European Environmental Law Observatory News

Issue of September 2015

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The observatory covers information about the application of the Aarhus Convention on access to information, participation in decision-making and access to justice in environmental matters; provides updates on judgments of the Court of Justice and the General Court, decisions of the European Ombudsman as well as other official decisions from EU institutions; and highlights questions raised in recent doctrinal contributions, hand-picked by the Observatory's staff from a selection of major legal journals. The Observatory staff is composed of Anaïs Berthier (coordinator), Ludwig Krämer, Anne Friel and Giuseppe Nastasi. Other staff from ClientEarth contribute on an ad hoc basis.

This issue covers materials published between July 1, 2015 to 1 September, 2015.

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Section A: Aarhus Convention

There have been no recent developments

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

Court of Justice of the EU

B.1 Case C-615/13, ClientEarth v EFSA, judgment of 16 July 2015

Case C-615/13 concerned access to the names of scientific experts providing advice to the European Food Safety Authority (EFSA) in the context of the drafting of guidance on the inclusion of peer-reviewed independent studies in a risk assessment for the approval of an active substance under the plant protection products regulation (Regulation 1107/2009).

Under the Regulation, there is an obligation for all applicants for an authorisation to include Scientific peer-reviewed open literature published within the last 10 years, as determined by EFSA, on the active substance and its relevant metabolites dealing with side-effects on health, the environment and non-target species. The European Court of Justice (ECJ) decision in favour of ClientEarth and Pesticide Action Network (PAN) Europe clarifies the interaction between protection of personal data and access to information.

The Court established that an EU institution cannot generally claim that disclosure of personal information can harm the privacy and integrity of a person involved in a decision making process because they may be criticised by civil society because of their opinions. The Court states that if such claims were to be accepted, they could be applied to any situation where an authority of the European Union obtains the opinions of experts prior to the adoption of a measure which has effects on the activities of economic operators in the sector concerned, regardless of which sector.

Therefore, given that there was no to personal integrity and privacy, the Court found that disclosure of the requested information is necessary to ensure the transparency of the process of adoption of a measure likely to have an impact on the activities of economic operators, in particular, in order to appreciate how the form of participation by each expert in that process might, through that expert's own scientific opinion, have influenced the content of that measure.

The ruling will apply to all EU institutions and Agencies that withhold names of scientific experts to the public unless their integrity or privacy can be demonstrated to be undermined by public disclosure.

Vito Buonsante

B.2 Case C-612/13P, ClientEarth v. Commission, judgment of 16 July 2015

This decision by the Court of Justice concerned the appeal by ClientEarth against the judgment of the General Court in case T-111/11. The facts concern ClientEarth's request for access to conformity studies commissioned by the Commission from external providers. Conformity studies look at the transposition of a specific EU directive by the Member States. The General Court held that the studies were part of an investigation, on whether a Member State had complied with its obligations under EU law, and could therefore be withheld by the Commission in accordance with Article 4(2) third indent of Regulation 1049/2001.

On appeal, the Court of Justice held that a presumption of confidentiality applies to the studies which, at the time the Commission replied to ClientEarth, had been followed by the sending of a letter of formal notice under Article 258 TFEU. The Court relied on the need for a climate of mutual trust between the Commission and the Member States. However, the presumption of confidentiality did not apply to the studies which had not been followed by a letter. The Commission should have carried out a case-by-case analysis of these studies to decide whether they fell under an exception provided by Regulation 1049/2001.

This appeal judgment, which was delivered four years following ClientEarth's initial application to the General Court, is of considerable practical importance. It should allow NGOs and individuals to have access to all the conformity studies which the Commission makes as long as no infringement proceedings have been started. NGOs and the public in general may thus find out themselves whether a Member State in reality complied with the requirements of an environmental directive and start public discussions in their respective countries on the need to protect the environment. In 2010, the Commission made some 60 of such conformity studies. The public discussion to what extent EU environmental legislation exists merely on paper or whether it is lived up in the Member States, can now at last start - provided NGOs and individuals make use of their right on access to conformity studies!

The Court, however, rejected the application of the Aarhus Convention and ClientEarth's arguments that the exception enshrined in Article 4(2) third indent of Regulation 1049/2001 protecting the purpose of investigations was not compatible with Article 4(4)(c) of the Convention. It confirmed the ruling of the General Court in that the Convention had been concluded to apply to States and not the EU institutions. This raises the question of the applicability of international law to EU institutions and of the Aarhus Convention in particular.

