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Recent Developments in the environmental area in Sweden since May 2015

Introduction

The Parliamentary situation in Sweden 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. In addition to this, the Green Party has experienced a number of humiliating defeats within the Government in some of their "matters of the hart". The decision to further on with the license hunt on wolves – basically spitting the Commission in the face during the ongoing infringement proceedings – was perhaps the first one, but Vattenfall's sell out of the coal mines in Germany was certainly not the last. Be that as it may, the passive position of the Government in environmental issues has been striking over the last year. My report is therefore quite meagre and the "juicy bits" come from case law. This is also why the summary of the General Court's judgement in the biocidal products case and the Supreme Administrative Court's judgement on the relationship between the Aarhus Convention and the EU principle of judicial protection is more comprehensive than usual in this context.

Sweden and EU

Sweden has been involved in a couple of cases in the CJEU. Most importantly, in 2014 Sweden – with the support from Denmark, France, the Netherlands, Finland, the European Parliament and the Council of the European Union – sued the European Commission, for not having adopted delegated acts concerning the scientific criteria for the determination of endocrine-disrupting properties (T-521/14). The Commission opposed the action, claiming that the time frame in Regulation (528/2012) on biocidal products was not binding and that the scientific evaluations must first be supplemented by an economic impact assessment in order to analyse the effects on industry. In December 2015 – only a month after the hearing of the case – the General Court declared that the Commission, by not having adopted delegated acts to specify scientific criteria for the determination of endocrine-disrupting properties, had failed to fulfil its obligations under the first subparagraph

of Article 5(3) of Regulation (528/2012). The most interesting parts of the judgement read as follows:[1]

> 61. Troisièmement, d'une part, il convient de relever que, postérieurement à l'adoption de ce règlement, le législateur n'a pas modifié ou abrogé, par un quelconque texte contraignant, la date limite figurant à l'article 5, paragraphe 3, premier alinéa, du règlement n° 528/2012 pour l'adoption des actes délégués visés par cette disposition. À cet égard, il importe de noter que, ainsi que cela a été indiqué par cette institution lors de l'audience en réponse aux questions du Tribunal, la Commission n'a pas proposé au législateur de modifier ledit règlement afin de procéder au report de cette date. D'autre part, admettre l'interprétation dudit article proposée par la Commission reviendrait à remettre en cause le système de délégation de pouvoir prévu par l'article 290 TFUE. En effet, l'article 290, paragraphe 1, premier alinéa, TFUE prévoit qu'un acte législatif peut déléguer à la Commission le pouvoir d'adopter des actes non législatifs de portée générale qui complètent ou modifient certains éléments non essentiels de l'acte législatif. Le second alinéa de cette disposition précise que les actes législatifs délimitent explicitement les objectifs, le contenu, la portée et la durée de la délégation de pouvoir. Or, en l'espèce, l'acte législatif en cause, à savoir le règlement n° 528/2012, a, en son article 5, paragraphe 3, premier alinéa, clairement fixé pour objectif à la Commission d'adopter, au plus tard le 13 décembre 2013, des actes délégués en ce qui concerne la spécification des critères scientifiques pour la détermination des propriétés perturbant le système endocrinien. Lors de l'audience, le Parlement et le Conseil ont indiqué, en réponse à une question du Tribunal, qu'ils n'avaient pas révoqué la délégation de pouvoir visée à cet article, comme le permet l'article 83, paragraphe 3, dudit règlement. Dans ces conditions, admettre que la date fixée expressément par cette disposition ne devrait pas être considérée comme étant contraignante reviendrait à mettre en cause la délégation ainsi consentie par le législateur à la Commission.
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> 67. Dans ces conditions, il convient d'écarter l'allégation selon laquelle il aurait été contraire au principe de sécurité juridique d'adopter des critères en vertu de l'article 5, paragraphe 3, premier alinéa, du règlement n° 528/2012, applicables uniquement dans le cadre dudit règlement, de soumettre ensuite au comité permanent de la chaîne alimentaire et de la santé animale des propositions de mesures concernant les critères scientifiques spécifiques pour la détermination des propriétés de perturbation endocrinienne conformément au point 3.6.5 de l'annexe II du règlement n° 1107/2009 et, concomitamment, d'élaborer des critères scientifiques harmonisés fondés sur le danger, applicables horizontalement conformément au septième programme d'action, en vue de leur adoption ultérieure. En effet, ainsi qu'il découle de ce qui précède, ni le règlement n° 1107/2009, ni le septième programme d'action ne remettent en cause l'obligation découlant de l'article 5, paragraphe 3, premier alinéa, du règlement n° 528/2012.
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> 72. Dans ce contexte, il importe de relever que, en adoptant le règlement n° 528/2012, le législateur a procédé à une mise en balance de l'objectif d'amélioration du marché intérieur et de celui de la préservation de la santé humaine, de la santé animale et de l'environnement, que la Commission se doit de respecter et ne saurait remettre en cause. À cet égard, il échet de constater que, certes, ledit règlement a pour objectif, ainsi qu'il ressort de son article 1er, paragraphe 1, et comme le relève la Commission,

