PUBLIC GUIDE ON CLEAN AIR CASES

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Introduction

Air pollution is such a modern time crime in which we are the perpetrators and the victims at the same time. It is a typical field of environmental protection policies where the State has to make too many compromises, in which such incomparable values are confronted, such as right to health and life and right to certain economic activities and transport. If we consider the data about the close connection between the polluted air in our cities and the tens of thousands of premature deaths and millions of lost healthy days annually in the reports of the European Environmental Agency, the World Health Organisation and other independent scientific bodies, we will have to realise that the stake is too high to wait until our governments take effective measures to reduce air pollution below health standards.

There is a high amount of money at stake on the air pollution side, considering expenses of preventive measures, such as reorganizing city traffic, spatial planning transition towards compact cities on the side of governments and municipality councils, or introducing very expensive air protection devices on the side of the concerned branches of industry. Most typically, the amount of money necessary for the latter mounts up to 40 % of the total investment and operation expenses. Amidst such high economic and political pressures on the authorities in the field of clean air protection, transparency and accountability of their work is indispensable - actually, this overlaps with the long-term professional interests of the authorities charged with environmental, spatial planning, transport etc. matters. Only those decisions will stand the test of time in which all the interested parties took substantial part. In such a situation, public participation is extremely important. Features inherent in environmental democracy, such as revealing alternative information sources, representing practical orientation, system approach and showing strong motivation from the members and organizations of the public will pave the way for more effective, complex air protection policies in our major cities and elsewhere.

A line of constitutional provisions claims more effective air protection in European countries, starting from the citizens' right to health, dignity and life, as well as the good governance principles. A specific constitutional aspect of air protection is the role of the courts in environmental protection, which is called also as court activism, supporting the participation of the concerned local communities and the environmental NGOs not seldom specialized in the complicated professional and policy matters of urban air pollution issues.

Last year the European network of environmental law organisations, Justice and Environment (J&E) prepared a survey of the implementation of the EU air quality laws in one third of the member states[1]. The study underlines that public participation should be enhanced to support the implementation of these laws more effectively. Public participation, however, should not be exhausted in informing the public about the ambient air quality issues (while we consent that this is a key task for the authorities to perform), but the members and associations of the public have a right to participate in several levels of environmental decision-making, such as legislation, plans, programs, policies and individual administrative decisions. Furthermore, access to justice needs a better place in the agenda of the decision-makers. We also noted that following the general rules (Article 3) of the Aarhus Convention, each Member State should establish well designed, systematic public participation regimes, where the three pillars of public participation form a coherent effective system. Public participation should not end with the decision of the environmental authorities but should continue in the monitoring and implementation/enforcement phases, too. All the pillars of the system of environmental democracy shall be supported by appropriate capacity building measures, too.

In the first part of the present guide, we survey the system of substantive law on air protection. We will not enter into the details of individual directives or the texts of national laws, except the most important legal tool for air quality planning (AQP) in the endangered zones. The Directive on AQP and the national implementation play a key role in saving the health of citizens. However, in some countries strategic planning is considered the sole realm of the Government on several levels and in specific professional, mainly environmental branches. Public participation shall not be formal, it should substantively influence the discretionary power of the planning authorities. Public participation in AQP, therefore, shall not be exhausted in formal information and collection of opinions, the environmental authorities shall consider the local communities and professional environmental NGOs as partners who help them achieve meaningful results in designing and implementing effective plans.

In the second part of the guide, we turn our attention to the procedural considerations, namely the practical elements of the construction of the air quality protection campaigns. We consider the selection of complainants/plaintiffs, the complained/defendant part, as well as other participants, helpers in the air protection cases. It is especially important to prepare for the difficulties in proving the legal connection between certain air pollution activities and ambient air quality and the social-economic, public health consequences. Finally, time and expenses are also important factors of the air protection campaigns of the local communities and the environmental NGOs.

[1] „A survey on access to justice in the practical implementation of European Union air quality laws" Justice and Environment, Brno, 2020 (hereinafter: J&E, 2020), http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2020/Clean_air_study_web.pdf

I. Structure of air protection laws

I.1. Tasks of clean air protection laws

The best way to interpret a piece of legislation is to reveal its social purpose, in other, somehow misleading terms, “the will of legislator”. Actually, the mental status of and notes, comments from those specific persons who designed, amended, discussed a given legislative act (and especially those who forwarded the final draft for a formal acceptance) might be informative, but in our opinion the main key to the true meaning of the text can be found in its rational social goals as it is understood from the whole text of the law, a reference to the higher level assignment, the declaration of goals or a detailed description of the social purposes in the preamble, as the EU Directives are usually arranged.

A contextual analysis of the clean air laws leads us to certain obvious goals, such as:

Task 1: prevent that otherwise unavoidable air pollution cause serious harm in public health or in the environment;

Task 2: select those polluters that cause the highest and most dangerous air pollution (similarly to the Japanese forerunner policy, where the legislator time to time makes the environmental standards more and more serious, this way motivating those polluters who are lagging behind);

Task 3: eliminating odours that cannot be described by thresholds of certain materials but disturb their neighbourhood (with the help of best available technology – BAT).

I.2. The biggest polluters and the worst polluting materials

The biggest polluter groups are industry (combustion plants, incinerators etc.), public transport and individual household heating, while in the countryside agricultural pollutants (dust of fertilizers, pesticides, poorly handled topsoil, cows etc.).

The most frequent polluting materials are sulphur dioxide, nitrogen dioxide (they are related to the two basic forms of city smog), carbon monoxide, lead, benzol, surface level ozone, small particulates, sometimes called mistakenly „floating dust”, but they are grades smaller, they are actually small particles of soot, on their surface carrying other pollutants, bacteria, allergic materials etc.

