AVOSETTA MEETING

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National Developments in Environmental Law: Country Updates 2019

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Report on recent developments

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A. Legislative Initiatives

1. Developments in EIA law: New party and stricter standing requirements for NGOs

In Austria, when implementing the EIA Directive, the legislator opted in the Austrian EIA Act[2] for a one-stop-shop ('concentrated procedure'). This means that in the permitting procedure, the competent authority applies all relevant laws, whether federal laws or laws of the Laender (federal state or provincial laws), environmental or others, including their material and procedural provisions, in this one procedure. In addition, the EIA Act includes specific procedural rules, including additional provisions on standing and party rights.[3] The recent 2018 Amendment to the Austrian EIA Act[4] saw two main changes to these rules.

a. Business Location Ombudsman as a new party in EIA procedures

In line with the government manifesto,[5] the recent amendment to the Austrian EIA Act introduced the so-called Business Location Ombudsman (*Standortanwalt*) as a new party to EIA permitting procedures. This party can invoke those legal provisions prescribing public interests in favour of the project at stake in permitting procedures and before the administrative courts.[6] Organisationally, the Business Location Ombudsman was installed with the Laender branches of the Austrian Economic Chambers,[7] an association that represents Austrian businesses through mandatory membership.

Observers have quite correctly pointed out the Business Location Ombudsman does not actually fit the concept of parties in Austrian administrative law. In principle, parties can only participate and challenge an EIA permit insofar as their subjective rights are violated in order to defend their rights in view of a project. The Business Location Ombudsman, however, shall advocate **for** a project and its

* I would like to thank Birgit Hollaus LL.M as well as Niklas Hartmann LL.B and Evelyn Pleschberger LL.B. for providing valuable research assistance.

[2] EIA Act (UVP-G), Federal Law Gazette I 1993/697, last amended by Federal Law Gazette I 2018/80.

[3] § 19 EIA Act.

[4] Federal Law Gazette I 2018/80.

[5] Government manifesto available at <https://www.oevp.at/download/Regierungsprogramm.pdf>.

[6] § 19(12) EIA Act.

[7] Economic Chamber Act (WKG), Federal Law Gazette I 1998/103, last amended by Federal Law Gazette I 2018/108.

permitting. It is thus unclear how he Business Location Ombudsman would actually contribute to faster permitting procedures. Quite rightly, observers have pointed out that in case the Business Location Ombudsman challenges conditions set in an EIA permit, it would rather prolong procedures.[8]

b. Stricter criteria regarding standing for environmental organisations

The amendment also introduced a further requirement to the standing rules for environmental organisations (eNGOs). So far, an environmental organisation had to (i) have environmental protection as its primary objective according to its statutes, (ii) be non-profit oriented in the sense of Austrian tax law and (iii) exist for at least three years in order to have standing in EIA proceedings. Now, with the additional fourth criterion, an environmental organisation must also dispose of at least a hundred members.[9]

The introduction of this additional fourth criterion for environmental organisations has sparked heated debate amongst stakeholders with criticism voiced regarding two aspects mainly. For one, stakeholders doubt that this "minimum member criterion", which in fact only a few Austrian environmental organisations can meet, is in line with EU law requirements and the Aarhus Convention.[10] For another, stakeholders have criticised that this controversial criterion had – arguably deliberately – not been included in the original draft law published on the parliament's website but was only introduced by a motion in the Parliamentary Environmental Committee, so that it was not subject to public scrutiny.[11]

2. More participation and access to justice rights for the public concerned

In late 2017, the CJEU had confirmed in the *Protect* case[12] that the provisions of the Austrian Water Act[13] on public participation and access to justice were not in line with requirements of the Aarhus Convention and the European Charter of Fundamental Rights (EUCFR).[14] In fact, the CJEU found that the access to justice guarantees of neither Article 9(2) nor Article 9(3) of the Aarhus Convention had been implemented in Austrian water protection law. Since, in the Austrian legal system, the right to legal remedies is intrinsically tied to the prior participation in the permit proceedings, the Court established that it is necessary to grant the public concerned, in any case environmental

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[8] Ennöckl, `Wirtschaftskammer wird zum Standortanwalt` (*derStandard.at*, 13 Dezember 2018), <https://derstandard.at/2000093797043/Wirtschaftskammer-wird-zum-Standortanwalt> accessed 15 May 2019; Hochmuth, `Beschluss und Kritik: Wirtschaftskammer wird Standortanwalt bei Großprojekten` (*kleinezeitung.at*, 13 Dezember 2018), < https://www.kleinezeitung.at/wirtschaft/wirtschaftktnhp/5545698/Beschluss-und-Kritik_Wirtschaftskammer-wird-Standortanwalt-bei> accessed 15 May 2019.

[9] § 19(6) EIA Act.

[10] Schamschula, 'Neue Änderungen im UVP-G: Umweltorganisationen müssen draußen bleiben' (*umweltrechtsblog.at*, 6 October 2018), <https://www.umweltrechtsblog.at/blog/blogdetail.html?newsID=%7B28FE58F4-C972-11E8-8746-309C23AC5997%7D> accessed 15 May 2019.

[11] Ökobüro, 'Amendment of the Environmental Impact Assessment Act (UVP-G) curtails participation rights of Environmental Organisations', <http://www.oekobuero.at/4-english-summary-okt18> accessed 15 May 2019.

[12] Judgment of 20 December 2017, *Protect*, C-664/15, ECLI:EU:C:2017:987. For details on this case see the report on recent developments in Austria submitted for the 2018 Avosetta proceedings.

[13] Austrian Water Act (WRG), Austrian Federal Law Gazette 1959/215, as amended by Austrian Federal Law Gazette I 2018/73.

[14] OJ C 2012/326, 391.

organisations (eNGOs), also participation rights; this even, where the Aarhus Convention does not explicitly demand it, ie outside the scope of application of Article 6.

The findings of the Court in this preliminary reference procedure prompted several legislative initiatives both at federal and at Laender level with the aim of rectifying the legal situation for the public concerned, in particular eNGOs.

a. The Aarhus Participation Act at federal level

With the so-called Aarhus Participation Act,[15] the federal legislator addressed the legal situation of the public concerned in the Austrian Water Act, the Federal Waste Management Act,[16] and the Air Pollution Control Act.[17] Despite being termed 'Act', the amendment does not introduce a new law but introduces new, individual provisions on public participation and access to justice to these existing sectoral laws. However, the changes introduced by the amendment are not uniform. As a consequence, the amendment creates a slightly different situation for the public in each sectoral law; an observation made and criticised by both legal practitioners and scholars.[18]

Observers and in particular environmental organisations have criticised the amendment for several aspects. Frist, the amendment would address only three sectoral environmental laws, namely those in relation to which the European Commission has already launched an infringement procedure under EU law.[19] Many others, mainly but not exclusively those falling within the legislative competence of the Laender, remain untouched.[20] As Austria is itself a party to the Aarhus Convention, in addition to being bound by the Convention as an EU member state, the Aarhus Participation Act would not bring Austrian law in line with all of the Aarhus Convention's requirements.[21]

Then, in view of the newly created procedural status of eNGOs as a "crossbreed" between parties and mere participants, concerns were raised as to the lawfulness of this special status. Effectively, it provides eNGOs with some but not the same rights as parties and therefore creates worse conditions for eNGOs than for others. eNGOs thus question whether the Aarhus Convention, in any case the principle of equivalence in EU law, would permit such a special status.[22]

Lastly, the sectoral laws would now grant environmental organisations certain rights, yet these laws refer to the definition of 'environmental organisation' in the EIA Act. Since in the latter act, the

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[15] Aarhus Participation Act (Aarhus-BeteiligungsG), Austrian Federal Law Gazette I 2018/73.
[16] Federal Waste Management Act (AWG), Austrian Federal Law Gazette I 2002/102, last amended by Austrian Federal Law Gazette I 2018/73.
[17] Air Pollution Control Act (IG-L), Federal Law Gazette I 1997/115, last amended by Federal Law Gazette I 2018/73.
[18] See the statements submitted during the pre-parliamentary procedure available at < https://www.parlament.gv.at/PAKT/VHG/XXVI/ME/ME_00061/index.shtml#tab-Stellungnahmen> accessed 15 May 2019.
[19] Infringement case n° 20144111 relating to the Water Act, the Federal Waste Management Act, the Air Pollution Control Act and the nature protection laws at Laender level.
[20] See, however, below.
[21] Ökobüro, 'First steps towards an implementation of the Aarhus Convention´s Guarantees on „Access to Justice" in Austria', <http://www.oekobuero.at/4-english-summary-okt18> accessed 15 May 2019.
[22] Ökobüro, `Bedenken gegen Nachprüfungsrecht statt Parteistellung im Umweltrecht`, <http://www.oekobuero.at/bedenken-gegen-nachpruefungsrecht> accessed 15 May 2019.

definition has become more stringent,[23] not many civil society organisations will be able to benefit from those newly granted rights in the Water Act, the Federal Waste Management Act, and the Air Pollution Control Act.[24] As both EU law and the Aarhus Convention require broad public participation and access to justice, especially for eNGOs, it is doubtful whether the Aarhus Participation Act is in line with those basic requirements.[25]

b. Further legislative initiatives at Laender level

At Laender level, only one out of nine Laender has passed amendments to its nature protection laws yet, granting rights to eNGOs. Several other Laender are known to currently prepare such amendments. It is expected that again the legal situation for eNGOs will not be uniform at Laender level. Two examples suffice to illustrate this argument.

In Lower Austria, eNGOs now have the right to participate in proceedings for the appropriate assessment of plans or projects pursuant to the Habitats Directive.[26] They also have the subsequent right to a legal remedy, in which they are not limited to invoking grounds already submitted during the permitting procedure.[27] In view of procedures relating to the species protection provisions of the Habitats Directive, eNGOs are granted a subsequent right to a legal remedy, yet no right to participate in the proceedings.[28]

In Upper Austria, the proposed system is similar, yet appears even more casuistic when it comes to those proceedings in which eNGOs have participation rights and in relation to which they only have recourse to a legal remedy.[29] Contrary to Lower Austria, eNGOs are not automatically eligible to participate in permitting procedures and invoke their right to legal remedies, provided they are formally recognised as an eNGO at federal level.[30] Rather, eNGOs are required to submit an application to be recognised at Laender level to the Laend government. eNGOs are thus experiencing additional administrative burden. In addition, whereas eNGOs are granted more rights, the rights of the Environmental Ombudsman for Upper Austria are (simultaneously) restricted. Should the legislator pass the amendment in this version, eNGOs expect an increase in their workload as they no longer share the task of ensuring environmental laws are observed with this independent institution.[31]

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[23] See above.
[24] EEB, *Power for the People* (2019) 15.
[25] Scharfetter, Lueger and Schamschula, 'Access to Justice in Austria: One step forward, two steps back' (Access to Justice for a Greener Europe, 3 December 2018), <https://www.clientearth.org/access-to-justice-in-austria-one-step-forward-two-steps-back/> accessed 15 May 2019.
[26] § 27a, § 27b Lower Austrian Nature Protection Act (NÖ NaturschutzG), Lower Austrian Law Gazette 5500-11, last amended by Lower Austrian Law Gazette 2019/26.
[27] § 27b NÖ NaturschutzG.
[28] § 27c NÖ NaturschutzG.
[29] Draft law GZ. Verf-2012-116503/34-Tu. See Hollaus, 'Was lange währt, wird endlich gut? Zur dezentralen Umsetzung der Aarhus-Konvention in Österreich' [2019] EurUP (forthcoming, manuscript on file with the author).
[30] See above.
[31] OTS, ` Umweltdachverband zur OÖ Naturschutzgesetz-Novelle: Bittere Fehlentscheidung zum Leidwesen der Natur` <https://www.ots.at/presseaussendung/OTS_20190410_OTS0079/umweltdachverband-zur-ooe-naturschutzgesetz-novelle-bittere-fehlentscheidung-zum-leidwesen-der-natur> accessed 15 May 2019 .

3. Speeding up proceedings for EIA projects in the interest of Austria as a business location

Following its announcement in 2018,[32] the coalition government submitted their draft law on the speeding up EIA permitting procedures for projects, which are considered being in the interest of the Republic of Austria.[33] This draft law was heavily criticised during public scrutiny[34] as it essentially provided for automatic permitting: After EIA projects had been identified as being in the public interest by means of an ordinance, the EIA authority would have been required to decide within one year of the ordinance being published whether the project can be permitted. If the authority had failed to do so, the project would have been deemed permitted. In view of this draft law, a group of environmental organisations had even submitted a complaint to the European Commission informing it of the legislative plans in Austria.[35]

Subsequently, the legislative proposal was redrafted and finally adopted by parliament in late 2018.[36] The new Business Location Development Act is in force since 1 January 2019. The mechanism aimed at speeding up EIA permitting procedures for projects in the public interest can be summarised as follows: A developer can suggest its planned EIA project to the Minister for Digital and Economic Affairs (BMWD) for a formal attestation of it being in the public interest.[37] Depending on the type of project, the BMDW then requests the competent minister for a statement on whether the respective project is in the public interest.[38] The Act provides that such public interest exists where the project is expected to have a positive impact on Austria as a business location.[39] Additionally, the BMWD asks an advisory committee, comprised of independent business experts, for a recommendation on the question of public interest.[40] Based on this recommendation, the minister's statement and the developer's submission, the BMWD together with the Minister for Transport, Innovation and Technology (BMVIT) decides whether the respective project is in the public interest.[41] The attestation of a project being in the public interest is subsequently formalised by means of an ordinance.[42]

A project listed in such an ordinance benefits from several mechanisms aimed at speeding up the EIA permitting procedure such a facilities in view of the project announcement[43] and restrictions on the length of oral submissions in the hearing.[44] The EIA authority is required to decide on the application of such a project within 12 months of its submission.[45] Only where it clearly transpires that the

[32] See the report on recent developments in Austria submitted for the 2018 Avosetta meeting.
[33] The ministerial draft law is available at <https://www.parlament.gv.at/PAKT/VHG/XXVI/ME/ME_00067/index.shtml> accessed 15 May 2019.
[34] See the statements submitted during public scrutiny available at <https://www.parlament.gv.at/PAKT/VHG/XXVI/ME/ME_00067/index.shtml#tab-Stellungnahmen> accessed 15 May 2019.
[35] Letter of 17 August 2018, available at <http://www.oekobuero.at/images/doku/open_letter_and_complaint_austria_stentg.pdf> accessed 15 May 2019.
[36] Business Location Development Act (StEntG), Federal Law Gazette I 2018/110.
[37] § 3 StEntG.
[38] § 4(1) in conjunction with § 4(4) StEntG.
[39] § 2(2) StEntG.
[40] § 5(1) in conjunction with § 6(1) StEntG.
[41] § 5(2) in conjunction with § 7(1) StEntG.
[42] § 9(1) StEntG.
[43] § 11(4)-(6) StEntG.
[44] § 11(8) StEntG.
[45] § 11(4) StEntG.

project is not fulfilling the criteria to receive a permit, an EIA application can be rejected.[46] This may be understood as constituting a duty to permit for the EIA authority, in any case as putting pressure on the deciding authority.[47]

In case the EIA authority fails to decide on the project within 12 months of the permitting application having been submitted, the project applicant has the right to ask the administrative court of first instance to decide on the application.[48] Stakeholders have questioned whether this right granted to the project applicant will actually lead to a speeding-up of the permitting procedure. Such a right already exists if the permitting authority is at fault, yet this right is hardly ever invoked.[49] Rather, developers and practitioners argue that it would need (further) restrictions on the rights of the public, citizens' initiatives and environmental NGOs (eNGOs) as they would often use their procedural rights to prolong procedures.[50] Contrary to this, however, it can be criticised that the public is given no role in the decision-making on whether a project can be deemed in the public interest, and should subsequently benefit from accelerated proceedings.

4. No gold-plating of EU law

In line with its deregulation agenda,[51] the coalition government proposed the so-called Anti Gold-Plating Act to parliament in 2019.[52] This draft law has recently received support in the National Council and is expected to also pass the Federal Council successfully. Based on information provided by the respective ministries, the proposed act identifies and annuls legislative provisions, which go beyond the EU minimum requirements and are thus putting additional bureaucratic burden on whoever is subject to these provisions.[53] The changes relate primarily to notification, reporting, approval and auditing obligations in the Commercial Code and in financial laws. In the Federal Waste Management Act, the only environmental law addressed in this Act, impacts on environmental protection standards are not to be expected.[54]

However, as this Act is only the first measure in the anti-gold plating agenda, stakeholders still highlight the possibility of a reduction of safeguard provisions and a deterioration of employee protection rights and consumer standards and investor protections.[55]

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[46] § 11(4) StEntG.
[47] Dzugan,` Neues Standortentwicklungsgesetz: „Langfristig verlieren alle"`(*profil.at*, 14 February 2019), <https://www.profil.at/shortlist/wissenschaft/standortentwicklungsgesetz-raumplaner-stoeglehner-10643913> accessed 15 May 2019.
48 § 12 StEntG.
[49] Kerschner, '"Auf unzweifelhafte Weise" sehr zweifelhaft' (*umweltrechtsblog.at*, 3 December 2018) < https://www.umweltrechtsblog.at/blog/blogdetail.html?newsID=%7BCB7959BD-F6FC-11E8-84E0-309C23AC5997%7D> accessed 15 May 2019.
[50] Eisenberger, `Standortentwicklung: Warum das Gesetz dringend gebraucht wird` (*derStandard.at*, 27 November 2018), < https://derstandard.at/2000092263838/Warum-das-Standortentwicklungsgesetz-dringend-gebraucht-wird > accessed 15 May 2019.
[51] Government manifesto available at <https://www.oevp.at/download/Regierungsprogramm.pdf>.
[52] Anti-Gold-Plating Act 2019 (Anti-Gold-Plating-Gesetz 2019), parliamentary procedure 508 d.B.; for more detail see at <https://www.parlament.gv.at/PAKT/VHG/XXVI/I/I_00508/index.shtml#tab-Uebersicht>.
[53] Explanatory notes to Anti-Gold-Plating Act 2019, RV 508/RV 26. GP, 2.
[54] Relating to § 2(6)(6)(a) AWG 2002 only.
[55] Explanatory notes to Anti-Gold-Plating Act 2019, RV 508/RV 26. GP, 2 et seq. For insight into the parliamentary debate see the summary at <https://www.parlament.gv.at/PAKT/PR/JAHR_2019/PK0428/index.shtml> accessed 15 May 2019.

5. State objective relating to Austria as a business location

To strengthen the economy in Austria, an initiative of the coalition government proposed the introduction of a constitutional provision (state objective) acknowledging the importance of economic growth, employment and representing a competitive business location in order to ensure prosperity;[56] the law in which this provision is proposed to be introduced already includes a state objective requiring comprehensive environmental protection.[57]

The legislative initiative is currently discussed in parliament and has recently passed the constitutional affairs committee with the votes of the governing parties, yet in a textually adapted version.[58] The envisaged state objective now reads 'The Republic of Austria (federation, Laender and municipalities) avows itself to a sustainable and competitive business location as a precondition for prosperity and employment.' Despite the rewording, it is still doubtful whether the proposed state objective will gain the necessary 2/3 majority in the parliamentary vote.

B. Case law

1. Update on the Vienna airport's third runway case

The legal proceedings concerning Vienna airport's (VIE) third runway have continued since the last report. The Federal Administrative Court of First Instance (BVwG) had to decide anew on the EIA application for the runway extension after the Constitutional Court (VfGH) had annulled its initial judgment refusing this permit. According to the VfGH, the BVwG had been in the wrong to consider a public interest in climate protection in its balancing exercise.[59]

In its new judgment of March 2018, the BVwG, being bound by the views of the VfGH, held that it could not consider climate change aspects in its balancing exercise.[60] However, it could include the public interest in 'avoiding avoidable noise' and in 'the prevention of negative effects on life, health and property' and ultimately granted the EIA permit under multiple conditions aiming at protecting those public interests.

Again, several individuals and citizens' initiatives, all parties to the proceedings, filed for legal review of this EIA permit decision with both the Austrian Constitutional Court (VfGH) and the Administrative Court (VwGH) putting forward different arguments. The VfGH quite quickly rejected the complaint filed with it:[61] In its view, the claim that due to the intense public debate on the case there had been no 'fair trail' in the sense of Art 6 of the European Convention on Human Rights (ECHR) was not sufficiently substantiated. In addition, the claim questioning the constitutionality of the regulation on air traffic noise levels would not raise an issue of constitutional law.

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[56] The parliamentary material is available at <https://www.parlament.gv.at/PAKT/VHG/XXVI/I/I_00110/index.shtml#tab-Uebersicht> accessed 15 May 2019.

[57] Federal Constitutional Act on sustainability, animal protection, comprehensive environmental protection, on water and food security as well as research, Federal Law Gazette I 111/2013.

[58] Parliament correspondence No 479 of 6 May 2019.

[59] For details on the case see the report on recent developments submitted for the 2017 Avosetta proceedings.

[60] BVwG, Judgment of 23 March 2018, W109 2000179-1/350E, 130. Arguing, however, that the lower court could have relied on another line of reasoning despite being bound by the VfGH's view, Hollaus, 'Country Report for Austria. Courts at the frontline' (2018) 9 IUCN E-Journal.

[61] VfGH, Decision of 4 October 2018, E 1818/2018.

The VwGH dealt with the complaint, yet ultimately dismissed the claims as unfounded and thereby confirmed the EIA permit.[62] On the issue of climate change, the Court found in essence that this was indeed an issue to be considered in EIA permitting. However, in the EU, the ETS system was designed to reduce CO2 emissions from air traffic. Within this system, emissions are attributed to airline operators, not airport operators. The interest in climate protection would thus not provide grounds for refusing an EIA permit for an airport operator.

