European Environmental Law Observatory

News

Issue of January 2014

ClientEarth's European Environmental Law Observatory, willing to animate an engaging debate on European environmental law, includes updates on important judgments and legal doctrine.

The European Environmental Law Observatory is made up of three sections. The first section is the traditional Aarhus Newsletter, covering case law and other materials relevant for the application of the Aarhus Convention on access to information, participation in decision-making and access to justice in environmental matters. The second section provides updates on judgments of the Court of Justice and the General Court, which either relate to the environment directly, or address important issues of law relevant for environmental law practitioners. The third and last section highlights questions raised in recent doctrinal contributions, hand-picked by the Observatory's staff from a se lection of major legal journals.

This issue covers materials appearing between 25th October and 25th December 2013.

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Section A: Aarhus Newsletter

A.1 - Case C-72/12, Judgment of the Court (Second Chamber) of 7 November 2013, Gemeinde Altrip and Others v Land Rheinland-Pfalz [2013] ECR-000

(Possibility to take court action against an environment impact assessment that is inadequate)

Some landowners and tenants opposed the decision to construct an industrial installation, arguing that the environmental impact assessment (EIA) had been inadequate. The administrative procedure for the construction had started before 25 June 2005, date by which Directive 2003/35 on public participation in decision-making, which explicitly introduced a provision granting access to justice, had to be transposed into national law. The decision authorising the construction was adopted after that date.

The ECJ held that the applicants were entitled to challenge the decision before the national court. The national procedure did not provide for specific delays to initiate legal proceedings. The Court therefore held that the provision in the German legislation which provided that access to the courts was only possible against administrative decisions closing procedures which were initiated after 25 June 2005 was invalid.

The ECJ held in substance that national law could not limit access to the courts against administrative decisions where no EIA had been made as EU law did not contain any such restriction. Access to the courts also had to be possible, where it was argued that the EIA was inadequate.

As EU law contains no restriction, an applicant may, in principle, invoke in court any procedural defect in the EIA procedure. However, in view of the wide discretion which the EIA directive grants to Member States, the national legislation may provide that a procedural defect which conceivably has no influence on the final administrative decision does not constitute the impairment of a right which gives access to courts. German law, though, puts the burden of proof, that a procedural defect had an impact on the final decision, on the applicant; this makes access to the courts excessively difficult and is thus not permitted. The national court will have to weigh all the evidence submitted by the operator or the administration and will in particular have to ensure that the guarantees which EU EIA legislation grants to the public with regard to information and participation are well safeguarded in such cases.

A.2 - Joined cases C-514/11 P and C-605/11 P, Judgment of the Court (Fifth Chamber) of 14 November 2013, LPN and Finland v Commission [2013] ECR-000

(Documents relating to the pre-litigation stage of infringement procedures are presumed to be excluded from public access, but applicants may prove the contrary)

The applicant, Liga para a Protecção da Natureza (LPN, Portugal), applied to set aside the judgment of the General Court in case T-29/08. In that judgment, the General Court upheld a Commission decision not to disclose documents which had been established during an infringement procedure (Art. 258 TFEU) between the Commission and Portugal. That infringement procedure, which had been initiated following a complaint by LPN, was closed by the Commission. Subsequently, LPN obtained access to some documents, but was refused access to others.

On appeal, the ECJ upheld the judgment of the General Court. It considered that the procedure under Art. 258 TFEU constituted an "investigation" for the purpose of Article 4(2), third indent, of Regulation No 1049/2001 on access to documents, which entitles the Commission to decide that documents, generated during that procedure, are to be withheld. The Court went even further – it created a presumption of confidentiality applying to all the documents adopted during that procedure. The ECJ held that there was a general presumption that disclosure of the documents in the administrative file relating to an infringement procedure at the pre-litigation stage would undermine protection of the purpose of the investigation. The Court added that disclosure would 'be likely to change the nature and progress of that procedure, given that, in those circumstances, it could prove even more difficult to begin a process of negotiation and to reach an agreement between the Commission and the Member State concerned putting an end to the infringement alleged'. The Court relied on one of its prior decision in a State aid case (Commission v Technische Glaswerke Ilmenau) in which it recognised the existence of a general presumption of confidentiality applicable to the administrative file relating to the aid and considered that infringement procedures had characteristics which are comparable to those of State aid review procedures to extend the scope of the presumption. That is very questionable as State aid procedures are regulated by specific provisions, including conditions under which access is given and the constitution of an administrative file, from which the Court was able to draw the existence of a presumption of confidentiality. However, no such legislative framework exists with regard to infringement procedures. The two legal contexts are therefore absolutely different and should not be subject to the same presumption of confidentiality. This judgment is dubious not only in law, but also in fact, as the length of infringement procedures shows that negotiating with the Member States behind closed doors does not speed up compliance with EU law. On the contrary, transparency and openness would enable the public to scrutinise the procedure, exert pressure on their governments to bring about compliance and make the Commission accountable for its obligation under Art. 17 TEU.

