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

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Overview of the Judgments

Waste Water as Renewable Energy Source

Judgment of the Court (Second Chamber) of 2 March 2017 in Case C-4/16 – *J. D. v Prezes Urzędu Regulacji Energetyki*

Subject Matter

This request for a preliminary ruling concerns the interpretation of the second subparagraph of Article 2(a) of the Renewable Energy Sources Directive. In the national proceedings J.D. challenged the decisions of the Chairman of the Energy Regulatory Office rejecting J.D.'s application for an extension in respect of the small-scale hydropower plant on the grounds that only hydropower plant producing energy obtained from wave, current and tide and the downward flow of rivers could be regarded as plants producing energy from renewable sources. This was due to the fact J.D.'s small-scale hydropower plant is located at the point of discharge of industrial waste water from another plant, which was not

* Only judgements and orders available on Curia.eu under the subject matter 'environment' have been included in this report.

involved in electricity production. The Court of Appeal, Warsaw (Poland), hearing the case decided to add the Court of Justice to know, in essence, whether the concept of 'energy from renewable sources', in the second subparagraph of Article 2(a) of Directive 2009/28, must be interpreted as covering energy generated by a small-scale hydroelectric power station, which is not a pumped-storage power station or a hydroelectric power station with a pumping installation, sited at the point of discharge of industrial waste water from another plant which previously used the water for its own purposes.

Key Findings

31 As was stated, in essence, by the Advocate General in points 36 to 38 of his Opinion, it follows from those factors that all hydropower constitutes energy from renewable sources, within the meaning of the second subparagraph of Article 2(a) of Directive 2009/28, whether it is generated by hydropower provided by a natural water flow, or whether it is generated from hydropower provided from an artificial water flow, with the exception of electricity generated from pumped storage units using water that has previously been pumped uphill.

33 To exclude the concept of hydropower produced from renewable sources, for the purposes of Directive 2009/28, all electricity generated from hydropower provided from an artificial water flow, and that on the sole ground that it concerns water flow of that type, as is suggested, in essence, by the Polish Government, is not only contrary to the intention of the EU legislature, as was stated in paragraphs 26 to 31 of the present judgment, but also conflicts with the achievement of those objectives.

36 In order to avoid any risk of circumvention, it is nevertheless necessary that the uphill activity, which is at the source of that artificial water flow, does not exist solely to create that water flow for the purposes of its uphill exploitation in order to produce electricity. Therefore, in particular, electricity produced from hydropower provided from an artificial water flow where the latter was created uphill by pumping with the sole aim of producing that electricity downstream does not come within the concept of hydropower produced from renewable sources, for the purposes of Directive 2009/28.

Operator's Fault Prevents GHG Emissions from being Property Rights

Judgment of the Court (Fifth Chamber) of 8 March 2017 in Case C-321/15 – *ArcelorMittal Rodange et Schifflange SA v État du Grand-duché de Luxembourg*

Subject Matter

This request for a preliminary ruling concerns the interpretation of the ETS Directive. In the dispute in the main proceedings 'ArcelorMittal' challenged the decision of the Minister with responsibility for Sustainable Development and Infrastructure of Luxembourg requiring that company to surrender, without compensation, 80,922 unused greenhouse gas emissions allowances. These emissions were granted in 2012, only because ArcelorMittal had failed to communicate that the activities of its installation had been suspended since the end of 2011 for an indefinite period. The Constitutional court hearing the case asked to the Court of Justice, in essence, whether the ETS Directive must be interpreted as precluding a national provision which allows the competent authorities to require to surrender without compensation emissions allowances which have been issued but were not used by an operator.

Judgment

31 It is for the referring court to ascertain whether in the present case ArcelorMittal actually suspended activities at its installation in Schifflange as of November 2011 and whether that suspension could be classified as a cessation of activities for the purposes of Article 13(6) of the Law of 2004.

32 If that is the case, Directive 2003/87 does not preclude the competent authority from adopting, in circumstances such as those at issue in the main proceedings, a decision ordering the surrender without compensation of the emissions allowances. Where an installation has ceased its activities at a date prior to that of the allocation of emissions allowances, those allowances clearly cannot be used in order to account for greenhouse gas emissions which can no longer be produced by that installation.

36 Accordingly, Directive 2003/87 must be interpreted as not precluding national legislation which allows the competent authority to require the surrender, without full or partial compensation, of unused emissions allowances which have been improperly issued to an operator, as a result of the failure by the latter to comply with the obligation to inform the competent authority in due time of the cessation of the operation of an installation.

38 Thus, the surrender of those allowances would not mean the expropriation of an asset which already formed an integral part of the operator's property, but simply the withdrawal of the act allocating the allowances, on account of the failure to comply with the conditions laid down in Directive 2003/87.

On the Consideration of Data Other than Those Relating to the Hazards Arising from the Intrinsic Properties of the Substances Concerned under REACH (I)

Judgment of the Court (First Chamber) of 15 March 2017 in Case C-323/15P – *Polynt SpA v European Chemicals Agency*

Subject Matter

In this appeal, Polynt seeks to have set aside the judgment of the General Court of the European Union in Polynt and Sitre v ECHA (T-134/13), by which the General Court dismissed its action seeking the annulment in part of Decision ED/169/2012 of the European Chemicals Agency (ECHA) of 18 December 2012 concerning the inclusion of substances of very high concern in the list of candidate substances, in so far as it concerns cyclohexane-1,2-dicarboxylic anhydride (EC No 201-604-9), cis-cyclohexane-1,2-dicarboxylic anhydride (EC No 236-086-3) and trans-cyclohexane-1,2-dicarboxylic anhydride (EC No 238-009-9) (together, 'HHPA'). On request from the Netherlands, HHPA, which is a cyclic acid anhydride used, among others, as an intermediate or monomer in industrial processes, ECHA identified it as a substance of very high concern and included in Annex XIV to the REACH Regulation. This is due to the fact that HHPA may cause allergy or asthma symptoms or breathing difficulties if inhaled. Among the grounds for its appeal, Polynt alleged errors in the interpretation and application of Article 57(f) of the REACH Regulation. The Court of Justice dismissed the appeal, but corrected the General Court as regards one point.