2. Case-law following the CJEU's findings in the *Protect* case

As reported last year,[63] the CJEU found in the *Protect* case[64] that the provisions on public participation and access to justice in the Austrian Water Act are not in line with the requirements of the Aarhus Convention and the EUCFR. The Austrian Administrative Courts of First Instance (VwG) and the Austrian Administrative Court (VwGH) were quick to follow up with these findings of the CJEU.[65] They even applied them to other legal areas than water protection law.[66] In doing so, they granted the public concerned standing and the right to legal remedies where this was not provided for in the respective laws.

This "activism" of the courts was heavily criticised by developers and practitioners.[67] They argued that such practice would in fact amount to law-making and was therefore outside the competence of the courts. However, also eNGOs criticised the developments following the *Protect* case:[68] As the application of the CJEU's findings by the courts, and even less so by public authorities, was not uniform, it would create legal uncertainty as to their procedural rights. Quite rightly, observers pointed out that only the legislator was in a position to create such legal certainty.[69]

Meanwhile, the Austrian legislator has passed the Aarhus Participation Act in an attempt to rectify the legal situation for the public concerned in water protection law, waste management law, and air quality law.[70] Overall, however, this legislative step appears quite minimalistic as it e.g. only addresses some selected pieces of environmental legislation and is largely limited to environmental law with a link to EU law. Whether this act will thus create legal certainty for the public concerned remains to be seen.

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[62] VwGH, Judgment of 6 March 2019, Ro 2018/03/0031 and others.
[63] See for a more detailed account, the report on recent developments in Austria submitted for the 2018 Avosetta proceedings, available at <https://avosetta.jura.uni-bremen.de/Austria_2018.pdf>.
[64] Judgment of 20 December 2017, *Protect*, C-664/15, ECLI:EU:C:2017:987.
[65] E.g. VwGH, Judgment of 30 October 2018, Ra 2018/07/0377 and others; VwGH, Judgment of 30 October 2018, Ra 2018/07/0380 and others.
[66] VwGH, Judgment of 27 September 2018, Ro 2015/06/0008; VwGH, Judgment of 5 September 2018, Ro 2018/03/0024; VwGH, Judgment of 19 February 2018, Ra 2015/07/0074.
[67] Riegler, 'Parteistellung für Umweltorganisationen im wasserrechtlichen Verfahren' [2018] RdU 163, at 169. Even earlier Bergthaler, 'Öffentlichkeitsbeteiligung bei Großprojekten – aktuelle Herausforderungen im Lichte der Aarhus-Konvention' [2015] RdU-UT 2015 86, at 89; Sander, 'Gedanken zum „Mysterium" des Art 9 Abs 2 der Aarhus-Konvention', in Institut für Umweltrecht der JKU Linz (ed), *Jahrbuch des österreichischen und europäischen Umweltrechts 2017 – Herausforderung Umweltverfahren: Effizienz, Rechts(un)sicherheit, Öffentlichkeitsbeteiligung (2017)* 181, at 187.
[68] Alge and Rametsteiner, 'VwGH stärkt Rechtsschutz durch Aarhus-Konvention und EuGH-Rechtsprechung' [2018] RdU 137, at 143.
[69] Wagner, 'Fehlende Umsetzung von Aarhus im Wasserrecht' [2018] RdU 34, at 40.
[70] See above.

BELGIUM

Recent Developments in Environmental Law in Belgium (May 2018- April 2019)

L. Lavrysen

I. Legislation

As usual a lot of adaptations of federal and regional law, to implement European or International environmental law, or of a purely domestic nature, have occurred. Only some of them deserve our attention in the context of this report.

Climate Change

After more than 7 years of negotiations, legal drafting work and parliamentary approval procedures a *Co-operation agreement* of 12 February 2018 between the Federal State and the Regions has now been approved by all parliaments concerning the *intra-Belgian burden sharing 2013-2020*.[1] The Doha Amendment has been accepted by Belgium on 14 November 2017,after approval by all parliaments.[2]

In the course of 2018, a group of environmental and constitutional law academics studied *climate governance in Belgium*.[3] Building on this research and taking into account the important and current expectations in society, they have drafted early 2019 a climate law bill[4]. The proposal concerns a special act that aims to strengthen the coordination of climate policy between the federal government and the federated entities of Belgium and to set the long-term and ambitious climate policy objectives. The proposal was presented at a press conference in Brussels on 1 February 2019[5] .The intention was to contribute to the public debate and to invite policy makers to continue working on this. The proposal was immediately picked up by a series of parliamentarians from different parties. On 12 February 2019 the parliamentary deliberations started with a hearing with the academic team. The Opinion of the Legislative Section of the Council of State was delivered on 4 March 2019. It was favorable for most parts of the proposal, except for two essential elements: de mid- en long term objectives of climate change policies and the basic principles. The Opinion contained different suggestions to solve the problem. The academic team preferred the solution by an Amendment of Art. 7a of the Constitution dealing with sustainable development, by adding the following phrase to it: "*In particular, they [the Federal State, the Communities and Regions] work together on an effective climate policy in compliance with the objectives and principles and in accordance with the modalities laid down by a law adopted by the majority determined in Article 4, last paragraph*." The proposal was picked up again by members of parliament. Approved by a majority in the competent Parliamentary Commission, it failed to receive the adherence of a two third majority of the House of Representatives during a vote on 29 March 2019 (76

[1] http://www.ejustice.just.fgov.be/eli/wet/2018/06/15/2018031304/staatsblad
[2] http://www.ejustice.just.fgov.be/eli/wet/2014/06/13/2018031131/staatsblad
[3] https://www.klimaat.be/nl-be/klimaatbeleid/belgisch-klimaatbeleid/nationaal-beleid/klimaatgovernance
[4] The proposal is the result of a collaboration between French and Flemish academics of the Université Saint-Louis (D. Misonne, M. El Berhoumi, D. Van Eeckhoutte), Ghent University (L. Lavrysen, C. Billiet, H Schoukens), UCLouvain (CH Born) and Hasselt University (J. Theunis).
[5] http://www.usaintlouis.be/sl/actu/38240.html

in favor; 66 against). As the legislature comes to an end the question remains if that article will be declared open for review after the next general elections on 26 May 2019. The House voted in favor on 4 April 2019 (134 in favor; 3 against; 1 abstention), but the Senate and the Government must still take position. Because the proponents of the Special Act believed that a vote on it in would gave a similar result (it needs a 2/3 majority and a majority in both language groups) it was decided to suspend the work on it and to see if one can make progress or not in the upcoming legislature.

Standing

By a Federal Act of 21 December 2018 the standing rules for ngo's in civil and criminal matters have been modified. Article 17 of the Judicial Code reads now (own translation):

"A legal claim cannot be admitted if the claimant has no capacity and no interest in filing it.
A claim of a legal person that seeks to protect human rights or fundamental freedoms as recognized in the Constitution and in the international instruments binding Belgium is also admissible under the following conditions:
1 ° the corporate purpose of the legal person is of a special nature, distinct from the pursuit of the public interest in general;
2 ° the legal person pursues this social objective in a sustainable and effective manner;
3 ° the legal person takes legal action within the framework of that corporate purpose, with a view to the defense of an interest connected with that objective;
4 ° the legal person pursues merely a collective interest with his legal claim."

The Act of 12 January 1993 on a right of action for the protection of the environment has been adapted accordingly. The criteria are very closely inspired by the case law of the Constitutional Court that guarantees wide access for ngo's to the Court.

II. Jurisprudence

The most important cases concerning air quality have been discussed in the main report.

Constitutional Court judgments

Constitutional Court, 28 February 2019, n° 32/2019, *l'ASBL Association Belge de l'Industrie des produits de protection des plantes v. Walloon Goverment* – Constitutional Court, 28 February 2019, n° 38/2019, *vzw Belgische vereniging van de industrie van plantenbeschermingsmiddelen t. Vlaamse Regering* – **Regional bans on the use of pesticides**

The Constitutional Court rejects the demands for annulment of the Walloon and Flemish Decrees that allow introducing far-going restrictions of the use of pesticides in the respective regions. The Court is of the opinion that the regions are competent to introduce such interdictions to use some pesticides in the concerned region and that the measure cannot be regarded as a product standards allowing the marketing of such pesticides (being a federal competence) as long as there is no complete ban to use the concerned products in any circumstance.

Constitutional Court, 28 February 2019, n° 33/2019, *d'Oultremont, Boitte and asbl Eoliennes à tout prix ? v. Walloon Region* – **SEA and legislation**

The contested provisions form part of the Spatial Development Code of the Walloon Region introduced by the Decree of 20 July 2016, which completely replaces the organic regulations on, for example, spatial planning and urban development, previously contained in the Walloon Code of Spatial Planning, Urban Planning and Heritage. The Spatial Development Code makes a large number of changes to those regulations. The contested provisions lay down the general land use rules for zones intended for business premises, agricultural areas and forest areas. These regulations apply not only to new or amended regional plans that are adopted after the entry into force of the Spatial Development Code, but also to the regional plans in force on the date of entry into force of the Spatial Development Code. The question at stake was if the Decree should have been submitted to SEA. The Court reviews the relevant case law of the CJEU and is of the opinion that SEA do not apply. Even though the contested provisions have an effect on the applicable regional plans, they cannot be considered, either individually or read in their context, to be acts which, by the adoption of rules and control procedures applicable to the sector concerned, establish a whole set of criteria and modalities for the approval and implementation of one or more projects that may have significant effects on the environment, in the sense of the jurisprudence of the CJEU. Although it must be acknowledged that the scope of Directive 2001/42/EC must be broadly interpreted as it seeks to ensure a high level of environmental protection and although certain regulatory acts must be considered in special circumstances as "plans" or "programs" falling within the scope of that directive, it remains valid that neither regulations as such nor legislation as such has been brought within the scope of the directive. Deciding that the Spatial Development Code or certain parts thereof fall within the scope of the directive would mean that any legislation and regulations that could have significant effects on the environment should be subjected to an environmental assessment in accordance with the directive. Such a conclusion corresponds not to the aim of the European legislator, which aims to "subject certain plans and programs that may have significant effects on the environment to an environmental assessment in accordance with the Directive" (Article 1).

Constitutional Court, 14 March 2019, n° 46/2019, *vzw Aktiekomitee Red de Voorkempen and Others v. Flemish Government* - **Unconstitutional restriction of appeal in integrated environmental permit matters**

The Constitutional Court annuls some restrictions for administrative and judicial appeals introduced in the Flemish Decree of 25 April 2014 on Integrated Environmental Permits by an Amendment of 8 December 2017. According that amendment in principle only those who have been active during the public participation phase can appeal. The Court held that the right of access to justice is a fundamental right that must be guaranteed to everyone, in compliance with Articles 10 and 11 of the Constitution. The restriction, in principle, of that right, for the members of the public concerned, to those who have submitted a reasoned objection, position or comment in the context of the public inquiry is not proportionate to the objective pursued by the legislator that essence is to streamline and speed up administrative dispute resolution. The objective of providing the licensing authority with all information as quickly as possible does not justify the obligation for members of the public concerned to submit a

reasoned opinion, comment or objection at the moment they do not yet have all relevant information – e.g. opinions of competent authorities - in order to safeguard their access to the administrative and judicial appeal procedures.

Case pending before the CJEU

Request for a preliminary ruling from the Constitutional Court — Inter-Environnement Wallonie asbl, Bond Beter Leefmilieu Vlaanderen vzw v Conseil des ministers (Case C-411/17) – **Postponement of nuclear phase out**

In a case (demand for annulment) concerning the Federal Act of 28 June 2015 amending the Act of 31 January 2003 concerning the nuclear phase-out, by which a live time extension of some nuclear reactors is possible, the Constitutional Court (Judgment N° 82/2017 of 22 June 2017) referred some questions to the CJEU. The case is still pending. AG Kokott suggests answering them as follows:

"1. The answer to Questions 2, 4 and 7 of the request for a preliminary ruling is that under Article 1(4) of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment only projects the details of which have been adopted by a specific legislative act, in such a way that the objectives of that directive have been achieved by the legislative process, are excluded from the ambit of the directive. It is for the national court to verify whether the legislative act is equivalent to development consent for a project and whether the objectives of the directive are achieved in the legislative process, taking account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates.

2. The answer to Questions 1, 3(a), 5(a) and the first part of Question 6(a) is that, contrary to previous case-law, the definition of 'project' under Article 1(2)(a) of Directive 2011/92 includes the extension by 10 years of the period of industrial production of electricity by a nuclear power station.

In the event that in respect of the extension of the period of production of electricity in nuclear power stations the Court adheres to its interpretation of the definition of 'project' under Article 1(2)(a) of Directive 2011/92, I propose that it find that the directive is nevertheless applicable to such extension because it constitutes a project within the meaning of Article 1(5) and Appendix I to the Espoo Convention on access to information, public participation in decision-making and access to justice in environmental matters and Article 6(1)(a) and Annex I to the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters.

Irrespective of whether the Court concurs with the proposals regarding the interpretation of Article 1(2)(a) of Directive 2011/92 in conformity with international law or regarding the direct application of the definition of 'project' in the Espoo and Aarhus Conventions, the extension of the period of industrial production of electricity by a nuclear power station constitutes consent for a project within the meaning of Article 1(2)(a) where it involves consent for works or interventions altering or extending the installation.

3. The answer to Question 6(b) is that an extension by 10 years of the period of industrial production of electricity by commercial nuclear power stations, which is linked with structural improvement measures, must, as a change to a nuclear power station, be made subject to an assessment of its environmental effects in accordance with Article 4(1) and Annex I, point 24 in conjunction with point 2(b) to Directive 2011/92 if the extension is not already to be regarded in itself as consent for a project in accordance with Annex I, point 2(b).

The answer to the third part of Question 6(a) is that in the case of a decision concerning the extension of the period of industrial production of electricity by certain nuclear power stations, which is connected with structural

improvement measures, public participation must take place in accordance with Article 6(4) of Directive 2011/92 as early as possible, when all options are open, that is to say, before the decision on the extension is taken.

4. The answer to Question 3(c), Question 5(c), Question 6(d) and Question 9 is that Article 2(4) of Directive 2011/92 permits an exemption from the obligation to undertake an environmental impact assessment for the extension of the period of industrial production of electricity by a nuclear power station if another form of assessment is necessary to avert a grave and imminent peril to an essential interest of the Member State concerned, such as security of electricity supply or legal certainty, and the public concerned and the Commission are informed in accordance with Article 2(4)(b) and (c). On the other hand, it is not permissible under Article 2(4) to dispense with a transboundary environmental impact assessment under Article 7.

5. The answer to Question 8(a) is that the extension of the period of industrial production of electricity by a nuclear power station is to be regarded as a project within the meaning of the first sentence of Article 6(3) of Directive 92/43/EEC even if that extension would not constitute a project as such within the meaning of the EIA Directive or on account of its connection with works to improve the installation.

The answer to Question 8(b) is that Article 6(3) of Directive 92/43 does not allow a national authority, even if it is a legislative authority, to authorise a plan or project without having ascertained that it will not adversely affect the integrity of the site concerned.

The answer to Question 8(d) is that the public interest in ensuring a minimum supply of electricity constitutes a reason of public safety within the meaning of the second subparagraph of Article 6(4) of Directive 92/43, while the further-reaching public interest in security of electricity supply is to be regarded as a reason of an economic nature within the meaning of the first subparagraph of Article 6(4).

6. National courts may exceptionally maintain temporarily the effects of a decision taken in breach of a duty under EU law to undertake an environmental assessment if

– that decision is as soon as possible regularised a posteriori by rectifying the procedural error,

– on the basis of the available information and the applicable provisions, it is highly likely that the decision will be confirmed in the same form following regularisation,

– as far as possible no additional faits accomplis are created, and

– overriding public interests in maintaining the effects prevail over the interest in the effectiveness of the obligation to undertake the environmental assessment and the fundamental right to effective judicial protection.

7. The answer to Question 3(b), Question 5(b), Question 6(c) and Question 8(c) is that the need to adopt administrative acts implementing the Law of 28 June 2015 for the Doel 1 nuclear power station, which does not exist for the Doel 2 nuclear power station, does not affect the answers to the questions referred for a preliminary ruling."

The Belgian Climate Case – "De klimaatzaak"[6]

On April 20, 2018 the Court of Cassation has dismissed the appeal of the Flemish Environment Minister and thereby confirms the judgment of the district court of 8 February 2016. The language issue – the case before the French speaking Court of Brussels - is now definitively resolved. The written procedure is

[6] https://www.klimaatzaak.eu/nl

going on and one expect judgment end of 2020. The first claim, a joint reduction of GHG with 40 % towards 2020 (and at least 25 %), will have no relevance any more at that moment. The second claim (reduction in 2030 with 55% and at least 40% compared with 1990) will be at the heart of the case.

CZECH REPUBLIC

Ilona Jancarova, Stepan Jakl

Czech Republic

Legislation:

The Act No. 254/2001 Coll. on waters was substantially amended by Act No. 113/2018 Coll. The most important changes:

1. The agenda of collection of fees for water use and waste water discharge to surface waters was transferred from the Czech Environmental Inspectorate to the State Environmental Fund of the CR.
2. Water Protection Authorities are empowered to prior consent to developmental activities which do not require their permit and which are capable to influence hydrologic conditions (for example geological works).
3. 2 phase assessment of developmental activities based on the EU WFD requirement. In case the activity is anticipated to have negative impact on conditions of a water body, it may be permitted only if an exemption is granted based on strictly set conditions.
4. Provisions regarding the waste water discharges.
5. Special service stations as a part of navigable waterways enabling to dispose the waste waters and hazardous substances of the craft.
6. Provisions regarding floods.
7. Changes related to provisions on sanctioning breaches of the law.

The Air Act No. 201/2012 Coll. was amended by Act No. 172/2018 Coll.

The aim of the amendment was implementation of Directive 2015/652/EU and partially Directive 2015/1513/EU. In the amendment, the rules were set for producers and importers of oil and gasoline enabling to achieve 6% reductions of GG emissions from fuels till 2020 and to meet the obligation of the Czech Republic to achieve 10% of renewable sources of energy in transportation.

The Act No. 45/2019 Coll. changed four laws regarding limited use of mercury.

The Act No. 115/2000 Coll. on compensation of the damage caused by certain specially protected species of animals was amended by the Act No. 100/2019 Coll. The aim is to compensate the economic losses caused by cormorants (formerly protected , later on delisted from endangered species list) to fishermen, for the limited time period 3 years.

The Act No 167/2008 Coll., on environmental damage liability was amended by the Act No. 98/2019 Coll. in order to comply with the reasoned opinion regarding the possibility to open the administrative procedure on corrective measures to environmental NGOs.

The Forest Act No. 289/1995 Coll. was amended by the Act No. 90/2019 Coll. The amendment empowered the Ministry of Agriculture to adopt necessary measures in forestry management in specific situations which were not anticipated by the former Forest Act (droughts, bark beetle outbreaks and other calamity situations). The amendment brought exemptions to the Forest Act provisions with the aim to react promptly to extraordinary situations in protective and specially designated forests (for example forests in national park, steep slopes etc.)

Jurisprudence:

1) Constitutional Court (CR): Case ÚS 1685/17 (18.12.2018)

The applicant challenged the decision of the Supreme Administrative Court, which decided on participation of the environmental NGOs (activities of such NGOs must be focused on environmental protection) in administrative procedure regarding imposition of fines for the breach of Nature Protection Act.
The Nature Protection Act enables such NGOs to participate in administrative proceedings in which their interests in nature protection are concerned. In the case, there was primary question if in administrative penal procedure regarding imposition of a fine these interests might be concerned. For many years, administrative courts held that NGOs might participate in administrative procedure regarding corrective measures imposition, nevertheless, the imposition of a fine does not represent a priori the interest in nature protection.
The Constitutional Court ruled that in certain cases might be necessary to enable NGOs to participate in these administrative penal procedures and that administrative courts should interpret these terms in compliance with the Aarhus Convention even though provisions of the Czech law justify different point of view.

2) Supreme Administrative Court : Case 2 As 187/2017-149 (19. 4. 2018)

Municipalities are entitled to challenge land-use plans of neighboring municipalities if these plans might influence their rights. The concern must be significant and clearly defined.

EU

EU Legal Measures in the Environmental Sector (2018)

Ludwig Krämer

The European elections, foreseen by the end of May 2019, the renewal of the European Commission (including its president) and of the President of the Council and of the President of the European Central Bank in the summer of 2019, have all had as a consequence that the Commission announced in autumn 2018 that it would not launch new legal initiatives in 2019, before the Commission was renewed.

Climate

As regards climate change, Regulation 2018/842 obliged the Member States to reduce the GHG emissions for certain sectors (industrial products, product use, agriculture, waste, energy) until 2030 by a certain percentage, compared to 2005. These reductions go from 0% (Bulgaria) till 40% (Luxemburg, Sweden); the sectors covered by Directive 2003/87 on GHG emission trading are not included. Where a Member State does not reduce sufficiently, it is obliged to present a reduction plan, but the Commission has no other enforcement tools than Article 258 TFEU.

Regulation 2018/841 concerned the emissions of GHG from land use, land use change and forestry, and asked Member States to ensure that the emissions from these sectors do not exceed the absorptions.

Directive 2018/844 amended the directive on the energetic performance of buildings; it asked Member States to draw up a strategy for renewing the national building park by 2050. And the Commission adopted a regulation to further amend directive 2003/87 (regulation2018/2066).

Regulation2018/1999 introduced provisions on energetic governance, in particular planning and information provisions. Member States must draw up a national integrated energy-climate plan and renew it every ten years. They also have to inform the Commission of their long-term strategy on climate issues.

Directive 2018/2001 replaced directive 2009/28 on renewable energies; Directive 2018/2002 amended directive 2012/27on energy efficiency. Both directives fixed targets to be achieved - by the EU! - by 2030.

No provisions were introduced at EU level on CO^2 emissions from trucks.

The Court of Justice held that that the EU decision to establish a stability reserve for GHG emissions, introduced by decision 2015/1814, was correctly based on Article192(1) TFEU (majority) and not on Article192(2) (unanimity) (case 5/16).

