

Workshop for Judges and Prosecutors:
NATIONAL JUDGES AND THE EU AARHUS ACQUIS
Focus on Access to Justice, 9 March 2021, 09:15 to 11:00



Credit: ImaginAIR: Atmospheric pollution in Paris by NO2 Image © Jean-Jacques Poirault

Case Study: “A(ir)ccountability”

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A: Admissability of the action?



„Well, the action **should be** admissible.“



However,
that is not the answer you
would pay a lawyer for!

The question is whether the ENGO-action to improve an air quality plan („diesel ban“) **actually is admissible** under the existing set of law and jurisprudence in Memberland.



Janecek (C-237/07) sets the path for air quality litigation ...

In its landmark decision the CJEU stated that the **Air Quality Directive** confers substantive rights on individuals and their associations and held in **paragraph 39**:

“It follows from the foregoing that the natural or legal persons directly concerned by a risk that the limit values or alert thresholds may be exceeded must be in a position to require the competent authorities to draw up an action plan where such a risk exists, if necessary by bringing an action before the competent courts.”

You may refer to it as an enforceable **„right to clean air“** ...



Let's into the details ...



A: Nr 1 Administrative Act? (I)

Challenging a national administrative act is a classical court case where no one would have any doubts as regards the admissibility of the action. This raises the question whether it is in any way possible to qualify an air quality as an administrative act.

A wide spread definition of an administrative act understands it as - at least - any measure of individual scope taken by a public authority and **having legally binding and external effects**.

Typically, an air quality plan will be more of an internal administrative document and therefore seem to lack “legally binding and external effects”.



A: Nr 1 Administrative Act ? (II)

- However, this first approach to determine the legal character of an air quality plan necessitates an accurate check in the view of EU rights, Article 9 (3) of the Aarhus Convention and the EU principle of effectiveness.
- If, in practice, a certain domestic system of administrative justice confines effective judicial review to those cases where administrative acts are challenged, then - and only then - an air quality plan has to be understood as a

“quasi administrative act”

vested with legally binding and external effects by EU law.



A: Nr 2 Admissible type of action ?

- Guidance by CJEU was given in **Case C-404/13 *ClientEarth***:
- In this judgment from November 19, 2014 the CJEU reiterated that air quality limits values are of a legally binding nature and that national courts are obliged to provide a remedy where these are breached.
- While national courts could determine exactly what kind of remedies to give, they must be sufficient to ensure that the responsible authorities establish a plan which meets the requirements of the Air Quality Directive.



A: Nr 3 Standing of the ENGO (I) under Art. 9 (3) Aarhus Convention?

Case C-664/15 *Protect*, paragraph 45:

“It is true that only ‘members of the public’ that ‘meet the criteria, if any, laid down in ... national law’ have the rights set out in Article 9(3) of the Aarhus Convention, so that that provision, in itself, **has no direct effect in EU law**.

However, the fact remains that that provision, read in conjunction with **Article 47 of the Charter**, imposes on Member States an obligation to ensure effective judicial protection of the rights conferred by EU law, in particular the provisions of environmental law.



A: Nr 3 Standing of the ENGO (II) under Art. 9 (3) Aarhus Convention?

Case C-664/15 *Protect*, paragraph 46:

“ ... the right to bring proceedings set out in Article 9(3) of the Aarhus Convention would be deprived of all useful effect, and even of its very substance, if it had to be conceded that, by imposing those conditions, certain categories of ‘members of the public’, a fortiori ‘the public concerned’, such as environmental organisations that satisfy the requirements laid down in Article 2(5) of the Aarhus Convention, **were to be denied of any right to bring proceedings.**”

If this is not enough guidance ,
feel free to launch a preliminary reference under Art 267 TFEU!



B: Is it possible for the court to gather more facts and expertise?

Case C-71/14 *East Sussex*, paragraph 53 - 55:

“ ... In the absence of further detail in EU law, it is for the legal systems of the Member States to determine that extent, subject to observance of the **principles of equivalence and effectiveness**.

As regards the principle of **equivalence** ...[to be filled in]



As regards the principle of **effectiveness** ...[to be filled in]

Feel free to launch
a preliminary reference under Art 267 TFEU!



B: Nr 1 Is it possible to question the location of the sample devices?

Case C-723/17 *Craeynest*; paragraph 56:

- “ ... it is for a national court ... to verify whether
- the sampling points located in a particular zone have been established in accordance with the criteria laid down in paragraph 1(a) of Section B of Annex III to the (air quality) directive and,
- if they were not,
- to take all necessary measures in respect of the competent national authority, such as, if provided for by national law,
- an order, with a view to ensuring that those sampling points are sited in accordance with those criteria.”