Let us have a small survey of the most important air polluting materials:

- Sulphur dioxide (SO_2): ensuing from the energy sector, households with coal heating and public transport with fossil fuels; its effect is irritation of the respiratory system, in high concentration it might lead to spasms in the lungs
- Nitrogen dioxide (NO_2): primarily from public transport and heating; also, with irritative effects, but apart from respiratory symptoms, it decreases the defensive capacity of the human organism, becoming this way more apt to infection
- Nitrogen oxides (NO_X): also, from public transport and heating a more complex material mix is produced with a main component of nitrogen oxide (NO) – in circumstances of free exchange with air it soon transforms to nitrogen dioxide (NO_2)
- ozone (O_3): secondary pollutant, created by a photo-chemical procedure from exhaust fume of cars; irritating mucous membranes, aggravates chronic diseases, but causes symptoms in healthy persons, too; decreases lung functions, leads to nausea and chest pains
- Carbon monoxide (CO): primarily from cars, a poisonous gas that has no colour or smell; decreases oxygen carrying capacity of the blood, this way leads to headache, dizziness, insomnia and other nerve system complaints; also enhances the probability of hearth attack
- Lead (Pb): earlier it came from leaded gas, nowadays certain industrial activities result in emitting lead into air, causing this way serious poisoning cases, first of all it hinders haemoglobin production, harms the intestine and also the nervous system, as well as harming kidney and joints (articulations)
- Benzol (C_6H_6): its main source is the engines of cars; while it does not cause acute respiratory problems, benzol can accumulate in the human body (fat tissues, nerve system, bone marrow and adrenal glands; further accumulation might lead to cancer, especially in the blood production and lymphatic system
- Ammonia (NH_3): emitted mostly by agricultural sources, but also by waste incineration; irritates the conjunctival and the mucous membranes, results in strong weeping and sneezing
- Volatile organic compounds (VOC): these complex materials are created by numerous compounds under special meteorological conditions, however, in new buildings there could be a more than average level of VOC because of the new furniture, coverages, paints and glues, while the modern, better insulation of windows keeps them indoor more effectively. Such materials cause headache, respiratory diseases, throat and eye irritation, dizziness, exhaustion, decreased concentration. On longer run VOC might cause liver and nerve system damages.

- PM_{10}: floating solid or fluid particulates smaller than 10 micrometre, ensuing from multiple sources, such as household heating, and several agricultural and industrial activities, also from abrasion of roads and car engines. Lower parts of the respiratory system respond to PM10 with obsessive coughing, hard breathing.
- $PM_{2,5}$: typically ensuing from combustion; being smaller than PM_{10}, these particulates have access to alveoli of the lung where they cause general inflammation, laryngitis and asthma on the longer run; cardio-vascular diseases can also be aggravated by $PM_{2,5}$

I.3. The most important branches of environmental and neighbouring laws serving air protection purposes

Above we have referred to the low prestige of the environmental administrative branches and their scarcity of resources and manpower. In addition to that, environmental law is a relatively new development in our administrative law, with not more than a several decades long history. The good side is that environmental law "shamelessly" occupies and uses the neighbouring fields of law, practically whatever that could be used for its purposes. These are the reasons why for having a greater chance of success in an air pollution problem, we need to survey all the possible legal tools within and outside environmental law:

- Horizontal part of environmental law: EIA, environmental liability, public participation
- Waste management law (e.g., regulations on waste incinerators, stoves, open air burning of waste)
- Water protection law (e.g., subsidence of pollutants on water surfaces)
- Neighbouring fields of law: public transport law (e. g. establishing and operating linear infrastructure); spatial planning (e.g., positioning the polluting facilities, determining protective zones); public health law (e.g., allergic pollens), chemical safety law and soil protection law (also because of sedimentation)
- Non-administrative fields of law: certain branches of civil law, such as nuisance and trespassing

Environmental law is a crosscutting branch of our legal systems; therefore, local communities or environmental civil organisations have a wide range of choices when they design their clean air protection campaigns. Within administrative law not only the narrow sense environmental legal tools, but a line of so-called related fields is available. Some of them has much longer history in our legal systems, deeper embeddedness, and social prestige. When having serious air pollution problems, those who are determined to make effective steps might turn to public health laws, public transport regulations or spatial planning ones, amongst many others. Practically, it might promise better results if they try to start such procedures parallel to each other. Moreover, various civil law paths offer themselves, such as nuisance/trespassing or tort procedures, especially when they can target one or just a couple of specific polluters, like a large combustion plant or the maintainer of a crowded public road.

I.4. Environmental legal tools

a. Environmental impact assessment

Environmental impact assessment (EIA) is an individual administrative legal tool available for prevention of air pollution. EIA is an administrative procedure, frequently called the flagship of environmental law permitting type procedures, because it has relatively high social and economic importance within environmental law. It is a major contribution to planning investments with significant possible environmental effect. In an iterative, consultative administrative procedure the investor gets familiar with the opinion and data served by various participants, including local communities, environmental NGOs, municipalities, and at least half a dozen of professional authorities. The central and starting point of the EIA procedure is the environmental impact statement, prepared by the investor (by experts contracted by her) containing the detailed description of the investment, the analyses of all significant environmental emissions, together with the calculation and an evaluation of the environmental effects of these emissions. In principle the EIA procedure should touch upon the possible alternatives both in terms of location and technical solutions in all stages of the investment (construction, operation and abandonment) and taking into consideration all the accompanying activities such as mining or transportation necessary for the construction and/or the operation.

The EIA procedure is highly professional, that means that the civil side has to calculate with the necessity of high-level expert and legal knowledge. Yet, it happens that small communities with low level resources can organise themselves and cope with these tasks, possibly with the help of specialised professional and legal organisations, university departments and even international networks of likeminded groups. In many cases, though, the EIA decision is unacceptable for the concerned communities and NGOs, so they have to make up their minds about investing in legal remedies. This might be a lengthy and costly procedure. However, time is vital not only for the civil side but also for the investors' side, because their debtors might not wait for too long to make their loans work profitably.

