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Case Law Report

Case Law of the Court of Justice of the European Union and the General Court

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Overview of the Judgments

1 On the Right to Relay on the Nitrates Directive

Judgment of the Court (First Chamber) of 3 October 2019 in Case C-197/19 – *Wasserleitungsverband Nördliches Burgenland and Others*

1.1 *Subject Matter*

This request for a preliminary ruling concerns the interpretation of Article 288 TFEU, Article 5(4) and (5) and Annex I A, point 2, to Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources (the Nitrates Directive). The request has been made in proceedings brought by the *Wasserleitungsverband Nördliches Burgenland* (Water Association of North Burgenland), and other parties against the decision of the *Bundesministerium für Nachhaltigkeit und Tourismus*

1 Only opinions, judgements and orders available on Curia.eu under the subject matter ´environment´, 'energy' and 'provisions concerning the institutions/access to documents' have been included in this report. Due to the length constrains, only those proceedings that in the subjective opinion of the editor were considered interesting are included.

(Federal Ministry for Sustainability and Tourism, Austria; 'the Ministry'), which rejected as inadmissible the requests to amend or revise the regulation Aktionsprogamm Nitrat 2012 (the 2012 Nitrate Action Programme Regulation). By its question, the referring court asked, in essence, whether Article 288 TFEU and Article 5(4) and (5) of, and Annex I A, point 2 to, the Nitrates Directive must be interpreted as meaning that natural and legal persons, such as the applicants in the main proceedings, who are responsible for ensuring the supply of water or who have the option of using a water well, should be in a position to require the competent national authorities to amend an existing action programme or adopt additional measures or reinforced actions, provided for in Article 5(5) of that directive, in order to attain a maximum nitrate level of 50 mg/l at each intake point.

1.2 *Key Findings*

32 It follows, as the Advocate General observed in point 41 of her Opinion, that at least the natural or legal persons directly concerned by an infringement of provisions of a directive must be in a position to require the competent authorities to observe such obligations, if necessary by pursuing their claims by judicial process.

33 In addition, 'where they meet the criteria, if any, laid down in [the] national law, members of the public' have the rights provided for in Article 9(3) of the Aarhus Convention. That provision, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, imposes on Member States an obligation to ensure effective judicial protection of the rights conferred by EU law, in particular the provisions of environmental law (see, to that effect, judgment of 20 December 2017, Protect Natur-, Arten – und Landschaftsschutz Umweltorganisation, C-664/15, EU:C:2017:987, paragraph 45).

34 The right to bring proceedings set out in Article 9(3) of the Aarhus Convention would be deprived of all useful effect, and even of its very substance, if it had to be conceded that, by imposing those conditions, certain categories of 'members of the public', a fortiori 'the public concerned', such as environmental organisations that satisfy the requirements laid down in Article 2(5) of the Aarhus Convention, were to be denied of any right to bring proceedings (judgment of 20 December 2017, Protect Natur-, Arten – und Landschaftsschutz Umweltorganisation, C-664/15, EU:C:2017:987, paragraph 46).

46 It follows that natural and legal persons, such as the applicants in the main proceedings, must be in a position to require national authorities to observe those obligations, if necessary by bringing an action before the competent courts.

68 It follows that exceeding 50 mg/l of nitrates in the waters or the risk of exceeding that level at one of the selected measuring points entails the obligation to implement the measures provided for in Article 5(4) and (5) of Directive 91/676. However, that directive does not oblige Member States to expand the monitoring measures beyond what is provided for in Article 5(6) of that directive.

69 To the extent that the values measured in a well or at another intake point, such as those of the applicants in the main proceedings, differ from the values obtained at the measuring points, it cannot be ruled out that the locations of those measuring points have been chosen, contrary to Article 5(6) of Directive 91/676, so that it is impossible to determine the extent of pollution in the territory they cover.

73 In the light of all the foregoing considerations, the answer to the question referred is that Article 288 TFEU and Article 5(4) and (5) of, and Annex I A, point 2 to, Directive 91/676 must be interpreted as meaning that, provided that the discharge of nitrogen compounds of agricultural origin significantly contributes to the pollution of the groundwaters in question, natural and legal persons, such as the applicants in the main proceedings, should be in a position to require the competent national authorities to amend an existing action programme or adopt additional measures or reinforced actions, provided for in Article 5(5) of that directive, as long as the nitrate levels in the groundwaters exceed or could exceed, in the absence of such measures, 50 mg/l at one or more measuring points within the meaning of Article 5(6) of that directive.