Key Findings

44 Therefore, the General Court erred in law in holding, in essence, that Article 57(f) of the REACH Regulation excludes, in principle, any consideration of data other than those relating to the hazards arising from the intrinsic properties of the substances concerned, such as those relating to human exposure reflecting the risk management measures in force.

On the Consideration of Data Other than Those Relating to the Hazards Arising from the Intrinsic Properties of the Substances Concerned under REACH (II)

Judgment of the Court (First Chamber) of 15 March 2017 in Case C-324/15P – *Hitachi Chemical Europe GmbH and Polynt SpA v European Chemicals Agency*

Subject Matter

In this appeal, Hitachi and Polynt seeks to have set aside the judgment of the General Court of the European Union in Polynt and Sitre v ECHA (T-134/13), by which the General Court dismissed its action seeking the annulment in part of Decision ED/169/2012 of the European Chemicals Agency (ECHA) of 18 December 2012 concerning the inclusion of substances of very high concern in the list of candidate substances, in so far as it concerns hexahydromethylphthalic anhydride (EC No 247-094-1), hexahydro-4-methylphthalic anhydride (EC No 243-072-0), hexahydro-1-methylphthalic anhydride (EC No 256-356-4) and hexahydro-3-methylphthalic anhydride (EC No 260-566-1) (together, 'MHHPA'). On request from the Netherlands, MHHPA, which is a cyclic acid anhydride used, among others, as an intermediate or monomer in industrial processes, ECHA identified it as a substance of very high concern and included in Annex XIV to the REACH *Regulation. This is due to the fact that MHHPA may cause allergy or asthma symptoms or breathing difficulties if inhaled. Among the grounds for its appeal, Hitachi and Polynt alleged errors in the interpretation and application of Article 57(f) of the* REACH *Regulation. The Court of Justice dismissed the appeal, but corrected the General Court as regards one point.*

Key Findings

44 Therefore, the General Court erred in law in holding, in essence, that Article 57(f) of the REACH Regulation excludes, in principle, any consideration of data other than those relating to the hazards arising from the intrinsic properties of the substances concerned, such as those relating to human exposure reflecting the risk management measures in force.

On Cost Allocation of Waste Treatment Activities in Croatia

Judgment of the Court (Sixth Chamber) of 30 March 2017 in Case C-335/16 – *VG Čistoća d.o.o. v Đuro Vladika and Ljubica Vladika*

Subject Matter

This request for a preliminary ruling concerns the interpretation of the polluter-pays principle and of Article 14(1) of the Waste Directive (Directive 2008/98/EC). The request has been made in the course of proceedings between VG Čistoća d.o.o., a municipal waste management company, and Mr Đuro Vladika and Mrs Ljubica Vladika, users of a waste management service, concerning the payment of invoices for the collection and management of municipal waste between October

2013 and September 2014. The defendants in the main proceedings object to the payment of the items on the invoices relating to the payment for separate collections, recycling and the disposal of waste left unlawfully in the environment, and to the payment of a special levy intended to finance capital investment by the waste management company in recycling operations. The Velika Gorica Municipal Court, Croatia, essentially asks whether Article 14 and Article 15(1) of the Directive preclude requiring waste management service users to pay a fee calculated on the basis of the volume of the container provided for them, and not on the basis of the waste actually transported, and to pay an additional levy intended to finance investments necessary for the processing of the waste collected.

Judgment

Article 14 and Article 15(1) of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives must, as EU law currently stands, be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which, for the purposes of financing an urban waste management and disposal service, provides for a price calculated on the basis of an estimate of the volume of waste generated by users of that service, and not on the basis of the quantity of waste which they have actually produced and presented for collection, as well as for the payment by users, in their capacity as waste holders, of an additional levy intended to finance capital investments necessary for the processing of waste, including the recycling thereof. It is, however, incumbent on the referring court to verify, on the basis of the matters of fact and law placed before it, whether this results in the imposition on certain 'holders' of costs which are manifestly disproportionate to the volumes or nature of the waste that they are liable to produce. Accordingly, the national court may take into account, inter alia, criteria relating to the type of property that the users occupy, its surface area and use, the productive capacity of the 'holders', the volume of the containers provided to the users, and the frequency of collection, in so far as those parameters are liable to have a direct impact on the amount of the costs of waste management.

On the Financing of N2000 Areas Co-owned by Private Parties and the State

Judgment of the Court (Tenth Chamber) of 30 March 2017 in Case C-315/16 – *József Lingurár tegen Miniszterelnökséget vezető miniszter*

Subject Matter

This request for a preliminary ruling concerns the interpretation of Articles 42 and 46 of Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD). The request has been made in proceedings between József Lingurár and the Chancellery of the Prime Minister, Hungary, concerning the decision refusing to grant Mr Lingurár support for a Natural 2000 forest area which he owns. This was due to the fact that the State owned 0.182% of that area. The Supreme Court of Hungary, competent in the main proceedings, asked, in essence, whether the first sentence of Article 42(1) of Regulation No 1698/2005 must be interpreted as precluding the complete exclusion of a Natura 2000 forest area from entitlement to the support provided for in Article 36(b)(iv) of that regulation on the ground that a small part of that area is owned by the State, irrespective of the ratio of the size of the part owned by the State to the size of the part owned by a private owner.

Key Findings

22 In this case, the interpretation of the first sentence of Article 42(1) of Regulation No 1698/2005 which follows from the national legislation leads, in particular in the circumstances of the main proceedings, to a reversal of the relationship between the rule laid down by that provision and the exception set out in Article 30(4)(a) of Regulation No 1974/2006. The principle established in Article 42(1) of Regulation No 1698/2005 is that Natura 2000 support is to be paid to private owners and their associations. However, in the circumstances of the main proceedings, even though only a negligible part of the forest area in question is owned by the State, the refusal to pay any support to the private owner who owns most of that area effectively makes the exception the rule.

