European Environmental Law Observatory

News

Issue of May 2015

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. The standing contributors of the Observatory are Anaïs Berthier (coordinator), Ludwig Krämer, Anne Friel and Giuseppe Nastasi. Other staff from ClientEarth contribute on an ad hoc basis.

This issue covers materials published between 15 March 2015 to 1 May 2015.

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ClientEarth

Section A: Aarhus Convention

There are no updates on application of the Aarhus Convention in this edition. You can read about the most recent developments in the March newsletter.

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

Court of Justice of the EU

B.1 Case C-409/13, Council of the European Union v Commission, Judgment of the Court Grand Chamber of 14 April 2015.

(Action for annulment — Macro-financial assistance to third countries — Decision of the Commission to withdraw a proposal for a framework regulation — Articles 13(2) TEU and 17 TEU — Article 293 TFEU — Principle of conferral of powers — Principle of institutional balance — Principle of sincere cooperation — Article 296 TFEU — Obligation to state reasons)

In this case the Grand Chamber of the Court of Justice addressed the limits to the Commission's discretion to withdraw legislative proposals. The legislative proposal in question was for a Regulation laying down general provisions for macro-financial assistance (MFA) to third countries. MFAs were previously decided on a case by case basis using the ordinary legislative procedure, a process that can take many months. The aim of the Commission's proposal was to provide a framework enabling MFA to be made available expeditiously. In particular, Article 7 of the proposal provided that the Commission would grant MFA by way of implementing acts. The Council and the European Parliament objected to the lack of democratic oversight in this process. The Parliament preferred the use of delegated legislation, which provides a greater role for the Parliament, while the Council adopted a "general approach" suggesting that the ordinary legislative procedure should be used for the adoption of each decision granting MFA. The three institutions entered into trilogue meetings (informal meetings designed to allow compromises to be reached), following which the Council and the Parliament agreed to retain the ordinary legislative procedure. As a result, the Commission withdrew the proposal.

The Council applied to the Court of Justice to annul the Commission's decision to withdraw the proposal. Notably, the European Parliament did not join the action. The Council argued that the Commission's withdrawal exceeded the powers conferred upon it by the Treaties and undermined the principles of institutional balance and sincere mutual cooperation enshrined in Article 13(2) TEU. Furthermore, the Commission failed to state the reasons on which the decision was based.

The Court clarified that the Commission has discretion to withdraw a legislative proposal under Article 293(2), as long as the Council has not acted. However, this discretion cannot confer upon the Commission a veto in the conduct of the legislative process. The Commission "must state to

the Parliament and the Council the grounds for the withdrawal, which, in the event of challenge, have to be supported by cogent evidence or arguments."

The Court found that the requirement to state reasons was satisfied because the Commission had communicated its reasons at a Council working group party and the trilogue meetings. The Court then went onto assess the substance of the Commission's reasons for withdrawal. It held that "where an amendment planned by the Parliament and the Council distorts the proposal for a legislative act in a manner which prevents achievement of the objectives pursued by the proposal and which, therefore, deprives it of its raison d'être, the Commission is entitled to withdraw it." The Court found that the Commission was entitled to decide that the planned amendment to Article 7 would prevent MFA being granted in an expeditious way and would therefore have deprived the proposal for its raison d'être. Consequently, it rejected the Council's application as unfounded.

This judgment clarifies that the Commission does not enjoy unfettered discretion to withdraw legislative proposals, and its decisions in this regard can be subject to judicial review. Nevertheless, it does not set the bar very high. First, with regard to the procedure for stating reasons, the Court found it sufficient for the Commission to communicate its reasons at the trilogue meetings which take place to allow the Commission, the Council and the Parliament to negotiate legislation in secret. Given the opaque and informal nature of these meetings, this does not even guarantee that the reasons are communicated to all MEPs and Member States, never mind to the public. Second, as to the substantive test, the Court accepted the Commission's argument that expediency was the most important objective of the proposal, without even engaging in a discussion of the importance of having democratic control of the decision-making process. This is a worrying development in the context of the new Commission's commitment to "better regulation" and its track record of withdrawing "unnecessary" legislation, such as the circular economy package.

Anne Friel

B.2 C-570/13, Gruber v Unabhängiger Verwaltungssenat für Kärnten and Others, judgment of 16 April 2015

Reference for a preliminary ruling - Environmental impact assessment - construction of a retail park - decision not to carry out an impact assessment- public participation

A private applicant asked for a permit to build a retail park in Klagenfurt (Austria). The regional government declared that an environmental impact assessment was not necessary. Under Austrian law, private persons are not parties to that procedure. The responsible administrative authority granted the permit, arguing that it was bound by the regional government's decision. Mrs. Gruber, a neighbour of the future retail park, applied to the court, asking for the permit to be quashed, because no environmental impact assessment had been carried out. The Austrian court then applied to the Court of Justice for a preliminary ruling, asking whether EU Directive

2011/92 allowed for Mrs. Gruber to be bound by the declaratory decision of the regional government, though she was not a party to that procedure.

The Court of Justice held that Article 11 of Directive 2011/92 granted a right of access to the courts to persons concerned by a decision, in order to challenge the procedural and substantive legality of the decision. This provision, read in the light of Article 9(2) of the Aarhus Convention, intended to provide wide access to the courts.

Austrian law, which excludes private citizens almost altogether from participating in the procedure for deciding whether an environmental impact assessment has to be carried out, "deprives a large number of individuals" from exercising their right of access to justice and is thus not compatible with Directive 2011/92. This conclusion is not put into question by the fact that Austrian law allows neighbours to raise objections against the construction of an industrial or commercial facility, where such a construction risks endangering their lives, health, property or constitutes a nuisance. The reason for this is that "the primary purpose of such a procedure is to protect the private interests of individuals and it has no specific environmental aims in the interest of society".

