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Summary Report: Results of the Questionnaire

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INTRODUCTION

Air pollution is among the chief environmental challenges both in and outside Europe, causing 456.000 premature deaths on an annual basis in the European Union (EU) according to the estimation of the European Environment Agency.[2] Proper implementation of EU air pollution legislation can be a key tool to abate the significant public health hazards imposed by worsening air quality. Yet several EU Member States appear to struggle with implementing and enforcing EU air quality legislations, signalled by a high number of infringement proceedings launched in this sector.[3] Simultaneously, excessive air pollution is also litigated before domestic courts, as evidenced by a rising number of such legal proceedings that have been recently concluded or are currently pending before courts in several European countries. This aptly demonstrates that domestic courts have a significant role in overseeing effective and proper enforcement of air pollution laws.

It was against this background that the EUFJE 2020 Annual conference took upon the task of focusing on air pollution law in EUFJE member states. The questionnaire prepared for the Annual conference interrogates the challenges that courts are facing in domestic air pollution

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[2] European Environment Agency: Air quality in Europe — 2019 report, p. 68, Table 10.1.

[3] See e.g. C-479/10 Commission v Sweden; C-34/11 Commission v Portugal, C-68/11 Commission v Italy, C-488/15 Commission v Bulgaria; C-336/16 Commission v Poland; C-636/18 Commission v France; (C-635/18 Commission v Germany; C-637/18 Commission *v* Hungary, *C-638/18 Commission v Romania*; C-644/18 Commission v Italy; C-664/18 Commission v UK; C-573/19 Commission v Italy, C-730/19 Commission v Bulgaria II.

litigation. Respondents have been judge members of EUFJE working in 16 member states[4] of EUFJE in administrative, criminal, civil, and constitutional courts or in specialized environmental courts in civil and common law jurisdictions.[5]

The questionnaire included 10 overarching questions relating to four main issues of interest. Each section of the questionnaire has been organized around one of the main pillars of EU air pollution law. Section I relates to issues concerning the implementation and judicial enforcement of ambient air quality directives (Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe[6] and Directive 2004/107/EC of the European Parliament and of the Council of 15 December 2004 relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air). Section II comprises a group of questions pertaining to the national emissions directive (Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants), while Section III interrogates domestic judicial experience relating to vehicle type approval rules with respect to secondary EU legislations (Directive 2007/46/EC establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles[7] and 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[8]). Section IV relates to domestic air pollution laws that are also at play in the judicial practice in EUFJE member states besides EU law.

The present report lays out a comparative analysis of the answers that respondent judges have provided to the questionnaire. It will be structured into two main parts; the first sets out an overview of the answers given to each question, which will be followed by a second part containing analytical remarks on the shared challenges and patterns of national air pollution laws and adjudication.

[4] Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Italy, Slovakia, Spain, Poland, Romania, the Netherlands, the United Kingdom.
[5] The original national reports of judges can be downloaded from EUFJE's website.
[6] http://data.europa.eu/eli/dir/2008/50/2015-09-18
[7] http://data.europa.eu/eli/dir/2007/46/2019-09-01
[8] http://data.europa.eu/eli/reg/2007/715/2012-06-04

ANALYSIS OF THE ANSWERS RECEIVED

Section I – Questions concerning Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe[9] and Directive 2004/107/EC of the European Parliament and of the Council of 15 December 2004 relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air[10]

1. **Have there been problems to fulfil the obligations, set out in these directives, *in practise*? Are there effective systems in place to ensure detection of possible non-compliance and relevant follow-up, including prosecution and adjudication?**

The reports submitted by respondents attest that the majority of EUFJE member states are plagued by excessive air pollution as a result of various problems in the practical implementation of EU and domestic air quality standards. Only Cyprus, Estonia, Finland, The Netherlands and Denmark did not report considerable and structural problems with compliance with limit values of air pollutants. These countries experience only occasional, sporadic exceedances in certain places with regard to minor polluting agents.

(i) Major pollutants and their main causes

The gravity of the problem, along with the types of typical air pollutants as well as their major causes vary among respondent countries. Spain struggles with nitrogen dioxide (NO_2) emitted by vehicles, the particulate matter (PM_{10}) produced by traffic, central heating systems and industrial sources, as well as with ozone (O_3) concentrations. Serious problems arise with respect to NOx emissions in Madrid, Barcelona and Catalonia, where respective levels or air pollutants have been 44% and 55% above statutory levels. Likewise, poor air quality continues to be a problem in Romania as well, where the main sources of air pollution are transportation and electricity generation.

[9] http://data.europa.eu/eli/dir/2008/50/2015-09-18
[10] http://data.europa.eu/eli/dir/2004/107/2015-09-18

Air pollution is a defining problem also for the Czech Republic, where twenty of the 200 most polluted European cities are situated. Specifically, dust pollution poses health hazards, as the maximum daily limits for PM_{10} are regularly exceeded in 9 out of 10 air quality zones and 1 with regard to fine particulate matter ($PM_{2.5}$). Limit values for ozone and NO_2 have also been exceeded.

In Hungary and Poland, the major source of air pollution is emission from households, the legal regulation of which poses challenges for governments. Whereas in Slovakia, the major source of pollution is the transportation sector and the local industry. In Germany, the ongoing excess of NOx limit values is rooted in stagnating political discussion and the hesitation of administrative bodies to introduce harsh measures against diesel vehicles.

Some countries face less pervasive air pollution problem. Most concentrations of air pollutants are below EU limit values in Belgium, although target values set by Directive 2004/107 for arsenic, cadmium and nickel were not met at some measuring stations. Only occasional NO_2 exceedance has been reported from Denmark as well. In Finland, air quality is dependent upon weather conditions, as in wintertime the weather does not always allow for dilution bringing NOx and PM_{10} concentrations near the limit values. Normally, the concentrations of As, Cd, Ni and $C_{12}H_{20}$ (cyclohexylidenecyclohexane) are under limit values, and exceedance in heavy metal concentrations only occurred in the vicinity of metal industry plants. Another typical source of $C_{12}H_{20}$ in Finland is household heating, i.e. wood incineration in fireplaces.

A couple of reports pointed out the problem of transboundary air pollution. With respect to Denmark, the major sources of pollutants are from influx of other countries and marine cruise ships. In Cyprus, PM_{10} influx arrives from the deserts of Northern Africa and the Middle East. In the Czech Republic a considerable amount of air pollution is attributed to sources in Poland. In their bilateral context, however, international cooperation foreseen by the Directive to tackle transboundary pollution has thus far been unable to mitigate the problem of air pollution.

(ii) Problems with the air quality monitoring network

Some EUFJE members reported specific problems with the air quality monitoring network, which is supposed to provide the public with accessible, real-time data on the concentrations of

the main pollutants monitored at automatic measurement stations. At the same time, the monitoring systems in Estonia, Denmark, and The Netherlands are functioning properly and meet the requirements of EU legislation.

Serious and structural deficiencies have been identified in the data measured by the Romanian monitoring network. Slovakia also reported problems with complying with monitoring requirements. The Belgian report discusses specific problems inherent in the siting of sampling stations, especially, whether such monitoring points are sited in accordance with the Directive, which requires them to be fully representative of the exposure of the general population. Therefore, agglomeration zones where the population is likely to be exposed to the highest concentrations for a significant period of time are of special relevance for siting the sampling points. This was confirmed by a citizen science project called "Curieuze Neuzen Vlaanderen" (Curious Noses Flanders) conducted in 2018, when 20.000 citizens measured NO_2 concentrations near their houses for a month. The project detected an exceedance of limit values in 2,3% of the cases suggesting that 150,000 people in the Flemish Region are affected by the exceedance.