35 Consequently, the exclusion of only the plot or hectare owned in part by the State from Natura 2000 compensatory support for a forest area eligible for such support—or even no exclusion at all if that part is negligible—would comply with the principle of proportionality, unlike the complete exclusion of that area without any regard being had to the ratio of the size of the part of that area owned by the State to the size of the part owned by the private owner.

On Air Quality in Bulgaria

Judgment of the Court (Third Chamber) of 5 April 2017 in Case C-488/15 – *European Commission v Republic of Bulgaria*

Subject Matter

This case concerns an infringement procedure brought by the European Commission against Bulgaria for breach of Articles 13 and 23 of the Air Quality Directive. Following Bulgaria's failure to rely on Article 22 of the Directive to obtain an extension of the deadline to comply with the EU quality standards, the Commission started an action for the systematic and consistent failure to comply with the provisions of the Directive. Bulgaria did not deny that it had failed to fulfil its obligations under Article 13 of the Directive. Yet it contended the fact that the Commission's action before the Court of Justice had a temporal scope which is broader than that in the reasoned opinion. Moreover, as regards the complaint that Bulgaria had breached article 23 of the Directive, this Member State replied that the concept of 'as short as possible' under this provision should be interpreted taking into account the two-year period provided for communicating the plans to the Commission after the end of the year the first exceedance was observed.

Key Findings

46 While the data on air quality for 2014 amount to events which took place after the reasoned opinion of 11 July 2014, those events are of the same kind as those to which the opinion referred and constitute the same conduct.

47 Consequently, those data, which came to the Commission's knowledge after the reasoned opinion of 11 July 2014 was issued, could legitimately be mentioned by it in finding that the Republic of Bulgaria had failed to comply with the provisions of Article 13(1) of, in conjunction with Annex XI to, Directive 2008/50, also in relation to 2014.

50 In addition, since the Court may consider of its own motion whether the conditions laid down in Article 258 TFEU for an action for failure to fulfil obligations to be brought are satisfied (see judgments of 15 January 2002, *Commission* v *Italy*, C-439/99, EU:C:2002:14, paragraph 8, and of 22 September 2016, *Commission* v *Czech Republic*, C-525/14, EU:C:2016:714, paragraph 14), it must be ascertained whether, by its first complaint, the Commission is entitled to declare that the Republic of Bulgaria failed to fulfil its obligations as from 2007.

52 However, according to the Court's case-law, the Commission has standing to seek a declaration that a Member State has failed to fulfil obligations which were created in the original version of an EU measure, subsequently amended or repealed, and which were maintained in force under the provisions of a new EU measure. Conversely, the subject matter of the dispute cannot be extended to obligations arising under new provisions which do not correspond to those arising under the original version of

the measure concerned, for otherwise it would constitute a breach of the essential procedural requirements of infringement proceedings (judgments of 24 May 2011, *Commission* v *Portugal*, C-52/08, EU:C:2011:337, paragraph 42, and of 10 September 2015, *Commission* v *Poland*, C-36/14, not published, EU:C:2015:570, paragraph 24).

55 In the light of the foregoing, it must be found that the complaint alleging an infringement of the provisions of Article 13(1) of, in conjunction with Annex XI to, Directive 2008/50 is admissible for the period from 2007 to 2014 inclusive.

74 In those circumstances, it must be found that the Republic of Bulgaria was not exempted from the obligation to comply with the limit values until 11 June 2011.

76 When it has been objectively found that a Member State has failed to fulfil its obligations under the FEU Treaty or secondary law, it is irrelevant whether the failure to fulfil obligations is the result of intention or negligence on the part of the Member State responsible, or of technical difficulties encountered by it (see judgments of 1 October 1998, *Commission* v *Spain*, C-71/97, EU:C:1998:455, paragraph 15, and of 4 September 2014, *Commission* v *Greece*, C-351/13, not published, EU:C:2014:2150, paragraph 23).

77 Consequently, Republic of Bulgaria's argument relating to its socio-economic situation cannot be accepted.

112 It follows from the wording of Article 23(1) of Directive 2008/50 and from the broad logic of that provision that the obligation to keep the exceedance period for the limit values as short as possible is wholly separate from the obligation to communicate the plans to the Commission. Consequently, the third subparagraph of Article 23(1) of that directive does not confer any additional period on the Member State concerned for them to adopt appropriate measures and for those measures to take effect.

On the Notions of Mitigation Measures and Cumulative Effects under Article 6(3) of the Habitats Directive

Judgment of the Court (Second Chamber) of 27 October 2017 in Case C-142/16 – *European Commission v Federal Republic of Germany*

Subject Matter

This case concerns an infringement procedure against Germany. According to the European Commission, by authorising the construction of a coal-fired power

station in Moorburg, near Hamburg (Germany), without conducting an appropriate and comprehensive assessment of its implications, the Federal Republic of Germany has failed to fulfil its obligations under Article 6(3) and (4) of the Habitats Directive. Germany had performed an environmental impact assessment and concluded that that authorisation was compatible with the conservation objectives of the Natura 2000 areas in view of the undertaking given by the operator to install a second fish ladder approximately 30 km from the plant, by the Geesthacht weir, intended to compensate for fish killed during the operation of the cooling mechanism, which draws large quantities of water from the river in order to cool the Moorburg plant ('the fish ladder'). According to the Commission, Germany wrongly classified the fish ladder as a mitigating measure, and, secondly, had failed to take into account cumulative effects with other relevant projects.

Key Findings

36 That fish ladder was intended to increase migratory fish stocks by allowing those species to reach their breeding areas, along the middle and upper reaches of the Elbe, more quickly. Increasing stocks in this manner was expected to compensate for the fish deaths near the Moorburg plant so that the conservation objectives of the Natura 2000 areas upstream of the plant would not be significantly affected.