The Court therefore held that, provided Mrs.Gruber was part of the "public concerned", the national court was obliged to declare that the declaratory decision by the regional government was not binding on her.

Ludwig Krämer

B.3 Case C-456/13 P, T&L Sugars Ltd, Sidul Acucares, Unipessoal Lda v Commission, Judgment of the Court (Grand Chamber) of 28 April 2015.

(Appeal — Action for annulment — Article 263, fourth paragraph, TFEU — Right to bring an action — Locus standi — Natural or legal persons — Regulatory act not entailing implementing measures — Act of individual concern to the appellants — Right to effective judicial protection — Exceptional measures relating to the release of out-of-quota sugar and isoglucose on the European Union market — Marketing year 2010/2011)

This case concerned the standing of individuals to challenge regulatory acts before the European courts. Due to a shortage of sugar on the EU market, in 2011 the Commission adopted regulations with the objective of increasing the supply of sugar. The Regulations in question required the Member States to issue certificates according to criteria established by the Commission. Two cane sugar refiners challenged the Regulations before the General Court. Article 263(4) TFEU, which regulates legal standing before the EU courts, states that natural or legal persons may challenge an act of the EU institutions if it is of “direct and individual concern to them”, as well as regulatory acts which are of direct concern to them and do not entail implementing measures. The case focused on the interpretation of the concept of “implementing measures”. The General Court held that the issuing of certificates by the Member States

constituted “implementing measures”, and therefore the regulations were not regulatory acts. The Court then applied the *Plaumann* test for “direct and individual concern” and found them to lack standing. The sugar refiners appealed to the Court of Justice, arguing first that the General Court misinterpreted the concept of an “act not entailing implementing measures” and second, that the General Court misinterpreted the fourth paragraph of Article 263(4) in finding that the Regulations were not of direct and individual concern to them.

With regard to their first plea, the Court found that the concept of a “regulatory act which…does not entail implementing measures” must be interpreted in the light of the objective of that provision, which is to ensure that individuals do not have to break the law in order to have access to a court. By contrast, where a regulatory act entails implementing measures, judicial review by a national court is ensured, allowing individuals to challenge the legality of the regulation in question and request the national court to make a preliminary reference to the ECJ. The Court found that as the regulations in question produced legal affects vis-à-vis the appellants only through the Member States’ decisions to grant or refuse applications for certificates, these decisions constituted implementing measures, despite the fact that the Member States had no discretion regarding their implementation. Having decided that the regulations were not regulatory acts, the Court reaffirmed the *Plaumann* test, finding that the applicants did not have direct and individual concern.

Interestingly, the Court considered the fact that, according to the appellants, there was no effective legal remedy available to them at national level. The appellants argued that in these circumstances, the General Court should have interpreted Article 263(4) in light of the right to effective judicial protection guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union, by allowing standing in the situation where there is no effective remedy in national law. The Court rejected this argument, confirming its approach that the Charter of Fundamental Rights does not affect the rules on standing laid down in the Treaties. With regard to persons who do not fulfil the requirements of Article 263(4), it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the fundamental right to effective judicial protection, with the possibility of making preliminary references to the EU courts. This argument undermines the principle of effective judicial protection. First, national rules on standing are diverse. In some Member States it is just as difficult to gain access to national courts as to the European courts. Second, only courts of last instance are obliged to make preliminary references to the ECJ, and therefore the process can be long and expensive before the case is even heard in Luxembourg. Third, the applicant has no role in drafting the question to the ECJ. It is worth remembering that in the context of environmental matters, the Aarhus Convention Compliance Committee has ruled that this system does not respect the right to access to justice contained in the Aarhus Convention.

Anne Friel

B.4 Case C-148/14, Germany v Nordzucker, Judgment of 29 April 2015

(Reference for a preliminary ruling — Environment — Directive 2003/87/EC — Greenhouse gas emission allowance trading scheme in the European Union — Determination of the extent of the obligation to surrender allowances — Penalties — Article 16(1) and (3))

The Emission Trading Scheme Directive 2003/87/EC (ETS Directive) requires operators of industrial and other activities to submit, each year, enough emission allowances to cover their greenhouse gas emissions in the previous year, or pay a fine. The harmonised EU-wide scheme ensures that there is a level-playing field for all operators across the Union. Consistent with this approach, the fine for failure to surrender allowances is set out in the Directive and is the same for all operators -- EUR 100 for each tonne of carbon dioxide equivalent left uncovered (Article 16(3) of the ETS Directive). As usual in EU directives, Member States are required to introduce effective, proportionate and dissuasive penalties for violations of (other) provisions of the Directive (Article 16(1)).

Who determines how much an operator has emitted, and therefore how many allowances must be submitted? Operators themselves report relevant emissions data, and the reports are verified by independent verifiers. But what happens if that verified data later turns out to be incorrect? Does the verified report limit the obligation once and for all, or can the authorities impose the EUR 100/tonne fine for uncovered emissions?

The answer of the Court of Justice is that the verification of the emission report finally determines the number of allowances that must be submitted. Once the operator submits those allowances, the surrender obligation is fulfilled. If errors in the verified report are found later on, Member States can impose penalties that they have introduced under Article 16(1) for violation of other requirements of the Directive, but the EUR 100/tonne fine for the failure to surrender allowances does not apply.