Ludwig Krämer

B.3 Case C-461/13 BUND v. Germany, judgment of 1 July 2015

(Water framework Directive 2000/60 - Dredging the Weser River in Germany - Deterioration of the water quality)

In a preliminary ruling, the Court of Justice (Grand Chamber) was asked to provide its interpretation of Article 4(1)(a)(i) to (iii) of Directive 2000/60 establishing a framework for action in the field of water policy. The question dealt with the deterioration of the water quality of a river. The German authorities granted consent for projects to dredge the Weser River with the objective of making the river accessible for larger ships. The environmental organisation BUND challenged the permit as incompatible with the requirements of Directive 2000/60. The Court found that Article 4 of the Directive requires Member States to prevent the deterioration of waters and to enhance water quality. This provision did not constitute a mere planning or management objective, as the German and the Netherland Governments had argued, but was a legally binding requirement. The Court then considered, what constituted a "deterioration" of waters. It rejected the argument of the German government that only a "serious impairment" of the water quality constituted a deterioration. The Court found the solution in annex V to Directive 2000/60. That annex fixed, for "high", "good" and "moderate" water quality a number of biological, hydromorphological and physico-chemical elements which determined each of these classes of quality. The Court found that the Directive contained two other classes, namely "poor" and "bad". It determined that there existed "deterioration" in the sense of the Directive, "as soon as the status of at least one of the quality elements [of Annex V] falls by one class, even if that fall does not result in a fall in classification of the body of surface water as a whole". If the water was already in the lowest class, any deterioration was not allowed.

This judgment is without doubt a very environmentally positive interpretation of Directive 2000/60. Its problem is, as also the referring court and the Court of Justice stated themselves, that Article 4 of the Directive allows derogations to be granted under certain conditions. Whether the Weser River will be dredged or not is thus not yet certain.

Ludwig Krämer

B.4 Case C-653/13, Commission v Italy, nyr., Judgment of 16 July 2015

(Directive 2006/12/CE – Articles 4 et 5 – Waste management – Campania Region)

This is the umpteenth ruling of the European Court of Justice (ECJ) finding Italy in breach of EU waste laws. With this judgement, handed down on 16 July 2015, the ECJ condemned Italy to pay a lump sum (EUR 20 million) and a daily penalty (EUR 120,000 per day) for failing to comply with a Court ruling of five years earlier (case C-297/08).

The most interesting aspects of this case concern the seemingly insoluble problem of waste management in Campania, the Italian region surrounding Naples; the Court's remarks on the principle of proximity, according to which waste should be disposed of or recovered in nearby installations; and the criteria applied by the Court to determine the form and amount of the penalties imposed.

Despite earlier infringement findings, the region of Campania still lacks the necessary landfill, incineration and treatment capacity (about 1.8 million tonnes, 1.2 million tonnes, and 385,000 tonnes respectively) to properly deal with its own waste. About six million tonnes' worth of

"ecoballe" (old unsorted waste wrapped up pending treatment) remain untreated. Handling them will take 15 years, once the required treatment installations will be built (if ever). Italy acknowledged that the problem still exists, and referred to the 'administrative, functional and even political challenges' that stand in the way of proper waste management in Campania – which, of course, do not free the Member State of its responsibility.

However, Italy argued that, pending the construction of treatment installations, waste from Campania was being treated in other parts of Italy. The Commission contested this temporary arrangement in the light of the principle of proximity – as Italy has decided to allocate waste-related competences to the regions, self-sufficiency should in principle be achieved at regional level. The Commission's argument was based on the ruling in case C-297/08, which was, however, limited to non-hazardous urban waste – a type of waste which does not normally need complex treatment, and therefore should not require aggregated management outside regions. In the judgement under review, the ECJ did not take a clear position on the point, contenting itself with noting that the amount of waste coming from Campania puts too much strain on the Italian waste management network, thus hampering national self-sufficiency, and that, in any case, 'numerous landfills located in nearly all Italian regions have not yet been brought into compliance with waste management rules', so that relying on them is not really a solution.

Concerning the penalties, the Commission applied for a lump sum of EUR 29,089.60 times the number of days elapsed between the earlier judgement (five years ago) and the date the Court would rule in the present case. In addition, the Commission requested a daily penalty of EUR 256,819.20 to be paid until compliance is achieved. The Commission's application was based on the principles established in its earlier communications (SEC(2005) 1658 and C(2012) 6106 final), which do not bind the Court but which, as the Court acknowledged, improve transparency and legal certainty. In line with its jurisprudence, the ECJ exercised its discretion to determine the form and amount of the penalties differently from the Commission's requests, without however explaining which criteria the Court applied to come up with the final figures – which does not much help transparency or legal certainty.

