

Answers to the case study on access to justice for citizens and NGOs in cases relating to air quality and on the main provisions of the Air Quality Directive (AQD)

A. Admissibility

- Judgment of the Court (Second Chamber) of 25 July 2008, *Dieter Janecek v Freistaat Bayern*; Case C-237/07

"It follows from the foregoing that the 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." (Para. 39)

- Judgment of the Court (Second Chamber) of 19 November 2014, *The Queen, on the application of: ClientEarth v The Secretary of State for the Environment, Food and Rural Affairs*; Case C-404/13

"It follows that the natural or legal persons directly concerned by the limit values being exceeded after 1 January 2010 must be in a position to require the competent authorities, if necessary by bringing an action before the courts having jurisdiction, to establish an air quality plan which complies with the second subparagraph of Article 23(1) of Directive 2008/50, where a Member State has failed to secure compliance with the requirements of the second subparagraph of Article 13(1) of Directive 2008/50 and has not applied for a postponement of the deadline as provided for by Article 22 of the directive (see, by analogy, judgment in Janecek, EU:C:2008:447, paragraph 39)." (Para. 56)

B. Merits

Question no. 1

According to Articles 13 and 16 of the Air Quality Directive, Member States shall ensure that, throughout their zones and agglomerations, levels of PM₁₀ and PM_{2.5} in ambient air do not exceed the limit values laid down in Annex XI and Annex XIV, respectively.

Article 23 provides that where, in any zone or agglomeration, a limit value or target value is exceeded, the Member State must prepare an air quality plan in order to achieve compliance with the standard. Where the breach of a limit value occurs after the relevant deadline has expired, the air quality plan must "set out appropriate measures, so that the exceedance period can be kept as short as possible" (Article 23(1), second sub-paragraph). The Directive is quite prescriptive as to what information must be included in air quality plans (Annex XV, Section A). Three elements are essential to allow scrutiny of the public and courts: (1) a detailed description of measures; (2) a timetable for implementation of each measure; and (3) an assessment of the estimated impact of each measure and of the whole plan, including the identification of the expected compliance date.

In several cases, the CJEU clarified that Member States are subject to an obligation of result to achieve compliance in the shortest time possible. It also clarified that there are limits to the discretion of competent authorities concerning the adequacy of air quality plans to achieve compliance in the shortest time possible. Those limits can be relied on before national courts, that, accordingly, are required to review the content of air quality plans in view of the Air Quality Directive's requirements.

See also:

- Judgment of the Court (Second Chamber) of 25 July 2008, *Dieter Janecek v Freistaat Bayern*, Case C-237/07

"It must be noted in this regard that, while the Member States thus have a discretion, Article 7(3) of Directive 96/62 includes limits on the exercise of that discretion which may be relied upon before the national courts (see, to that effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 59), relating to the adequacy of the measures which must be included in the action plan with the aim of reducing the risk of the limit values and/or alert thresholds being exceeded and the duration of such an occurrence, taking into account the balance which must be maintained between that objective and the various opposing public and private interests." (Para. 46)

- Judgment of the Court (Second Chamber), 19 November 2014, *The Queen, on the application of: ClientEarth v The Secretary of State for the Environment, Food and Rural Affairs*, Case C-404/13

"Member States must take all the measures necessary to secure compliance with that requirement and cannot consider that the power to postpone the deadline, which they are afforded by Article 22(1) of Directive 2008/50, allows them to defer, as they wish, implementation of those measures." (Para. 31)

"It follows, next, from the second subparagraph of Article 23(1) of Directive 2008/50 that where the limit values [...] are exceeded after the deadline laid down for their attainment, the Member State concerned is required to establish an air quality plan that meets certain requirements." (Para. 40)

"Thus, that plan must set out appropriate measures so that the period during which the limit values are exceeded can be kept as short as possible and may also include specific measures aimed at protecting sensitive population groups, including children. Furthermore, under the third subparagraph of Article 23(1) of Directive 2008/50, that plan is to incorporate at least the information listed in Section A of Annex XV to the directive" (Para. 41)