The Court achieved this conclusion based on the fact that the verification procedure is the only control mechanism explicitly regulated by the Directive. However, this does not by itself mean -- as the Court acknowledges -- that Member State authorities cannot carry out their own checks, as the German authorities did in this case. Nonetheless, the Court quoted a passage from the Commission monitoring and reporting guidelines (Commission Decision 2004/156/EC, now replaced by two Regulations), which stated that '[t]he total emissions figure...in an emissions report that has been verified as satisfactory shall be used by the competent authority to check that a sufficient number of allowances have been surrendered'. In the view of the Court, this passage supports the conclusion that the ETS Directive 'does not make the surrender of allowances subject to any conclusion other than the emissions report being found to be satisfactory' by the independent verifier. Strangely, the Court did not mentioned that the very passage quoted thus continued: 'Member States shall ensure that divergences of opinion between operators, verifiers and competent authorities do not affect proper reporting...'. This passage casts significant doubt on whether the intention of the legislator was to fully and finally outsource the verification of compliance with applicable rules to private parties.

All in all, this judgment privileges legal certainty for operators (a worthy concern) over the assurance that the obligation to surrender allowances is correctly quantified, and that therefore operators are held liable for their emissions -- not more and not less. The judgment raises the question of how the opposite case of overstated emissions in a verified report would be resolved -- would the operator be required to surrender more allowances than necessary in the light of proper (if late) accounting of its emissions? It also underlines the importance of ensuring that penalties introduced by Member States are indeed effective, proportionate and dissuasive, as well as effectively implemented (an aspect not consistently investigated by the European Commission when controlling the transposition of Directives). In the case that gave rise to this judgment, the EUR 100/tonne fine would have resulted in a total penalty of over EUR 100,000 --

how often do Member States impose such high sanctions for the violation of environmental Directives?

Giuseppe Nastasi

B.5 Case C-534/13, Ministero dell'Ambiente e della Tutela del Territorio e del Mare and Others v Fipa Group Srl and Others, Judgment of 4 March 2015

(Reference for a preliminary ruling — Article 191(2) TFEU — Directive 2004/35/EC — Environmental liability — National legislation under which no provision is made for the administrative authorities to require owners of polluted land who have not contributed to that pollution to carry out preventive and remedial measures, and the sole obligation imposed concerns the reimbursement of the measures undertaken by those authorities — Whether compatible with the 'polluter pays' principle, the precautionary principle and the principles that preventive action should be taken and that environmental damage should be rectified at source as a matter of priority)

This judgment addresses the question of whether the polluter pays principle and the Environmental Liability Directive 2004/35/EC (ELD) entitle public authorities to require current owners of polluted sites, who did not themselves cause the pollution, to adopt preventive or remedial measures to deal with it.

The facts of the case can be summarised as follows. From the 1960s to the 1980s (i.e. well before the ELD), the operators of an industrial site for the manufacture of insecticide and herbicide located in Massa Carrara, Tuscany (Italy), had seriously contaminated the site by various chemical substances. Some of the site was "decontaminated" in 1995, but the intervention was so badly done that the site remained contaminated. In the years 2000s, new owners took possession of parts of the site. After the ELD took full effect (30 April 2007), the Italian authorities ordered the new owners to adopt "emergency safety measures". While the ELD, as a rule, places liability for environmental damage and responsibility for taking relevant measures upon the operator that caused the damage, the Italian authorities argued that proper interpretation in the light of the polluter pays and the precautionary principles should allow for the owners of the site to be required to take the necessary measures.

The Court of Justice recalled that the mentioned principles of EU environmental law direct EU action, but do not create rights and obligations that can be directly relied on by individuals or authorities. Thus, they only apply to the case to the extent that they are implemented by the ELD. The ELD, however, only concerns damage to the environment that can be ascribed to the operator. The Court thus held that the present case therefore falls outside of the scope of the Directive to the extent that the current owners of the site did not contribute to the pollution. It remains possible for Member States to adopt more stringent provisions (e.g. identifying additional parties that can be held liable for the environmental damage) -- however, that goes beyond the Directive.

This judgment intervenes in an area of divergence in Italian jurisprudence. One line of cases, going beyond the provisions of both the ELD and the Italian Environmental Code, holds that owners who did not cause the pollution may nevertheless be required to take safety and rehabilitation measures based on environmental law principles. The other line of cases, endorsed by the Italian Council of State, adopt a more literal interpretation of the law and only allow competent authorities to recover some costs from the owners of a site (a possibility expressly set out in the Italian Environment Code).

It is not the ruling of the Court of Justice that can be criticised. The question is rather how it can take thirty years for the rehabilitation of a contaminated site *not* to be completed.

Giuseppe Nastasi

General Court

B.6 Case T-121/10 – Giovanni Conte et al. V Council of the European Union, Order of 26 March 2015

(« Recours en annulation – Pêche – Conservation des ressources halieutiques – Institution d'un régime communautaire de contrôle, d'inspection et d'exécution – Notion d'acte réglementaire – Notion d'acte législatif – Défaut d'affectation individuelle – Irrecevabilité »)

A group of Italian fishermen brought an action for annulment of Regulation 1224/2009/EC establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, which amended a number of previous regulations (the "Control Regulation"). This raised the question of whether the fishermen had standing to bring the case before the General Court under Article 263(4). The Court focused on whether the Control Regulation is a "regulatory act" or a "legislative act" for the purpose of Article 263. The difference is significant because natural or legal persons must show individual and direct concern to challenge a "legislative act" (meeting the criteria laid down in the *Plaumann* case), while they need show direct concern only to challenge a regulatory act.