B: Nr 2 Is it possible to hear experts on air quality?

Case C-71/14 *East Sussex*, paragraph 53 - 55:

“ ... In the absence of further detail in EU law, it is for the legal systems of the Member States to determine that extent, subject to observance of the principles of equivalence and effectiveness.

As regards the principle of **equivalence** ... [to be filled in]



As regards the principle of **effectiveness** ... [to be filled in]

Feel free to launch
a preliminary reference under Art 267 TFEU!



C: On the merits: Is the lawsuit well-founded? (I)

- It is not easy for the domestic judge to render the EU required judgment, if the air quality plan is not in conformity with the Air Quality Directive.
- As a rule, it does not belong to the task of the judiciary, let alone to the abilities of the judges, to get involved in air quality planning.
- The question “**whether or not**” to establish an air quality plan may be a legal one, suitable to be answered by a court of law.



C: On the merits: Is the lawsuit well-founded? (II)

- The question on “**how**” to establish an air quality plan falls within the **discretion of the public entity**.
- Hence, a judgment has to respect this discretion under the principle of separation of powers. It is not for administrative judiciary to assume the role of public administration.
- How to formulate **the operative part of a positive judgement?**

German Administrative Courts refer to the phrase used in Article 23 of the Air Quality Directive and **order public entities to establish and/or ameliorate air quality plans in a way that the breach of limit values can be kept “as short as possible.”** If a “diesel ban” is the only feasible way to do it , well it is in the court order ...



C: Nr 1 Is the Covid-situation in 2020 / 2021 relevant?

- The Covid-situation does not seem to be relevant:
- Air quality plans do not envisage a short term situation but a longer period of time for which air quality has to be secured.
- Therefore, the data collected by scientists in 2016, 2017, 2018 and 2019 may be seen as significant enough to come to the conclusion that the existing air quality plan is not adequate.



C: Nr 2 Is cassation of the existing air quality plan your legal solution?

- Cassation of the plan would make the situation worse...
- Cassation is a classical feature of administrative justice and reflects the separation of executive and judicial powers. It prevents a „government of non-elected and therefore not accountable judges“.
- However, the enforcement of legal rights, enshrined in legislative acts, is a core feature of administrative justice.
- Under *Janecek (C-237/17)* there is **a substantial right to a proper air quality plan**.
- *To avoid a denial of justice it is up to the national court to issue an order for a better air quality plan.*



C: Nr 3 Is there an enforceable legal obligation to improve the air quality plan?

Yes, again and again a reference to *Janecek* (C-237/17) paragraph 39:

“It follows from the foregoing that the natural or legal persons directly concerned by a risk that the limit values or alert thresholds may be exceeded must be in a position to require the competent authorities to draw up an action plan where such a risk exists, if necessary by bringing an action before the competent courts.”

As NGOs often do, you may call it ... **„right to clean air“** ...



C: Nr 4 May the court (really?) oblige Memberland to issue a “diesel ban”?

What about the discretion of the administration?

Well, it is not the task of the judge to choose the measure which seems to be the best to become part of the air quality plan.

The question remains to what extent the judge can interfere in order to guarantee „effective judicial protection“.

However: If discretionary powers are „reduced to zero“

(= the diesel ban is the only feasible measure)

the scope of legal review is not limited anymore and the court may order to issue a diesel ban (German solution).



D: : Enforcing a final judgment that imposes a “diesel ban”

Non-enforcement of a binding judgment providing a diesel ban occurred in Munich. A very interesting reading material on the topic is the Judgment of the Court of Justice (Grand Chamber) from 19 December 2019 in Case C-752/18,

Deutsche Umwelthilfe e.V. ./ Freistaat Bayern

The punch line is:

Should the (Bavarian) Prime Minister go to prison (!),
if his administration does persistently not comply
with a binding judgment on air quality (plans)?



D: Nr 1 „Put them in prison (=coercive detention)“

In *Deutsche Umwelthilfe* (C-752/18) the Court held:

“... if there is **no such legal basis**
[for coercive detention] in domestic law,
EU law does not empower that court to have recourse
to such a measure.”



D: Nr 2 „Make them pay (coercive fine) ..

Under Deutsche Umwelthilfe (C-752/18)

it is clear that the legal basis for the coercive fine has to be in the domestic law.

However, the provisions have to be interpreted in the light of EU law because the enforcement of the judgement is an enforcement of an EU right.



For more (easy to get) information, google ...

Commission Notice on Access to Justice in Environmental Matters

C(2017) 2616 final

And recently by the Commission:

Improving access to justice in environmental matters in the EU
and its Member States COM(2020) 643 final



Thank you for giving me the most precious
things an administrative judge has...

...your time and your attention !

