

# Right to Clean Air and Access to Justice: challenging the content of air quality plans

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# Contents

PART 1 – Case law of the CJEU on judicial review of air quality plans

PART 2 - Challenging the content of air quality plans before the German courts

PART 3 - Challenging the content of air quality plans before the courts in Central and Eastern Europe





# PART 1

## CASE LAW OF THE CJEU ON JUDICIAL REVIEW OF AIR QUALITY PLANS





# Case C-237-07 – *Janecek*

- Review of short-term action plans under Directive 96/62:

*“while the Member States thus have a discretion, Article 7(3) of Directive 96/62 includes limits on the exercise of that discretion which may be relied upon before the national courts [...], relating to the adequacy of the measures which must be included in the action plan with the aim of reducing the risk of the limit values and/or alert thresholds being exceeded and the duration of such an occurrence, taking into account the balance which must be maintained between that objective and the various opposing public and private interests”*

[para 46]



# Case C-404/13 – ClientEarth

- Review of Air Quality Plans (Art. 23 Directive 2008/50):
  - “Member States must take *all the measures necessary to secure compliance*” and are not allowed “to defer, as they wish, implementation of those measures” [para 31]
  - “As regards the *content of the plan*, it follows from the second subparagraph of Article 23(1) of Directive 2008/50 that, while Member States have a degree of discretion in deciding which measures to adopt, *those measures must, in any event, ensure that the period during which the limit values are exceeded is as short as possible*” [para 57]



# Case C-723/17 – *Craeynest*

- Intensity of review of scientifically complex assessments:
  - “in order to determine the *rigour of judicial review* of national decisions adopted pursuant to an act of EU law, it is necessary to *take into account the purpose of the act* and to ensure that its effectiveness is not undermined” [para 46]
  - Air Quality Directive protects fundamental rights, including:
    - *high level of environmental protection, precautionary principle and principle of prevention* required under Article 3(3) TEU and Article 191 (1) and (2) TFEU) [see para 33]
    - *right to life*, under Article 2(1) Charter of Fundamental Rights [see Opinion AG Kokott in Case C-723/17, para 53]



# Case C-723/17 – *Craeynest*

- Reversal of burden of proof:
  - “authorities are required to base their decisions on *sound scientific data* and, as set out in Section D of Annex III to Directive 2008/50, to prepare comprehensive documentation that includes *evidence supporting the choice* of the location of all monitoring sites” [para 51]
  - Opinion of AG Kokott [para 64]:
    - it is for the competent authorities to convince the courts by presenting substantiated arguments
    - the other party can counter such claims with its own scientifically substantiated arguments
    - the court can appoint independent experts



# What is “as soon as possible”?

Minimum requirements for air quality plans (Annex XV, Part A, Directive 2008/50/EC):

1. identification of **possible measures** to improve air quality (point 6(b))
2. detailed **description of measures adopted** in the plan (point 8(a))
3. **timetable for implementation** of each measure (point 8(b))
4. assessment of the **estimated impact** of each measure and of the whole plan, including the identification of the **expected compliance date** (point 8(c))





# Case C-68/11 – *Commission v Italy*

- Obligation of result:
  - *“it is irrelevant whether the failure to fulfil obligations is the result of intention or negligence on the part of the Member State responsible, or of technical difficulties encountered by it”* [para 63]
  - The following defences cannot be accepted:
    - technical difficulties
    - financial difficulties
    - unfavourable weather conditions



# Case C-488/15 – *Commission v Bulgaria*

- Finding of systemic and continuous breach of the Air Quality Directive
- Argument based on “*socio-economic situation cannot be accepted*” [para 77]
- Case-by-case analysis and strike “*balance between the aim of minimising the risk of pollution and the various opposing public and private interests*” [para 106]



# Opinion of AG Kokott in Case C-488/15 – *Commission v Bulgaria*

- Balancing exercise: “*the high importance of ambient air quality for the protection of life and health leaves only very little room for consideration of other interests*” [para 96]
- “*the longer the exceedances persist, the more they show how effective — or ineffective — the measures already taken to improve air quality were*” [para 104]
- Reversal of burden of proof [para 107]
- Information required by Annex XV (on measures, timetable, impact assessment, compliance date) is central to assess adequacy of air quality plans [para 113]



