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Recent Developments in Sweden in the field of environmental law since May 2017

Introduction

The Parliamentary situation in Sweden still is very complicated, why the minority government – Social democrats and the Green party – is acting very cautiously. This is the reason for why very little legislation in the environmental area has been proposed for the last 12 months. Although, as we are getting closer to the 2018 elections (9 September), at least some important legislative steps have been forwarded to the Parliament. In addition to that, I will as usual report on a couple of important judgements in the Swedish courts. But let's begin with the relations between Sweden and EU. As most Member States are non-transparent in their relationship with the EU Commission, it may be interesting to get some information from a country where the situation is opposite.

Sweden and the EU Commission

As of today, the EU Commission has initiated 42 formal infringement cases against Sweden, out of which 7 belong to the field of environmental law. Of these, 4 are Letters of Formal Notice (LFN) and concerns energy performance in buildings, environmental objectives in water bodies and the definition of water services according to WFD, waste and sewage plants. Two Reasoned Opinions (RO) are delivered, one on the wolf hunt and another on ambient air quality in a number of cities, mostly focusing on PM10. In addition to this, the Commission has also issued a LFN according to Article 260 for fines concerning another issue in relation to sewage plants. Along with this, 29 informal communications are opened within EU Pilot, out of which 12 is under the responsibility of the Ministry of Energy and the Environmental. The Ministry has also received a number of questions from different DGs on issues related to EU law and the environmental, 5 from DG ENVI and 7 from DG CLIM, DG GROWTH, DG SANTE and DG ENERGI taken together. The informal cases concerns carbon capture and storage (CCS), Natura 2000, Air Quality Standards, waste (Waste Framework Directive), WEE and Reach. In the last mentioned case, the Commission objects to our call for "kindergartens free from chemicals", where we use limit values for kids under 1,5 years for all groups with children up to 6 years. According to the Commission, this is in breach with the rules on free trade and competition, as children over 1,5 years are allowed to be exposed to higher levels of chemicals..! As a general reflection, one may note that the Commission recent years seems to prefer means of informal contacts (emails, meetings, etc.) over EU Pilot, which I think raises transparency concerns.

The other way around, Sweden has sued the Commission once again, this time for allowing a Canadian firm to put into the EU market paints containing lead chromates (T-837/16). The reason given for this is that paint containing lead pigments have been banned in EU for some years due to health concerns, and there are alternatives which should be used according to the substitution principle (http://www.ipen.org/news/sweden-suing-commission-over-lead-chromates-authorisation). For now, Finland, Denmark and the European Parliament have intervened on behalf of Sweden. I dare say that the Commission was taken by surprise and it is reported – whether this can be explained by the Swedish action or not – that the ECHA is underway improving the procedure for such licensing, perhaps even involving the ENGO community.

Finally, it should be noted that Sweden intervenes in quite a few cases lying close to the heart of the Government. These are cases with similar controversies we have with the Commission (C-525/12; water services), cases which are important for domestic legislation on that particular field of law (C-472/14 on the register of the National Chemicals Agency, C-573/12 on the certificate for renewable energy) or concerns issues of principal importance for us (C-442/14, C-673/13 P, T-51/15, T-716/14 on transparency issues and C-626/15 and C-659/16 on the competence of the Commission to decide on matters concerning protected areas in the Wedell Sea in the Antarctic).

Legislation, proposals and controversies

A proposal for a reform of the Environmental Code about the permit regime for hydro power is put on the Parliament's table by the Government. The obvious background to this move is the infringement case against Sweden on the implementation of WFD (2007/2239) and the "water cases" in the CJEU (mainly C-461/13 *Weser* (2015) and C-346/14 *Schwarze Sulm* (2016), but some extent also C-529/15 *Gert Folk* (2017)). The package contains rules on compulsory updating requirements for permits given before 1998 when the Code came into force, a national plan for the prioritization of that work and a national fund. The latter will organized and managed by the hydro power industry and the money will come from levies on electricity produced therein in order to avoid criticism from the Commission about illegal state aid. The national plan aims at having reviewed and – if need be – updated all permits for hydro power in the country by 2027, a timeframe which the Commission apparently has accepted. A national review on those water bodies that are classified as Heavily Modified (HMW) will also commence, aiming at performing such a classification for more reasons than just hydro power, such as drinking supply, irrigation, recreation (see main report to Avosetta 2018). All in all, the reform package has been created to balance between the requirements from EU law and the interests of the small scale hydro power industry. This way, many very small installations will be kept alive by the industry as a whole. There are also strong concerns that the Government will try to classify a large number of those activities as HMW, although they are without any real importance for the energy supply as a whole.

