

# Relevant case law of the CJEU

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Air Pollution Law



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# On the Advocate General

- Member of the Court
- Advises the Court by preparing Opinions **independently**
- Does not participate in deliberations
- Opinion is not a Judgment
- Only the Judgment has the authority of the Court
- Opinions can illuminate the background

# Outline

- Crayenest: How to identify pollution (C-723/17, EU:C:2019:533)
- Top-Down Enforcement – EU Commission Infringement Proceedings
- Bottom-Up Enforcement through Member State Courts
- Air Quality and individual projects
- Dieselgate

# Ambient Air Quality Rules

- Various limit and target values on specific pollutants in the ambient air
  - Art. 13(1)
    - MSs shall ensure that, throughout their zones and agglomerations, levels of **sulphur dioxide, PM10 (2005), lead, and carbon monoxide** [+ some instances of **PM2.5**] in ambient air do not exceed the limit values laid down in Annex XI
    - In respect of **nitrogen dioxide (NO2 – 2010 + 5 year extension possible) and benzene**, the limit values specified in Annex XI may not be exceeded from the dates specified therein
  - Art. 23(1)
    - Where ... the levels of pollutants in ambient air exceed any limit value ... Member States shall ensure that **air quality plans** are established for those zones and agglomerations in order to achieve the related limit value or target value ...
    - In the event of exceedances of those limit values for which the attainment deadline is already expired, the air quality plans shall set out appropriate measures, so that the exceedance period can be kept **as short as possible**.  
...

# Ambient Air Quality Rules

## Practical Application

- PM10 (particles, dust) are an issue in cities where wood or lignite (brown coal) are used for heating, in particular in Bulgaria or Poland
- NO<sub>2</sub> is an issue in cities with much automobile traffic with diesel engines, many EU 15 Member States are affected, eg. Germany, France or UK
- Compliance requires severe restrictions, but also balancing of objectives and interests >> To what extent can air quality plans be judicially controlled in this regard?

# Craeynest

## C-723/17 (EU:C:2019:533)

- Inhabitants and ClientEarth challenge the placement of sampling points in Brussels
- Reference asks
  - whether the placement can be challenged
  - how to determine whether a limit value is exceeded: average of sampling points or highest value

# Craeynest

## C-723/17 (EU:C:2019:533)

### On the Placement

- Persons concerned can rely on a directive, in particular if it aims to protect public health
- Directive specifies EU's obligation to protect the environment and public health
- Direct effect? If there is discretion, at least the limits of this discretion must be enforced by the courts
- Eg. (some) sampling points must be placed to register the highest values
  - complex assessment >> discretion
  - sound scientific data
  - court must verify limits of discretion

# Craeynest

## C-723/17 (EU:C:2019:533)

### Compliance with Limit Values

- Art. 23(1)(3) requires identification of exceedances, but no explicit rules on the establishment of a breach => Average or individual exceedance?
- >> General Scheme and Purpose
  - Representative sampling points
    - Areas where the highest concentrations occur to which the population is likely to be exposed
    - Other areas which are representative of the exposure of the general population
    - Averages of all samples would not represent pollution
  - Art. 23(1)(3) & Annex XV Sec. A para 1: place of exceedance
  - Health must be protected where it is affected by exceedances
- Exceedance can result from individual sampling points



# Infringement Proceedings

## First Approach

- COM v Sweden (C-479/10, EU:C:2011:287)
- COM v Portugal (C-34/11, EU:C:2012:712)
- COM v Italy (C-68/11, EU:C:2012:815)

In Year X the air had been bad at some locations!

Art. 260 TFEU?