In Bulgaria, the environmental association 'For the Earth' filed a complaint to the Administrative Court of Sofia City together with 3 other non-profit organizations and one individual (for sharing the burdens and using the different legal status of NGOs and concerned individuals) against an EIA decision on an investment proposal for "Construction of a plant for cogeneration of heat and electricity from refuse-derived fuel" on the site of the thermal power plant "Sofia" in the Serdika district, Sofia municipality. The first instance court ruled on 12 March 2019 (almost a year after proceeding with the case on the merits), rejecting all appeals. Thereafter a cassation appeal was filed to the Supreme Administrative Court of Bulgaria. The main argument was that NGOs' evidence on the harmful effects on human health caused by dioxins and furans released during waste incineration had been overlooked by the lower-level court. On 16 June 2020, the Supreme Administrative Court annulled the decision of the first instance court and referred the case back to it for a new hearing. While the case was not solved at this stage, the significant delay in the case put the NGOs (not having caused or contributed to the delay in the administrative and court procedure) into a stronger bargaining position with the investor (J&E).

b. Environmental permitting of a polluting activity

While the EIA procedure usually ends with a specific permit from the environmental authority, it is just generally about the acceptability of the investment on the basis of its location, synergistic effects, community and public health consequences, based on general principles of environmental law, such as precautionary principle and public participation principle. However, when the EIA permit is issued, the investors may further develop their projects regarding their technical details. At that stage the environmental authority is in the position to evaluate the best available techniques and the concrete legal requirements in the field of clean air protection and other relevant aspects of environmental effects. The emission limits and several other conditions of operation determined in the permit is subject to continuous monitoring, reporting and corrective measures ordered by the authority at later stages. When such highly technical decisions are challenged at courts, the procedure takes considerable time.

The Rosia coal deposit case in Romania had severe air pollution aspects. The deposit belonged to Rosia Quarry where the operator extracted lignite. In 2015 the long-term permit was withdrawn by the Environmental Protection Authority because the environmental standards were severely breached: there was no cover of the dry topsoil and the large piles of extracted coal, which produced dust and other kinds of pollution as close to the nearby households as 100 m. Even so, the environmental authority renewed the transitional environmental permit of the coal mine in every year, allowing the coal deposit to function, despite the vast air pollution and the protests expressed by the local population. A Romanian partner NGO to Justice and Environment challenged two governmental decisions at the local court for suspension of the permit without delay (the motion is called injunctive relief) and for the annulment of the decisions after having examined them legally and professionally with the help of independent experts. The court examinations of the cases in merit are still in process, while the motion of the NGO for injunctive relief was dismissed and this decision became final in autumn 2020, with a dismissal of the requests of the NGO. Even so, the operator might think that this location entails a lot of conflicts and legal complications, therefore he abandoned the coal deposit at the contested site and has carried the whole amount of the coal to another location (J&E).

I.5. Air Quality Planning

Directive of the European Parliament and the Council of May 21 2008 No. 2008/50/EC on the quality of ambient air and on the program called „Cleaner Air for Europe" [2] has quite specific and ambitious goals – no wonder that it is not fully implemented in the majority of the Member States, whereas almost a dozen countries were found in infringement of this law by the European Court of Justice.

In any case when the legal thresholds for the pollutants specified in the Directive are not met on a longer run, an Air Quality Plan (AQP) shall be designed for the district in question. In each case when the deadline in the Directive has expired without full compliance, AQPs shall put together zonal plans in order to eliminate the exceedance within the shortest possible time. Measures shall be effective enough and shall contain at least the measures included in the long list of Annex XV of the Directive.

a. Content of AQPs

- Location of monitoring stations and of transitional measuring points (on map and with coordinates), together with the location of the objects to protect
- An analysis of the major reasons of air pollution, a list (with map) of the major pollutants, an inquiry of the major activities, total amount of annual pollution and also an estimation of the migrating pollution from other zones, together with all other factors that influence the pollution situation

[2] 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, *OJ L 152, 11.6.2008*

- An analysis of the factors of exceeding the threshold (e.g., the role of public transport, including transboundary exchanges, secondary pollutants evolving in the air, transmission)
- A list of possible measures and programs in order to amend air quality in the zone, also measures and programs already running and recently finished, together with future ones with details
- Foreseeable expenses and sources of them

b. Laws useful during the implementation of AQPs

- On regular technical supervision of vehicles using public roads and on the conditions of putting and keeping them in traffic
- Combustion engines of stationary machines and their emission of gases and particulate matters
- Quality requirements of gasolines
- Regulation of volatile organic compound (VOC) emission of certain activities
- Regulation of sulphur content of certain liquid fuels
- Technical requirements of waste incinerators, conditions of operation and emission thresholds
- Combustion plants with capacity smaller/larger than 50 MWth - conditions of operation and emission thresholds
- Paints, lacquers and polishing materials – content of organic solvent

I.6. Practice of the Court of Justice the European Union in AQP cases

The starting point in solving larger scale, regional air pollution problems is the “Cleaner Air for Europe” Directive 2008/50, which reorganised, repealed or amended the majority of the relevant European clean air protection laws. The central piece of this directive is the obligation of the Member States to establish Air Quality Plans (AQPs) for the zones where the major air pollutants (sulphur dioxide, PM_{10}, lead, carbon monoxide, nitrogen dioxide and benzene). The question arises, how far a local community or an environmental NGO can contribute to the effectiveness of such plan. Article 26 and Annex XVI of the Directive contain detailed rules on public information concerning ambient air quality and the drafting and measures planned in the AQPs. Access to information is, however, just a part of the system of public participation as it is drawn in the Aarhus Convention to which both the European Union and all the Member States are Parties. As concludes, based on the information given, the members and organisations have to have a say in designing and amending, as well as implementing the AQPs and also have access to justice on administrative and court level. Courts have to act when such issues are brought to them by the members and associations of the public as it was underlined by the CJEU in the Client Earth case.