The Court started by recalling its findings in case T-18/10 *Inuit Tapiriit Kanatami v the Parliament and the Council*, which held that, according to the Treaty on European Union, the question of whether an act is a legislative act or a regulatory act is based on the criterion of the procedure which led to its adoption. In this regard, Article 289 TFEU states that an act adopted by the "special legislative procedure" constitutes a legislative act in the specific cases provided for by the Treaty. The Control Regulation was adopted on the basis of Article 37 TEC, before the entry into force of Article 289 with the Lisbon Treaty. Therefore, although Article 37 TEC used a legislative procedure which corresponds to the "special legislative procedure" in Article 289, it did not refer specifically to it. Therefore, the Court was unable to conclude on this basis that it is

a legislative act, and looked to the following relevant factors. First, if the Control Regulation had been adopted following the entry into force of the Lisbon Treaty, it would have been based on Article 43 TFEU, which refers to the ordinary legislative procedure, and would thus have automatically qualified as a legislative act. Second, the procedure leading to the adoption of the Control Regulation corresponds exactly to the "special legislative procedure" laid down in Article 289 TFEU. The fact that Article 37 TEC does not refer specifically to the "special legislative procedure" is because the concept was only introduced in the Lisbon Treaty. Finally, the Regulation is legislative in nature, in that it contains fundamental political choices about how the common fisheries policy is controlled, and regulates a series of situations which are defined objectively. The Court consequently found the Regulation to be a legislative act, and went on to apply the *Plaumann* test for "direct and individual" concern. Owing to the general and objective nature of the act, the applicants were found to lack standing.

In this case the applicants also raised the argument that such a strict interpretation of Article 263(4) does not comply with the right to effective judicial protection in Article 47 of the Charter of Fundamental Rights of the EU. The Court applied the reasoning referred to above in the T&L Sugars case, stating that Article 47 does not affect the rules on legal standing laid down in the Treaties.

Anne Friel

B.7 T-402/12, Schlyter v. Commission, Judgment of 16 April 2015

Access to documents - Regulation 1049/2001- Commission opinion on a draft national legislation - no investigation procedure

In 2011, France notified to the Commission a draft national order relating to the content and submission conditions of the annual declaration of nanoparticle substances. This notification was based on Directive 98/34 which obliges Member States to notify to the Commission any draft national legislation on technical standards and regulations which might have an impact on the free circulation of goods within the EU. The notification has as a consequence that a standstill period of three months becomes applicable, during which time the Member State may not adopt its legislation. When the Commission or a Member State consider that the draft legislation might have an impact on the free circulation of goods, they may send comments or a detailed opinion to the notifying Member State; the standstill period is then prolonged by a further three months.

The Commission issued a detailed opinion. During the running of the standstill period, the applicant requested to have access to that detailed opinion which the Commission refused. The Commission invoked that disclosure of the detailed opinion would undermine the purpose of investigations. After France had adopted its national order and after having concluded that there

was no need to initiate an infringement procedure under Article 258 TFEU, the Commission sent the detailed opinion to the applicant.

The General Court found that "*the concept of investigation [under Regulation 1049/2001, Art.4] covers all the research carried out by a competent authority in order to establish that an infringement has taken place as well as the procedure by which an administrative body gathers information and checks certain facts before making a decision*". It held that under Directive 98/34, the detailed opinions of the Commission are not binding and are therefore not a "decision"; the procedure under Directive 98/34 is not either carried out to establish whether an infringement has taken place. Indeed, national draft legislation cannot infringe EU law, as it is only a draft which may be amended. The Court did not either accept that the procedure under Directive 98/34 could be assimilated to that of an infringement procedure under Article 258 TFEU. The Court therefore annulled the Commission's decision not to disclose the opinion during the standstill period.

While the judgment is to be commended, the definition which the Court gave on the term "investigation" is much too broad. It is unacceptable that *any* gathering of information before making a decision is considered to be an investigation. This would mean that whenever the Commission - or another EU institution or body - launches a study, writes to Member States in order to collect information or otherwise looks for information, an investigation procedure would exist which would entitle the non-disclosure of information. All Member States would thus be under an almost permanent stage of investigation.

The difference between an investigation and an enquiry lies in the fact that under EU law, an investigation is a formalised procedure which must explicitly be foreseen, under the principle of conferral, in a regulatory text. An investigation procedure allows the investigating body to collect information without consent or against the will of a person or of an administration; no such right exists in an enquiry. It is for this reason that under environmental law, the Commission may not make investigations against Member States or individual pollutors, take samples of water, of soil or of air quality, in order to find out whether EU law was respected. Indeed, there is no provision in EU law which allows it to do so, contrary, for example, to the provisions in competition law, in fisheries law or in customs law.

Ludwig Krämer

ClientEarth Litigation Update

R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs

In this case the UK Supreme Court gave its second and final ruling on ClientEarth's challenge against the UK Government's failure to comply by January 2010 with the legal limits for nitrogen dioxide (NO_2) laid down by Article 13 of Directive 2008/50/EC on ambient air quality and cleaner air for Europe (the Air Quality Directive). The UK Supreme Court judgment applied the

preliminary ruling of the Court of Justice of the European Union to the facts of the case. The two key issues to be determined were: (i) whether the UK Government was obliged to apply for postponement under Article 22 of the Air Quality Directive and (ii) whether the Supreme Court should order the production of a new air quality plan under Article 23(1) of the Air Quality Directive, setting out appropriate measures to keep the period of breach as short as possible.

Unfortunately, the length of time taken to resolve the case meant that the first question was rendered no longer of any practical significance (the maximum extension deadline of 1 January 2015 having passed by the time final judgment was given). The one exception to the insignificance of Article 22 is its link to Annex XV Section B of the Air Quality Directive. This requires additional information to be included in air quality plans, above that which would be required under Article 23. The most important part is a checklist of measures which the Government must show it has considered when coming up with its air quality plans. The Court agreed with ClientEarth that this information should be included in the new air quality plan.

