The 7th Vienna Forum on European Energy Law – One Step Beyond
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11.30 – 11.45 / 12:15 – 12.30

Session II: Beyond public policy:
Private enforcement of environmental and climate

Air pollution and climate in national courts - or how to stand up for clean air …

Dr Matthias Keller
Presiding Judge / Mediator
Administrative Court Aachen

Background: International law:

Article 9 of the Aarhus Convention

guarantees a wide acces to justice in all environmental matters

The „Spirit of Aarhus“ (Preamble, para. 18):

„… effective judicial mechanisms should be accessible to the public, including organisations, so that

legitimate interests are protected

and

the law (here: on air quality) is enforced.“

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CJEU: “**Janecek**” C-237/07

Mr Janecek lives on Munich’s central ring road.

The limit value fixed for emissions of particulate matter was exceeded much more than 35 times, even though that is the maximum number of instances permitted under the German Federal law on combating pollution.

Mr Janecek brought an action for an order requiring the Freistaat Bayern **to draw up an air quality action plan** in the district.

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CJEU: “Janecek” C-237/07

The German Supreme Administrative Court asked the Court of Justice whether, under EU law, **an individual can require the competent national authorities to draw up an action plan** where there is a risk that the limit values or alert thresholds may be exceeded.

The Court answered in the affirmative.

It observed that it is incompatible with the binding effect of the directive to exclude, in principle, the possibility of **the obligation which it imposes being relied on by the persons concerned.**

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The “**Janecek-**message” of the CJEU is quite clear …

Come on, you domestic judges, issue orders to draw up action plans on air quality …

Already done by Supreme Courts

the **UK Supreme Court**, judgment of 29 April 2015
and the **German Federal Administrative Court**,
judgment of 5 September 2013 - 7 C 21.12 – (“Darmstadt case”)

However, how to deal with the legal details?

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The dark … and the bright side of the legal pyramid

C-752/18 : A ticking bomb from Munich …

The Bayerischer Verwaltungsgerichtshof, Order of 9 Nov. 2018, Deutsche Umwelthilfe, ECLI:DE:BAYVGH:2018:1109.22C18.1718.00,

asks the Court of Justice whether national courts may be obliged

to impose detention (!)

on public officials

in order thereby to enforce the obligation to update an air quality plan within the meaning of Article 23 of Directive 2008.

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However,

in many Member States

other procedural problems (than detention of public officials) are more important

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Admissibility: Reviewable administrative act?

In all Member States and the EU “administrative acts” are subject judicial review. A commonly used definition in this context would be:

> “Administrative act means any measure of individual scope taken by a public authority and having legally binding and external effects.”

My opinion:

In the light of the **Janecek-Judgment**

– where the CJEU stated that establishing an air quality plan can be **judicially enforced by an affected person (Dieter Janecek)** –

an air quality plan must be interpreted as an administrative act if otherwise there will be no judicial review as regards to air quality plans.

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Admissibility: Administrative omission?

Background:

Omission or administrative silence can lead to a denial of justice.
EU and Member states have different strategies to avoid this.

Spain has to offer an interesting solution:

"Silencio administrativo negativo" can lead to a fictitious denial.
"Silencio administrativo positivo" can lead to a fictitious permit.

German doctrine on legal protection of rights

tries to handle the inaction of public administration like the inaction of a private party in civil law proceedings:

If there is an individual (subjective public) right conferred to the plaintiff the court shall oblige the defendant to act according to this right. ("Verpflichtungsklage" / "Leistungsklage").

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Admissibility: Administrative omission?

Very often “omission” is defined as follows:

„Administrative omission means a failure of public authority to adopt an administrative act.“

Problem:

The public authority did not decide on the application to institute an action plan on air quality (classical omission).

My opinion:

In order to grant access to justice to the fullest extend possible (cf. Art. 9 para. 3 Aarhus Convention and CJEU in „Slovak Brown Bear“) it may be necessary to interpret national procedural law in way that „omission“ means as well „not fulfilling obligations under EU law“.

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Admissibility:
Locus standi of the plaintiff as an ENGO?

Problem in Germany: No NGO-standing under national law if air quality plans are challenged. Ordinary standing requires a „possible violation of a subjective public right.“

Landmark judgment by the Federal Administrative Court of Germany in the „Darmstadt case“- 7 C 21.12 –:

In the light of Art. 9 (3) Aarhus Convention interpreted by the CJEU („Slovak Brown Bear“) the traditional German notion of

subjective public right

is to be understood in a way that an **ENGO can claim to be violated in such a right** if an air quality plan is not drawn up in conformity with the environmental law of the EU.

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Lawsuit well-founded?

Sure, if the conditions are met …

EU law puts an obligation on the domestic administrations to take measures (an action plan) to prevent for instance critical loads of PM 10.

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Lawsuit well-founded? Discretion?

What about the discretion of the administration?

Answer:

In all Member States the fundmental principle of „separation of powers“ has to be observed. Therefore, the judiciary must respect the discretionary powers of the administration.

Here, it is not the task of the judge to choose the measure which seems to be the best to become part of the air quality plan.

The question remains to what extent the judge can interfere in order to guarantee „effective judicial protection“.

(Germany: If discrectionary powers are „reduced to zero“ by legal requirements, the scope of legal review is not limited anymore.)

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The operative part of a judgement:

The operative part of a German judgment would be :

[„Bescheidungsurteil“ / judgement remitting the case for (new) decision-making]

„The defendant is obliged

- to decide on the application of the plaintiff concerning the improvment of the the air quality plan and
- to observe the legal opinion of the Court within the decision-making.“

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For further reading …

ERA Forum December 2016, Volume 17, Issue 4, pp 437–447

How to stand up for clean air: a practitioner's view on air quality litigation

Matthias Keller

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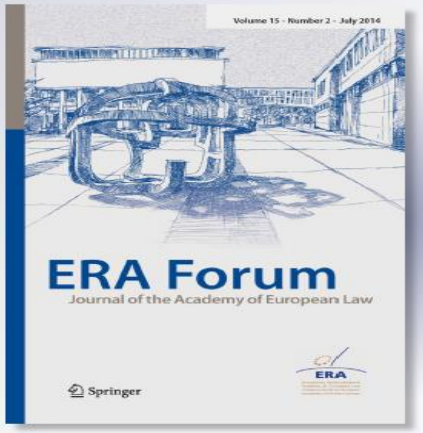

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