# Infringement Proceedings

## New Approach

- COM v Bulgaria (C-488/15, EU:C:2017:267):  
Ongoing breaches over **several years** (PM10)
- Art. 13 - exceeding the limit values **systematically and continuously >> continuation into the future**
- Art. 23 – plans insufficient
  - balance between minimising the risk of pollution and the various opposing public and private interests
  - limit values continued to be exceeded

Confirmed: COM v Poland (C-336/16, EU:C:2018:94)

>> Continued infringement could lead to the imposition of payments under Art. 260 TFEU

# Infringement Proceedings

## Current round

- COM v France (NO<sub>2</sub>)(C-636/18, EU:C:2019:900)
  - Limit values
    - structural problems irrelevant
    - highest values determine exceedance
    - restrictions of traffic can be justified
    - absence of sufficiently strict standards for cars do not justify the exceedance
  - Plans
    - no specific considerations for the areas concerned => manifestly insufficient
- COM v Romania (PM<sub>10</sub>)(C-638/18, EU:C:2020:334)

# Infringement Proceedings

## Current round

### Pending

- *COM v Germany (NO<sub>2</sub>) (C-635/18)*
- *COM v Hungary (PM<sub>10</sub>) (C-637/18)*
- *COM v Italy (PM<sub>10</sub>) (C-644/18) (Grand Chamber requested – judgment soon)*
- *COM v UK (NO<sub>2</sub>) (C-664/18)*
- *COM v Italy II (NO<sub>2</sub>) (C-573/19)*
- *COM v Bulgaria II (SO<sub>2</sub>) (C-730/19)*
- *COM v Spain (NO<sub>2</sub>) (C-125/20)*

# Janecek - EU:C:2008:447



Munich, Landshuter Allee

# Janecek - EU:C:2008:447

- Breach of EU limit values for ambient air quality was not disputed (Dir 96/62 & Dir 99/30)
- Mr. Janecek sued the city, asking for the plan required by the Directives
- German Supreme Administrative Court asked CJEU whether a citizen has a right to such a plan
- German doctrine: general public interest (plans) is defended by public authorities, not individuals
- Direct Effect? Sufficiently clear and unconditional
- CJEU: individuals have a legitimate interest in a healthy environment

# ClientEarth - EU:C:2014:2382





# ClientEarth - EU:C:2014:2382

- In 40 of 43 zones and agglomerations in the UK, one or more of the limit values for NO<sub>2</sub> were exceeded in 2010 (road traffic and domestic heating)
- ENGO ClientEarth applied in UK courts for an injunction against the UK to comply with the limit values as soon as possible and by 2015 at the latest
- High Court and Court of Appeal refuse: **political question**, Supreme Court referred to the CJEU
- Content of plans: **discretion**, but exceedance must be as short as possible
- Courts must take ‘**any necessary measure**, such as an order in the appropriate terms, so that the authority establishes the plan’



# ClientEarth - EU:C:2014:2382

Follow-up: UK High Court is looking deeply into the technicalities to achieve ambient air quality (congestion charge appears the preferred measure)

- High Court (Garnham J), R (ClientEarth (No.2)) v Secretary of State for the Environment, Food and Rural Affairs and others [2016] EWHC 2740 (Admin)
- High Court (Garnham J), R (ClientEarth (No.3)) v Secretary of State for the Environment, Food and Rural Affairs and others [2018] EWHC 315 (Admin)

# Deutsche Umwelthilfe

## C-752/18 (EU:C:2019:1114)

### Enforcement

- German region of Bavaria refuses to ban diesels in cities, alternative measures do not promise a solution in the near future
- Supreme Administrative Court of the region imposed two penalty payments of 4.000 Euros each that were paid from the environmental authorities to regional ministry of finance
- Reference to the CJEU: What to do? In particular, must officials be placed in **coercive detention** until they adopt the necessary measures?

# Deutsche Umwelthilfe

## C-752/18 (EU:C:2019:1114)

### Enforcement

- MS enjoy procedural autonomy, subject to principles of equivalence and effectiveness
- If a judgment cannot be enforced the **essential content** of the right to an effective remedy is violated, in particular, if it is about health
- Interpretation in conformity (depends on internal law)
- Disapply any internal provision that is contrary to EU law

# Deutsche Umwelthilfe

## C-752/18 (EU:C:2019:1114)

### Enforcement

BUT: Right to Liberty (Art. 6 of the EU Charter of Fundamental Rights) must not be infringed either

- Is there a sufficient legal basis for coercive detention in MS law? >> For MS Courts to decide!
- Proportionality of Detention? Is there a less restrictive measure? Eg. higher penalties paid to other recipients.