(iii) Halting projects causing incremental air pollution in already polluted zones

A specific legal challenge has been repeatedly pointed out in relation to individuals' ability to halt a project causing incremental air pollution in court. National laws as well as the jurisprudence of domestic courts in EUFJE member states differ on this point substantially, which will be addressed under Question I.4. below in more details.

(iv) Maintaining EU air quality standards after Brexit

Maintaining EU air quality standards in the UK is met with idiosyncratic challenges due to Brexit. Until a final Brexit agreement is reached with the EU, the fate of EU air pollution requirements post Brexit is subject of speculation. The UK Government announced that it does not intend to change limit and target values and domestic legislation ensures EU air pollution law will remain operable after the withdrawal of the UK from the EU. However, after exit day once the European Communities Act 1972 is repealed, the UK Government could then amend air quality standards and review any deadlines for meeting them. Yet the role that EU institutions play in monitoring and enforcing proper implemenation of air quality targets will

be lost. In order to fill this void, an indepented watchdog organization has been set up to hold the UK Government to account of its environmental law obligations. The 2020 Environment Bill has created the Office for Environmental Protection (OEP), an independent body for enforcement required to act objectively and impartially. Any person can make a complaint to the OEP if a public authority is believed to have failed to comply with environmental law by unlawfully failing to take proper account of it or by unlawfully exercising, or failing to exercise, any function it has under environmental law. The OEP has investigative powers and may give a decision notice to the public authority should it find a failure to comply with environmental law. The authority in such cases may apply to the Upper Tribunal for an 'environmental review' of the alleged failure.

2. Are those directives properly implemented in your Member State? Have stricter or complementary air quality standards been introduced?

The reports received from EUFJE members attest that relevant directives have been transposed into national laws and that the overwhelming majority of respective countries chose not to introduce stricter or complementary air quality standards (so-called gold-plating). Only Belgium, Estonia, The Netherlands and the United Kingdom reported gold-plating of EU air pollution law to a certain extent.

The Estonian legislature has imposed limit and target values for 25 other pollutants in addition to the 13 priority pollutants regulated by EU air pollution law. In Belgium, there are some complementary air quality standards in the Flemish region for chorine, hydrogen chloride, monovinyl chloride, hydrogen fluoride, asbestos and dust deposit. Those standards are stricter in some protected areas, such as in nature reserves. Similarly, stricter rules apply in The Netherlands depending on whether the standard relate to rural or urban areas. The UK introduced certain complementary rules on air pollution requiring the Secretary of State to publish annual reports containing details of cases where levels of pollutants have exceeded the limit or target values together with a summary assessment of the effects of those exceedances.

Mere transposition of relevant EU directives is, however, insufficient to deliver real progress in improving air quality. The key lies in effective application and thorough implementation,

which seems to be problematic in many states. As the Czech report pointed out, some of the anticipated legal instruments have not been activated on the national level.

3. Have EU infringement proceedings in relation to these directives been brought against your Member State?

Recently the EU Commission has been particularly vigilant in commencing infringement proceedings against Member States for failing to meet the requirements of the Directive 2008/50/EC. Accordingly, only 3 out the of 16 respondents (see responses from Cyprus, The Netherlands and Finland) reported a lack of infringement proceedings against their respective states. Most of the countries were subject to repeated infringement proceedings, and several of these cases have reached the Court of Justice of the European Union (CJEU). Some of the proceedings are still pending before the Court. The following will provide a brief overview of the most significant air pollution infringement proceedings in relation to EUFJE member states.

Belgium and the Czech Republic were subject to three infringement proceedings. The first letter of formal notice to Belgium was issued in 2008, but the proceedings have been closed later on. The second commenced in 2015 for the poor air quality of three zones and agglomerations, this case was also closed in the administrative phase. The most recent infringement case was initiated in 2018 and is still pending. In this proceeding the Commission questions the way air quality is monitored in Belgium, including the location of measuring points for NO_2 in Brussels.

There are three ongoing proceedings against the Czech Republic. The first concerns PM_{10} limit values[11]; the second relates to NO_2 limit values[12] and the third interrogates alleged ineffective enforcement of limit values and questions the lawful nature of the domestic law definition of "volatile organic compounds".[13]

Spain, Italy, Poland, Slovakia, and Hungary were each subject to two infringement proceedings. Spain was first addressed by the Commission in 2018, but this proceeding did not reach the

[11] Infringement case number 2008/2186.
[12] Infringement case number 2016/2062.
[13] Infringement case number 2018/2262.

CJEU. The second proceeding was launched in 2019 and was referred to the Court in connection with NO_2 exceedance in two large urban areas. The first proceeding against Italy has been launched in 2018 for failing to respect PM_{10} limit values and to take appropriate measures to

keep exceedance periods as short as possible (C-644/18). In 2019, Italy was again referred to the CJEU (C-573/19) in a case concerning the failure to protect citizens against high levels of NO_2. Both cases are currently pending.

With respect to Poland, the Court found a violation of Directive 2008/50/EC by exceeding PM_{10} limit values. In May 2020, the Commission decided to launch a new proceeding against Poland regarding access to justice rights in air pollution cases. With respect to Slovakia, the first letter of formal notice was sent in 2013 for exceedance of PM_{10} limit values. This case did not reach the Court. Another proceeding concerned NO_2 pollution, in relation to which Slovakia failed to ensure an appropriate number of sampling points and to provide sufficient data. This case was closed as Slovakia accepted the notice of the Commission and changed its legislation. Lastly, there has been an infringement proceeding against Hungary in relation to Directive 2008/50/EC starting in 2010, which was closed in 2011. Another case is currently pending before the CJEU for exceeding the limit values imposed by the Directive 2008/50/EC (C-637/18).

Romania, Denmark, Estonia, France, Germany, and the UK have each seen one infringement proceeding. The CJEU found Romania to be in systematic and persistent non-compliance with the daily and the annual limit values for PM_{10} concentrations. The Danish infringement case was launched in 2016 and was closed by the Commission in 2019. The Commission brought an action against Germany in 2018 before the Court (Case C-635/18) for systematically and continuously exceeding the annual limit value of NO_2 in 26 air quality zones. The case is currently pending. Estonia was subject to one infringement proceedings for the non-communication of the Directive's transposition.[14] France was taken to the Court for regular exceedance of NO_2 annual limit values in twelve regions and that of hourly limit values in Paris and Lyon (C-636/18). The Commission referred the UK to the CJEU in 2018 for a failure to respect limit values for NO_2.

[14] Infringement no 20100459.

4. Is there national case law in which these directives are relied upon and what are the most relevant subject areas (e.g. concerning adoption and content of air quality plans, access to relevant environmental information and public participation, etc.)?

The Directives were featured in domestic court proceedings in several EUFJE member states, only judges from Finland, Poland, Denmark, Estonia did not report any such reference before domestic courts. Relevant cases featured varied subject areas as will be described below in a comparative overview of the case-law reported by respondents. A more detailed account of respective proceedings can be found in the national reports displayed on EUFJE's website.