Moreover, the requested information was environmental information and should have been dealt with in accordance with the Aarhus Convention which does not provide any exception to the right of access on the purpose of investigation except for criminal or disciplinary ones. Yet, infringement proceedings are neither criminal nor disciplinary, the environmental information

adopted within these proceedings should therefore not be protected under Article 4(2), third indent, of Regulation No 1049/2001.

The Court held that it remains open to the applicant to prove that the general presumption of confidentiality does not apply with regard to specific documents. Finally, the Court held that LPN and Finland did not allege any specific interest justifying disclosure of the documents in question, but merely adduced the importance of the availability of environmental information regarding the environment and human health. It concluded that they had not demonstrated that there was an overriding public interest in disclose.

With this judgment, the discussion concerning disclosure of documents relating to infringement procedures appears to be closed, unless the whole system of monitoring the application of EU environmental law is raised before the ECJ. The present judgment does not discuss why the procedure under Art. 258 TFEU is an "investigation", why there is no overriding public interest in disclosure (though it concedes that LPN defends a public interest), and why access to some documents may be refused even after the infringement procedure is closed.

A.3 – Case C-279/12, Judgment of the Court (Grand Chamber) of 19 December 2013, Fish Legal and Emily Shirley v Information Commissioner and Others [2013] ECR-000

(Are UK water companies public authorities for the purposes of Directive 2003/4 and therefore obliged to disclose environmental information?)

The applicants had requested information from different UK water companies on discharges, clean-up operations and emergency flows. Disclosure was first refused, but when the cases were brought to a court, disclosure was granted on a voluntary basis. The national court asked the EU Court of Justice (ECJ), whether private UK water companies constitute public authorities for the purposes of Directive 2003/4 on public access to environmental information and are therefore obliged to disclose such information.

The ECJ considered the request to be admissible, though the information had been disclosed, as the questions raised were controversially discussed and decided in the United Kingdom.

In substance, the ECJ repeated that the term "public authority" in Directive 2003/4 had to be given an autonomous interpretation under EU law. UK law was not relevant in this regard, all the more, as the French and the English version of the Directive diverged.

The Court examined the structure of Art. 2(2) of Directive 2003/4. It held that article 2(2.a) covered all administrations which form part of the public administration or executive of the State and which only the State can decide to dissolve. Art. 2(2.b) covers entities which are entrusted with certain functions in the public interest and have been entrusted, for that purpose, with specific powers. UK water companies perform services in the public interest, such as the maintenance and development of water and sewage infrastructure, water supply and sewage treatment. They had been entrusted with certain powers in that regard, namely the possibility of compulsory purchase, of establishing by-laws for waterways and land in their ownership, of

discharging waters in certain circumstances, including discharges into private waters courses, of imposing temporary hosepipe bans and of deciding, under certain conditions, to cut off the supply of water. The ECJ held that it was up to the national court to decide whether these powers constituted "specific powers" under Directive 2003/4, so that water companies would have to be seen as public authorities under Article 2(2.b).

Whether water companies came under Article 2(2.c) of Directive 2003/4 depended on the questions, whether they were only "regulated" by the State or whether they were "controlled". The answer was to be given by the national court. The ECJ held that a company must be considered to be "controlled" when the public authorities have a decisive influence on its activity and the entity could not be considered as acting in a genuinely autonomous manner. It is instead not decisive whether the State can determine the day-to-day management of the company.

Finally, the ECJ held that a company which comes under Article 2(2.b) has to disclose all environmental information of which it disposes. A company that comes under Article 2(2.c) only has to disclose information concerning the services for which it is controlled. Where doubts exist, information has to be disclosed.

