EEL News Service

Issue 03/2014 of 3 April 2014

In this Issue:

- HELF Lecture: The European Aarhus space - the role of the Aarhus Convention Compliance Committee, the EU and CJEU
- The Environmental Legacy of Sochi: Time to Take the Olympic Charter Seriously
- Summer Programme on International and European Environmental Law: Facing the Challenges?

Case Law

Scope of application Charter of Fundamental Rights

ECJ Case C-206/13, *Cruciano Siragusa v Regione Sicilia*, 6 March 2014

The case concerned a request for a preliminary ruling on the compatibility of an Italian legislative decree with the right to property as enshrined in Article 17 Charter of Fundamental Rights of the European Union and the proportionality principle as a general principle of EU law. The decree prohibits any alteration of property located in national landscape conservation areas without clearance from the competent local authority. In case of non-compliance, the local authority can order the property to be restored to its former state, irrespective of whether a specific evaluation of the compatibility of the activity in question with the features of the landscape has been carried out.

The national court, referring to a number of EU rules based on the environmental competence of the Union, had suggested that EU law was applicable to the case because landscape protection could not be seen to "stand alone as a concept separate from the protection of the environment". The ECJ disagreed, stating that according to Artide 51 of the Charter, the obligation to respect fundamental rights defined in the context of the EU is binding upon the member states only in respect of matters "covered by EU law". According to the Court, the concept of "implementing Union law" requires a certain degree of connection that goes beyond the matters covered being closely related or one of those matters having an indirect impact on the other. It mentioned a number of points to be taken into consideration when making the assessment, like the nature of the national legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law, and whether there are specific rules of EU law on the matter or capable of affecting it. EU law provisions have to impose obligations on member states with regard to the situation at issue in the main proceedings for EU law to be applicable. Possible indirect effect on a system established by EU law does not constitute a sufficient connection. The Court concluded that the objectives pursued by EU legislation are not the same as those pursued by the relevant Italian legislative decree, even though landscape is one of the factors to be taken into consideration in assessing the impact of a project on the environment in accordance with Directive 2011/92 and among the factors to be taken into consideration as part of the environmental information referred to in the Aarhus Convention Regulation No 1367/2006 and Directive 2003/4. Since the national court had failed to establish a sufficient link between the national legislation and provisions of EU law, the ECJ found that it lacks jurisdiction to answer the referred questions.

See also:
European Law Blog, Case C-206/13 Siragusa: A further piece for the Åkerberg Fransson jigsaw puzzle, 12 March 2014
Case C-617/10 Åkerberg Fransson, 26 February 2013

'Guarantees of origin' and EU external competence

AG opinion in Case C-66/13 *Green Network*, 13 March 2014

On 13 March 2014, Advocate General Yves Bot delivered his conclusions in the case Green Network (Case C-66/13) which concerns principles on EU external competences and EU environmental protection policy, in particular the development of energy produced from renewable energy sources. In this request for a preliminary ruling, the Court has been asked to establish whether the adoption of the RES Directive 2001/77/EC has led to the EU having exclusive rights to enter into agreements with third countries on the recognition of guarantees of origin for energy produced from renewable energy sources. The main proceedings concerned a national legislative decree, implementing the RES Directive, which contained an exemption to the obligation to purchase green certificates for imported electricity if the third country had concluded an agreement under which it is given "assurance that the imported (green) electricity really is (green) in the meaning of Article 5 of Directive 2001/77".

AG Bot recalled the principle laid down in case 22/70 AETR, according to which the European Community not only has the power to enter into international agreements in areas expressly referred to in the Treaties, but that such competence can arise by implication from the power the Community has been conferred on an internal level. This means that the member states no longer have the ability to enter into agreements with third countries on commitments that might affect those rules or alter their scope. The AG concluded that based on the evaluation of Directive 2001/77, Directive 2009/28 and the "foreseeable development of EU law", and considering that guarantees of origin is one of the most important tools to promote green energy, it represents an area already largely covered by EU law. According to the AG, the EU's exercise of its internal competence has led to its exclusive external competence and is precluding national legislation such as the Italian decree, under which the member state concerned may conclude international agreements with third countries on the recognition of guarantees of origin. The fact that Switzerland has concluded a general free trade agreement with the EU does, according to AG Bot, not affect the division of powers between the EU and its member states.

