

ACCESS TO JUSTICE WITHIN THE EU IN CASES RELATING TO WATER PROTECTION (Part: II)

JUDr. Vojtěch Vomáčka, Ph.D., LL.M.



NATIONAL JUDGES AND
EU WATER LEGISLATION: Focus on access to justice
Online workshop for judges and prosecutors (24 October 2022)

Protect Natur-, Arten- und Landschaftschutz Umweltorganisation (C-664/15, Water Framework Directive):

The NGO must be able to challenge a permit for a project of abstracting water from the river to produce snow for a ski resort under the EU law.

The NGO claimed, on the basis of certain studies, that the project at issue would have a significant impact on areas protected under Directive 92/43, in particular due to the noise of the snow-production facility, and that it would cause considerable harm to certain species present in those areas, including numerous protected bird species whose habitats are already threatened by the existing facility; it has indeed already led to the disappearance of several of those species from those areas.

By its first question, the referring court asks, in essence, whether Article 4 of Directive 2000/60 or that directive as a whole must be interpreted as meaning that, under Article 9(3) of the Aarhus Convention, an environmental organisation must be able to contest before a court a decision on a permit that is governed exclusively by the legislation governing water-related matters in respect of a project that is not subject to an environmental impact assessment under Directive 2011/92.



In Case C-664/15 Protect Natur-, Arten- und Landschaftschutz Umweltorganisation, the CJEU held that the environmental NGOs must be able to access the court to challenge a decision approving a project which may be in breach of an obligation laid down in the Water Framework Directive.

Land Nordrhein-Westfalen (C-535/18, EIA, Water Framework Directive):

The construction of the section of the motorway/federal road comprising three to four lanes over a distance of approximately 3.7 kilometres. That decision authorised the developer to discharge rainwater running off the road surfaces into three bodies of surface water or into the groundwater. In that regard, the decision contained a number of provisions in annexes intended to ensure that waters are protected, in respect of both the discharge of rainwater into surface waters and its infiltration into the groundwater.

Point (b) of the first paragraph of Article 1 of Directive 2000/60 and the first indent of the second paragraph of Article 1 of that directive, together with Article 4(1)(b) thereof, read in the light of Article 19 TEU and Article 288 TFEU, must be interpreted as meaning that the members of the public concerned by a project must be able to assert, before the competent national courts, that there has been a breach of the requirements to prevent the deterioration of bodies of water and to improve the status of those bodies of water, if that breach concerns them directly.



Most notably, the Court confirmed that individuals who are “directly concerned ” by a decision that breaches Article 4 of the WFD by virtue of the fact that they “legitimately use” the body of water in question, must have standing to challenge that decision. The Court also provided useful clarifications on standing for individuals under Article 11 of the EIA Directive, particularly in Member States that make standing conditional on the impairment of a right, and the interaction between the assessments of water quality required under the WFD and the EIA procedure.

Land Nordrhein-Westfalen (C-535/18, EIA, Water Framework Directive):

- the claimants in the main proceedings were subject to expropriation or had a domestic well within the area covered by the project for their private water supply
- *However, neither the information contained in the order for reference nor the observations submitted to the Court are capable of establishing the relevance, for the claimants in the main proceedings, of the bodies of surface water that may also be affected by the project at issue. In those circumstances, it does not appear that the claimants in the main proceedings can be concerned by a possible infringement of obligations deriving from Article 4(1)(a) of Directive 2000/60, with the result that the Court's examination will concern only Article 4(1)(b), regarding groundwater.*
- *it must be held that, by its objective and the obligations laid down in Article 4(1)(b) in order to attain that objective, Directive 2000/60 also pursues the specific objective of protecting groundwater as a resource for human use.*



The Court confirmed that the public is not in a position to participate meaningfully in the decision-making process if it has not been given access to the information necessary to assess the impact of the project on the water bodies concerned. This statement does not go as far as the Advocate General, who opined that each of the procedural guarantees laid down in Article 6 EIA Directive must be considered as substantive individual rights. Nevertheless, it is a strong indication that the failings in the public participation procedure described above deprived the applicants of their right to participate in the decision-making process.

As to the question of whether the individuals in this case were “directly concerned” by the WDF provisions relating to groundwater, the Court stated one of the objectives of the WDF, including Article 4 thereof, is to protect groundwater as a resource for legitimate human use. Therefore, because violations of the obligations in Article 4 are liable to affect such use, the individuals with a right to use the body of groundwater in question are directly concerned by a breach of those obligations.

