legal basis for three reasons. First, both the purpose and the content of the contested Directive correspond to the purpose and content of a basic standard within the meaning of Article 30 EA. Second, Articles 30 and 31 EA constitute a more specific legal basis than Articles 191(1) and 192 (1) TFEU in that they refer explicitly to the protection of workers and the general public against the dangers arising from ionising radiations. Third, were Articles 191(1) and 192(1) to be judged the appropriate legal basis for all measures aimed at protecting human health, Articles 30 and 31 EA could no longer serve as a basis for action at EU level. This would be in violation of the principle enshrined in Article 106a(3) EA, according to which the provisions of the TFEU are not to derogate from the provisions f the EAEC Treaty.

The Parliament then argued that the overlapping of the two schemes, i.e. that of Euratom Directive 2013/51 on the one hand and EC Directive 98/83 on the other, undermined legal certainty. The Court rejected the argument because it found there to be no contradiction in the relationship of the two schemes. In addition, as EC Directive 98/83 concerns the general quality of water intended for human consumption, the contested Directive is lex specialis with regard to the protection of human health against the dangers of radioactive substances in such water.

Finally, the Parliament argued that the contested Directive breached the principle of sincere cooperation in that it artificially separated part of a legislative act in force in order to be the subject of a separate legal measure, the adoption of which precluded the involvement of the parliament as a co-legislator. The Court dismissed this argument on the basis that it had already found Articles 30 and 31 EA to be the correct choice of legal basis according to the objective factors identified above. The fact that the Parliament has a consultative role only under Articles 30 and 31 EA was the result of the choice made by the framers of the treaties and not from an infringement of the principle of sincere cooperation.

If the Council did not intend to exclude the Parliament from the legislative process it is hard to understand why it simply did not opt to amend the standards already adopted in EC Directive 98/83. This rather formalistic ruling from the Court leaves the Parliament with little judicial protection where a valid alternative legal basis exists which excludes it from the legislative process. One wonders if this is really in the interests of democratic decision making in the EU.

Anne Friel

B.3 Case C-498/13, Agrooikosystimata EPE v Ipourgos Oikonomias kai Oikonomikon, Ipourgos Agrotikis Anaptixis kai Trofimon, Periferia Thessalias (Perifereaki Enotita Magnisias), 5 February 2015

(Reference for a preliminary ruling — Agriculture — Common agricultural policy — Regulation (EEC) No 2078/92 — Agricultural production methods meeting the requirements of environmental protection and upkeep of the countryside — Long-term set-aside of agricultural land for purposes connected with the environment — Agri-environmental aid paid to farmers and co-financed by the European Union — Status as recipient of such aid)

This was a request for a preliminary ruling from the Greek Council of State concerning the interpretation of Council Regulation 2078/92/EEC on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside and Commission Regulation 746/96/EC laying down detailed rules for its application. The case concerned financial aid paid to Agrooikosystimata, a private limited company, in return for the creation of a nature reserve, under the long-term set-aside scheme for agricultural land ('the LTSAS').

The question that the Court of Justice was asked to consider was whether the beneficiaries of the LTSAS under Council Regulation 2078/92/EEC and Commission Regulation 746/96/EC are required to be farmers or whether it is sufficient that they assume the financial risk of the eligible land and are responsible for its management.

In 1997 Agrooikosystimata leased land with a view to establishing biotopes and ecological parks. In 1998 it entered into a land use contract with the Ministry of Agricultural Development of Food within the framework of the LTSAS, under which the land was entered into the scheme for

20 years. In 2005 the Central Monitoring Committee for the LTSAS in Greece found that Agrooikosystimata did not fulfill the criteria to receive the aid because, at the time of the inclusion of the agricultural land in question, Agrooikosystimata was not earning an income from agricultural activities which it would lose as a result of the planned reduction in production. The land use contract was terminated and the land excluded from the LTSAS. On appeal, the Administrative Court of Appeal of Larisa agreed with that decision. Agrooikosystimata lodged a further appeal to the referring court.