[1] In French, as I gather that most members of Avosetta don't read Swedish. For those of you who don't read either of the two languages, the press release from the General Court will have to suffice; http://curia.europa.eu/jcms/jcms/P_188292/.

d'améliorer le fonctionnement du marché intérieur par l'harmonisation des règles concernant la mise à disposition sur le marché et l'utilisation des produits biocides. Toutefois, ainsi qu'il découle de la même disposition, il vise également à assurer un niveau élevé de protection de la santé humaine et animale et de l'environnement. En outre, alors que l'article 4 du règlement n° 528/2012 énonce les conditions d'approbation des substances actives, l'article 5, paragraphe 1, de ce règlement prohibe l'approbation des substances actives qui, notamment, sur la base des critères établis en vertu du paragraphe 3, premier alinéa, du même article, sont considérées comme ayant des propriétés perturbant le système endocrinien pouvant être néfastes pour l'homme. L'article 5, paragraphe 2, de ce même règlement prévoit néanmoins des exceptions à cette interdiction, en particulier lorsque la non-approbation de la substance active aurait des conséquences négatives disproportionnées pour la société par rapport aux risques que son utilisation représente pour la santé humaine, pour la santé animale et pour l'environnement. Quant à l'article 5, paragraphe 3, premier alinéa, du règlement n° 528/2012, il poursuit, eu égard à sa nature et à sa portée, l'objectif d'assurer un niveau élevé de protection de la santé humaine et animale ainsi que de l'environnement, en excluant l'approbation des substances actives qui, sur la base des critères établis par les actes délégués visés par cette disposition, sont considérées comme ayant des propriétés perturbant le système endocrinien pouvant être néfastes pour l'homme, conformément au paragraphe 1, sous d), du même article. Force est donc de constater qu'il découle tant de l'article 1er, paragraphe 1, du règlement n° 528/2012 que d'une lecture d'ensemble de ce dernier que celui-ci traduit l'équilibre souhaité par le législateur entre l'amélioration du fonctionnement du marché intérieur par l'harmonisation des règles concernant la mise à disposition sur le marché et l'utilisation des produits biocides, d'une part, et la préservation d'un niveau élevé de protection de la santé humaine et animale et de l'environnement, d'autre part. Or, dans le cadre de la mise en œuvre des pouvoirs qui lui sont délégués par le législateur, la Commission ne saurait remettre en cause cet équilibre, ce que cette institution a d'ailleurs en substance admis lors de l'audience. Dans ces conditions, la circonstance, évoquée par la Commission, que ledit règlement vise également à améliorer le fonctionnement du marché intérieur ne saurait en aucun cas, à elle seule, remettre en cause l'obligation claire, précise et inconditionnelle figurant à l'article 5, paragraphe 3, premier alinéa, du règlement n° 528/2012, ni permettre à la Commission de s'y soustraire. Il convient, pour les mêmes motifs, d'écarter les allégations de la Commission relatives aux prétendues incidences sur la libre circulation des produits biocides.

73. S'agissant, d'autre part, des critiques de nature scientifique, il doit être constaté que la Commission a indiqué, dans sa défense, que, en octobre 2013, lors d'une réunion entre la conseillère scientifique principale du président de la Commission et des scientifiques, les participants avaient conclu qu'il existait un accord scientifique concernant l'identification des perturbateurs endocriniens, même si certains éléments qui ne relevaient pas de l'identification elle-même étaient encore incertains. La Commission a précisé que ces conclusions allaient dans le sens des travaux du JRC et de l'EFSA et étaient conformes à une avant-proposition de critères scientifiques qu'elle avait élaborée, de sorte qu'il aurait été mis fin à la discussion scientifique. Toutefois, lors de l'audience, la Commission a indiqué que cette affirmation ne représentait pas sa position et qu'il convenait de prendre en compte, à cet égard, les affirmations figurant dans la duplique, ce dont il a été pris acte dans le procès-verbal d'audience. Quoi qu'il en soit, à supposer même qu'il n'existait pas de consensus scientifique en octobre 2013, comme cela est soutenu en substance dans la duplique, il est à noter que, ainsi que cela a été relevé au point 61 ci-dessus, la Commission n'a pas proposé au législateur de