In relation to the second question, the UK Government submitted that, in the absence of any allegation or finding that the 2011 plans were as such affected by error of law, there was no basis for an order to quash them, nor in consequence for a mandatory order to replace them. In addition, given the stated intention of the Government to prepare updated plans by the end of the year, no further relief was necessary or appropriate. The UK Supreme Court firmly rejected both these arguments, holding that the critical breach is of article 13 of the Air Quality Directive, which lays down the limit values, not of article 22 or 23, which are supplementary in nature. Considering the seriousness of the breach and the grave danger to human health, the national court was required to provide a remedy.

In addition, in the absence of a formal undertaking by the Government (which the UK declined to give), the UK Supreme Court held that the national court would fail in its duty if it simply accepted the respondent's assurance, without issuing a mandatory order requiring the Government to prepare new air quality plans under Article 23 of the Air Quality Directive by the end of 2015.

Finally, the UKSC has given liberty to apply to the Administrative Court for the determination of any other legal issues which may arise between the parties in the course of preparation of the plans. Such questions may regard the interpretation of the words "*as short as possible*" or the definition of the circumstances under which the Government can claim that the adoption of specific pollution abatement measures is impossible.

This judgment marks a welcome development in the approach of UK courts to environmental cases. The UK Supreme Court made it very clear that contrary to the views of the High Court and the Court of Appeal, it is the role of the national courts to ensure the proper implementation of EU environmental law, regardless of political or economic factors raised by such judicial intervention and regardless of the possibility of Commission infringement proceedings.

Ugo Taddei

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Section C: European Ombudsman decisions

C.1 Decision closing her inquiry into complaint 402/2014/PMC against the European Commission

A representative of a group of citizens (the complainant) put forward a European Citizen's Initiative (ECI) to the Commission. Following the submission of the ECI for registration the complainant confirmed that the citizens' committee wanted to use the Commission's open-source software for the online collection of signatures.

The complainant asked whether the Commission would give the ECI the full 12 months to collect signatures online given that this process can only start once the online collection system has been certified by the competent national authority and such certification can be requested only after the ECI has been registered by the Commission. The Commission replied that the 12 months period for the collection of signatures starts on the date of registration of the initiative with the Commission.

Twelve days after having made the request for registration of the ECI, the complainant submitted a new annex and asked the Commission for permission to add it to the original request. The Commission exceptionally accepted it but informed the complainant that the 2 month time-limit for registration would be counted from the date that the new annex was submitted. Fifteen days later the complainant asked whether she could add a further annex. The Commission refused and replied that she would have to submit a new initiative if she wanted to include the new document to the request.

The complainant lodged a complaint with the European Ombudsman. She claimed that the procedures and conditions for using the Commission's open source software for the online collection of signatures create unnecessary difficulties for organisers using it; that the Commission should ensure that the complainant has 12 months from certification of the open source software for collecting signatures. She also claimed that the Commission's decision that adding a further document to the request would entail starting the registration process again is unfair and disproportionate.

The Ombudsman noted that ECI organisers have a choice as to whether to use the Commission's online collection system services. She pointed out that the Commission's approach as regards the deadline is based on an interpretation of the Regulation (legal basis for ECIs) that is reasonable. She also stated that the Commission was doing its best to limit the disadvantage arising from the fact that organisers need to obtain a national certification authorisation may mean that signatures can be collected only after the date when the 12-month deadline has started. No maladministration had therefore been committed. However, she adopted a further remark stating that "*In order to avoid ECI organisers wasting financial and organisational effort unnecessarily, it would be useful if the Commission would inform ECI*

organisers, who intend to use their own collection system, updated about its preliminary assessment of the admissibility of their proposed initiatives."

On the second claim, the Ombudsman decided that the assessment as to whether new information should or can be added to a proposed ECI within the original 2 month time-limit should be done on a case-by-case basis. No maladministration had been committed.

The Ombudsman also concluded by stating that she recognised with concern that the ECI process is facing a number of procedural and systemic problems that have to be addressed in order for the ECI tool to be truly citizen-friendly. She identified the main problems in the ECI process and proposed possible solutions in her decision closing the own-initiative inquiry OI/9/2013/TN.

Anaïs Berthier

C.2 Decision closing her own-initiative inquiry 01/9/2013/TN concerning the European Commission

The inquiry concerns the operation of the European Citizen's Initiative (ECI) and the Commission's role and responsibility in this regard. The ECI allows a group of at least one million EU citizens from seven Member States to call on the Commission to propose new EU legislation. It has been running since 1 April 2012 when the ECI Regulation setting out the rules and procedures was adopted. The Ombudsman's inquiry has two objectives, first to ensure that the present ECI Regulation works as well as possible and second, to provide input for the legislator to consider as part of the review being carried out this year. The Ombudsman suggests the following guidelines to the Commission:

1. Provides as much guidance as possible to staff in the Europe Direct Contact Centre so that they can exercise reasonable judgment in striking the delicate balance between supplying helpful advice and being seen to steer a particular ECI.

2. Endeavours to provide reasoning for rejecting ECIs that is more robust, consistent and comprehensible to the citizen.

3. Articulates more clearly for citizens its understanding of the value of the public debate generated through the ECI procedure and of how this debate, in its own right and irrespective of the individual outcome, gives the ECI process value and legitimacy.

4. Does all in its power to see to it that, throughout the ECI procedure, the public debate ensuing from a registered ECI is as inclusive and transparent as possible.

5. Explores with Parliament, the latter being responsible for organising public hearings, how to ensure that the two arms of the legislature, Parliament and Council, as well as interested stakeholders (for and against the initiative) are present at the public hearing.

6. In its formal response to an ECI that has obtained one million signatures, explains its political choices to the public in a detailed and transparent manner.