Giuseppe Nastasi

B.5 Case C-140/14, Commission v Slovenia, nyr., Judgment of 16 July 2015

(Directives 2008/98/CE et 1999/31/CE)

Alerted by a complaint submitted by an individual, the European Commission investigated two sites where waste was being illegally stored. One site, located close to Celje (Slovenia) stocked, since 2009, construction waste, polluted earth and other waste, some of which resulting from industrial activities. To avoid the emission of dust, the waste was covered with a layer of plastic. The other site was an illegal landfill, in which construction waste and excavation materials were placed between 2000 and 2006, and which was later buried under earth. Hazardous chemicals polluted both sites.

The most interesting points of the case concern the distinction between a storage site and a landfill of waste, as well as the extent of Member States' obligations under EU directives.

As to the former point, Slovenia put forward that what the Commission considered as a landfill was in fact a temporary waste storage site. The Court observed that the presence of waste on the site since several years testified to the permanent character of the situation, and that therefore the site was indeed a landfill. The Court took the occasion to underline that, even if the site had been used for temporary storage only, the Member State would have remained bound by the obligation to ensure waste is managed without risks to human health or the environment (Art. 13, Directive 2008/98/EC) – adding a layer of plastic or topping the waste with earth are not appropriate measures to this end.

As to the other point, Slovenia argued that its authorities had taken measures to stop illegal activities, but that the operators concerned had failed to comply. In this regard, the Court held that, while a situation of fact does not always prove that the Member State has breached its obligations under EU law, the persistence of the situation and the significance and duration of the harm to the environment without meaningful action from the competent national authorities does in this case show that the measures taken by the Member State were not sufficient to achieve the objectives of the directive as required by the Treaty (Art. 288(3) TFEU).

Giuseppe Nastasi

B.6 Case C-145/14, Commission v Bulgaria, nyr., Judgment of 16 July 2015

(Directive 1999/31/CE – Article 14 -Hazardous waste)

With this judgment, the European Court of Justice (ECJ) found that Bulgaria failed to comply with the Landfill Directive (Directive 2009/31/EC). In particular, Bulgaria omitted to close old landfills, or bring them into compliance with the provisions of the directive, by the date set out in that law (16 July 2001) or by the expiry of the transitional period allowed by Article 14 of the directive (which lasted until 16 July 2009).

The most interesting aspect of this case concerns the procedure followed by the European Commission before applying to the ECJ. As explained in the summary of the pre-litigation phase included in the ruling, already in 2012 (and perhaps as early as 2009 – this is not clear from the judgment), the Commission took the view that 140 landfills of non-hazardous waste were illegal. Instead of pursuing Bulgaria in court, the Commission engaged in a bilateral exchange with the Member State, which went on until 2014. One of the Commission's letters to Bulgarian authorities even went so far as suggesting that the institution could "accept" a plan, prepared by Bulgaria, which envisaged compliance with the directive by mid-2015 – as if the deadline for compliance with EU law could be freely negotiated (behind closed doors for the purposes of enquiry) between an institution and a Member State. For no clear reason, while Bulgaria was revising the plan in the light of a request from the Commission, the institution decided to go to court. Bulgaria protested that the principle of sincere cooperation was breached, but to no avail.

Other arguments put forward by Bulgaria included the impossibility to build compliant landfills in a timely manner due to, among other things, litigation based on EU directives on environmental impact assessment and remedies in the field of public procurement, as well as the interruption in

the provision of EU funding. The ECJ dismissed both these arguments – the former, because matters internal to the Member State cannot justify violations of EU law; the latter, because compliance with the Landfill Directive is not conditional on receiving EU funding.

Giuseppe Nastasi

B.7 Case C-83/14, CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia, nyr., Judgment of 16 July 2015

(Reference for a preliminary ruling - Directive 2000/43/EC - Principle of equal treatment between persons irrespective of racial or ethnic origin - Urban districts lived in mainly by persons of Roma origin)

This case mainly concerns the interpretation of the Racial Equality Directive (Directive 2000/43/EC). It is interesting for the purposes of this newsletter because it originated from an individual contesting the practice, by an electricity supplier, of placing meters too high on pylons for the complainant to check her consumption and the correctness of her bills. This practice was applied only in districts inhabited by people of Roma origin, for the alleged reason of preventing abusive connections and meter tampering.

Among other things, the European Court of Justice (ECJ) held that the practice at issue could only be objectively justified if it does not go beyond what is appropriate and necessary to achieve the aims – legitimate in themselves – of ensuring the security of the power transmission network and the due recording of consumption, and provided that the disadvantages caused are not disproportionate to the objectives pursued. These conditions, which are for the national court to ascertain, would not be met if other less restrictive means could be used, or if the legitimate interest of the electricity consumer to monitor her consumption regularly and to have access to power supply in conditions which are not of an offensive or stigmatising nature is excessively prejudiced.