Chinese export restrictions on rare earths violate WTO law

WTO Cases WT/DS431/R, WT/DS432/R and WT/DS433/R, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, 26 March 2014

A WTO panel has found Chinese export restrictions on rare earths, tungsten, and molybdenum to be in breach of China's WTO obligations. These raw materials are all used in the production of electronic goods. The case concerned three types of export restrictions: duties (taxes) on the export of various forms of the materials; an export quota on the amount of the materials that can be exported in a given period; and limitations on the enterprises permitted to export the materials. The complainants have argued that the restrictions are designed to provide Chinese industries that produce downstream goods with protected access to the materials and that they are in breach of China's WTO obligations under its Accession protocol. In its defence, China claimed that the restrictions are related to the conservation of its exhaustible natural resources, and necessary to reduce pollution caused by mining. By referring to the exemptions in Article XX(b) and (g) of the GATT 1994, China claimed that the export duties are necessary to protect human, animal and plant life or health from the pollution caused by mining the minerals at issue and that the export quotas and restrictions on trading rights are justified since they relate to the conservation of an exhaustible resource. The majority of the panel agreed with the claimants and found that the "General Exceptions" contained in Article XX GATT 1994 could not justify exemptions from the obligation to eliminate export duties contained in China's Accession Protocol. Even if they had been applicable,

the duties imposed by China, were not "necessary to protect human, animal or plant life or health". The panel also found that the export quotas were discriminatory and designed to achieve industrial policy goals rather than conservation. Concerning the restrictions on trading rights the Panel found that China could rely on the Article XX exceptions to justify the restrictions in question, although it found that China had not adequately explained why its trading rights restrictions were justified under this provision. Consequently, the Panel concluded that China's trading rights restrictions breach its WTO obligations.

See also:

European Commission press release, 26 March 2014

Japanese whaling in breach of international law

ICJ Case *Whaling in the Antarctic (Australia v. Japan: New Zeeland intervening)*, 31 March 2014

Although a moratorium is in place on the killing of whales for commercial reasons, whales can still be killed for purposes of scientific research under Article VIII of the 1946 International Convention for the Regulation of Whaling, provided a special permit is issued by the state concerned. Australia was convinced that the number of whales that Japan allows to be killed each year is too high to be labelled as scientific research. The ICJ noted that there exist "divergent views about the appropriate policy towards whales and whaling", but that it is not for the Court to settle these differences. It merely can ascertain whether the special permits granted in relation to Japan's research program (Japanese Whale Research Program under Special Permit in the Antarctic, JARPA II) fall within the scope of Article VIII(1) Whaling Convention.

The ICJ noted that "scientific research" is not defined in the Whaling Convention. Australia had cited one expert to clarify four criteria that need to be met before investigations qualify as scientific research, but the Court was not convinced by this interpretation. The ICJ did not formulate its own definition of scientific research, nor did it come up with alternative criteria. JARPA II, the Court found, can be broadly characterized as "scientific research". The ICJ did however investigate whether elements of Japan's whaling research programme's design and implementation are reasonable in the light of its own objectives, notably by looking at the scale of the whale killings, the timeframe associated with the programme, scientific output, peer review and the coordination of the programme with related research projects. In that way the Court limited its judgment to the question whether the killing of whales under JARPA II is for the purposes of scientific research.