Wasserleitungsverband Nördliches Burgenland and Others (C-197/18, Nitrates Directive):

Protection of waters against pollution caused by nitrates from agricultural sources

Affected natural and legal persons, such as the applicants in the main proceedings (**incl. municipality and a water distribution association**), should be in a position to require the competent national authorities to amend an existing action programme or adopt additional measures or reinforced actions

municipality = not public concerned under the Aarhus Convention, but can be affected by violation of EU law

The obligations provided for in Article 5(4) and (5) of Directive 91/676 are clear, precise and unconditional, which means that they can be invoked by individuals against the State (see, by analogy, judgment of 26 June 2019, Craeynest and Others, C-723/17, EU:C:2019:533, paragraph 42).



In C-197/18 Wasserleitungsverband Nördliches Burgenland and Others, the CJEU held the individuals concerned including municipalities must be able to requests to have the Nitrate Action Programme Regulation amended.

THE CONTENT OF THE RIGHT – AIR QUALITY PLANS

- An individual person (and also an NGO) has **a right to see the action plan elaborated**, since the key element in the AQD is the setting of binding limit values together with the obligation to adopt air quality plans containing adequate measures to achieve compliance in the shortest time possible.
- In Case C-404/13 (*ClientEarth*), the CJEU confirmed that **the national court should order any measure necessary to bring the air pollution plan into line with EU air quality legislation**.
- The Court of Justice **limited the right of persons to request a specific content of a plan**. It held that the public authorities were to take measures to keep the time of (the risk of) exceedance as short as possible, but that they benefitted of a large amount of discretion, so that specific measures could not be asked for (C-237/07).
- Similar approach applies to the obligations in the **NEC Directive**. The natural and legal persons directly concerned must be able to require the competent authorities, if necessary by bringing the matter before the national courts, to observe and implement such rules of EU law – for example **to draw up national programmes for the progressive reduction of national emissions of inter alia SO₂ and NO_x** (Joined Cases C-165/09, C-166/09 and C-167/09)

As regards access to justice, the CJEU confirmed direct effect of numerous EU directives in line with Art. 9(3) of the Aarhus Convention which requires that "members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment." As a consequence, both individuals and environmental NGOs should be able to challenge administrative acts based on EU environmental law before the national courts. Moreover, the legal form of these acts cannot, in principle, prevent the individuals from access to justice (Case C-237/07 *Janecek*). In Case C-404/13 *ClientEarth*, the CJEU held that EU law (Art. 23 of Directive 2008/50) imposes a clear obligation to establish an air quality plan that complies with certain requirements; an obligation capable of being relied on by individuals as against public authorities.

THE CONTENT OF THE RIGHT – AIR POLLUTION MONITORING SYSTEM

- The individuals must be able to **challenge the air pollution monitoring system** in their cities because the AQD lays down detailed rules concerning the use and location of sampling points to measure air quality in zones and agglomerations comprising the territory of each Member State (*Case C-723/17 Craeynest and Others*)
- The **obligation to establish sampling points** in such a way that they provide information on the most polluted locations, and the obligation to establish at least a **minimum number of sampling points** are clear, precise and unconditional.
- It is for **the national courts to verify whether those obligations have been complied with**. In this respect, the average values across a whole zone or city are insufficient as they may underestimate the actual exposure to polluted air.



The scope of judicial review is a key element of an effective system of judicial review as it determines how national judges will assess the legality of contested decisions, acts and omissions. As regards the intensity of scrutiny/standard of review, under Article 9(2) and Article 9(3) of the Aarhus Convention, Member States are to ensure an effective judicial review of the substantive and procedural legality of decisions, acts and omissions falling within the scope of these provisions, even if EU secondary legislation does not make any explicit reference to a standard of review that covers both of these aspects of legality. In particular, procedural legality relates to:

- i. whether the public authority concerned had the legal power to make the decision, act or omission being contested;
- ii. whether the public authority fully and correctly followed a procedure laid down for adopting the contested decision, or act, for example a procedure requiring consultation of the public;
- iii. whether the decision, or act can be found in the correct form.

THE CONTENT OF THE RIGHT – APPROVAL OF VEHICLES

- **C-873/19 (*Deutsche Umwelthilfe*)**
- Will be decided soon.
- Opinion: Article 9(3) of the Aarhus Convention read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that **an approved environmental association, which is entitled to bring legal proceedings under national law, must be able to challenge before a national court an administrative decision granting EC type-approval of vehicles** which may be contrary to Article 5(2) of Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information, a provision which prohibits, subject to certain exceptions, the use of defeat devices which reduce the effectiveness of emission control systems.