2 On the Protection of Large Carnivores under EU Nature Conservation Law

Judgment of the Court (Second Chamber) of 10 October 2019 in Case C-674/17 – *Luonnonsuojeluyhdistys Tapiola Pohjois-Savo – Kainuu ry*

2.1 *Subject Matter*

This request for a preliminary ruling concerns the interpretation of Article 16(1) of the Habitats Directive. The request has been made in proceedings brought by *Luonnonsuojeluyhdistys Tapiola Pohjois-Savo — Kainuu ry* ('Tapiola') concerning the lawfulness of decisions by which *Suomen riistakeskus* (Finnish Wildlife Agency) granted derogation permits to hunt wolves. By its questions, the referring court asked, in essence, whether Article 16(1)(e) of the Habitats Directive must be interpreted as precluding the adoption of decisions

granting derogations from the prohibition on the deliberate killing of wolves laid down in Article 12(1)(a), read in conjunction with Annex IV(a) to that directive, by way of hunting for population management purposes, the objective of which is to combat poaching. This judgment as well as the Opinion of AG in this case were discussed in J. Darpö, Anything goes, *JEEPL* 2019 16(3), 305–318 and J. Darpö, The Last Say? Comment on CJEUs Judgement in the Tapiola Case (C-674/17), *JEEPL* 2020 17(1), 117–130.

2.2 *Judgment*

Article 16(1)(e) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as precluding the adoption of decisions granting derogations from the prohibition on the deliberate killing of wolves laid down in Article 12(1)(a), read in conjunction with Annex IV(a) to that directive, by way of hunting for population management purposes, the objective of which is to combat poaching, where:

- the objective pursued by such derogations is not stated in a clear and precise manner and where, in the light of rigorous scientific data, the national authority is unable to establish that the derogations are appropriate with a view to achieving that objective,
- it is not duly established that their objective cannot be attained by means of a satisfactory alternative, the mere existence of an illegal activity or difficulties associated with its monitoring not constituting sufficient evidence in that regard,
- it is not guaranteed that the derogations will not be detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range,
- the derogations have not been subject to an assessment of the conservation status of the populations of the species concerned and of the impact that the envisaged derogation may have on it, at the level of the territory of that Member State or, where applicable, at the level of the biogeographical region in question where the borders of that Member State straddle several biogeographical regions or where the natural range of the species so requires and, to the extent possible, at cross-border level, and
- not all conditions are satisfied in relation to the taking, on a selective basis and to a limited extent, under strictly supervised conditions, in limited and specified numbers, of specimens of the species listed in Annex IV to that directive, compliance with which must be established in particular by reference to the population level, its conservation status and its biological characteristics, are satisfied.

It is for the national court to ascertain whether that is the case in the main proceedings.

3 On the Admissibility of Action against an ACER's Decision I

Judgment of the General Court (Seventh Chamber) of 24 October 2019 in Case T-333/17 – *Austrian Power Grid AG and Vorarlberger Übertragungsnetz GmbH v European Union Agency for the Cooperation of Energy Regulators* (*ACER*)

3.1 *Subject Matter*

This proceedings concerns an action for annulment under Article 263 TFEU seeking annulment of Decision A-001-2017 (consolidated) of the Board of Appeal of ACER of 17 March 2017 dismissing the appeals brought by Austrian Power Grid AG and Vorarlberger Übertragungsnetz GmbH against ACER Decision No 6/2016, regarding the determination of capacity calculation regions.

3.2 *Judgment*

1. Annuls Decision A-001-2017 (consolidated) of the Board of Appeal of the Agency for the Cooperation of Energy Regulators (ACER) of 17 March 2017 dismissing the appeals against Decision No 6/2016 issued by ACER regarding the determination of capacity calculation regions in so far as it dismisses the appeals brought by Austrian Power Grid AG and by Vorarlberger Übertragungsnetz GmbH;
2. Dismisses the action as to the remainder

4 On the Admissibility of Action against an ACER's Decision II

Judgment of the General Court (Seventh Chamber) of 24 October 2019 in Case T-332/17 – *nergie-Control Austria für die Regulierung der Elektrizitäts – und Erdgaswirtschaft* (*E-Control*) *v European Union Agency for the Cooperation of Energy Regulators* (*ACER*)

4.1 *Subject Matter*

This proceedings concerns an action for annulment under Article 263 TFEU seeking annulment of Decision A-001-2017 (consolidated) of the Board of Appeal of ACER of 17 March 2017 dismissing the appeals brought by Energie-Control Austria für die Regulierung der Elektrizitäts – und Erdgaswirtschaft (E-Control) against ACER Decision No 6/2016, regarding the determination of capacity calculation regions.