(i) Challenging the content and the scientific bases of air quality plans

The absence or the inadequacy of air quality plans have been subject to court proceedings in several EUFJE member states. Public authorities have a clear obligation under EU law to prepare air quality plans if there is a risk that the limit values or alert thresholds may be exceeded.[15] As the CJEU has firmly stressed in *Janecek* „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."[16]

Nevertheless, environmental NGOs are sometimes denied standing to challenge the sufficiency of the measures contained in air quality plans. The Commission has just called Poland to remove barriers to access to justice for citizens and environmental organisations in relation to air quality plans. In Hungary, the air quality plan of Budapest has been challenged by an NGO with the help of ClientEarth and EMLA for not being feasible to reduce within the shortest time possible the concentrations of several air pollutants. The first instance court, however, was of the view that NGOs and private individuals cannot challenge the content of an air quality plan before a court. The claimants have just submitted their appeal to the Supreme Court at the time of concluding this report.[17]

[15] Case C-237/07 Dieter Janecek v Freistaat Bayern, para. 35.
[16] Case C-237/07 Dieter Janecek v Freistaat Bayern, para. 39.
[17] See the press release of the claimant, Clean Air Action Group: https://www.levego.hu/hirek/2020/07/a-kuriahoz-fordul-a-levego-munkacsoport-a-budapesti-levegominosegi-terv-miatt-2/

Courts play a key role in overseeing the adoption of air quality plans. The French Council of State ordered the Prime Minister and the Minister for the Environment in 2017 to take all necessary measures for developing and implementing an air quality plan within the shortest time possible and to submit it to the Commission. In 2020, the Council of State found partial

non-compliance with its judgement due to the persistent exceedance of limit values and the insufficient level of details provided for the implementation of concrete actions, coupled with an unclear timeframe in which improved air quality could be expected from those actions. Therefore, the Council of State ordered the State to pay a penalty of EUR 10 million per semester until the date on which its 2017 judgement will be executed.[18]

The UK Government has been sued by ClientEarth in a series of litigation for the inadequacy of its air quality plan. The UK applied for time extensions under the directive for 24 zones and submitted air quality plans showing how the limit values would be met by 1 January 2015. In the remaining 16 zones, it submitted air quality plans under Article 23, projecting compliance between 2015 and 2025. The Supreme Court, having made a preliminary reference to CJEU, unanimously ordered that the Government must submit new air quality plans to the Commission, recognizing the obligation to act urgently under the Directive "in order to remedy a real and continuing danger to public health as soon as possible."[19] The new plan has also been challenged and was quashed by the court. The Government has again redrafted its plan, and ClientEarth issued a claim for judicial review of the revised plan for a lack of detail and for delegating actions to local authorities. The High Court found the revised plan unlawful,[20] prompting the Government to publish a supplement to it.

Czech courts have already quashed air quality plans for their inadequate content. A series of claims have been filed by individuals and NGOs to challenge the air quality plans of several highly polluted regions, such as Ústí nad Labem, and the agglomerations of Prague, Brno and Ostrava. The courts found that the plans were contrary to the Directive 2008/50/EC for not providing effective measures to achieve an acceptable air quality within the shortest time

[18] Council of State, decision of July 10, 2020 n ° 428409, in more details see the report of France.
[19] *R. (on the application of ClientEarth) v Secretary of State for Environment, Food and Rural Affairs* [2013] UKSC 25
[20] *R. (on the application of Client Earth) (No.3) v Secretary of State for Environment, Food and Rural Affairs*

possible. The courts also stressed that the plan should specify a timeframe for implementation and should also contain methods to quantify and evaluate the contribution of the individual measures to improved air quality. Similarly, the Regional Court in Bratislava annulled the city's air quality plan for providing only unrealistic plans for improving the air quality. The court stressed that any plan for improving ambient air quality shall declare measurable, revisable and time-limited actions in light of the governing EU and domestic laws.

In a currently pending case before Romanian courts, the claimants also challenge the content of the air quality plan of Bucharest. In their view, the measures proposed fail to be quantifiable and effective in solving specific air pollution problems, as they are evasive to an extent that it is impossible to assess their impact.

Belgian courts were ready to hear complaints challenging the substantive scientific bases of an air quality plan. In *Greenpeace Belgium v Flemish Region,* the President of the Dutch-speaking Court of First Instance of Brussels ordered the Flemish Region to reassess the existing air quality plan for the Antwerp agglomeration, to expand its scope to the entire territory of the Flemish Region and to formulate such measures by taking into account all data, not solely those gained from fixed measurement stations. The government was ordered to do so within a period of one year, subject to a penalty payment of EUR 1,000 per day of delay, with a maximum of EUR 5,000,000. The Flemish Government therefore approved the 2030 Flemish Air Policy Plan setting out measures to tackle air pollution in Flanders on the short, middle, and the long term. Environmental NGOs challenged the plan for being insufficient, yet in a decision brought in 2020 the court rejected their demand to draw up a new air quality plan. The court held that the claimants did not make it plausible that the measures foreseen would be insufficient to achieve the intended result, namely, to keep the exceedance period of annual limit values for NO_2 as short as possible. Hence, the measures proposed in the plan were found to be based on genuine scientific analysis.

(ii) Location of measuring stations

Another Belgian case focused on the siting of measuring points and the role citizen science may play in informing the siting process. The location of measuring points for NO_2 was at the core of a reference for a preliminary ruling from the Court of First Instance of Brussels in *Craeynest*

and Others and ClientEarth v Brussels Capital Region (Case C-723/17). The preliminary reference asked by the court concerned the siting of measurement stations and the legal criteria of establishing an exceedance. In particular, whether a limit value within the meaning of the Directive is exceeded if it has been established on the basis of the measurement results *from a single sampling point,* or such an exceedance occurs only when this becomes apparent *from the average of the results from all sampling points* in a particular zone? The CJEU held that it is for the national court to verify whether the sampling points have been established in accordance with the criteria laid down in Directive 2008/50/EC. Regarding the second question, the CJEU stressed that it was sufficient that an exceedance be measured at a single sampling point. According to the Belgian report, one might expect that more court cases will follow on the basis of this judgement, now that an important discrepancy between the results of the official measurement stations and those obtained through citizen science projects has been noticed.

Similarly, Dutch law sets forth elaborate legal principles for determining whether the air quality should be assessed at a given location, such as the principle of applicability, exposure and representativeness. The application and interpretation of these criteria are subject to repeated court proceedings (see the report of The Netherlands).

(iii) Challenging projects that cause incremental pollution in areas with poor air quality

The wording of the Directive appears to be too programmatic and broad for compelling relevant authorities to deny individual projects' permits on account of their contribution to rising pollution levels. It is for this reason not very surprising that national laws and domestic courts have adopted varying approaches towards granting individuals the right to halt major development projects that would cause an exceedance of a limit value or result in additional air pollution in areas already in exceedance with regard to certain pollutants. Such lawsuits are usually brought by private persons against neighbouring large-scale projects.

Certain laws allow such claims to proceed. Under Czech law, individuals may also halt a development project, even though their chances of success are quite limited. The Czech Supreme Court held that in assessing whether an individual can successfully claim such an exceptional protection depends on a number of factors. First, it needs to be considered whether the plaintiff was able to raise objections to the operation in question during the administrative

proceedings. Second, the public benefits of a project should be measured against the benefits of a possible ban on development. Third, a claim can only succeed if the emissions are

disproportionate to the local circumstances. Lastly, the courts take into consideration the period over which the facilities were already active. All these conditions result in significantly reduced chances of success for neighbours in challenging large-scale developments. Individuals enjoy a considerably better position if the nuisance is caused by minor activities not requiring an official permit. Nevertheless, state authorities are not allowed to permit a new source of pollution contributing significantly to the existing excessive levels of pollution without adopting compensatory measures.

