

# European Environmental Law Observatory

# News

Issue of March 2014

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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 selection of major legal journals.

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

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## Section A: Aarhus Newsletter

### A.1 – European Ombudsman

In February 2014, the European Ombudsman adopted three decisions on whether the Commission had committed a case of maladministration by closing a file concerning a complaint made by individuals (Decision 1263/2012 of 7 February 2014; Decision 230/2012 of 14 February 2014; Decision 2366/2011 of 26 February 2014).

Only the last case concerned an environmental case. The complainant had argued that a project within a Natura 2000 habitat - creating overflow space for a river - should have undergone an environmental impact assessment. The European Commission had closed the file, as it saw no breach of EU law. The Ombudsman saw no case of maladministration. She considered that the project in question was part of a project to restore the natural river course and was thus directly connected with the management of the site. In those cases, Article 6 of Directive 92/43 on habitats did not require an impact assessment, even when the impact on the environment was significant.

The decision as such appears more than doubtful. The restoration of a river course does not have anything to do with the management of a Natura 2000 habitat.

However, the very fact that the Ombudsman is now prepared to look into the closing of complaint files and examine, whether this was a case of maladministration, appears to be a step forward.

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

### General Court

#### B.1 – Case T-303/13, *Miettinen v. Council*, judgment of 14 January 2014

##### (Access to Council Legal Service's Opinion)

The applicant asked the Council for access to a document of the Council's Legal Service on the legal basis for a directive concerning the fight against fraud to the EU's financial interests of criminal law. The Council refused access the applicant appealed to the General Court of the EU. The Council eventually disclosed the requested document once its decision was being challenged before the Court and asked the Court not to decide on the substance as the document had been released. The applicant asked the Court to decide and declare that the Council had acted illegally. The Court decided that there was no need to adjudicate anymore and charged the Council to pay the costs.

The Court's decision is of relevance to NGOs. Indeed, the question, whether in such cases, the applicant has an interest in a judgment by the Court, depends on the question, whether it is likely that the Council would in future, in similar occasions, again refuse disclosure. The General Court held that this was unlikely. However, it is worth noting that the judgment of the Court of Justice, where it was held that in principle the opinions of the Council's Legal Service adopted in legislative matters shall be accessible to the public, dates from 7 July 2008 (case C-39/05P). Despite this decision, in the past five years, the Council had not disclosed opinions of its legal Service. Thus, it remains to be seen, whether there is now a new policy of the Council with regard to disclosure of such documents and whether the Council is going to comply with the case-law of the Court.

## Court of Justice

### B.2 – Case C-530/11 Commission v UK, judgment of 13 February 2014

Article 9 of the Aarhus Convention requires parties to ensure that persons have access to legal or administrative procedures by which they can challenge acts or omissions which contravene the access to information and public participation requirements of the Convention or national environmental law. Article 9(4) requires that these procedures must be fair, equitable, timely and not prohibitively expensive.

The EU has partly implemented these provisions by adopting Directive 2003/35/EC (the Public Participation Directive, which amends Directives 85/337/EEC (the Environmental Impact Assessment Directive) and Directive 96/61/EC (the Integrated Pollution Prevention and Control Directive).

The Commission had received a complaint that the UK had failed to comply with its obligations under the Public Participation Directive because access to the courts was prohibitively expensive. The allocation of legal costs in England and Wales is normally at the court's discretion. Traditionally, the courts apply the "loser pays" principle i.e. the unsuccessful party will be ordered to pay the other side's legal costs – both court fees and lawyers' fees - in addition to their own. In recent years the courts had developed, through the evolution of case-law, a system of "protective costs order" (PCOs) whereby the courts would, provided certain criteria were satisfied, make an order at an early stage in proceedings setting a limit or "cap" on the costs payable by the claimant.

However, the court ruled that this regime did not provide sufficient clarity and precision. The mere fact that the court had to analyse a body of case law in order to determine whether national law met the requirements of the Directive led to this view. EU law confers on individuals specific rights which require unequivocal rules in order to be effective. The absence of such rules in favour of a reliance on rules laid down in case law meant that claimants did not have reasonable predictability as to whether they would have to pay costs and how much they would

be made to pay. The court therefore declared that the UK had failed to properly transpose Directive 2003/35/EC.