4.2 *Judgment*

1. Annuls Decision A-001-2017 (consolidated) of the Board of Appeal of the Agency for the Cooperation of Energy Regulators (ACER) of 17 March 2017

dismissing the appeals against Decision No 6/2016 issued by ACER regarding the determination of capacity calculation regions in so far as it dismisses the appeal brought by Energie-Control Austria für die Regulierung der Elektrizitäts – und Erdgaswirtschaft (E-Control);
2. Dismisses the action as to the remainder

5 On the Concept of 'End-of-Waste' under the New Waste Directive and Used Vegetable Oils

Judgment of the Court (Second Chamber) of 24 October 2019 in Case C-221/18 – *Prato Nevoso Termo Energy Srl v Provincia di Cuneo and ARPA Piemonte*

5.1 *Subject Matter*

This request for a preliminary ruling concerns the interpretation of Article 6 of Directive 2008/98/EC on waste (the New Waste Directive) and Article 13 of Directive 2009/28/EC on the promotion of the use of energy from renewable sources (the Renewable Energy Sources (RES) Directive 2009/28), and the principles of proportionality, transparency and simplification set out therein. The request has been made in proceedings between Prato Nevoso Termo Energy Srl ('Prato Nevoso') and the Provincia di Cuneo (Province of Cuneo, Italy) and the ARPA Piemonte, concerning the rejection of an application made by that company for authorisation to replace methane, as a power source for its thermal and electrical power plant, with a bioliquid obtained from the chemical treatment of used vegetable oils. By its questions, the national court asked, in essence, whether Article 6(1) and (4) of the New Waste Directive and Article 13(1) of the RES Directive, read together, must be interpreted as precluding national legislation under which an application for authorisation to replace methane, as a power source for an electric power plant producing atmospheric emissions, with a substance derived from the chemical treatment of used vegetable oils, must be refused, on the ground that that substance is not included in the list of categories of biomass fuels authorised for that purpose and that that list may be amended only by an internal act of general application, the adoption procedure of which is not coordinated with the administrative procedure for authorising the use of a substance derived from biomass as fuel.

5.2 *Key Findings*

39 It follows from the foregoing that EU law does not, in principle, preclude the possibility that the use of a substance derived from waste as a fuel in a

plant producing atmospheric emissions must be subject to the national legislation on energy recovery from waste, on the ground that it does not fall within any of the categories included in the list of authorised fuels, while providing that that list may be amended only by a generally applicable national legal act, such as a ministerial decree.

40 This finding is not invalidated by Article 13(1) of Directive 2009/28, which requires Member States to ensure that the national rules concerning the authorisation, certification and licensing administrative procedures that are applied to plants such as that at issue in the main proceedings are proportionate, necessary, coordinated and defined, since, as noted by the Advocate General in paragraph 93 of his Opinion, that provision does not concern the regulatory procedures for the adoption of end-of-waste status criteria, referred to in Article 6(4) of Directive 2008/98.

41 In the present case, in view of the fact that the vegetable oils in question in the main proceedings are not included in the list of authorised fuels, the legislation at issue in the main proceedings has the effect that that substance must be regarded as waste and not as a fuel.

42 It must be ensured that the legislation at issue in the main proceedings does not amount to an obstacle to the attainment of the objectives set by Directive 2008/98, such as encouraging the application of the waste hierarchy laid down in Article 4 of that directive, or, as is stated in recitals 8 and 29, encouraging the recovery of waste and the use of recovered material in order to preserve natural resources and to enable the development of a circular economy (see, to that effect, judgment of 28 March 2019, Tallinna Vesi, C-60/18, EU:C:2019:264, paragraph 27).