THE CONTENT OF THE RIGHT – DAMAGES

C-61/21 (*Ministre de la Transition écologique a Premier ministre*)

- Will be decided soon.

Due to the non-adoption of air quality improvement plans (for almost ten years), individuals living in the affected area are seeking compensation for the damage caused. They invoke, *inter alia*, the Aarhus Convention.

OPINION: The limit values laid down for pollutants in ambient air and the obligations to improve ambient air quality laid down in Articles 7 and 8 of Directive 96/62, read in conjunction with Directive 1999/30, and Articles 13 and 23 of Directive 2008/50 are intended to confer rights on individuals.

A claim for compensation for damage resulting from health problems caused by the exceedance of limit values set for PM10 and nitrogen dioxide in ambient air (...) is that the injured party proves the existence of a direct link between that injury and his or her residence in a place where the relevant limit values were exceeded without an air quality improvement plan having been drawn up...



OBLIGATIONS OF THE NATIONAL COURTS - INTERPRETATION

Preliminary reference procedures:

Case **C-525/20** (*Association France Nature Environnement*): The CJEU did not support **the French practice of derogating from water protection requirements**. It considered the French regulation on water management master plans and water management plans, which allowed for the disregard of "temporary and short-term impacts without long-term consequences" when assessing the compatibility of programmes and administrative decisions taken in the field of water policy to prevent deterioration of water quality.

Judgments delivered as a result of infringement procedures:

Case **C-510/20** (*Commission v Bulgaria*): The CJEU criticised Bulgaria for shortcomings in the **adoption of strategic documents in the field of water protection**, namely the breach of the obligation to review and update marine strategies, which should take place every six years under the Marine Strategy Directive (2008/56/EC). The Court confirmed that there are no exceptions to this obligation under EU law.

C-278/01 (*Commission v Spain*): a penalty payment of EUR 624 150 **per year** and per 1% of bathing areas in Spanish inshore waters which have been found not to conform to the limit values.



For interpretation of the water management requirements, judgements delivered in both preliminary reference procedure and infringement procedure might be helpful, even though the latter are not binding *erga omnes*.

OBLIGATIONS OF THE NATIONAL COURTS - EFFECTIVENESS

To **achieve effective regulation of air quality**, the national court *should be able to bring the national practice in line* with EU legislation.

Example: In Case C-404/13 ClientEarth, the CJEU ruled that **the national court should order any measure necessary to bring the air pollution plan into line with EU air quality legislation**. In this case, an NGO asked the UK courts to order the government to improve plans required under EU law to reduce dangerous levels of nitrogen dioxide in 16 urban areas, including Greater London. High nitrogen dioxide levels affect the health of millions of British people, especially vulnerable groups such as children and old people. The first UK court ruled that it was not its business to order the government to improve air quality measures but the UK Supreme Court sought guidance from the CJEU which confirmed it is (also) up to the national courts to achieve effectiveness of the EU law.



To illustrate requirement to achieve effective regulation of air quality, the CJEU asks the national court to order any measure necessary (and available to the national court) to bring the air pollution plan into line with EU air quality legislation.

OBLIGATIONS OF THE NATIONAL COURTS - EFFECTIVENESS

Furthermore, the national court **must be able to provide full review of the facts** to take all necessary measures against the national authority concerned.

Example: In [Case C-723/17 Craeynest and Others](#), the CJEU ruled that **the national courts have jurisdiction to review the choice of location of air quality measuring stations and to take all necessary measures against the national authority concerned.** In assessing whether limit values have been complied with, the pollution level at each sampling point must be taken into account individually. **The competent courts (in this case the Brussels court) must enforce EU rules to make sure monitoring stations are located where the highest concentrations of air pollution occur.** This means that the court also has jurisdiction to **take all necessary measures** in respect of the national authority concerned, such as an order, to ensure that such points are sited in accordance with the criteria laid down in the AQD.



The national court must be able to provide full review of the facts to take all necessary measures against the national authority concerned. This means, for example, to review the choice of location of air quality measuring stations and to take all necessary measures against the national authority concerned.

TIMELINESS, EFFICIENCY AND COSTS

Klohn (C-167/17, EIA): No direct effect of EU law implementing Art. 9(4) of the Aarhus Convention (requirement for a procedure which is not prohibitively expensive)

C-470/16 (North East Pylon, EIA): ...but it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the Aarhus Convention

East Sussex (C-71/14), Gruber (C-570/13), Mellor (C-75/08): The requirement of effectiveness covers the judge's examination of the assessment of the merits of a decision, act or omission, such as in the case as well the scrutiny of national legislation and regulatory acts (**C-41/11, Inter-Environnement Wallonie**)

Leth (C-420/11): A national court dealing with a dispute governed by EU environmental law must be in a position to order interim measures as well as to award compensation for pecuniary damages, provided the three conditions for state liability are met



The general requirements of EU law implementing Art. 9(4) of the Aarhus Convention are not directly applicable but still it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the Aarhus Convention (usually by using the instruments available already in the national law). No direct application is then needed.