The Court of Justice considered Agrooikosystimata's argument that Article 2(1) of Regulation 2078/92/EEC identifies the beneficiaries of the scheme as "agricultural landholders", defined as the person taking the economic risk associated with holding the land, and that the status of "farmer" was not required. The Court found linguistic discrepancies among the different language versions of Article 2(1), with the Greek, French, Italian and Dutch language versions referring to the notion of "agricultural landholder", while the Spanish, German and English language versions referred to the notion of "farmer". The Court recalled its previous case-law, whereby divergences among the various language versions of a text of EU law must be interpreted by reference to the purpose and general scheme of the rules of which it forms part. Following an examination of the recitals and provisions of Regulation 2078/92/EEC, the Court held that the objective of the LTSAS was to regulate the production of agricultural products by providing financial compensation to farmers who undertook to set aside from their agricultural activity part of their agricultural holding for environmental purposes and the protection of natural resources. It followed from this that only persons who had previously produced agricultural products could participate in the LTSAS, a judgment which effectively excludes Agrooikosystimata as a beneficiary.

Anne Friel

B.4 Case T-482/12, International Hilfsfonds eV v European Commission, 9 January 2015

(Action for annulment — Access to documents — Regulation 1049/2001/EC — Implied refusal of access to document — Execution of a judgment of the Court — Application initiating proceedings — Disregard of formal requirements — Article 44(1)(c) of the Rules of Procedure — Inadmissible)

Although this access to documents case does not involve environmental information, it is a useful demonstration of the pitfalls that can be experienced by requesting parties when the institution in question is reluctant to disclose information. In 2002, German NGO, Hilfsfonds, made an access to documents request to the Commission under Regulation 1049/2001/EC. In the face of continued refusal by the Commission to disclose all of the documents requested, Hilfsfonds complained to the European Ombudsman in 2004 (resulting in a finding of maladministration against the Commission) and lodged two applications for annulment with the General Court (one in 2005 and another in 2010), both of which failed on procedural grounds. In 2012 the General Court finally ruled on the merits of the case, and annulled the Commission's

refusal to disclose a number of the documents originally requested 2002 (case T-300/2010). Hilfsfonds subsequently wrote to the Commission asking it to disclose the identified documents in accordance with its responsibility to comply with the Court's decision under Articles 266 and 254 TFEU. The Commission responded on 28 August 2012, stating that Hilfsfonds' letter constituted a new request for access to documents under Regulation 1049/2001/EC and providing a CD ROM with copies of the documents it considered to be those identified in the Court's ruling. On 4 October 2012, Hilfsfonds submitted a confirmatory application, stating that the CD-ROM did not contain all of the documents identified by the Court. When the Commission did not reply, Hilfsfonds asked the General Court to annul the Commission's implied refusal of the confirmatory application and made a subsidiary request for the Court to annul the Commission's decision of 28 August 2012 for failing to comply with the obligations handed down in Case T-300/10.

The General Court ruled the application to be inadmissible on the basis of Article 41(1)(c) of the Rules of Procedure of the General Court, which requires that applications must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based. With regard to its first request, the Court found that the application failed to establish why the Commission's letter of 28 August 2012 should qualify as a response to a new application for access to documents in accordance with Article 7(1) of Regulation 1049/2001/EC, and therefore why the Commission's lack of response to the confirmative request should be considered, by virtue of Article 8(3) of Regulation 1049/2001/EC, as an implied decision to refuse access to the documents, against which an application for annulment can be lodged. In addition, even if the Court did consider the Commission's lack of response to constitute such an implied decision, the application failed to identify the legal grounds on which the Court should annul it. With regard to the second request, that the Court should annul the Commission's decision of 28 August 2012 because it did not comply with the General Court's ruling in case T-300/10, the Court found that the application did not refer to any facts capable of substantiating this claim. Although the relevant arguments and facts were laid out as an annex to the application, the Court held that this was incapable of remedying the deficiency as it is not the Court's role to research and identify in the annexes the arguments that it considers to be the grounds for the application.

The procedural deficiencies in Hilfsfonds' application are beyond doubt and the case serves as a stark reminder that getting the procedure right is just as important as the substance of a case. However, taken as a whole, the history of this case leaves the reader with a sense of deep frustration. Thirteen years after Hilfsfonds' initial request, and despite the findings of the European Ombudsman and the General Court in case T-300/10, the Commission is yet to respond in a manner that complies with Regulation 1049/2001/EC.

Anne Friel

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Section C: European Ombudsman decisions

C.1 Decision closing the inquiry into complaint 2266/2013/JN against the European Commission

The complainant submitted to the Commission a request for access to documents under Regulation 1049/2001 for documents which related to EU funded water sector reform projects in Egypt including studies, evaluation reports , the programme minutes, studies or evaluations of the Donor Assistance Group or Donor Partners group ('DGP'), information on the Stakeholder and Civil Society Consultations on the projects.