59 In the light of the foregoing considerations, the answers to the questions referred by the referring court are that Article 6(1) and (4) of Directive 2008/98 and Article 13(1) of Directive 2009/28, read together, must be interpreted as not precluding national legislation under which an application for authorisation to replace methane, as a power source for an electric power plant producing atmospheric emissions, with a substance derived from the chemical treatment of used vegetable oils, must be refused, on the ground that that substance is not included in the list of categories of biomass fuels authorised for that purpose and that that list may be amended only by an internal act of general application, the adoption procedure of which is not coordinated with the administrative procedure for authorising the use of such a substance as fuel, if the Member State could consider, without making a manifest error of assessment, that it has not been demonstrated that the use of that vegetable oil, in such circumstances, satisfies the conditions laid down in Article 6(1) of Directive 2008/98 and, in particular, is devoid of any

possible adverse impact on the environment and human health. It falls to the national court to determine if that is the situation in the case in the main proceedings.

6 On Ambient Air Quality in France

Judgment of the Court (Seventh Chamber) of 24 October 2019 in Case C-636/18 – *European Commission v French Republic*

6.1 *Subject Matter*

This judgment concerns an infringement action against France for not having complied with Articles 13 and 23 of Directive 2008/50/EC on ambient air quality and cleaner air for Europe (the Air Quality Directive) at several locations since 2010.

6.2 *Judgment* (*Not Available in English*)

1) En dépassant de manière systématique et persistante la valeur limite annuelle pour le dioxyde d'azote (NO_2) depuis le 1er janvier 2010 dans douze agglomérations et zones de qualité de l'air françaises, à savoir Marseille (FR03A02), Toulon (FR03A03), Paris (FR04A01), Auvergne-Clermont-Ferrand (FR07A01), Montpellier (FR08A01), Toulouse Midi-Pyrénées (FR12A01), zone urbaine régionale (ZUR) Reims Champagne-Ardenne (FR14N10), Grenoble Rhône-Alpes (FR15A01), Strasbourg (FR16A02), Lyon Rhône-Alpes (FR20A01), ZUR Vallée de l'Arve Rhône-Alpes (FR20N10) et Nice (FR24A01), et en dépassant de manière systématique et persistante la valeur limite horaire pour le NO_2 depuis le 1er janvier 2010 dans deux agglomérations et zones de qualité de l'air, à savoir Paris (FR04A01) et Lyon Rhône-Alpes (FR20A01), la République française a continué de manquer, depuis cette date, aux obligations qui lui incombent en vertu de l'article 13, paragraphe 1, de la directive 2008/50/CE du Parlement européen et du Conseil, du 21 mai 2008, concernant la qualité de l'air ambiant et un air pur pour l'Europe, lu en combinaison avec l'annexe XI de cette directive, et ce depuis l'entrée en vigueur des valeurs limites en 2010.

La République française a manqué, depuis le 11 juin 2010, aux obligations qui lui incombent en vertu de l'article 23, paragraphe 1, de ladite directive, lu en combinaison avec l'annexe XV de celle-ci, et en particulier à l'obligation, établie à l'article 23, paragraphe 1, deuxième alinéa, de la même directive, de veiller à ce que la période de dépassement soit la plus courte possible.

7 On the Obligation of Ensuring Effective Public Participation and Judicial Protection under the EIA Directive

Judgment of the Court (First Chamber) of 7 November 2019 in Case C-280/18 – *Alain Flausch e.a. tegen Ypourgos Perivallontos kai Energeias e.a.*

7.1 *Subject Matter*

This request for a preliminary ruling concerns the interpretation of Articles 6 and 11 of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (the EIA Directive). The request has been made in proceedings brought by Alain Flausch and other parties against the Ypourgos Perivallontos kai Energeias (Minister for the Environment and Energy, Greece), and other authorities, concerning the legality of the measures authorising construction of a tourist resort on the island of Ios (Greece). Information about the public participation procedure and the right to challenge the authorisation procedure for such project were made available at the island of Syros, located 55 nautical miles from Ios. The referring court asked, in essence, whether Article 6 of the EIA Directive must be interpreted as meaning that a Member State may carry out the procedures for public participation in decision-making that relate to a project at the level of the headquarters of the competent regional administrative authority, and not at the level of the municipal unit within which the site of the project falls. Moreover, the referring court asked in essence whether, in the light of the answer given to the first question, Articles 9 and 11 of the EIA Directive must be interpreted as precluding legislation, such as that at issue in the main proceedings, which provides that the announcement of the approval of a project on a specific website sets running a period of 60 days for bringing proceedings.

