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Recent developments in Swedish environmental law and practice

General

Since September 2022, Sweden has a conservative Government ruling with the support of the right-winged nationalist Party, the *Sverigedemokraterna*. So far, this has resulted in a merger of the ministries of enterprise and environment into a single Ministry of Climate and Enterprise. This reform drew some international attention, as it was said that Sweden for the first time ever had closed down its Ministry of Environment and that all such issues now were placed under the responsibility of the Minister of Enterprise (Sweden threatens European biodiversity | Science). This was one of those rumours which simply are not true; such mergers have happened before and the minister of the environment is on an equal footing to the minister of enterprises (in Sweden, the Government always decides as a group, no such thing as "ministerial rule" as in other countries exists). However, the Government was also quick to undertake radical changes to the climate policy of the old government; the weakening of the reduction duty of the greenhouse gas intensity of transport fuels, a stop for the subsidies to electric cars and the reform of the tax system for work travels, as well as the withdrawal of the financial support to the drawing of cables to wind farms at sea. In addition, there is a Parliamentary standstill – emphasized by the Presidency of the Council of the EU during the spring 2023 – although the Government has assigned a number of commissions on different environmental topics, mostly in line with the ideas of Better Regulation. In addition, the Government has announced a range of measures in order to promote the building of new nuclear power plants, although most of those so far have been mainly symbolic.

Sweden's first climate case

To this background, it is not very surprising that Sweden during the year has seen the first "real" climate case; Climate Trials | Auroramålet (xn--auroramlet-75a.se) *Aurora*, a group of more than 300 individuals (26 years and younger) have sued the Government for its inability to meet the international climate obligations. As in many of other European climate cases, the *Aurora* association invokes the European Convention on Human Rights, most importantly Articles 2 and 8. However, in contrast with similar cases in Europe, they don't claim that EU law or the Paris agreement shall be used as a yardstick, but that Sweden's efforts shall be calculated from its "fair share contribution", developed by the organization *Climate Analytics*; The Fair Share Approach to Establish Climate Responsi-

bility (climatefairshares.org) The case is handled by the Nacka Land and Environmental Court and a subpoena against the State was issued in late March.

Forestry in Sweden

As for other issues to be mentioned, forestry has been in the focus of the public debate in the field of environmental law in Sweden. As you may be aware of, the Swedish Government has been very active in its effort to oppose any environmental demands on forestry in the Fit-for-55 agenda, encompassing the negotiations on the new RED, and the coming directives on nature restoration, deforestation, soil health law and more. According to the Swedish Government, forestry is sustainable as it is and there is no need for further biodiversity requirements or any control mechanisms for that matter.

Further, as mentioned in last year's update, the Forest Agency succeeded in its campaign against the "over-implementation" of the Birds Directive in the Swedish Species Ordinance (2007:845). Until October 2022, the protection scheme in the Ordinance was similar for listed species under the Habitats Directive (92/43, HD) and birds under the Birds Directive (2009/147, BD). However, after the reform there are provisions in the Ordinance, in verbatim repeating the prohibitions in Article 5 BD and Article 12 HD. In contrast, the derogation grounds are still to be found in one common provision, reflecting Article 16 HD. Hopes ran high among the forest owners that the protection of birds would now be very different and allow for more clear-cutting operations in sensitive areas. So far, this has not happened. The strong tendency that the Land and Environmental Courts stop controversial operations in the forest having effect on prioritized birds – such as the Capercaillie, Three-toed woodpecker, Siberian jay, Willow tit, Eagle owl, etc – continue as a result of ENGO actions against decisions and omissions by the Forest Agency. Commonly, the courts strike down on the authority's failure to show – or even to try to show – that the operations will not entail damage or disturbance of the birds according to Article 5 of the Directive. Despite the ruling in C-473/19 and C-474/19 *Skydda skogen* and subsequent case-law by the Land and Environment Court of Appeal (MÖD 2020:45), the authority refuses to confirm its responsibility to obtain knowledge about the area where a clear-cutting operation will take place, the species therein and the operation's effect on the species and its habitats (see paras 67-78 in the ruling). Instead, the authority is actively culling the registers built up since the beginning of the 1990s on "key habitats", resulting in that most notifications about clear-cutting operations today go through the automatic control system without "flagging". Thus, after 6 weeks, the forest owner can further on with the operations without any control at all, if not an ENGO reacts and challenges the Agency's passivity in court. In 2018-19, about 10% of the annually 65,000 notifications ran through the system without check, today the number is more than 50%. Originally, the registry contained about 70,000 sites of "key habitats", but has today been reduced by close to 10,000 sites. This development has been driven not only by small and middle-sized landowners, but also by big forest companies such as STORA.