Access to information on the environment

Directive 91/692 on environmental implementation reports was repealed (decision 2018/853).

The CJE gave access to impact assessments which the Commission made before submitting legislative proposals to the other institutions. These assessments discuss the different options for action. The Commission published the assessments only, once it had made its proposal. The CJE held this to be

wrong, as the assessment procedure was part of the legislative process, for which particular transparency and openness was required (T-57/16P).

The General Court refused to apply regulation 1367/2006 to the Euratom Treaty (T-307/16) and to give access to opinions of the Commission's Legal Service on international trade agreements and the ECJ's role in that (T-644/16). In the meantime, the ECJ confirmed that the Agreement with Canada (CETA) which provided for the installation of arbitration courts for investors, was compatible with EU law (opinion1/17).

In case T-545/11 RENV, the General Court refused access to glyphosate studies made by the producer, with the argument that glyphosate was emitted into the environment only as a product, not as a substance.

Access to justice in environmental matters

The Council adopted a decision to ask the Commission to submit a study on possibilities to solve the conflict with the Aarhus Convention Compliance Committee (decision2018/881). The study was made by Milieu Ltd. The Commission's follow-up is likely to be adopted in autumn 2019.

The General Court found that a decision to authorize the marketing of GMO-maize was a decision in the area of environmental law and quashed thus a Commission decision to refuse an internal review under regulation 1367/2006 (T-33/16). In contrast, it held inadmissible a request for internal review of the decision to prolong the permit for glyphosate, with the argument that internal reviews were only possible against administrative acts, but not against decisions of general nature.

The General Court did not take into consideration the now settled case-law of the CJE, according to which, when a conflict exists between a provision of EU law which is not of direct effect, and national law (or subordinate EU law), the court has to provide for a consistent interpretation which leads to the application of the EU provision. Should this not be possible, because such an interpretation would be contra legem, the court has to set aside the provision of national law (and of subordinate EU law); see for example C-664/15 Procter; C-187/15 Pöpperl, C-579/15 Poplawski, C-384/17 Link,C-193/17 Cresco. This CJE jurisprudence is likely to considerably change the discussion on Article9(3) Aarhus Convention.

Implementation of EU environmental law

Commission decision 2018/C19/03 set up a forum on the respect of environmental legislation (OJ 2019, C 19 p.3), composed of Member States authorities, Europol, agencies etc.

Biodiversity and nature conservation

The CJE decided that fishing prohibitions in EU habitats were the exclusive competence of the EU (C-683/16). Projects to spread sewage in such habitats constituted a "project" (C-293/17, repetition of C-127/02 Waddenzee). In case C-160/17 it further defined, what constituted a "plan".

In case C-164/17, the CJE discussed again the installation of a windpark in a habitat.

UK was found not to have designated enough habitats to protect the harbour porpoise (C-669/16). Maltas regulations to allow the capturing of birds were considered illegal (C-557/17). And the forest

measures in a habitat in Poland were declared illegal (C-441/17; two important injunctive relief decisions pertain to this case).

Products

The EU adopted a regulation on organic agriculture (2018/848) which replaced regulation 834/2007, and updated the list of States from where imports of organic products are allowed (Regulation 2018/849). Little is said about controls of imports.

The Commission published the names of chemicals which come under regulation 1272/2008 on the classification and labelling of chemicals, in the other languages than English, 10 years after the adoption of the first regulation (Regulation 2018/669)!

As regards GMO plants, seven decisions on the placing on the market of plants were published in 2018, based on regulation1829/2003.

The CJEU decided that the genome editing (CRISPR procedure) came under directive 2001/18 (C-528/16).

The General Court approved the large restriction of three active substances which are suspected to contribute to the killing of bees(T-429/13 and T-451/13). The case is on appeal (C-499/18). In another case, concerning fipronil, the General Court quashed the Commission's decision to restrict the use, because the precautionary principle, on which the Commission had based its decision, was not accompanied by a cost-benefit analysis (T-584/13)! This case is not onappeal.

Water

The CJEU decided in three cases under Article260 TFEU that Greece, Italy and Spain had still not done everything to comply with directive 91/271 on urban waste water - more than 25 years after its adoption (C-326/16,C-251/17 and C-205/17).

The Commission proposed a regulation on the re-use of water (COM(2018) 377.

As regards directive 91/676 on nitrates in water, the Commission granted three further derogations from the requirement to limit the livestock per hectare which brings the number of derogations between 2002 and 2018 to 24. The CJEU came out with a severe judgment against Germany, arguing that too little had been done to limit the nitrate content in surface and groundwater (C-543/16). Overall, this is the 19th judgment of the CJEU on the non-application of this directive.

Air pollution

The Commission had introduced, in 2016, a "conformity factor" fordiesel cars, which allowed such cars to emit 129 mg/km NOx (for 4 years even 168 mg/km), instead of the 80 mg/km which regulation 2007/715 had allowed. On appeal from Paris, Bruxelles and Madrid, the General Court quashed the decision, arguing that it should have been the EP/Council which adopted the measure (T-339/16 etc). The case is on appeal, in particular on the question, whether the cities have standing.

Waste

The European Parliament and the Council adopted a package of directives, in order to promote the circular economy. A first directive intended to improve the information on the implementation of the

directives on end of life-vehicles, batteries, and electrical and electronic waste (directive 2018/849). Directive 2018/851 amended the framework directive on waste, directive 2018/850 amended the directive on the landfill of waste and directive 2018/852 the provisions on packaging waste. These last three directives increased in particular the recovery and recycling quantities which Member States have to achieve, but continued to leave open, how exactly compliance is ensured.

GERMANY

Recent Developments Germany (Gerd Winter, 16 My 2019)

1. **In May 2018 a sublegal regulation – the 43rd Verordnung to the Bundesimmissionsschutzgesetz – was adopted that transposes EU Directive 2016/2284 on national emission ceilings (NEC) for SO2, NOx, NMVOC, NH3, and PM2,5. The regulation sets timelines for the reduction of the overall emissions of those substances. Its major instrument is a nationwide air pollution abatement program. Quite interesting in view of our related discussions in Vienna are the various possibilities for flexibilisation of the emission reduction commitments, including that the overshooting of one pollutant can be compensated by an undershooting of another pollutant (§ 12 43.BImSchV) (as if different pollutants had the same adverse effect).**
   Note that the NEC Directive may be included in our discussions on air pollution. It presents a third strategy besides air quality objectives and emission limits.
2. **An amendment to the Act on Renewable Energies (Erneuerbare Energien Gesetz) removed some of the privileges for "Bürger-Energie-Gesellschaften" (citizen energy undertakings). By such undertakings citizens can "bottom up" form their own joint ventures of investment in wind energy projects. It happened that almost all of the wind energy projects auctioned in 2017 were won by citizen energy undertakings, one of the reasons being that other than commercial undertakings they did not have to have obtained an installation authorization beforehand. That privilege was removed in order to level out the competition conditions with commercial enterprises (§ 104 sec 8 EEG).**
3. **A new wave of legislation aiming at the acceleration of planning and authorization procedures has been launched in 2018. A government bill submitted in July 2018 provides that for large infrastructure projects preparatory works (reaching even to the clearing of a site) can be authorized before the authorization for the entire project is issued, a hearing can be waived in cases that are considered to be "einfach" (simple) (even though it may be subject to an EIA which by itself one would expect not to be "simple"), a deadline of 10 weeks for submitting evidence and legal arguments in court procedures is established[1], the independence of the hearing authority from the deciding authority which has already been given up in several other proceedings is removed also for procedures concerning railways, and the concentration of court review to just one instance, the Federal Administrative Court, is extended to railways. Commendable is that all documents grounding a project must be made accessible in the internet.**
   Along the same line the procedures on authorizing the construction of transmission grids set up by the (sorry for the word monster) Netzausbaubeschleunigungsgesetz Übertragungsnetze (Law on Acceleration of the construction of transmission grid systems) were streamlined. The background is that of the 5900 km transmission lines that are deemed necessary to bring wind generated electricity from the North to the South of the country only 150 km have thus far been constructed.
4. **Concerning recent discussions on geo/climate engineering it may be of interest that the German government brought a bill addressing the fertilization of the high seas, EEZ and territorial waters.[2] Ocean fertilization is a means to stimulate algae growth and thereby remove CO2 from the atmosphere. The increased algae mass shall feed fish and make the CO2 contained in dead algae sink to and be stored on the ocean ground. There are concerns about adverse effects of such techniques on the marine ecosystems. Requirements for ocean fertilization projects were in 2013 laid down as amendment to the Protocol of 1996 to the London Convention on the Prevention of Marine Pollution through Dumping of Waste. The bill**

[1] This may raise concerns because the ECJ in C-137/14 (Commission v Germany) held that a preclusion of submissions violate the principle of effective legal protection.
[2] BT-Drucksache 19/4463.

transposes the amendment by establishing a rather strict control regime requiring that only projects for research purposes are allowed, a prior authorization must be obtained, an EIA is required and the project results must be made public.

5. **In January 2019 the Kommission Wachstum, Strukturwandel und Beschäftigung ("Kohle Kommission"), a high level pluralistic Commission charged with developing proposals on the phasing out of coal, published its 336 pages long report. The proposals were widely accepted by the ruling coalition, the affected industry and the public at large. Some of them are:**
    - **Steps of phasing out of coal based power stations**
    - **Deletion of CO2 certificates in relation to phased out coal power stations**
    - **Steady increase of renewables to 65 % by 2030**
    - **Promotion of combined heat and power**
    - **Accelerated construction of transmission grids for renewable electricity**
    - **Development and financial support of alternative investment in regions affected by the phasing out of coal power stations**
6. **The Minister for the Environment drafted a Klimaschutzgesetz (Climate Protection Act) which has not yet been officially published. Its major aim is to fix overall and sectoral CO2-emission ceilings for industry, buildings, transportation, agriculture and waste. It has raised heated debates between parties, sectoral ministries, industry and the public at large.**
7. **In June 2018 the ECJ decided that Germany in various ways infringed Directive 91/676 on water pollution by nitrate from agricultural sources. As widely known nitrate leaching into the soil and contaminating the ground water is a major pollutant from intensive agriculture endangering also the use of groundwater as drinking water. Germany tried hard to bring excuses which however were all rejected (ECJ C-543/16).**
8. **In March 2018 the Bundesverfassungsgericht (Federal Constitutional Court) was asked to decide (inter alia) whether the cutting back of freely allocated emission allowances for the second allocation period (2008-2012) infringed the property guarantee. The Court considered but left open if the expectation of coal power enterprises that the allocation for free would be continued from the first to the second allocation period was a property position. It held that even if this was a property position (which I believe it is really not) it could be removed without compensation if this was done proportionally, i.e. (in this context) in respect of any investment dispositions that may have been taken trusting in the perseverance of free allocation. The Court denied that such trust could have legitimately arisen (BVerfG 1 BvR 2864/13, ZUR 2018, 611)**

GW 15.05.2019

GREECE

Added: 9/1/20

AVOSETTA MEETING
London, 24-25.05.2019 (UCL School of Law)

Recent National Developments-Greece

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A. Legislative Developments

1. The insufficient transposition of the revised EIA Directive (2014/52) The revised

Certain issues concerning the transposition of the revised EIA Directive have aroused. The first issue concerns the fact that the new and extended criteria set in Annex III of the Directive (protection of health, the risk of major accidents and/or disasters and the cumulation of the impact of the designed project with the impact of other projects), which in accordance with Article 4 para. 3 lit.b and para.4 of the revised Directive have to be taken into consideration when the national competent authorities decide about whether Annex II projects should be exempted from the EIA or not, have not been transposed in an appropriate manner into the greek legal order. This is due to the fact that the relevant Ministerial Decision[1] which sets the criteria for the classification of the projects in categories and subcategories was modified prior to the adoption of the Ministerial Decision which transposed the relevant provisions of the revised EIA Directive and the new modified Annexes[2]. *Subsequently, the new criteria for Annex II projects were not taken into consideration in the classification of the projects foreseen in the relevant Ministerial Decision (MD* 37674/27.07.2016,as modified by Decision 2307/2018). Furthermore, *the classification of projects in categories and subcategories is not sufficiently justified and is not accompanied by a specific scientific study.*[3] It is

[1] Ministerial Decision 2307/2018 "Modification of the 37674/27.07.2016 Decision of the Minister for Environment and Energy for the classification of public and private projects in categories and subcategories in accordance with Article 1 para. 4 of the Law 4014/2011" with regard to the classification of certain projects of the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th and 12th Group of Projects, Official Government Gazette Issue B 439/14.2.2018.

[2] JMD 5688/2018, "Modification of the Annexes of the Law 4014/2011 in accordance with Article 36 A of the relevant Law and in compliance with the Directive 2014/52 " "amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment", Official Government Gazette Issue B 988/21.3.2018.

[3] For example, while research drilling activities for minerals and hydrocarbons are classified as projects of Category A., some other research drilling activities are classified in the Category

worth mentioning that the Council of State had to deal with the issue of whether a project which is not included either in the Annexes of the EIA Directive or in the relevant Annexes of the Greek Legislation and concerned the recreation of an urban park that presupposed the cutting of a large number of trees, should be subject to the EIA procedure or not. The Court ruled that *the non-classification of the critical project either in the Annexes of the EIA Directive or in the annexes of the national legislation is not by itself sufficient, so that it can be concluded that it does not have significant impact on the environment and subsequently it has to be exempted without any further examination from the EIA procedure* (Decision 2559/2017, para. 17**).**

Another issue concerns the transposition of the definition of the "Environmental Impact Assessment"[EIA] (Article 1 lit g of the revised EIA Directive) in the greek legal order. In particular, there is no specific definition for EIA, as there is in the Directive. Instead of that, the definition of the EIA is included in the relevant definition of the "environmental permit" (Article 2 of JMD 1915/2018 that modified Article 3 of the JMD 167563/2013) . The critical issue that arises*, lies in the fact that the simplified procedure foreseen in Law 4014/2011 for the projects of Category B, which does not include public consultation procedures, does not seem to be in harmony with the relevant definition of the EIA Directive and that of the "environmental permit" in the greek legal order, as public consultation is an integral part of the EIA*[4]. In spite of the incompatibility issues that the simplified procedure raises, it would be preferable for the sake of legal clarity that the relevant definition of the EIA or even of the environmental permit would be included in the Law for the environmental authorization procedure (Law 4014/2011) and that there would be a specific justification for the simplified procedure as a deviation from the ordinary EIA procedure and environmental authorization[5].

B without any specific justification and are thus subject to a simplified procedure. See *WWF Hellas*, Environmental Legislation in Greece, 14th Policy Review, 2018, p. 21.

[4] This must be probably the reason for which the definition of the environmental permit was included in the JMD that regulates the projects of Category A (namely those with the most significant impact).

[5] *WWF Hellas, supra,* note 3, p. 22-23.

Finally, certain provisions of the revised EIA Directive have not been transposed into the greek legal order. This concerns in particular the provision of the EIA Directive concerning the obligation of the competent authorities to perform their duties in an objective manner and do not find themselves in a situation that gives rise to a conflict of interest (Article 9a) and the provision which requires that MS lay down rules on penalties applicable in the cases of the non-compliance with the provisions of the Directive (Article 10a).

B. Developments in the Leadership of the Council of State and Jurisprudential developments

1. The Selection of the first woman President of the Greek Council of State

Last October Mrs Aikaterini Sakelalropoulou, then Vice President of the Council of State was chosen by the Cabinet as the first woman President of the Court, after a selection process which included also parliamentary hearings. It is worth mentioning that Mrs Sakellaropoulou, a highly experienced and very well-respected judge, served for a long time in the Fifth Section of the Council of the State, namely the Section that deals with the environmental-related cases, and has contributed to the formation of the jurisprudence of the Court in significant environmental-related cases, such as the Acheloos Case, the Asopos Case and the Mining Cases in Chalkidiki. She has also contributed to the jurisprudence relating to the protection of the cultural environment. She has also served as President of the Hellenic Association of the Environmental law for four years.

2. Reference for a Preliminary Ruling by the Council of State (C-280/18) for the "presumption of full knowledge" for environmental permits through their publication on the website of the Ministry

The Council of State had to deal with the issue of the "presumption of full knowledge", which stems from the publication of the environmental permits on the special website of the Ministry for Environment and Energy (Article 19A of the Law 4014/2011 and Article 1 of the JMD 21938/2012**).** The adoption of this "presumption" plays a critical role in the effective exercise of the right of access to justice in environmental matters, as the deadline for submitting a petition for annulment of the critical environmental permit starts from the next day of its publication on the website of the Ministry. The

Council of State (Decision 647/2018) submitted a request for a Preliminary Ruling to the CJEU which included two questions (C-280/18). The first issue that was raised by the Court related to whether the provisions of the national law (Law 4014/2011 and the respective Ministerial Decisions specifying the Law), *which lay down the procedures preceding the adoption of the environmental permits for projects and activities with a significant environmental impact, namely projects belonging to A Category [subcategories A1 and A2] (publication of the environmental impact studies, public information and participation in the consultation process)* that have to be initiated and conducted primarily by the wider administrative unit (Region) and not by the municipality concerned, are in conformity with Articles 6 and 11 of the EIA Directive read in combination with the provisions of Article 47 of the Charter. The second issue that was raised by the Court related to whether the relevant provisions of the national law (Article 19A of the Law 4014/2011 and Article 1 of the JMD 21938/2012) which provide that publication of environmental permits by means of posting them on a special website of the Ministry for Environment and Energy, creates a presumption of full knowledge on the part of every interested party for the purpose of exercising their right to legal remedy by submitting a petition for annulment before the Council of State, is compatible with Articles 6 and 11 of the EIA Directive in conjunction with Article 47 of the Charter of Fundamental Rights. The Council of State notes that while answering the second question, the CJEU should also bear in mind that the legislative provisions governing the publication of environmental impact studies and public information and participation during the procedure to approve the environmental conditions of those projects and activities, are initiated and conducted by the wider administrative unit (Region), rather than by the municipalities concerned.

3. Decision 1424/2018 of the Council of State concerning the compatibility of the simplified environmental authorization procedure with the

constitutional provisions for the protection of environment and public health

The Council of State (5th Section) ruled that the simplified environmental authorization which is foreseen for the construction and the installation of antennas of an onshore base station for mobile telecommunications (Article 8 of Law 4014/2011) and is based on "Standard Environmental Commitments'' set in the form of a Ministerial Decision, without a case by case examination, does not contravene the relevant constitutional provisions for the protection of environment (Article 24) and that of public health (article) as well as the principles of prevention and precaution which are set in EU Primary Law. The Court justified its position on the assumption that the Standard Environmental Commitments'' on which the simplified permit is based, regulate, except for the radiation, various elements and parameters which are critical for the protection of the environment, while the ordinary EIA procedure is applied in cases of base stations that have specific characteristics, such as those which are installed in nature protected areas. Moreover, the Court justified further its position by arguing that the authority, which has competence for the issuance of the construction and installation license of the concrete antenna examines the comprehensiveness and the legality of the simplified environmental permit and the accuracy of the submitted documents and that a specific regulatory framework is applied concerning the impact of the radiation on the human health and the environment due to the installation of the antenna in the base station (para. 14).

4. Decision 685/2019 of the Plenary of the Council of State concerning the unconstitutionality of the exception of illegal housing agglomerations in forest areas from the forest maps

The Plenary of the Council of State decided that the relevant legislative provision (Article 153 para. IA of the Law 4389/2016 that was added in the Law 3889/2010) that provided for the exception of the illegal housing agglomerations in forest areas from the forest maps, and the Ministerial Decision which was based on the critical legislative provision, contravene Article 24 para. 1 of the Constitution that obligates the State to protect the natural environment, including the forests in which it makes a specific

reference.[6] The Court justified its position first by making reference to its constant jurisprudence with regard to the strict protective status for the forests which is set in the relevant constitutional provisions (Article 24 para.1 and 117 para.3) and requires that the modification of their use is acceptable only exceptionally and for concrete reasons of overriding public interest (para. 15). Furthermore, the Court shaped its thesis on the argument that the provision for the exception of the illegal agglomerations from the forests maps *does not serve an overriding reason of public interest, but it instead rewards those who have constructed illegal buildings in the forest areas* (para. 16). Finally, the Court rejected the argument of the Ministry for the Environment, according to which such an exception can contribute to the acceleration of the ratification of the forest maps by ruling that *the relevant exception does not constitute an appropriate mean for the acceleration but it mainly calls off the inclusion of these areas in the forest maps and circumvents the application of the forest legislation* (para. 16).

[6] It is worth referring that the relevant constitutional provision obligates the State to set forest maps, so that forests are clearly delineated and protected.

HUNGARY

Recent development – Hungary
(with a special focus on the Constitutional Court)
Gyula Bándi

Introduction

In the past two years (I cover two years, as I missed the meeting in Wien) two tendencies could be detected in Hungary in connection with environmental legislation:

- a definite, still not too quick move in the direction **of loosening the different environmental limitations** of 'development', or in other words, business activities. This is not a Hungarian speciality, and the major characteristic of it is to support the changes in the name of 'public interest'. See the example of forest legislation and regional planning below;
- the constant reorganization of the system of public administration, beginning in 2011 and still ongoing. The most recent example is a new proposal for the 'simplification' of public administration (the proposal is 950 pages long!). There are two clear lines, both follow the 'modernization', 'simplification' reasoning: a) the concentration of the different public administration organs in one, big government office system, organized by the 19 counties plus Budapest, using less and less the options of de-concentration and decentralization, and b) the generalization of the same system, which means that the several authorities – such as the environmental authority – having a special, individual, consequently possibly powerful role, are organized within the same centralized system of government offices. The likely hazard might be detected from our last decision of the Constitutional Court, below.