The Commission provided partial access to the requested documents. The Egyptian government and the representative of the UN involved in the projects opposed disclosure of the detailed reports and remaining documents.

The Commission stated that the DPG documents were not in "*its ownership*" as the DPG was composed of "*23 bilateral partners and 17 multilateral organisations, plus the private sector and sometimes the Egyptian government*". They were therefore third-party documents and the Commission had to consult them before deciding whether to give access. As regards the information on consultations with civil society and stakeholders carried out by the DPG and the Commission, they both argued that they did not have any written record of their consultations in respect of the water sector. The UN resident coordinator in Egypt also replied that no documents relating to the work of the DPG (discussions, minutes, studies and evaluations) were compiled.

In view of these refusals, the Commission considered that access had to be denied under Article 4(1) of Regulation 1049/2001 on the protection of international relations, as disclosure of the documents would have harmed the EU's relations with Egypt.

On the allegation that the decision of the Commission was unduly delayed, the Ombudsman saw no reason to examine in detail the Commission's compliance with the deadlines set out in the regulation as the Commission had apologised. This is surprising given that it took almost a year for the Commission to provide a final reply to the request when the regulation requires the institution to reply within 15 working days or a month in the case that a large number of documents were requested. The decision therefore comforts the Commission in the fact that they can get away with not complying with this requirement.

On the substance, the Ombudsman recalled that the relevant notion for the purposes of access to documents under Regulation 1049/2001 is that of 'possession' and not 'ownership', in that the regulation applies to all the documents 'held' by the EU institutions. However, the Ombudsman found the explanations provided by the Commission reasonable and acceptable. The Ombudsman also found the Commission's use of Article 4(1) of the regulation acceptable. She further noted that the complainant has not put forward any arguments challenging the Commission's position on this issue. However, neither the Commission nor the Ombudsman explains how disclosure would effectively undermine the relations of the EU with Egypt.

The Ombudsman however adopted a further remark stating that "The Commission should keep an adequate written record of its meetings held in the context of public consultations. This would increase transparency". This is quite a weak remark as institutions are already under an obligation to keep a written track of their meetings and activities. Moreover, in this case it is the actual existence of consultations that was at stake. We could have therefore expected a stronger statement.

Anaïs Berthier

C.2 European Ombudsman Opinion OI/1/2014/PMC: Own-Initiative Inquiry into European Institutions' Whistleblowing Regulations

The Staff Regulations of the EU institutions were amended in January 2014 to require internal rules to be put in place regulating the protection of whistleblowers, including the provision of information to them, and a procedure for handling complaints. In July 2014 the European Ombudsman opened an own-initiative inquiry into the steps taken by the EU institutions to implement this requirement. In particular, she asked them to provide her with:

Information on whether they had already adopted, or intended to adopt, the internal rules on whistleblowers required;

Information on the procedure for adopting the internal rules;

A copy of the rules or a preliminary draft;

Any other useful information, including extension of the internal rules to external whistleblowers (e.g. contractors).

On 26 February 2015 the Ombudsman adopted her decision. She was disappointed to find that only the European Commission and the European Court of Auditors had adopted internal rules so far. Indeed, the Committee of the Regions, the Council, the Court of Justice and the EESC were not even in a position to forward copies of the draft rules they had drawn up. On the question of external whistleblowers, she noted that the Court of Auditors' rules apply to economic operators participating in procurement procedures and to contractors, while the Commission already has in place system for external whistleblowers to complain anonymously through the European Anti-Fraud Office (OLAF). With regard to the procedure for adopting the rules, she noted that since launching her inquiry, the European Parliament, the Council, the Court of Justice and the EESC had intensified their discussions on the issue at meetings of the inter-institutional Preparatory Committee for Matters relating to the Staff Regulations (CPQS). She also recalled the experience of her own office in adopting internal whistleblowing rules according to a procedure which involved the consultation of the Staff Committee and Data Protection Officer, and urged the other institutions to draw on this example.

Anne Friel

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Section D: Other EU institutions' decisions

D.1 Commission Proposal for a Regulation to amend Regulation 1007/2009 on trade in seal products, COM(2015) 45 of 6 February 2015

Following legislation adopted by Netherlands and Belgium, the EU adopted, on the basis of the present Article 114 TFEU, Regulation 1007/2009 concerning an import ban for seal products, in particular in order to react to large-scale hunting and inhumane killing of seals in Canada. The Regulation provided for an exception for Inuits and other indigenous communities, and for products which had been obtained for the purpose of the sustainable management of marine resources and on a non-profit basis.