7. Duly follows up on its commitment to analyse the suggestions made in contributions to the Ombudsman's consultation aimed at improving the online collection system (OCS) software.

8. Should be mindful, in improving the OCS software, of the needs of persons with disabilities who wish to submit statements of support of ECIs online.

9. Draws on the example of the Transparency Register's quality checks and its alerts and complaints system to ensure that funding and sponsorship information provided by ECI organisers reflects reality and that any issues are brought to its attention.

10. In order to facilitate EU citizens wishing to sign an ECI, and irrespective of in which Member State they are currently residing, proposes once again to the legislature simpler and uniform requirements for all Member States in terms of the personal data to be provided when signing a statement of support.

11. Comes forward with ideas on the two important aspects of translation and funding of ECIs and, if necessary, proposes relevant provisions in a revised ECI Regulation.

The Commission is required to indicate how and when it will implement each measure and to follow-up by 31 May 2015. The Ombudsman will also draw the attention of the European Parliament's President to relevant aspects of her decision, notably guidelines 4, 5, 6, 10 and 11.

Anaïs Berthier

C.3 Decision closing her inquiry into complaint 240/2014/FOR against the European Commission

The complainant, an Irish citizen who campaigns against the construction of windmills, complained to the Ombudsman about how the Commission conducted a public consultation during the process of drawing up of a list of infrastructure projects that would be given priority for funding by the Commission. His claims are twofold: the Commission should have ensured that all relevant environmental information is available to the local Communities affected by the projects in question; the Commission should publish its website on public consultations in all the official languages of the EU or at least in the official languages of those Member States which could be affected by the schemes contemplated.

The Ombudsman recalled Article 1 of the TFEU and its importance in relation to policies and decisions that may impact the environment, the public participation provisions of the Aarhus Convention and Regulation 1367/2006 and in particular Article 9 thereof. She then stated that the Commission should not have used all *possible* means of ensuring access to information on the list of energy infrastructure projects but rather all *appropriate* means. Whether a measure is appropriate depends on the nature of the environmental issue and the nature of the decision-making and whether other bodies are better placed to carry out such measures.

She added that according to the relevant legislation, Regulation 347/2013, and as argued by the Commission, none of the projects on the list of projects can be implemented unless they have undergone appropriate consultation at local level, where persons who are most affected by the projects and who may be better informed as regards the impact of the projects on the environment, may put forward their views and concerns. She therefore considered that there were safeguards which ensured that citizens can participate in the decision-making relating to individual projects and make known their views on the impact of those projects on the environment before they are implemented. Also, funding is not granted without approval at national level. She concluded that it would not be appropriate for the Commission to replicate the consultation that already must take place at national level.

Furthermore, the Commission had carried out a broad consultation on its plans to fund projects on a very diverse range of issues. Persons and interest groups throughout the EU were entitled to and were empowered to put forward their views on those broad issues.

No maladministration was therefore found. However, a further remark was adopted stating that the Commission should, in addition to using web-sites, consider also using more dynamic and interactive internet forms of communicating, such as social media, with citizens in public consultations.

As regards the second allegation, the Ombudsman found that the Commission failed to provide citizens with the necessary translations of a document to allow them to participate fully in the public consultation and that this constituted maladministration. The Commission did publish in all official languages information relating to its public consultation on the projects to be potentially funded by the Commission. However, it did not translate all the documents relating to the consultation, specifically not the list of projects which was provided in English only.

Anaïs Berthier

C.4 Decision closing the inquiry into complaint 349/2014/OV against the European Investment Bank

In 2005, the EIB signed a 500 million euro loan agreement with the Mopani company which is majority-owned by the Swiss group Glencore. The loan was made to partially fund the renovation and modernisation of the Mulfuria copper smelter to reduce the emissions of sulphur dioxide at the industrial plant dating from the 1930s.

On 8 November 2012, the complainant, a development organisation, requested the EIB to publicly disclose the investigation report it did following the publication on the internet of a draft audit report on allegations of tax evasion by Mopani and its parent company. The EIB refused. The complainant submitted a complaint to the Complaint Mechanism of the Bank. Having received no reply from the Mechanism seven months after having lodged the complaint, the complainant turned to the Ombudsman.

The Ombudsman asked the EIB to either release the report or to explain with reference to the exceptions in point 5.2 of the EIB's Transparency policy why releasing the report would specifically and effectively undermine the protection of an interest relied upon. The EIB replied that it maintained the earlier refusal contrary to the conclusion of its own Complaints Mechanism which had recommended the disclosure of a redacted version of the report or, should this not allow the EIB to disclose a meaningful document, a summary of the investigation and its outcome.

The Ombudsman noted that the EIB had not carried out a specific examination of the investigation report in order to refuse access. Instead, it relied on a general presumption of non-disclosure of documents and information relating to its anti-fraud investigations (Article 5.2.3 of the Transparency Policy). According to the Ombudsman a general presumption of non-disclosure within a fraud investigation in order to protect the purpose of investigation would in principle apply only as long as the investigation is still on-going. In this case the investigation had been closed for 3 years. The EIB could not therefore rely on a general presumption of confidentiality.

The Ombudsman also noted that the EIB had to consider whether there was an overriding public interest in disclosure in accordance with its Transparency policy. The general public had the right to know once an investigation is closed, and to the extent that disclosure does not undermine the protection of commercial interests, the outcome and at least the essential findings of such an investigation, in particular when such considerable amounts of money are involved. In its view the update on the EIB's website contained no meaningful information concerning the findings of the investigation. This constituted an instance of maladministration. The Ombudsman made the following draft recommendation to the EIB: "*The EIB should reconsider its refusal to grant access to the investigation report ... and decide either to grant access to a redacted version of the report or, should this not be possible, to at least provide the complainant with a meaningful summary of the main findings of the investigation report*". It also recommended that the EIB should consider whether other exceptions set out in its transparency policy applied and stated that the EIB might, as a means to increase transparency and reinforce the public trust in the Bank's efforts to fight fraud and corruption, be guided by the practice followed in similar cases by the World Bank's Integrity Vice-Presidency.