> modifier le règlement n° 528/2012 aux fins de procéder au report de la date figurant à l'article 5, paragraphe 3, premier alinéa, de celui-ci, dans le but, notamment, de bénéficier d'un délai supplémentaire pour mener les travaux permettant la spécification des critères scientifiques en cause, le cas échéant sur la base de l'avant-proposition de critères élaborée par la DG « Environnement » (voir point 13 ci-dessus), de l'avis de l'EFSA concernant les critères scientifiques applicables aux perturbateurs endocriniens (voir point 14 ci-dessus) et du rapport du groupe consultatif d'experts sur les perturbateurs endocriniens (voir point 15 ci-dessus). Au demeurant, il n'a pas été démontré qu'un consensus scientifique ait été nécessaire pour la spécification des critères scientifiques pour la détermination des propriétés perturbant le système endocrinien visée par l'article 5, paragraphe 3, du règlement n° 528/2012, la Commission demeurant libre de favoriser une approche scientifique par rapport à une autre, sous réserve du respect des dispositions dudit règlement.

The Commission's reaction on the judgement is interesting. First, they will NOT appeal the judgment to CJEU and second, they will still undertake the assessment of the economic impacts on the market of the required action, which will take another year. Meeting the press the day after the judgement, the Commission declared:

> The Commission takes note of the judgement. We need however to stress that the impact assessment is now on track. The first phase of the assessment is ongoing and others will start in the early 2016 building on the result of the first phase. So the objective is to conclude the impact assessment in 2016 and the decision making process concerning the criteria for identifying endocrine disruptors will follow therafter.

However, at the same meeting, the Commission also confessed that it was impossible to predict when the decision on the criteria can be expected. This attitude from the Commission was thereafter criticised by a number of MPs, but defended by Commissioner Vella at the December meeting of the Environmental Council. Tbc, and it would not be very surprising if Sweden decides to follow up with another legal action against the Commission on this issue…

Another interesting case involving Sweden concerned the national product register on chemicals (C-472/14). The company Canadian Oil was prosecuted for not having notified an import to the Swedish chemicals register and the Supreme Court asked for a preliminary ruling from the CJEU on whether such an obligation was in breach with the free movements of goods, as there already exists a requirement to register the same products with the European Chemicals Agency. CJEU answered in the negative, stating that:

> Regulation (EC) No 1907/2006 (REACH), establishing a European Chemicals Agency (…), must be interpreted as not precluding national legislation which requires an importer of chemical products to register those products with the competent national authority when that importer is already under an obligation under that regulation to register those same products with the European Chemicals Agency, provided that that registration with the competent national authority does not constitute a pre-condition to the placing of those products on the market, it concerns information different from that required by that regulation and contributes to the achievement of the objectives pursued by that regulation, in particular those of ensuring a high level of protection of human health and the environment and the free movement of such substances in the internal

market, in particular, by the implementation of a system of controls of the safe management of such products in the Member State concerned and the evaluation of that management, which it is for the referring court to ascertain. The combined provisions of Articles 34 TFEU and 36 TFEU must be interpreted as not precluding the notification and registration requirement for chemical products, as provided for in the national legislation at issue in the main proceedings.

Legislation, proposals and controversies

This spring, the Government left a proposition to the Parliament to implement a "waste hierarchy" in Chapter 15 of the Environmental Code (1998:808). The requirement for such a hierarchy comes from the Framework Directive on Waste (2008/98), where the Member States are required to apply the following waste management scheme: First of all, prevention in all kinds of production aiming at the minimizing waste, minimizing dangerous substances in products and materials and minimizing the negative effects from waste. Second, if waste cannot be avoided, the following priority order shall apply: 1. preparing for re-use, 2. recycling, 3. recovery, and 4. disposal. The Government expects that the new waste hierarchy will result in more waste prevention measures will be undertaken in industry and production. When applying for a permit according to the Environmental Code, the operator must show how waste will be avoided in the operation. The legislation will be processed in Parliament in June this year.