37 However, it is clear that the impact assessment itself did not contain definitive data regarding the effectiveness of the fish ladder, and merely stated that its effectiveness could only be confirmed following several years of monitoring.

38 It must therefore be held that, at the time the authorisation was granted, the fish ladder, even though it was intended to reduce direct significant effects on the Natura 2000 areas situated upstream of the Moorburg plant, could not guarantee beyond all reasonable doubt, together with the other measures referred to in paragraph 35 of the present judgment, that that plant would not adversely affect the integrity of the site, within the meaning of Article 6(3) of the Habitats Directive.

63 It follows from the foregoing considerations that, by failing to assess appropriately the cumulative effects resulting from the Moorburg plant together with the Geesthacht pumped-storage power plant, the Federal Republic of Germany has failed to fulfil its obligations under Under Article 6(3) of the Habitats Directive.

67 In those circumstances, it must be held that the run-of-river hydroelectric power plant at the Geesthacht weir did not constitute 'another project' within the meaning of Article 6(3) of the Habitats Directive. Accordingly, the second part of the second complaint must be rejected.

On the Concept of 'placing on the market' under Article 5 of the REACH Regulation

Judgment of the Court (Third Chamber) of 27 April 2017 in Case C-535/15 – *Freie und Hansestadt Hamburg v Jost Pinckernelle*

Subject Matter

This case concerns a preliminary reference made in proceedings between the City of Hamburg and Jost Pinckernelle, concerning the export of chemicals outside the territory of the European Union which were imported into that territory without being registered in accordance with, in particular, Article 5 of the REACH Regulation. The referring court asked, in essence, whether Article 5 of the REACH Regulation is to be interpreted as meaning that substances which have not be registered at the time of their import into the territory of the European Union in accordance with that regulation can be exported outside that territory.

Key Findings

41 It follows from the foregoing that the export of a substance to a third country cannot be considered as the 'placing on the market' of that substance within the meaning of Article 3(12) and Article 5 of the REACH Regulation.

44 It follows from all those considerations that the market referred to in the REACH Regulation is the internal market and that therefore the expression 'placing on the market' relates to the internal market. Such an interpretation is not contradicted by any element of that regulation, especially since, when dealing with the release of substances outside the internal market, that regulation refers to the concept of export.

49 In light of all the foregoing conclusions, the answer to the question referred for a preliminary ruling is that Article 5 of the REACH Regulation, read in conjunction with Article 3(12) of that regulation, must be interpreted as meaning that substances which have not be registered at the time of their import into the territory of the European Union in accordance with that regulation may be exported outside that territory.

On the Inclusion of the DEHP Substance under Annex XIV to the REACH Regulation

Judgment of the General Court (Fifth Chamber) of 11 May 2017 in Case T-115/15 – *Deza, a.s., v European Chemicals Agency* (*ECHA*)

Subject Matter and Judgment

This case concerns an action for annulment started by Deza a.s. seeking the annulment of a decision of 12 December 2014 by the Executive Director of the ECHA by which the existing entry relating to the substance DEHP on the list of identified substances with a view to their eventual inclusion in Annex XIV to the REACH Regulation was supplemented to the effect that that substance is also identified as a substance with endocrine-disrupting properties that may have serious effects on the environment, within the meaning of Article 57(f) of that Regulation. The General Court dismissed the action.

Water Deterioration, Environmental Damage and Damage Covered by Authorization

Judgment of the Court (First Chamber) of 1 June 2017 in Case C-529/15 – *Gert Folk*

Subject Matter

This request for a preliminary ruling concerns the interpretation of the Environmental Liability Directive made by the Verwaltungsgerichtshof (Administrative Court, Austria). Wasserkraftanlagen Mürzzuschlag GmbH operates, based on an authorisation granted in 1998, a hydroelectric power station on the river Mürz, in Austria, which, according to Mr Folk, caused significant environmental damage, as it disrupted the natural reproduction of fish and has caused fish to die along extended stretches of the river Mürz. The application based on environmental damage brought by Mr. Folk was dismissed at first instance as the national court considered the damage alleged by Mr. Folk, who own fishing rights for the river Mürz, covered by the authorisation granted by law. In appeal, Mr. Folk alleged that national law infringed the Environmental Liability Directive. The Administrative Court hearing the appeal raised several questions to the Court of Justice, among which, whether the Directive precludes a provision of national law which excludes that damage be categorised as 'environmental damage' in the case where such damage is covered by an authorisation granted under that law. Moreover, it asked whether Articles 12 and 13 of the Directive preclude a provision of national law, which does not entitle persons holding fishing rights to initiate a review procedure in relation to environmental damage.

Key Findings

34 It follows from the foregoing considerations that the answer to the third question is that Directive 2004/35, and in particular Article 2(1)(b)

thereof, must be interpreted as precluding a provision of national law which excludes, generally and automatically, that damage which has a significant adverse effect on the ecological, chemical or quantitative status or ecological potential of the water in question be categorised as 'environmental damage', due to the mere fact that it is covered by an authorisation granted under that law.

49 An interpretation of national law which would deprive all persons holding fishing rights of the right to initiate a review procedure following environmental damage resulting in an increase in the mortality of fish, although those persons are directly affected by that damage, does not respect the scope of Articles 12 and 13 and is thus incompatible with that directive.

50 Having regard to the foregoing considerations, the answer to the second question is that Article 12 and 13 of Directive 2004/35 must be interpreted as precluding a provision of national law, such as that at issue in the case in the main proceedings, which does not entitle persons holding fishing rights to initiate a review procedure in relation to environmental damage within the meaning of Article 2(1)(b) of that directive.