This judgment has largely been overtaken by events: In April 2013 the UK introduced a fixed costs regime for all cases covered by the Aarhus Convention in England and Wales. This allows claimants to benefit from an automatic cost cap set at a maximum of £5,000 for individuals and £10,000 for groups, with a reciprocal cap of £35,000. However, its importance should not be underestimated as the early stages of the Commission's action was instrumental in bringing about these reforms.

In the UK context this ruling's significance going forward will be that it prevents the UK from rowing back from the fixed costs regime – the whole system of judicial review is being reviewed with the intention of reducing the number of challenges to decisions by public authorities, mainly by increasing the costs of bringing legal challenges. Environmental cases have largely been shielded from the worst of these proposals and this judgment ensures that this will continue.

One area that may need to be reformed concerns the allocation of costs in appeals. The fixed costs regime only applies to cases at first instance, with appeals to be decided on a case by case basis at the discretion of the appeal court. This ruling made clear that that this would not be sufficient. The UK will now have to bring appeals within the fixed costs regime in order to comply with the judgment.

This judgment potentially has a significance that goes much wider than the specific issue of the allocation of costs in environmental cases. It calls into question the compatibility of the common law systems of the UK and Ireland with EU law.

### **B.3 – Case C-537/11, Mattia Manzi, judgment of 23 January 2014**

#### **(Air pollution; application of the Marpol Convention within the EU)**

In 2008, the Italian authorities found that a cruise ship, flying the Panamanian flag, used, in an Italian port, marine fuels with a sulphur content of more than 1.5% by mass, the limit fixed by EU Directive 1999/32 on the sulphur content of fuels. The ship owner defended himself by arguing that (a) the Directive did not apply to cruise ships; (b) that the Protocol to the Marpol Convention allowed the use of marine fuels with a sulphur content not exceeding 4.5 % by mass.

The ECJ, in a preliminary judgments, declared that a cruise ship was covered by the Directive, when its journeys were organized at a particular frequency, on specific dates, and at specific times. As to the application of the Marpol Convention provisions, the Court found that it could not examine the Marpol Protocol, as the EU had neither ratified the Marpol Convention nor the relevant Protocol. If all Member States had ratified the Protocol, the Court would be obliged to take into account the content of the Protocol when interpreting secondary EU law. However, in

the present case, only some Member States had ratified the relevant Protocol, so that the Court - and hence also the national court - could ignore its provisions.

## **B.4 – Case C-67/12, Commission v. Spain, judgment of 16 January 2014**

### **(Energy performance of buildings - Directive 2002/91)**

The European Commission brought a case before the Court of Justice against Spain, arguing that Spain had not transposed Articles 3 (method for calculating the energy performance of buildings), 7 (energy certificate for buildings) and 8 (regular inspections for boilers) into Spanish law. The Court found in all three cases that Spain had not complied with its obligations.

The case is noticeable for a specific reason: the Commission did not bring the case before the Court on the basis of Article 260(3) but on 258 TFEU. Under Article 258 TFEU the Court makes a declaratory judgment ("Spain has infringed..."), whereas under Article 260(3) TFEU, the Commission may ask for the fixing of a penalty payment against the defaulting Member State.

Until now, there is not yet a judgment by the Court which applies Article 260(3) TFEU also to cases, where a Member State has failed to transpose only one or two articles into national law. The Commission has brought a number of such cases before the Court and it will be interesting to see, how the Court will decide on the application of Article 260(3) TFEU. Should it decide to apply Article 260(3) also to cases where EU law was only partially transposed into national law, this will give a very strong stick to the Commission in order to better enforce EU law.

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## **EU Commission communications and reports**

Between 1 January and 28 February, the Commission adopted the following documents:

- a Communication on "Blue energy - oceans and energy till 2050 and beyond; COM(2014) 8;
- a Communication on climate and energy until 2030; COM (2014) 15;
- a Proposal for a decision to amend Directive 2003/87; COM(2014) 20;
- a Communication on fracking; COM (2014) 23;
- a Proposal on the position to be adopted in the Indian Ocean Tuna Commission ; COM (2014) 49;

- a Communication on the EU and wildlife trafficking; COM (2014) 64;
- a Report on waste statistics; COM (2014) 79;
- a Report on the Marine waters strategy Directive 2008/56, COM (2014) 97;
- a Report on the state of affairs on Carbon capture and storage COM (2014) 99.