National case-law

The development of windfarms has been very strong in Sweden recent years. It is mostly the big wind farms at sea or in the mountains with turbines stretching over 250 meters which are truly profitable with today's prices on electricity. The prognosis is that we will

meet the renewable goals for 2020 by far (almost 18 GwH in 2017, actually passing Denmark in production capacity). Along with the strong development comes raising conflicts. Last year, species protection was at the centre of the debate, whereas noise disturbances have been highlighted this year. Especially concerns about cumulative effects from several wind farms – in one case five of them!! – have occupied the courts and challenged their ingenuity in deciding joint conditions or conditions that take into consideration impacts from different sources. In addition to this, the cumulative effects on species protection also begins to raise interest, with the focus on how to secure "continued ecological functionality (CEF) of areas vital for birds of prey and forest hens, as well as for species of bats. Another crucial question is how to ensure that the EIA/AIA in cases where the original investigation was performed many years ago and the operator want to renew the decision on account of rising electricity prices.

Recent years' wolf hunt has been cautious and the Swedish/Norwegian population has stabilized, but on a level that raises concerns about the conservation status of the species. The Norwegian hunt is also quite controversial, especially as there is no guarantee that the individuals which are most valuable for keeping up the genetic status of the joint population "goes west" when they pass the boarder. Be that as it may, the Finnish Supreme Administrative Court requested the CJEU for a preliminary ruling on the wolf hunt this winter, although the questions posed are outdated in that country, but highly relevant for the Swedish wolf hunt (C-674/17).

Another case that raised public attention even outside the Swedish boarders was the application for end storage of nuclear waste in Forsmark. In its decision, the Land and Environmental Court in Nacka remitted the case to the Government, stating that the investigation of the durability of the copper capsules for the ground repository was questionable (2018-01-23; case No M 1333-11). As the Swedish Radiation Authority had put a lot of effort and not so little prestige in to show that the method is reliable, it will be very interesting to see how the Government will balance between this and the rather sharp criticism from the court. The Government's decision is expected in a year or so.

Finally some words about the *Bunge* case, the continuing serial about a lime stone quarry on Gotland, one of the large island in the Baltic Sea. The first application came in 2006 and the case has been wandering up and down the court levels, mostly due to the stubbornness of the Land and Environmental Court of Appeal in NOT taking into account the requirements of Article 6(3) of the Habitats Directive, namely that the assessment of the impacts on the Natura 2000 site in question should be "complete, exact and final", also considering cumulative effects. After the Supreme Court's judgement on this issue (NJA 2013 s. 613), the case went back to the lower courts for such an assessment. Last summer during ongoing permit procedure, the Government decided to list the quarry area as part of the surrounding Natura 2000 site in order to meet the criticism from the Commission.[1] This decision by the Government was in turn challenged by the applicant Nordkalk, which requested judicial review in the Supreme Administrative Court (HFD), claiming that there had been a breach with the fair trial requirements of Article 6 of ECHR. In a rather short judgement, the HFD (2017-06-29; case No 6337-15) rejected the application. First, the Court noted that the Member States of EU are required to nominate Natura 2000 sites from scientific reasons only (C-371/98 *First Corporate Shipping*

[1] The Governments decision was by some caracterised as "the last stand of the Green party", excluding all other moves on behalf of the environment for the rest of the mandate period.

(2000), C-226/08 *Stadt Papenburg* (2010)), albeit with a certain discretion (C-67/99 *Com v Irland* (2001)). When evaluating if such a decision is in breach with Article 6 of ECHR, the Strasbourg court has stressed that the legislator cannot intervene in ongoing procedures unless there are overriding public interests (*Azienda Agricola Silverfunghi S.A.S. and others v. Italy*, ECtHR 2014-06-24). However, when the case concerns administrative acts on an issue of public interest, the ECtHR in a number of cases has founded in favor with the State, thus accepted that such an intervention with ongoing procedures are not in breach with the fair trial requirements (*Varga v. Slovakia*, ECtHR 2012-07-10 and *Gorraiz Lizarraga and others v. Spain*, ECtHR 2004-04-27). In the latter case, the ECHR made clear that the common core for those situations where the intervention has not been accepted is that the State's action aimed at impacting ongoing judicial proceedings, to block such proceedings or to render executable decisions null and void. In contrast, in the *Lizarraga* case, the legislation was launched in order to promote regional development, which had an impact on an ongoing procedure about the building of a dam. This was, according to the ECHR, an area where the public interest is prominent, why changes and amendments to the legislation must be accepted. According to the HFD, this situation equaled the one in the Bunge case. The Government had decided to list the area as part of its Union obligations and the decision was based on scientific evidence, which HFD assessed to be correct. The issue whether such an area should be protected is a question of strong public concern, even without Union obligations in the background. Thus, as the decision aimed at the protection of certain nature types, it could not be said to infringe upon the fair trial requirements of ECHR. Accordingly, the case – which had been resting in the Land and Environmental Court of Appeal for more than a year – was resumed and a judgement is expected to come this very summer. I have learned not to make any forecasts on the outcome of Bunge, but one can safely say that this time the decision is final. My guessing is that the permit application will be turned down, but also that Nordkalk will find some consolation in damages for the delay of procedure according to *Matti Eurén v. Finland* (ECtHR 2010-01-19). But that is, as we say here in the North, "small potatoes" in comparison with the extraction value of the quarry, which has been assessed to 200 M€..!

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