# “As short as possible” and balancing of other interests

- **Structural changes** needed to achieve compliance cannot be considered exceptional circumstances and are not such as to exclude the possibility of setting shorter compliance date than 10 or 15 years after the start of the exceedances
  - **Case C-336/16 – Commission v Poland [para 99-101]**: socio-economic costs and financial challenge of replacing individual and collective boilers across Poland with more efficient equipment
  - **Case C-636/18 – Commission v France [para 83-85]**: significant financial investment and risk of backlash (“*gilets jaunes*”) in order to modernise vehicle fleet and change mobility infrastructure



# PART 2

## CHALLENGING THE CONTENT OF AIR QUALITY PLANS IN GERMANY



Image: Håkon Sataøen (Unsplash)





# Federal Administrative Court 5.9.2013 (AQP Darmstadt)

- Planning authorities have a discretion regarding the choice of air quality measures
  - However, the as short as possible requirement can limit this discretion, if only the adoption of a specific measure allows a timely compliance
  - Also, it requires a justification of the adopted air quality measures "*with regard to an element of time*". A "gradual return" (Janecek) is not sufficient
- accelerated action necessary



# Administrative Court of Sigmaringen 22.10.2014 (AQP Reutlingen)

- AQP is insufficient if it deals only with individual measures and leaves open when the overall objective will be achieved → no public control possible
- It must "*include a coherent concept of the measures and their effects required to comply with the limit values*" and "*specify a point in time at which the limit values are likely to be complied with*"
- If the planning authority is unable to ensure compliance with the limit values by means of measures within its own competence, it is obliged to seek consensual solutions with other decision-makers



# Administrative Court of Wiesbaden 30.6.2015 (AQP Offenbach)

- The plan must list, irrespective of the responsibilities for the implementation, all conceivable measures which are at all suitable for reducing pollution and quantify the effectiveness of the measures (reduction values) in a prognostic manner
- Only in a second step, i.e. after all conceivable measures have been identified, does the question of the proportionality of the measures or their legal or financial enforceability arise...,
- ... *"whereby it is questionable whether economic aspects may play a role at all"* (reference to the Italy case -C-68/11)



# First instance rulings on diesel bans

- Diesel ban most effective measure
  - VG Düsseldorf 13.9.2016: Traffic bans (on a single route) for Diesel vehicles are legally allowed and should be implemented immediately
  - VG Stuttgart 26.7.2017: Even diesel traffic bans for a whole zone can and need to be adopted
- Leap frog revision to the Federal Administrative Court







# Federal Administrative Court 27.2.2018

- Air quality plan infringes Art. 23 (1) in any event if it
  - “does not include the measures, which are currently the most appropriate to comply with the exceeded limit values (diesel ban), excludes the taking effect of those measures before 1 January 2020 and*
  - makes them subject to conditions the occurrence of which is uncertain and which cannot be brought about by the planner himself.”*



# Federal Administrative Court 27.2.2018

- Diesel traffic bans (route-related/zonal) are proportionate if:
    - there are no equally effective measures
    - they do not lead to exceedance of limit values on alternative routes
    - for vehicles with Euro 5 zonal bans apply only from 1 September 2019 (four years after the introduction of the Euro 6 emissions standard)
    - exceptions for craftsmen and certain residents apply.
  - National law must remain inapplicable if Union law cannot otherwise be complied with (i.e. rules hindering the enforcement of the ban)
- Subsequent convictions for introduction of diesel bans



# Higher Administrative Court of Mannheim

## 18.3.2019 (AQP Reutlingen)

- The as-short-as-possible-rule requires the adoption of diesel ban in even then, when limit values would be complied without such a ban in the following year (2020)
  - Immission forecast (compliance in 2020) not "sufficiently likely" even after the (limited) judicial control of the choice and correct application of a scientifically justifiable method, correctness of facts, clear justification
  - Obiter Dictum: The obligation of result could even require a stricter judicial control of the projections in the AQP
- Federal Administrative Court decides on 27.2.2020