Inuit groups and Canadian persons and associations brought the case before the European Court of Justice, but were unsuccessful in having the Regulation quashed (C-583/11P).
Canada and Norway took action against the EU before the WTO. However, in June 2014, the WTO dispute Settlement Appellate Body ruled that in principle, the EU import ban for seals was justified on moral grounds (DS 400 and DS401). The Appellate Body found that some minor provisions of the exception for Inuits could not be justified and that also some provisions concerning the exception for the sustainable management of marine resources constituted discrimination.

The present proposal aims at eliminating the problems raised by the WTO Appellate Body. It leaves the import ban practically untouched.
The case is of legal relevance. Indeed, Canadian seals are not a species that is threatened or endangered. As far as can be seen, this is the first time that a measure to protect a non-threatened species was considered justified under WTO rules (Article XX(a) GATT).

Ludwig Krämer

D.2 Court of Auditors, Special Report 24/2014 of 24 February 2015: Is the EU support for preventing and restoring damage to forests caused by fire and natural disasters well managed?

The Court of Auditors issued a 56 pages report, based on examining 76 forest projects in France, Italy, Spain, Austria and Slovakia. It came to the conclusion that the answer to the question in the title was negative.

In the period 2003 to 2012, some 440.000 hectares of forest per year were on fire in the EU, 95 per cent caused by humans. 85 per cent occurred in the Mediterranean region plus Portugal.

Between 2007 and 2013, the European Union spent 1.55 billion euro for forest fire and other disaster measures.

The Court of Auditors found that the money was, overall not effectively used. The Court found that no classification of forests with low, average and high risk of fire existed. Environmental measures to prevent forest fires did not receive sufficient attention, for example the protection of forests in Natura 2000 areas which formed some 20 per cent of all forests. Considerable amounts of the money were used to build roads, mainly for economic purposes. Generally, the measures which were supported by EU funds were not sufficiently targeted.

The Court made a number of recommendations to improve the situation. In its answer, the Commission principally defended the policy and actions taken so far.

Ludwig Krämer

Section E: Legal journal articles

E.1 L. Krämer: Impact assessment and environmental costs in EU legislation, Journal of European Environment & Planning Law 2014, 201

The article looks at the impact assessments made with regard to legislative proposals at EU level, which are almost entirely made by the Commission before it presents a proposal for legislation to the other institutions**.** Ten examples of environmentally relevant legislative proposals over the last years were selected for closer examination. The article criticizes the procedure to elaborate the Commission's impact assessment, the fact that no public discussion on the draft impact is admitted, that the impact assessment is published only once the Commission has made a proposal; in this way, a public debate about alternatives or any other public participation is avoided. The impact assessments do not discuss the long-term effects of the legislation. In most of the assessments which were examined, the questions related to the environment which the Commission's guidelines for impact assessments contain, were not examined. There is no methodology of measuring environmental impacts. Particularly serious are the affirmations that the environmental parts of the impact assessments are often biased in favour of economic interests, that the political influence on the assessments is considerable and that, overall, the discussion of the effects of legislation is aligned to the political objective that is attempted to be achieved. The impact assessments "are a political instrument in the dress of science".

Ludwig Krämer

E.2 Jan Darpö, Article 9.2 of the Aarhus Convention and EU law Some remarks on CJEU case-law on Access to Justice in Environmental Decision-making, JEEP LAW 11(2014) 367-391

The article highlights the development of the case-law of the CJEU as well as the findings of the Aarhus Convention Compliance Committee on the access to justice provisions of the Aarhus Convention, more particularly of Article 9.2, and of the EIA Directive. The author notes that since the ratification of the Aarhus Convention in 2005, the development of the case-law on access to justice has been rapid and that most of the cases deal with the EIA Directive.

The article gives an overview of the most important cases from the CJEU concerning access to justice in which the Court has in fact ensured the standing rights of the applicant within procedures under the EIA Directive. It analyses the relationship between the concepts of "direct effect" and individuals' "rights" and the principle of effectiveness and judicial protection according to EU law.

