

BASICS OF THE EU ENVIRONMENTAL LAW

RECENT CASE LAW OF THE CJEU



department
of environmental law
and land law

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In its judgment in **Joined Cases C-473/19 and C-474/19 (Föreningen Skydda Skogen)**, the CJEU confirmed that the conservation requirements of Article 5 of the Wild Birds Directive and Article 12 of the Habitats Directive apply even to species for which favourable conservation status has been achieved.

Consequences?

Thus, the prohibitions cannot be limited to situations where the proposed activity would lead to adverse effects on the conservation status of the species, even if, according to the Court, the purpose of the activity is clearly other than killing or disturbing the species. In the dispute which gave rise to the preliminary ruling, Swedish NGOs challenged the inaction of the prefecture in relation to extensive deforestation in a forest area in the municipality of Hårryda (near which the large Gothenburg airport is located). According to the Prefecture, there was no need to issue a species protection exemption on the ground, inter alia, that national case-law required that, if an activity pursues an objective other than that pursued by the prohibitions contained in the Directives, it must give rise to a risk of adverse effects on the conservation status of the species concerned in order to be covered by those prohibitions. This practice was rejected by the CJEU.

In its judgment in **Case C-826/18 (Stichting Varkens in Nood and Others)**, the CJEU held that access to judicial protection under Article 9(3) of the Aarhus Convention can be made conditional on the submission of observations in administrative proceedings, but that such a restriction does not hold under Article 9(2) of the Aarhus Convention (so that neither the participation condition nor the objection condition is possible).

But who is affected in the particular case?

The judgment also clarifies the criterion of the involvement of natural persons (here a veterinarian living 20 km from the permitted construction for pig farming - she may be a member of the public within the meaning of Article 9(3) of the Convention if national law grants her, for example, participation rights in the permit procedure).

In **Case C-300/20 (Bund Naturschutz in Bayern)**, the CJEU considered the nature of an ordinance of the district of Rosenheim (Bavaria) establishing a protected landscape area. According to the NGO, the ordinance should have been assessed in the SEA process.

Which plans and programmes are subject to SEA?

Although the aim of the decree was to protect nature and the landscape, the decree apparently only laid down general prohibitions and the obligation to obtain permits for certain activities without laying down sufficiently detailed rules on the content, preparation and implementation of the projects listed in Annexes I and II of the EIA Directive:

"The adoption of an ordinance such as the Inntal Süd MPA Ordinance may therefore have some effect on the location of projects, as such location is more difficult inside the protected area defined in Section 1 thereof and, on the contrary, easier outside it, even on land, which were included in the protected area defined prior to the adoption of that decree, it is clear that that decree does not lay down a substantial set of criteria and conditions for the approval and implementation of one or more of the projects listed in Annexes I and II to Directive 2011/92, which, however, must be verified by the referring court. "

In **Case C-254/19 (Friends of the Irish Environment)**, the CJEU considered whether a decision extending the period of validity of a permit for the construction of a liquefied natural gas regasification terminal requires, in principle, a Natura assessment under Article 6(3) of the Habitats Directive where the original permit has lapsed and ceased to produce legal effects after the expiry of the time limit it set for the work and the work has not started.

What are the requirements of Art. 6(3) of the Habitats Directive?

The CJEU answered positively. In particular, the new assessment must take into account both the earlier assessment, if any, and the development of relevant environmental and scientific knowledge, as well as any changes to the project or the existence of other plans or concepts.

In **Case C-629/19 (Sappi Austria Produktion a Wasserverband)**, the CJEU addressed the nature of the sludge generated from the treatment of waste water from the production of paper and pulp, which was further incinerated for energy recovery.

What is the definition of waste?

According to the Court, such sludge is not waste if the conditions of Article 6(1) of the Waste Directive (the state where waste ceases to be waste) are met before incineration.

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What is the difference between Art. 9(2) and Art. 9(3) AC regime?

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In **C-463/20 (Namur-Est Environnement)**, the CJEU addressed the relatively simple question of whether the granting of an exemption from species protection is a permit within the meaning of the EIA Directive. In other words, whether the procedure for granting an exemption should be considered a follow-on procedure with all the consequences that entails.

Discuss – what is a permit under the EIA Directive?

The CJEU reiterated its well-established conclusions that Member States have discretion in determining the procedural conditions of an EIA and may divide such an assessment into several stages between several authorities. The decision on the species protection exemption itself is part of the project authorisation process within the meaning of the EIA Directive, provided that the project cannot be implemented without the authorisation of the exemption and that the authority competent to issue the single permit retains the possibility of an overall and possibly more stringent environmental assessment of the project.

C-463/20 (Namur-Est Environnement): The EIA Directive 'allows Member States to delegate to a specific authority the responsibility for making preliminary and targeted decisions on certain environmental effects of projects subject to assessment, while reserving to the authority responsible for authorising such projects the task of carrying out a full and final assessment. In the event of a negative outcome of such a partial assessment, the notifier may either abandon its project without having to continue with the comprehensive assessment and authorisation process established by Directive 2011/92, or modify the project in such a way as to eliminate the negative impacts identified by that partial assessment, with the competent authority having to take a final decision on that modified project

Conversely, in the event of a positive outcome, that authority may take into account the previous decision, although it is not bound by it in its final assessment or in the legal consequences to be drawn from it. Thus, the existence of a partial assessment leading to a preliminary decision may in any event constitute a factor of quality, efficiency and greater consistency in the assessment and authorisation procedure.

In **C-470/19 (Friends of the Irish Environment)**, the CJEU confirmed that the Access to Environmental Information Directive does not regulate access to environmental information contained in court files, as neither the courts nor the institutions or bodies which are governed by those courts, and therefore have a close connection with those courts, are "public authorities". The dispute in the original proceedings concerned a request by an environmental association for access to environmental information contained in court files relating to closed proceedings.

What is the ratio behind the arguments of the Court?

That file was, at the date of that request, in the possession of the judicial service, which is responsible for the storage, archiving and management of court files, and which carries out that activity on behalf of and under the direction of the court.

THANK YOU FOR YOUR ATTENTION!

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