A.4 – Case T-456/11, Judgment of the General Court (Seventh Chamber) of 14 November 2013, ICdA and Others v Commission [2013] ECR-000

(Commission Regulation on cadmium annulled)

The applicants, International Cadmium Association (ICdA), asked for the annulment of Commission Regulation No 494/2011 which restricted the use of cadmium pigments in some plastic materials.

The General Court found that there were a number of studies and reports in the file which concerned the impact of cadmium on the environment which the Commission had not included in its risk assessment under Art. 68 of the REACH Regulation No 1907/2006. Consequently, it considered that the Commission had made a manifest error of assessment and annulled the Regulation in question.

This is thus another chapter in the story on getting cadmium out of the environment. There is a unanimous Council Resolution of 1988 asking for the elimination of that heavy metal (OJ 1988, C 30 p.1). A quarter of a century later, we are still not there.

A.5 – Ombudsman

Case OI/6/2013/KM, opened on 11 December 2013, Respect of time limits for dealing with initial and confirmatory applications for access provided for in Regulation 1049/2001

The Ombudsman decided to open an own-initiative report on the Commission's compliance with the time-limits foreseen in Regulation No 1049/2001 on public access to documents.

This is a long-standing concern of citizens and the public in general, as well as of ClientEarth: the Commission almost systematically disregards its obligation to answer requests for access to documents within the time limits prescribed by the Regulation. And the EU Courts side with the Commission (see for example Case T-355/04, Co-Frutta Soc. coop. v Commission), holding that a delayed answer remains valid without any restriction. Of course, one could argue that the Regulation provides that, when no answer is given within the attributed time, this is a negative answer; and that a later answer could not substitute the earlier (negative) answer. However, this would make the time limits of Regulation No 1049/2001 (too) efficient, and the Courts do not follow this understanding.

ClientEarth has made a petition to the European Parliament which also complains about the lack of compliance of the Commission with the prescribed delays and regularly reminds the Commission that it cannot reply to requests by stating that they will reply "as soon as possible" once time limits have expired. However, the Commission still allows itself to reply well after the deadlines, thus preventing any meaningful participation in ongoing decision-making processes. It remains to be seen, whether the Ombudsman will be able to make the Commission comply with the law.

Decision of the European Ombudsman of 10 December 2013 closing her inquiry into complaint 622/2012/ANA against the European Food Safety Authority (EFSA)

A national environmental organisation complained to the Ombudsman that the Chair of one of EFSA's Scientific Panels also worked for the International Life Sciences Institute (ILSI), which is close to industry and therefore liable to create a conflict of interests. The Ombudsman investigated the case, inter alia by conducting an inspection of EFSA's files. He found that the person in question had worked for ILSI when he was appointed Chair in EFSA in 2003. He had declared these interests in his annual declarations of interest. Just before the national NGO published, in December 2009, a report on conflicts of interest within EFSA, he stated in his Declaration of Interest for 2009 that he had stopped working for ILSI in 2005. He left his functions as Chair in 2012.

The Ombudsman saw, at the end of 2013, no reason to investigate the matter further. She mentioned, though, that EFSA's internal checks on the correctness of declarations of interest did not appear to have worked well and suggested that EFSA should, in the future, admit when it makes mistakes and apologise for them.

Decision of the European Ombudsman of 19 December 2013 closing her inquiry into complaint 1682/2010/(ANA)BEH against the European Commission

Following a complaint from an NGO, the Ombudsman made a long investigation into the several expert groups which exist within the Commission. The complainant had lamented that there was no complete register of such groups, that their operation was not transparent, that best practice with regard to transparency was not applied, that no general criteria for the selection of experts existed and that there was no balance in the composition of the groups, with vested economic groups being in the majority. The Ombudsman discussed the issues with the Commission. She made, in a proposal for a friendly solution, a number of suggestions to improve the situation which the Commission appears to have accepted.

It remains to be seen, whether the present situation will indeed change. There is no doubt that a very close observation of the whole system of expert groups by civil society will be necessary, in order to improve the status quo. And environmental NGOs will have to think more about their representation in such groups.

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

B.1 – Case C-262/12, Judgment of the Court (Second Chamber) of 19 December 2013, Association Vent De Colère! and Others v Ministre de l'Écologie and Ministre de l'Économie [2013] ECR-000

(A mechanism whereby the additional costs from an obligation to purchase wind-generated electricity at a price higher than the market price is financed by all final consumers of electricity in a Member State constitutes an intervention through State resources)

This case concerns the interpretation of one of the criteria constituting the concept of State aid as laid down in Art. 107(1) TFEU, namely the question whether the aid was granted by a Member state or through Member state resources.