Giuseppe Nastasi

General Court

B.8 Case T-312/14, Federazione nazionale delle cooperative della pesca v Commission, Judgment of 7 July 2015

In this case, the General Court clarifies the scope of the condition laid down in Article 236(4) TFEU requiring direct concern (hereafter 'the third option').

The Commission adopted an action plan to rectify the shortcomings in the Italian fisheries control system. In particular, the plan comprised the adoption of measures in order to ensure the implementation of provisions relating to the minimum catch size for swordfish and the technical characteristics of longlines; and the strengthening of the deterrent nature of the financial penalties applied in the case of serious and repeated infringements. Several fishermen's

associations, representing professionals in the fisheries sector and, in particular, the interests of fishermen authorised to catch swordfish, brought an action before the General Court seeking the annulment of the Commission's decision. The Court dismissed the action as inadmissible.

The General Court ruled that the third option granted by Article 263(4) TFEU to challenge regulatory acts which do not entail any implementing measures, only concerns acts which, by themselves, that is independently of any implementing measures, change the individual's legal position. The General Court explained that it is so where an act restricts the rights of the applicant or imposes upon him obligations or where a decision bans the placing on the market of a substance as in the case of the *Microban case* (T-262/10). The General Court decided that the challenged decision did not by itself alter the legal position of professionals in the fisheries sector. According to the Court, the Commission's decision at issue does not in itself alter the legal position of any natural or legal person other than the Member State concerned because it is to the Member State to implement the decision at national level. The Court therefore concluded that the Applicant could not rely on the last sentence of Article 263(4)TFEU.

The Court then examined whether the applicant could rely on the second option provided by Article 263(4)TFEU. The Court reasserted the *Plaumann* test and decided that the decision concerned the members of the association applicants only in their capacity as fishermen, in particular, fishermen fishing swordfish using certain fishing techniques, as any other economic operator actually or potentially in an identical situation. The Court further stated that the fact that the list of Italian vessels authorised to fish swordfish comprised more than 7300 vessels confirmed that these could not be individually concerned by the challenged decision. The Court concluded that the applicants were not individually concerned.

This ruling demonstrates that the interpretation by the Court of the direct concern criterion is as unduly restrictive as the one of the individual concern. Even economic operators having their professional activity impacted by the Commission's decisions are not considered as legitimate to challenge such a decision. The large number of operators affected by the decision runs contrary to the interest of the applicants since as soon as the applicant is not the only stakeholder affected by the challenged decision the Court refuses to provide standing.

Given the lack of will from the EU courts to relax the standing rules for economic operators there is no likelihood that they will adapt their interpretation of these for NGOs. Were the Courts to interpret the direct concern criteria in the same way for NGOs, these would not be considered as directly concerned by any decisions of EU institutions. An EU institution's decision in an environmental matter does not restrict the rights of an environmental NGO nor does it impose obligations on them. An environmental NGO does not produce, manufacture, import or place on the market products or substances and will therefore not be concerned either directly or individually by decisions such as the one adopted in the *Microban* case. If the reasoning of the Court was to be applied in environmental matters, it would be in violation of Article 9(3) of the Aarhus Convention. Regulation 1367/2006 designated NGOs having as their primary stated objective the promotion of environmental protection in the context of environmental law, as the appropriate stakeholders to represent the environment before the Courts. NGOs should therefore be considered as those concerned directly and individually by decisions of EU institutions in environmental matters.

Anaïs Berthier

B.9 Case T‑115/13, Gert-Jan Dennekamp v European Parliament, Judgment of 15 July 2015

Like the EFSA case discussed above, this access to documents case also deals with the interaction between the protection of personal data and access to information. Dutch journalist, Gert-Jan Dennekamp, requested access to documents relating to the additional pension scheme for Members of the European Parliament. The European Parliament rejected the request on the grounds that the disclosure would undermine the protection of privacy and the integrity of the MEPs concerned (Article 4(1)(b) of Regulation 1049/2001). Under Article 8(b) of Regulation 45/2001 on the protection of personal data, the applicant was therefore obliged to establish that the data transfer was necessary and that there was no reason to assume that the MEPs' legitimate interests would be prejudiced. In the Parliament's view, the applicant had failed to meet this cumulative test.