Notably because of recommendations adopted by the Whaling Commission to take into account whether research objectives can be reached using non-lethal methods, which were accepted by Japan, and the fact that the country had stated itself that it does not use lethal means more than it considers necessary, the ICJ investigated whether there existed an analysis on the use of such alternative, non-lethal methods. It found they were lacking and that therefore, it was not certain that killings are proportionate. The ICJ also pointed out that since 2005, some 3,600 minke whales were killed under JARPA II, but "the scientific output to date appears limited" (notably only two peer-reviewed papers, both of which turned out not related to JARPA II objectives). Based on an extensive investigation by the Court of these and a number of other issues, it found that while JARPA II can be broadly characterised as "scientific research", the evidence does not establish that the programme's design and implementation are reasonable in relation to achieving its stated objectives. Hence, the ICJ concluded that the special permits granted by Japan for the killing of

whales in connection with JARPA II were not "for purposes of scientific research" pursuant to Article VIII(1) Whaling Convention and ordered Japan to revoke all permits and not to issue new permits under JARPA II. That part of the judgment was supported by twelve of the sixteen judges, with four votes against.

Climate Change

IPCC working group report on the impacts of climate change

On 31 March 2014, the report from IPCC Working Group II (WGII) titled 'Climate Change 2014: Impacts, Adaptation and Vulnerability' was issued. It details the impact of climate change up to date, the future risks from changing climate, and the opportunities for effective action to reduce risks. Compared to past WGII reports the new report covers a larger knowledge base of relevant scientific, technical and socioeconomic literature. Observed impacts of climate change have already affected agriculture, human health, ecosystems on land and in the oceans, water supplies and people are occurring all around the world. Additional global warming of 1-2 °C will pose increased risks for unique and threatened eco-systems (particularly arctic-sea-ice and coral-reef systems) and extreme weather events (heat waves, coastal flooding, and precipitation). In addition to mapping the changes and risks, the report identifies particularly vulnerable people, industries and ecosystems worldwide. It recognises three risk components for a changing climate: vulnerability (the propensity or predisposition to be adversely affected) and exposure (people, ecosystems and assets in that could be adversely affected) overlapping with hazards (triggering climate events or trends), each of which can be targeted for actions. According to the report risks have to be managed, both by cutting greenhouse gas emissions to avoid the worst climate change risks, and by investing in better adaptation to increase resilience against future effects. Adaptation has to be carried out across regions, sectors and throughout societies. Working Group I's contribution on the physical science base was released in September 2013 and the report of Working Group III on mitigation of climate change will be released in April 2014. The IPCC Fifth Assessment Report cycle will conclude with the publication of a Synthesis Report in October 2014.

See also:

IPCC press release, 31 march 2014

IPCC WGII Summary for Policymakers, 31 March

IPCC WGII Final Drafts

Time running out on EU ETS aviation exemptions

On 4 March 2014, the Council and European Parliament (EP) reached an informal agreement to change the rules of the EU Emissions Trading System (EU ETS) again. This new amendment would effectively exempt non-EU airlines from having to pay for their CO2 emissions, even if they fly in EU airspace. However, on 19 March 2014, the EP Committee on Environment voted against the compromise, leading to uncertainties in the final say of the EP.

Since the beginning of 2012 all emissions from flights landing and taking off from EU airports have been covered by the ETS legislation. There has been an on-going conflict over the legality of bringing

aviation under the EU ETS system. Third countries have objected to the inclusion of emission outside EU airspace, arguing among other things that this is in breach of the principles of territoriality and sovereignty. In the case brought by US airlines and trade organisations, the ECJ had ruled that the EU ETS legislation is in line with international law. However, flights leaving or entering EU airspace have already been temporarily exempted since April 2013 where it concerned flight movements outside EU airspace, in order to give the International Aviation Organisation (ICAO) time to agree on a global mechanism to control aviation emissions.