On the Compatibility of the RES Directive with the Provisions on the Free Movement of Goods

Judgment of the Court (Second Chamber) of 22 June 2017 in Case C-549/15 – *E.ON Biofor Sverige AB*

Subject Matter

This request for a preliminary ruling concerns the interpretation of Article 18(1) of the Renewable Energy Sources Directive. The request had been made in proceedings between E.ON Biofor Sverige AB ('E.ON') and Statens energimyndighet (National Energy Agency, Sweden; 'the SE') concerning an order sent by it to E.ON as regards the biogas sustainability verification system put into place by the SE. E.ON, a company established in Sweden, has shown before the referring court that it purchases, from a sister company established in Germany, consignments of sustainable biogas produced by the latter in that Member State. E.ON then transports those consignments to Sweden via the German and Danish gas networks, that biogas remaining, at each stage of the transport, the property of companies in the group and remain at all times covered by an REDCert DE sustainability certificate issued in accordance with the German national mass balance verification system. The SE ordered E.ON to ensure that the mass balance was achieved

'within a location with a clear boundary'. Compliance with that order has the consequence that the biogas produced in Germany which E.ON imports into Sweden via the German and Danish gas networks cannot be included in that verification system. The national court hearing the dispute between E.ON and SE wanted to know in essence whether Article 18(1) of the Renewable Energy Sources Directive must be interpreted as placing an obligation on the Member States to authorise imports, via their interconnected national gas networks, of sustainable biogas. By its second question, the referring court asks whether Article 18(1) of the Renewable Energy Sources Directive is valid in the light of Article 34 TFEU, since the application of that provision can have the effect of restricting trade in sustainable biogas.

Key Findings

38 Such a provision cannot be interpreted as meaning that it gives rise to an obligation on the Member States to authorise imports of sustainable biogas via their interconnected gas networks.

56 It follows from the foregoing that the view cannot be taken that Article 18(1) of Directive 2009/28 makes it impossible, as such, in a situation of movement of sustainable biogas between the Member States via interconnected national gas networks, for the sustainability of that gas to be recognised in the Member State of import for the purposes set out in Article 17(1) of that directive, nor, therefore, that Article 18(1) thereof thus constitutes an obstacle to the free movement of goods guaranteed under Article 34 TFEU.

From Waste Incineration to Environmental Damage and Related Liability of Land Owners

Judgment of the Court (Second Chamber) of 13 July 2017 in Case C-129/16 – *Túrkevei Tejtermelő Kft*

Subject Matter

The present request for a preliminary ruling concerns the interpretation of Articles 191 and 193 TFEU and of the Environmental Liability Directive. The request has been made in a dispute between Túrkevei Tejtermelő Kft. ('TTK') and the Országos Környezetvédelmi és Természetvédelmi Főfelügyelőség (National inspectorate general for the protection of the environment and nature, Hungary; 'the inspectorate') concerning a fine imposed on TTK as a result of illegal waste incineration occurring on land belonging to it and which resulted in air pollution. In

its administrative decision to reject TKK's request of administrative review of the fine, the inspectorate took the view that the incineration of waste in an open space had caused an environmental hazard. According to the law on environmental protection, persons who own or are in possession of the property at the material time are to be held jointly and severally liable, except where the owner can prove beyond reasonable doubt that it cannot be held responsible. Given that the lessee of the land had died, the Lower Environmental Protection Agency maintained that it was fully entitled to hold TTK responsible. The national court hearing the dispute asked, in essence, whether the provisions of the Directive, read in light of the Polluter Pays Principle, must be interpreted as meaning that they preclude national legislation, such as that at issue in the main proceedings, which identifies, in addition to operators using the land on which unlawful pollution has been produced, another category of person which is jointly liable for such environmental damage, namely the owners of the land, without it being necessary to establish a causal link between the conduct of the owners and the pollution found to have occurred. moreover, it wanted to know whether the Directive allowed the imposition of a fine.

Key Findings

46 By contrast, if the referring court should find that the air pollution at issue in the main proceedings has also caused damage or given rise to an imminent threat of such damage to water, land or protected natural species or habitats, such air pollution would come within the scope of Directive 2004/35.

53 It is apparent from all of the foregoing that the liability mechanism established by Directive 2004/35 is founded on the precautionary principle and on the polluter-pays principle. To that end, that directive places operators under a duty both to prevent and to remedy environmental damage (see, inter alia, judgment of 9 March 2010, *ERG and Others*, C-379/08 and C-380/08, EU:C:2010:127, paragraph 75).

54 In the present case, it is not in dispute that TTK was held liable in its capacity not as operator, but as owner of the land on which the pollution occurred. It also appears—this being a matter for the referring court to verify—that the competent authority imposed a fine on TTK and did not also require it to undertake preventive or remedial measures.

55 It is therefore apparent from the documents submitted to the Court that the provisions of Hungarian legislation applied to TTK do not form part of those which implement the liability mechanism established by Directive 2004/35.

56 However, it must be noted that Article 16 of Directive 2004/35 grants Member States the power to maintain or adopt more stringent provisions in relation to the prevention and remedying of environmental damage, including the identification of additional activities to be subject to the prevention and remediation requirements of that directive and the identification of additional responsible parties.

68 Accordingly, the answer to the second question is that Article 16 of Directive 2004/35 and Article 193 TFEU must be interpreted, to the extent that the situation at issue in the main proceedings comes within the scope of Directive 2004/35, as not precluding national legislation, such as that at issue in the main proceedings, pursuant to which the owners of land on which unlawful pollution has been produced are not only held to be jointly liable, alongside the persons using that land, for such environmental damage, but may also have fines imposed on them by the competent national authority, provided that such legislation is appropriate for the purpose of contributing to the attainment of the objective of more stringent protection and that the methods for determining the amount of the fine do not go beyond what is necessary to attain that objective, this being a matter for the national court to establish.