The UK courts have also heard challenges against proposed large-scale developments on grounds including their impact on air quality in air quality zones already in excess of limit values. The judges decided against refusing the planning permissions and emphasized the competent authority's very wide discretion and liberty not to call in its permit even if the projects would likely frustrate the requirement to reduce exceedances in a period as short as possible. In the same vein, the Divisional Court dismissed claims alleging that building a fourth runway to Heathrow Airport would undermine the UK's obligations under Directive 2008/50/EC.

Other jurisdictions take a different approach to the problem. Estonian national law makes it impossible for individuals to challenge a project that causes an exceedance of limit values. Likewise, Belgian law also does not imply a general prohibition on granting a permit that could cause additional air pollution, nor does it impose a compensation obligation for the incremental pollution resulting from a development project. In *Melen v. Walloon Region*, the Council of State held that compliance with the limit values of the Directive should be assessed in relation to a given zone, but not in relation to a specific urban development project. The *Angenon v. Flemish Region* case concerned a demand for annulment of a land use permit for the redevelopment of Ghent Railway Station. The plaintiff argued that the permit cannot be delivered because that would lead to lasting violation of PM_{10}, NOx and NO_2 limit values in the area. Yet the Council of State did not accept the argument, as in view of the Belgian courts,

there is no direct link between the environmental quality standards and the permit of a concrete project.

The solution adopted in The Netherlands represents a third approach. The Dutch law transposing the Directive introduces the so-called NIBM rule, according to which if a project does not make a 'significant contribution to air pollution', no assessment against the air quality limit values is required. The NIBM Regulation establishes quantitative limits for specific projects and a presumption of the lack of significant contribution for certain developments (e.g. building a residential unit of max. 500 houses and one access road is always defined as not making a significant contribution). Austrian law adopts a similar solution inasmuch as only those projects can be permitted that do not make a significant contribution to the limit values of pollutants, which is defined as 1% of the long-term limit value. Otherwise, short-term compensation by reduction of other sources in the relevant area is required.

(iv) Banning diesel vehicles

German administrative courts were asked to rule on the legality of banning diesel vehicles. The Federal Administrative Court made clear with its first judgement on this topic[21] that if a ban of diesel vehicles is the only possibility to render the time of exceedance of NOx limits as short as possible, it must be possible to enact such bans, as far as the ban is proportional. The Court also gave several hints on how such a ban can be designed to be proportional, including exceptions for delivery traffic and considering the age of the concerned vehicles. Similar proceedings are still pending concerning more fine-grained details of proportionality.

(v) Competences allocated to various actors under Directive 2008/50/EC

The Hungarian Supreme Court annulled a mayor's decree that set out short-term action plans for air pollution in excess of the alert threshold stipulated in the Directive. Specifically, the decree delegated to a committee certain powers, which were solely bestowed upon the mayor under higher-ranking environmental laws transposing the Directive.

(vi) Lawfulness of interfering with property rights in the public interest

[21] BVerwG, judgements of 27 February 2018 - 7 C 26.16 and 7 C 30.17

Three NGOs asked the Bucharest Tribunal to order the cessation of the grubbing of trees on a land in Bucharest. The owner requested a permit for the clearance of trees, which the City Hall denied. The Tribunal found that granting a building permit does not oblige the administrative authority to issue the deforestation permit as well. It emphasized that although the denial of permit could amount to an interference with the applicant's property rights, it was lawful and foreseeable, pursued a legitimate aim and was proportionate to the public interest in complying with goals set out in the Directive.

a) Are there specific difficulties to enforce judgements in these cases?

As a prerequisite to decide such cases courts should grant individuals access to justice rights in air pollution litigation. Yet in Poland, courts experience difficulties in establishing whether NGOs can be a party to administrative and judicial proceedings concerning the review of environmental protection programs. In Hungary, an expert NGO was also denied standing to challenge an air quality plan.

In many jurisdictions, it is unclear how the obligation of preparing adequate air quality plans could be actually enforced against relevant authorities. In Belgium, the imprecise legal status of air quality plans causes difficulties. In Romania, the problem lies in ensuring that adequate action is actually taken following a court order to that effect. The UK air quality litigation also demonstrates how governments may repeatedly fail to comply with judgements ordering the drafting of proper air quality plans. This has prompted the High Court to exercise an unusually flexible supervisory jurisdiction and allow claimants to bring the matter back before the court if there is evidence that the defendant is falling short in its compliance with the terms of the order.

The experience of the Czech courts shows that there is no real leverage on the State to improve the air quality. Similarly, French courts can only address injunctions to administrative authorities and state organs, but the Council of State has been precluded from establishing the responsibility of the State for exceeding limit values and violating human rights to a balanced and healthy environment. In a somewhat similar fashion, German courts also experience hardship in ensuring compliance with their action-forcing judgements. Despite repeated

decisions of the Federal Administrative Court ordering the authorities to develop or modify their air quality plans in a way as to include diesel bans, some administrations were still hesitating to introduce this harsh measure. The possibilities of taking enforcement measures against the State in such cases are rather limited. According to German law, the main avenue is to order a penalty payment, where a state entity has to pay a certain sum to the central budget. The idea to have responsible politicians arrested until they enact the demanded measures was dismissed in a preliminary ruling judgement, following the CJEU's declaration that the enforcement of national judgements is a matter of national law and that EU law does not demand specific enforcement measures (C-752/18).

Furthermore, awarding compensation for violations is precluded in certain jurisdictions. In the Czech Republic, individuals who access national courts and repeatedly win disputes against the authorities are merely given an affirmative ruling that their rights have been violated but are left with no financial compensation. Given the lack of a class action system under Czech law, individuals are barred from seeking financial compensation in an effective procedure. Under French law, individual or collective damage claims resulting from high pollution levels encounter many obstacles, including diffuse sources of pollution and difficulties in establishing direct causality between the emission and certain pathologies that may have several triggering factors.

Finally, the report from Spain highlighted the issue that criminal judges may not be familiar with environmental laws, which causes hurdles in establishing responsibility as the latter is tied to a violation of administrative law under Spanish law.

b) Who are the claimants in the different categories of cases (e.g. local authorities, non-governmental organisations, private persons)?

In many jurisdictions, typically it is NGOs who are proactive plaintiffs. A marked trend manifests in the collaboration between international and national environmental NGOs in bringing strategic air pollution litigation cases to courts. Such public interest litigation often requires a creative appeal to existing legal avenues.

The NGO-driven nature of air pollution litigation has, however, certain blind spots. The Czech report noted that NGOs are mainly active in major cities, such as Brno and Prague, where they have the necessary public support, which results in a disproportionately low number of lawsuits in heavily polluted rural areas. Notably, two-thirds of all environmental cases brought by NGOs in the Czech Republic relate to Prague and Brno, yet one of the most polluted area of the entire EU, namely, Silesia, has seen only a couple of environmental lawsuits. The key role of civil society in air pollution litigation also points to the crucial problem of allocating sufficient funding for the civil society, which could ensure the viability of such grass-root initiatives.

In certain jurisdictions, individuals, local authorities, regional governments, trader's associations and various other stakeholders also act as frequent claimants. In Hungary, a court proceeding was launched on the petition of the Ombudsman for Future Generations to the Supreme Court. The Ombudsman is responsible for representing the environmental interests of posterity and has the power to initiate lawsuits through the High Commissioner for Fundamental Rights of Hungary.

Claims may be brought by a strategic alliance between various actors. In the Czech Republic for instance the enlargement of the Václav Havel Airport in Prague was challenged by five municipality districts, two individuals, and four institutes of the Czech Academy of Sciences.