Seemingly small changes to make business easier

My first example is **forest legislation** (Act XXXVII of 2009), amended substantially by the Act LVI of 2017, entering into force in January 1, 2018. My predecessor and myself, as future generations ombudsmen, sent several messages to the legislator to refer to the many possible negative consequences during the drafting period of 2016/17, but we did not succeed. The 2009 forest law could create a careful balance between the interests of forestry and nature conservation, which has been changed in this new version of forest law.

With the amendments of the act in 2017, the changes in forest management could lead to a controversial situation, within which the short-term interests of forestry could somehow get across with nature conservation interest in a way that the original restrictions in many forest uses have been revealed. There are several, seemingly technical changes, which might have a direct impact on nature conservation and primarily on Natura 2000 interests, diminishing the level of protection by different means and methods. For example, the spin-off forests up till the last changes had a special nature conservation status, which is missing today and according to some estimates this might lead to a two-thirds (!) cut of the protection status. Also, the priority order of different forest functions has been changed, and as one example of its consequences, flood protection and military interests have a priority over nature conservation interests. There are also many changes in forestry methodology, which all may lead to a serious regression of nature conservation interests.

The WWF and the Hungarian Friend of the Earth associations in spring 2018 turned to me as an ombudsman, asking for the careful revision of the new law with a possible view of finding the unconstitutional elements. After several discussions, round of reviews related to the

practical consequences of the amendment, we could convince the Commissioner of Fundamental Rights (the ombudsman of future generations is a deputy position, and only the Commissioner may initiate a constitutional review) to turn to the Constitutional Court in January 2019. Our main focus is the serious weakening of the level of protection both in terms of qualitative and quantitative protection, putting the nature conservation interest in the background as compared with the interests of forestry, changing the system of guarantees of the protection substantially. This infringes the constitutional right to environment, the rights of future generations, thus infringes the non-regression principle, while also seriously affecting the principle of legal certainty.

In our dossier we proposed the deletion of 7 full paragraph and 33 other items (which might be one word, a part of a sentence or a full sentence) in 22 other paragraphs. Among others the amended act provided a different reading for some definitions the Natura 2000 legislation, limiting its scope.

The system of **regional development** has also been changed recently, combining three previous individual acts – regional development, Lake Balaton, Budapest and agglomeration – into one, that is the Act CXXXIX of 2018, several detailed elements of which are still waiting for further implementing legal regulation. At the moment, in my office we are considering those main reasons, which support our vision of serious regression. Summing it up, the original system of different regions, areas designed for different uses has been changed in a way to leave much more room for lower level regulation, making any future change easier. This is mostly the case in connection with our main recreational area, the lake Balaton. There are certain ideas of clear business nature how to use the lake more 'efficiently' that is to create new harbours, parking places, hotels, resort areas. As the careful analysis is still going on, I could only provide this short summary.

<u>The renewed environmental activism of the Constitutional Court</u>

The Constitutional Court, while being a bit hesitant in certain other issues, in the past two years is relatively active in interpreting the right to a healthy environment and widening its approach to cover even more aspects than earlier, among others precautionary principle.

The first in the list is the Constitutional Court decision No. (28/2017 (X. 25.) AB határozat), connected with **nature conservation**, more specifically with Natura 2000 protection versus agricultural uses. Some new provisions of agricultural uses – according to the Court – limited the chances and efficiency of nature conservation, while it was not a necessary condition or prerequisite in order to protect any other human right or constitutional value. The verdict did not intervene directly in the regulatory process, but only stated that the legislator made an omission. Fortunately, the Court referenced some very important basic requirements, which could be used for any further legal arguments. They underlined the importance of biodiversity, the special use of Natura 2000 sites, referred to the common heritage of the nation – which is closely connected to the common heritage of mankind – and emphasized again the non-regression (or non-derogation) principle. According to the Court, while environmental protection is everyone's obligation, the responsibility of the state is even greater, as the state shall also create the underlying legal conditions of effective environmental protection.

In this decision the Court also interpreted the **obligations towards future generations**, as it has been articulated by Article P) of the Fundamental Law. This encompasses a threefold obligation: (1) to provide the chance for options, (2) to maintain the environmental quality and

(3) to provide the chance for access. All three shall be used in a way to protect the interest of future generations. In the given case it means that the purely economic vision in connection with the utilization of Natura 2000 sites may not be accepted. Finally, the Court clearly stated that the state, when making various decisions in connection with nature conservation, must keep in mind the precautionary principle. The precautionary principle has been taken as part of the constitutional right to the environment.

The **precautionary principle** has been better articulated in the Decision No. 27/2017. (X. 25.) AB határozat, strictly connected with the other, covering issues of land use. Here the Court clearly stated:
"[49] According to the precautionary principle - widely accepted in environmental law – the state must guarantee that the state of environment is not deteriorated as a consequence of a given measure…."

A next judgment (3223/2017 (IX. 25.) AB határozat), while rejecting the motion, interpreted the principle of **non-regression**, which must cover both the regulatory steps and the individual decision of the authorities. Also, it stated the requirement to carry out necessity assessment and proportionality test when making such decisions.

The next judgment (13/2018 (IX. 4.) AB. határozat) is based upon the constitutionality initiative of the President of the Republic, using the arguments of the Ombudsman for Future Generations to a large extent. The main issue is **water management**, more specifically, the unlimited – meaning here that no authorization or notification is needed - **drilling and use of groundwater wells**, down to the level of 80 metres. Here we must keep in mind that with very few exceptions, water is a state property, it does not belong to the scope of land ownership. Consequently, this judgment combines the references to future generations and right to environment with the questions of state property or even more national assets (Article 38 of the Fundamental Law) – the water resources belong to this scope.
First, we should mention that the non-regression principle is underlined again, as being based on the provisions of Fundamental Law, and it is combined with the precautionary principle, also distinctly referred to. In both cases the necessity-proportionality test shall be used, comparing the protection of the environment to the protection of various other human rights. As the proposed law aims to eliminate the permitting or notification requirements in case of the given wells without replacing this with any other guarantees, the Court could not accept this regression of protection interests. We should also not forget – says the Court – that the protection of water resources is a strategic task of the state. The legislator failed to point to any other human rights of a constitutional nature which might support the limitation of environmental rights.

Here also, as in the previous decisions, the Court – e.g. in point [13] - referred to the Fundamental Law, taking its reference to **sustainable development** seriously, underlining that the state has a great responsibility when dealing with the environmental values and interests. The Court claims: "The responsibility towards future generations, following from the provisions of the Fundamental Law requires that the legislator should evaluate and consider the likely consequences of its measures on the basis of scientific information, according to the principles of prevention and precaution.

According to the Court (point [20]) the non-regression principle, together with the **precautionary principle and prevention** are originating from the Fundamental Law. It is the legislator (point [27]) who should prove that the proposed legislation does not mean regression,

consequently, does not cause irreversible damage or does not even mean the likelihood of such damage. It is also mentioned that the precautionary principle and the non-derogation should necessarily be coupled, the precautionary principle might have its own way. It is a constitutional obligation of the legislator to taken into consideration the risks. The state (point [21]) shall consider the non-derogation on the basis of proportionality and necessity, as compared with the possible implementation of other rights.

The Court underlined (point [50]) that the repeal of authorization or notification of the wells is only a tool and not the purpose, consequently the limitation of the right to a healthy environment in this respect has not been necessary for the protection of any other constitutional rights. The main message in connection with water management is (point [69]) that the state should only manage the underground water supplies, belonging to the common heritage of the nation, in a way that not only the water demand of today but also of the future shall be guaranteed in a sustainable mode. "The available water resources might only remain usable also in the future, if the qualitative and quantitative protection is provided for."

Hungaroring is a major attraction in Hungary, having several unfavourable consequences for the people living in the neighbourhood. The legal background of noise abatement was the subject matter of the Decision of the Constitutional Court (17/2018. (X. 10.) AB határozat), summarizing (point [87]) the non-regression principle, in line with the principles of precaution and prevention – these are "understood in unity" according to the Court. Also they require the legislator to implement these principles of the merit when the option of limiting the right to a healthy environment is in question.

The Court underlined (point [91]) that the principle of non-derogation or non-regression prohibits those derogations which might lead to the irreversible damage of the environment or nature, while the precautionary principle and the prevention examines the risk of an such damage. "The constitutional protection of the environmental and of the nature have common roots: both protect the conditions of (human) life." Noise may also be taken as a longer process the consequence of which might be the irreparable damage.

Finally, the Court had to deal with the **reorganization of the system and competences of public authorities** – Decision 4/2019. (III. 7.) AB határozat. This has been raised by MPs in 2015, and in my capacity as an ombudsman I could also issue a 20 pages statement in 2018, trying to influence the decision. It was clear from the beginning that the Court would not decide against the restructuring, referring to the primary responsibility of the Government to design the public administration and its procedural provisions. Still, the major question is, how these changes effect the right to a healthy environment, taking into consideration the principles of prevention ad precaution (see, for example, point [74]).

What is really missing, according to the Court (see, e.g. point [79]) is the lack of clear note or reference within the public authority decision to those environmental protection considerations, which have been taken into consideration during the process. Actually, if everything is dissolved in a huge administrative structure, without a special emphasis of some interests which need a distinct treatment – protection – than the momentum might be lost. But the decision must always refer to these interests. It is an omission of the legislator, which must be fixed by the middle of 2019 in a way (see. e.g. point [93]) that the decision of the authority should visualize those statements of the authority which clearly focus on the protection of environmental interests or values of nature.

And the final example of recent decisions is connected with the too many and too quick changes of the structure of public administration - Decision 12/2019. (IV. 8.) AB határozat. In the given case, some months after the original first-instance decision, the same authority became the second instance decision-maker which issued the first decision. This is not only an environmental problem, but also a serious deficiency of the protection of the right to legal redress, as provided for in Art. XXVIII of the Fundamental Law. “The Constitutional Court underlines: the Parliament and the Government both has a wide margin of discretion when creating or restructuring the public organization system, but this rights is not unlimited, might only be implemented within the framework of the Fundamental Law, with a full respect to the provisions of the same.” (see point [23])

IRELAND

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Avosetta Meeting

London, 24-25 May 2019

Report Developments in Ireland

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The most significant developments in Ireland over the past 12 months relate to three main areas: climate action, the establishment of the Office of the Planning Regulator and ongoing developments concerning implementation and enforcement of obligations arising under EU environmental law and the Aarhus Convention.

1. Climate Action

Ireland has a dismal track record on climate action. The 'climate 'laggard' badge is richly deserved. In its Annual Review 2018, the Climate Change Advisory Council, the independent body tasked with assessing progress and advising Government on climate policy, reported that Ireland 'is completely off course' to meet its 2020 and 2030 emissions targets and to decarbonise the economy by 2050.

From laggard to leader?

The Citizens' Assembly and the Committee on Climate Action

In its report on how the State can make Ireland a leader in tackling climate change, published in April 2018, the Citizens' Assembly set out a clear blueprint for decisive climate action on a number of fronts. Its recommendations included:

- higher taxes on carbon intensive activities (subject to the revenue raised being ring-fenced and used to support the transition to a low carbon economy and with built-in protections against increasing fuel poverty);
- taking steps to ensure the greatest possible level of community ownership in future renewable energy projects;

- the phasing out of subsidies for peat extraction (with proper provision made to protect the rights of the workers impacted by this measure); and
- a tax on greenhouse gas emissions from agriculture, with rewards for land management that sequesters carbon and any resulting revenue being reinvested to support climate friendly agricultural practices.

A particularly strong theme in the Assembly's deliberations was to identify a mechanism to hold the Government to account so as to ensure that it delivers on the State's climate obligations. The Assembly recommended (with 97% of members voting in favour) that, as a matter of urgency, a new (or existing) independent body should be given a broad range of new functions and powers in legislation to urgently address climate change. The rationale behind this recommendation was to put climate change firmly at the centre of policy-making in Ireland.

The Assembly's report, including its detailed recommendations on climate action, was presented to the Houses of the *Oireachtas* (Parliament) in April 2018.

Subsequently, in July 2018, a Joint Oireachtas Committee on Climate Action was established to consider the report and recommendations produced by the Citizens' Assembly.

The Committee on Climate Action issued a ground-breaking report on 28 March 2019 setting out 42 priority recommendations in the area of climate action. This report, which is a very welcome and robust response to the recommendations of the Citizens' Assembly, provides a strong political mandate for Government to act urgently and ambitiously to address the climate crisis. In particular, the report proposes a new framework for climate governance in Ireland. It proposes a new body to supersede the existing Climate Change Advisory Council, to be known as the Climate Action Council, with enhanced powers, functions and resources. The following extract from section 1.4 of the report produced by the Committee on Climate Action provides an overview of the key proposals regarding governance and accountability:

A New framework for delivering climate action

Once the overall target is agreed[1], a new framework will govern the way the State will deliver on its legally binding commitments which will involve the following division of responsibilities:

1. The Government will be responsible for allocating carbon budgets and will retain responsibility for the delivery of national targets and international obligations as the executive authority of the State; An all of government approach, led by the Department of the Taoiseach [Prime Minister], will ensure that all sectors deliver on targets as mandated by law.

2. An independent external expert body, the Climate Action Council, will have enhanced powers, functions and resources, and will supersede the existing Climate Change Advisory Council. This body will, amongst other things, devise and recommend five-yearly carbon budgets and monitor the progress of the State in reducing GHG emissions.

3. A Standing Committee on Climate Action of both Houses of the Oireachtas [Parliament] will constitute the main accountability mechanism.

The structure of the proposed new Climate Action Council will be modelled broadly on the UK Climate Change Committee.

Drawing heavily on the recommendations of the Citizens' Assembly, the Committee's report is a turning point for climate action in Ireland. At the very minimum, it provides a strong basis for cross-party commitment to robust climate measures.

[1] The Committee recommended that new climate change legislation be enacted in 2019 to include:

1. A target of net zero economy-wide GHG emissions by 2050;
2. A provision for a 2030 target, consistent with the GHG emissions reduction pathway to 2050 to be set by 2020 by Statutory Instrument requiring the formal approval of both Houses of the Oireachtas following receipt of advice from the Climate Action Council;
3. Provision for five-yearly carbon budgets, consistent with the emissions reduction pathway to 2030 and 2050 targets, to be set by Statutory Instrument requiring the formal approval of both Houses of the Oireachtas following receipt of advice from the Climate Action Council;
4. A target for the renewable share of electricity generation of 70% by 2030.

Declaration of a climate and biodiversity emergency

On 9 May 2019, *Dáil Éireann* (the lower house of the *Oireachtas* [Parliament]) declared 'a climate and biodiversity emergency' and accepted and endorsed the report of the Committee on Climate Action. It also called for 'A Citizens' Assembly to examine how the State can improve its response to the issue of biodiversity loss'.[2]

Forthcoming 'All of Government Climate Action Plan'

The Minister for Communications, Climate Action and Environment, Richard Bruton TD is expected to publish a so called "all of government plan" which will set out the actions to be taken in every government department and body to address the climate crisis. The stated aim is 'to make Ireland a leader in responding to climate change'.

While the 'all of government' approach is a very welcome development, it remains to be seen how quickly this new commitment will translate into specific action points, with clear targets and timeframes for delivery, that lead to significant, rapid reductions in emissions in practice.

Recent media reports indicate that publication of the plan may be imminent and that the term 'climate disruption' will be used in the title of the Government's new plan. A draft of the plan has been seen by the *Irish Times*: 'Climate change plan: Carbon taxes seen as best way to reduce pollution Climate change plan': 'Draft plan sets out unprecedented changes' *Irish Times* 19 May 2019 and 'Carbon taxes seen as best way to reduce pollution' *Irish Times* 19 May 2019.

Climate-related Legislation

The Fossil Fuel Divestment Act 2018 was adopted on 17 December 2018.

[2] Dáil Debates, 9 May 2019 https://www.oireachtas.ie/en/debates/debate/dail/2019-05-09/32/. See further 'Ireland Declares Climate and Biodiversity Emergency' *Green News* 9 May 2019 https://greennews.ie/dail-call-climate-emergency/ and 'Climate Emergency Declaration "Crucial" Step Forward' *Green News* 17 May 2019 https://greennews.ie/climate-emergency-declaration-crucial-step-forward/

Climate Litigation

Climate Case Ireland was heard in the High Court in Dublin over four days in late January 2019. Judgment has been reserved and is pending at the time of writing.

General remarks

Public interest in climate change continues to rise in Ireland. The increasing frequency of extreme weather events makes the consequences of global warming more compelling and more visible across the State and in local communities. Calls for more ambitious and urgent climate action are louder and more dramatic than ever before, with regular climate demonstrations and school climate strikes. The mainstream media is finally giving climate change the attention it deserves, thereby stoking further public interest and informed debate and intensifying the calls for urgent action. It is now beyond doubt that the public expects an appropriate and timely response from the Government to address the climate crisis.

2. Establishment of the Office of the Planning Regulator

The appointment of an independent Planning Regulator with oversight of the Irish planning system was one of the key recommendations of the *Tribunal of Inquiry into Certain Planning Matters and Payments* (the 'Mahon Tribunal').[3] The establishment of the long awaited Office of the Planning Regulator (*Oifig an Rialaitheoir Pleanáil*) was provided for under the Planning and Development (Amendment) Act 2018.

The Office of the Planning Regulator has a wide range of important functions concerning: oversight of Ireland's planning system; delivery of better planning services by planning authorities; research on planning to assist policy and practice; and improving public awareness and understanding of planning.[4] It has a budget of €2.3 million for 2019.

Where it considers it to be 'necessary or appropriate in the circumstances', the Office of the Planning Regulator has the power to conduct a review of the systems and

[3] https://planningtribunal.ie/.
[4] N. Cussen, 'Establishing the Office of the Planning Regulator' presentation to Irish Environmental Law Association, 16 April 2019.

procedures used by any planning authority or *An Bord Pleanála* (the Planning Appeals Board) in relation to the performance of its functions under the planning legislation. It does not examine *individual* planning decisions by planning authorities or the Board. The Regulator's focus is on 'ensuring underlying processes and procedures are fit for purpose, robust and efficient, leading to consistency and public confidence in the making of planning decisions across the Country.'[5] It also has significant functions in terms of education, training and research.

The Government appointed Mr Niall Cussen as Ireland's first Planning Regulator, heading up the new Office of the Planning Regulator. Mr. Cussen was previously the Chief Planner at the Department of Housing, Planning and Local Government.

3. Implementation and enforcement of obligations arising under EU environmental law and the Aarhus Convention

Costs in environmental litigation

Implementation of the obligation to ensure that certain categories of environmental litigation are 'not prohibitively expensive' continues to prove challenging for the Irish legal system.

In October 2018, the special costs rules governing environmental litigation under section 50B of the Planning and Development Act 2000 (as amended) were amended to include proceedings in the High Court by way of judicial review of any decision pursuant to a statutory provision that gives effect to Article 6(3) or (4) of the Habitats Directive.

The implications of the ruling of the CJEU in Case C-470/16 *North East Pylon Pressure Campaign Ltd v An Bord Pleanála* EU:C:2018:185 (a reference from the High Court of Ireland) are still being teased out. See, in particular, the recent judgment of Simons J in *Heather Hill Management Company CLG v An Bord Pleanála* [2019] IEHC 186.

[5] N. Cussen, 'Establishing the Office of the Planning Regulator' presentation to Irish Environmental Law Association, 16 April 2019.

The judgment of the CJEU in Case C-167/17 *Klohn v An Bord Pleanála* EU:C:2018:833, a reference for a preliminary ruling from the Supreme Court of Ireland, is significant in terms of the temporal application of the ban on 'prohibitively expensive' costs and the scope of the obligation falling on the national courts (including a strong interpretative obligation) to give effect to the right of access to justice in environmental matters.

Access to environmental information

Right to Know CLG v An Taoiseach [2018] IEHC 372 is an interesting example of the dramatic consequences that can flow from the Irish courts 'stepping up' to enforce EU environmental law in the face of fundamental principles of constitutional law. This case concerned Ireland's transposition of the Directive 2003/4/EC on public access to environmental information and the intersection with the principle of Cabinet confidentiality. When transposing this directive, Ireland purported to create a mandatory exception for records of discussions at meetings of the Government. This exception is found in Articles 8(b) and 10(2) of the Access to Information on the Environment Regulations 2007-2018 (the AIE Regulations). While Directive 2003/4/EC permits Member States to provide for certain exceptions to the right of access, any attempt to invoke an exception is subject to two overarching provisos. First, all exceptions must be interpreted restrictively and second, the public authority to whom the request is made must engage in a public interest balancing test before deciding to refuse access. In this case the public authority (the Department of An Taoiseach) cited Articles 8(b) and 10(2) of the AIE regulations as giving effect to the principle of Cabinet confidentiality when it refused the request for access to 'all documents which show cabinet discussions on Ireland's greenhouse gas emissions from 2002 to 2016'. The text of the decision to refuse access provided no indication as to whether the mandatory public interest balancing test was carried out in this case.

The High Court (Faherty J) found that the principle of cabinet confidentiality (as reflected in Articles 8(b) and 10(2) of the AIE regulations) could not, in itself, be invoked as the reason to exempt records of Cabinet discussions from disclosure. Any refusal to release environmental information must be justified by reference to the specific requirements of the directive, including the public interest balancing test. In an earlier judgment in *An Taoiseach v Commissioner for Environmental Information* [2010] IEHC

241, O'Neill J held that Cabinet discussions on Ireland's greenhouse gas emissions were 'internal communications' and were not subject to disclosure by reason of Article 8(b) and Article 10(2). Remarkably, O'Neill J reached this conclusion without considering the public authority's obligation to carry out the balancing test before deciding to refuse access. Faherty J could find no basis to depart from O'Neill J's finding that Cabinet discussions were 'internal communications' for the purpose of the AIE regulations. However, the learned judge did not agree with O'Neill J's conclusion that only Articles 8(b) and 10(2) of the AIE regulations govern or affect Cabinet confidentiality. The mandatory obligation to interpret any exception restrictively and to engage in the public interest balancing test also applied to records of Government discussions. Faherty J insisted that a public authority 'may refuse access to environmental information only where the requirements of those provisions have been substantially and procedurally adhered to.' The impact of this conclusion is that the 'fundamental right of access to environmental information' dilutes the absolute principle of Cabinet confidentiality. In the words of Faherty J:

> [T]he very fact of the constitutional protection afforded to Cabinet confidentiality in Irish law, as reflected in Article 8(b) cannot, to my mind, be solely dispositive of the applicant's request for access to environmental information. For a refusal of such information (including information about emissions into the environment) to be justified, the requisite weighting exercise must be embarked on. It must not be a formulaic exercise. Any decision on a request for environmental information must reflect the fact that the process of engagement with the request (whatever the ultimate outcome) was conducted in accordance with the letter and spirit of the Directive.