On the Inclusion of Chromium Trioxide to Annex XIV to the REACH Regulation

Judgment of the Court (Sixth Chamber) of 13 July 2017 In Case C-651/15P – *Verein zur Wahrung von Einsatz und Nutzung von Chromtrioxid und anderen Chrom-VI-Verbindungen in der Oberflächentechnik eV* (*VECCO*) *and Others*

Subject Matter and Judgment

This appeal case originated from the request made by VECCO and other appellants seeking to have set aside the judgment of the General Court of the European Union in case T-360/13, VECCO and Others v Commission, by which that court dismissed their action for partial annulment of Commission Regulation (EU) No 348/2013 adding, among others, chromium trioxide to Annex XIV to the REACH *Regulation, without any exemptions under Article 58(2) of that regulation being granted for certain uses or categories of uses of that substance. The Court of Justice dismisses the action.*

On the Concept of 'Decision-making Process' in the Context of Access to Environmental Information and Exceptions Thereto

Judgment of the Court (Fifth Chamber) of 13 July 2017 in Case C-60/15P – *Saint-Gobain Glass Deutschland GmbH*

Subject Matter

This appeal case originated from the request made by Saint-Gobain Glass Deutschland GmbH ('Saint-Gobain'), asking the Court to set aside the judgment of the General Court of the European Union in Case T-476/12, Saint-Gobain Glass Deutschland v Commission, by which that court dismissed its action for annulment of the Commission's decision of 17 January 2013 refusing full access to the list communicated by the Federal Republic of Germany to the Commission containing information relating to certain installations of Saint-Gobain, situated on German territory, relating to provisional allocations and activities and capacity levels in relation to carbon dioxide (CO^2) emissions between 2005 and 2010, the efficiency of the installations and the annual emission quotas provisionally allocated for the period between 2013 and 2020. In support of its appeal, Saint-Gobain puts forward, in essence, two grounds of appeal. Most importantly, the first ground, divided into two parts, is based on an incorrect interpretation of the first subparagraph of Article 4(3) of Regulation No 1049/2001, read in conjunction with the second sentence of Article 6(1) of Regulation No 1367/2006, in that the General Court, first, made an extensive interpretation of those provisions and, second, did not hold that, in the case before it, there was an overriding public interest justifying disclosure of the environmental information requested.

Key Findings

75 The General Court's interpretation of the first subparagraph of Article 4(3) of Regulation No 1049/2001, confusing as it does the concepts of decision-making process and administrative procedure, has the effect of expanding the scope of the exception to the right of access provided for by that provision to the point where it allows a European Union institution to refuse access to any document, including documents containing environmental information, held by that institution, in so far as that document directly relates to matters dealt with as part of an administrative procedure pending before that institution.

76 Yet the concept of 'decision-making process' referred to in that provision must be construed as relating to decision-making, without covering the entire administrative procedure which led to the decision.

86 Given the foregoing considerations, the conclusion is that, in not having interpreted the first subparagraph of Article 4(3) of Regulation No 1049/2001 strictly as required by the second sentence of Article 6(1) of Regulation No 1367/2006, the General Court erred in law.

87 Consequently, as the first part of the first ground of appeal is well founded, the judgment under appeal must be set aside, without its being necessary to examine the second part of the first ground of appeal or the second ground of appeal.

On the Validity of Decision 2011/278/EU on the Allocation of Greenhouse Gas Emission Allowances

Judgment of the Court (First Chamber) of 26 July 2017 in Case C-80/16 – *ArcelorMittal Atlantique et Lorraine SASU*

Subject Matter and Judgment

This request for a preliminary ruling concerns the validity of Commission Decision 2011/278/EU determining transitional Union-wide rules for harmonised free allocation of emission allowances. ArcelorMittal Atlantique et Lorraine SASU, an operator of greenhouse gas-emitting installations, contested the legality of the decree adopted by the ministre de l'Écologie, du Développement durable et de l'Énergie (Minister for Ecology, Sustainable Development and Energy, France, 'the Minister'), implementing Decision 2011/287/EU. The tribunal administratif de Montreuil (Administrative Court, Montreuil, France) hearing the case decided to stay the proceedings and refer the matter to the court of Justice. The Court of Justice revealed nothing that could affect the validity of Commission Decision 2011/278/EU.

On the Regularisation of Plants Built without an EIA

Judgment of the Court (First Chamber) of 26 July 2017 in Joined Cases C-196/16 and C-197/16 – *Comune di Corridonia and Others*

Subject Matter

The present requests for a preliminary ruling concern the interpretation of the Environmental Impact Assessment Directive. These requests have been made in the context of proceedings between, on the one hand, the Comune di Corridonia and other municipalities and, on the other hand, the Provincia

di Macerata (*Province of Macerata, Italy*), *concerning decisions by which that province found that plants for the generation of electrical energy from biogas belonging to VB101 Società Agricola Srl* (*'VB101'*) *and VB102 Società Agricola Srl* (*'VB102'*) *were compliant with environmental standards. Both establishments had been built without an environmental assessment, but their authorisation had been annulled because the law exempting them from an environmental impact assessment was in breach of the Directive according to the Italian Council of State. Upon resubmission of the authorisation requests the environmental impact assessments then made concluded that both plants were compatible with environmental requirements. Several municipalities challenged these decisions leading the Italian court to ask whether Article 2 of Directive 2011/92, in circumstances such as those in the main proceedings, mean that the failure to carry out an environmental impact assessment of a plant project required pursuant to Directive 85/337 cannot be regularised, following the annulment of consent granted in respect of that plant, by such an assessment being carried out after that plant has been built and has entered into operation.*

Key Findings

34 However, neither Directive 85/337 nor Directive 2011/92 contains provisions relating to the consequences of a breach of that obligation to carry out a prior assessment.

37 The Court has, however, held that EU law does not preclude national rules which, in certain cases, permit the regularisation of operations or measures which are unlawful in the light of EU law (judgments of 3 July 2008, *Commission* v *Ireland*, C-215/06, EU:C:2008:380, paragraph 57; of 15 January 2013, *Križan and Others*, C-416/10, EU:C:2013:8, paragraph 87; and of 17 November 2016, *Stadt Wiener Neustadt*, C-348/15, EU:C:2016:882, paragraph 36).

