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elni REVIEW

CONTENTS

Editorial

The current issue of *elni Review* contains several contributions focussing on different aspects in the field of European environmental law practice.

In his profound article "The genome editing technique is covered by Directive 2001/18 – Comment on Advocate Bobek's Opinion in case C-528/16" *Ludwig Krämer* argues that genome editing must be understood as being covered by the provisions of Directive 2001/18 on the deliberate release of genetically modified organisms into the environment.

"The ECJ Rules Environmental NGOs Must Have Access to Justice in Water Law Procedures" by *Summer Kern* and *Gregor Schamschula* assesses the current developments of implementation with regard to access to justice in Austrian Water Law. The ruling in question can certainly be seen as a milestone in environmental case law.

The article by *Erjon Muharremaj* "The role of legislation and courts in the protection of the environment in the European Union and its impact on the European integration of Albania" delivers interesting insights with regard to the current state of environmental law in Albania and its shortcomings with regard to jurisdiction. This certainly will have an impact on the acquisition negotiations with the European Union.

Finally, *Martin Führ, Jaqui Dopfer, Kilian Bizer et. al.* discuss simulation games as a method for regulatory impact assessments. They set out their experiences with the method acquired during the impact assessment of the EIA Amending Directive 2014/52/EU.

The current issue of the *elni Review* delivers information about recent developments; a summarized version of the "Peoples' Climate Case"-application delivered by the applicants and a review of the book "Environmental Crime in Europe" by the editors Andrew Farmer, Michael Faure and Grazia Maria Vagliasindi.

We hope you enjoy this issue.

Nicola Below/Martin Führ

July 2018

The "Peoples' Climate Case" summarized

Hugo Leith, Roda Verheyen and Gerd Winter

1 Summary of the Application

The case, dubbed the people's climate case[1], is brought by children and their parents, working in agriculture and tourism in the EU and abroad who are and will increasingly be adversely affected in their livelihoods and their physical well-being by climate change effects such as droughts, flooding, heat waves, sea level rise and the disappearance of cold seasons. They are supported and joined by an association of indigenous Sami youth. The applicants are engaged in a range of economic activities, including the cultivation of crops, forestry management, animal herding, and eco-tourism.

For each of the families, climate change has in some cases already curtailed their activities and livelihoods; for instance, droughts have led to the destruction of a Portuguese farmer's forest in a wildfire, to a French farmer's lavender harvest to seriously decline, and a Kenyan pastoralist to loose feeding ground and water; sea level rises and worsening storms have inundated a Fijian farmer's land and will put a North Sea island hotel owner at risk, and changing patterns of freezing and warming in winter times have harmed Sami reindeer herding. As time goes on climate change will if left unchecked increasingly impair living conditions if mitigation measures remain inadequate. Changes in the climate have also exposed some of the applicants to physical harm; these risks to physical well-being will increase as climate change worsens.

The Defendants are the European Parliament and the Council of the EU. These are the institutions of the Union responsible for the adoption of the legal acts challenged by this application.

The Applicants are represented by the three authors of this article.

The Applicants bring two related applications concerning the responsibility of the Union for emissions of greenhouse gases ('GHGs'), leading to dangerous climate change.

They contend that the Union has failed and continues to fail to meet its urgent responsibilities to limit the emission of GHGs, in breach of its binding obligations of higher rank law. This breach currently manifests in three recently adopted legal acts of the European Parliament and the Council, which cover different sectors of the economy. These comprise:

(a) the amended Directive on emissions trading (the "ETS Directive");[2]

(b) the Regulation on climate action by Member States (the "Effort Sharing Regulation" or "CAR Regulation")[3], and

(c) the Regulation on land use, land use change and forestry (the "LULUCF Regulation")[4];

– collectively, the "GHG Emissions Acts".

The GHG Emissions Acts in aggregate comprise an overall reduction of 40%, as compared to the emissions of 1990, by 2030. This target is inadequate – by at least 10 to 20 % - to deliver the level of reduction demanded by higher rank law. The applicants accordingly seek the annulment of the GHG Emissions Acts insofar as they fail to set more ambitious targets.

Further, the Union's past and continuing failure to adopt sufficient measures to reduce emissions as required by higher rank law has caused, is continuing to cause, and will cause the applicants damage, engaging the non-contractual liability of the Union. The applicants accordingly seek an injunction requiring the Union to set deeper emissions reduction targets at the level required by law.

2 Admissibility

The applicants are each directly and individually concerned by the acts under challenge as required by Art.263 (4) TFEU.