Faherty J stressed the 'the strong imperative in the Directive towards disclosure of environmental information'. The public authority did not have a 'carte blanche' to refuse information on emissions into the environment solely by relying on Article 8(b). The public interest balancing test must be undertaken in each particular case.

While it may well be the case, on a particular set of facts, that the outcome of the balancing test is that the confidentiality of Government discussions should indeed prevail over the public interest served by disclosure of the information, this is a very

significant ruling from the High Court. It confirms that the principle of Cabinet confidentiality must yield to the 'fundamental right of access to environmental information' guaranteed under Directive 2003/4/EC where the outcome of the public interest balancing test lies in favour of disclosure.

Enforcement of EU law by public authorities

In Case C-378/17 Minister for Justice and Equality and Commissioner of An Garda Síochána v Workplace Relations Commission ECLI:EU:C:2018:979 (a reference for a preliminary ruling from the Supreme Court of Ireland) the CJEU (Grand Chamber) confirmed that (footnotes omitted):

> 34 The Member States have the task of designating the courts and/or institutions empowered to review the validity of a national provision, and of prescribing the legal remedies and the procedures for contesting its validity and, where the action is well founded, for striking it down and, as the case may be, determining the effects of such striking down.
>
> 35 On the other hand, in accordance with the Court's settled case-law, the primacy of EU law means that the national courts called upon, in the exercise of their jurisdiction, to apply provisions of EU law must be under a duty to give full effect to those provisions, if necessary refusing of their own motion to apply any conflicting provision of national law, and without requesting or awaiting the prior setting aside of that provision of national law by legislative or other constitutional means.
>
> 36 Accordingly, any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of EU law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to disregard national legislative provisions which might prevent directly applicable EU rules from having full force and effect are incompatible with the requirements which are the very essence of EU law.
>
> 37 That would be the case if, in the event of a conflict between a provision of EU law and a national law, the solution of the conflict were to be reserved to an authority with a discretion of its own, other than the court called upon to apply EU law.
>
> 38 As the Court has repeatedly held, that duty to disapply national legislation that is contrary to EU law is owed not only by national courts, but also by all organs of the State — including administrative authorities — called upon, within the exercise of their respective powers, to apply EU law.

> 39 It follows that the principle of primacy of EU law requires not only the courts but all the bodies of the Member States to give full effect to EU rules.
>
> …
>
> 49 Rules of national law, even constitutional provisions, cannot be allowed to undermine the unity and effectiveness of EU law.
>
> 50 It follows from the principle of primacy of EU law, as interpreted by the Court … that bodies called upon, within the exercise of their respective powers, to apply EU law are obliged to adopt all the measures necessary to ensure that EU law is fully effective, disapplying if need be any national provisions or national case-law that are contrary to EU law. This means that those bodies, in order to ensure that EU law is fully effective, must neither request nor await the prior setting aside of such a provision or such case-law by legislative or other constitutional means.

This ruling has very significant implications in Ireland because, previously, the legal position in Ireland – confirmed consistently in the jurisprudence of the Superior Courts – was that public authorities could not set aside provisions of national law that conflicted with EU law. That jurisdiction was reserved exclusively for the courts under the Constitution of Ireland. Clearly, that position flew in the face of fundamental principles of EU law, including the principle of primacy and the well-established *Constanzo* principle (Case C-103/88 *Costanzo* EU:C:1989:256). The CJEU's ruling is therefore a most welcome development for the enforcement of EU law, including EU environmental law, within the national legal order.

References for preliminary rulings

The Irish courts continue to make references for preliminary rulings to the CJEU in important cases involving environmental matters. The most recent reference is Case C-254/19 *Friends of the Irish Environment v An Bord Pleanála*, currently pending before the CJEU, concerning the correct interpretation of the Habitats Directive. This reference was made by the High Court of Ireland (Simons J.) in *Friends of the Irish Environment v An Bord Pleanála* [2019] IEHC 80

20 May 2019

ITALY

Updated: 9/1/20

Avosetta – London 24-25 May 2019

Recent National Developments in Italy *

Short overview of most relevant legislative and policy developments in 2018

With respect to legislative developments, those taking place in 2018 consists primarily in the transposition and implementation of relevant EU legislation. In particular:

Nature and Biodiversity protection

The Italian government adopted on 15 December 2017 Legislative Decree No 230/2017 (GU No 24 of 30 January 2018), which entered into force on the 14th February 2018. The Decree aims at implementing into the Italian legal system EU Regulation No 1143/2014 on invasive alien species. Coherently with the objectives of the Regulation, the Decree introduces provisions aimed at the prevention, reduction and management of adverse impact on biodiversity deriving from the, accidental or deliberate, introduction and diffusion of invasive alien species.

Pursuant to the Decree, the Ministry of Environment is the public authority responsible for liaising with the European Commission, and competent to give the permissions and authorisations to the introduction of such species, by way of derogation and in accordance with articles 8 and 9 of the corresponding EU Regulation.

On a related aspect, however, the Government has approved on 4th April 2019 a Regulation, to be subsequently adopted by Presidential Decree that will amend relevant the Italian legislation (presidential decree 8 September 1997 - No 357) implementing the Habitat Directive. In particular, the forthcoming Regulation provides that, where there are justified reasons of public interest, the Italian Ministry of Environment can provide exceptions to the prohibition of re-introduction, or introduction of non-native species; this, however, has to be supported by studies proving the absence of negative impacts on the environment and by specific criteria that the Ministry of Environment shall adopt within 6 months after the entry into force of the decree.

Waste

Provisions in the field of waste were included in Legislative Decree 14 December 2018 No 135, also called the 'Simplifications Decree' ("Decreto Semplificazioni"). This addresses different aspects, from public procurement for projects below EU threshold to measures aimed at simplifying and streamlining administrative requirements for businesses and public administration. Among those provisions, there is the abolishment, starting from 1st January 2019, of the old system for the electronic tracking of waste ("SISTRI"). This system was introduced in 2010, but in practice was never fully operational. This, consequently, entailed significant costs for business and for the State. According to the decree, the SISTRI will be replaced by a new electronic waste tracking system directly managed by the Ministry of Environment.

Furthermore, Law 1 December 2018 No 132 introduced the obligation for the operator of waste treatment and plants to set up an internal and external emergency plan. The external emergency

* Report prepared by Emanuela Orlando, in cooperation with Massimiliano Montini.

plan is to be developed by the competent public authority (specifically the *Prefetto*) on the basis of the information provided by the operator and in agreement with the Region and other interested public entities. It must be noted, however, that this decree only applies to generic type of risks posed by waste. Therefore, it does not apply to the operators of plants for the treatment and storage of hazardous waste, as the specific risks entailed by those installations are addressed by an ad hoc legislation, which forms part of the SEVESO Package – namely, Legislative Decree No 105/2015 containing measures for controlling the risk of accidents in connection with dangerous substances (SEVESO III).

Climate Change and Air Pollution

Adoption of Legislative Decree 30 May 2018, No 81 for the reduction of national emissions of certain air polluting substances – implementing EU Directive 2016/2284 (NEC Directive)

Latest developments during early 2019: energy efficiency; circular economy and marine plastic pollution

The first part of 2019 has seen a number of interesting legislative developments initiated by the government, with specific respect to circular economy and marine protection. As these are very recent developments, some of these governmental initiatives are still waiting to formally complete the legislative procedure in order to become fully effective. Nevertheless , there are two aspects that are worth to be highlighted:

1. Several measures aimed at implementing circular economy and improving energy efficiency have been included in the recent Growth Decree (*Decreto Crescita*), which was adopted in April 2019 (published in G.U. No 100 of 30th April 2019). With respect to energy efficiency it provides the availability of incentives for both individuals (with respect to energy efficiency in buildings) and municipalities (including incentives to increase the energy efficiency of public lighting and of public buildings). With regard to circular economy, Art 26 of the decree aims at introducing a number of financial incentives for companies and businesses, as well as to research centres, with a view to encourage them to present and develop (both individually or as a collaborative partnership between business and research centres) research & development projects aimed at realizing innovations in the field of products, processes or services with a view to achieve a more efficient use of resources. The decree is at the moment being examined by the Parliament with a view to its approval and conversion into law.

2. At the same time while the Growth Decree was discussed, another important step was made by the Italian government in the fight against marine plastic pollution with the proposal for Law "*Salva Mare"* (literally: Save the Sea). This law, which is still at a proposal stage, combines the objective of marine environmental protection with the idea of promoting the circular economy. This is particularly the case for the provisions aimed at promoting the recycle of plastics found in the sea - to this effect, article 5 provides that the Ministry of environment can define the criteria whereby the debris collected voluntarily or accidentally in the sea are not qualified as waste.

   There are also a number of provisions aimed at raising awareness and promote marine protection behaviour. Of these, article 7 establishes measures to encourage fishermen and seafood companies to respect the marine and coastal environment. These include the conferral of an environmental certificate to marine-related workers who are

committed to use instruments with low environmental impact, are actively involved in campaigns for the promotion of clean marine environment and agree to put in place strategies to recycle debris accidentally collected in the sea.

Yet, it is unfortunate that in the most recent version of this proposal a very progressive provision (included in the first draft of the proposal) aiming at banning the introduction into the market of single use plastic products was skipped. This would have been an anticipation of the ban on throwaway plastics by 2021 recently adopted by the European Parliament and the Council.

Case-Law

In 2018 and the first half of 2019, two important judicial decisions have been adopted, respectively, by the Italian Constitutional Court and the European Court of Human Rights concerning the severe industrial pollution and related health and personal injury in connection with the operation of the ILVA steel plant.

— *Constitutional Court Decision 23rd March 2018, No 58 – "ILVA"*

This decision is the most recent in a series of judicial decisions and ministerial initiatives taking place over the past years in relation to the ILVA case, a notorious case of industrial pollution in Taranto. From a government and political perspective, this was a very difficult and controversial case since the Italian steel company employs thousands of people in Italy and its closure could lead to very significant consequences in terms of unemployment and the economic development of the Taranto area. Given the size of the company, its closures would have significant effect on the national steel production, with potential negative consequences on the whole Italian industrial system.[1]

In this decision, the Italian Constitutional Court declared the constitutional illegality of certain legislative provisions (specifically, article 3 of Decree Law ('*Decreto Legge'*) No. 92/2015 and article 1 (para 2 and 21) of Law No 132/ 2015) to the extent that they permitted the continuation of the production activities of industrial plants of strategic national interest notwithstanding the existence of a judicial order of formal seizure of some of ILVA's installations due to the company's alleged violations of several legislative provisions concerning the health and safety of workers.

In assessing the constitutional legality of the law, the Constitutional Court considered that in principle the continued operation of production activities of seized companies is legally acceptable, provided that there are provisions guaranteeing a proper balancing between the interests of production and the rights and interests protected by the Constitution and which include the right to work but also the right to health and the right to a healthy environment. According to the Court, this did not happen in the ILVA case: by allowing the continuation of the activity, the State privileged excessively the interest in industrial production and did not adequately protect the fundamental rights to health and to life (article 2 and 32 of the Italian Constitution), and the closely related right to work in a safe and non dangerous environment (article 4 and 35 Constitution).

[1]For further and more detailed background on this case, see the case-study presented in the context of the EFFACE project: A Lucifora, F Bianco, and MG Vagliasindi 'Environmental Crime though Corporate mis-Compliance', https://efface.eu/sites/default/files/EFFACE_Environmental%20and%20corporate%20mis-compliance.pdf

While this decision focuses essentially on the citizens/workers' right to health and personal safety, and it does not specifically mention a right to a healthy environment ('*diritto ad un ambiente salubre*'), it sends an important signal on the importance of constitutionally protected rights versus the interests of industrial production and development. In particular, it is interesting to examine this decision in the light of a previous Constitutional Court's decision of 2013—concerning a previous and similar 'Rescuing Ilva' Decree Law No 207/2012 adopted by the Italian government in an attempt to preserve ILVA's production capacity and safeguard employment in the Taranto area—where the Court noted that there is not an automatic prominence of a constitutional right over the other. Rather fundamental rights stand in a mutually integrated relationship, and therefore the right to a health (and to a healthy environment) does not automatically prevail over the right to work.

Like the above mentioned 2018 Decree, the Decree 207/2012 allowed the continuation of the plant's activity for 36 months, notwithstanding the judicial seizure of certain plant's installation. In examining the conformity of the Decree with the rights protected under the Italian Constitution, the Court had to assess whether the government had struck a reasonable balance between the right to work and the right to a safe and healthy environment. In its assessment—which eventually led to a positive conclusion on the Decree's constitutional legality—the Court paid attention to the fact that, unlike the 2018 Decree, the 2012 Decree had subjected the continuation of the company's activity to its compliance with the requirements of an Integrated Environmental Authorization (IEA) and established a specific monitoring system to check the company's fulfillment of the environmental requirements.

— *European Court of Human Rights – Cordella and Others v Italy (24th January 2019), Application Nos 54414/13 and 54264/15*

The health and environmental pollution problems caused by ILVA reached eventually the European Court of Human Rights. The Court, deciding on a claim brought by 180 applicants resident in the Taranto region, considered that there has been a violation of article 8 (right to respect for private life) and article 13 (right to an effective remedy).

As to article 8, the Court's assessment paid attention to a number of government's failures and inefficiencies in the measures put in place in the attempt to achieve decontamination of the region, which it considered as signals that the State failed to strike a fair balance between the applicants' interest in not being subject to severe environmental pollution that could affect their private life and the interests of the society as a whole. The Court noted, among others, the Government's attempts to safeguard ILVA's production despite relevant judicial findings of serious risks to health and environment; the uncertainty arising from the company's state of financial failure; and that the prescriptions and recommended measures contained in Decree Law 207/2012 regarding the IEA and the compliance with environmental requirements had never been properly put in place, leading to a European Commission's infringement procedure.

LATVIA

Recent developments
2018/2019

Latvia

I Recent legislative changes

1. **In the area of regulating polluting activities (connected with air quality):**
   1.1. Quite significant amendments have been made with respect to regulations (Law and Government enactments) for digitalizing environmental permitting system, including obligations to submit information and issue permits electronically, as well as with respect to reporting, monitoring. This in fact also results in better accessibility of data and all permits through internet for the society.
   1.2. Two major amendments in the Law on Pollution during 2018:
      1) Aimed at improving regulation for air quality and permitting of industrial activities taking into account new EU requirements (and some infringement procedure)
      2) Introducing additional requirements aimed at addressing the problems from activities in the area of ports connected with air pollution (VOC) and odour (on-going problem in two cities: Ventspils and Riga where ports are located quite close to inhabited areas.)

With respect to the first above mentioned amendments (came into force 10 May 2018), they aimed at implementing two directives: 2016/2284 on national emissions[1] and Directive No 2015/2193 on MCP,[2] as well as adjusting the provisions of the Law for correct implementation of Directive No 2010/75 EID[3] triggered by the EU COM Pilot case.
Shortly about these amendments:

1) Due to the new targets for national emission limits to be reached after 2020 and 2030, the legislator requires to adopt a national action programme for achieving set limits focusing on different economic sectors.[4] The Ministry of Environmental Protection and Regional Development has been tasked to elaborate such plan together with other responsible ministries (listing in the Law e.g., the Ministry of Agriculture, the Ministry of Transport, the Ministry of Finance, the Ministry of Health) and other institutions if their decisions concern emissions of air pollutants. According to the law the plan has to be approved by the Government (thus having generally binding nature in contrast to some previous plans that have been adopted by the Ministry and thus considered as internal act.)
2) To implement the Directive on MCP the requirements need to be extended with respect to activities that are not covered by A and B category permit. So, the environmental requirements

[1] Directive No 2016/2284 on the reduction of national emissions of certain atmospheric pollutants, amending Directive 2003/35/EC and repealing Directive 2001/81/EC
[2] Directive No 2015/2193 on the limitation of emissions of certain pollutants into the air from medium combustion plants
[3] Directive No 2010/75 on industrial emissions (integrated pollution prevention and control)
[4] Draft for Action Plan on Reducing Emissions of Air Pollutants 2019-2030. (Launched for public consultations in April 2019). Available:
http://www.varam.gov.lv/lat/likumdosana/normativo_aktu_projekti/normativo_aktu_projekti_vides_aizsardzibas_joma/?doc=27258

are extended to so-called category C activities that so far have been in the class that has no environmental permit but only had obligation to inform (notify) the environmental authority. In addition, the competence of the environmental authorities is extended. The monitoring requirements are extended to all categories activities if they have incinerator installation (so, includes C category to cover small combustion plants.)

3) With respect to adjustments needed according to the Pilot case (on the Directive No 2010/75/EU) some terminology is adjusted, and covered activities defined more precisely. In addition, more specific requirements were needed to be adjusted connected for example with transposition of Chapter VI of the Directive "Special provision for installations producing titanium dioxide," and the terms, preconditions when BAT needs to be required (four-years time limit after publication) etc.

The second amendments of the Law on Pollution in 2018 have authorized local governments to adopt more stringent environmental requirements in order to limit volatile organic compounds (VOC), including odour from polluting activities - loading/discharging of oil and chemical products into/from tankers in ports. A local government is authorized to adopt binding municipality regulation requiring to install a pollution reducing equipment (vapours emission control system) as well as monitoring system if it carries out determined types of activities. These amendments in fact came after one municipality already in 2016 has already adopted quite identical requirements as now the law permits.

At this moment, the regulation of the municipality adopted in 2016 with respect to these more stringent requirements is challenged by the operator before the Constitutional Court. In his constitutional claim he questions the municipality competence to regulate such restricting requirements that, according to the operator, breaches his constitutionally protected right to property.[5] The local government required to install equipment by June 2018. The law now provides the term "by 2021 except where the municipality has requested to install earlier." It will be interesting to see what the court rules as it is about the competences in the area of environmental protection and with respect to air quality.

2. Waste management

Improvements in the system of waste management continues amending or adopting new Government regulations, firstly to solve problems identified with respect to the deficiencies in the functioning of extended producer responsibility scheme (see the last year report)[6] and secondly to implement Directive 2018/851.[7]

Main changes in the legislation aimed at implementing the requirements on financial security introduced by the amendments of the Law on the Natural Tax and requirements of Directive 2018/851 extending producer responsibility.

3. **Amendments in the Law on Natural Tax** - they are connected with the improvements of waste management, among other things excluding from the tax exemptions some type of "single use plastics" (SUP): single use tableware and accessories if they are from plastic (polymers and composite materials as luminates)

[5] Constitutional Court case No 2018-19-03 (pending), see more information in the Questionnaire under Q 13.
[6] Recent development, Latvia 2017-2018: https://avosetta.jura.uni-bremen.de/Latvia_2018.pdf
[7] Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC on waste.

4. Discussion continues (in the Parliament, as legislative proposals submitted by the Government already in 2016) **on possibilities of introducing Deposited-refund system (DRS)** for cans, plastic and glass bottles. It is already for the forth time when the Ministry of the Environmental Protection and Regional Development tries to proceed with the legislative initiative to introduce the DRS. It seems now it has quite realistic chance to get through, however, with quite changed approach on how the system has to be introduced and function. (The proposals for changes are pending influenced by some of the most powerful lobbies from waste management industry, who don't want to lose the significant part of their business). So, let's see what the result will be when I report next year.

Recent Developments in Environmental Jurisprudence

There are no cases that would have been discussing some EU environmental issues or related to implementation of directives. There are no preliminary questions to the CJEU initiated by the courts of Latvia in environmental disputes till so far. So, I picked up the most recent environmental cases adjudicated by the Department of Administrative Cases of the Supreme Court (ASC) to demonstrate the trend on issues discussed and topical therein.

Administrative Court

1. Case **on nature protection** through establishing micro-reserve

The most recent case worth noting is the judgment of 18 March 2019 that was heavily criticized by environmental NGOs as being destructive to one of the significant instruments for nature protection.[8] The dispute was about the requirement to establish nature protection area (in the form of micro-reserve)[9] requested by environmental NGO (ENGO) based on the scientific assessment of existence of the specially protected habitat – woodland dunes in particular territory. The competent authority (regional department of the State Forest Service) initially satisfied the request deciding to establish micro-reserve in area of aprox. 5 ha. This was appealed by the owner of the land (private company – developer of housing areas) and the initial decision was annulled by the higher authority (The State Forest Service). The decision was appealed by the ENGO before the administrative court. Proceeding through three instance the result is negative to the ENGO as the Administrative Supreme court upheld the Regional court judgement and dismissed the application of the ENGO.

