

# **Conference session 4:** **Strategic litigation in practice.**

## Summary

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ClientEarth held this final session of the conference “*Access to justice in environmental matters: obstacles, impacts and ways forward*” on 16<sup>th</sup> October. This session focuses on strategic litigation in practice and gave us the chance to explore five recent environmental landmark cases.

To start with, Dr Caroline Douhaire presented us the access to justice situation in Clean Air litigation matter in Germany. Lawyer since 2015 in the law firm Geulen & Klinger active in a number of proceedings concerning clean air, clean water and climate protection, she gave us an interesting overview of the successes and remaining challenges.

Among the achievements, Caroline Douhaire especially highlighted two landmark cases in Germany.

- The first case she mentioned was the Janecek Case. Indeed, with this judgment the European Court of Justice granted standing to natural persons to enforce the Air Quality Directive, as well as a right to a legal remedy and to substantive review. Caroline Douhaire walked us shortly through the background of the case, concerning a local resident living in a highly polluted area where the limit value was exceeded, and asking the federal state to draw an Air Quality Plan. Before this judgement, the German law had never recognised a right for an individual to claim the adoption of an Air Quality Plan.
- The second case she highlighted concerned the Air Quality Plan of the city of Darmstadt, brought by the environmental organisation DUH. This case also consists of a great achievement for access to justice as it granted for the first time standing to an environmental association to enforce the Air Quality Directive.

Caroline Douhaire explained that thanks to those two cases opening the access to justice avenues for individuals and environmental associations, many more cases were brought and consequently about 30 new and better Air Quality Plans were adopted.

Then, Caroline Douhaire decided to underline the remaining challenges when it comes to access to justice in Germany in the context of Air Quality.

- Firstly, she explained us that the question whether environmental associations have standing to sue against type approvals of motor vehicles was still pending in Germany. She reminded us of the background of the case, related to the Diesel scandal. Unfortunately, she explained that, because the German Environmental Appeals Act does not provide for standing in this particular case, the German national court had decided against granting standing to environmental associations. However, this right being provided by Article 9(3) of the Aarhus Convention, Caroline Douhaire told us that the question had been referred to the European Court of Justice, with the support of the Commission. The Court should answer this question in 2021.
- Secondly, Caroline Douhaire highlighted another pending question: the right for environmental associations to go to Court in order to ensure the air pollution control plans are enforced. She explained the question was raised in a case concerning the Air Quality Plan of Mainz. As the question was not regulated in the German national procedural legal framework by the Environmental Appeals Act, the arguments also rely on the Aarhus Convention, hoping to establish a precedent for standing.
- Finally, she expressed her regret to see that for now, environmental associations in Germany do not have the right to demand stricter air quality limits. She explained that this right only exists when derived from fundamental rights such as the right to health, and can therefore not be granted to NGOs as they do not have their own basic rights.

Then, **Agata Szafraniuk**, lawyer in the Wildlife and Habitats Programme at ClientEarth, walked us through the Białowieża case.

She started by explaining us the background of the case, aiming at the protection of the Białowieża forest. This Natura 2000 forest, worldwide known for its high conservation value, was the subject of intensive logging since the apparition of beetles three years before, with a significant impact on the ecosystem.

Responsible for the legal strategy on behalf of the NGO community, ClientEarth was at the heart of a very intense conflict between the different stakeholders, namely the NGO community, the forest managers, the lawmakers, and the policymakers.

Agata Szafraniuk gave us details the legal battle ClientEarth and the coalition of NGOs when through,.

First, she explained that they submitted a complaint to the EU commission, claiming that contrary to the requirement set out in the Habitat Directive, no environmental impact assessment were carried out to determine in advance the consequences on this Natura 2000 site.

In the meantime, she explicated that they also brought a claim at national level, but that the Administrative Court of Warsaw refused them standing, arguing that neither NGOs nor the civil society can challenge internal act. Disagreeing, the polish Ombudsman also got involved and challenged the decision but the claim was dismissed as well.

Agata Szafraniuk then highlighted how unusual the pressure of the civil society was all over the country, with many protests in cities, and activists attaching themselves to trees in the forest. She said that saw in

the civil disobedience around the Białowieża case the symbol of a Polish society waking up after the communism time.

During this period, the UNESCO summit took place in Poland and Agata Szafraniuk explained that ClientEarth went to provide evidence and push for a law protecting the forest. However, she said that even though the mobilisation from the civil society was huge and brought a high pressure, the Polish government did not take into consideration the UNESCO recommendations to end the logging.

Coming back to the pending legal challenges, Agata Szafraniuk explained that following this event, the European Commission finally referred the case to the CJEU, with a request for interim measures. The Court agreed on momentarily banning the logging, but the Polish authorities did not stop, arguing that the logging was in the interest of the civil society's security, as it protects people from falling trees damaged by beetles. In response, the EU Commission requested the CJEU to impose financial penalties over the logging. The Court did so, and the logging finally ended.

Finally, the ruling of the CJEU was adopted in April 2018. Agata Szafraniuk described us the judgment, stating that the logging in the Białowieża forest was violating European law, because the Polish authorities failed to adequately protect rare and precious species and failed to assess the impact of the logging.