Where a Member State has failed to comply 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, 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 (Case C-404/13).

We need to be aware that the balancing exercises with other social and economic interests, as introduced in the previous point of the Guide, will be operative in such cases, too. Even if so, the CJEU tries to set the limits to these compromises, clearly establishing the primacy of the public health goals of the Directive. The first thing to keep in mind is that exceedance of the limit values shall be ceased within the shortest time.

(…) the fact that a Member State has exceeded the limit values for PM_{10} is not in itself sufficient to find that that Member State has failed to fulfil its obligations under the second subparagraph of Article 23(1) of Directive 2008/50. However, 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 kept as short as possible. In those circumstances, it is necessary to ascertain on the basis of a case-by-case analysis whether the air quality plans drawn up by the Member State concerned comply with the second subparagraph of Article 23(1) of Directive 2008/50. In the present case, it must be held, at the outset, that the Italian Republic has systematically and persistently failed to fulfil its obligations under the provisions of Article 13(1) of, in conjunction with Annex XI to, Directive 2008/50 in the zones and agglomerations concerned by the present action, between 2008 and 2017, as is apparent from the examination of the first complaint raised by the Commission. It should be noted in this context that the obligation to draw up air quality plans containing appropriate measures to ensure that the exceedance period is kept as short as possible in the event of exceedances of the limit values laid down in Directive 2008/50 has been binding on the Member State concerned since 11 June 2010. In so far as such exceedances had already been detected on or even before that date in almost all the zones and agglomerations covered by this action and, in any event, in at least one zone or agglomeration covered by each regional air quality plan submitted in the context of the present action for failure to fulfil obligations as from that date, the Italian Republic, which was required to bring into force the laws, regulations and administrative provisions necessary to comply with Directive 2008/50, in accordance with Article 33(1) thereof, was required to adopt and implement appropriate measures as soon as possible, pursuant to Article 23(1) of that directive (Case C-644/18).

Public authorities might interpret their obligations to hit the right balance between the social-economic interests connected to air polluting activities (combustion, road traffic etc.) in a way that all the obligations ensuing from the Directive are null and void. In a German, Bavarian case before the CJEU the referring national court asked about the right selection of sanctions when the court ordered to restore the air quality in a large part of a major city along the route of high traffic. Actually, even a growing or cumulated number of financial penalties seemed to be absolutely futile, because in such a case the money would just flow from one pocket to another of the State budget. In principle the administrative procedural code of the State allows for a punitive detention of the noncompliant persons as a last resort. In the given instance, high ranked officers of the State overtly announced that they would not be willing to obey the court order to restore the air quality alongside the road, because of the other interests at the stake. The CJEU answer was, naturally, very careful in this case, but, upon certain conditions, it did not totally exclude the solution of deprivation of personal freedom of the non-compliant officials. Here we quote some longer paragraphs from this important decision of the European Court. First the fact from the domestic court referring the case to the CJEU.

It is apparent from the order for reference that the limit value for nitrogen dioxide (NO2) set by the second subparagraph of Article 13(1) of Directive 2008/50 in conjunction with Section B of Annex XI thereto, namely 40 μg/m3 on average over a calendar year, has been exceeded, sometimes to a very considerable extent, at numerous locations on several kilometres of road within the city of Munich (Germany). In an action brought by Deutsche Umwelthilfe, the Verwaltungsgericht München (Administrative Court, Munich, Germany) enjoined the Land of Bavaria, by judgment of 9 October 2012, to amend the air quality action plan applicable in respect of the city of Munich, which is an ‘air quality plan’ within the meaning of Article 23 of Directive 2008/50, in such a way as to include the measures necessary in order for the limit value set for nitrogen dioxide to be complied with in that city as soon as possible. That judgment has become final. By order of 21 June 2016, the Verwaltungsgericht München (Administrative Court, Munich) threatened the Land of Bavaria with a financial penalty of EUR 10 000 if it did not comply with that injunction within one year from service of the order. The order contained some measures, including the imposition of traffic bans in respect of certain diesel vehicles in various urban zones. The Land of Bavaria did not appeal against that order and paid that sum. Subsequently, the Land of Bavaria still did not comply in full with the terms of the injunction granted against it by the order of 27 February 2017. On the contrary, representatives of the Land of Bavaria, including its Minister-President, publicly stated their intention not to comply with the aforementioned obligations relating to the imposition of traffic bans. By orders of 28 January 2018, the Verwaltungsgericht München (Administrative Court, Munich) threatened to impose upon it an additional financial penalty of the same amount if it did not comply, within a fresh period, with another point of the operative part of that order. On the other hand, that court dismissed, in particular, the application for coercive detention of the Minister for the Environment and Consumer Protection of the Land of Bavaria or, failing this, of its Minister-President. According to the referring court, there is no reason to expect that the Land of Bavaria will comply with the order of 27 February 2017 by adopting the traffic bans at issue. The referring court states that, where the executive demonstrates so clearly its determination not to comply with certain judicial decisions, the view must be taken that the setting and payment of fresh financial penalties, of a higher amount, are not liable to alter that conduct. Indeed, payment of a financial penalty does not result in any economic loss for the Land of Bavaria. On the contrary, the financial penalty is paid by entering the amount fixed by the court as a debit item under a given heading of the budget of the Land concerned and crediting the same amount to its central funds. The referring court takes the view that, although, in principle, it could be conceivable to ensure compliance with the obligations and judicial decisions at issue by ordering the coercive detention of certain members of the government of Upper Bavaria (Germany), the Minister for the Environment and Consumer Protection of the Land of Bavaria or the Minister-President of that Land, for reasons of constitutional law that instrument, provided for by the ZPO, is not applicable here. (…) Nevertheless, according to the referring court, if the coercive detention of office holders involved in the exercise of official authority were ordered on the basis of Paragraph 888 of the ZPO, that would be tantamount to failing to have regard to the requirement, stated by the Bundesverfassungsgericht (Federal Constitutional Court) in its order of 13 October 1970, that the intention of the legislature when it adopted a provision which is used as the legal basis for a deprivation of liberty must have encompassed the objective for the fulfilment of which that provision is now applied. According to the referring court, in the light of the history of Paragraph 888 of the ZPO, the requirement thereby set is not met so far as concerns office holders involved in the exercise of official authority. The referring court is nevertheless uncertain whether EU law demands a different assessment of the legal situation at issue in the main proceedings (Case C-752/18).