38 The Court has made it clear that such a possible regularisation would have to be subject to the condition that it does not offer the persons concerned the opportunity to circumvent the rules of EU law or to dispense with their application, and that it should remain the exception (judgments of 3 July 2008, *Commission* v *Ireland*, C-215/06, EU:C:2008:380, paragraph 57; of 15 January 2013, *Križan and Others*, C-416/10, EU:C:2013:8, paragraph 87; and of 17 November 2016, *Stadt WienerNeustadt*, C-348/15, EU:C:2016:882, paragraph 36).

39 Consequently, the Court has held that legislation which attaches the same effects to regularisation permission, which can be issued even where no exceptional circumstances are proved, as those attached to

prior planning consent fails to have regard for the requirements of Directive 85/337 (see, to that effect, judgments of 3 July 2008, *Commission* v *Ireland*, C-215/06, EU:C:2008:380, paragraph 61, and of 17 November 2016, *Stadt Wiener Neustadt*, C-348/15, EU:C:2016:882, paragraph 37).

41 Furthermore, an assessment carried out after a plant has been constructed and has entered into operation cannot be confined to its future impact on the environment, but must also take into account its environmental impact from the time of its completion.

On Urban Waste Water Treatment in Certain Greek Agglomerations

Judgment of the Court (Tenth Chamber) of 14 September 2017 in Case C-320/15 – *European Commission v Hellenic Republic*

Subject Matter

By this infringement procedure, the European Commission requested the Court of Justice to declare that, by not having ensured an appropriate level of treatment of urban waste water from the agglomerations of Prosotsani, Doxato, Eleftheroupoli, Vagia, Galatista, Desfina and Chanioti, the Hellenic Republic has failed to fulfil its obligations under the Urban Waste Water Treatment Directive.

Key Findings

25 It follows that, as at the date set in the additional reasoned opinion, discharges of urban waste water from the agglomerations of Prosotsani, Doxato, Eleftheroupoli, Vagia and Galatista—as the Hellenic Republic has conceded—did not comply with Article 4(1) of Directive 91/271.

35 In the light of all the foregoing considerations, it must be held that, by not having ensured secondary or equivalent treatment of urban waste water from the agglomerations of Prosotsani, Doxato, Eleftheroupoli, Vagia and Galatista

On the Taxation of Electricity Generated by Wind Power Plants

Judgment of the Court (First Chamber) of 20 September 2017 in Joined Cases C-215/16, C-216/16, C-220/16 and C-221/16 – *Elecdey Carcelen SA and Others*

Subject Matter

These requests for a preliminary ruling concern a levy imposed on wind power plants designed to produce electricity by the the Comunidad Autónoma de

Castilla-La Mancha (*Autonomous Community of Castilla-La-Mancha, Spain*). *Elecdey Carcelen SA and other wind power plants operators challenged the legality of this charge. The national court hearing the case asked, in essence, whether the Renewable Energy Sources Directive or Council Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity precludes the application of a levy on wind turbines designed to produce electricity.*

Key Findings

37 It follows that neither Article 3(1) to (3) of Directive 2009/28, read in conjunction with subparagraph (k) of the second subparagraph of Article 2 and Annex I to that directive, nor subparagraph (e) of the second subparagraph of Article 13(1) thereof prohibit Member States from imposing a levy, such as that at issue in the cases in the main proceedings, on wind turbines designed to produce electricity.

51 Consequently, there is no connection between, on the one, hand, the operative event for the levy at issue in the cases in the main proceedings and, on the other, the actual production of electricity by wind turbines, and even less the consumption of electricity generated by them (see, by analogy, judgments of 10 June 1999, *Braathens*, C-346/97, EU:C:1999:291, paragraphs 22 and 23; of 4 June 2015, *Kernkraftwerke Lippe-Ems*, C-5/14, EU:C:2015:354, paragraphs 61 to 65; and of 1 October 2015, *OKG*, C-606/13, EU:C:2015:636, paragraphs 31 to 35).

52 It follows that a levy, such as that at issue in the cases in the main proceedings, does not tax electricity within the meaning of Directive 2003/96.

53 Accordingly, a levy, such as that at issue in the main proceedings, which applies to wind turbines designed to produce electricity, does not fall within the scope of that directive, such as it is as defined in Article 1 and Article 2(1) and (2) thereof.

On the Need of Scientific Evidence to Justify the Reduction of the Size of a Natura 2000 Site

Judgment of the Court (Fourth Chamber) of 19 October 2017 In Case C-281/16 – *Vereniging Hoekschewaards Landschap*

Subject Matter

This request for a preliminary ruling has been made in proceedings between the Vereniging Hoekschewaards Landschap and the Staatssecretaris van Economische Zaken (*State Secretary for Economic Affairs, Netherlands*) (*'the*

State Secretary') *concerning the legality of a decision to reduce the size of a special area of conservation* (*'the* SAC*'*) *which was implemented by Commission Implementing Decision* (EU) *2015/72 adopting an eighth update of the list of sites of Community importance for the Atlantic biogeographical region. According to the Netherlands and the Commission, the inclusion of the Leenheerenpolder in the* SAC *was based on a scientific error as other areas sufficed to achieve the conservation goals of the Haringvliet* SCI*. The Dutch Council of State hearing the case asked, in essence, whether the reduction in the size of the Haringvliet site by excluding the Leenheerenpolder, on the ground that the initial inclusion of the latter in the site was the result of a scientific error, is valid.*

Key Findings

36 As the Advocate General has observed in point 28 of her Opinion, as the inclusion of a site in the list gives rise to the presumption that it is relevant in its entirety from the point of view of the Habitats Directive's objective of conserving natural habitats and wild fauna and flora, a proposal by a Member State to reduce the size of a site placed on that list requires proof that the areas in question do not have a substantial interest in achieving that objective at national level. In addition, the Commission may accept and implement the proposal only if it concludes that those areas are also not necessary from the perspective of the entire European Union.

38 In that respect, the Netherlands Government confirmed, at the hearing, that the Kingdom of the Netherlands had not invoked the existence of a 'scientific error' at the time it submitted to the Commission its proposal to reduce the size of the Haringvliet SCI.