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity is an international agreement which aims at sharing the benefits arising from the utilization of genetic resources in a fair and equitable way. It contains provisions on access, benefit-sharing and compliance. It also addresses genetic resources where indigenous and local communities have the established right to grant access to them. Contracting Parties are to take measures to ensure these communities' prior informed consent, and fair and equitable benefit-sharing, keeping in mind community laws and procedures as well as customary use and exchange. The Government proposes to the Parliament to amend the Environmental Code in order to supplement the EU Nagoya Regulation (511/2014), both in substance (in areas not covered by the Regulation) and by penal provisions in order to enforce the Regulation. It will be regarded as a criminal offense to utilize genetic resources neglecting to abide to agreed conditions or not showing due care. The Government is of the opinion that it is not necessary to regulate by express legislation the access to genetic resources in Sweden, due to the public access to land, existing patents law and codes of conduct under CBD.

Furthermore, negotiations have been ongoing since 2011 between Sweden, Finland and Norway concerning a Sami Convention, which is expected to be concluded this year. The Convention aims at strengthening the rights of the Sami people in order to protect and develop their language, culture, land use and reindeer herding enterprises and other social activities, irrespective of national borders. All countries take part in the negotiations with delegations from the Government and the Sami people on equal footing.

There is also an ongoing discussion within the Government on how to adapt the Environmental Code to the CJEU's judgement in the Weser case (C-461/13). This controversy is closely related to the discussion on how to adapt the Swedish system with "eternal water permits" for hydro power operations to the management cycles and updating requirements in the Water Framework Directive (2000/60).[2]

Finally, a Governmental Commission has proposed a "climate law" for Sweden. A framework legislation is discussed, containing an ambitious aim for the administration, using long-term targets for greenhouse gases that are decided by the Parliament. A system for planning, follow-up and information is also part of the legislation, where the Government will be responsible for the measures that are deemed necessary.

National case law

The most controversial environmental cases during the last 12 months have concerned wind farms and the "deliberate criteria" in the Habitats Directive and – as always it seems – access to justice for the public to challenge environmental decision-making.

Wind mills may under certain circumstances have an impact on nearby populations of bats and slow-flying birds such as eagles, kites, ospreys and forest hens. To establish wind farms in the vicinity of nesting areas or resting places of those species may therefore be less desirable. Quite a few permit applications for such operations have accordingly been turned down by the administration recent years with reference to the precautionary principle and the effect on the species' conservation status. This line of reasoning has been challenged by industry, claiming that Sweden has gold-plated the implementation of the Habitats Directive and that the "deliberate criteria" of Article 12 means only direct killing/disturbing of the species, such as hunting or destroying. However, in a series of judgements, the Land and Environmental Court of Appeal has confirmed that if an authority grants a permit for an operation that causes a risk to the species' conservation status, this amounts to "deliberate killing/disturbing.[3] In my understanding, this application of the Habitats Directive is shared by the Finnish Supreme Administrative Court[4] and the German Bundesverwaltungsgericht.[5] It seems also be in line with the reasoning of the Standing Committee of the Bern Convention.[6]

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[2] Those of you who are interested in WFD and the updating issue may find it fruitful to study the infringement case between the EFTA Surveillance Authority (ESA) and Norway on the matter; *Case No: 69544; Complaint against Norway concerning compliance with the Water Framework Directive 2000/60 as regards regulated water courses*. In contrast to the secrecy making within EU, all communications in that case are published (in English) on either the website of ESA (http://www.eftasurv.int/press--publications/public-documents/) or the Norwegian Water Portal (www.vannportalen.no).

[3] MÖD 2013:13, MÖD 2014:47, MÖD 2014:48, MÖD 2015:3, MÖD 2016:1, MÖD 2015-12-08; M 6960-14 and MÖD 2016-02-03; M 2114-15.

[4] HFD:2015:3.

[5] A list of German cases concerning wind farms and species protection is posted on my home page, see www.jandarpo.se /Övrigt material: *Urval av tyska domar om artskydd: Bundesamt für Naturschutz.*

[6] Recommendation No. 144 (2009) of the Standing Committee, adopted on 26 November 2009, on the wind park in Smøla (Norway) and other wind farm developments in Norway.

As mentioned in the answers to the questionnaire, the Swedish courts have been very proactive in promoting of a wide access to justice for the public in environmental matters. In part, this may be explained by – or at least be seen in the light of – the striking passivity and even reluctance from the legislator on this issue. Commonly, the courts have been able to apply the "so as to enable formula" according to *The Slovak Brown Bear* in order to grant standing for individuals and ENGOs. However, as was illustrated in the court proceedings concerning access to justice to challenge decisions on hunt wolf, one must go even further, applying general principles of EU law.