Thereafter the analysis of the CJEU, based on the responsibilities of the Member State's court to enforce their decisions supporting the implementation of the Directive, but taking into consideration the constitutional guarantees that prevent any arbitrary detention of non-compliant persons on administrative procedural bases.

According to the referring court, this question arises in the context of the Court of Justice's case-law according to which, where a Member State has failed to comply 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, it is for the national court having jurisdiction, should a case be brought before it, to take, in 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. According to the Court's case-law, national legislation which results in a situation where the judgment of a court remains ineffective because that court does not have any means of securing observance of the judgment fails to comply with the essential content of the right to an effective remedy enshrined in Article 47 of the Charter. That right would be illusory if a Member State's legal system were to allow a final, binding judicial decision to remain ineffective to the detriment of one party. More specifically, according to the case-law of the European Court of Human Rights which relates to Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 – and in the light of which Article 47 of the Charter should be interpreted – the fact that the public authorities do not comply with a final, enforceable judicial decision deprives that provision of all useful effect. 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. In addition, in 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. To that end, it is incumbent upon the national court to ascertain, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by that law, whether it can arrive at an interpretation of domestic law that would enable it to apply effective coercive measures in order to ensure that the public authorities comply with a judgment that has become final, such as, in particular, high financial penalties that are repeated after a short time and the payment of which does not ultimately benefit the budget from which they are funded. That said, in the present instance the referring court considers that it cannot secure compliance with the principle of the effectiveness of EU law and the right to an effective remedy unless EU law empowers or even obliges it to disregard the reasons of a constitutional nature which, in its view, prevent the application of coercive detention to office holders involved in the exercise of official authority. 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. Nevertheless, that case-law of the Court cannot be understood as meaning that the principle of effectiveness of EU law and observance of the right, guaranteed by the first paragraph of Article 47 of the Charter, to effective judicial protection oblige the national court to disapply a provision of national law or not to follow the only interpretation of that provision which seems to it to accord with the national constitution if, in so doing, it infringes another fundamental right guaranteed by EU law. Indeed, and as is apparent from Article 52(1) of the Charter, the right to effective judicial protection is not an absolute right and may be restricted, in particular in order to protect the rights and freedoms of others. A coercive measure such as coercive detention entails a limitation on the right to liberty, guaranteed by Article 6 of the Charter. In order to answer the question referred for a preliminary ruling, it is accordingly necessary, in the third place, to weigh against one another the fundamental rights at issue in the light of the requirements laid down in the first sentence of Article 52(1) of the Charter. As regards the requirements that the legal basis for a limitation on the right to liberty must satisfy, the Court has already stated, in the light of the judgment of the European Court of Human Rights of 21 October 2013, Del Río Prada v. Spain that a law empowering a court to deprive a person of his or her liberty must, so as to meet the requirements of Article 52(1) of the Charter, be sufficiently accessible, precise and foreseeable in its application in order to avoid all risk of arbitrariness. Those conditions apply in respect of any type of deprivation of liberty, including where it results from the need to enforce a penalty imposed by a judicial decision, irrespective of the possibility for the person concerned of avoiding the deprivation of liberty by complying with an injunction imposed by that decision or an earlier decision. Whilst it is apparent from the oral argument at the hearing before the Court that doubts remain as to whether the conditions that would allow the coercive detention provided for by German law to be ordered in respect of office holders involved in the exercise of official authority are fulfilled, it is for the referring court alone to determine whether the relevant national provisions are, in the light of their wording and substance, sufficiently accessible, precise and foreseeable in their application and thus enable all risk of arbitrariness to be avoided. If that is not so, the national court cannot order coercive detention solely on the basis of the principle of effectiveness and of the right to effective judicial protection. Any limitation on the right to liberty must be provided for by a law that meets the requirements recalled in paragraph 46 of the present judgment. As regards the requirements stemming from the principle of proportionality, it is to be borne in mind that, where several fundamental rights are at issue, the assessment of observance of the principle of proportionality must be carried out in accordance with the need to reconcile the requirements of the protection of those various rights, striking a fair balance between them. As the Advocate General has observed in point 86 of his Opinion, since the ordering of coercive detention entails a deprivation of liberty, recourse may be had to such an order only where there is no less restrictive measure that enables the objective pursued to be attained. It is therefore for the referring court to determine whether national law governing enforcement can be interpreted in conformity with the right to effective judicial protection, to the effect that it would authorise the referring court to adopt measures that do not impinge upon the right to liberty, such as those referred to in paragraph 40 of the present judgment. It is only if the referring court were to conclude that, in the context of the balancing exercise referred to in paragraph 45 of the present judgment, the limitation on the right to liberty which would result from coercive detention being ordered complies with the conditions laid down in that regard in Article 52(1) of the Charter that EU law would not only authorise, but require, recourse to such a measure. It should also be pointed out that the foregoing reasoning is without prejudice, in particular, to the possibility that an infringement of Directive 2008/50 such as that identified by the referring court as giving rise to the dispute in the main proceedings may be found by the Court in an action for failure to fulfil obligations under EU law. Furthermore, it should be remembered that the full effectiveness of EU law and effective protection of the rights which individuals derive from it may, where appropriate, be ensured by the principle of State liability for loss or damage caused to individuals as a result of breaches of EU law for which the State can be held responsible, as that principle is inherent in the system of the treaties on which the European Union is based. That principle applies to any case in which a Member State breaches EU law, whichever public authority is responsible for the breach. In the light of all the foregoing, the answer to the question referred is that EU law, in particular the first paragraph of Article 47 of the Charter, must be interpreted as meaning that, in circumstances in which a national authority persistently refuses to comply with a judicial decision enjoining it to perform a clear, precise and unconditional obligation flowing from EU law, in particular from Directive 2008/50, it is incumbent upon the national court having jurisdiction to order the coercive detention of office holders involved in the exercise of official authority where provisions of domestic law contain a legal basis for ordering such detention which is sufficiently accessible, precise and foreseeable in its application and provided that the limitation on the right to liberty, guaranteed by Article 6 of the Charter, that would result from so ordering complies with the other conditions laid down in that regard in Article 52(1) of the Charter. On the other hand, if there is no such legal basis in domestic law, EU law does not empower that court to have recourse to such a measure (Case C-752/18).