7.2 *Key Findings*

38 In that regard, the conditions for access to the participation procedure file must be such as to enable the public concerned to exercise its rights effectively, which entails accessibility to the file under easy conditions.

39 Any difficulties encountered by the public concerned in this regard may, however, be justified by the existence of a disproportionate administrative burden for the competent authority.

43 It is for the referring court to establish whether the principle of effectiveness was, in that regard, complied with in the procedure at issue in the main proceedings, by assessing compliance with requirements analogous to those referred to in paragraphs 38 and 39 above.

44 Accordingly, the answer to the first question is that Article 6 of the EIA Directive must be interpreted as precluding a Member State from carrying out the procedures for public participation in decision-making that relate to a project at the level of the headquarters of the competent regional administrative authority, and not at the level of the municipal unit within which the site of the project falls, where the specific arrangements implemented do not ensure that the rights of the public concerned are actually complied with, a matter which is for the national court to establish.

56 It would, on the other hand, be incompatible with the principle of effectiveness to rely on a period against a person if the conduct of the national authorities in conjunction with the existence of the period had the effect of totally depriving him of the opportunity to enforce his rights before the national courts, that is to say, if the authorities, by their conduct, were responsible for the delay in the application (see, to that effect, judgment of 19 May 2011, Iaia and Others, C-452/09, EU:C:2011:323, paragraph 21).

57 Finally, it is apparent from Article 11(3) of the EIA Directive that the Member States must pursue an objective of wide access to justice when they lay down the rules governing review procedures in respect of public participation in decision-making (see, to that effect, judgments of 11 April 2013, Edwards and Pallikaropoulos, C-260/11, EU:C:2013:221, paragraphs 31 and 44, and of 17 October 2018, Klohn, C-167/17, EU:C:2018:833, paragraph 35).

58 It may be pointed out in this regard that, as is clear from the answer to the first question, the public concerned must be informed of the consent procedure and of its opportunities to participate in it adequately and sufficiently in advance. If that is not the case, members of the public concerned cannot expect to be informed of a final decision granting consent.

59 That is especially so in circumstances such as those at issue in the main proceedings. Indeed, the mere ability to have access ex post on the Ministry of the Environment's website to a decision granting consent cannot be regarded as being sufficient in the light of the principle of effectiveness since, in the absence of sufficient information on the launch of the public participation procedure, no one can be deemed informed of the publication of the corresponding final decision.

8 On the Scope of Harmonisation and the Meaning of the Duty to Recover Costs of Water Services under the Water Framework Directive

Judgment of the Court (Fifth Chamber) of 7 November 2019 in Joined Cases C-105/18 to C-113/18 – *Asociación Española de la Industria Eléctrica* (*UNESA*) *and Others v Administración General del Estado*

8.1 *Subject Matter*

These requests for a preliminary ruling concern the interpretation of Article 191(2) TFEU, Article 9(1) of Directive 2000/60/EC establishing a framework for Community action in the field of water policy (the Water Framework Directive), Article 3(1) of Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC and Article 107(1) TFEU. The requests have been made in proceedings between, of the one part, Asociación Española de la Industria Eléctrica (UNESA) and several other Spanish hydroelectricity producers and, of the other, the Administración General del Estado (General administration of the State, Spain), concerning the lawfulness of a tax on the use of inland waters for the production of electricity. Among others, the referring court asked, in essence, whether Article 191(2) TFEU and Article 9(1) of Directive 2000/60 must be interpreted as precluding a tax on the use of inland waters for the production of electricity, such as the tax at issue in the cases in the main proceedings, which does not incentivise the efficient use of water, or establish mechanisms for the preservation and protection of public water resources, the quantification of that tax being unconnected to the capacity to cause damage to the public water resources, as it is focused solely and exclusively on the income-generating capacity of hydroelectricity producers. Moreover, the referring court asked, in essence, whether the principle of non-discrimination, as provided for in Article 3(1) of Directive 2009/72, must be interpreted as precluding a tax, such as the tax at issue in the cases in the main proceedings, which exclusively affects hydroelectricity generators operating in river basins encompassing more than one autonomous community.