After the ICAO's adoption of a timeline to agree a future mechanism in 2016, the Commission proposed an amendment to the ETS legislation, exempting emissions outside EU airspace until 2020. Still, third countries and airlines have put pressure on the EU to exempt non-EU aviation all together. Negotiations between the member states and the MEPs at the beginning of March 2014 resulted in a compromise, limiting the aviation coverage of EU ETS to emissions from flights within the European Economic Area (EEA) for the period from 2013 to 2016. The regulation would apply to all EU or non-EU aircrafts alike and exclude all emissions from any flight entering or leaving EU airspace, essentially exempting all foreign flights from complying with the ETS. Two weeks later, the EP Environment Committee rejected the compromise leaving the issue uncertain. Time is running out since the 'stop-the-clock' exemption will expire in April. The MEPs final vote on the agreement will be cast in plenary session 3 April 2014 and is to be followed by a Council decision. The legislative process could be concluded by the end of April 2014.

See also:

European Council press release, 7 March 2014

European Voice, EU surrenders on aviation in ETS, 5 March 2014

European Voice, MEPs to vote on ETS aviation scheme, 19 March 2014

EEL News Service 2013/07 on the ICAO mechanism

Suzy Huber, The EU, international aviation and climate change – a case study for the EU as a global role model?, in: W.Th. Douma and S. van der Velde, EU environmental norms and third countries: the EU as a global role model?, CLEER Working Paper 2013/5

Case law

Case C-366/10 *ATA and others v EU ETS*

Comment on Case C-366/10 ATA and others v EU ETS EEL News Service 2011/11

Natural Resources

Commission proposes draft Regulation on 'conflict minerals'

On 5 March 2014, the High representative (HR) of the EU for Foreign Affairs and Security Policy Catherine Ashton and EU Trade Commissioner Karel De Gucht proposed an integrated EU approach, aimed to stop profits from extracting and trading minerals from being used to fund armed conflicts. The approach aimed at making it easier for companies to source tin, tantalum, tungsten and gold responsibly and to encourage legitimate trading channels.

The Commission's draft regulation does not place direct obligations on EU importers but is intended to facilitate more responsible imports into the EU through self-certification. EU importers who choose to be part of the system are required to exercise 'due diligence' - they are to avoid causing harm in the affected areas by monitoring and administrating their purchases in line with the OECD Due Diligence Guidance. Another aim of the proposal is to facilitate information flows throughout the supply chain. Participating importers are to provide information on the origins and processing of the minerals and metals covered by the regulation. Competent authorities in the respective member states will carry out ex-post checks on the 'responsible importers'. In addition, the Commission is to adopt and publish an annual list of 'responsible smelters and refiners of minerals'. The Commission and the HP presented the overall comprehensive foreign approach on how to confront the connection between conflict and the trade of minerals, reaffirming that 'conflict minerals' are part of the EU foreign policy agenda in the promotion of conflict resolution, rule of law and sustainable development.

Campaigners and NGOs have criticized the proposal for being weak and not living up to expectations since the system is voluntary, limited to a number of minerals and only applying to companies placing raw materials on the market and not importers of products such as mobile phones, which may already have had the materials installed. The proposal also does not follow the EP Report calling for binding legislation on conflict minerals. NGOs also fear that the proposed legislation risks to undermine state responsibility to protect human rights and threatens to lower international standards, starting a race to the bottom.

By comparison, the US Dodd-Frank Act that passed in 2010 obliges corporate financial disclosure by stock exchange listed firms. The due diligence rules apply throughout the supply chain in the US system, subjecting numerous companies to the obligations at first. Due to heavy criticism on its scope, the application was limited later on to companies already subject to reporting requirements under the Exchange Act. Unlike the proposed EU regulation, the Dodd-Frank Act is limited in geographical scope to the Democratic Republic of Congo and adjacent countries.

See also:

European Commission press release, 5 March 2014

Draft Regulation on conflict minerals, 5 March 2014

Joint Communication by the European Commission and the High Representative, 5 March 2014

NGO position paper, 16 September 2014

Global Witness: Proposed EU law will not keep conflict resources out of Europe, campaigners warn, 5 March 2014