At the roots of this case were two orders of the French Ministry of Ecology and the Ministry of Economy, that set out the conditions for the purchase of electricity generated by wind installations. After a French Conseil d'Etat ruling of 2003 that, in accordance with Case C-379/98 Preussen Elektra, the French tariff mechanism then in force did not constitute State aid (primarily because the financial burden was shared amongst a number of undertakings, without public resources contributing), French Law was amended in such a way that the additional costs were to be offset through charges payable by consumers. Also, under the new law, the level of these charges was to be determined by the Ministry of Energy.

Having discussed the relevant case law, the Court of Justice ruled that Art. 107(1) must be interpreted as meaning that a mechanism whereby the additional costs from an obligation to purchase wind-generated electricity at a price higher than the market price is financed by all final consumers of electricity in a Member State constitutes an intervention through State resources. The Court in particular paid attention to the character and mandate of the Caisse des depots et consignations, a public law corporation established to administer the aid, and its relation to (other) public institutions. With this ruling the Court distinguished this case from the situation in Preussen Elektra, mainly underlining the strong public control of the mechanism implemented by the French Law.

A request from the French government to limit the temporal effects of the judgment was rejected by the Court, which pointed out that, in light of the existing case law, the French government could not have been unaware of the prohibition laid down in Art. 108(3) TFEU, nor that the effect of the ruling would cause a risk of serious difficulties.

B.2 – Case C-281/11, Judgment of the Court (Fifth Chamber) of 19 December 2013, Commission v Poland [2013] ECR-000

(Review of Polish legislation transposing Directive 2009/41 on GMOs)

This case concerned an infringement action by the Commission against Poland for fulfill its obligations under Directive 2009/41 on genetically modified micro-organisms (GMOs) by an incorrect and partly incomplete transposition of that Directive.

In this case the Court rejected three out of six claims submitted by the Commission. The first claim concerned the transposition of certain definitions and concepts laid down in Directive 2009/41, such as 'micro-organisms', 'genetically modified micro-organisms' and the concepts of 'accident' and 'user'. Concerned that the Polish alternative wordings would broaden the scope of the Directive, the Commission had, among other things, argued that this wording would lead to a lack of legal certainty and practical difficulties. The Commission had even submitted that reproducing the definitions verbatim would have been the best way to ensure uniformity in the application of European Union law throughout the Member States.

The Court rejected all of these claims, stating that the Commission had not sufficiently shown in what way the broader wording of the Polish law would lead either to practical difficulties or jeopardise the objectives of Directive 2009/41. Also, the Court took the view that the alternative use by Polish law of 'genetically modified organism' by definition incorporates also genetically modified micro-organisms. The Court further rejected the Commission's argument that the broader wording of the concept 'accident' could run counter the objectives of Directive 2009/41. Two other claims of the Commission, in relation to the transposition of Art. 10(3) and 10(4) of Directive 2009/41 were partly found inadmissible and partly rejected. These articles allocate powers to competent authorities and provide for an authorisation procedure for the use of GMOs. Although Poland law added further details in national legislation transposing these articles – in particular by making certain powers of the competent authorities conditional and attaching a time limit to the application procedure – the Court found it had not acted counter the objectives of the Directive.

Following the Commission remaining three pleas, however, the Court found that Poland had not correctly transposed Directive 2009/41. First, Poland had not correctly transposed the relevant provisions relating situations of conflicting laws, which impaired legal certainty for operators. Also provisions relating to notification obligations for different classes of GMOs and the confidential treatment of certain information disclosed by the notifier had been transposed incorrectly or incompletely. Regarding the latter, the Court underlined its settled case law that mere administrative practices, which by their nature are alterable at will by the authorities and are not given appropriate publicity, cannot be regarded as constituting proper fulfillment of obligations to transpose a directive.

B.3 – Joined cases C-241/12 and C-242/12, Judgment of the Court (First Chamber) of 12 December 2013, Shell Nederland Verkoopmaatschappij and Belgian Shell [2013] ECR-000

(A consignment of diesel accidentally mixed with another substance is not covered by the concept of 'waste', provided that the holder of that consignment does actually intend to place that consignment, mixed with another product, back on the market)

This case provides an interpretation of the concept of waste in the context of Council Regulation No 259/93 on the supervision and control of shipments of waste.