CJEU practice of the AQPs reach out to the definition of the ambient air quality issues, based on the Preamble of the Directive. Indirectly, Recital 2 of the Directive determines a minimum international guiding value for the goals of air protection when states: In order to protect human health and the environment as a whole, it is particularly important to combat emissions of pollutants at source and to identify and implement the most effective emission reduction measures at local, national and Community level. Therefore, emissions of harmful air pollutants should be avoided, prevented or reduced and appropriate objectives set for ambient air quality taking into account relevant World Health Organisation standards, guidelines and programmes.

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. The air quality plans may additionally include specific measures aiming at the protection of sensitive population groups, including children. Those air quality plans shall incorporate at least the information listed in Section A of Annex XV and may include measures pursuant to Article 24. Those plans shall be communicated to the Commission without delay, but no later than two years after the end of the year the first exceedance was observed. …' Annex XI to Directive 2008/50 is headed 'Limit values for the protection of human health'. Section B thereof sets limit values per pollutant in terms of its concentration in ambient air, measured in different time periods (Case C-752/18).

The territorial extension of non-compliance is taken into consideration, too, as it is seen in the Bulgarian and the Polish AQP cases.

BULGARIA

By exceeding the daily and annual limit values for PM10 concentrations systematically and continuously from 2007 until 2014 inclusive in the zones and agglomerations BG0001 AG Sofia, BG0002 AG Plovdiv, BG0004 North Bulgaria, BG0005 South-West Bulgaria and BG0006 South-East Bulgaria; — by exceeding the daily limit value for PM10 concentrations systematically and continuously from 2007 until 2014 inclusive in the zone BG0003 AG Varna and the annual limit value in 2007, 2008 and from 2010 until 2014 inclusive in zone BG0003 AG Varna, — the Republic of Bulgaria has failed to fulfil its obligations under the provisions of Article 13(1) of, in conjunction with Annex XI to, 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 (Case C-488/15).

POLAND

The Republic of Poland has failed to fulfil its obligations under, respectively, Article 13(1), in conjunction with Annex XI, the second subparagraph of Article 23(1), and Article 22(3) of, in conjunction with Annex XI to, 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, for the following reasons:

– since 2007 and up to 2015 inclusive, the daily limit values for particulate matter PM10 concentrations were exceeded in 35 zones for the assessment and management of ambient air quality and the annual limit values for particulate matter PM10 concentrations were exceeded in 9 zones for the assessment and management of ambient air quality;

– no appropriate measures have been incorporated in ambient air quality programmes to ensure that the exceedance period of particulate matter PM10 concentrations limit values is kept as short as possible;

– the daily limit values for particulate matter PM10 concentrations in ambient air, increased by the margin of tolerance, were exceeded from 1 January 2010 to 10 June 2011 in the Radom, Pruszków-Żyrardów, Kędzierzyn-Koźle zones, as well as from 1 January 2011 to 10 June 2011 in the Ostrów-Kępno zone (Case C-336/16).

We have to note here that the environmental authorities are not the enemies of the concerned public but rather victims of the situation themselves, too. While they are very well aware of the weak content and feeble implementation of an AQP, their low social prestige makes them an easy target to social and economic pressures, instructions from their higher-level authorities constrain their scope of work and their scarce budget and staffing prevent them from more ambitious planning and follow-up activities.

The Budapest Air Quality Plan was first created in 2011 and seriously transformed in 2016 because of inability of the city to keep NO_x, $PM_{2,5}$ and partly surface level ozone within the ambient quality thresholds. It turned out – from a direct written acknowledgement of the environmental protection authority – that the methodology of preparing the AQP was nothing else than the authority made a survey amongst the largest polluters about their plans to amend emission and not too much more got into the final plan than this. Moreover, even these very modest measures were not properly implemented, because of lack of resources at the authority. Altogether they have only two officials for the whole Budapest region, dealing with any other air protection cases, not only AQP ones. Also, the authority overtly expressed their doubts that they might have the proper legal tools to do that.

The professional environmental NGOs and local communities make the environmental authorities develop complex air protection plans, including issues of traffic, household heating, industry and also agriculture, where relevant. The plans shall encompass strong and detailed monitoring schedules and a list of possible sanctions for the infringement of the provisions of the plan. All of these means a very wide range of data collection and very complex consultative procedure from several experts of quite different fields of social and technical sciences. Large professional mainstream NGOs and NGO networks together with activated and motivated local communities can offer a vital support to such a planning procedure.