The articles then reflect on the meaning of "substantive and procedural legality" of the judicial review under Article 9.2 of the Aarhus Convention. According to the author Article 9.2 requires all kinds of decisions under the environmental procedure to be challengeable including the final one. This is in accordance with the Court's rulings in *Djurgarden* and *Trianel* in which it held that the organisation must be able to have access to a review procedure to challenge the decision by which a body has given a ruling on a request for development consent.
The article then discusses the different interpretation of the "public concerned" as provided under Article 9.2 in relation to standing throughout the Member States and touches upon which individuals should have standing to appeal decisions under the EIA Directive and what should be "the intensity of the review", considering that both Article 9.2 of the Convention and Article 11 of the Directive allow for *actio popularis* but do not require such a solution. He concludes that the public concerned shall have the possibility to challenge all aspects of the legality of administrative decisions under the EIA Directive.

The next section is on the role of Environmental NGOs. It is argued that according to the Compliance Committee findings adopted in a case concerning Denmark in 2008, an individual or an ENGO must have the possibility to take action against an environmental decision. This emphasizes the crucial role played by ENGOs in this area of law as expressed in *Trianel*. It concludes that Article 11 of the EIA Directive has direct effect concerning ENGO standing and that the Member States have very little discretion on this matter and cannot restrict this right to certain categories of decision under the Directive.

The article then analyses the concept of "courts and tribunals" in environmental decision-making procedures and the way it is implemented at national level. The author takes the view that the expression "court of law or another independent and impartial body established by law" in Article 9.2 of the Convention and Article 11 of the Directive requires that the reviewing body meets the criteria for being a court or tribunal according to EU law and the ECHR. However, some differences with the remedies required under Article 9.3 of the Aarhus Convention are touched upon. It finally stresses the immediate and astonishing impact of the *Brown Bear* case on

national courts in Member States due to the extension of legal standing to ENGOs in cases that were traditionally were inadmissible.

The article concludes that access to justice in the Member States shows divergent trends. The case-law of the CJEU has been the main driving force leading to some improvement along with the decisions of the Commission and the Aarhus Convention Compliance Committee. The article however, notes that the strong movement of "better regulation" contributed to a tendency in the opposite direction, weakening the rights of the public to challenge decisions in environmental matters. The author therefore calls for more guidance from the CJEU that is likely to be provided in Article 258 and 267 TFEU proceedings.

Anaïs Berthier

E.3 Helle Tegner Anker, Simplifying EU Environmental Legislation- Reviewing the EIA Directive, Journal of Environmental Law and Planning, 2014 Vol.11, pp 321-347

This article analyses the recent review of the EIA Directive and the resulting amendments adopted in Directive 2014/52/EU. It begins with a description of the review process and the factors driving it. The decision to review the EIA Directive was influenced by the "Better Regulation" agenda, which had identified EU environmental legislation as an area with potential for simplification. At the same time, "implementation gaps" among the Member States had been identified as a major problem in EU environment legislation. As a result, the review process saw the Commission embark on the task of simplifying the EIA Directive, while at the same time providing greater harmonisation.

The author goes on to discuss the difficult relationship between the simplification and harmonisation agendas in terms of the amendments adopted and their impact on the fundamental characteristics of the original Directive. Take, for example, the new requirements on screening. Article 4(4) requires developers to provide information on the characteristics of the project and its likely significant effects on the environment in order to allow the authority to assess whether an EIA is required. IN the case that the authority decides that an EIA is not required, Article 4(5) requires that it to state any mitigating measures envisaged by the developer to avoid or prevent significant adverse effects (so-called "project adaptations"). The requirement for a "mini-EIA" was intended to resolve the problem that different practices in the Member States resulted in too many EIAs in some countries and too few in others, while the acceptance of "project adaptations" was intended to simplify the procedure by decreasing the number of projects subject to EIAs. However, the author predicts that the new requirements will in fact increase the burden of both developers and authorities and questions the extent to which it will result in more uniform screening practices, given that the amendments offer no clarity on how to define projects and what types of changes to existing projects are subject to a screening procedure. In addition to this, the concept of "project adaptations" may reduce opportunities for the public to participate in the decision-making process, one of the core functions of the Directive in the first place.

To conclude, the author offers up the question of whether the current review processes within the EU are capable of delivering the desired results. The example of the EIA Directive review clearly demonstrates the difficulties of reconciling the "simplification" and "harmonisation"

agendas without careful consideration of the appropriate level of harmonisation, and of the fundamental elements of the instrument in question.

