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Analysis

ANALYSIS

The German Courts and European Air Quality Plans

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ABSTRACT

This article considers and reviews the judgment of the European Court of Justice in Case C-237/07 *Dieter Janecek v Freistaat Bayern* [2008] ECR I-06221, which followed a reference for a preliminary ruling by the Bundesverwaltungsgericht in Germany. It also considers later German cases concerning the law on air quality plans. The analysis elucidates the aims and legal scope of EU air quality law and reflects on the questions referred to the Court of Justice of the European Union by the UK Supreme Court following the judgment in *R (on the application of ClientEarth) v The Secretary of State for the Environment, Food and Rural Affairs* [2013] UKSC 25.

1. INTRODUCTION

Clean air for Europe is a goal that is promoted by various instruments of environmental law. Among these instruments are significant EU Directives on ambient air quality, which have been updated over time and have their basis in Article 192 of the Treaty on the Functioning of the European Union (TFEU). They pursue the goals in Article 191 TFEU of seeking to protect the environment and human health. The main EU Directive on air quality is the Air Quality Framework Directive (AQFD), which was first introduced in 1996,[1] and was subsequently replaced by Directive 2008/50/EC on ambient air quality and cleaner air for Europe.[2] Both Framework Directives were transposed into German and UK Law, in German law by the Federal

1 Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management [1996] OJ L296/55.

2 Parliament and Council Directive 2008/50/EC of 21 May 2008 on ambient air quality and cleaner air for Europe [2008] OJ L151/2.

Emission Control Act (Bundesimmissionsschutzgesetz) 2002 with later amendments.

Air quality plans are required under the AQFD and are important instruments for realising its goals. Amongst other things, such plans are used to introduce low emission zones, which impose restrictions for traffic in urban areas. However, citizens and environmental non-governmental organisations (NGOs) have not always been satisfied with the results achieved by the responsible public authorities in creating or implementing these plans. One result of has been judicial review actions brought by concerned citizens or organisations against relevant state bodies, arguing for more effective air quality plans. Such cases include the German case of *Dieter Janecek v Freistaat Bayern*, referred to the European Court of Justice (or ECJ), as it then was, in May 2007,[3] and more recently the UK Supreme Court case in *R (on the application of ClientEarth) v The Secretary of State for the Environment, Food and Rural Affairs*, which was referred to the Court of Justice of the European Union (CJEU) in May 2013.[4]

This analysis considers the German *Janecek* case and the subsequent German case law on air quality plans, with the aim of broadening the understanding of the requirements of EU air quality law so as to inform the questions referred to the CJEU by the UK Supreme Court in the *ClientEarth* case.

2. EU DIRECTIVES AND THEIR PROVISIONS ON ACTION PLANS

The 1996 AQFD aimed to prevent or reduce harmful air pollution, partly through fixing limit values and alarm thresholds for ambient air pollution levels. These air quality standards related to various atmospheric pollutants, including nitrogen dioxide, sulphur dioxide and particulate matter. Article 7(1) of the 1996 Directive required Member States to take the necessary measures to ensure compliance with the prescribed limit values for such pollutants. In some cases, such measures included short-term action plans (Article 7(3)) and medium-term air quality plans (Article 8(3)). Article 7(3) in particular required air quality action plans in instances where there was a risk of exceeding limit values or alert thresholds. Such action plans were to indicate short-term measures to be taken, which could control and, where necessary, suspend activities (including motor-vehicle traffic) that contribute to exceeding limit values.

A further Directive 1999/30/EC ('the First Daughter Directive') contained the technical detail of the limit values, margins of tolerance, and deadlines for compliance for various pollutants. Annex II set limit values for nitrogen dioxide and Annex III set those for particulate matter (PM_{10}). The deadline for achieving the limit values for PM_{10} was 1 January 2005 and, for nitrogen dioxide, the deadline was 1 January 2010.

The 2008 AQFD was a consolidating and amending measure. It repealed the 1996 AQFD and the First Daughter Directive, but the same limit values, margins of tolerance and deadlines are reproduced in Annex XI of the new Directive. For particulate matter ($PM_{2.5}$), these requirements are found in Annex XIV. The provisions

3 Case C-237/07 *Dieter Janecek v Freistaat Bayern* [2008] ECR I-06221.

4 *R (on the application of ClientEarth) v The Secretary of State for the Environment, Food and Rural Affairs* [2013] UKSC 25, [2013] 2 All ER 928.

on air quality plans are contained in Article 23 and 24 of the 2008 Directive. Article 23 regulates medium term air quality plans (compare Article 8 of the 1996 Directive) and Article 24 short-term action plans (compare Article 7 of the 1996 Directive, which is differently worded in some key respects).[5]

3. THE CJEU JUDGMENT IN THE *JANECEK* CASE

On 25 July 2008, the ECJ handed down the judgment in *Janecek v Bayern.* The case concerned an air quality action plan in Munich and whether it met the requirements of Article 7 of the 1996 AQFD. The case was brought to the ECJ by a request for a preliminary ruling of my court, the German Federal Administrative Court, which is our national supreme court in administrative matters.