The case concerned the situation where Shell had loaded Ultra Light Sulphur Diesel (ULSD) with the purpose of delivering it to a client established in Belgium. When that consignment of diesel was delivered in Belgium, it became apparent that the tank had not been completely empty at the moment of filling it, with the result that the ULSD had been accidentally mixed with methyl tertiary butyl ether. Following this discovery, the consignee had returned the consignment to Shell, which shipped it back to the Netherlands.

The Dutch prosecutor took the view that at the time of its shipment from Belgium to the Netherlands, the product constituted waste and Shell had failed to follow the notification procedure laid down in Art. 15 of Regulation No 259/93, and was therefore guilty of illegal traffic, within the meaning of Art. 26(1) of that Regulation.

Having discussed the particular circumstances of the case, the Court found that a consignment of diesel accidentally mixed with another substance is not covered by the concept of waste, provided that the holder of that consignment does actually intend to place that consignment, mixed with another product, back on the market.

B.4 – Case C-292/12, Judgment of the Court (Fifth Chamber) of 12 December 2013, Ragn-Sells v Sillamäe Linnavalitsus [2013] ECR-000

(Local authorities may require undertaking responsible for the collection of waste to transport mixed municipal waste to the nearest appropriate treatment facility established in the same Member State as that authority; they may not impose such requirement in relation to industrial and building waste destined for recovery operations)

May a local authority of a Member State impose an obligation on an undertaking responsible for the collection of waste on its territory to deliver certain types of waste to specific treatment facilities situated in the same Member State? This, in essence, is the question raised in this case, which concerns a contractual clause of a concession for waste collection and transport services awarded by an Estonian municipality, to the effect that mixed municipal waste had to be transported to a certain facility (located 5 km from the municipality), while industrial and building waste was to be taken to a designated landfill site (located 25 km away). The referring court (Tartu ringkonnakohus – Court of Appeal of Tartu) asks whether the exclusive rights (Art. 106(1) TFEU) granted to the operators of the two facilities, read in light of the principle of proximity laid down in the Waste Framework Directive (Art. 16(3) of Directive 2008/98), are compatible with Treaty rules on, inter alia, competition and free movement of goods.

After having dismissed the question on competition as inadmissible (there was nothing in the order for reference suggesting the existence or abuse of a dominant position), the European Court of Justice (ECJ) recalled that the movement of waste is governed by Regulation No 1013/2006. Therefore, the questions referred must be answered in light of that Regulation, and not of the Treaty free movement rules.

Regulation No 1013/2006 lays down different rules for shipments of waste between Member States, depending on whether the waste is destined for disposal or recovery operations. However, shipments of mixed municipal waste collected from private households, whether destined to recovery or disposal facilities, are subjected to the provisions on waste destined for disposal (Art. 3(5) of Regulation No 1013/2006).

As regards waste destined for disposal and mixed municipal waste (whether or not destined for disposal), the ECJ interpreted Regulation No 1013/2006 (Art. 11(1)(a) and Recital 20) and the Waste Framework Directive (Art. 16) as allowing Member States to restrict shipments of waste between Member States, insofar as such restrictions implement, inter alia, the principles of self-sufficiency and proximity in the management of waste (Art. 16 of the Waste Framework Directive). In particular, Member States must seek to have the waste treated in the nearest appropriate facility to the place where the waste is produced, in order to limit as far as possible the transportation of waste.

Therefore, local authorities may well require undertakings responsible for the collection of waste on their territory to transport mixed municipal waste to the nearest appropriate facility in the same Member State.

The situation is different as regards waste destined for recovery operations (other than mixed municipal waste). In this case, Regulation No 1013/2006 does not allow Member States to generally limit shipments of that waste – restrictions are possible, but only on a case-by-case basis.

Therefore, local authorities may not require undertakings responsible for the collection of waste on their territory to transport industrial and building waste destined for recovery operations to the nearest appropriate treatment facility in the same Member State.

B.5 – Case T-240/10, Judgment of the General Court (First Chamber, extended composition) of 13 December 2013, Hungary v Commission [2013] ECR-000

(Scientific opinions referred in the recitals of a measure authorising the placing on the market of GMOs constitute integral part of that measure – the Commission may not lawfully base an authorisation on scientific opinions that have not been submitted to the relevant Member State committee)

[No appeal filed at the time of writing]

This case concerns two decisions from the European Commission authorising the pleacing on the EU market of the genetically modified potato Amflora (Solanum tuberosum L. lignée EH92-527-1) by a company of the BASF group. The genetic modification entailed the introduction of an antibiotic resistance marker gene.