The Swedish Environmental Protection Agency (SEPA) permitted hunting seasons for wolves in 2010 and 2011. The decisions were decried by ENGOs, but their legal challenges were dismissed for lack of standing. Following legal developments at the EU level and further legal challenges by Swedish ENGOs, standing was granted and injunctions were granted against the 2013 and 2014 hunting seasons, and they were eventually declared invalid by the Swedish administrative courts. Determined to permit licensed hunting, the Government changed the procedure for decision-making in order to disallow appeals to a court. In 2014, the hunting decisions were taken by the regional County Administrative Boards (CABs) instead and appeals could be made to SEPA, but no further. Despite the appeals ban, the ENGO Nordulv appealed this decision to the administrative courts, and it was finally decided by HFD in late 2015 (HFD 2015:XX). Here, the Government argued that a system which allows for administrative appeals that meets the criteria in Article 9(4) of the Aarhus Convention is also sufficient according to EU law, and that both the CABs and the SEPA are independent from the Government according to the Swedish Constitution. Nordulv argued that the principle of judicial protection in EU law requires a possibility to go to a court or a tribunal according to Article 267 TFEU in order to be able to ask the CJEU for a preliminary ruling on the matter.

To begin with, the HFD stated that the relevant provision in Article 12 of the Habitats Directive is unconditional and clear, requiring strict protection of the wolf. The case law of CJEU has created general principles of law, among them the principle of judicial protection.[7] To a certain extent, these principles are today expressed in the Treaty of the European Union (Articles 4(3) and 19(1) para 2) and the Charter of Fundamental Rights of EU (Article 47). Furthermore, according to established case law of CJEU under Article 288 TFEU, clear provisions in directives create "rights" that shall enjoy legal protection.[8] HFD thereafter pointed to the fact that CJEU several times has answered questions concerning what kinds of national procedural provisions are required to meet the obligations of the Habitats Directive, one such case being *The Slovak Brown Bear*. Here, the CJEU said that, in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the Habitats Directive. On that basis, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness). According to the CJEU, it would therefore, if the effective protection of EU environmental law is not to be undermined, be impermissible that Article 9(3) of the Aarhus Convention be inter-

[7] C-97/91 *Borelli*, paras 13-14, C-562/12 *Lihaveis MTÜ*, para 75.
[8] C-41/74 *van Duyn*, paras 12-13.

preted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.

Thereafter, HFD pointed to the fact that *The Slovak Brown Bear* concerned the interpretation of national procedural law, not a situation where there was an express appeals ban. However, the demands expressed in that case on how to interpret national law derive from the principle of useful effect (effet utile) of Union law. This principle not only requires the Member States' courts to interpret national law in a manner loyal to EU law, but also may imply that they shall disregard those procedural rules that are in conflict with clear provisions of EU law.[9] Moreover, the HFD referred to the *Waddenzee* case, in which the CJEU has stated that "*it would be incompatible with the binding effect attributed to a directive (…) to exclude, in principle, the possibility that the obligation which it imposes may be relied on by those concerned*". The CJEU furthermore stated in this case, that, particularly where a directive provision imposed on Member States the obligation to pursue a particular course of conduct, the effectiveness of such an act would be weakened if individuals were prevented from relying on it before their national courts, and if the latter were prevented from taking it into consideration as an element of EU law in order to rule whether the national legislature has kept within the limits of its discretion set by the directive.[10]

According to the HFD, the statement of the CJEU in *Waddenzeee*, shall be understood as meaning that ENGOs have rights according to the Habitats Directive that shall enjoy effective protection in court. It also found that the useful effect of the directive requires that individuals can invoke the provisions therein and the national court is free to evaluate if the law of the Member State is in line with the directive. In sum, this means that according to HFD, Union law requires that the question whether clear and unconditional provisions in the Habitats Directive have been implemented correctly in national law can be tried in a national court. The fact that the appeals ban also excluded the possibility to refer such a question to CJEU by way of a request for preliminary ruling reinforces the impression that such a provision is in breach of EU law. Thus, the appeals ban in the Swedish Hunting ordinance was disregarded.

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[9] C-106/77 *Simmenthal*, para 22, C-213/89 *Factortame*, para 20 and C-263/08 *DLV*, para 45.
[10] C-127/02 *Waddenzee*, para 66.