Direct concern: In setting emissions reduction targets, the GHG Emissions Acts are also instruments by which quantities of allowable emissions are allocated to Member States; in total, still 60% of the emissions of 1990 are permitted to be allocated in 2030. This is an excessive volume of emissions

1 See the website https://peoplesclimatecase.caneurope.org/. For the full version of the application click 'documents'. A concentrated version which was required by the General Court will soon be published on the same website.

2 Directive (EU) 2018/410 of the European Parliament and the of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814[Annex 1] pp.1 ff., as published in the Official Journal 2018 L 76/3.

3 Regulation (EU) 2018/842 of the European Parliament and of the Council on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013, OJ 2018 L 156 p. 26. The Regulation will in the following be cited as ESR.

4 Regulation (EU) 2018/841 of the European Parliament and of the Council on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) 525/2013 and Decision 529/2013/EU, OJ 2018 L 156, p. 1.

which directly infringes the applicants' fundamental rights.

Individual concern: Concerning the requirement of individual concern the applicants have two submissions.

First, according to the standard set out in the *Plaumann* case[5] for showing "individual concern", the applicants meet that standard. Each applicant complains of a breach of fundamental individual rights. While all persons may in principle each enjoy the same right (such as the right to life, or the right to an occupation) the effects of climate change (to which the EU Emissions Acts under challenge contribute) and hence the infringement of rights is distinctive and different for each individual.

Second, in the alternative, it is submitted that the *Plaumann* formula is inapposite and should not be followed in this case. Rather, the standing requirements of Article 263 (4) TFEU are established if it is shown that the act under challenge does affect the applicant in an individual capacity, even if other persons may also be affected, especially where the harm caused is serious. The applicants clearly meet this alternative standard.

a. Since adoption of the *Plaumann* formula the text of Article 263 (4) TFEU has changed: the object "decisions" was exchanged for "acts", thus including legislative acts which do not have addressees to whom an applicant seeking to establish standing could be compared (a comparison the *Plaumann* formula assumes can be made).

b. The formula has perverse results: the more serious the harm and thus the higher number of affected persons, the less legal protection is available.

c. The stringency of the *Plaumann* approach is not sustainable in light of the CJEU's insistence that all questions of EU law – and in particular those arising under the Charter – are reserved to its jurisdiction.[6] If the CJEU is to be the sole arbiter of the reconciliation of EU measures and fundamental rights, it must follow that an individual whose fundamental rights are at stake necessarily has a right of access to the EU judicature.

d. The *Plaumann* test – when applied in the context of rights under the Charter – is inconsistent with the guarantee for effective remedies of rights conferred by Article 47 of the Charter. A gap in legal protection is clear in the present case. This action is not directed against implementing measures of either Member States or EU institutions but rather against the fundamental legal basis for climate action; more precisely the allocation by the GHG Emissions Acts of an excessive and unlawful quantity of emissions. That allocation is dictated by the Emissions Acts themselves, and requires no implementing measures which could be the subject of a challenge.

Concerning the reindeer herders' association (one of the applicants), CJEU case law is pertinent insofar as it grants an association *locus standi* if the individuals forming it or at least part of them have standing themselves.

All of the members of the association belong to families of reindeer holders and therefore have individual standing.

3 First Plea: annulment of the three GHG Emissions Acts

The Applicants submit that the GHG emissions that would be allocated and permitted under the +60% target (or -40 %, respectively) enshrined in the three GHG Emissions Acts are incompatible with higher rank law, as follows:

a. First, <u>any</u> further emissions of GHG gases will contribute to the ongoing warming of the Earth system and to dangerous climate change. Permitting any further emissions will result in harm and will encroach on the interests protected by the EU's duties; namely, the international no-harm rule, as well as various fundamental rights of the applicants, including the right to health, occupation, property, well-being of children, and equal treatment both of generations and people living in developed and less developed countries.

b. Second, moreover, the GHG Emissions Acts would permit the continued emission of dangerous GHGs at levels that materially exceed the maximum permissible levels of emissions that are implied by the Paris Agreement. Scientific analysis can estimate the maximum quantity of emissions that can be released globally into the atmosphere so as to result in a likelihood of temperature increases being kept within the defined levels to which the EU has committed itself. The EU cannot consume more than its *per capita* share of those global emissions, yet the GHG Emissions Acts will result in it doing so. The Paris Agreement tem-

[5] The *Plaumann* formula defines "individual concern" of persons other than those to whom a decision is addressed as: "if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed." (ECJ decision of 15.7.1963, Case 25/62 Plaumann v Commission [1963] ECR p. 95, at 107.