### **Court of Auditors:**

On 14 January 2014, the Court of Auditors adopted a Special Report with the title "Has the environmental component of the LIFE programme been effective?" Special Report 15/2013.

The overall conclusion is that the examined part has not been operating effectively. The Court of Auditors criticized in particular that the projects which were financed by LIFE were not selected on their merits in order to get the best projects, but also on the Member State of origin. Also, the dissemination and replication of the results of the projects was clearly ineffective.

## **Section C: Legal journal articles**

### **C.1 – Paul Gragl, A giant leap for European human rights? The final agreement on the European Union’s accession to the European Convention on Human Rights, Common Market Law Review 51: 13–58, 2014**

This article explores the legal issues surrounding the accession of the European Union to the European Convention on Human Rights. It reviews the final Agreement on EU Accession to the Convention, finalised in April 2013, explaining the importance of accession for human rights protection in the EU and analysing the pressing legal problems that still need to be resolved, notably as regards the protection of the EU’s legal autonomy and the Union’s participation in the Council of Europe’s bodies.

The author heralds accession as a historic achievement, a giant leap for Europe. The Accession Agreement – an international treaty – and the Convention will become part of EU law, ranking lower than the Treaties, but higher than secondary EU law. Thus, they will enjoy supremacy over the Member State’s legal orders, with the consequence that national courts will have to disapply national law which conflicts with the Convention. Clear and precise provisions of the Convention capable of bestowing well-defined rights upon individuals could well become directly applicable, and the Court of Justice of the European Union will be able to interpret and apply the Convention as part of EU law before any cases can be submitted to the European Court of Human Rights (ECtHR). Should national courts unlawfully omit to submit a question for

preliminary ruling to the European Court of Justice (ECJ), a prior involvement mechanism (discussed at length in the article) will enable the ECJ to pronounce on the interpretation or validity of relevant Union law, without however binding the ECtHR.

Accession will enable any person or NGO who believe their rights under the Convention have been violated by acts or omissions of the European Union (including primary law, ECJ judgments and measures in the area of the Common Foreign and Security Policy) to bring the matter before the European Court of Human Rights (ECtHR). Decisions of the ECtHR will be binding on the Union and all of its executive, legislative and judicial organs.

In submitting cases to the ECtHR, applicants may face the risk of wrongly identifying the counterparty. It may be difficult for citizens to understand whether the alleged violation should be ascribed to the Member State applying EU law, or to the Union itself. In order to avoid that mistakes may lead to the inadmissibility of applications, the Accession Agreement introduces a (voluntary) mechanism allowing the EU to become co-respondent in proceedings initiated against a Member State, and vice versa. The main effects of this mechanism are that the ECtHR's judgment will be binding on both respondent and co-respondent, and that applicants will have to exhaust local remedies of either the Union or the Member State – not both.

The article analyses in some details the different cases in which the EU and Member States may become co-respondents and the rules for apportioning responsibility between the Union and the Member State where violations of the Convention are found. It expands on the possible procedures (yet to be adopted) for the ECJ prior involvement mechanism and for the participation of the EU in the Council of Europe's organs.

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## **C.2 – Elise Muir, The fundamental rights implications of EU legislation: Some constitutional challenges, Common Market Law Review 51: 219–246, 2014**

This article addresses the issue of fundamental rights protection in the EU but, unlike most other contributions, it focuses attention on secondary law which sets fundamental rights standards and/or defines the scope of human rights protection in specific areas. The article notes that EU intervention in fundamental rights matters through secondary legislation poses several challenges from the perspective of the relationship between the European and Member State legal orders. First, it may go beyond the principle of conferred competences and the mandate originally held by political institutions. Second, it may be difficult to ensure that EU action complies with the principle of subsidiarity.