I.7. Using the provisions of the Environmental Liability Directive

Regretfully, the material scope of the Environmental Liability Directive (ELD) extends only to water, land and nature, but not the air. However, in certain cases serious air pollution might have obvious consequences in the pollution and harm of these three elements of the environment and such way might become substantial for the ELD, too. Taking into consideration the extraordinary strong public participation rights, namely that the competent national authorities are obliged to start an examination upon the request of the members and organisations of the concerned public, this tool deserves consideration, too, when examining the legal possibilities in an air pollution matter.

It is therefore for the referring court to verify, on the basis of the facts which it alone may determine, whether, in the main proceedings, air pollution was capable of causing such damage or the imminent threat of such damage as to give rise to the need to take preventive or remedial measures within the meaning of Directive 2004/35. If that court should conclude that this was not the case in this instance, it will have to find that the pollution here at issue does not come within the scope of Directive 2004/35, and that such a situation is then a matter to be dealt with under national law, in compliance with the rules of the EU and FEU Treaties and without prejudice to other measures of secondary legislation. By contrast, if the referring court should find that the air pollution at issue in the main proceedings has also caused damage or given rise to an imminent threat of such damage to water, land or protected natural species or habitats, such air pollution would come within the scope of Directive 2004/35/EC (Case C-129/16).

In the so-called REFIT analysis, the EU Commission's Environmental Directorate General (DG ENV) points out that there is a drawback in the ELD system, namely the absence of a clear requirement for Member States to monitor and to report on implementation of air quality plans or update them with new measures when progress is insufficient. This makes compliance verification difficult[3]. In this respect some national environmental laws tried to introduce legal automatisms that make easier to find the liable persons. In Hungary, the landowners have a legislative duty to monitor their lands against illegal pollution and if they fail to do so, they might be responsible for the harm themselves.

[3] https://ec.europa.eu/environment/air/quality/aqd_fitness_check_en.htm

Article 102(1) of the Hungarian law on environmental protection provides that, in the absence of proof to the contrary, the persons who own or are in possession of the land 'on which the environmental damage or hazard occurred' are to be held jointly and severally liable; the owner can discharge himself of his liability only if he can identify the actual user of the land and can prove beyond reasonable doubt that he did not cause the damage himself, which is such as to strengthen the liability mechanism provided for by Directive 2004/35. To the extent that, without affecting the liability in principle of the operator, such national legislation seeks to prevent a lack of care and attention on the part of the owner, as well as to encourage the owner to adopt measures and develop practices likely to minimise the risk of damage to the environment, it contributes both to the prevention of such damage and, as a result, to the attainment of the objectives of Directive 2004/35. The effect of this national legislation is that the owners of land in the relevant Member State are deemed to monitor the conduct of those using their property and to report such users to the competent authority in the event of environmental damage or the threat of environmental damage, failing which the owners will themselves be held jointly and severally liable (Case C-129/16).

I.8. Related fields: traffic law, spatial planning

Indeed, city traffic is one of the three major sources of urban air pollution, apart from household heating with different fossil fuels and with other materials in poorer districts, as well as certain branches of industry. While community heating is very diverse and difficult to regulate and control, and the polluting industries are to be supported by the European states, rather than restricting their scope of operation, the still relatively easiest target seems to be city traffic. Yet, opposing interests could be too powerful even here, and the public mood can easily swing into an anti-environment direction, too. Traffic law and spatial planning solutions of decreasing city air pollution are therefore promising, but not always long lasting, tenable ones.

In Spain the Town Council of the City of Madrid adopted a municipal Ordinance on Sustainable Mobility (OSM) with complex purposes, including to lessen mobility needs, to exclude polluting traffic from core zones of the city and to improve the air quality. The Ordinance established a Low Emission Zone (LEZ) of Madrid Central. The objective of the LEZ was to reduce the environmental pollution level and improve the quality of life of residents, promote a more sustainable mobility, favouring public collective transport and decrease the intensity of traffic also by recovering public space for pedestrians. The LEZ was producing positive results as the major polluters from gasoline fed transport, especially NO_2 levels dropped significantly since it entered into force in June 2019. However, loud representatives of the transport lobby created negative emotions on the LEZ in certain part of the public, while a new city government as arriving at power, withdrawn the LEZ and the system of rules that enhanced its implementation (J&E).

I.9. Another related field: public health framing of air pollution matters

Another indirect approach of ambient air quality problems is through their health effects. Communication sciences call “framing” an editing method, when a message gains new meanings and importance because of being situated into another topic, which is widely accepted and appreciated. Here, environmental problems, even city air pollution might seem to be too distant for the general public, while by making their health effects widely known and demonstrated, every news consumer will understand their importance.

Our Czech colleagues in Frank Bold Society in their clean air protection campaign were seeking compensation from the Ministry of Environment for the high number of lung cancer cases in a part of a major Czech city. Their selected client was a lady, who was successfully treated in her case, but which her husband succumbed to. She sees the causes of their illness in the long-term above-limit concentration of air pollutants (PM10, PM2.5 and benzo(a)pyrene) in her hometown Ostrava-Radvanice, where they spent their whole life. It was an outstanding feature of their case that the Ministry has not taken effective measures that would change the unhealthy air of the city for better. Similarly to other cases, also supported by the Society, the concentrations of hazardous substances in air far exceeded the limit values, and this went on for many years unchanged. On that bases the widow filed an administrative lawsuit against the Ministry. The legal expertise was provided by lawyers from Frank Bold Society, and they argued that there was an unlawful interference with the constitutionally guaranteed rights to health of the plaintiff when the regional authority, and later on the Ministry of Environment, failed to adopt an action plan of measures for the area with worsened air quality. The regional court in Ostrava upheld the claim and decided that the regional authority acted unlawfully when they failed to adopt efficient interim measures for air quality protection in the excessively polluted city parts. The Regional Court’s decision was afterwards approved also by the Supreme Administrative Court. Such a civil lawsuit for damages is of a great social significance, as it highlights a systemic breach of the air quality legislation in the Czech Republic and a long-term inactivity of the Ministry of Environment to meet the air quality standards by implementing effective policies (J&E).