The General Court found that there is nothing in Regulation 45/2001 to prevent the applicant from relying on a general justification, e.g. the public's right to information, to establish the necessity for transferring personal data. However, the condition of necessity in Article 8(b) must be interpreted strictly; it must be established that the transfer of personal data is the most appropriate of the possible measures for attaining the applicant's objective, and that it is proportionate to that objective. The Court found that the disclosure of the names of the MEPs who were members of the additional scheme and who had participated in votes affecting the scheme was necessary "to bring to light potential conflicts of interest of MEPs when they are deciding on the additional pension scheme."

The Court then went onto examine the second cumulative condition for the transfer of personal data required by Article 8(b) of Regulation 45/2001, i.e. that there is no reason to assume that transferring the names of the MEPs could prejudice their legitimate interests. It found that the personal data at issue belonged in the public sphere of MEPs, and therefore the legitimate interests of the MEPs concerned must be subject to a lesser degree of protection than that which would be enjoyed by the interests falling into their private sphere. The Court concluded that, "in view of the importance of the interest invoked here, which are intended to ensure the proper functioning of the European Union by increasing the confidence that citizens may legitimately place in the institutions, it must be held that the legitimate interests of the MEPs who are members of the additional pension scheme…cannot be prejudiced by the transfer of the personal data at issue." The Parliament's decision was annulled insofar as it refused to grant access to the names of the MEPs who were members of the scheme and who actually took part in votes on the scheme.

Anne Friel

B.10 Case T-685/14, EEB v Commission, judgment of 17 July 2015; Case T-565/14, EEB v Commission, judgment of 17 July 2015

The EEB requested the Commission to review, under Article 10 of Regulation 1367/2006, its decisions not to raise objections to the transitional national plans notified by Bulgaria and Poland

which provide for a temporary exemption from the obligation to comply with the emission ceilings set by Directive 2010/75 for certain pollutants. The Commission rejected the requests as inadmissible on the grounds that the decisions did not constitute an administrative act for the purpose of Article 2(1)(g) of Regulation 1367/2006. The EEB challenged these decisions before the General Court.

The General Court first relied upon the *Vereniging Milieudefensie* ruling according to which Article 9(3) of the Aarhus Convention cannot be relied on in order to assess the legality of Regulation 1367/2006. Although Article 9(3) of the Aarhus Convention provides that 'acts' and 'omissions' may be challenged and does not restrict the right of access to justice solely to measures of individual scope, it is not possible to interpret the definition of administrative acts under Regulation 1367/2006 as encompassing measures of general application. Such an interpretation would be *contra legem*.

The Court stated that a decision addressed to a Member State is regarded as being of general application "*if it applies to objectively determined situations and entails legal effects for categories of persons envisaged generally and in the abstract*". The decision at issue was thus not of individual scope. The fact that eight combustion plants were mentioned in the plans did not mean, contrary to what the EEB argued, that the decisions established specific obligations in respect of each plant. On the contrary, the Court held that the decision was addressed to Bulgaria and Poland.

Finally, the General Court rejected the argument that the requirement provided under Article 32(4) of Directive 2010/75 made the Commission's decision one of individual scope. It recalled that Article 32(4) provides that the measures foreseen for each of the plants must be included in the transitional national plan. The Commission rightly found that those measures provided for each of the installations only formed part of the information provided by the Member States to the Commission which enabled it to approve the overall emission ceilings. But the measures foreseen for each of the plants were not approved by the Commission. The General Court further referred to Commission Implementing Decision 2012/115/EU laying down rules concerning the transitional national plans referred to in Directive 2010/75 which does not lay down rules in relation to the measures foreseen for each of the plants in the light of which the Commission could verify those measures. The decision was therefore of individual scope and the case dismissed.

This case confirms that decisions adopted by the Commission and addressed to Member States may not be challenged before the EU courts by NGOs. It is regrettable that the EU courts refuse to proceed to the examination of the conformity of Regulation 1367/200 with the Aarhus Convention. If the Court were to go ahead with the examination, it would be difficult to ignore that the restrictive definition of the acts that may be challenged under Regulation 1367/2006 does not allow NGOs genuine access to justice as provided by Article 9(3) of the Aarhus Convention.

Anaïs Berthier

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Section C: European Ombudsman decisions

There have been no recent developments.

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Section D: Other EU institutions' decisions

D.1 Regulation 2015/757 on the monitoring, reporting and verification of CO^2-emissions from maritime transport (OJ 2015, L 123p.55)

The European Parliament and the Council adopted Regulation 2015/757. They explained in the first Recital that directive 2009/29 had provided that, should the International Maritime Orgnisation (IMO) not reach an agreement on the reduction of CO^2 emissions from maritime transport by 2011, the EU would adopt measures on its own which would become applicable by 2013. The IMO did not reach any such agreement. Regulation 2015/757 constitutes thus the autonomous EU decision on CO^2 emissions from ships.