Municipalities may also act as rights-holders in air pollution cases. In 2010, the city of Ostrava filed an action against the Czech government. It claimed that the inactivity of the government contravenes relevant EU law, rendering Ostrava helpless in dealing with desperate air quality in the region. The first instance court dismissed the case concluding that the city did not have any rights to be violated. Yet, the Supreme Administrative Court disagreed and found that the right to self-government was at stake and Ostrava was also entitled to defend the rights of its citizens. However, the Court ultimately concluded that the city failed to prove a direct relationship between the inactivity of the defendant and the exceedance of limit values. The Court also pointed out that the city itself has been one of the authorities responsible for the harmful situation.

Private persons may also act as plaintiffs in toxic tort claims to demand compensation for the harmful effects of air pollution. In 2019, the Montreuil Administrative Court recognized the fault on part of the French State for passing only inadequate measures to limit concentrations of NO_2 and PM_{10} in the Île-de-France region. The damage claim for developing respiratory diseases has however been dismissed due to the lack of a requisite direct causal link.

c) Is there case law, in which claimants demand the withdrawal of measures aimed at improving the air quality (e.g. annulment of ban of certain cars)?

Many jurisdictions have seen attempts to withdraw measures aiming to reduce air pollution. Such lawsuits are diverse in nature, as will be detailed below. All but one type of such claims have been rejected by the courts and, thus, such claims proved to be unsuccessful in cancelling pollution abating measures.

(i) Withdrawal of low-emission zones

Designating low-emission zones (LEZ) generated high levels of public tensions and the attempts to repeal such schemes ultimately reached the courts in several jurisdictions. In Spain, the Madrid Council created a LEZ in 2018 for the core of Madrid, rendering 4.7 square kilometres of the city centre off-limits to car traffic except for local residents and public transport. Only cars with a zero-emission tag were allowed to enter the LEZ, and drivers who entered the LEZs without proper permission have been fined. In terms of reduction goals, the Madrid Central LEZ has been considered as one of the most effective plans in the EU for reducing NO_2 concentration, causing a 32% decrease in greenhouse gas emissions. Yet, the measure has been quite unpopular and supposedly was a major cause behind the incumbent mayor's loss at the elections in 2019. The new mayor sought to suspend the scheme, but this was blocked by the courts, which argued that the LEZ was needed to prevent pollution from steadily rising and hence to safeguard the health of residents.

There were similar attempts to repeal the LEZ created in Brussels, which were also refuted by the courts. The Constitutional Court ruled that the Brussels Capital Region's legislation creating the LEZ was not in breach of the allocation of powers between the federal and the regional government nor that of property rights, the equality principle and the free movement of persons,

goods and services. The Court equally refused to find a constitutional law problem with the imposition of a kilometre charge for trucks, partially depending on the emission standard of the vehicle.

In Romania, individual plaintiffs requested the suspension of the Bucharest General Council's decision to create an area, where the vehicles with non-Euro, Euro 1 and Euro 2 pollution norms is banned between 7am to 10pm. starting as of January 2022. The Bucharest District Court dismissed the challenge based on the right to property by finding that the measure does not constitute a violation. In other States, cities are yet to introduce LEZ, such as in the case of Slovakia.

(ii) Eliminating diesel bans

In Germany, bans on diesel vehicles have been targeted by both individual car owners and affected states to make the courts suspend the bans. None of these attempts have been successful so far. For instance, the Federal Constitutional Court, following decisions of the Administrative Court of Stuttgart and the Higher Administrative Court of Baden-Württemberg, dismissed the application of a private individual in an injunction procedure.[22] Similar efforts in Italy have also remained fruitless. An attempt to revoke a car ban was first made by a traders' association, which argued that the ban was ineffective in reducing the air pollution and was discriminatory for not differentiating between different types of fuels and fuel efficiency standards (Euro 1 and 2). The Administrative Court of Sicily rejected the petition.

(iii) Limiting the use of coal for household heating purposes

In 2019, the Supreme Administrative Court of Poland[23] dismissed the claim of private persons demanding the annulment of the local authorities' ban on the use of coal for household heating purposes in Cracow. Both the first instance court and the Supreme Administrative Court dismissed the challenge.

(iv) Imposing environmental taxes on cars

[22] BVerfG, decision of 1 October 2019 - 1 BvR 1798/19.
[23] Case of 2OSK 1060/17.

The only measure that was withdrawn due to legal challenges was the Romanian environmental tax on cars. Such a tax has been introduced several times under several schemes in the form of a 'registration tax', 'special pollution tax', 'tax for polluting emissions', and 'environmental stamp'. All initiatives of the Romanian legislator to impose a tax on cars were declared illegal and contrary to the TFEU by national courts as well as the CJEU[24] for not respecting the right to property and EU law. The relevant car taxes have been viewed as disguised customs, discriminatory in nature, and hence were annulled.

d) With a view to the penalty clauses of Article 30 Directive 2008/50/EC and Article 9 of Directive 2004/107/EC: What type of penalties are applicable in your country to breaches of obligations deriving from these two directives? More specifically:

- Are the sanctions specifically stipulated in the transposing national legislation or are there sanctions of a general kind established in other legislation and applicable more widely?

Under applicable provisions of the Directive 2004/107/EC and Directive 2008/50/EC, Member States shall determine the penalties applicable to infringements of the national provisions adopted pursuant to these Directives and shall take all necessary measures to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. The answers received from respondents reflect that EUFJE member states have designed various sanction schemes under these Directives.

In certain jurisdictions, sanctions are of a general nature, and not specifically provided under the transposing legislation (see reports of Spain, Belgium, Italy, Germany). Whereas in the Czech Republic, Estonia, Hungary and Poland, sanctions are specifically stipulated in the transposing legislation.

- Are the sanctions directed explicitly or implicitly against competent authorities? Are the sanctions addressed to private natural and legal persons and/or economic operators?

[24] C-402/09, C-263/10, C-565/11, C-97/13, C-214/13, C-331/13, C-586/14.

Generally speaking, sanctions of relevant national laws do not appear to differentiate between the addressee of the sanctions and may be directed against both natural and legal persons. In Italy, sanctions are normally addressed to natural persons.

A marked point of divergence between national laws lies in whether they allow for sanctioning public entities, state organs, which are often one of the main sources of pollution. This aspect will be addressed in more detail in the following section.

- Are the sanctions of administrative or criminal nature or both? What is their range?

In most of the relevant countries, sanctions are both administrative and criminal in nature (e.g. Spain, Belgium, Poland, Hungary, Italy, Germany, Slovakia, Estonia). Under Czech law, only administrative sanctions can be imposed.

(i) Criminal liability of public entities

Public entities may not always be subject to criminal sanctions. The 2010 reform of the Spanish Penal Code has excluded local and governmental authorities from the scope of liability even though they also play an important role in generating pollution. In Belgium, some public legal entities, such as the federal state, the regions, the communes, etc. can only be declared guilty under criminal law, but cannot be otherwise sanctioned in the case of criminal liability.[25]

(ii) Criminal liability of legal persons

Spanish law provides for autonomous criminal liability of corporations, allowing them to be sanctioned even when it is not possible to single out the criminal liability of a natural person. In order to establish criminal liability, the corporate conduct must also constitute an infringement of environmental administrative law.

(iii) Criminal liability of individuals

In Romania, applicable criminal sanctions include imprisonment from 3 months to 5 years.

[25] These public legal entities can, however, be ordered to pay compensation to the victim.