8.2 *Key Findings*

30 It follows that since the polluter pays principle is expressly referred to in Article 9(1) of Directive 2000/60 and that directive was adopted on the basis of Article 175(1) EC (now Article 192 TFEU), whether that principle applies to the cases in the main proceedings must be examined on the basis of Article 9(1) of Directive 2000/60.

35 In that regard, the fact that the second indent of the second subparagraph of Article 9(1) refers to the different water uses, which must contribute adequately to the principle of recovery of the costs of water services confirms that the obligation to take that principle into account is imposed in the context of the Member States' general policy relating to those services. Such an interpretation is indeed confirmed by the wording of the third subparagraph of Article 9(1), according to which Member States may have regard to the social, environmental and economic effects of the recovery of those costs as well as the geographic and climatic conditions of the region or regions affected, thereby

leaving discretion to the Members States as regards the implementation of the principle of the recovery of costs.

36 It is, therefore, apparent from the wording of Article 9(1) of Directive 2000/60 that it is only in the light of all the relevant national rules implementing programmes of measures governing water services that it could be ascertained whether a Member State has taken into account the principle of the recovery of the costs of those services. It follows that compliance with Article 9(1) cannot be assessed by reference to a national measure, taken in isolation, which applies to the users of water resources.

45 In the light of the foregoing considerations, the answer to the first question is that Article 191(2) TFEU and Article 9(1) of Directive 2000/60 must be interpreted as not precluding a tax on the use of inland waters for the production of electricity, such as the tax at issue in the cases in the main proceedings, which does not incentivise the efficient use of water, nor establish mechanisms for the preservation and protection of public water resources, the quantification of that tax being unconnected to the capacity to cause damage to those public water resources, as it is focused solely and exclusively on the income-generating capacity of hydroelectricity producers.

50 In the present case, it must be pointed out that since it is apparent from the information before the Court that the situations at issue in the main proceedings are purely internal, in the sense that they are devoid of any cross-border element and that the tax on the use of inland waters for the production of electricity at issue constitutes a tax measure, the principle of non-discrimination, as provided for in Article 3(1) of Directive 2009/72, is applicable to that tax only if it that directive seeks to harmonise the Member States' tax provisions.

51 As regards the objective of Directive 2009/72 which consists in completing an internal market in electricity, the EU legislature used the ordinary legislature procedure provided for in Article 95(1) EC (now Article 114(1) TFEU), for the adoption of measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States in the establishment and functioning of the internal market.

52 However, in accordance with the wording of Article 95(2) EC (now Article 114(2) TFEU), Article 95(1) (now Article 114(2) TFEU), is not to apply to fiscal provisions.

53 Since Directive 2009/72 is not a measure for the approximation of the Member States' fiscal provisions, it must be found that the principle of non-discrimination provided for in Article 3(1) thereof does not apply to a tax, such as the tax on the use of inland waters for the production of electricity at issue in the cases in the main proceedings.

54 In the light of the foregoing considerations, the answer to the second question is that the principle of non-discrimination, as provided for in Article 3(1) of Directive 2009/72, must be interpreted as not precluding a tax, such as the tax on the use of inland waters for the production of electricity at issue in the cases in the main proceedings, which exclusively affects hydroelectricity generators operating in river basins encompassing more than one autonomous community.

9 On the Meaning of the Polluter-Pays Principle and the Principle of Non-Discrimination under the EU Provisions for an Internal Market in Electricity

Judgment of the Court (Fifth Chamber) of 7 November 2019 in Joined Cases C-80/18 to C-83/18 – *Asociación Española de la Industria Eléctrica* (UNESA) *and Others v Administración General del Estado and Others*