The main significance of this judgment is not so much about particular case lost but about the new interpretation of the preconditions that precludes establishing micro-reserve.[10] According to the

[8] The Department of Administrative Cases of the Supreme Court (ASC), Case No SKA-246/2019, ECLI:LV:AT:2019:0318.A420206216.5.S

[9] Micro-reserve - the territory, which is determined, in order to ensure the conservation of the specially protected species or biotope outside special areas of conservation, as well as in the special areas of conservation, if any of functional zones fails to ensure the adequate protection. (Article 1 (3) of the Law On the Conservation of Species and Biotopes, 2000)

[10] This instrument (initiating micro-reserve) is used to protect "suddenly" discovered specially protected habitats or species (including, for example, nests of birds such as black stork)

Government Regulation No 940/2012 on establishing, managing and protecting micro-reserves, it may not be established in areas that are indicated as "existing building territory with constructed infrastructure." The dispute was about this criterion, i.e., whether it includes only territories with existing buildings or it covers also territories that has been just *planned* as "building areas" regardless of whether any buildings exist there. The court interpreted the norm as the latter formulation suggests (in line with the arguments of the defender and the third party). Accordingly, now whenever a municipality has planned one area or another as "building area" the micro-reserve for the nature protection may not be established. At the same time, this case indicates the significance of the involvement of the society, including ENGOs already at the planning stage where decisions on determining one territory or another as "building area" are taken.[11]

2. Case **on an interim measure** (provisional regulation) in the dispute on excessive noise from motoracing track.[12]

There are several cases initiated about the same problem – on excessive noise level from Kandava's moto race track located very close to populated area. The municipality of Kandava authorized the operation of the mototrack based on the norms of noise limits that were later found illegal by the Constitutional Court.[13]

In the case on the interim measure before the administrative court, the owner of the mototrack requested to allow continuing its exploitation as a complaint to the court challenging the authorisation automatically suspend the permit. The Supreme Administrative court ruled that if a complaint is submitted in the area of environmental protection in order to protect the right to a healthy environment, (noting that negative affect of exceeded noise level that the moto race track creates affecting health is covered by this right), when the court assesses the subjective criteria for applying interim measure, it shall assess the effect of challenged act to the environment next to the assessment of the effect of (suspension) to the applicant.

Thus, the court has broadened the scope of the assessment of preconditions for applying interim measure including the environmental concerns as one of them against the developer interest to continue its actions.

3. Case on the legality of the requirement of a local government to connect to a **centralized water supply and sewage treatment system[14]**

Several individuals challenge the requirement to connect to the centralized water supply and sewage treatment system (WSST) set in the detailed planed as precondition for getting a building permit. They objected to these requirements as disproportional and beyond the competence of the municipality as fulfilment of such requirements would mean obligation to construct connecting infrastructure to be able to connect to the system located in aprox.1 km away from private lands concerned.

[11] This conclusion one may draw from the Supreme Court line of arguments in para 12, noting *inter alia* that after the spatial planning has been adopted the land owners and developers have to know their possibilities and rights. Disputes that might limit their rights need to be addressed already at the stage of the planning, thus, if envisaged solutions might raise environmental concerns they need to be solved primarily at the planning stage.
[12] ASC judgment of 23 Aug. 2018, Case No SKA-1475/2018 ECLI:LV:AT:2018:0823.A420346615.11.L
[13] Discussed in the last year Report, Constitutional Court Case No. 2017-02-03, judgment of 19 Dec.2017.
[14] ASC judgment of 20 June 2018, Case No SKA-170/2018, ECLI:LV:AT:2018:0620.A420349813.4.S

The Supreme Court pointed out that in principle obligation to connect to the centralized system is legitimate based on the environmental concerns. However, it is the autonomous function of the municipality to ensure appropriate infrastructure for the developments planned in its territory including constructing WSST system in cases determined by law. In accordance with the Law on Water management services (2016), a local government may provide co-funding to facilitate households connecting to a centralized system, but it may not transfer its duties to ensure construction of the infrastructure.

4. Case identifying the peculiarity of **environmental disputes**

Today one may note that the jurisprudence of the administrative courts has admitted the right to submit a complaint in public interest (or an *actio popularis*) based on environmental concerns applying exception provided in the Environmental Protection Law. Recently, the Administrative Supreme Court has started developing different preconditions for submitting complaint based on the so-called "environmental exception clause." In the judgment of 27 June 2018,[15] the ASC has pointed out that a claim has to be submitted based on substantiated claim identifying which norms of environmental law are breached or how the environment is threatened. It emphasized that the law establishing environmental exception clause allow to submit a claim to ensure "protection of environmental interests" and it is aimed at "giving the possibility for the society to take care about the environment to avoid from unjustified negative effect of planned development."[16] However, as in this case environmental NGO (Jurmala protection association) did not raise any environmental concerns or indicated any breach of environmental law their complaint was dismissed. [17]

[15] ASC judgment of 27 June 2018, Case No SKA-306/2018, ECLI:LV:AT:2018:0627.A420181715.2.S
[16] Ibid, para 6.
[17] In this case, ENGO argued that a building permitted by the municipality as "nursing house" will in reality be a multi-story private apartment house, thus building permit is breached by the developer. (The developer had already started advertising these apartments under construction for selling.) The house is located in the coastal area where the developer would not get permit for building private apartments.

NORWAY

NORWAY
Annual Report
Avosetta, London 24-25 May 2019

1. Legislation

There is not much to report regarding new legislation in Norway the previous year. The following can be noted:

- A comprehensive act on mineral activities on the continental shelf, Act no. 7, 2019
- A significant revision of the regulation implementing the Water Framework Directive
- New legislation on the removal of shipwrecks by adding new chapter to the Maritime Code (1994 no. 39)
- A new and comprehensive regulation for the implementation of CITES (2018 no. 889)

One recent Act that should also be noted is the Climate Act which was adopted in June of 2017 and entered into force on January 1, 2018. It was pushed forward by the Parliament against the will of the minority government. There was significant disagreement as to the function of the Act and how it should distribute power amongst the legislative, executive and judiciary. The Government wanted the Act to remain a "political statement" with very few strings attached. The majority of the Parliament wanted an Act that set clear targets and can be the basis for political responsibility of the Government. Only a small minority in the Parliament wanted the Act to be legally binding in the sense that it would open up for judicial review. Although not clearly stated in the Act itself, it was made clear in the preparatory works that the Act cannot be legal basis for claims regarding duties of public authorities or rights of private parties.
The Act is very brief. The first section states its general objectives:

- Promote achievement of climate related objectives as a means of achieving a low-emission society by 2050,
- Promote transparency and public debate,
- Not prevent that Norway achieves the objectives through cooperation with the EU.

Section 2 defines the scope of the Act as relating to those emissions and sinks that are covered by the Paris Agreement, but indicates that its scope can be extended through regulations.

Section 3 sets the emission reduction target for 2030 to 40 % with 1990 as the baseline year.

Sections 4 and 5 contain rules regarding transformation of Norway to a low-emission society by 2050. Depending on developments in science, emissions globally, national circumstances and Norway's participation in the UE-ETS, the objective is reduction of emissions by 80-95 % with 1990 as baseline year. The objective is linked to Article 2.1(a) of the Paris Agreement. The Government shall present updated emission targets in 2020 and thereafter every five year. Such targets shall be based on the best available science, as far as possible be quantified and possible to measure, and in accordance with Norway's NDCs under the Paris Agreement

Section 6 obliges the Government to present reports in the annual budget propositions on how Norway shall reach the targets defined in sections 3-5 and the climate-related effects of the budget. In addition, the Government shall produce a more detailed and technical annual report on emissions and sinks, adaptation, and cooperation with the EU.

2. Issues and cases of interest

There have been significant developments within the following areas:

- Aquaculture of salmon: a new management regime has been implemented based on the occurrence of salmon lice – it is of particular interest due to the way in which it regulates the level of allowed production to science-based classification of production areas
- Wind power: A national framework for expansion of wind power is about to be adopted and has generated much discussion
- The Arctic Oil Drilling Case in which Article 112 of the Norwegian Constitution – right to environment – is at stake, was appealed by the environmental NGOs. They sought to have the appeal brought directly to the Supreme Court, but was denied by the Court, and have had to bring the case first to the appeals court. The case is scheduled for early November in Borgarting Appeals Court.

PORTUGAL

Recent developments in Environmental law 2018-2019 Portugal

Alexandra Aragão

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Better regulation: Air

In 2015 a simplified environmental permit regime was adopted[1], unifying under only one "title" different environmental licencing regimes: water emissions, waste management permits, noise, GHG emissions, dangerous chemicals (Seveso) etc.. In 2018, the Decree-Law No. 39/2018 of June 11 includes the "air emissions title" in the package.

The adoption (by the Ordinance No. 221/2018 of August 1) of a standardized template to report the results of air pollution monitoring by the industrial operators shows the intention to start taking private monitoring of air pollution more seriously. Besides the identification of the operator and of the economic activity at stake, other information, relative to the pollutant shall be transmitted as well: year and month; pollutant code; emission source, mean value of concentration, concentration, uncertainty, average concentration value, O2 content, capacity used, dry volumetric flow rate, code to identifies the **status of each data**. The different status of the data shows the admissible degree of uncertainty: The data shal be marked ar: valid value (≥ 75% of measurements in the base period); value obtained in case of malfunctioning of the gas treatment system; value obtained in case of malfunctioning of the Automatic Measurement System; Invalid data due to malfunctioning of the Automatic Measurement System; Invalid data due to maintenance of the Automatic Measurement System; Starting of the emission source; Stopping the emission source; Period of non-operation of the emission source. (Annex II).

Environmental offenses:

In 2019 the Law No. 25/2019 of March 26, amends the framework law on environmental offences, enshrining a "new principle" (!) the non-notification of inspections and enforcement actions. For the first time, "surprise" inspections will the rule, not the exception. Exceptionally the operator can be notified when documents must be prepared to be presented, or when some "démarches" must be prepared by the operator beforehand.

Fossil fuels:

The project for onshore prospection of gas will hopefully be submitted to an EIA as the Ministry for the environment (now called ironically, from October 2018, "Ministry for the environment and energetic transition") declared that he would not authorise prospection without an EIA, (contrary to what he decided for offshore prospection).

The case against the government for authorising offshore oil prospection without an EIA and disregarding public participation is still pending in the Court of Appeal. This court refused the interim measures requested by NGOs and granted by the first instance court with the argument that "knowing the country's natural resources is more important than environmental concerns"). The consortium of concessionary companies gave up oil prospection in the Portuguese coast, probably to social and media pressures.

[1] Aragão Alexandra "Environmental modernization and administrative simplification in Portugal", in: *ELNI Review*, Environmental Law Network International, n.º1/2016, pp. 10-17.

Biodiversity:

The Resolution of the Council of Ministers no. 55/2018, of May 7 - Approves the National Strategy for Nature Conservation and Biodiversity 2030.

The strategy highlights the importance of geodiversity side by side with biodiversity and promises to halt the invisibility of geodiversity (several new UNESCO geoparks have been proposed).

The strategy addresses another long-term national problem: the “rural exodus” and the increasing depopulation of the inland (non-coastal) territories. The depopulation is a “factor of pressure on biodiversity” due to the increased risk of forest fires in abandoned lands and proliferation of invasive species. The path to reverse this trend is “remuneration for ecosystem services provided by producers, managers and owners in general, will contribute to contain this trend while at the same time realizing the potential for job creation and the establishment of populations associated with activities linked to natural heritage and the provision of ecosystem services”. The pilot system of payment for ecosystem services in nature conservation areas is about to be launched in the end of June.

Risk management:

The risk of coastal erosion is increasing. The Resolution of the Assembly of the Republic No. 171/2018, of July 11 recommends the Government to take the necessary measures to urgently make the inventory the patrimonial infrastructures at risk (collapse end loss) and to define a program to replace the dunes (recharge beaches artificially with sand) and to minimize the coastal risks.

As a consequence of the terrible forest fires where 65 people were killed in October 2017, several reactive measures were adopted. As most of the deaths resulted from bad information as a consequence of non-coordination of efforts between firemen, police and civil protection authorities (as the mobile communications were off, the authorities indicated wrong escape routes and the victims were caught by the fire in the road they were using to escape from their homes). One was the establishment of a “National System of Monitoring and Communication of Risk, Special Alerts and Warning to the Population”.

A 'Special alert' means the communication by the civil protection system of the imminence or occurrence of a major accident or catastrophe accompanied by information essential to the knowledge of the situation in order to allow for the initiation of complementary actions in the area of protection and relief, in accordance with the principles set out in the Integrated Protection and Relief Operations System;

A ’Notice of civil protection' means the communication to the population potentially affected by imminence or occurrence of a major accident or catastrophe, in order to provide information related to the event and self-protection measures to be taken. Can assume the for of:

(i) 'Preventive warning' means a warning issued for the purpose of inform the population of the increase in risk in a given geographical area;

(ii) 'Notice of action' means the notice issued to induce the population to adopt measures of self-protection in the event of a major accident or catastrophe within a specific time period in a given geographical area.

Individual activism and SLAPP:

For three years one citizen (a prison guard who is very fond of rivers)[2] used the social media networks to disclose information on the bad quality of the river Tagus (largest international river that flows into the Atlantic Ocean in Lisbon). The reason is the wastewater of a cellulose factory[3] by the river and the fact that the river does not flow freely because of the dams (the water doesn't oxygenate).

As the quality of the water became more degraded during draught, his posts went viral and made the headlines of the national newspapers and TV news.

When the environmental inspectorate went to collect samples of water quality, the samples disappeared mysteriously. Finally, the administrative process proceeded, and the factory was fined. In appeal, the court replaced the fine by a written warning.

The citizen receiver the ecocitizen prize of the year awarded by the Confederation of ENGOs[4] but the company sued the citizen for defamation (crime where someone attributes a fact to other person, that can be considered as offensive to his honor or consideration) and a solidarity movement begun[5]. This mediatic case demonstrates that the risk of strategic litigation against public participation is real and the protection of generous altruistic whistle blowers is crucial.

[2] http://www.mediotejo.net/tejo-arlindo-marques-o-guarda-prisional-a-quem-chamam-o-guardiao-do-rio-cvideo/
[3] http://celtejo.com.pt/pt
[4] https://observador.pt/2018/11/10/arlindo-marques-o-guarda-prisional-que-ganhou-o-premio-nacional-do-ambiente/
[5] The slogan was "We are all Arlindo Marques" (https://ppl.pt/causas/somos-todos-arlindo-marques).

SPAIN

Avosetta Meeting
London, 24-25 May 2019
Spain
Recent developments

Agustín García-Ureta, University of the Basque Country, Bilbao

Arguably, the most important development in the legislative front has been the adoption of Law 9/2018, on the reform of Law 21/2013, on environmental impact assessment. The former Law transposes (half a year later) Directive 2014/52. This may be regarded as a very detailed reform in the sense that it amends particular provisions of Law 21/2013 (save those relating to SEA that remain unaltered).

One of the remarkable matters in the new Law is the insistence on the *instrumental* nature of EIA. This notion is defined as an instrumental administrative procedure rather than a procedure designed to include the environmental perspective within the decision-making process. This position had already been expressed when Spain incorporated the original Directive 85/337 and largely explains the inadequacies of Spanish law vis-à-vis EU EIA legislation.

According to the Law, projects, the EIA of which had begun after 17 May 2017 (the Directive was to be implemented by 16 May 2017 at the latest) but before the entry into force of Law 9/2018 (7 December 2018) have to be subject to "review" before the issuing of the environmental declaration (*declaración de impacto ambiental*)[1] in order to fulfil the provisions set out in the Directive. Law 9/2018 retrospectively applies the provisions of Directive 2014/52 (once implemented in Spain). this is possible in the light of the Spanish Constitution (Article 9(3) and the case law of the Constitutional Court, in so far as it refers to *ongoing* procedures. However, bearing in mind the provisions of the Law:

(a) Projects with a *declaración de impacto ambiental* issued after the entry into force of Law 9/2018 (7 December 2018), or
(b) Projects the authorization procedure of which had begun on 17 May 2017 and was concluded before December 7, 2018,

have not actually complied with the requirements of Directive 2014/52. Therefore, they may be challenged by third parties in the light of the *Wells* case (case C-201/02, C-201/02, *The Queen, ex parte Wells v. Secretary of State for Transport, Local Government and the Regions,* ECLI:EU:C:2004:12.

The new Law also contradicts the Habitats Directive. It requires the developer to prepare an impact report on habitats and species, including preventive, corrective and *compensatory* measures. The public authority responsible for the managements of the affected Natura 2000 site is to determine, in the light of the report prepared by the developer, whether the plan, program or project may cause damage to the integrity of the site. The Law contradicts the Habitats Directive because compensatory measures cannot be taken into account when determining whether the project may or may not have harmful effects on a Natura 2000 site. Such measures can only be considered if the conclusions derived from the EIA are negative but nevertheless the public authority decides to execute the project or plan. The Law also contradicts the Habitats Directive by allowing the carrying out of projects (without prior EIA) in cases of force majeure, catastrophes or

[1] This a report prepared by the environmental authority that precedes the final decision.

serious accidents. Another disputable case concerns a provision (Article 9) that reads as follows: 'No environmental impact assessment regulated in title II of this law will apply to projects partially or fully executed without having been previously submitted to EIA'. The wording of the Law plainly admits that a project, which should have been subject to EIA, may avoid this procedure simply because it has partially or totally been executed. However, as can be seen from Directive 2011/92 and the CJEU's case law, this does not constitute any cause for exemption.

As said before the new Law carries out a very detailed amendment of Law 21/2013. For instance, in the case of the content of the environmental impact study the Law excludes the word 'assessment' by replacing it with 'identification', therefore supporting greater description of the project but arguably not a proper evaluation of its likely effects.

The new also modifies the definition of the environmental declaration (*declaración de impacto ambiental*). This a report prepared by the environmental authority that precedes the final decision. Unlike the previous Law, the new wording is not so conclusive regarding the role of the declaration. According to Law 21/2013, the declaration determined whether the project could or could not be carried out. The new Law blurs this role by referring (in a much more indirect manner) to the possible execution of the project in accordance with the conditions set out in the declaration. The Law coincides with the notion of the EIA as an instrumental procedure. Nevertheless, development consent must include, as a minimum, the following information set out in the declaration, namely: (a) the conclusion about the significant effects of the project on the environment, and (b) the environmental conditions, as well as a description of the characteristics of the project and the measures planned to prevent, correct and, if possible, compensate its adverse effects on the environment, as well as, where appropriate, follow-up measures.

Further contradictions with the Habitats Directive are found in a provision that purportedly relies on the wording of Article 6(3, first sentence) of the Directive. As it is known, this rule reads:

'Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.'

Law 9/2018 states that in order to verify that a plan, program or project 'is directly related' to the management of a Natura 2000 site or is necessary for its management, the developer can indicate the corresponding section of the management plan in which that circumstance is set out, or request a report from the competent management authority of the site. In order to attest that a plan, program or project is not likely to cause appreciable adverse effects on a Natura 2000 site, the promoter can indicate the corresponding section of the management plan in which it is expressly stated that it is an authorized activity. However, the fact that a plan or project is directly related to the management of a Natura 2000 site does not imply that its complete content is exempted from EIA. Indeed, a management plan can refer to a diversity of activities that may not have such 'direct' relationship, which is the adjective used by the Habitats Directive.

As regards the political front, the Socialist party won the general elections held on 28 April 2019 (123 seats out 350 seats in the Chamber of Representatives; 121 seats out of

265 seats in the Senate). Its political manifesto concerning the environment may be summarised as follows:

(1) The manifesto commits to incorporate in Article 45 of the Constitution the principle of sustainability, the limits of planet Earth as a condition for economic progress and the principles of caution and no regression in the preservation of natural capital. It should be noted that Article 45 does not enshrine an enforceable right to the environment. In addition, a constitutional reform would be required to include such principles in that provision.

(2) It also foresees the growing electrification of the transport sector, establishing obligations on electric recharge installations, a calendar for the closure of thermal and nuclear power plants, the reform of the electricity market, by reducing the cost of renewable energies, the promotion of environmental taxation discouraging pollution, and boosting the decarbonisation of the economy.

(3) Further general measures include a Plan for waste collection at sea, monitoring the discharge of waste, especially plastics; measures for the preservation of protected marine spaces, including the recently declared Area of Migration Corridor of Cetaceans in Mediterranean.

(4) The manifesto also commits to integrate biodiversity values into national accounting, the adoption of a new Forestry Plan (these two measures lack any further detail, as it happens with other sections of the manifesto), and to guarantee NGO free access to justice.

(5) Other measures concern hydrological planning, or measures to control the use of water and its quality, or to prevent and combat all forms of waste.

(6) A further commitment refers to develop a Circular Economy Strategy, to move towards ‘zero waste’ by 2050.

SWEDEN

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Recent Developments in Sweden in the field of environmental law since May 2018

Introduction

The general election in September 2018 left us with a limbo situation in the Parliament and negotiations between the different parties for several months. During this period, Sweden was without a proper Government, which was used by the conservative parties together with right-winged populist party (Sverigedemokraterna) to pass in Parliament a budget bill for the next year (2019), where the words "environment" and "climate" were more or less absent. All funds to nature conservation and area protection were cut by almost 50%, something which created chaos in much of the efforts on the "green area". Come Christmas and the Social democrats and the Green party managed to get parliamentary support from the "middle field" (Liberals and Agricultural Party) to continue to be in charge. The funding of nature conservation is back, as well as a quite strong investment in the budget on different climate issues. But even so, the minority government is cautious in environmental issues, as the supporting "middle field" are strong defenders of "property rights", free enterprise and lesser "administrative burdens".

Sweden and the EU

During the year, the Commission has started new communications and infringement cases against Sweden on WEE, waste and waste water treatment plants.

The other way around, Sweden was successful in its action against the Commission in the case concerning the decision to allow a Canadian firm to put into the EU market paints containing lead chromates (T-837/16). The General Court was short and harsh in its judgement – unfortunately not available in English or German – rejecting all of the Commission's arguments for derogation. Interestingly, the court said that there is no room for a general proportionality test outside that which is already done in any of the articles under Reach (para 102). The contested derogation was thus repealed with immediate effect. In addition to this, some of the cases in which Sweden has intervened have also been decided in favour of transparency and openness, most notably the glyphosate case (T-716/14). In a way, also the cases concerning the proposal for marine reserves in the Weddell Sea and the Ross Sea in the Antarctic (C-626/15 and C-659/16) can be regarded as a (small) victory for the environment.