Mr Janecek was, and still is, the president of the Green Party in Bavaria. He lived on the Landshuter Allee, Munich's central ring road, approximately 900 m north of an air quality measuring station. Measurements taken at that station showed that, in 2005 and 2006, the limit value fixed for emissions of fine particulate matter (PM_{10}) was exceeded much more than 35 times. Exceeding the limits 35 times per year is the maximum number of instances permitted under the German Federal Emission Control Act. This limit value relates to fine particles with a diameter of less than 10 micrometres. PM_{10} is emitted from fossil fuel burning, as occurs in street traffic, and causes significant problems for human health, especially in urban areas. Motor vehicles produce around 40% of urban particulate matter pollution. The remainder originates from power plants and heating systems. Research studies of the World Health Organisation have shown increased occurrence of respiratory and cardiovascular diseases at high particulate matter concentrations.[6]

In the city of Munich as a whole, there had existed an air quality action plan since December 2004. However, there was no short-term air quality action plan for the Landshuter Allee district. Mr Janecek brought an action before the Verwaltungsgericht (Administrative Court) of Munich. He argued for an injunction that would require the State of Bavaria to draw up an air quality action plan in the Landshuter Allee district in accordance with Article 7(3) of the 1996 Directive. He argued that this action plan should require the relevant administration to determine the measures required to ensure compliance with the limit values for PM_{10}. The Verwaltungsgericht dismissed the action as unfounded. On appeal, the Higher Administrative Court of Bavaria took a different view.[7] It held that the residents concerned could require the competent authorities to draw up an action plan, but that they could not insist that it include measures that would guarantee compliance in the short-term with the emission limit values for PM_{10}. According to the Higher Administrative Court, the national authorities are required only to ensure that such a plan pursues that objective to an extent that is possible and proportionate. Consequently, it ordered the Freistaat Bayern to draw up an action plan complying with those requirements.

5 In particular, art 24 no longer *requires* short-term action plans to be drawn up when there is a risk of limit values being exceeded.

6 World Health Organisation, *Air Quality Guidelines – Global Update 2005*, available at <http://www.who.int/phe/health_topics/outdoorair/outdoorair_aqg/en/index.html> accessed 10 February 2014.

7 Judgment of the Higher Administrative Court of Bavaria of 18 May 2006 – 22 BV 05.2462, Neue Zeitschrift für Verwaltungsrecht 2007, 233.

Mr Janecek and the State of Bavaria appealed to the Bundesverwaltungsgericht (Federal Administrative Court) against the judgment of the Verwaltungsgerichtshof. At that time, the Bundesverwaltungsgericht was of the opinion that the applicant was not entitled to force the government to draw up an action plan pursuant to section 47(2) of the Federal Emission Control Act. The Bundesverwaltungsgericht took the view that Article 7(3) of the 1996 AQFD does not confer a personal (directly effective) right to have an action plan drawn up. However, the Court conceded that there were differing opinions and asked the ECJ for a preliminary ruling on the matter.[8]

The Luxembourg Court decided that persons directly concerned by instances of air pollution may require the competent national authorities to draw up an air quality action plan, and that those persons have the right to bring an action before the competent national courts in that respect.[9] This consideration applies particularly in respect of a Directive that is intended to control and reduce atmospheric pollution and which is designed, therefore, to protect public health.

Individuals and NGOs may have other courses of action available—in particular, the power to require that the competent authorities lay down specific measures to reduce pollution, which is the case under German law. However, this was said to be irrelevant to the directly effective EU right to claim that an AQFD-compliant air quality action plan be drawn up.

The ECJ has also answered a second question from the Bundesverwaltungsgericht. The German court wanted to know whether the competent national authorities were obliged to lay down measures, which, in the short term, would ensure that the relevant limit value is attained, or whether they can confine themselves to taking measures to improve the air quality gradually. The ECJ pointed out that the Member States are not obliged to take measures to ensure that limit values are *never* exceeded. They are only obliged to take measures that reduce the risk to a minimum. In this regard, Member States have some discretion, but the exercise of this discretion is limited. In particular, the discretion is limited by the overall aim of the Directive to reduce the risk of the limit values being exceeded.