9.1 *Subject Matter*

These requests for a preliminary ruling concern the interpretation of Article 191(2) TFEU, Article 3(1) and (2) of Directive 2009/72/EC concerning common rules for the internal market in electricity, Articles 3 and 5 of Directive 2005/89/EC concerning measures to safeguard security of electricity supply and infrastructure investment, and Articles 20 and 21 of the Charter of Fundamental Rights of the European Union ('the Charter'). The requests have been made in proceedings between (i) Asociación Española de la Industria Eléctrica (UNESA) and other parties against the Administración General del Estado (General administration of the State, Spain), concerning the lawfulness of the taxes on the production of spent nuclear fuel and radioactive waste from nuclear power generation and on the storage of such nuclear fuel and waste in centralised facilities. First, the referring court asked, in essence, whether Articles 20 and 21 of the Charter and Article 3(1) of Directive 2009/72 must be interpreted as precluding national legislation, such as that at issue in the cases in the main proceedings, establishing taxes on the production and storage of nuclear fuel and waste, which are applied only to electricity-generating undertakings using nuclear energy, and the main objective of which is not to protect the environment but to increase the amount of revenue for the electricity financial system. Moreover, the referring court asked, in essence, whether Article 3(2) of Directive 2009/72 must be interpreted as precluding national legislation, such as that at issue in the cases in the main proceedings, when the environmental objective and the characteristics that define environmental taxes provided for

in that legislation are not specified in the statutory provision having legislative force in that legislation.

9.2 *Judgment*

1. The principle of non-discrimination, as provided for in Article 3(1) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC must be interpreted as not precluding national legislation establishing taxes on the production and storage of nuclear fuel and waste, such as those taxes at issue in the cases in the main proceedings, which apply only to electricity-generating undertakings using nuclear energy and the main objective of which is not to protect the environment but to increase the amount of revenue for the electricity financial system.

2. Article 3(2) of Directive 2009/72 must be interpreted as not precluding national legislation, such as that at issue in the cases in the main proceedings, when the environmental objective and the characteristics that define environmental taxes provided for in that legislation are not specified in the statutory provision having legislative force in that legislation.

10 On the Imposition of a Penalty Payment and a Lump Sum on Ireland for Persisting in Non-performing an Environmental Impact Assessment

Judgment of the Court (Grand Chamber) of 12 November 2019 in Case C-261/18 – *European Commission v Ireland*

10.1 *Subject Matter*

This case concerns an infringement action against Ireland under Article 260(2) TFEU for failure to comply with the judgment of the Court in case C-21/06 *Commission v Ireland* of 3 July 2008, in which Ireland was condemned for failure to perform and environmental impact assessment under the EIA Directive of the effects of the wind farm and associated works at Derrybrien, Country Galway (Ireland). The Commission asked the Court of Justice to impose both a penalty payment and a lump sum for such a failure.

10.2 *Judgment*

1. Declares that, by failing to take all measures necessary to comply with the judgment of 3 July 2008, Commission v Ireland (C-215/06, EU:C:2008:380), Ireland has failed to fulfil its obligations under Article 260(1) TFEU;

2. Orders Ireland to pay the European Commission a lump sum in the amount of EUR 5 000 000;

3. Orders Ireland to pay the Commission a periodic penalty payment of EUR 15 000 per day from the date of delivery of the present judgment until the date of compliance with the judgment of 3 July 2008, Commission v Ireland (C-215/06, EU:C:2008:380);

11 On the Deadline to Revise a Waste Management Plan under the New Waste Directive

Judgment of the Court (Eight Chamber) of 5 December 2019 in Case C-642/18 – *European Commission v Kingdom of Spain*

11.1 *Subject Matter*

This case concerns an infringement procedure against Spain for failure, in particular, to revise the waste management plans provided for in the New Waste Directive, concerning the Autonomous Communities of the Balearic Islands and the Canary Islands. Yet, there was confusion as about the deadline to comply with the duty to revise the plan under the Directive.

11.2 *Key Findings*

21 In the first place, as is apparent in the reply, the Commission interpreted Article 30(1) of that directive, which provides that Member States are to ensure that waste management plans are evaluated at least every sixth year and revised as appropriate, as meaning that it required Member States to revise those plans within 6 years of the date of entry into force of that directive, namely from 12 December 2008.

22 However, the obligation to evaluate and, where necessary, to revise the waste management plans adopted by the Autonomous Communities of the Balearic Islands and the Canary Islands, laid down in Article 30(1) of Directive 2008/98, could arise only on the date of expiry of the deadline for transposition of that directive, as follows from Article 40(1) of that directive, namely 12 December 2010.

23 Consequently, the deadline for Member States to fulfil their obligations under Article 30(1) of Directive 2008/98 expired only 6 years after the expiry of the deadline for transposition of that directive, that is to say on 12 December 2016.