Legislation, proposals and controversies

In the Ministry of Energy and the Environmental, the work during the year has been focusing on minor issues, such as amending the implementation legislation for ELD and MSFD, introducing a legal regime on carbon storage and capture (CSC, which only exist on paper), adjustments to the new legislation about updating of permits for old hydro power stations (WFD), as well as following up on different infringement cases. However, the changes made in the Environmental Code introducing a ban on the extraction of uranium ore may not be considered as minor, although any such mining does not exist in Sweden today.

National case-law

As I noted in last year's report, the Bunge case was finally decided by the Land and Environmental Court of Appeal in Stockholm in the fall of 2018 (MÖD 2018-09-11; M 5431-14). Not very surprisingly, the application for a permit to extract lime stone from the Bunge area on the island Gotland in the Baltic Sea was turned down. As the Supreme Court in the beginning of April decided not to grant leave to appeal, the case is finally over after 13 years of litigation. Partly, the lengthy process can be attributed to the applicant, who has been very litigious in all phases. However, the heaviest responsibility rests on the land and Land and Environmental Court of Appeal, which has twice neglected to correctly apply the EU law requirements according to the Habitats Directive. The applicant – Finnish Nordkalk – is now expected to file a complaint to the European Court in Strasbourg for breaches of the fair trial requirements in Article 6 and 13 of ECHR. I expect that also this action will fail in all other respects than the lengthy procedure (cf. ECtHR 2010-01-19; *Matti Eurén v. Finland*). When the case was finally decided by the Supreme Court, more than ten years have passed since the first judgement in December 2008.

On access to justice matters, the development towards opening up for ENGOs to challenge decision-making both on areas of environmental law which are covered by EU legislation and "domestic" areas. Thus, ENGOs have over the year been granted standing rights in cases concerning decision-making under the Planning and Building Act, the Act on Electric Installations, the Act on Cultural Heritage and more. This trend is exclusively driven by the courts, against the will of an opposing Government and legislature. It is also noteworthy that in many of these cases, the competent national authority has actively opposed wider access to justice for the complaining ENGO, or any other for that matter. However, an exception to this general trend of wider access to justice for ENGOs can be observed concerning the action brought by the Polish branch of ClientEarth against the government's decision to allow Nordstream 2 in the Baltic Sea. Here, the Supreme Administrative Court (HFD 2019-12-21 in case No 4840-18) found that it was up to the organisation to prove that it has "support from the public", as the criterion is expressed in the Environmental Code. As ClientEarth failed to do so, the action was dismissed. Interestingly, the HFD did not request for further clarification from the organisation, nor did the court explain whether the public support should appear in Poland or Sweden.

The controversies around forestry and species protection continue. As case-law stands today, there is a clear division between the protection of domestic species and species under EU law. For the latter, derogation is given for just about any kind of forestry operation, unless the authorities compensate the landowner with 125% of lost profit from that

very operation. Concerning EU species such as birds (most cases have dealt with forest birds such as the capercaillie and the Siberian jay) and bats, the prohibitions according to Article 5 of the Birds Directive and Article 12 of the Habitats Directive are strictly upheld if the forestry operation may have an effect on the population status of the species. In these cases, the landowners instead have to take actions in court afterwards in order to be compensated. The Supreme Court has not yet decided on whether compensation according to the Swedish scheme is in line with EU law, as it may be regarded as overcompensation and thereby illegal state aid.

The case concerning Boliden's export of hazardous waste to Chile during the 1980s – the Arica Victims case – was decided in the Court of Appeals in the beginning of the year. In contrast with the District Court, the Court of Appeals decided that Swedish law on statutory time limit applied. The consequence is absurd, as it means that the possibilities to demand damages by Boliden ceased to exist already ten years after the events took place (1984-85), even though no one at the time was aware of the sicknesses that the waste should cause the inhabitants in the area. Even though the litigation costs already amount to almost 4 million € for the Arica victims to pay, the case is expected to go to the Supreme Court. An interesting question here is whether the Swedish rule on statutory time limit is in accordance with the notion of *ordre public* in international law.

Finally, the case about the neonicotinoids should be mentioned. In December 2018, the Swedish Chemicals Agency (Kemi) granted a one-year derogation from the neonicotinoids ban in Reach for large scale growing of beets in the Southern part of the country. The decision was embarrassing for the Government, as the substance is very controversial for its effects on wild bees and honey bees (https://www.efsa.europa.eu/en/press/news/180228) and Sweden has been in the fore front for a prohibition. In its decision, Kemi stated that there were no available alternatives and many other Member States have granted derogations for 2019. The decision brought attention and a number of ENGOs, as well as the National Association of Bee Keepers, appealed to the Land and Environmental Court in Nacka, which immediately injuncted the decision. This was appealed by both the Kemi and the beet farmers to the Land and Environmental Court of Appeal, but to no avail. In April, the Land and Environmental Court quashed the contested decision and that judgement was not appealed.

The Aarhus Convention

Finally, I want to draw the attention to a conflict that is upcoming between the Task Force on access to justice (TF) and the secretariat of the Aarhus Convention. The mandate of the TF is the following:

> (a) To promote the exchange of information, experiences, challenges and good practices relating to the implementation of the third pillar of the Convention, with a focus on the main barriers to effective access to justice and with special attention to:
>
> (i) Information cases;
>
> (…)
>
> c) As resources allow, to prepare analytical, guidance and training materials to support the work detailed in subparagraphs (a) and (b) above;
>
> (d) To promote understanding and the use of the relevant findings of the

> Compliance Committee of a systemic nature, multi-stakeholder dialogues and e-justice initiatives, and the dissemination of information on access to review procedures, relevant case law and collections of relevant statistics;

I have been chairing this body since 2008 and we have undertaken a number of "analytic studies" on different topics on access to justice; standing, costs, effective remedies, etc. In our last study – which was coordinated by Elena Fasoli (assistant professor at Università degli Studi di Trento) – we investigated the possibilities for ENGOs to obtain damages on behalf of the environment in four countries; The Netherlands, Belgium, France and Italy.

In February 2018, the TF decided to perform a study on access to justice in information cases, covering 12 of the Parties to the Convention. From the responses received, I wrote a report to the 12th TF meeting in the beginning of this year. Here, ClientEart and EartJustice voiced objections to the report, claiming that the text was exceeding the mandate of the TF as some of the conclusions were too "opinioned". They alerted the secretariat and we agreed that I should rewrite the text. In version 2, I explain the law as it stands today, using the ordinary sources of law, namely the text, decisions made by the Compliant Committee (CC) and taking into account "soft law" sources such as the case-law of CJEU and the Implementation Guide. In my view, the text is loyal to the Convention and the CCs finding and not drawing any controversial conclusions, although I criticize the Implementation Guide to go beyond the text of Article 9.1. It was therefore very surprising that the secretariat – which have accepted the first version until the ENGOs protested –reacted strongly against the text, claiming that "no body under the Convention except for the CC is mandated to have a say about the understanding of the text and the practice created thereunder". Further, they reacted on my mentioning of the case-law of CJEU as "state practice" (Article 31(3)(b) VCLT) and furthermore demanded me to cite the controversial part of the IG, not to criticize it.

To me, the discussion is of principal interest as it touches upon the basic principles of transparency and openness under the Convention. According to the secretariat, only the Compliance Committee is allowed to express an opinion about the Convention and the findings of the Compliance Committee. I do agree that we shall be loyal to the text and the findings of the Compliance Committee in our work under the Convention. But if we are not allowed to draw ordinary conclusions from the law as it stands, or even express a view on the Implementation Guide – where the authors (most members of the Compliance Committee) go beyond the text of the Convention – the situation will develop to a "perfect storm of conformity", which clearly is breach with the ideas of Aarhus. According to my contacts who are active in the international arena, this is also quite different from their experience from other MEAs, where the debate can be quite lively. After all, the Aarhus Convention is about transparency and environmental democracy, something which requires room for debate also within the Convention.

§ § § § § §

SWITZERLAND

Avosetta 2019

Recent developments in Switzerland

Markus Kern

I would herewith like to report two developments in the Swiss regulatory context:

1. **CO_2-Act**: In the course of the year 2018 the parliamentary chambers in Switzerland debated a total revision of the CO_2-Act, which is the legislative corner-stone of Swiss climate policy. In order to achieve the commitment of Switzerland in the Paris Agreement to reduce CO_2-emmissions by 50% below the level of 1990 by 2030, the **Federal Council** (government) proposed to achieve this goal via a 30% reduction in Switzerland plus a 20% reduction abroad. Thus the ratio between the national and the international objectives would have been 60:40. The draft act touched the transport sector, the building sector as well as industry, whereas agriculture is to be tackled in a different regulatory setting.
   In the *transport sector* Switzerland would have followed the European CO_2-fleet-regulation regime. In addition to this, the law would have enshrined an obligation of mineral oil importers to compensate up to 90% of the emissions from fuels, whereof 15% would have had to be compensated in Switzerland.
   In the *building sector*, which is second when it comes to CO_2-emissions in Switzerland (after transportation), the existing CO_2-tax on fuels would have been continued with the option to increase its level up to 210 CHF per ton of CO_2 (currently the level is 96 CHF per ton of CO_2).
   With regard to *industry*, the draft foresaw a range of instruments, amongst others also the inclusion of air-transport and fossil-fuel power plants into the existing emission trading scheme.
   In addition to this, the government came up with a proposal to link the Swiss emission trading scheme with the one of the European Union.

   In the **National Council** (popular chamber of Parliament) the draft of the CO_2 -Act wasn't quite given a warm welcome. After a heated debate the act was amended in such a way that would have allowed that the full reductions of CO_2 could be achieved abroad. From the perspective of a developed country with a high price level, this would have allowed to achieve the necessary reduction in a comparatively cheap manner. This and further alleviations of the ambition of the draft-act led to an "unholy alliance" between the right-wing party, which considered the act as being too far-reaching and the left as well as the green parties, which were not willing to swallow the watered down version of the act. Therefore the draft was rejected in the final vote in December 2018, which constitutes a decision of the chamber not to enter into the parliamentary debate.

   The draft is now debated by the competent committee of the **Council of States**. In case the Council of States also decides not to enter the debate, the decision is final. If it decides to vote for a substantive version, the draft goes back the National Council, which could bury the draft by another decision not to enter the parliamentary debate or reverse its decision.

Two factors may influence the further development of the debate:
First, after the decision by the National Council, there was a series of climate demonstrations in Switzerland ("Fridays for future"; Greta-movement), which had quite tangible effects on the latest cantonal elections. As a consequence, the liberal party (FDP) is reformulating is environmental policy program, which could tilt the balance towards a more ambitious CO_2-regime.
Second, there are elections on the national level in Switzerland in autumn 2019 and it is therefore very probable that the newly elected National Council will decide upon the proposed act in the next round, thus opening the option of having a new approach to the question of the allocation of the reduction objectives.

2. **Noise**: Under the Environmental Protection Act (EPA) the State is under the obligation to implement **noise remediation schemes for roads**. This obligation was first legally enshrined in 1987 with an implementation deadline until the year 2002. As this deadline could not be met, it was postponed until 2015 (national highways) respectively 2018 (all other roads). Despite considerable investments (about 1.8 bio. Swiss francs) currently about 14% of the population are exposed to excessive noise emissions from roads.

   In this context the NGO "Lärmliga Schweiz" launched an initiative of **pooling individual complaints of owners and tenants**, who are willing to take judicial steps against the excessive noise pollution from roads. Under this mechanism claimants pay a lump sum into the pool and as soon as there are enough claimants, a lawyers firm will start a first wave of proceedings with a few model lawsuits. If these model lawsuits turn out to be successful at the Federal Tribunal, a second wave of suits is launched for an individual lump sum in order to obtain damages in every single case in the pool. If individual claimants obtain damages they are obliged to hand over the rates for the first three years to the institution leading the process for them.

   The **odds of the initiative** are difficult to assess. It is very clear that there is in many cases a violation of the legal noise standards. And – in comparison with the air pollution example – the sources of noise pollution are also quite clear. Nevertheless it remains to be seen whether the judiciary is willing to accept the formal requirements for the claims and to impose further measures on the State, particularly against the background of a huge number of cases which may follow if the test cases turn out to be successful.

THE NETHERLANDS

An update on the Netherlands

Kars de Graaf

Although the debate on the development of environmental law in the Netherlands is dominated by the restructuring of practically all environmental law in the future Environment and Planning Act (see here), I will focus on two other issues that were relevant in 2018: (a) in the appeal proceedings brought by the Dutch State against the Urgenda judgement the Court of Appeals in The Hague decided on 9 October 2018 to uphold the 2015 district court decision; (b) in December 2018 the Lower House of Parliament agreed on an Dutch Climate Act that provides both a CO2 emissions reduction target and a framework to implement programs and measures laid down in the so-called Climate Agreement.

(a) The appeal judgement in the Urgenda-case

The civil law section of the The Hague District Court ruled on 24 June 2015 that the Netherlands has breached the standard of due care by implementing a policy that would lead to a reduction of CO2 emissions by 2020 of less than 25% compared with 1990 emissions (*Urgenda v The Netherlands*, ECLI:NL:RBDHA:2015:7196). Any such policy of the Netherlands was seen by the court as insufficient to avoid dangerous climate change and was therefore unlawful towards Urgenda, a citizen's platform that brought the case to court, also on behalf of 886 Dutch individuals. As is well known the court ordered the State to cut CO2 emissions by 25% by 2020 against a baseline of 1990 emissions. The court reasoned that there was a causal link between the (in)actions of the Netherlands and the possibility of dangerous climate change. At least two other aspects of the ruling in 2015 were interesting.

First, there was the question of the legal obligation that was allegedly violated. The court recognized no specific *written legal obligation* of the State to do more than it was already doing. Also, Urgenda could derive no legal obligation of the State from international or European law. Relevant was therefore whether the actions of the Netherlands were in breach of the *standard of due care* mentioned in Article 162 of book 6 of the Dutch Civil Code (negligence/tort). How could the court decide on the actual scope of the duty of care? On the one hand the court used certain elements from the case law of the Dutch Supreme Court on negligent endangerment (or: hazardous negligence): (1) the nature and extent of climate change damage; (2) the foreseeability of such damage; (3) the chance that hazardous climate change will occur; (4) the nature of the acts or omissions of the State; (5) the onerousness of taking precautionary measures; and (6) the extent of the discretionary powers of the State, with due regard to public law principles. On top of that the court used the international treaties (agreements) to establish the unwritten standard of due care of the State in this particular case. This is remarkable since these treaties are concluded between States and the Dutch Constitution does not provide citizens with rights vis-à-vis the State on the basis of such treaties/agreements. As it had been established that the current government policy regarding mitigation of GHGs did not comply with the standards deemed necessary by science and international climate policies to avoid *dangerous* climate change, the State was found to be in breach of its duty of care and therefore acted unlawfully towards Urgenda.

Urgenda had argued that, under Articles 2 and 8 of the European Convention on Human Rights (ECHR), the State has a positive obligation to take protective measures

towards its citizens. Urgenda claimed that the State had been acting contrary to Articles 2 and 8 of the ECHR and that those actions constituted a violation of a personal right of each of the claimants in the sense of Article 162 of Book 6 of the Dutch Civil Code on liability for tort (unlawful acts). The court however found that the Urgenda Foundation itself did not have the status of a potential victim within the sense of Article 34 ECHR and therefore could not rely on these provisions. Urgenda was therefore refused a judgment on human rights grounds.

Second, setting mitigation targets and finding efficient and effective instruments to achieve those targets is generally considered a matter of discretion and policy. Therefore, the argument goes, the Dutch system of separation of powers between the legislator and the judiciary does not allow for orders given by the court to the legislator. The court was aware that its judgment might be perceived as encroaching on the powers of government but it held that Dutch law does not have a full separation of powers but rather a balanced system between the powers of State, with the court's role understood in the following terms: '[s]eparate from any political agenda, the court has to limit itself to its own domain, which is the application of law.' (*Urgenda v The Netherlands*, 4.95).

Although the State agreed that CO2-emissions entail a serious risks for human life on earth, it lodged an appeal against the judgment of the district court (while promising to implement the order). The judgment of the Court of Appeals in The Hague on 9 October 2018 (ECLI:NL:GHDHA:2018:2610) gives answers to the same questions the district court had to answer. Surprising to many in the Netherlands, the Court of Appeal in The Hague confirmed the district court's ruling. Moreover, the court of appeal found a stronger legal basis for the ruling: it allowed Urgenda to proceed with its claim based on violation of the human rights guaranteed by the ECHR. It also was not impressed with constitutional arguments that the court had overstepped its powers by giving the (legislative?) order.

Could Urgenda itself claim violation of human rights (on behalf of Dutch citizens)? Different from the district court, the court of appeal ruled that Article 34 ECHR does not stand in the way of such a claim being made by Urgenda. Article 34 ECHR only stipulates who has access to the proceedings before the ECtHR and does not provide a binding indication of parties that are allowed to claim the violation of a human right guaranteed by the convention. Urgenda represents a generation of Dutch citizens that could be – in the words of Article 34 ECHR – the victim of a violation by one of the Contracting Parties. The court of appeal did not rule the State in breach of an unwritten standard of due care but instead blamed the State for breaching its human rights obligations guaranteed by the ECHR. The judgment states that the current actions of the State to combat climate change are insufficient in the light of the State's human rights obligations; more precisely, a violation of Articles 2 and 8 of the ECHR, guaranteeing the right to life and to private and family life respectively. In fact, the court interprets these human rights in such a way that the resulting positive obligation for the government to combat dangerous life-threatening climate change, is violated in the event government relies on a less ambitious CO2 reduction target by the end of 2020 than the goal the Netherlands has as an Annex I country (of the Kyoto protocol). This target is, on the basis of climate science arguments, a minimum reduction of 25% per 2020 (*Urgenda Appeal*, par. 72).

Interesting enough the court of appeal expressly mentions the precautionary principle and accepts that principle as 'generally accepted principle of international law' (*Urgenda Appeal*, par. 63). The government of course has discretion when it chooses between (legislative) measures to give substance to the positive obligation. However, according to the court the precautionary principle entails that the State cannot opt for measures for which there is a real chance that the reduction will be lower than 25% in 2020.

Since all other relevant grounds for the appeal of the State were unfounded, the judgement of the court of first instance was confirmed on 9 October 2018. The State quickly decided to appeal to the Supreme Court in the Netherlands. The Netherlands has however also, since June 2015 consistently stated that it will implement the Urgenda decision. The judgment of the Supreme Court will be based on matters of law (and not fact). The Dutch Government is anxiously awaiting the ruling by the supreme court because it feels society needs an answer to the question whether the order given by the court is an unauthorized judicial interference in the political domain or simply – as the appeals court argued – a violation of human rights by the State. In that regard the court of appeal argued that the plea from Urgenda that the order by the district court could not be considered an unlawful order to issue new (or: better) legislation, was unsuccessfully refuted by the State. In par. 68 the court of appeals states that the order could also be met without issuing new legislation. It explicitly mentions the example of concluding a Climate Agreement; this idea has become a reality since 300 organizations, lobby groups and private individuals have presented after nine months of taking part in round-table climate talks a 200 plus page report outlining ways the Netherlands can cut carbon dioxide emissions (see www.klimaatakkoord.nl). Whatever the Supreme Court will rule on these issues, the Urgenda case has successfully put the fight against climate change on the political as well as the legal agenda.

(b) The proposed Dutch Climate Act

On 20 December 2018 the Lower House of Parliament adopted a Climate Act (Parliamentary Papers I 2018/19, 34 534, A). Next step in the legislative process is the assessment of the proposal by the Senate of the Dutch Parliament.

The proposed Dutch Climate Act consists only of ten provisions and qualifies as a framework act. It determines the long-term policy goals and contains the procedures of policy-making, accountability and participation. The Act itself does not include any substantive standards or concrete measures to reach the climate goals.

What goals have been stipulated in the Act? The main goal is a greenhouse gas reduction target of 95% in 2050 compared to 1990 emissions (Art. 2). For the interim period only a target to *strive* for a reduction of emissions in 2030 by 49% is set and the goal to *strive* for CO2 neutral electricity production by 2050 (Art. 2). The national goal concerns the emissions in the Netherlands, including those from EU ETS-installations (and of course those from the non-ETS sectors, see Effort Sharing Regulation 2018/842). The goals leaid down in the Climate Act have no legal status. The explanatory memorandum explains that the goals are solely guiding for the government's policy and the act makes absolutely certain that the target of 95% by 2050 is not legally enforceable in court. Only Parliament can hold government to account for reaching the goal.

The *Climate Plan* is the main instrument for the government to shape climate policy. It should outline the main policy measures for the next 10 years aiming at achieving the climate targets (Art. 3). The Climate Plan shall contain the measures that must be taken to reach the goals as well as the measures to stimulate the share of renewable energy and the saving on primary energy use. In addition to the measures, the plan must include an assessment of, among other things, the impact of climate policy on the financial position of households, businesses and governments, employment development and a equitable energy transition. The Minister of Economic affairs and Climate shall adopt the Climate Plan at least once every five years (Art. 4). Every two years after the adoption of the Climate Plan, progress of the implementation is reported and, if necessary, additional measures shall be taken. This procedure of drawing up a Climate Plan is intended to be in line with the cycle of the so-called Integrated National Climate and Energy Plan (INEC) which all EU Member States must draw up on the basis of the Regulation on the Governance of the Energy Union (2018/1999) that came into force on 24 December 2018.

The Climate Plan must be in accordance with the opinion of the entire ministerial council (Art. 5). The involvement of Parliament is guaranteed by the requirement that the plan must be submitted to both chambers of Dutch Parliament. The draft plan is made public and everyone is allowed to submit their point of view about the draft. There is no judicial review of the Climate Plan by a administrative law court. The plan does not have a binding external effect and is only addressed to government.