However, the Polish government still wasn't taking action. Therefore, Agata Szafraniuk told us that ClientEarth with other NGOs organised a highly mediated conference pointing at this non-compliance. Following this media pressure, the government finally announced the end of the extensive logging in the Białowieża forest.

To conclude, Agata Szafraniuk said that this case was not only a great success because it resulted in the end of the logging, but also because it raised awareness in Polish society about conservation issues, and gave a hope that the EU play a major role in enforcing the environmental law in Poland.

Also, she brought our attention to a similar situation in Romania, in which ClientEarth is helping local associations to launch a similar complain. She said that the Commission reacted very quickly, and already started an infringement procedure against Romania.

The next speaker on the panel was **Dennis van Berkel**, legal counsel to the Urgenda Foundation in the Netherlands, and co-director of the Climate Litigation Network, which supports climate cases worldwide. Dennis van Berkel shared his litigation experience of the Urgenda case in the Netherlands, outlining especially the role that the Human Rights played for the protection against climate crisis.

First, Dennis van Berkel started providing some background information on this case, which started in 2013. He explained that the case gathered 886 Dutch residents against the Dutch government, to contest the inexistence of a regulatory framework providing enough protection against climate change. He also highlighted the main arguments of the judgement. First, that insufficient action against climate change is a violation of the government's general duty of care, and second, that it consists of a violation of the right to life and right to family protected by the European Convention on Human Rights (ECHR).

Then, Dennis van Berkel walked us through the different steps of the judgement, reminding us that the Urgenda foundation first won the case in 2015 before the Court of first instance. The government was then ordered to reduce its emission by 2020, and decided to appeal the judgement to the Supreme Court in December 2019. But the Supreme Court reaffirmed the first ruling in favour of Urgenda's, and confirmed that the insufficient action of the Dutch government was violating the Human Rights.

Coming to the heart of the judgment, Dennis van Berkel brought to our attention three elements of the judgement:

- First, he clarified the situation regarding standing and access to the Court. He explained that Urgenda was able to bring the case thanks to a provision in the Dutch civil code, allowing associations to represent the general interest in Court cases when in relation to the objectives described in their statute. However, he also told us that the Court did not rule on the application of the 886 plaintiffs, stating that they had no specific interest since the court had already ruled in favour of Urgenda.
- Second, Dennis van Berkel explained the Court reasoning on the Human Rights argument in its judgement of December 2019. First, the Dutch Supreme Court outlining that, in the event of a serious threat to the right to life (Article 2 ECHR) or to the right to family (Article 8 ECHR), the State has the obligation to take appropriate measures. However, the question at stake was whether this rights also offer protection to the global threat represented by Climate change. To decide whether the global nature of the threat should provide the protection, the Court applied the common ground method, using other sources of law to interpret the obligation. Thus, it looked at the Paris agreement, the United Nation framework treaty on Climate change, the no harm principle under international environmental law, and the principle of partial responsibility under international private law and national private law. Finally, the Court came to the conclusion that the Dutch government had to do is share to reduce the emissions in order to prevent climate change. Dennis van Berkel also highlighted that the Court also added two new information: First that the threat can be a future threat and second that the threat does not have to only concern a small group of individuals but can involve the entire society.
- Thirdly, Dennis van Berkel explained that the judgement also clarified the practical consequences of this duty for the Dutch government and parliament when coming up with environmental policies. Looking at some general principles in relation to the rule of law, at constitutional principle in the Dutch context, and at article 13 of the ECHR providing the right to an effective protection, the Court specified that, once we established that there is a duty to protect, there must also be some lower levels limits to what constitutes the minimum amount of action that the state has to take in order to protect the rights and comply with its duty. Then, the Court made a factual assessment looking at science and international climate negotiations, and set up this minimum limit of action. The court found this minimum level of reduction in the 25-40% reduction target for 2020 (compared to 1990) that was first proposed by the IPCC in 2007 and which had gained large international recognition, amongst others in the context of the UNFCCC COP meetings.

To conclude, Dennis van Berkel shared his satisfaction to see that Human Rights can offer and effective protection against the climate crisis, and that the Court plays a very central and important role in protecting those rights.

This session of the conference kept on with the participation of **Lorenz Riegler**, practicing lawyer for 20 years in Vienna, scientific staff at the Austrian Constitutional Court (1998-2000) and University lecturer for environmental law.

Lorenz Riegler told us about the implementation of the Aarhus Convention in Austria, and the impact of the Protect judgement in that matter. He explained that since ratified in 2005, the Aarhus Convention is still not implemented in many area of law. Also, he regrets to see that the decision on Protect in 2017 was only a partial success as it only led to the implementation of the Aarhus participation pillar in the area of water law and air pollution law. Still awaiting for improvement, he informed us that in its last progress

report, the ACCC had asked Austria to take further steps by October 2020 in order to comply with international obligations, especially regarding article 9.3.