After an initial notification from BASF in 1996, the competent national authorities adopted, in 2004, an evaluation report, which the Commission submitted to the competent authorities of the other Member States. Objections were raised by several of them, including Hungary (France, Luxembourg, Austria and Poland intervened in the present case in support of Hungary). The Commission thus requested the European Food Safety Authority (EFSA) to carry out a risk assessment. At the end of 2005, EFSA's scientific group on GMOs adopted two opinions to the effect that the placing on the market of the Amflora potato – both in industrial uses and for food and feed – was unlikely to have adverse effects on human or animal health or the environment. The following year, the Commission submitted a draft decision to the competent Member State committee. The committee did not however achieve the required majority, and the Commission put the draft before the Council. The Council too did not get the necessary majority, so the Commission would have been entitled to adopt the measure. Instead, it decided to consult EFSA again.

Meanwhile, the European Medicines Agency had issued a declaration – following a position expressed by the World Health Organisation – stating that the antibiotics against which the gene at issue in this case produced a resistance were in fact important in human and veterinary medicine. Following the fresh Commission request to EFSA to deliver a consolidated opinion on the use of antibiotic resistance marker genes in genetically modified plants, EFSA adopted, in 2009, an opinion acknowledging the crucial therapeutic importance of the relevant antibiotics; nevertheless – even though there was uncertainty about sampling, even though it was difficult to

estimate exposition levels and even though it was impossible to assign to a determined source the resistant genes that were transferable – EFSA concluded that adverse effects on health and the environment from the transfer of the antibiotic resistant gene from the genetically modified plant to bacteria were unlikely to happen. Two EFSA members, however, produced minority opinions stating that it was not prudent to consider resistance to certain antibiotics as irrelevant or negligible in a situation where it was not possible to evaluate the adverse effects on human health and the environment of a possible transfer of the gene from the plant to bacteria.

In 2010, the Commission adopted the two contested decisions. The two decisions are identical to the drafts originally submitted by the Commission to the Member State committee and to the Council, save for four new recitals (two for each decision), which make reference to the fresh consultation of EFSA and its most recent opinions. The question thus arose of whether, in adopting these decisions, the Commission respected the essential procedural requirements of the applicable regulatory procedure (Art. 5 of Decision 1999/468).

The answer given by the General Court was negative – by failing to submit to the Member State committee the new draft decisions, the most recent EFSA opinion and the minority opinions, the Commission failed to comply with essential procedural requirements. The Court expressly stated that, even though the provisions of the contested decisions are identical to those of the original drafts, the reasons on which the contested decisions are based – as set out in the recitals – are different. In particular, the Commission's argument that the fresh consultation of EFSA only had confirmatory value was invalid – if the Commission decided not to adopt the decisions following the initial opinion of EFSA and the original submission to the Member State committee and the Council, but rather chose to mandate further research to EFSA, it means that it considered additional assessment of risks to be required in light of scientific uncertainty and in application of the precautionary principle. The Court further recalled settled case law according to which the provisions of an act must be read in light of the reasons that led to its adoption, which together form an inseparable unity. It rejected the Commission's argument that EFSA opinions did not become part of the reasons for the contested decisions – reference to scientific opinions in the recitals of a measure has the effect of incorporating their content into the motivation of that measure. In consequence, the General Court annulled the two contested decisions.

Section C: Legal journal articles

C.1 – Elen Stokes and Steven Vaughan, Great expectations: Reviewing 50 years of chemicals legislation in the EU, Journal of Environmental Law, 2013, Vol. 25, Issue 3, pp. 411-435

This article looks back at five decades of EU chemicals law, it identifies the themes that have characterised its evolution and given rise to certain expectations from REACH (Regulation No 1907/2006 on the Registration, Evaluation, Authorisation and Restriction of Chemicals). The Authors find that some of these expectations are unrealistically high (notably as regards information on chemicals), others misplaced (diffused governance), others unnecessarily low (public information and engagement).

The first expectation regards information and its role in risk management. Since the entry into force of the Regulation in 2007, over 35000 information dossiers have been submitted to ECHA, the European Chemicals Agency. This is surely a positive result compared to the scarcity of information prevailing before REACH, but the Authors recall that the often of poor quality of the data has been widely recognised. Moreover, they question the utility of the information generated, noting that, even though available, it is too technical in character for the great majority of EU citizens to access it, and thousands of pages long Safety Data Sheets about risks and mitigation measures are often no more useful to chemicals users.