EU-related CO^2 emissions from ships increased by 48 % between 1990 and 2007. However, as the title of the Regulation indicates, no reduction measure for CO^2 emissions is foreseen. The Regulation limits itself to measures concerning the monitoring, reporting and verification of CO^2 emissions. Ships with more than 5000 gross tonnage arriving at, within or departing from ports under the jurisdiction of Member States shall draw up, until august 2017, a monitoring plan and monitor their emissions as of the beginning of 2018. The plan and the monitoring shall be controlled by independent, accredited verifiers, and Member States shall fix penalties for cases of non-compliance.

Recital 2 mentions that ships also emit quantities of nitrogen oxides, sulphur dioxide, methane, particulate matters and black carbon; however, the Regulation does not provide for any measure as regards the monitoring or reduction of emission of these pollutants.

D.2 Council Decision 2015/1339 to conclude the Doha Amendment to the Kyoto Protocol on greenhouse gas emissions (OJ 2015, L 207 p.1)

The Council approved the Doha amendment to the Kyoto Protocol which provides that until the end of 2020, the EU Member States reduce their greenhouse gas emissions by 20 per cent, compared to 1990. The relevant EU legislation - Directive 2009/29 and Decision 406/2009 - was already adopted earlier.

It should be recalled that the Kyoto Protocol provided for commitments to reduce greenhouse gas emissions until 2012. The Doha amendment concerns the period 2013-2020. Only Australia, the EU and its 28 Member States, Norway, Liechtenstein, Monaco, Switzerland and Ukraine undertook commitments for this period 2013 till 2020. All the other industrialised countries

subject to the Kyoto Protocol, dragged their feet and were not prepared to make any more commitments. It remains to be seen whether they will make any greater commitment at the Paris Conference of end of 2015 for the aftermath of 2020. By mid-September 2015, the Doha Amendment was ratified by 43 countries. In order to enter into force, ratification by 144 countries is needed.

D.3 Commission report on the indication of labelling and standard product information under Directive 2020/30 (COM (2015) 345)

Based on its report on the application of Directive 2010/30 ((COM(2015) 345), the Commission proposed a new Regulation on energy efficiency labelling. In its report, the Commission had essentially identified two problems: first, the introduction of energy labels for household appliances such as refrigerators, washing machines etc with labels indicating A+++ to A+, and then A to G, according to the energy consumption of the product, did not work. Consumers were not able to see the difference between an A+ and A+++product. Furthermore, for certain product groups, only products with labels of A+ to A+++ were placed on the market which made the indications of A to G redundant. Second, the Commission found that between 5% and 40 % of all products were wrongly labelled. This - on average 20% non-compliance - led "to some 10% of envisaged energy savings being lost".

The new proposal suggests the adoption of a Regulation, underlining the trend that EU product-related legislation moves more and more away from directives, in order to ensure a level playing field for business. The proposal is based on Article 194 TFEU. It suggest to rescale, at regular intervals, the existing energy labels, so that, for example, in future the refrigerators- which at present are all labelled A+ to A+++, would again be labelled between A and G. The rescaling should be done by delegated acts by the Commission. Transition periods ensure that original and rescaled labels coexist on the market for a certain period, though the Commission wants to keep that period short.

As regards the problem of non-compliance, the proposal suggests to set up a product database, where all products are listed. Interestingly, it is suggested that the "compliance information" should only be available to Member States market surveillance authorities and the Commission"(annex I). Consumers have no right to know which producer or supplier does not comply with the legally binding labelling requirements. This proposal seems to be incompatible with the right of access to documents of Regulation 1049/2001.

There is another, rather disappointing feature of the proposal: Directive 2010/30 provided for rules on energy labelling *and* product standard information. For example, the Commission delegated Regulation on the labelling of refrigerators (Regulation 1060/2010) required the indication of the energy consumption, but also of the water consumption, the noise level and the frozen food storage capacity. The new proposal limits itself to energy labelling. Standard product information is no longer dealt with. Article 1 of the proposal refers to the "consumption of energy and other resources" which might include water, but does not include noise levels or storage capacity, And it is up to the delegated Commission act, whether it provides for such other information.

D.4 Commission proposal for a Regulation to prohibit HBCDD (COM (2015)409)

The Stockholm Convention on persistent organic pollutants (POPs) banned the substance HBCDD (hexabromocyclodecane). The Commission had originally proposed to the adaptation committee of Regulation 850/2004 to prohibit the production, use, export and import, but to accept unintended trace contaminants of that substance in other substances, preparations or articles up to 10 mg/kg. The committee found this exception too restrictive; the Commission increased its proposal to 100 mg/kg; yet, the committee refused a positive vote. Thus, the Commission had to submit its proposal with the 100 mg/kg limit to the European Parliament and to the Council.