4. THE SUBSEQUENT *JANECEK* JUDGMENTS OF THE GERMAN FEDERAL ADMINISTRATIVE COURT

As a consequence of the ECJ judgment, Mr Janecek and the State of Bavaria withdrew their appeals against the judgment of the Higher Administrative Court of Bavaria. The Bavarian judgment of 18 May 2006 thus became final, and the Court ordered the State of Bavaria to draw up a short-term action plan that pursued the objectives of the AQFD to the extent that is possible and proportionate. This plan was enacted and put into force. The Bavarian Court has stressed that it may be impossible to meet the requirements of the limit values in certain places where a number of pollution factors come together (for instance, central traffic junctions at which several sources of emission coincide at the same time and place). As one suitable measure to be included in short-term action plans, the Bavarian court mentioned the installation of low emission zones.

8 Judgment of the Bundesverwaltungsgericht of 29 March 2007 – BVerwG 7 C 9.06 – BVerwGE 128, 278.
9 *Janecek v Bayern* (n 3) [39].

Subsequently, there was also a second *Janecek* judgment of the Bundesverwaltungsgericht.[10] Mr Janecek also brought an action in which he asked the court to order an injunction against the competent authorities to restrict the traffic in his street so that the limit values of the German Emission Control Act were not exceeded. The lower courts had dismissed his claim, but the Bundesverwaltungsgericht decided that Mr Janecek was entitled to claim that appropriate measures be taken to reduce fine particulate matter emissions whilst there existed no valid air quality action plan compliant with Article 7(3). If no such short-term action plan existed, the claimant could ask for measures outside an action plan. This was because the limit value for fine particulate matter emissions in the relevant German Ordinance (22. BImSchV) aimed to protect human health. Further, section 45(1) of the Federal Emission Control Act obliged the administration to take the necessary measures to ensure compliance with the emission limit values. Notably, the claim was restricted by the principle of proportionality. The competent authorities could impose restrictions on the different groups of polluters—traffic or emitting plants—only insofar as they contribute to pollution. However, the discretion of the administration could in certain situations be reduced to zero. In this judgment, the Bundesverwaltungsgericht mentioned as possible measures a complete traffic ban for a certain time or for certain types of vehicles, such as trucks or lorries, or the prohibition of parking in a high-emission zone. The Federal Court also mentioned measures such as requiring modernization of public transport vehicles, wet street cleaning and the planting of trees along the streets. In short, the Bundesverwaltungsgericht decided that concerned residents could require appropriate measures to reduce the emission of fine particulate matter in order to comply with the limit values, but the administration had a discretion as to which appropriate measures it would take.

5. NEW DEVELOPMENTS IN THE GERMAN CASE LAW

In recent years, many medium term air quality plans have been enacted and have entered into force in German communities. The city of Munich has already the fourth version of its air quality plan—originating from 2004—now introduced on the basis of Article 23 of the 2008 AQFD. Many communities have installed low emission zones, in which only cars with low emissions are allowed to drive. There are more than 40 low-emission zones in Germany. Car owners have opposed this in the courts, but without success.[11]

In October 2012, the Administrative Court of Munich held that the Munich air quality plan of September 2010 was not in accordance with Article 23 of the 2008 Directive because it was not sufficiently effective in reducing fine particulate matter and nitrogen dioxide as demanded by EU limit values. The Court would not accept a plan under which harmful emissions would still exceed the prescribed limit values for

10 Judgment of the Bundesverwaltungsgericht dated 27 September 2007 – BVerwG 7 C 36.07 – BVerwGE 129, 296.

11 Judgment of the Bundesverwaltungsgericht dated 11 July 2012 – BVerwG 3 B 78.11 – Neue Zeitschrift für Verwaltungsrecht 2012, 1175; High Administrative Court of Berlin-Brandenburg, Judgment dated 20 October 2011 – OVG 1 B 4.10 – Deutsches Autorecht 2012, 157,

many years.[12] The Court thus granted an injunction against the Bavarian authorities, requiring them to change the air quality plan for Munich so that it contained the necessary measures to ensure that, in the shortest possible amount of time, air polluting emissions do not exceed the limit values.