(iv) Administrative sanctions

Private entities may be ordered to pay an administrative fine. Administrative liability may be a precondition for establishing criminal liability (e.g. under Spanish law).

Public entities often can be subjected to administrative sanctions, typically financial sanctions (e.g. Belgium, Poland, Estonia, the UK). The UK Government for instance has a discretionary power to require local authorities responsible for breaching limit values under the Directive to pay all or part of any fine imposed by the European Commission.

The exact range of administrative sanctions vary across jurisdictions. In Romania it ranges from 500 lei to 10,000 lei (EUR 100-2,000) for individuals, and from 3,000 lei to 15,000 lei (EUR 650-3,000) for legal persons. Under Czech law, fines may amount to CZK 20,000 or 50,000 (approx. EUR 800 or EUR 2,000 respectively) depending on the particular misdemeanor of the natural person; and up to CZK 20,000, 50,000, 500,000, 2 million and 10 million (approx. EUR 800 to 400,000) depending on the misdemeanor of a legal person. In Slovakia, fines vary between EUR 330 and EUR 330,000 depending on the severity of administrative offense.

- Are there any case law statistics available? Or statistics on the application of penalties outside of court proceedings?

Except for Estonia, none of the respondents pointed to any specific national case-law or administrative statistics regarding the application of sanctions in air pollution cases. In Estonia, the Environmental Inspectorate publishes statistics on the annual total sum of administrative fines imposed for infringing provisions of the national Atmospheric Air Protection Act. Yet these statistics do not indicate the sum of fines specifically imposed for infringements of Directive 2008/50/EC or Directive 2004/107/EC, or the number of such violations.

Section II – Questions relating to Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants[26]

[26] http://data.europa.eu/eli/dir/2016/2284/oj

1. Is this directive properly implemented in your Member State? Have stricter emission reduction commitments been introduced? Has national legislation been adapted to meet the emission reduction commitments?

The answers received suggest that the Directive (EU) 2016/2284 has been duly transposed into the domestic laws of EUFJE members. Except for one respondent, all EUFJE members reported the absence of complementary reduction commitments. In Finland, certain additional measures have been introduced concerning wood incineration and for reducing street dust in urban areas. The UK also adopted its National Air Pollution Control Programme explaining how the UK can meet legally binding emission reduction commitments for NOx, NH_3, NMVOCs, $PM_{2,5}$ and SO_2 by 2020 and 2030.

2. Have EU infringement proceedings in relation to this directive been brought against your Member State?

With respect to this directive, fewer infringement proceedings have been launched against EUFJE member states compared to the directives discussed above. None of these proceedings have reached the CJEU. In particular, two letters of formal notice under Article 258 TFEU have been sent to Belgium for non-communication. With respect to Romania, two proceedings have been launched, the first was withdrawn and the second is currently pending before the Commission. Estonia received a formal notice in 2017 for a failure to enact the laws, regulations and administrative provisions necessary to comply with Article 10(2). This case was closed in the same year. The Commission issued a letter of formal notice to the UK in 2017; the case has been closed and no further action has been taken. There is also a pending infringement proceedings against Cyprus regarding incorrect transposition of Directive (EU) 2016/2284.

3. Is there national case law in which this directive is relied upon?

The majority of respondent judges did not report such cases. Relevant court proceedings have, however, been cited from Germany and Slovakia.

In 2020, the Slovak Supreme Court decided a dispute concerning a permit granted to a new cellulose manufacturing installation. Negative impacts on ambient air quality have been a major cause for concern in the case. The regional authority, acting as defendant, argued for deeming local urban plans containing strict requirements for environmental protection as irrelevant to the process. In particular, the authority declared the limitations on NOx, SOx and $PM_{2,5}$ emissions are not a matter for immediate concern, but only a task for the future. The Supreme Court disagreed and, by referring to the preamble of the Directive (EU) 2016/2284, announced the obligation to commence immediate emission reductions.

Furthermore, there is a relevant pending case before the Upper Administrative Court of Berlin-Brandenburg brought by the NGO Deutsche Umwelthilfe, which claims that the national air pollution control programme fails to comply with the Directive (EU) 2016/2284.

Section III – Questions relating to Directive 2007/46/EC establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles[27] and 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[28]

From 1 September 2020, a new EU vehicle type-approval framework is applicable across the EU and Directive 2007/46/EC has been repealed. This provides an apt occasion for evaluating the experience of domestic courts with the Directive.

1. How has your Member State implemented these EU vehicle type approval rules?

All relevant jurisdictions have transposed the directive, with relevant solutions ranging from introducing a classification system of stickers indicating energy efficiency of the vehicle (e.g. France, Spain), to vehicle registration schemes (e.g. Czech Republic). The Commission has

[27] http://data.europa.eu/eli/dir/2007/46/2019-09-01
[28] http://data.europa.eu/eli/reg/2007/715/2012-06-04

nevertheless sent letters of formal notice to Germany, Italy, Luxemburg, and the UK for a failure to comply with EU vehicle type-approval rules.

2. Treatment of diesel vehicles when using illegal shutdown devices:

The 'Dieselgate' scandal has garnered substantial public attention across European countries. EUFJE member judges have also faced a number of lawsuits originating from the use of illegal shutdown devices, i.e. software installed by manufacturers in order to manipulate the levels of harmful emissions detected during the testing of diesel vehicles.

a) Are there national regulations or jurisprudence according to which an issued EC type approval (Directive 2007/46/EC) loses its legal effect if an (impermissible) shutdown (defeat) device is discovered, which was already installed, when approval was granted? (A shutdown device - usually a cheat software - manipulates gas measurements.)

Article 13 of Regulation (EC) No 715/2007 entrusts Member States to lay down effective, proportionate and dissuasive penalties applicable for specific infringements by manufacturers, including the use of defeat devices that reduce the effectiveness of emission control systems. This has prompted States to adopt different sanction schemes. Transposing national legislations usually provide for general sanctions and do not designate specific penalties for the installation of a defeat device (e.g. Belgium, Estonia, Hungary, Italy). Certain reports explicitly mention the possibility under national law to withdraw in whole or in part the approval in case a manufacturer violates type approval rules (see reports of Germany, Hungary, Italy, Slovakia).

Other jurisdictions allow financial sanctions (e.g. Czech Republic, Italy). Under Czech law, mass marketing of vehicles infringing type approval rules, including the use of cheat software, is punishable with significant pecuniary sanction up to CZK 50 million (approx. EUR 2 million). In addition, car manufacturers may also face misdemeanor charges in such cases, where a financial penalty of up to CZK 5 million (approx. EUR 200,000) may be imposed for the offense of not remedying the harm and threat implicated upon the environment by their wrongful conduct.

Criminal sanctions may also be applicable. Under Belgian law, a failure to comply with type approval rules is punishable by a term of imprisonment of ten days to ten years and a fine of EUR 1,000 to EUR 7 million, or one of those penalties only, if that unlawful act or omission is committed with the intent of causing environmental or health damage. The same sanctions are applicable for inciting to commit such infringement. The offender is punishable by a term of imprisonment of eight days to one year and a fine of EUR 250 to EUR 5 million, or one of those penalties only if that unlawful act or omission is committed with gross negligence.

b) What legal measures have been taken in your Member State (if any) against car manufacturers, which have failed to comply with vehicle type approval rules? These legal measures might include court cases, including between car buyers and manufacturers.