Waste

Updated rules on shipment of waste expected from 2016

Council and EP have agreed on a compromise to update rules for shipment of waste. According to a press release, the new regulation, amending Regulation (EC) 1013/2006, contains strengthened measures to ensure a more uniform implementation of the waste shipment regulation throughout

the EU. The amendment is an attempt to resolve the problem of "port hopping", where exporters of illegal waste chose to send their waste through member states with less rigorous control. Member states will, by 1 January 2017, have to establish inspection plans based on a risk assessment. As a minimum requirement, the inspection plans have to include the objectives and priorities of the inspections, the geographical area covered by the inspection plans and the tasks assigned to each authority involved in the inspections. Further, the inspection plans are to be reviewed on a regular basis and updated at least every three years. Member states will also have to make information related to inspections publically and electronically available on an annual basis. To come into effect the regulation will have to be formally approved by the Parliament that is expected to vote on the matter on 17 April, and the Council. The regulation is to apply from 1 January 2016.

Water

Commission's reluctant response to 'Right2Water'

On 19 March 2014, the European Commission published a Communication, officially responding to Right2Water, the first successful European Citizens' Initiative (ECI). The initiative called on the Commission to ensure that all EU citizens enjoy the right to water and sanitation, to exclude water supply and management of water resources from internal market rules and liberalisation, and to increase its efforts to achieve universal access to water and sanitation around the world.

In its Communication, the Commission first outlined the work already done by the EU in the areas of water and sanitation and emphasised that the competence to make decisions on operate water services lies with the public authorities in the respective member states. Water distribution and supply are, along with wastewater services, expressly excluded from the free movement of services. The Commission further reiterated that provision of water services has been excluded from the proposed Directive on the rewarding of concession contracts.

The response did not include any proposals of judicial measures or obligations of the Commission, which rather reemphasised its supporting and facilitating role in ensuring water and sanitation within the EU and internationally. It committed itself to a list of 'concrete steps and new actions' in addressing the initiative and its goals. These actions include the launch of an EU-wide public consultation on the Drinking Water Directive, the improvement of transparency for urban wastewater and drinking water data management and a more structured dialogue between stakeholders on transparency in the water sector. Although aspects of the response were welcomed by the organisers of Right2Water they criticised the Commission for the absence of proposal for legislation recognising the human right to water and the lack of legal commitment that there would be no EU initiatives to liberalise water and sanitation.

Background:

According to article 11(4) TEU and Regulation 211/2011 one million citizens from seven member states can through an initiative invite the European Commission to submit a proposal on matters on matters where citizens consider that legal act of the Union is required for the purpose of the implementation of the Treaties. The purpose of the ECI is to give a stronger voice to European Union citizens by giving them the right to call directly on the Commission to bring forward new policy initiatives.

See also:

European Commission Communication, 19 March 2014

Right2Water "Commission lacks ambition in replying to first European Citizens' Initiative", 19 March 2014

Upcoming Events

1st Hague Environmental Law Facility (HELF) Lecture: "Whaling in the Antarctic: Observations on the ICJ Judgment in the Case Australia v. Japan"

Speaker: Dr. Olivier Ribbelink, Senior researcher International Public law, T.M.C. Asser Instituut

On 31 March 2014, the International Court of Justice pronounced its judgment in the case Whaling in the Antarctic: Australia v Japan, New Zealand Intervening. Australia had claimed that Japan's continued pursuit of a large-scale program of whaling under its research program is in breach of that countries' obligations under the International Convention for the Regulation of Whaling. The ICJ found that the special permits granted by Japan for the killing of whales under its research program were not "for purposes of scientific research" as the Whaling Convention stipulates, and ordered Japan to revoke all permits and not to issue new permits under this program. Dr. Ribbelink will provide his observations and comments on the manner in which the ICJ decided in this case. Afterwards, there is room for discussion. The event will be followed by a reception.

The Hague Environmental Law Facility (HELF) is a joint initiative of the T.M.C. Asser Instituut and the Institute for Environmental Security that aims at bringing together those involved in research, education, policy advice and practice regarding environmental law. HELF focuses on concrete challenges regarding the development and implementation of international and European environmental law, by means of organizing conferences, seminars and courses and setting up an environmental law clinic. This event is the first of the HELF Lecture series. Further information on HELF and upcoming activities will be made available at the event.