Another crucial point is the use of information, once generated. In this regard, the Authors lament that ECHA's narrow mandate and limited resources forestall effective data quality assurance and risk management. Of 25000 chemicals dossiers submitted to ECHA between 2008 and 2011, only 249 were checked. Moreover, REACH places the primary responsibility for the identification of 'substances of very high concern' (which may later be banned or limited on the market) with Member States – not ECHA. Only few Member States have been proactive in this regard, putting forward chemicals as possible substances of very high concern or devoting resources to the enforcement of REACH. In this situation, the risk is ending up with a data cemetery that does not help human health or the environment.

The second expectation relates to governance. Prior to REACH, the development of EU chemicals regulation followed the familiar path of European integration, with regulatory responsibility shifting from Member States to the EU, but remaining within the public sector. REACH introduced a more diffuse system of responsibility, with certain regulatory tasks being placed with industry (also in keeping with the more general EU 'Better Regulation' agenda). However, the Authors cite evidence produced by ClientEarth (REACH registration and endocrine disrupting chemicals, July 2013, at http://www.clientearth.org/reports/reach-registration-and-endocrine-disrupting-chemicals.pdf) showing that industry data reporting is not altogether successful. In addition, the Authors note that the actual workings of REACH and the role of ECHA both testify to the continued presence of state-centric features.

As to the third and last expectation – stakeholder engagement – the Authors argue that REACH does not go far enough in responding to the demand for more public and stakeholder dialogue. They argue that the capacity of EU regulation to incorporate multi-stakeholder deliberation has

been untapped and downplayed. Difficulties arise both from insufficient accessibility of information (they cite findings on the dissatisfactory functioning of Art. 33 REACH allowing consumers to request from chemicals manufacturers information on substances of very high concern) and, even more importantly, from the lack of institutional and legislative recognition that useful information does not come solely from technocratic risk assessments and evaluations, but also from stakeholders. While ECHA acknowledges that all concerned organisations and stakeholders are welcome to participate in its work, in practice the Agency mainly engages with 69 Accredited Stakeholder Organisations, only 7 of which represent civil society. In this situation, multi-actor participation can only remain incidental and ancillary.

C.2 – Vanessa Edwards, A review of the Court of Justice's case law in relation to waste and environmental impact assessment: 1992-2011, Journal of Environmental Law, 2013, Vol. 25, Issue 3, pp. 515-530

In this article, the Author (which in the period 1992-2011 was EU case-law editor at the Journal of Environmental Law) reviews the contribution made by the case law of EU Courts on waste and environmental impact assessment (EIA) to the development of both the fundamental concepts of legislation in those areas and the general principles of EU law on direct effect, implementation of directives, and enforcement.

It was in the field of waste that the first case under what is now Art. 260 TFEU was brought: in Commission v Greece (C-387/97 [2000] ECR I-5047), the Court ruled that the penalty for a Member State's failure to comply with a judgment must be proportionate both to the breach and to that State's ability to pay. In another important case, the Court clarified that Member States must refrain from adopting measures liable to seriously compromise the result of a directive during the period laid down for its implementation (C-129/96, Inter-Environnement Wallonie v Région wallonne [1997] ECR I-7411). On enforcement, the Court stated that Member States enjoy wide discretion in implementing directives, including as regards penalties to ensure their effectiveness, provided that penalties are analogous to those applicable to infringement of comparable national law (principle of equivalence) and that they are effective, proportionate and dissuasive (principle of effectiveness) (Joined cases C-58/95, C-75/95 and others, Gallotti and others [1996] ECR I-4345).