# Deutsche Umwelthilfe

## C-752/18 (EU:C:2019:1114)

### Follow-up

- Bavarian situation still open because a new plan without diesel bans was issued > compliance between 2020 and 2026
- In the neighbouring German region of Baden-Württemberg the courts ordered a one-time penalty of 25.000 Euro to be paid from the region to a medical NGO (14.5.2020, 10 S 461/20) – apparently the regional government now intends to comply
- French Council of State ordered the state pay 10 Mio. Euros per semester until clean air is achieved (ECLI:FR:CEASS:2020:428409.20200710) – French law clearly allows this method of enforcement, though this is the highest sum ever (recipient unclear, possibly yet to be decided: plaintiff, other NGOs or independent state body)
- Italy: a special commissioner can be appointed to adopt the necessary measures

# Air Quality and the Authorisation of Projects

- Can individuals or NGOs oppose a project on air quality grounds if limit values are already breached or will be breached because of the project?
- No CJEU case on the issue yet, but see *Stichting Natuur en Milieu and Others* (C-165/09 to C-167/09, EU:C:2011:348):
  - Directive 2001/81 set up maximum total amounts of certain atmospheric pollutants (National Emissions Ceilings, now Directive 2016/2284)
  - According to Dutch projections these ceilings would be breached
  - But NL authorised three power stations that would add substantial quantities of the relevant pollutants

# Air Quality and the Authorisation of Projects

In *Stichting Natuur en Milieu and Ors* the CJEU found that Directive 96/61 [IE-Directive 2010/75] did not require that the ceilings are taken into account in the permit

- 60 – 62 – emission ceiling is not an environmental standard [limit value would be, but does it require stricter measures?]
- 69 – 70 - Directive 2001/81 does not require it [as air quality rules]
- 74 – 75 - Directive 2001/81 has a general and programmatic approach [as air quality rules]
- 78 – 83 – obligation to refrain from frustrating the objective of Directive 2001/81? Programmatic approach is based on MSs discretion
- 99 – 104 – individuals can require appropriate programmes to attain ceilings
- Limits to discretion? Does it respect an Air Quality Plan?

# Ville de Paris and ors v Commission

(T-339/16, T-352/16 and T-391/16, EU:T:2018:927)

- In an implementing regulation COM set limit values for NO<sub>2</sub> emissions during testing of diesel cars that exceeded the emission limits of the basic regulation (168 and 120 v 80 mg/km)
- Paris, Brussels and Madrid challenged the COM measure
- General Court annulled the COM measure



# Ville de Paris and ors v Commission

(T-339/16, T-352/16 and T-391/16, EU:T:2018:927)

## Admissibility?

- Plaintiffs are NOT privileged
- Direct Concern?
  - Can the plaintiffs restrict the use of cars to improve air quality, if the cars comply with the Commission Regulation?
  - General Court: Not wrt cars complying with the highest standards > direct concern!
  - CJEU in COM/France: Restrictions are possible
- Appeals (C-177/19 P – Germany, C-178/19 P – Hungary, C-179/19 P – Commission)
- Older Diesel cars (class IV) can no longer enter Stuttgart

# Dieselgate Defeat Device

- CLCV (C-693/18) – Opinion of AG Sharpston:  
Terms „design“, „emission control system“ and „defeat device“  
Prevention of sudden damage can justify a defeat device,  
but not reduction of aging effects.  
Judgment pending

# Dieselgate

## Defeat Device

- Deutsche Umwelthilfe (C-873/19) – Can NGOs attack the type permit under Aarhus?  
Consequences of a defeat device?
- GSMB Invest (C-128/20), Volkswagen (C-134/20), Porsche Inter Auto et Volkswagen (C-145/20) – Illegal defeat device in civil cases (Austria)
- B (C-276/20) – Deduction for actual use of the vehicle if the car is returned because of the defeat device? Is the judge sufficiently independent in view of structural issues and a circular on Diesel cases by the president of the Higher regional court of a neighboring region?

# Thank you for your attention!