Date: Friday 4 April 2014, 15.00 - 17.30
Venue: Venue: T.M.C. Asser Instituut, R.J. Schimmelpennincklaan 20-22, 2517 JN The Hague
Registration: Attending the lecture is for free, but we kindly ask you to register here.
Contact: conferencemanager@asser.nl

IES Policy Forum: "Planetary Economics": Implications for European Energy and Climate Policy

Discussions of key findings of the new book "Planetary Economics. Energy, Climate Change and Three Domains of Sustainable Development" by Michael Grubb et al.

Speakers include:

Prof. Michael Grubb, Chair of Energy and Climate Policy at Cambridge Centre for Mitigation Research, visiting Professor at Imperial College London, and Senior Advisor, UK Office of Gas and Electricity Markets (Ofgem)
Discussants: William Garcia, Executive Director at CEFIC and Thomas Legge, Senior Associate at the European Climate Foundation
Chair: Prof. Sebastian Oberthür, Academic Director at the Institute for European Studies, Vrije Universiteit Brussel

Date: Friday 4 April 2014, 12:30 - 14:30
Venue: Institute for European Studies, Karel Van Miert Building, Conference Room Rome (Floor -1), Pleinlaan 5, 1050 Brussels
Registration: Registration form IES

8th Annual PIEL Conference - Corporations' Role in the Environmental Crisis: Problem or Solution?

Speakers include: Justice Weeramantry, former Vice-President of the International Court of Justice, Greenpeace, ClientEarth, European Food Safety Authority

Date: Friday, 11th April 2014, 09:00 – 18:15
Venue: Cass Business School, 106 Bunhill Row, London EC1Y 8TZ
Prices: students £5, NGO £20, Professionals £30 (includes lunch, tea and coffee and drinks reception),
For more information and tickets go to the PIEL website.

SCL Lecture: Addressing Crimes against the Environment under the Rome Statute (in cooperation with HELF)

Supranational Criminal Law Lecture (T.M.C. Asser Instituut, Coalition for the International Criminal Court (CICC) and the Grotius Centre for International Legal Studies of Leiden University), in cooperation with HELF

Speaker: Steven Freeland, Professor of International Law at the University of Western Sydney, Australia, 'Marie Curie Visiting Professor' at the Courts Centre of Excellence for International Courts, Denmark, and a Visiting Professor in International Law at the University of Copenhagen and University of Vienna.

Date: Wednesday 23 April, 18:30
Venue: T.M.C. Asser Instituut, R.J. Schimmelpenninck laan 20-22, 2517 JN The Hague
Registration: Not necessary, seats available on first-come-first-served basis

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HELF Lecture: The European Aarhus space - the role of the Aarhus Convention Compliance Committee, the ECHR and the CJEU

Speaker: Prof. Dr. Ellen Hey, Professor of International Law, Erasmus School of Law, Erasmus University and Visiting Professorial Fellow (2013-2015), School of Law, University of New South Wales (UNSW), Sydney, Australia

Date: 1 May 2014, 15:00
Venue: Institute for Environmental Security, Anna Paulownastraat 103, The Hague

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The Environmental Legacy of Sochi: Time to Take the Olympic Charter Seriously

Speaker: Antoine Duval, Senior researcher, T.M.C. Asser Instituut

Date: 16 May 2014, 15:00
Venue: T.M.C. Asser Instituut, R.J. Schimmelpennincklaan 20-22, 2517 JN The Hague

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Summer Programme on International and European Environmental Law: Facing the Challenges?

As already indicated in the previous news service, the T.M.C. Asser Institute in cooperation with the Institute for Environmental Security is organizing a Summer Program on International and European Environmental Law: Facing the Challenges? More information, including a preliminary overview of the program, can now be found at the Asser Instituut website.

Dates: 25-29 August 2014
Venue: T.M.C. Asser Instituut, R.J. Schimmelpennincklaan 20-22, 2517 JN The Hague

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Colofon

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