To explain this implementation gap, Lorenz Riegler mentioned two hurdles specific to Austria:

- The necessity in Austria to implement European laws through the legislator because the case laws are not sources of law like in England. He explained that in the Austrian legal system, all issues have to be brought to the highest Court by way of individual decisions in order to obtain a reasonable binding legal decision.
- The difficulty of having a federal state when it comes to applying the law uniformly. Indeed, individual matters such as nature conservation law or spatial planning law are the exclusive competence of the federal states, and federal administrative court may apply the law differently.

Lorenz Riegler also raised our attention to some growing obstacles for NGOs to access to justice:

- He explained that since a new amendment in 2018, recognition criteria for NGOs to fulfil got stricter. Indeed, organisations must now have at least 100 members in order to be recognised and to take part in proceedings.
- Also, cost of procedure for NGOs remain a major obstacle. He explained that since the procedures are becoming more and more complex, NGOs need to spend more money on technical statement and expertise, and therefore procedures become less and less affordable.

Regard to the implementation of the convention, Lorenz Riegler also raised two difficulties:

- Firstly, the definition of environmental organisations remains a problem. He explained that the authorities quite like the distinction between European and national environmental provisions in their decisions, as the Convention only applies to questions related to European laws.
- Secondly, the rules of preclusion are unclear. He regrets not to see a uniformed transitioning provision in the implementing law, or a uniformed regulation for the retroactive period.

On this issue, Lorenz Riegler gave the example of the *Protect* judgement and explained that it was unclear after the decision how far back environmental NGOs could contest environmental decisions. The Austrian Supreme Court answered this question in its 2019 decision and concluded that in *Protect*, the retroactive effect could be expanded until the year 2009, when the Charter of Fundamental Rights came into forces, because the Aarhus Convention only found its real effects in connection with article 47 of the charter.

Finally, Lorenz Riegler concluded by saying that, as there is no real status for environmental NGOs to participate, it is currently better from a strategic litigation point of view to bring cases through what “party management” (for instance landowners or neighbours). Indeed, they can usually bring forward more subjective rights than environmental NGOs. Therefore, he emphasised that overall, having access to information to participate in the proceeding and strive for judicial review against decisions is the most important.

Finally, the last speaker of the panel was **Andrew Jackson**, assistant Professor of Environmental Law at University College Dublin and solicitor with O’Connell and Clarke. Andrew Jackson litigates public interest environmental cases since many years before the Irish, English and EU courts.

Andrew Jackson recently was involved in the *Climate Case Ireland*, a case brought by *Friend of the Irish Environment* against the government of Ireland, resulting in a judgement from the Supreme Court of Ireland this summer 2020.

He started by explaining us the background and context of the case. Back in 2017 when the case was launched, the Irish government was perceived to be playing a negative role in the international and European stage in terms of ambitions to tackle Climate change. Friend of the Irish Environment wanted to change this narrative using the power of law, and therefore seized the opportunity of the very weak first mitigation plan adopted by the Irish government under the domestic framework climate law of 2015 (the Climate Action and Low Carbon Development Act).

Then, Andrew Jackson detailed us the arguments put by Friend of the Irish Environment in this administrative law challenge to the 2017 national mitigation plan:

- Firstly, Friend of the Irish Environment argued that the plan did not comply with the Climate Act.
- Second, they argued that the mitigation plan was in breach with the Ireland's Constitution, as by allowing emission to continue raising it breached various rights protected by the Constitution such as the right to life.
- Thirdly, they argued that it breached the Human Rights protected by the ECHR. This argument was inspired by the Urgenda case and built likewise on incontestable sources of scientific evidences such as the Intergovernmental Panel on Climate Change.

Also, Andrew Jackson brought to our attention two judgments that promisingly contributed to increase the relevance of the constitutional and ECHR aspects of Friend of the Irish Environment case.

- The first one consisted of the judgement on the Dublin airport case, also brought by Friend of the Irish Environment. Andrew Jackson explained us that in this case, the High Court of Ireland stated that unenumerated rights for an environment consistent with human dignity had to be read into the Ireland's Constitution. However, contrarily to what was expected, the Court did not consider this finding binding and did not follow the reasoning in the Irish Climate Case.
- The second promising judgment was the Court of Appeal decision in the Urgenda case, finding a direct breach of the ECHR.

Another promising factor was the very high public support on the case. Andrew Jackson explained us that since the scientific facts were in favour of the case, Friend of the Irish Environment took care to present the science as clearly as possible, with visual materials, and in a way that would resonate with the Urgenda judgements. This campaigning strategy worked successfully and the public attention grew significantly. As a result, the case collected the support of more than 20000 signatures online, and it led to an unprecedented involvement of the civil society during the Court proceeding in June 2019.

However, the above were not sufficient, and Andrew Jackson shared his disappointment and incomprehension regarding the outcome of this case. Indeed, the first response from the Government was a very aggressive position on cost, and stated that it was an excessive pleading. Andrew Jackson explained that luckily Friend of the Irish Environment could use the Aarhus Convention to defend themselves, as it states that litigants must not be penalised, persecuted or harassed. Likewise, the judgement of the Supreme Court was unexpected and very disappointing, not granting standing to Friend of the Irish Environment to litigate the rights aspects of the case and not recognising unenumerated constitutional rights to a healthy environment in the Irish constitution.