Every year the Environmental Assessment Agency (*Planbureau voor de leefomgeving*) will publish a neutral scientific report on the consequences of the climate policy (Art. 6). This report, the so-called Climate and Energy Exploration, must at least contain numbers on the emissions of greenhouse gases, the emissions per sector and the developments and measures that have influenced these emissions. This report will be sent to both chambers of Dutch Parliament every year on the fourth Thursday of October (Art. 7): climate day. This will allow Parliament the opportunity to review and check the government's policy. For the minister, it may provide a reason to arrange for additional measures. This is expressed by the Minister in a so-called Climate Memorandum. This Climate Memorandum must also include a representation of the consequences of the climate policy on the departmental budget, the financial consequences for households, companies and governments and the way in which the Climate and Energy Exploration is involved in the next revision or evaluation of the progress of the Climate plan.

The Advisory Division of the Dutch Council of State is awarded the role of reviewer of the government's policy. It will provide the government with independent expert advice on the Climate Plan (Art. 5) and the Climate Memorandum (Art. 7). This review will look at administrative, legal and financial-economic considerations. The Climate Act also contains a specific provision on participation (Art. 8). It stipulates that the minister will consult with administrative bodies of provinces, water boards, municipalities and other relevant parties in order to implement the Climate Act and achieve the goals. Also, the minister must promote concluding Climate Agreements aimed at achieving the climate goals.

The added value of the Dutch Climate Act is primarily, that it stipulates the goals in a legislative act and that the procedure to draw up climate policy and present it to Parliament is regulated. It provides the possibility to hold government accountable for climate policy. Comparing the primary goals of the Act with those in other Climate Acts, reveals that the

Dutch Climate Act is not the most ambitious in the world. Interesting to note is that the goal of this latest Dutch proposal is less ambitious compared to the previous proposed Climate Act in the Netherlands. The interim target has been revised downwards (from 55% by 2030 to 49%) and is now explicitly formulated as a value 'to strive for'. The reason for this is that the government wants to allow for flexibility in realizing an effective and efficient transition. The Dutch Climate Act gives no direction or pathway to reach the reduction target of 95% by 2050. What measures will be in the first Climate Plan? That will largely be determined by the so-called *Climate Agreement*. The Climate Act does not include any regulation of the process of establishing a Climate Agreement (www.klimaatakkoord.nl). A draft of the National Climate Agreement was presented in December 2018 and is expected to be concluded in the first half of 2019. It contains a package of agreements, measures and instruments to reduce CO2 emissions in the Netherlands by at least 49 percent in 2030. In order to actually implement measures, other legislation or financial frameworks will be necessary. Which legislation that will be, and whether it may be necessary to change current legislation, depends on the measure proposed.

TURKEY

AVOSETTA MEETING ON AIR QUALITY LAW, LONDON MAY 24-25, 2019

Recent Development on Environmental Law in Turkey (May 2018-May 2019)

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1. Legislative developments related to the environment- Amendments on several legislation

Amendments on the Law on Environment mostly are related to increasing of the current administrative fines for non-compliance with the requirements concerning emission certificate for motor vehicles, exhaust gas emission limits, and discharge of oil and solid waste from tankers. Additionally, consumers/buyers who want to use plastic bags are required to pay a certain amount of money. However the prescribed amount is far from to be persuasive for most of buyers. Importers of several products listed in the relevant annex, and persons who introduces them into the market are required to pay recycle wage. Amendment on the Coastal Law allows the construction of renewable energy production units in both the coastal areas and seas. Amendments on the Law on Road Traffic includes provisions as the construction of ecological bridges regarding protection of wild animals in the highways which crosscut the habitats[1]. Two amendments on the By-law on Environmental Impact Assessment in one year are related to the same issue concerning mining projects that are subjected to the mandatory EIA in the Annex 1. The second amendment removed the first one and added the terms "on the land surface" repealing the previous term "on the working field" for mining activities covering 25 hectare and over[2].

2. Policy developments related to the environment-Power plants

Decisive efforts of the ruling AKP government to proceed the constructions of nuclear, thermic and hydropower plants have being the leading issue on the political agenda as in the previous years in spite of public protests as well as various inefficient environmental impact assessment reports. As regard to the first nuclear power plant *(Akkuyu)* the basement for the first unit was completed, and is scheduled to start operation in 2023. Additionally the company (Russian ROSATOM) expects to receive the main construction license for the unit 2 soon. However according to the latest news (7 May, 2019) published in Turkish newspapers there have been various cracks in some parts of the basement and they are repeatedly reconstructed. Meanwhile the activities as cutting trees and negotiations with Japan for the second nuclear power plant that will be built in *Sinop* located in the southern edge of the Black Sea Region are in progress. On the other hand the Government continues to grant licenses for thermic and hydropower plants although there are severe concerns particularly for site selection regarding some of these power plants because they ignore the special characteristics of the related agricultural areas and/or other significant elements of the environment[3].

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[1] The amendments on the mentioned three laws have been made through a single law numbered 7153, named as the Law on the Amendment of the Law on Environment and Other Laws. Resmi Gazete 10.12.2018.

[2]These two amendments are published respectively in RG 14 -6.2018 and RG 19.4.2019.

[3] For the background infrormation ragarding all power plants see the previos reports of the Author written for the previous Avosetta meetings.

2. Legislation, and policy texts with regard to obligations of Turkey under the EU and international relations

The European Parliament (EP) in its resolution on the 2018 report prepared on Turkey, among other issues, "calls on the Turkish Government to halt its plans for the construction of the Akkuyu nuclear power plant, to adhere to the Espoo Convention, and asks the Turkish Government to involve, or at least consult, the governments of the neighboring countries in relation to any further developments in the Akkuyu venture" (parag. 25)[4]. Turkey, did not ratify the Espoo Convention on Environmental Impact Assessment in a Transboundary Context. That is why he was accused in a report of the EP's Committee on Foreign Affairs, prepared prior to discussing the issue in the Parliament.

4. Legal cases

a. Judgment of the ECtHR: *Ahunbay et autres contre la Turquie.*[5] Subject: *Alleged violation of Articles 8 and Article 2 of the Protocol 1 of the ECHR because of the construction of a dam***.** The applicants has asked the Court to oblige the Government to take preventive measures before the archeological and cultural city of *Hasankeyf* site in the Southeastern Batman province was flooded because of the construction of the *Ilısu Dam.* They relied on Article 8 (right to respect private and family life) and Article 2 of Protocol No.1 (right to education). However the ECtHR has ruled that the application is inadmissible on the ground that the application is incompatible with Articles 35/3(a) and 35/4 of the ECHR. The court assessed the rights regarding the cultural heritage in the light of their connection with the specific status of individuals who are beneficiaries as in the case of minorities. Subsequently, it stated that there has been either no "European consensus" or even "a tendency" among the Member States of the European Council that will make possible that a universal individual right to the protection of such a cultural heritage can be reached from the provisions of the Convention. This decision has caused disappointment among environmentalists who have been struggling to protect *Hasankeyf* since 2006, and is considered as "the ECtHR evaded responsibility".

b. Judgment of the Administrative Chambers General Council (the Council) of the Council of State *(Danıştay*)[6]. Subject: *Annulment claim of the consent given for the Akkuyu Nuclear Power Plant.* 6th Chamber of *Danıştay* had rejected the claim of annulment of the consent given for the EIA report on the construction of *Akkuyu* Nuclear Power Plant in the previous year although the said report included significant inefficiencies. Indeed, this decision was containing legal inconsistency between the reasoning based on the evaluation of the facts and the verdict reached[7]. Following the Court's judgment, the plaintiffs had appealed the decision. However the Council has also rejected the appeal claim and reaffirmed the decision of 6th Chamber ignoring the evidences in the expert reports submitted by the plaintiffs to support their claim for nullification. The decision is taken by the majority members of the Council.

[4] European Parliament Resolution of 13 March 2019 on the 2018 Com. Report on Turkey (2018/2150(INI).

[5] Deuxieme Section Decision. Requete no 6080/06, Parag. 24 and 25.

[6] Danıştay İdari Dava Daireleri Genel Kurulu. E.2018/1068. K.2018/3377. T. 20.06.2018 (www.kazanci.com).

[7] See, Nükhet Yılmaz Turgut, Recent Developments on Environmental Law in Turkey- 2018, Flexible Mechanisms Avosetta Meeting 25-26 May,2018 Vienna. www. avosetta.org (Danıştay 14. Daire. E. 2014/11695. K.2017/6248. 23.11.2017).

c. Judgment of the Constitutional Court on an Objection Brought by a First Instance Administrative Court[8]. Subject: *Unconstitutionality of a legal provision regarding not holding responsible the competent ministry to compensate damages occurred as a consequences of precautionary measures.* The law concerning plant safety, food and fodder includes the precautionary principle[9]. The related Article entitles the competent ministry to take measures as temporary prohibit the production, to prohibit introduction into the market, to remove from the market in the case of scientific uncertainty about the possible hazardous effect of any food or fodder on human and animal life. These precautionary measures would be taken until the more scientific data can be obtained to enable a comprehensive and sound risk assessment. The objected part of the said Article is that it explicitly states that it cannot be claimed compensation from the Ministry for damages occurred as a consequence of taking these precautionary measures. The Court rightly stated that an administration can be entitled to take temporary precautionary measures in case of scientific uncertainty. However damages occurred from such measures are certainly included into damages occurred from an administrative act in general. Therefore, the Court annulled the alleged provision on the ground that according to the Article 125 of the Constitution which subjects every act of administration to the judicial review, such damages can be claimed from the Ministry.

d. Judgment of the Constitutional Court on an Individual Application[10]. Subject: *Violation of the right to private and family life because of a river pollution occurred as a result of disposal of sewage into the river without any treatment.* Applicants are local residents who live around the river and use it for the agricultural and husbandry purposes. Their complaints is that they and their animals are suffering various diseases because of the river pollution. However they did not provide clear evidences with regard to this complaint. In spite of that the Court judged on behalf of the applicants taking into consideration the judgements of the ECtHR concerning the interpretation of Article 8 of the ECHR in terms of environmental matters, and ordered for the renew of administrative trial to consider the compensation claim of the applicants. The main reasoning of the Court is following. First, there is a serious environmental problem considering both the requirements of the relevant law and by-law as well as criminal penalty set out for non-compliance. Second, the alleged pollution and its reason (lack of treatment facility) is well established under the official documents. Third, the local municipality did not carry out its positive obligation to prevent such pollution through installing the treatment facility. Although to choose the type and mode of preventive measures is in the margin of discretion of the administration they must be taken without delay and a reasonable and appropriate way. Fourth, the applicants' houses are located near to the river. Consequently, there is a close link between the pollution and the right to private life of the applicants, and so they are victims of the alleged pollution. The core point of the case is that the municipality had still legal time to install the treatment facility when the applicants brought the first legal action before the administrative court, and this was the main basis for the rejection of the first claim of the plaintiffs. However during the final stage of administrative case, the granted time was over, in spite of that the compensation claim of the plaintiffs had been rejected.

5. Public concerns and actions

[8] AYMK. E. 2018/2. K.2018/43. Karar Tarihi: 2.5.2018 (RG.2.5.2018).
[9] 5996 Sayılı Veteriner Hizmetleri Gıda ve Yem Kanunu, madde 26 (RG.11.6.2010).
[10] AYMK. E. 2018/2. K.2018/43. Karar Tarihi: 1.2.2018 (RG.4.5.2018).

* Farmers in a town located in the Aegean Region brought a legal action before administrative court against the Ministry of Forestry and Agriculture on the ground that it allowed the use of a substance that is classified as toxic by the World Health Organization in the agriculture. Monsanto who produced and introduced this substance into market involved in the case on behalf of the said ministry. Additionally, the farmers have also applied to the International Criminal Court.

***** As during the previous years**, i**ntensive protests of local public and NGOs have been ongoing against the policies and actions of the Government regarding particularly the construction of above mentioned power plants as well as other developmental activities as mining and road construction. These protests particularly have been put forward during the public participation process under the environmental impact assessment with regard to the proposed investments. The main common objection for all proposed investments is related to the improper choice of the location, and approval of applications by the competent authorities in spite of the inadequate EIA reports. Consequently the legality of these decisions have been challenged by NGOs and local citizens before the administrative courts.

UK

AVOSETTA London 2019

UK National Report

Richard Macrory

1 BREXIT

At the time of writing, Brexit still remains unresolved, and Parliament has been unable to agree the transitional withdrawal agreement negotiated with the UK and the other Member States, but has also rejected a no-deal withdrawal. It demonstrates the challenges involved where the government has a minority in Parliament, and both major parties (Conservative and the Labour opposition) have internal splits on the approach to be taken. In April, EU leaders agreed an extension until 31 October, although withdrawal could happen earlier if Parliament reaches an agreement.

2 Post-Brexit UK Environmental Law: Office of Environmental Protection and Environmental Principles

The UK Government has undertaken to 'retain' existing EU law on the date of exit from the EU. In light of the fact that EU law has multiple sources and dimensions, this is a complex legal task. The area of environmental law has received particular attention in this respect with campaigners and MPs alike concerned about this legal change leading to lower environmental standards. As a result, draft legislation has been published – the Environmental (Principles and Governance) Bill 2018 – which would establish a new independent environmental body in England. This body (the 'Office for Environmental Protection') would monitor the implementation of environmental law and have powers to take enforcement action against government departments and other public bodies who are failing in their duties under national environmental law. The aim in creating this new body is to replicate as far as possible the current enforcement role played by the European Commission, which would lapse should the UK withdraw from the EU. The draft Bill would also incorporate the core EU environmental principles in some way into the national legal system. These legislative proposals have given rise to intense interest especially by environmental NGOs, and two Select Parliamentary Committees have recently held inquiries and reported on the proposals, basically calling for greater financial and political independence for the new body, stronger enforcement powers, and a legally more forceful role of the principles. The devolved administrations (Scotland and Wales) are considering whether they wish to establish similar bodies in their jurisdictions (Northern Ireland has indicated it wishes to be covered by the jurisdiction of the OEP and the draft Bill).

3 Environmental policies generally

The Minister in charge of the UK Department of Environment, Food and Agriculture (DEFRA), Michael Gove, was a core Brexiteer, but has been determined to show that the UK

could have a vigorous and progressive environmental policy post Brexit. He is politically the most powerful Minister that DEFRA has had for over ten years, and in many ways has reinvigorated the Department. A host of policy initiatives have been announced including a 25 Year Environment Plan published in January 2018 containing targets. One of the functions of the proposed Office for Environmental Protection would be to report every five years on progress in meeting these targets. A major new Environment Act is planned for the Autumn establishing the Office for Environmental Protection (see section 2 above) but also covering substantive areas such as air and waste. Other proposals being consulted on including making biodiversity net gain a requirement for developers seeking planning permission, and legislative proposals to see the government move away from direct subsidy schemes under the Common Agricultural Policy over a seven-year period from 2021 towards a new Environmental Land Management System under which farmers would be paid to deliver 'public goods' such as improved soil health, higher animal welfare standards, biodiversity protection etc. Nevertheless, as so often is the case with environmental policies, there are other departments whose policies have significant environmental impacts (planning, transport, energy etc.) and it is by no means certain that Michael Gove can win them all round to his vision.

4 Climate Change Policy

Under the Climate Change Act 2008, there is an overall duty on government to reduce greenhouse gas emissions by 80% by 2050 with intervening targets. In the light of the Paris Agreement, the Government consulted the independent Climate Change Committee as to whether it was feasible to change the target to 100% (zero emissions) by 2050. The Committee published its report in May 2019. The Committee's advice was that the foundations for achieving a net-zero economy were in place or in development and that the UK could achieve such a target by 2050 at acceptable costs but that clear, stable and well-designed policies had to be introduced without delay. It is likely that the Government will agree to change the 2050 legal target in line with the Committee's advice. By chance, the report was published following a ten-day period of peaceful direct action (including blocking key streets) initiated by an NGO, Extinction Rebellion, seeking zero target by 2025. The actions were well organized and largely tolerated by the police and received enormous publicity, largely favourable, putting climate change well up the national political agenda.

Some recent court decisions

5 Fracking protests and right to free speech

UK Oil Gas Investments plc v Persons Unknown [2018] EWHC 2252

Anti-fracking protesters attempted to disrupt activities on the public highway in order to disrupt a company reaching its site to carry out exploratory fracking work for which they had permission. The company sought an injunction, and while normally the names of individuals should be specified in injunction proceedings, this is not essential provided the description used was sufficient to identified those who would be included and those who

were not. The court noted the Human Rights Act 1998 and application of ECHR rights Art 10 (freedom of expression) and Art 11 (freedom of peaceful assembly). Both rights are qualified, but the court emphasized that demonstrations in a public place inevitably cause a degree of disruption and must be tolerated if the Convention rights were to have any substance. Here some of the activities involved (such as slow walking in the highway to hold up the traffic, chaining to gates, 'surfing' on lorries which then had to stop) directly interfered with the company's property rights and the injunction should be granted. But the court revised the terms of the injunction sought to make sure that it did not include environmental groups and others who were merely watching and monitoring the situation. The case underlies the difficult balancing tests a court must apply, and how fact sensitive each such case will be.

6 Climate Change Duties

Plan B Earth and others v Secretary of State for Business, Energy and Industrial Strategy [2018] EWHC 1892

Under the Climate Change Act 2008, the Secretary of State has a duty to achieve an 80% reductions of greenhouse gas emissions by 2050. The legislation gives him a power to amend this target. An environmental NGO took a judicial review action against the Secretary of State arguing that in the light of the Paris Agreement, he now had a duty to amend this target. There had been discussion with the Secretary of State and the independent Climate Change Committee on the meaning of the Paris Agreement, and the Committee had advised in 2016 that it was not immediately necessary to amend the target. The court accepted that that it could not be said that the Secretary of State's refusal to amend the target was an unlawful exercise of his discretion, or that they implications of the Paris Agreement had been misunderstood. During the hearing the government made clear that it would shortly be seeking the advice of the Climate Change Committee on whether the target should be amended to zero emissions by 2050. The court clearly felt that in the light of this it would be premature for the court to intervene at this stage. Subsequently the government did indeed seek the advice of the Climate Change Committee, and its report was published in in early May 2019 (see para 4 above).

The two-day hearing was notable because the court was crowded out with climate change activists including a party of schoolchildren from a coastal town which might be threatened by sea level rises. It is also likely (but difficult to prove) that the legal action in fact helped persuade the government to take more vigorous action in seeking the advice of the Climate Change Committee on a zero emission target.

7 Strategic environmental assessment: applicability to national planning policies

Friends of the Earth v Secretary of State for Housing, Communities and Local Government [2019] EWHC 518

The Government publishes a National Planning Policy Framework (NPPF), which provides a broad set of policies for land use planning. Individual planning authorities must have regard to these policies when considering individual applications for planning permission. A revised NPPF was published in July 2018 and Friends of the Earth argued that it should have been subject to Strategic Environmental Assessment under Directive 2001/42 and national implementing regulations. The court reviewed the case-law of the CJEU on the subject. The starting point was the definitions of 'plans and programmes' in Art 2(a) (plans and programmes required by legislative, regulatory, or administrative provisions) coupled with Art 3(2) (plans prepared, inter alia, for town and country planning which set the framework for future development consent for projects subject to environmental assessment). The court accepted that in deciding whether an SEA was required it was necessary to look at both definitions together: "*Although issues raised by these provisions run together they nevertheless contain individual ingredients which, whilst they need to be understood in the context of each other and the Directive as a whole, nevertheless need to be satisfied before a measure could come within the scope of the definition*". The court accepted the importance of the NPPF within the planning system, and that in reality it did set a framework for development consents even if not legally binding as such. The court accepted that the CJEU had given a broad interpretation of "required" in Art 2(a) of the Directive to include plans and programmes that were not necessarily obligatory but were regulated by rules of law (see Cases C-105/09 and C-110/09 *Terre Wallonne and Inter-Environment Wallone* [2010] ECR 1-5611. But in the case of the NPPF there was no obligation to produce it, and "*there are no specific statutory or administrative provisions which govern or regulate the procedure for preparing or adopting national planning policy in the form of the Framework. Furthermore, the fact that the statutory Framework makes references to the need to have regard to, or take account of, national planning policies does not amount to such a provision: they provide an explanation for why the Defendant might choose to exercise his express or implied power to produce national planning policy but, again, they do not amount to provisions within the scope of Article 2(a)".* The court concluded that the Directive did not apply to the NPPF.

8 Heathrow Airport expansion: legality of Aviation National Policy Statement

R (on the application of Spurrier and others) v Secretary of State for Transport and others [2019] EWHC 1070

The Planning Act 2008 introduced special planning procedures for dealing with nationally significant infrastructure projects which would be decided against the background of National Policy Statements (NPS) produced by government and setting out the need for such projects. The procedures for producing such Statements are governed by law including public consultation and Parliamentary scrutiny (though not approval) and are subject to strategic environmental assessment. But once produced, representations about the merits of the NPS may be disregarded in any applications for development consent to which they relate.

After lengthy procedures, in July 2018 the Government produced an Airports National Policy Statement setting out the need for new airport capacity in the South East of England and

stating that t this should be met by a new runway at Heathrow airport. The legality of the Airport NPS was challenged by a range of applicants including London local authorities on a range of environmental grounds including a failure to properly consider climate change impacts, noise, and air quality (drawing on various EU environmental regimes to make this case).

The court considered the intensity of review it should adopt. It adopted a fairly conservative approach : "*The court should accord an enhanced margin of appreciation to decisions involving or based upon "scientific, technical and predictive assessments" by those with appropriate expertise. The degree of that margin will of course depend on the circumstances: but, where a decision is highly dependent upon the assessment of a wide variety of complex technical matters by those who are expert in such matters and/or who are assigned to the task of assessment (ultimately by Parliament), the margin of appreciation will be substantial*". In a lengthy judgment, the court considered the various claims relating to environmental impacts, and rejected all of them. At the time of writing, it seems this High Court decision will be subject to appeal. Watch this space.