The EIB decided to provide the complainant with a meaningful summary of the main findings of the investigation report and to publish it on its website. Disclosure of the report would undermine the protection of public interests under exceptions provided in its transparency policy.

After assessing the summary provided by the Bank and the investigation report, the Ombudsman adopted two critical remarks. First, the EIB had not met its obligation to abide by the provisions of its own Transparency Policy as the summary does not constitute, with regard to the substantive findings into the allegations of tax evasion by Mopani, a meaningful summary of the EIB's report. Second, in the handling of the request for access to the report, the EIB had failed to meet its obligations under its own Transparency Policy.

Meanwhile the EIB has amended its Transparency policy to provide for a presumption of confidentiality for documents adopted within investigations even once these are closed, in complete contradiction with the findings of the Ombudsman. However, the policy provides that the Bank *may* disclose a summary of the investigation once it is closed. This is a very significant step backward in the way the Bank handles fraud and corruption cases. Providing for a presumption of confidentiality in a policy seems to be at odds with the Aarhus Convention and, as in any confidential proceedings, can only stir suspicion on the decisions adopted relating to these matters.

Anaïs Berthier

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Section D: Other EU institutions' decisions

D.1 Adoption of a directive on GMO cultivationThe Council adopted Directive 2015/412 which amends Directive 2001/18 on the deliberate release of genetically modified organisms (OJ 2015, L 68 p.1).

Under the new Directive, Member States may restrict or prohibit the cultivation of GMO plants in their territory. Member States may either, during the authorisation procedure, ask for an amendment of the geographical scope of the authorisation, so that all or part of their territory would be excluded. They may also, once a GMO has been authorised, prohibit or ban the cultivation of the GMO plant on grounds such as those related to the environmental or agricultural policy objectives, or other compelling grounds such as town and country planning, land use, socio-economic impacts, co-existence or public policy. The grounds invoked by a Member States must be different from those on which an environmental risk assessment had been made by the European Food Safety Authority (EFSA).

The new Directive entered into effect 20 days after its publication in the Official Journal.

Ludwig Krämer

D.2 Commission Proposal to amend its legislation on genetically food and feed, COM(2015) 177.

The Commission made a proposal to the Council to amend Regulation 1829/2003 on genetically modified food and feed, in order to adapt it to the recently adopted Directive 2015/412. This Directive enables Member States to restrict or prohibit GMO cultivation on their territory, or part of it, "provided that such measures are justified on the basis of compelling reasons other than the risk to human or animal health and the environment that is, criteria other than those assessed by EFSA in its risk assessment". Directive 2015/412 applies to both future

authorisations and to GMOs that have already been authorised at EU level, though it only applies to GMOs for cultivation.

The Commission proposes to align Regulation 1829/2003 to these new provisions in order to have one single management system. The Commission, though, did not consider aligning the EU's GMO legislation to the requirements of the Aarhus Convention. Indeed, the participation of the public in the decision-making process on GMOs is very clearly incompatible with the Aarhus Convention. This Convention provides for public participation in the decision-making procedure as early as possible, when options are open. In contrast, EU law (Regulation 1829/2003) allows the public to express, within 30 days, an opinion on EFSA's opinion of whether an application for a GMO should be approved or not. However, it normally takes several years, before an application is assessed by EFSA.

Ludwig Krämer

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Section E: Legal journal articles

E.1 Szydło M., How to reconcile national support for renewable energy with internal market obligations? The task for the EU legislature after Ålands Vindkraft and Essent, (2015) 52 Common Market Law Review, Issue 2, pp. 489–510

All Member States have introduced schemes to support renewable electricity. Authorised by the Renewable Energy Directive 2009/28/EC (RED), Member States' schemes discriminate in favour of national renewable energy generators and exclude support for renewable electricity produced in other Member States.

This article comments on the judgments of the Court of Justice in *Ålands Vindkraft* and *Essent*, which addressed the question of whether such (discriminatory) support schemes are compatible with EU rules on the free movement of goods. Those rulings are of crucial importance for all Member States, for the whole EU renewable energy industry, and for the European Commission's efforts to encourage Member States to open their schemes to foreign generators.

The facts of the two cases can be summarised as follows. *Ålands Vindkraft* concerned Sweden's green certificates mechanism, under which certificates were only issued to renewable energy producers located in Sweden. Ålands Vindkraft, a company that operated a wind farm located in Finland but connected to the Swedish electricity grid, was refused the certificates and filed the complaint that ultimately led to the judgment of the Court of Justice. *Essent* concerned the green certificates scheme of the Belgian region of Flanders, under which certificates could only be granted to operators who could demonstrate that renewable electricity was produced in Flanders.

In both cases, the Advocate General had suggested that the Court of Justice should declare the RED invalid, for violation of the Treaty rules on free movement of goods, in the part that allows Member States to restrict their support schemes to national producers. In both cases, the Court disregarded the argument of the Advocate General and held that, even though the schemes do constitute measures having equivalent effect to quantitative restrictions on imports (as a rule prohibited by the Treaty), they are justified because they promote the legitimate objective of promoting renewable energy, and are proportionate to the fulfilment of that overriding requirement.