The Court also ruled that this claim could be brought to court by an environmental NGO. The right of environmental associations to take legal action and to contest administrative decisions has been granted since the 1998 Aarhus Convention,[13] by the *Trianel* Judgment of the CJEU in 2011,[14] and by the German Federal Nature Conservation Act (Bundesnaturschutzgesetz)[15] and the German Environmental Appeals Act (Umwelt-Rechtsbehelfsgesetz).[16] The Administrative Court of Munich thus referred to the *Trianel* judgment and ruled that EU Law demanded that an environmental association must have the right to bring an action in court when a right granted by the EU is at stake – here the right to have an adequate air quality action plan. The claim against the Bavarian administration to change its air quality plan was based on the 2008 AQFD and the transposing German provisions in the German Federal Emission Control Act. In the case of certain streets of Munich—including the Landshuter Allee—the limit values had been exceeded more often than allowed in 2011. The Court accepted that air quality has improved steadily since 2005. But without taking new measures, it was unlikely that the limit values would be complied with in 2015 or 2020 in the Landshuter Allee. Even with regard to the margin of discretion that is granted to the administration, the measures included in the air quality action plan at issue were insufficiently far-reaching. There were also no indications that it would be impossible for the administration to meet the relevant limit values. In the opinion of the Court, the injunction granted did not exceed the margin of discretion left to the administration. It was for the administration to choose the measures to fulfill the goals of the AQFD.

In two other cases, the Administrative Court of Wiesbaden has decided similarly. In its judgment of October 2011,[17] the Court decided that a resident and an environmental association were both entitled to claim for a change of the existing air quality plan for the city of Wiesbaden and they were also successful. The plan—based on Article 23 of the 2008 AQFD—contained several measures but not a low emission zone. The plan explained that this would be an appropriate measure that would reduce air pollution in the most suitable way, but that the competent traffic authorities had not given their consent to introduce a low emission zone. The Court ruled that the refusal of the traffic authorities to give their consent was unlawful. It could not be justified by the burdensome costs for car owners of upgrading their vehicles to ecological standards. The Court conceded that the administration had a certain

12 Judgment of the Administrative Court of Munich dated 9 October 2012 – M 1 K 12.1046 – Zeitschrift für Umweltrecht 2012, 699.

13 BGBl 2006 Part II, 1251.

14 Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg (Trianel Kohlekraftwerk Lunen intervening)* [2011] ECR I-3673 (hereafter *Trianel*).

15 BGBl 2009 Part I, 2542; final version January 2013: BGBl 2013 Part I, 95.

16 BGBl 2006 Part I, 2816; final version January 2013: BGBl 2013 Part I, 95.

17 Judgment of the Administrative Court of Wiesbaden dated 10 October 2011 – 4 K 757/11.WI – Zeitschrift für Umweltrecht 2012, 113.

margin of discretion. However, in the particular circumstances of the case, where many appropriate measures had been included in the air quality plan but not the most effective one, the injunction of the Court meant in practice—as stated by the Court—that the administration was obliged to include the low emission zone in the air quality plan.

In another judgment of August 2012,[18] the Administrative Court of Wiesbaden ordered an injunction against the public administration requiring it to change the air quality plan for the city of Darmstadt because the Court regarded the administration's margin of discretion to be reduced by the demands of the 2008 AQFD. The Court held that it would contradict the demands of the Directive if the administration did not include a low emission zone in its air quality plan as well as the extension of necessary traffic restrictions (for instance traffic bans for trucks), in a case where the limit values for nitrogen dioxide continuously exceeded. The German Federal Administrative Court denied an appeal against the decision.[19] The Federal Court agreed that environmental associations are entitled to seek a change of existing air quality plans and that the lower court was right to order such a change for the air quality plan for the city of Darmstadt.

6. CONCLUSIONS AND PERSPECTIVES

The problems for public administration in complying with the limits for air pollution as defined in the relevant EU Directives raise serious political and economic questions. For German courts, however, this is not a reason to refrain from judicial control. On the contrary, they now regularly issue injunctions ordering public administration to issue more effective air quality plans.

The UK Supreme Court has exercised its role in controlling UK public administration by granting an express declaration that the UK is in breach of its obligation under Article 13 of the 2008 AQFD in light of the relevant limit values of air pollutants being exceeded. The Supreme Court has not yet decided if the claimant can demand an injunction against public administration to act in accordance with applicable air quality law, in a similar vein to the German decisions cited above. However, the Supreme Court has asked the CJEU what remedies a national court must apply to ensure that public administration acts in conformity with the rules of EU air quality law. The Luxembourg Court has up to now seen its role as ensuring an effective application of EU law. Therefore, it is unlikely that the CJEU will exempt Member State courts from the obligation to exercise effective control over the national government in this area of law, even when serious political and economic questions are raised.

18 Judgment of the Administrative Court of Wiesbaden dated 16 August 2012 – 4 K 165/12.WI – <http://openjur.de/u/547964.html> accessed 10 February 2014.

19 Judgment of the Bundesverwaltungsgericht dated 5 September 2013 – BVerwG 7 C 21.12 – Neue Zeitschrift für Verwaltungsrecht 2014, 64.

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