Cases related to the concepts of waste legislation specifically include the Walloon Waste ruling, in which Court held that waste, whether or not recyclable, constitutes goods the free movement of which should in principle not be prevented (C-2/90, Commission v Belgium [1992] ECR I-4431), even though restrictions might be justifiable for environmental reasons (C-203/96, Chemische Afvalstoffen Dusseldorp and others v Minister van Volkshuisvesting [1998] ECR I-4075) . The Court also clarified that the so-called 'hierarchy of waste' (Art. 4 of Directive 2008/98) does not confer rights on which individuals can rely against the State because it is neither unconditional nor sufficiently precise (C-236/92, Comitato di Coordinamento per la Difesa della Cava v Regione Lombardia [1994] ECR I-483). In a further series of judgments reviewed in the article, the Court clarified the definition of waste, which cannot be interpreted restrictively (Joined cases C-418/97 and C-419/97, ARCO Chemie Nederland v Minister van Volkshuisvesting [2000] ECR I-4475). It held, inter alia, that waste comprises all objects and substances discarded by their owners, whether for disposal, recovery or recycling purposes,

including those capable of economic reutilisation and those that have a commercial value (Joined cases C-304/94, C-330/94 and others, Tombesi and others [1997] ECR I-3561). It further stated that waste includes substances that are part of an industrial production process, such as any kind of residue and industrial by-product (C-129/96, above).

In the field of EIA, the Court addressed the issue of admissibility and burden of proof in infringement proceedings. In Commission v Ireland (C-392/96, [1999] ECR I-5901), the Court held that in order to prove incorrect transposition of a directive it is sufficient to consider the wording of the national legislation transposing it, without there being any need to wait for the application of that legislation to produce harmful effects. In Wells (C-201/02, [2004] ECR I-723), the Court ruled that, based on the principle of cooperation in good faith (now Art. 4(3) TFEU), Member States are obliged to take all measures to remedy the failure to carry out an EIA; which type of remedy – suspension/revocation of a development consent or compensation for damages – is available and appropriate for a violation of the EIA directive is for national courts to determine. Several other judgments recalled by the Author addressed the issue of multi-stage consents and the practice of 'salami slicing' – the artificial fragmentation of a project in smaller portions to avoid the application of the EIA directive.

As regards specific concepts of EIA legislation, in a number of judgments the Court specified that the classification of a decision as 'development consent' must be conducted pursuant to national law but consistently with EU law. Moreover, it held that Member States may not in advance generally exclude from EIA classes of projects listed in Annex II (C-133/94, Commission v Belgium [1996] ECR I-2323); specific projects may be excluded, but only under national legislation or on the basis of an individual assessment by national authorities, subject to the review of national courts. The conditions and limits of such discretion are the topic of a whole body of case law reviewed at some length in the article.

Finally, in relation to public consultation in the EIA procedure, the Court ruled that the public must be given the opportunity to express its opinion before the project is initiated (C-227/01, Commission v Spain [2004] ECR I-8253), and participation may be made subject to a fee, provided it is not such as to constitute an obstacle to the exercise of the public's right of participation (C-216/05, Commission v Ireland [2006] ECR I-10787). Furthermore, the Court held that members of the public concerned must have access to a review procedure to challenge the final decision regardless of whether or not they participated in the public consultation (C-263/08, Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd [2009] ECR I-9967).

C.3 – Maarten Zbigniew Hillebrandt, Deirdre Curtin and Albert Meijer, Transparency in the EU Council of Ministers: An Institutional Analysis, European Law Journal, 2014, Vol. 20, Issue 1, pp. 1-20

This article examines transparency in the context of the EU Council of Ministers, and primarily takes an historical perspective. The article divides the past decades in a period before 1992, a period between 1992 and 2006 and the period thereafter. The historical analysis shows that after a period of stable secrecy before 1992, a block of progressive Member States was able to enforce a formalisation of transparency in the period between 1992 and 2006, which primarily

resulted in the adoption and implementation of Regulation No 1049/2001. After that last period, however, the Council developed a certain transparency fatigue and the support for a restrictive interpretation of Regulation No 1049/2001 increased rapidly.

The article analyses political developments in each of these periods, and sheds light on the changing political landscape and preferences of power. For instance, reference is made to the increasing political attention for accountability, democratic principles and legitimacy in the context of the European Union in the period preceding the adoption of Regulation No 1049/2001.

Also, the article explains how external catalysts – such as the accession of new Member States and the increasing use and opportunities of information technologies – helped build the support for further transparency policies and their implementation. The article clarifies how social structures, such as within the European institutions, have been of importance in shifting the debate. In this regard, the jurisprudence of the European courts and the increasing powers of the European Parliament are discussed.

Although its concluding remarks warn for a possible deadlock in the current debate on transparency because of a polarisation of political preferences, the article underlines that future European social structures and balancing of powers could stir a debate on the development of transparency policies in the future.

Giuseppe Nastasi
Legal advisor
t +32 2 808 01 72
e gnastasi@clientearth.org
www.clientearth.org