"However, an analysis which proposes that a Member State would, in circumstances such as those in the main proceedings, have entirely satisfied its obligations under the second subparagraph of Article 13(1) of Directive 2008/50 merely because such a plan has been established, cannot be accepted." (Para. 42)

"[T]he fact that an air quality plan which complies with the second subparagraph of Article 23(1) of the directive has been drawn up does not, in itself, permit the view to be taken that that Member State has nevertheless met its obligations under Article 13 of the directive." (Para. 49)

"As regards the content of the plan, it follows from the second subparagraph of Article 23(1) of Directive 2008/50 that, while Member States have a degree of discretion in deciding which measures to adopt, those measures must, in any event, ensure that the period during which the limit values are exceeded is as short as possible." (Para. 57)

- Judgment of the Court (Third Chamber) of 5 April 2017, *European Commission v Republic of Bulgaria*, Case C-488/15

The Directive "includes limits on the exercise of that discretion which may be relied upon before the national courts, relating to the adequacy of the measures which must be

included in the action plan with the aim of reducing the risk of the limit values and/or alert thresholds being exceeded and the duration of such an occurrence, taking into account the balance which must be maintained between that objective and the various opposing public and private interests" (Para. 105)

"As the Advocate General observed in point 96 of her Opinion, the same approach must be followed as regards the interpretation of Article 23(1) of Directive 2008/50. Consequently, the air quality plans may be adopted only on the basis of the balance between the aim of minimising the risk of pollution and the various opposing public and private interests." (Para. 106)

[Opinion of Advocate General Kokott: "96. The air quality plans under Article 23(1) of Directive 2008/50 can also be adopted only on the basis of such a balance of interests. The high importance of ambient air quality for the protection of life and health leaves only very little room for consideration of other interests. It therefore also requires a strict review of the assessment made. However, there are undeniably overriding interests which may preclude certain appropriate measures."]

"It must be ascertained, on the basis of a case-by-case analysis, whether the plans drawn up by the Member State concerned comply with [Article 23(1) of Directive 2008/50]." (Para. 108)

"[W]hile 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 (judgment of 19 November 2014, *ClientEarth*, C-404/13, EU:C:2014:2382, paragraph 57)." (Para. 109)

Question no. 2

Articles 6 and 7 and Annex III and V of the Air Quality Directive contain provisions about minimum number and location of sampling points for assessment of air quality. In particular, Annex III, Section B, provide that "*(a) Sampling points directed at the protection of human health shall be sited in such a way as to provide data on [...] the areas within zones and agglomerations where the highest concentrations occur to which the population is likely to be directly or indirectly exposed for a period which is significant in relation to the averaging period of the limit value(s).*"

See also: Judgment of the Court (First Chamber) of 26 June 2019, *Lies Craeynest and Others v Brussels Hoofdstedelijk Gewest and Brussels Instituut voor Milieubeheer*, Case C-723/17

The CJEU has found that the rules on the use and location of sampling points "*contain clear, precise and unconditional obligations, which means that they can be invoked by individuals against the State*" [Para 42].

"It follows that the very purpose of Directive 2008/50 would be compromised if sampling points located in a given zone or agglomeration were not established in accordance with the criteria laid down therein" [Para. 49].

In this context, authorities are required to base their decisions on sound scientific data and, as set out in Section D of Annex III to Directive 2008/50, to prepare comprehensive documentation that includes evidence supporting the choice of the location of all monitoring sites. That documentation must be updated regularly to ensure that the selection criteria remain valid. [Para. 51]

While the CJEU acknowledged that the choice of the location of sampling points requires technical and complex assessments, it clarified that the discretion of the competent national authorities is limited by the purpose and objectives pursued by the Directive [para 52-53].

Accordingly, the CJEU held that citizens can challenge the adequacy of monitoring networks and that national courts have the power to verify whether sampling points have been established in accordance with the criteria laid down in the Directive. It also clarified that national courts shall have the power to take all necessary measures in respect of the competent national authority with a view to ensuring that those sampling points are sited in accordance with those criteria [para 56].