The author of the commentary notes that the Court avoided any talk of discrimination, thus raising the suspicion that 'the ECJ consciously did not want to expose the directly discriminatory nature of the national support schemes in question, so that it could justify those schemes by recourse to the category of overriding requirements' which, if they are proportional, can justify restrictions on the free movement of goods. The author further underlines that, while the control of proportionality carried out by the Court is usually strict, in both cases the Court did 'not apply the principle of proportionality too rigorously'. In particular, the Court did not check if the restrictive measures were appropriate or suitable to achieve the stated objective (in the commentator's words, 'the fact that the national support schemes exclude renewable electricity generated in other Member States from their scope of application hardly contributes' to promoting renewable energy) and if the desired objective could equally be met through less restrictive measures. The author thus reaches the conclusion that the Court simply accepted, 'with great reverence', the political decisions of the EU legislature and that any hope of eliminating discrimination in renewable energy support schemes now lies in the harmonisation of those schemes at EU level through a legally binding directive.

Giuseppe Nastasi

E.2 Steinbach A. and Brückmann R., Renewable Energy and the Free Movement of Goods, Journal of Environmental Law, Volume 27, Issue 1, March 2015, pp. 1-16

The authors of this article discuss the contradiction, in EU energy policy, between, on the one hand, the objective of integrating national energy markets and removing barriers to cross-border electricity transmission and, on the other hand, the encouragement of the fragmentation of those markets through national policies focused solely on domestic considerations.

The authors recall the 'back and forth' done by EU legislation which, in 2003, required Member States to ensure that foreign electricity generators have equal access to domestic markets (Internal Market in Electricity Directive 2003/54/EC); then, in 2009, it enabled Member States to decide to which extent they support renewable energy generated elsewhere in the Union (Renewable Energy Directive 2009/28/EC); then, later in 2009, it again prohibited discrimination against electricity providers (Internal Market in Electricity Directive 2009/72/EC).

In the view of the authors, the recent judgment of the Court of Justice in *Ålands Vindkraft* reinforces the trend towards fragmentation: '[t]he key message of the decision is that the right of Member States to independently formulated national [renewable energy] subsidy systems is to be preserved, even if such systems discriminate against foreign energy producers...Clearly, this decision is at odds with the effort to create a unified internal energy market'. This fragmentation,

according to the authors, will lead to increasing challenges as the share of renewable energy in the power system increases -- while the volatility of renewable energy generation could be managed through cross-border exchanges, the existence of incompatible support schemes impairs exactly those exchanges.

The authors go on to provide a detailed legal assessment of the arguments that the Court made (and did not make) in the *Ålands Vindkraft* ruling. But their conclusion brings to the fore the political character of the matter: renewable energy subsidies are worth billions of euros, and Member States want -- and, blessed by the Court, will continue -- to keep that money within the country.

Giuseppe Nastasi

E.3 *Christiernsson/Michanek/Nilsson*, Marine Natura 2000 and Fishery — The Case of Sweden, JEEPL 2015, 22.

Research indicates that some fishery operations may cause significant negative effects on marine Natura 2000 sites. This article looks at the EU regulatory framework relevant to fishery operations in marine Natura 2000 sites and the administrative practice in Sweden.

The authors first examine the application of Art. 6(3) of the Habitats Directive to (recurrent) fishery operations in Natura 2000 sites. For any plan and project likely to have a significant effect on the site in view of the site's conservation objectives, Art. 6(3) provides that such a plan or project can only be authorised if an appropriate assessment shows that it will not adversely affect the site's integrity.

Referring to the *Waddenzee case (*C-127/02) and the provision's wording, the authors conclude that fishing operations entailing the risk of either direct or indirect damage to the site must be considered as "projects likely to have a significant effect on the site" within the meaning of Art. 6(3). Further, the authors argue that recurrent fishing operations in one area may be regarded as distinct "projects" under Art. 6(3). Such fishing should consequently be considered individually for the purpose of an appropriate assessment, even if the first fishing operation had been undertaken before the Habitats Directive was transposed into national law. The authors see their interpretation confirmed by Art. 6(2) of the Habitats Directive which requires Member States to take appropriate steps in order to avoid the deterioration of natural habitats and the habitats of species in Natura 2000 sites. Consequently, an activity, such as fishing, must be re-assessed whenever required.

In the final section of the article, the authors examine whether a general exemption of fishery under Art. 6(3) of the Habitats Directive would comply with the CJEU's caselaw. They suggest that this caselaw would make it very difficult to formulate general requirements so that it was excluded that any future fishing operation would have a likely significant effect on the protected site.

The authors then turn to examine Art. 11 of the Common Fisheries Policy (CFP), which clarifies the competence of Member States to restrict fishing activities in their sovereign waters when fulfilling their environmental conservation obligations under EU law.

Article 11(1) authorises Member States to implement measures in relation to fishing activities throughout their exclusive economic zone, where they are necessary for the purpose of complying with their obligations under Art. 13(4) of the Marine Strategy Framework Directive, Art. 4 of the Birds Directive or Art. 6 of the Habitats Directive. The authors argue that the formulation in Article 11(1) would not prevent a Member State from adopting more stringent measures than provided for in the three quoted provisions.

Member States are also authorised under Article 11(2) to adopt measures which would also affect fishing vessels of other Member States which have a direct management interest. However, a specific procedure is set out, which is intended to result in a 'joint recommendation' to the Commission. The authors find that this procedure could entail a risk of delay of the adoption of measures when two Member States cannot agree on a joint recommendation and the Commission is consequently required to act in accordance with the ordinary legislative procedure. The authors predict that Member States might be led to propose less stringent measures than necessary in order to obtain agreement for a joint recommendation.

For a detailed analysis of Art. 11 CFP see ClientEarth's briefing (dated July 2014)

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