(i) Criminal proceedings against managers

Various criminal proceedings have been initiated against managers of respective manufacturers in Germany, such as the VW Group, Audi AG, Daimler AG, Robert Bosch GmbH and Continental AG. These have now been partially closed with the condition to pay a fine to the treasury. In Germany, it is not possible to take criminal measures against the companies themselves. Criminal investigations are also ongoing in Brussels.

(ii) Administrative fines

Administrative law fines have been imposed on car manufacturer companies in Germany,[29] albeit the magnitude of such sanctions has failed to reach the billions, as has been anticipated. The Federal Ministry of Transport has now been legally sentenced to provide further information for the reasons for this discrepancy.[30]

(iii) Damage claims

Under German law, car buyers can make tortious claims directly against the respective

[29] VW: one billion euros (public prosecutor's office Braunschweig); Audi: 800 million euros (public prosecutor's office Munich II); BMW: 8.5 million euros (public prosecutor's office Munich I); Porsche: 535 million euros (public prosecutor's office Stuttgart); Daimler: 870 million euros (public prosecutor's office Stuttgart), for more details see the national report of Germany.
[30] Higher Administrative Court Berlin-Brandenburg, decision of 05 February 2020 - OVG 6 S 59.19 -, juris.

manufacturer. The Federal Court of Justice has ruled that buyers have tort law claims against the manufacturer if they bought the vehicle before the Dieselgate scandal became known.

Damage claims may also be brought by consumer protection organizations. One such proceeding is currently pending before Belgian courts. Belgian, Italian, Portuguese and Spanish consumer organizations have filed a class action for damages before the Court of First Instance in Brussels against Volkswagen and D'Ieteren in 2016, which has been declared admissible. The consumer organization is thus entitled to represent all Belgian VW car owners in which defeat devices have been fitted. As negotiations to reach a settlement failed, the Court will now go into the substance of the case.

In Spain, there have been three cases, where the courts have condemned German car companies to pay a compensation amounting to approx. 10% of the vehicle's value.

(iv) Claims of investors

Shareholders may also have claims against manufacturers. On 16 September 2016, a group of Belgian investors filed proceedings against Volkswagen AG and Porsche with the Court of Braunschweig. The investors are seeking compensation of EUR 1,4 billion for the losses suffered on their purchases of Porsche and Volkswagen securities due to the company's failure to timely and correctly inform them about the use of defeat devices and its consequences on the company's earnings, outlook, and financial situation.

(v) Contract law claims

In the UK, owners of Volkswagen, Audi, Seat, and Skoda cars brought a group action against the manufacturers for among others fraudulent misrepresentation in relation to the sale of the affected vehicles.[31] The court had to rule on the preliminary issue whether the software used in the vehicles amounted to a defeat device, and found in favour of claimants.

c) Which requirements will be imposed on the request to retrofit a vehicle in your Member State?

[31] Anthony Joseph Champion Crossley and others v Volkswagen Aktiengesellschaft and others

The majority of respondent EUFJE members have had only a limited judicial experience regarding retrofitting, i.e. equipping vehicles already in use with diesel particle filters to reduce their harmful emissions. Generally speaking, relevant countries require an approval of the municipal or competent authorities for commissioning retrofitting (for more details on the exact procedures see the reports of Czech Republic, Germany, and Romania).

German authorities specifically require submitting the retrofitted vehicle's registration certificate together with all relevant photos and invoices pertaining to the reconstruction works carried out on the vehicle. Retrofitted vehicles must comply with technical requirements applicable at the time of first registration of the vehicle.

The UK has developed the Clean Vehicle Retrofit Accreditation Scheme, which is a certification scheme to approve technologies that can be retrofitted to diesel vehicles to reduce NO_X and PM emissions, and achieve Euro 6 equivalent standards. The scheme covers taxis, vans, buses, refuse collection vehicles and trucks. Technologies already accredited include exhaust aftertreatment technology, selective catalytic reduction, and the conversion of diesel engines to a more environmentally friendly mode of power. The scheme has been recognised in air quality policies, such as Clean Air Zones (England and Wales), the Ultra-Low Emission Zone (London) and Low Emission Zones (Scotland).

d) How does the authority get information about the lack of implementation of any software updates in your Member State?

Reports from EUFJE members have not pointed out any specific rules governing the detection of the lack of software updates. It appears that the authorities are usually either informed by individuals and another authority or gather information from the media or through their own investigation. In certain jurisdictions, transport authorities are specifically entrusted with market surveillance powers in order to ensure compliance with requirements of EU and national regulations, directives applicable to road vehicles (e.g. in Germany, the UK).

Market surveillance activities of the German Federal Motor Transport Authority include long-term planned surveillance with the objective to uncover the use of specific unauthorized vehicle

parts, especially through the authority's own research conducted on internet sites. This is complemented by reactive market surveillance responding to discrete events, such as accidents, complaints and defect reports received from external sources or gathered from the media. Both types of surveillance activities may trigger an investigation by the Federal Motor Transport Authority. If the products do not meet the requirements, measures can be taken. In the case of security-relevant defects, products can be recalled and public warnings may be ordered. The Federal Motor Transport Authority can also order sanctions for administrative offenses.

Estonian authorities have a right to demand the manufacturer to submit relevant documents, data, test protocols and explanations, to observe the manufacturing process and to have randomly chosen products referred for further inspection. If a vehicle or product does not comply with the type-approval or if the manufacturer fails to ensure access to relevant information, the authority may compel the manufacturer to have the deficiency eliminated; a failure to comply may result in penalty up to EUR 6,400.

e) Are there less onerous measures under the law of the Member State than imposing a driving ban on a vehicle? Have such less burdensome measures possibly been developed by case law?

In certain jurisdictions, unauthorized modification of vehicles is sanctioned with a financial sanction, a driving ban, or both (e.g. Czech Republic). As opposed to this, some national laws exclude imposing any less onerous measure than a complete driving ban (e.g. Romania, the UK).

Judicial practice to enforce such measures has only been reported from Germany,[32] where relevant laws enable the authorities to finally revoke the type approval in whole or in part. In the case of vehicles with engines with a shutdown device, the Federal Motor Transport Authority can impose on the manufacturers the obligation to remove the inadmissible shutdown

[32] VG Stuttgart, decision of April 27, 2018 - 8 K 1962/18 [ECLI: DE: VGSTUTT: 2018 : 0427.8K1962.18.00] - juris; see also VG Düsseldorf, judgement of 24.01.2018 - 6 K 12341/17 - juris and Schleswig-Holsteinisches VG, judgement of 13.12.2017 - 2 A 59/17 – juris, for more details see the report of Germany on the EUFJE website.

devices even with respect to vehicles already in traffic. Moreover, manufacturers should take appropriate recall actions to restore compliance.

IV. Domestic Law

Please provide information, including case law, on additional domestic air protection law that could be interesting for other Member States.

(i) Constitutional protection of the environment

Constitutional provisions on environmental protection and sustainable development have recently provided a vehicle for the judicial enforcement of air quality measures in many jurisdictions. Such provisions have now become the norm in European constitutions, and several respondents have specifically pointed out their relevance in their judicial practice (e.g. Czech Republic, France, Romania, Spain). Human rights safeguards guaranteeing a human right to a clean and healthy environment can be especially effective legal tools, which are increasingly utilized by individuals and NGOs in strategic air pollution litigation. The right of any citizen to live in a healthy environment may establish or reinforce the obligation of public authorities to improve ambient air quality. Furthermore, courts may translate human rights obligations to compel polluters to bear the costs of repairing the damage caused to the environment and human health, specifically by rebuilding an applicant's household in an appropriate area in terms of environmental conditions (see: report of Romania).