[6] ECJ Opinion 2/13 of 18.12.2014, Case C-2/13 (Adhésion de l'Union à la CEDH) ECLI:EU:2014:2425 para. 189.

perature limits as such therefore can provide no justification for the EU's policies; rather, those policies are in direct conflict with its requirements.

c. Third, the infringement of norms entailed in the GHG Emissions Acts is unlawful, unless the Union establishes a well-founded justification. Any such justification would need to show that the Union had acted proportionately and had infringed theduties and rights only to the extent that was necessary. To make good such a justification, the EU would need to identify and adopt measures for emissions reduction to the extent of its technical and economic capability.

d. Fourth, insofar as the EU legislature contends that its conduct in permitting the level of emissions it proposes in the GHG Emissions Acts is justified in the light of other, competing interests, the legislative record is to the contrary. The evidence shows that the EU's analysis of its 2030 targets impermissibly pursued an outdated objective of achieving an 80% reduction in emissions by 2050. That policy is contrary to law and in particular to the Paris Agreement. As the EU began its analysis from the wrong starting point, it failed to consider the feasibility of more ambitious reduction options.

e. Fifth, as could have been explored by an in-depth analysis of all emission sectors, the technical and economical capacity of the EU clearly extends to making emissions reductions of 50-60%. It is submitted that the GHG Emissions Acts must therefore be declared void insofar as they will allow in 2030 the emission of more than 40%-50% of the 1990 levels of emissions.

f. However, in order to avoid a legal vacuum, it is applied that the contested provisions shall remain in force for such limited period as the Court determines appropriate, until they are replaced with emissions target levels compliant with the norms of higher rank law.

4 Second plea: injunction for non-contractual liability

Further to the Applicants' case that the targets in the GHG Emissions Acts are incompatible with the Union's legal obligations and must therefore be annulled, the Applicants also contend that the non-contractual liability of the Union is established, entitling them to seek relief under Article 340, TFEU.

In overview, the Applicants' case is as follows:

a. First, the EU has failed to take sufficient steps required by high rank law to reduce emissions from within the Union. It has been in breach of its obligations to take these steps since 1992 (when the UNFCCC was adopted), alternatively since 2009 when the Charta of Fundamental Rights became binding EU law. It continues to be in breach of this obligation today.

b. Second, these failures have made and are continuing to make a material contribution to dangerous climate change that has already occurred, is occurring, and will occur, and for which the EU therefore bears a significant degree of responsibility.

c. Third, this dangerous climate change has caused, is causing, or will cause the Applicants material loss.

The relief sought is an order requiring the EU to adopt emissions reduction targets through the existing framework of the ETS, ESR and LULUCF regimes that are sufficient to bring the EU into compliance with its legal obligations. Based on the analysis of the emissions budget and of feasibility set out above, the Court can be confident that the minimum that the EU is obliged to is to adopt targets to the full extent of its capability.

The Applicants submit that this requires emissions reductions of 50%-60% by 2030, or such other level as the Court finds appropriate.

Imprint

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We invite authors to submit manuscripts to the Editors by email.

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elni membership

If you want to join the Environmental Law Network International, please use the membership form on our website: http://www.elni.org or send this form to the elni Coordinating Bureau, c/o IESAR, FH Bingen, Berlinstr. 109, 55411 Bingen, Germany, fax: +49-6721-409 110, mail: Roller@fh-bingen.de.

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The Öko-Institut (Institut für angewandte Ökologie - Institute for Applied Ecology, a registered non-profit-association) was founded in 1977. Its founding was closely connected to the conflict over the building of the nuclear power plant in Wyhl (on the Rhine near the city of Freiburg, the seat of the Institute). The objective of the Institute was and is environmental research independent of government and industry, for the benefit of society. The results of our research are made available of the public.
The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.
The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

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I·E·S·A·R
Institute for Environmental Studies and Applied Research
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The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

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sofia

The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.
The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.
The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of homo oeconomicus institutionalis, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

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elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt).

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researches, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

elni publishes a series of books entitled “Publications of the Environmental Law Network International”. Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference.

elni Website: elni.org

The elni website www.elni.org contains news about the network. The members have the opportunity to submit information on interesting events and recent studies on environmental law issues. An index of articles provides an overview of the elni Review publications. Past issues are downloadable online free of charge.

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