Anne Friel

E.4 Raf Callaerts, 'State Aid for the Production of Electricity from Renewable Energy Resources' (2015) 24 European Energy and Environmental Law Review, Issue 1, pp. 17–26

This article provides a brief yet comprehensive overview of the State aid rules applicable to renewable energy support, and of their evolution from the time Directive 2009/28/EC on renewable energy was adopted to the recent debates about reforming support schemes for renewables.

The article recalls that, at the time the Directive was adopted, Member States preferred national approaches to renewable energy support to a harmonised EU-wide one. As a result, Member States have introduced a variety of support schemes which, like all State aid, are governed by the 'hard law' of the Treaties and secondary legislation, and the 'soft law' of Commission guidance.

The article reminds the readers of the EU Courts' case law on the interpretation of Article 107(1) TFEU, which forbids aid granted by Member States or through State resources if it distorts competition, it favours certain business and it affects trade between Member States. In this context, for example, it contrasts the judgments of the Court of Justice in *Vent de Colère* and *PreussenElektra*, which addressed, with different outcomes, the question of whether 'State resources' were involved where Member States imposed, in different forms, payments to energy buyers with a view to funding renewable energy generation.
The article then proceeds to summarise the procedure for State aid notification and assessment, mentioning the effects of the General Block Exemption Regulation, which declares certain categories of aid compatible with the internal market, so that Member States do not have to notify them.

It concludes with a discussion of the recent concerns about overcompensation of renewable energy generation, and the intention to reform renewable energy support schemes by exposing renewable energy producers to market signals. In particular, the article summarises the rules applicable under the new Commission Guidelines on State aid for environmental protection and energy 2014-2020 to renewable energy support mechanisms, commenting on the merits and shortcomings of different schemes.

Giuseppe Nastasi

E.5 Varvaštian, Samvel, Achieving the EU Air Policy Objectives in Due Time: A Reality or a Hoax? European Energy and Environmental Law Review, February 2015

This article looks at the current challenges in achieving EU air policy objectives and the likely impacts from changes that are underway. The author sees two key problems to be resolved: Member States not complying with current legislation, and the legislation itself not achieving the long-term policy objective of reaching WHO pollution standards. The former of which, he concludes, seems to be far more solvable than the latter.

The article begins by setting out the health, environmental and economic impacts of air pollution. It explains why, despite an increase in awareness and concern about the issue, pollution concentration levels remain high in much of the EU. Five strands that make up the framework of EU air pollution policy are detailed: the 2005 Thematic Strategy on Air Pollution; the 2008 Ambient Air Quality Directive; the 2001 National Emission Ceilings Directive; the source-point control measures at national, international and EU level; and international actions and instruments. Between them, they cover direct controls of pollutants, targets and ceilings for concentrations, as well as long-term objectives and standards for measurement and management.

Having set out the current framework, the author then identifies a series of issues. These problems show the disparity between what appears to be a comprehensive package of legislation and its effectiveness in reality. First, is Member States' lack of compliance with legislation, which has resulted in infringement proceedings for some. The key causes identified for this are the sources of emissions themselves and the management failings of Member States. Second, and equally considered at fault, is this body of legislation that falls short of achieving either international commitments or the EU's own policy objective. Given this failing, which means that even full compliance would result in adverse health and environmental impacts, the author believes it crucial to revise the policy framework.

Following a review of EU air policy in 2011-2013 and the adoption of the Clean Air Policy Package (CAPP), the Commission has identified both a short-term and a long-term objective. The short-term objective sets out support measures in place to 2020, intended to help Member States comply with legislation. The long-term objective attempts to deal with adherence to WHO guidelines that protect human health, and to prevent adverse effects on ecosystems. Focusing on PM2.5 as a cost-effective and measurable option, the revised National Emission Ceilings Directive is seen as a crucial delivery mechanism for this objective. There is also a proposal on the table for revised legislation to cover source emissions from medium-sized combustion plants, a distinct and important source of pollution.

Although Varvaštian agrees that the new measures will result in improvements and reduced mortality rates, he cites the Commission's impact assessment which shows that technical constraints will still prevent WHO guidelines being met in the near future. He also sees much that needs addressing beyond the technological issues, including economic, climatic and social factors. Ultimately, he considers that "only a combined effort of legislative means, structural improvements and new scientific information coupled with further comprehensive revision of air policy could lead to successful achievement of the ultimate goal of EU air policy."

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