EFFECTIVENESS = COMPENSATION

The courts should be able to award damages (compensation) since in practice, there may be limits to the full effectiveness of EU law. The **national court, which has the task of applying EU law, sometimes has to balance a number of fundamental rights**. In particular, deprivation of liberty must be a measure of last resort

Example: In [Case C-752/18 Deutsche Umwelthilfe](#), the CJEU dealt with refusal of a German regional government to comply with a court judgement ordering the Land of Bavaria to amend its air quality plan by imposing a traffic ban on diesel vehicles in the city of Munich. The Land of Bavaria refused to introduce such a ban, however, despite an order for recurring financial penalties having been made against it (the payment of financial penalties does not reduce the Land's resources). **The national court contemplated taking the senior political representatives into coercive detention (prison) which could collide with the Constitution.** The CJEU concluded that the national court could not order coercive detention solely on the basis of the principle of effectiveness and of the right to effective judicial protection. Any limitation on the right to liberty must be provided for by a law that meets the requirements of Article 52(1) of the Charter



In extreme cases, the requirement of effectiveness translates into compensation if other remedies cannot be used (for example, in this case, for their conflict with constitutional rights).

OBLIGATIONS OF THE NATIONAL COURTS – PRELIMINARY REFERENCE

The courts of last instance are under an **obligation to refer the question** to the CJEU ([Article 267 \(3\) TFEU](#), [Case C 99/00 Lyckeskog](#), para. 14 et seq.; [Case C-210/06 Cartesio](#), para. 75-79).

October 2021: In case [C-561/19 Consorzio Italian Management e Catania Multiservizi and Catania Multiservizi](#) the CJEU clarified its case-law in *Cilfit* concerning the situations in which national courts or tribunals of last instance are not subject to the obligation to make a reference for a preliminary ruling: a court or tribunal of last instance may refrain from referring a question to the Court for a preliminary ruling on grounds of inadmissibility specific to the procedure before that court or tribunal

Example: In case [C-416/17 Commission v France](#), the CJEU emphasised the importance of the national courts giving effect to Article 267 TFEU, which can eventually be interpreted as an obligation. In this particular case, the Commission inter alia successfully challenged the failure by the French Council of State to make a preliminary reference in a taxation matter.



OBLIGATIONS OF THE NATIONAL COURTS – PRELIMINARY REFERENCE

Preliminary ruling procedure also serves **for references on the validity of EU acts** (Art. 267 TFEU), *inter alia* to provide the public concerned with a wide access to justice in environmental matters and to ensure effective judicial protection.

There are already examples of the preliminary ruling procedure used to challenge the validity of the EU acts concerning environmental matters directly or indirectly.

Example: In [Case C-293/97 *Standley*](#), the national court asked on the validity of the Nitrates Directive; in [Joined Cases C-313/15 and C-530/15 *Eco-Emballages*](#), the French court asked whether the Commission had exceeded its implementing powers by including roll-cores as packaging in the specific Commission Directive; and in [Case C-281/16 *Vereniging Hoekschewaards Landschap*](#), the Dutch Council of State asked the Court to rule on the validity of a Commission implementing decision under [the Habitats Directive](#). The CJEU eventually found that the Commission had exceeded its discretion.



OBLIGATIONS OF THE NATIONAL COURTS – PRELIMINARY REFERENCE

C-524/20 - VÍTKOVICE STEEL (Czech Republic)

CJEU refused to review EU act on allocation of emission allowances because Czech company could defend itself against individual decision

= the preliminary ruling procedure is not intended to replace the standard judicial review

= the court must clarify whether there is an implementing act against which a defence is admissible under national law (but not a sanction - see C-456/13 P)

Must the person be directly affected by the EU act? Not necessarily - it depends on the national rules (C-911/19)

Is it possible to review an international treaty in this way? YES - see e.g. C-679/20, paragraph 19

Can a non-binding act also be reviewed in this way? YES - see e.g. C-16/16 P and C-911/19

How can the validity be assessed? Difficult - low requirement for reasons (C-122/94, C-154/04 and C-155/04, C-456/13 P) but possibility to request information (C-644/17)



THANK YOU FOR YOUR ATTENTION!

vomacka@mail.muni.cz