24 Consequently, by giving notice to the Kingdom of Spain, on 18 November 2016, to put an end to an alleged breach of the obligation laid down in Article

30(1) of that directive, the Commission prematurely opened the pre-litigation stage of the procedure provided for in Article 258 TFEU.

25 Since the obligation which the Commission alleges was breached did not arise until after the date on which the letter of formal notice was issued, no failure to fulfil the obligation laid down in Article 30(1) could be validly invoked by the Commission.

30 In the light of all the foregoing considerations, the Commission's action for failure to fulfil obligations must be dismissed as inadmissible.

12 On the Adoption of Coercive Detention for Failure to Adopt and Effective Air Quality Plan

Judgment of the Court (Grand Chamber) of 19 December 2019 in Case C-752/18 – *Deutsche Umwelthilfe eVvFreistaat Bayern*

12.1 *Subject Matter*

This request for a preliminary ruling concerns the interpretation of the first sentence of Article 9(4) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, (the Aarhus Convention), of Articles 4(3) and 19(1) TEU, of Article 197(1) TFEU and of the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union. The request has been made in proceedings between Deutsche Umwelthilfe eV, a non-governmental organisation promoting environmental protection, and *Freistaat Bayern* (the Land of Bavaria, Germany) concerning the enforcement of an injunction requiring the adoption of traffic bans in order to comply with the obligations flowing from the Air Quality Directive. By its question, the referring court seeked, in essence, to ascertain whether EU law, in particular the first paragraph of Article 47 of the Charter, must be interpreted as meaning that, in circumstances in which a national authority persistently refuses to comply with a judicial decision enjoining it to perform a clear, precise and unconditional obligation flowing from the Air Quality Directive, EU law empowers or even obliges the national court having jurisdiction to order the coercive detention of office holders involved in the exercise of official authority.

12.2 *Key Findings*

41 That said, in the present instance the referring court considers that it cannot secure compliance with the principle of the effectiveness of EU law and the right to an effective remedy unless EU law empowers or even obliges it to

disregard the reasons of a constitutional nature which, in its view, prevent the application of coercive detention to office holders involved in the exercise of official authority.

48 Whilst it is apparent from the oral argument at the hearing before the Court that doubts remain as to whether the conditions that would allow the coercive detention provided for by German law to be ordered in respect of office holders involved in the exercise of official authority are fulfilled, it is for the referring court alone to determine whether the relevant national provisions are, in the light of their wording and substance, sufficiently accessible, precise and foreseeable in their application and thus enable all risk of arbitrariness to be avoided.

49 If that is not so, the national court cannot order coercive detention solely on the basis of the principle of effectiveness and of the right to effective judicial protection. Any limitation on the right to liberty must be provided for by a law that meets the requirements recalled in paragraph 46 of the present judgment.

51 As the Advocate General has observed in point 86 of his Opinion, since the ordering of coercive detention entails a deprivation of liberty, recourse may be had to such an order only where there is no less restrictive measure that enables the objective pursued to be attained. It is therefore for the referring court to determine whether national law governing enforcement can be interpreted in conformity with the right to effective judicial protection, to the effect that it would authorise the referring court to adopt measures that do not impinge upon the right to liberty, such as those referred to in paragraph 40 of the present judgment.

52 It is only if the referring court were to conclude that, in the context of the balancing exercise referred to in paragraph 45 of the present judgment, the limitation on the right to liberty which would result from coercive detention being ordered complies with the conditions laid down in that regard in Article 52(1) of the Charter that EU law would not only authorise, but require, recourse to such a measure.

56 In the light of all the foregoing, the answer to the question referred is that EU law, in particular the first paragraph of Article 47 of the Charter, must be interpreted as meaning that, in circumstances in which a national authority persistently refuses to comply with a judicial decision enjoining it to perform a clear, precise and unconditional obligation flowing from EU law, in particular from Directive 2008/50, it is incumbent upon the national court having jurisdiction to order the coercive detention of office holders involved in the exercise of official authority where provisions of domestic law contain a legal basis for ordering such detention which is sufficiently accessible, precise and

foreseeable in its application and provided that the limitation on the right to liberty, guaranteed by Article 6 of the Charter, that would result from so ordering complies with the other conditions laid down in that regard in Article 52(1) of the Charter. On the other hand, if there is no such legal basis in domestic law, EU law does not empower that court to have recourse to such a measure.