39 Furthermore, for its part, the Commission has provided to the Court no conclusive scientific evidence capable of proving that such an error had vitiated the initial proposal.

40 Therefore, at the occasion of the eighth update of the list of SCIs in the Atlantic biogeographical region by Implementing Decision 2015/72, the Commission could not, lawfully, rely on the existence of an initial scientific error in order to place the Haringvliet site on that list without including the Leenheerenpolder.

41 In the light of the foregoing considerations, it must be held that Implementing Decision 2015/72 is invalid, in so far as, by that decision, the Haringvliet site was placed on the list of SCIs for the Atlantic biogeographical region without the inclusion of the Leenheerenpolder.

On the Inclusion of Acrylamide under the REACH Regulation Framework

Judgment of the Court (First Chamber) of 25 October 2017 in Case C-650/15P – *Polyelectrolyte Producers Group GEIE (PPG) and SNF SAS*

Subject Matter and Judgment

By this appeal, Polyelectrolyte Producers Group GEIE (PPG) and SNF SAS ask the Court of Justice to set aside the judgment of the General Court of the European Union in case T-268/10 RENV, PPG and SNF v ECHA, by which that Court dismissed their action for annulment of the decision of the European Chemicals Agency (ECHA), identifying acrylamide as a substance meeting the criteria laid down in Article 57 of the REACH *Regulation. The Court of Justice dismisses the action.*

On the Classification of Pitch, Coal Tar, High-temperature as an Aquatic Acute 1 and Aquatic Chronic 1 Substance

Judgment of the Court (Sixth Chamber) of 22 November 2017 in Case C-691/15P – *European Commission v Bilbaína de Alquitranes SA and Others*

Subject Matter and Judgment

By this appeal, the European Commission seeks to have set aside the judgment of the General Court of the European Union in case T-689/13, Bilbaína de Alquitranes and Others v Commission, by which the General Court annulled Commission Regulation (EU) No 944/2013 in so far as it classifies pitch, coal tar, high-temperature as an Aquatic Acute 1 and Aquatic Chronic 1 substance. The Court of Justice dismisses the appeal.

Editor's Appraisal of the Reported Case Law

Given the length of the overview of judgments section, I will limit this appraisal to highlight an at times forgotten pattern in the manner in which the Court of Justice addresses the room for discretion of EU and national authorities in the field of EU environmental law. Indeed, the case law assessed in the period under consideration in this appraisal confirms that the most common approach by the Court of Justice to the discretionary power of the Member States and EU institutions under EU environmental law is a functional one, ie

the discretionary power must be functional to the achievement of the environmental goals of the relevant EU measure. Indeed, Case C-142/16, *Commission v Germany*, in the context of nature conservation confirms the case law of the Court in *Briels*[1] and *Orleans.*[2] In short, Article 6(3) of the Habitats Directive sets strict conditions for appropriate assessments, significantly restricting Member States' discretion as regards the classification of measures aiming at reducing environmental harms of plans and projects as mitigation measures.[3] To remain within the realm of the Habitats Directive, in Case C-281/1, *Vereniging Hoekshewaards Landschap*, the Court of Justice restricted Member States and Commission discretion to reduce the size of Natura 2000 sites by underlying the need of scientific evidence to sustain restrictions. In a different, but related manner, in the C-529/15, *Gert Folk*, the Court of Justice restricted the discretion of national authorities to rely on the permit defense under the Environmental Liability Directive. Permit authorizations cannot lead to the reduction of the scope of application of the Directive. On the contrary, in Case C-129/16, *Túrkevei Tejtermelő*, the Court of Justice seems to recognize some discretionary power to the Member States in the context of the Environmental Liability Directive when it comes to the adoption of more stringent protective measures to redress environmental damage. National authorities are allowed to hold land owners responsible to redress environmental damage caused by operators renting the land. Similarly, in Case C-335/16, *VG Čistoća*, the Court of Justice recognized some discretion to Member States on how to calculate and allocate the costs associate to waste treatment. A discretion confirmed as regards the taxation of electricity produced from renewable energy sources in Joined Cases C-215/16, C-216/16, C-220/16 and C-221/16, *Elecdey Carcelen SA and Others*. The picture that emerges from the above is that discretion is allowed to the extent that it is functional to the achievement of the environmental goals of the relevant EU environmental measure. This finding should not come as a surprise given the teleological approach of the Court of Justice in the interpretation of EU (environmental) law. Still, it remains an important finding given the reluctance of certain parties to interpret EU environmental law in light of its environmental goals, and give precedence to short term economic interests.

1 Case C-521/12, *T.C. Briels and Others v Minister van Infrastructuur en Milieu* [2014] ECLI:EU:C:2014:330.

2 Joined Cases C-387/15 and 388/15, *Hilde Orleans and Others v Vlaams Gewest* [2016] ECLI:EU:C:2016:583.

3 See recently hierover, H. Schoukens, 'Habitats Restoration Measures as Facilitators for Economic Development within the Context of EU Habitats Directive: Balancing No Net Loss with the Preventive Approach?' (2017) 29(1) *Journal of Environmental Law*, pp. 47–73.

It is in this light that the judgment in Case C-488/15, *Commission v Bulgaria*, is a welcome confirmation of the jurisprudential line set by the Court of Justice in the *Janacek*,[4] *RWE*[5] and *ClientEarth*[6] cases. To Ludwig Kramer the honor of underlying the importance of this judgment in his annotation.

4 Case C-237/07, *Janecek v Freistaat Bayern*, ECLI:EU:C:2008:447.

5 Joined cases C-165/09 to C-167/09, *Stichting Natuur en Milieu en anderen v College van Gedeputeerde Staten van Groningen* (C-165/09) *and College van Gedeputeerde Staten van Zuid-Holland* (C-166/09 en C-167/09), ECLI:EU:C:2011:348 (RWE).

6 C-404/13, *ClientEarth*, EU:C:2014:2382.