C. Remedies

Article 19(1) TEU requires Member States to "provide remedies sufficient to ensure effective legal protection in the fields covered by Union law." Article 19(1) TEU was introduced by the Lisbon Treaty and enshrines the general principle of effective legal protection within primary EU legislation, thus giving it constitutional status. Effective legal protection flows from the duty under Article 4(3) TEU to take all appropriate measures to ensure fulfilment of obligations arising out of the Treaties.

Effective remedies are also required by Article 47 of the Charter of Fundamental Rights of the EU and, in environmental matters, by Article 9(4) of the Aarhus Convention. Such right is also protected by the European Convention of Human Rights (Articles 6 and 13).

See also CJEU:

- Judgment of the Court (Second Chamber) of 19 November 2014, *The Queen, on the application of: ClientEarth v The Secretary of State for the Environment, Food and Rural Affairs*, Case C-404/13

"[W]here a Member State has failed to comply with the requirements of the second subparagraph of Article 13(1) of Directive 2008/50 [...], it is for the national court having jurisdiction, should a case be brought before it, 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 in accordance with the conditions laid down by the latter" (Para 58)

- Judgment of the Court (First Chamber) of 26 June 2019, *Lies Craeynest and Others v Brussels Hoofdstedelijk Gewest and Brussels Instituut voor Milieubeheer*, Case C-723/17

"In this respect, it is clear from the Court's case-law that, in the absence of EU rules, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, such as Directive 2008/50. However, the detailed rules provided for must not be less favourable than those governing similar domestic situations (principle of equivalence) and must not make it impossible in practice or excessively difficult to exercise rights conferred by EU law (principle of effectiveness) (see, to that effect, judgments of 6 October 2015, *East Sussex County Council*, C-71/14, EU:C:2015:656, paragraph 52, and of 22 February 2018, *INEOS Köln*, C-572/16, EU:C:2018:100, paragraph 42). As regards the latter principle, it should be recalled that the right to an effective remedy and to a fair trial is enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, which constitutes a reaffirmation of the principle of effective judicial protection (see, to that effect, judgments

of 26 July 2017, Sacko, C-348/16, EU:C:2017:591, paragraph 31, and of 27 September 2017, Puškár, C-73/16, EU:C:2017:725, paragraph 59)." (Para. 54)

- Judgment of the Court (Grand Chamber) of 19 December 2019, *Deutsche Umwelthilfe eV v Freistaat Bayern*, Case C-752/18

"[I]t should be noted, in the first place, that, in the absence of harmonisation of national enforcement mechanisms, the details of their implementation are governed by the internal legal order of the Member States by virtue of the principle of procedural autonomy of those States. Nevertheless, the means of implementation must meet two conditions, namely that they are no less favourable than those governing similar domestic actions (principle of equivalence) and that they do not make it impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness)" (Para. 33)

"[W]hen the Member States implement EU law, they are required to ensure compliance with the right to an effective remedy enshrined in the first paragraph of Article 47 of the Charter (judgment of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626, paragraph 69), a provision which constitutes a reaffirmation of the principle of effective judicial protection. In the case of actions intended to secure compliance with environmental law, in the particular on the initiative of environmental protection associations as in the main proceedings, that right to an effective remedy is also enshrined in Article 9(4) of the Aarhus Convention." (Para. 34)

"The right to an effective remedy is all the more important because, in the field covered by Directive 2008/50, failure to adopt the measures required by that directive would endanger human health" (Para.38)

"[I]n order to ensure effective judicial protection in the fields covered by EU environmental law, it is for the national court to interpret its national law in a way which, to the fullest extent possible, is consistent both with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention and with the objective of effective judicial protection of the rights conferred by EU law" (Para. 39)

"In that regard, it should be recalled that, where it is unable to interpret national law in compliance with the requirements of EU law, the national court, hearing a case within its jurisdiction, has, as an organ of a Member State, the obligation to disapply any provision

of national law which is contrary to a provision of EU law with direct effect in the case pending before it" (Para. 42)