The article distinguishes between three types of EU legislation with fundamental rights implications. In certain cases, EU Treaties empower EU institutions to introduce fundamental rights legislation (for example, Art. 19 TFEU on discrimination). In these cases, secondary

legislation gives specific expression to fundamental rights enshrined in the Treaties (for example, Directive 2000/43 on equal treatment) and thus it may allow EU law to have a direct impact in disputes between privates falling within the scope of that legislation (approach followed in the *Kücükdeveci* case, but which the Court has been reluctant to extend beyond anti-discrimination law).

There may also be cases in which secondary legislation is adopted in the exercise of an EU competence, but nevertheless touches upon fundamental rights (for example, the right to be heard in the field of competition). In these cases, the standard of protection established by secondary EU legislation may turn out to be controversial because it has not passed through a fully fledged political debate on fundamental rights protection.

Finally, secondary legislation impacts on the protection of fundamental rights in Member States even where it does not set fundamental rights standards or protection mechanisms at all. By merely defining the scope of application of EU law, legislation triggers the protection of fundamental rights by EU Courts, as EU institutions and Member States must respect fundamental rights when acting within the scope of EU law. However, in these cases, it may be difficult to determine in advance whether the EU system of fundamental right protection will operate, because it may not a priori be clear whether the Member State is acting within the scope of EU law.

In all these cases, the article finds that the principle of subsidiarity does not offer a viable instrument for shielding the Member State constitutional protections from EU intervention. Apart from questions of enforceability, the function of the principle is to regulate the relationship between the EU and Member States, whereas certain EU fundamental rights legislation regulates relationships taking place within the Member States. Moreover, the nature of the principle is one of effectiveness in pursuing pre-established objectives, whereas in the area of fundamental rights the controversies are about the objectives themselves, i.e. the prioritisation and trade off between values.

The article concludes that – failing attribution of competence and the principle of subsidiarity – new parameters must be found to address the issues highlighted.

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**C.3 – Maarten Zbigniew Hillebrandt, Deirdre Curtin and Albert Meijer, Transparency in the EU Council of Ministers: An Institutional Analysis, *European Law Journal*, Vol. 20, No. 1, January 2014, pp. 1–20**

This article provides a historical institutional analysis of policy change in the area of EU Council transparency. It considers the factors (Member State preferences, external events and social structures) that can explain three periods in the history of transparency within the Council: the pre-1992 era, the period after 1992, and that after 2006.

The article argues that the pre-1992 secrecy tradition, inspired by the norms of diplomatic negotiations, started to be put into question when the Netherlands (a country that, together with Denmark, had a national transparency tradition) proposed a treaty amendment to increase EU transparency. Although the proposed article did not gather sufficient support, a declaration (Declaration 17) on the matter was attached to the Maastricht Treaty.

It took an external event – the Danish electorate’s rejection of the Treaty in a referendum – to send transparency to the top of the agenda, marking the start of the post-1992 period of growing transparency. Under the UK presidency of the Council, the first steps started to be taken with the adoption of Council Decision 731/1993 and several Council internal rules, but it was not until Sweden and Finland joined the EU in 1995 that a coalition of pro-transparency Nordic countries could form that managed to gather enough support for including in the Treaty of Amsterdam an article mandating the adoption of an access to documents law. It was under the Swedish presidency that Regulation 1049/2001 was adopted – also thanks to pressure from the European Parliament, the media and civil society – thus fulfilling the mandate of the Treaty of Amsterdam.

Regulation 1049/2001 established the principle that the public should be able to have access to any document held by the institutions at any time during the decision-making process. Under its framework, the institutions began to emphasise inter-institutional cooperation, information policies, adopted codes of transparency and good administrative behavior. A period of intensive litigation allowed the Court of Justice of the European Union to resolve the ambiguities of the Regulation, generally leading to a broad interpretation of the public right to access documents.

From 2006, however, Member States began to show transparency fatigue. A Commission consultation on the revision of Regulation 1049/2001 held in 2007 revealed some stasis among Member States. A vote in the European Parliament recommending significant amendments to a Commission proposal tabled in 2008 was considered inadmissible by the Council on procedural grounds, and it now appears difficult that the Council majority will accept Regulation 1049/2001 – as interpreted by the Courts (most notably in the 2008 *Turco* and 2011 *Access Info Europe* cases) – as a starting point. Transparency thus seems to have entered a gridlock in the Council which will likely be broken only by action from the Parliament or the Courts, or by unpredictable, future external events.

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