The sudden tenfold increase of quantities of impurities compared to the original proposal - which was based, it must be assumed, on a scientific assessment - is not acceptable. Either a substance is toxic or it is not and the somehow arbitrary amendment of the Commission's own proposal leaves a bad feeling. After all, what the EU Treaties require is a *high* level of protection of human health and the environment.

D.5 Commission proposal for a directive to amend Directive 2003/87 on greenhouse gas emission trading allowances (COM(2015) 337)

The Commission proposed a directive to amend the emissions trading Directive 2003/87. Apart from a considerable number of technical improvement measures of the existing system - including derogation and transition possibilities - there are two significant new elements in the proposal: first, it is suggested to reduce the quantity of emission trading allowances, as of 2021, by 2.2% annually; the present reduction, laid down in Directive 2009/29, is 1.74 per cent annually. The Commission considers that this reduction is necessary to reach the overall reduction of greenhouse gas emissions by the sectors that are covered by Directive 2003/87, by 43 per cent until 2030. As there is a commitment by the EU to reduce the emissions until 2030 by 40 per cent - a political commitment, agreed by the European Council, but not laid down in EU legislation - this reduction together with a 37 per cent reduction of the sectors which are not covered by Directive 2003/87, will produce the desired results.

The second significant innovation is the proposal to establish a Modernisation Fund which would be financed from 2 per cent of the sums which Member States obtain from the auctioning of trading allowances. The Fund should, according to the Commission, assist those Member States which have a gross domestic product of less than 60 per cent of the EU average.

D.6 Commission communication, setting out a strategy for the Alpine Region (COM(2015)366)

The Commission submitted to the other institutions a strategy for the Alpine Region which covers some 80 million people in seven countries (Austria, Slovenia, Italy, Germany, France, Switzerland and Liechtenstein). The communication indicates that no legislative change is needed, and it does not provide either any additional funding; the existing EU funds and financial support means are declared to be available to the realisation of the objectives of the strategy. A time horizon for the realisation is not foreseen.

The strategy suggests three axes to realise: (1) economic growth and innovation (2) mobility and connectivity (3) environmental protection and energy. As regards the environment, the strategy suggests:

- to preserve and valorise natural resources, including water and cultural resources;
- to develop ecological connectivity in the region;
- to improve risk management and better manage climate change, inlcuding major natural risk prevention;
- to make the region a model for energy efficiency and renewable energy.

As becomes evident, the implementation of this strategy depends on the political will of the seven countries affected.

D.7 European Parliament, Resolution of 8 July 2015 on the ongoing TTIP negotiations (2014/2228/INI)

The European Parliament (EP) adopted a long Resolution on the ongoing negotiations between the EU and the USA on conclusion of a Transatlantic Trade and Investment Partnership Agreement (TTIP). These negotiations are conducted, for the EU, by the European Commission. The EP does not participate in the negotiations but will have to give its consent, before the agreement can be concluded (Article 218(6) TFEU).
Generally, the EP adopted a favourable position to the TTIP, underlining in particular the potential for both trading partners. As regards the environment, it recommended in particular to the Commission:

- to prevent social, fiscal and environmental dumping (2.a.ii);

- the agreement should guarantee the full respect of fundamental rights (2.a.iii);

- services of general interest and general economic interest (including water) should be excluded from the scope of application of the TTIP (2.b.vii);

- regulatory cooperation should secure the highest level of protection of health and safety, "in line with the precautionary principle laid down in Article 191 TFEU, consumer, labour environmental [sic!] and animal welfare legislation" (2.c.i);

- TTIP should not affect standards or legislation which are "very different" (for example REACH) or future definitions affecting the level of protection (endocrine disruptors, chemicals) (c.2.i);

- the recognition that, where the EU and the US have very different rules, there will be no agreement, "such as on public healthcare services, GMOs, the use of hormones in the bovine sector, REACH and its implementation... and therefore not to negotiate on these issues" (2.c.iii);
- to fully preserve the capacity of national, regional and local authorities to legislate their own policies, in particular social and environmental policies(2.c.ix);

- to ensure that the sustainable development chapter is binding and enforceable and aims at the full and effective ratification, implementation and enforcement of the "core international environmental agreements" (2.d.ii);

- to ensure that labour and environmental standards are equally included in the other areas of the agreement, such as investment, trade in services, regulatory cooperation and public procurement (2.d. iii);

- to ensure that the energy chapter contains guarantees that the EU environmental standards and climate action goals are not undermined (2.d.vi);

- to ensure that the EU energy labelling and eco-design standards are adhered to (2.d.x);

- "replace the ISDS system with a new system for resolving disputes between investors and States. where potential cases are treated in a transparent manner by publicly appointed, independent, professional judges in public hearings and which includes an appellate mechanism (2.d.xv);

- ensure transparency and access to information in TTIP negotiations and the subsequent negotiations under the agreement (2.e).