# Conclusions

- The short as possible requirement limits the discretion of planning authorities
- In order to allow a judicial (and public) control of the quality of the air quality plan, the plan must specify a point in time at which the limit values are likely to be complied with and on the basis of which measures (quantified reduction potential required)
- This forecast is subject to a judicial control on forecasting errors
- All conceivable measures need to be taken into account, questions of proportionality arise only in a second step (diesel ban is proportionate)
- Economic aspects, responsibilities for implementation do not matter



# PART 3

## CHALLENGING THE CONTENT OF AIR QUALITY PLANS IN CENTRAL AND EASTERN EUROPE



Image: Grzegorz Bednarczyk (flickr)





# Bulgaria, Plovdiv case 2019 No 9614

## SAC refusing the right to review the content of AQP

- AQP is an internal act of administration
- Individuals lack legal interest in challenging AQP
- Refusal to apply the EU air quality law and case law
- Art 9 § 3 of Aarhus Convention do not grant legal standing to individuals in AQP cases
- No need for preliminary question



# Slovakia, Bratislava case 2018 5S/31/2017-141

Formal requirements are enough to annul the AQP

- Public participation must be secured during the process of preparation of AQP
- Confirmation of the right to judicial review
- Content of the plan – requirements of Annex XV of Directive 2008/50/EC: points 6-9
- Legal test – measures must be quantifiable and controllable and the plan must set up timetable for implementation and compliance date to keep exceedance *as short as possible*



# Czech Republic, Ostrava case 2017 6As 288/2016-146

Using EU law and comparative study to overcome barriers to substantive review

- Reference to the EU and national air quality case law
- Confirmation of the right to judicial review
- Content of the plan – AQP should indicate:
  - ✓ a detailed timeframe of implementation of individual measures
  - ✓ clear prioritization of proposed measures
  - ✓ explanation how the proposed measures will contribute to combat air pollution



# Czech Republic, Ostrava case 2017

Using EU law and comparative study to overcome barriers to substantive review

## Legal test for Air Quality Plan

- Aim to achieve compliance *as short as possible*
- AQP should include all technically feasible and effective measures to bring forward compliance
- Providing just one implementation date (2020) for all measures in the plan do not fulfil the as short as possible requirement
- The compliance date cannot be set arbitrarily, without detailed analysis of the earliest possible implementation date for each measure



# Conclusions

- Air quality plans must ensure compliance in the shortest time possible and include detailed information on measures and the expected compliance date
- The high importance of ambient air quality for the protection of life and health significantly restricts the discretion of Member States
- Courts must carry out intense review of the content of air quality plans, without deferring to public authorities





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# Questions?



Next webinar of the series:

## « *Right to Clean Air and Access to Justice* »

**Session 3: “Right to Clean Air and Access to Justice: How can the judgments by enforced?”**

*26 February, 12:30pm GMT+1*

Register here: <https://meeting.zoho.eu/meeting/register?sessionId=1293302906>

The previous sessions are available online on our website *Access to Justice for a Greener Europe*

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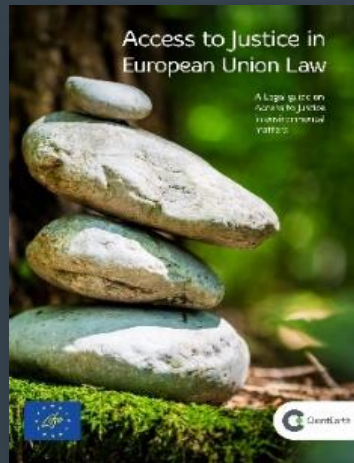
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Have a look at our legal publications :

\* Guide on access to justice in environmental matters at EU level:

<https://www.documents.clientearth.org/library/download-info/16209/>

\* Country-specific legal toolkits on access to justice at national level:

<https://www.clientearth.org/country-toolkits-on-access-to-justice/>