At the same time, certain human rights standards have been invoked to limit the inspection powers of relevant authorities. In 2017, members of the Czech Parliament claimed that granting new powers to the environmental protection authorities to conduct a search in the homes of private individuals violated the constitutional right to the inviolability of the home. The new regulation enabled the authority to enter private premises after a previous warning in order to inspect stationary sources of air pollution, i.e. solid fuel boilers. The Constitutional Court decided in favour of the public interest by finding that the restriction was necessary to protect the life and health of others. The Constitutional Court also pointed to foreign regulations that allow similar inspections, e.g. in Germany or Austria.

(ii) Minimum distance requirements

Permitting requirements can be a major tool to improve air quality. Finnish law allows for imposing minimum distance requirements for permitting rock crushing and gravelling activities. In order to minimize harmful impact on vulnerable groups, such activities cannot be carried out within a minimum distance from hospitals, kindergartens, schools and residential homes, as well as recreation houses.

(iii) Reducing emissions from vehicles: low emission zones and idling times

In addition to the growing number of LEZ created in several relevant jurisdictions (see reports of Belgium, Romania, and Spain), other transport-related measures can still be introduced to reduce the levels of harmful emissions coming from tailpipes. Finnish law for instance prohibits idling time of motor vehicles over 2 minutes. In a somewhat similar way, UK law allows fixed penalty notices to motorists who leave their stationary vehicles' engine running unnecessarily.

(iv) CO_2-tax imposed on cars

Embracing the growing role of electromobility States can also introduce carbon taxes on vehicles running with fossil fuels. Yet according to the 2020 survey of the European Automobile Manufacturers Association on CO_2-based motor vehicle taxes in the EU,[33] such taxes are far from being fully embraced across the EU. Three Member States have chosen not to impose such a tax (Estonia, Lithuania, Poland), while many others also underutilize this carbon pricing method. The study shows that taxes often only indirectly target CO_2-emissions, and they frequently do not apply uniformly to privately-owned and company cars.

(v) Long-term planning measures

The UK Government's 25-Year Environment Plan to Improve the Environment sets forth legally binding targets for combatting air pollution, which are not affected by Brexit. These include cutting emissions of five pollutants – ammonia, nitrogen oxides, non-methane volatile organic compounds, fine particulate matter and sulphur dioxide – by 2020 initially, and by 2030 for a deeper cut.

[33] https://www.acea.be/uploads/publications/CO2-based_motor_vehicle_taxes_European_Union_2020.pdf

ANALYTIC REMARKS

The answers provided to this questionnaire suggest that even though EUFJE members face country-specific drivers of air pollution, combatting adverse ambient air quality presents a shared challenge for EU Member States. This survey has presented an insight into the growing body of national jurisprudence relating to EU air pollution law and has illustrated some of the legal questions that frequently arise across jurisdictions.

The overview of national transposition measures has suggested that EU air pollution law serves as the backbone of domestic frameworks for combatting air pollution, as national lawmakers have generally remained reluctant to introduce stricter or complementary air quality measures. When relevant EU legislations are programmatic in nature and adopt a broad language, domestic laws tend to take divergent approaches to allowing individuals' legal claims before national courts. For instance, answers to this questionnaire revealed a diversity in national schemes as to whether the permit of individual projects causing exceedance in air pollution can be challenged before courts.

National courts have a critical role in ensuring effective implementation of EU law with respect to the three pillars of EU air pollution legislation that have been scrutinized here. The most heavily litigated instrument on the national level has been Directive 2008/50/EC. Courts play a crucial role in ensuring that Member States draw up air quality plans as envisaged by the Directive. As the CJEU has confirmed „it is for the national court (...) to take, with regard to the national authority, any necessary measure, such as an order in the appropriate terms, so that the authority establishes the plan required by the directive".[34] The present survey has showcased that diverse legal questions arise in the proceedings of domestic courts in fulfilling this mandate. In certain domestic regimes, there are still ambiguities and open questions about the legal nature of air quality plans and especially about their enforceability before courts. The standing of individuals and NGOs to challenge air quality plans is also burdened with uncertainties in certain states. The extent to which courts may offer effective remedy in cases of a violation are also dependent upon divergent substantive and procedural rules of national law. Moreover, the

[34] Case C-404/13, ClientEarth v The Secretary of State for the Environment, Food and Rural Affairs, para. 58.

room for manoeuvre of courts in a given dispute is often also impacted by the complexity of the techno-scientific background of the case.

The number and types of claims referred to national courts are also influenced by the robustness of domestic regulatory frameworks to ensure compliance by private actors. When salient gaps occur in the ability of national authorities to detect the fraudulent conduct of corporations, national courts will face waves of liability claims. This is aptly illustrated by the Volkswagen scandal, when defeat devices have been installed to purposefully manipulate emissions data of vehicles. This report has enumerated the diversity of claims that have been filed with national courts following the incident. Relevant legal bases have been ranging from tort law through consumer protection law to investment law depending upon the particularities of each case and the respective jurisdiction.

Answers to the questionnaire have also revealed that several national courts face problems in ensuring compliance with their action-forcing judgements. Put differently, they encounter dilemmas as to how to compel national and local law-makers to enact effective measures that are suitable for abating air pollution. A major related challenge lies in scrutinizing whether the chosen measures stipulated in air quality plans are capable of improving the air quality within the shortest time possible. With regard to the content of such plans, the CJEU stressed 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". Against this backdrop, domestic courts are increasingly asked to assess whether respective air quality plans have been properly adopted, have firm scientific bases and altogether respect the spirit, purpose and the letter of Directive 2008/50/EC. This judicial review increasingly entails a close scrutiny by domestic courts as the CJEU has read the provisions as mandating an obligation of result and not merely a 'best efforts' obligation.[35] While in certain countries, such proceedings still revolve around questions of standing and enforceability of air quality plans, the bulk of relevant national jurisprudence cited above attests that courts do go into the substance of such plans and review the adequacy of the commitments contained therein.

[35] Case C-404/13, ClientEarth v The Secretary of State for the Environment, Food and Rural Affairs, para. 30.

However, adopting ambitious air pollution measures, such as creating LEZs or introducing diesel bans, gives rise to intrusive policies, which often generates opposition from both the wider public and the economic sector. Opponents ultimately seek to withdraw such measures in courts, making domestic judges to be the final arbiters of policies aiming at ambitiously curbing emissions. It is noteworthy that although the legal challenges filed with domestic courts have been diverse in legal nature, judges did uphold such measures in all relevant disputes reported to this questionnaire.

Furthermore, several EUFJE members experience a rise in air pollution litigation driven by NGOs. This tendency also suggests that the normative and practical impact of EU air pollution law is much influenced by the access to justice rights of civil society organizations on the national level. At the same time, national jurisprudence also attests that a wide array of other actors also become frequent plaintiffs, such as municipalities, scientific institutions or traders' unions. The case-practice featured in this questionnaire therefore depicts the current state of national air pollution litigation as a matrix composed of heterogenous actors, various normative bases as well as conflicting legal and economic interests all to be tackled by the courts in discharging their judicial tasks.

In levelling this brief survey, it is to be recalled that scientific data on morbidity and mortality rates among European citizens stand as a shocking warning that the magnitude of human health impacts of poor air quality cannot be overstated. Proper implementation and enforcement of EU law obligations on the national level thus ultimately serve to safeguard human lives and to secure affected individuals' basic right to breath clean and healthy air across EU Member States.