To add to this somewhat dark picture of Swedish forestry, a recent ruling from the Supreme Court should be mentioned. The *Malsätra case* concerns the rules on compensation to foresters for measures that they have taken in order to protect species under EU law. According to Chapter 31 of the Environmental Code, any restriction on ongoing

land-use – including all clear-cutting operations in the forests (sometimes covering hundreds of hectares) – shall be compensated with 125% of the real estate's loss of market value (commonly the value of the timber). It had been debated for some years whether species protection shall be included in the compensation scheme in Chapter 31 of the Code, as denied derogation from the protection under the Species Ordinance is not listed in those provisions. It had also been debated if this generous scheme for compensation may run counter to the rules on state aid in Articles 107-109 TFEU. Among others, three governmental commission and the Forestry Agency has raised this issue. Against this background, the State as a Party to the proceedings in the case argued that the Supreme Court was obliged to make a request for preliminary ruling from the CJEU according to Article 267 TFEU on the matter.

In its judgement, the Supreme Court, answered yes and no to those questions. First, the court noted that although species protection is not mentioned in the compensation scheme under the Code, it may still be compensated under "general principles" under the Swedish constitution. The conditions for that, however, is that the landowner in the individual case is out control of or could not foresee the situation which triggered the order to protect the species. In addition, the order must represent a substantial economic loss for the landowner in question. Moreover, as denied derogation to species protection is not listed in the Environmental Code, the compensation should only cover the factual market value loss of the real estate. Second, as for the state aid issue, the Supreme Court simply stated that the rules in Chapter 31 of the Code merely are aiming at the covering of the loss for a landowner when a certain regulation results in unforeseeable and especially harsh consequences in economic terms in a way which is not common for all landowners. Thereby, the scheme only enables for the landowner in question to keep his or her competition position. Thus, the system does not entail any distorting effects on the competition at the common market, why the rules on state aid in Article 107 are not applicable.

At the face of it, the Supreme Court may seem to have established strict rules for compensation for landowners and others when abiding to the strict protection of species according to EU law. As illustrated in the case, however, this situation occurs very often in forestry. As the rules allows the landowner to circumscribe the protection worthy area by way of clearcutting surrounding areas, the effect will always be "unforeseen" as long as the authorities cannot prove otherwise. In the Malsätra case, the competent authority claimed that the area needing protection was the last of over 20 playgrounds for Capercaillie, as all the rest had been destroyed by forest operations by the landowner during the last 20 years. In addition, the economic effect is calculated from the "affected area", thus always being 100% of the value (the area in question in this case was 22 hectares in a property covering more than 22,000 hectares). And as the Supreme Court states that compensation with 125% of the market value is not in breach with the rules on state aid, it thereby invites the Swedish legislator to add species protection to the compensation catalogue in Chapter 31 of the Environmental Code. In sum, Swedish landowners will hereafter always to be able to claim 125 % compensation when their operations are affected by the strict protection of birds and species under the EU nature directives, and derogation is refused by the authorities.

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generous Swedish compensation scheme with the system in other Member States of the EU.

Finally…

…a decision by the European Court of Human Rights (ECtHR) concerning Sweden ought to be mentioned. The Sami village *Semisjaur-Njarg* appealed a decision by the Forest Agency not to take any further actions as regards a notification by a forest company to clearcut an area of importance for their reindeer herding. As the land-use and cultural rights of the Sami people are protected as a traditional property right in all the Nordic constitutions, it came as a big surprise when the administrative courts dismissed the Sami village's action, stating that the passivity of the authority ("omission") was a non-appealable decision. When the Supreme Administrative Court confirmed this position, the Sami village made a complaint to the ECtHR, claiming a breach of Articles 6 and 14 of the ECHR. The decision came in December last year and was quite astonishing (ECtHR 2022-12-08; A 44586-22; not published). The Court dismisses the complaint by stating that the "*domestic remedies have not been exhausted as required by Article 35 § 1 of the Convention, since the applicant failed to raise before competent domestic authorities, the Chancellor of Justice or the general courts, either in form or in substance and in accordance with the applicable procedural requirements, the complaints that were made to the Court*".

I have understood that the underlying reasoning of the ECtHR judge is that Sweden has introduced a possibility for victims to human right breaches to go to court and ask for compensation (cf Karin Andersson v. Sweden (29878/09), Eriksson v. Sweden, no. 60437/08, § 52; Ruminski v. Sweden [dec.], § 37). However, to apply this doctrine to forest operation having an impact on reindeer herding areas amounts to the absurd; each herding area may be impacted by hundreds of notification in the course of the years and how would one even be able to calculate the value of the loss of standing in each of those cases? Further, the Sami village wants to have a say in the decision-making procedure, which has nothing to do with money. And finally, this legal construct runs counter to the international protection of indigenous people, as they must not be "bought out" from their land-use and cultural rights by the majority society. A reasonable conclusion is therefore that the Sami community will regard the ECHR avenue as a "lost cause" in the future and that will instead rely on – using the Norwegian example of *Fosen* – Article 27 of the UN Convention on Civil and Political Rights (ICCPR).