It will be interesting to see how many of these requests are taken up in the final draft agreement. Preserving existing EU rules - on GMOs, REACH, energy labelling etc - will be difficult enough. The USA did not ratify the Kyoto Protocol, the Convention on biodiversity or the Convention on the shipment of waste: which "core" agreements should they ensure the ratification, implementation and enforcement of? It is to be noted that the EP is not in favour of the suggested dispute settlement procedure, but argues for a court-based system.

To what extent the Commission will take into consideration the EP's requests is not clear. At the end of the day, the EP will have to say yes or no to the whole agreement; a "yes, but" or "yes, except" is not possible.

D.8 Court of Auditors: Special Report 6/2015: The integrity and implementation of the EU emission trading scheme

The Court of Auditors published a report on Directive 2003/87, where it criticised the lack of integration of the emission allowance trading system into the overall financial system of the EU. It found that there was no oversight of the emission markets and that the cooperation between

the Commission and Member States was insufficient. For a number of activities - account opening, transactions - it requested tighter controls and better monitoring. The monitoring and reporting of emissions was insufficient (this covers the period until 2012) and the Commission did not give enough transparency to its monitoring function of the national allocation plans. Also, the Commission did not publish the required annual implementation report of the Directive and accepted that some Member States did not comply with all their reporting obligations either.

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Section E: Legal journals articles

E.1 Sarathy G,. Costs in Environmental Litigation: *Venn v Secretary of the State for Communities and Local Government*, Journal of Environmental Law 2015, Vol. 27, pp. 213-324

This article considers the implications of the Court of Appeal's decision in *Venn v the Secretary of State for Communities and Local Government* [2014] EWCA Civ 1539, particularly the court's criticism of the UK government's incomplete implementation of the obligation in Article 9(4) of the Aarhus Convention to ensure that costs are not prohibitively expensive or uncertain.
In England and Wales the court rules have been amended to provide for fixed cost capping in all environmental cases, but only if brought by way of judicial review. The case of *Venn,* an environmental challenge against a planning decision was a statutory appeal, and therefore was not subject to the new fixed cost capping rules (Civil Procedure Rules 45.41-45.44 and Practice Direction 45).

The article provides the procedural background to the case. Lang J, in the lower court, accepted that the case fell outside the Civil Procedure Rules but found that the court could give effect to the Aarhus Convention by exercising its inherent jurisdiction, which allowed him to make a protective cost order (PCO). The Secretary of State (SoS) then successfully appealed the decision. Sullivan LJ, who gave the leading judgment in the Court of Appeal , found that the UK's deliberate exclusion of statutory appeals from the fixed cost capping provisions made it inappropriate for the court to exercise its inherent jurisdiction to grant a PCO, and that the resulting gap in the cost regime could only be remedied by legislation. He also considered and rejected the 'ingenious' submission made by the SoS that the Local Plan policy, the subject of this challenge, was not an act or omission by an authority which contravened a provision of national law relating to the environment, but was an emerging policy. He gave two reasons for his conclusion: firstly, much of the UK's environmental protection is contained in local and national policies and not in legislation; and secondly to draw a distinction between policies that relate to the environment and the law that may not directly relate to the environment but is formulated and dependent on those polices, would deprive the Aarhus Convention of much effect.

The author notes that the judgment raises three broad issues for costs protection in cases that come within the scope of the Aarhus Convention. Firstly, the conclusion that the UK's cost regime is 'systemically flawed' raises institutional questions about the legal status of the obligations under the third pillar of the Convention. Secondly, there remains the unresolved tension between environmental justice and procedure, which in the UK has led to a gap in

protection. Thirdly, there is a need to characterise environmental policy, in its different forms, as a component of 'national law relating to the environment' - as recognised in Article 9(3) of the Convention - and to address the constitutional questions that this may give rise to.
The author in his conclusion identifies some broader conceptual questions that still remain to be answered. Firstly, how should the court treat the legal obligations under the Aarhus Convention? Secondly, what is the scope of judicial discretion to interpret secondary cost legislation? Thirdly, what is the nature of environmental law and how should it be characterised? These are all interesting areas that need further consideration by the judiciary.

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