I.10. Human rights aspects of air pollution cases

Clean air cases have human rights and constitutional legal ramifications, too, in connection with the right to health and to a favourable environment, but also right to dignity (for instance in cases when air pollution is accompanied with disturbing odour), right to rest and recreation, as well as right to enjoy the privacy of one's house, flat or other real estate. In the continental (statute based) legal systems infringement of constitutional rights may seldom form the basis of administrative or court procedures (unless there is a wide enough range accessibility of the Constitutional Court), while these constitutional and/or international human rights references can bolster our legal arguments in specific environmental or related administrative cases and in civil law cases. Moreover, clean air protection campaigns can calculate with starting a European Court of Human Rights (ECtHR) procedure at a certain point of the process – taking into consideration that exhaustion of the domestic legal remedies is usually a condition for such cases, unless the claimant can prove or make it reasonably probable that using such remedies would have been futile. While there are no direct environmental provisions in its context, the practice of implementation of Article 8(1) of the European Convention on Human Rights ("Everyone has the right to respect for his private and family life, his home and his correspondence.") has developed into the direction to encompass harmful or disturbing environmental effects, too.

While the objective of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities, it may also imply in some cases an obligation on public authorities to adopt positive measures designed to secure the rights enshrined in this article. This obligation does not only apply in cases where environmental harm is directly caused by State activities but also when it results from private sector activities. Public authorities must make sure that such measures are implemented so as to guarantee rights protected under Article 8. The ECtHR has furthermore explicitly recognised that public authorities may have a duty to inform the public about environmental risks. Moreover, the Court has stated with regard to the scope of the positive obligation that it is generally irrelevant of whether a situation is assessed from the perspective of paragraph 1 of Article 8 which, inter alia, relates to the positive obligations of State authorities, or paragraph 2 asking whether a State interference was justified, as the principles applied are almost identical. (Taşkın and Others v. Turkey, paragraph 113, also in Guerra and Others v. Italy, paragraph 58, Hatton and Others v. the United Kingdom [GC], paragraph 98; Tătar v. Romania, paragraph 87, Deés v. Hungary, paragraph 21, Moreno Gómez v. Spain, paragraph 61, Lemke v. Turkey, paragraph 41)

I.11. Nuisance/trespassing

Those air pollution and other environmental cases that end up at ECtHR start domestically as civil law cases based on the protection of the quiet possession of people's real estates against unlawful disturbance. In the famous López Ostra v. Spain case the applicant complained that the fumes and noise from a waste treatment plant situated near her home made her family's living conditions unbearable. After having had to bear the nuisance caused by the plant for more than three years, the family moved elsewhere when it became clear that the nuisance could go on indefinitely and when her daughter's paediatrician recommended them to relocate. The national authorities, while recognising that the noise and smells had a negative effect on the applicant's quality of life, argued that they did not constitute a grave health risk and that they did not reach a level of severity breaching the applicant's fundamental rights. However, the Court found that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect adversely their private and family life, even though it does not seriously endanger their health. In this case, the Court found a violation of Article 8.

The situation was similar in the Fadeyeva v. Russia case, while the standard of admittance seems to be higher. In this case the applicant lived in the vicinity of a steel plant. The Court observed that in order to fall under Article 8, complaints relating to environmental nuisances have to be bolstered by proving, firstly, that there has been an actual interference with the individual's "private sphere", and, secondly, that these nuisances have reached a certain level of severity. In the case in question, the Court found that over a significant period of time the concentration of various toxic elements in the air near the applicant's house seriously exceeded safe levels and that the applicant's health had deteriorated as a result of the prolonged exposure to the industrial emissions from the steel plant. Therefore, the Court accepted that the actual detriment to the applicant's health and well-being reached a level sufficient to bring it within the scope of Article 8 of the Convention. Here the Court concluded that there had been a violation of Article 8. We note, however, that even in this case the EHRC was much lighter handed than the majority of the national level courts, where the almost automatic causational connection between the air pollution exceeding the administrative standard limits and the health consequences. While it seems to be absolutely plausible that once the air pollution standards are based primarily on public health sciences, their exceedance shall have their effects on the health of the people who are exhibited to such level of pollution. Yet, domestic courts are willing or able to accept this simple logical conclusion extremely rarely, because the possibly high number of such complaints could cause incalculable harms to the national state economic household. The cruel reality is that at the time being national authorities and courts play blind when they are confronted with the mass public health effects caused by air pollution in our major cities and elsewhere in the vicinity of large sources, such as power plants and highways. Dramatic changes cannot be expected abruptly, but the consequential pressure from civil groups might (must) achieve certain shifts in this untenable situation.

In Dubetska and Others v. Ukraine, the Court recognised the difficulties in proving the causal chain between the air pollution and the health hazards. The EHRC decision explained that while there is no doubt that industrial pollution may negatively affect public health in general and worsen the quality of an individual's life, it is often impossible to quantify its effect in each individual case. It is often hard to distinguish the effect of environmental hazards from the influence of other relevant factors. Instead, the health effects the Court based its sentence on the fact that the specific area in which the applicant lived was both according to the legislative framework (provision of minimum distances from industrial plants) and empirically unsafe for residual use. Consequently, the Court found a violation of Article 8 as the authorities had not found an effective solution to the applicant's situation for 12 years by curbing the pollution. Notably, in this case the domestic court ordered the State to resettle the complainant's family, which judgment the State failed to comply with for such a long time.

Air pollution is frequently accompanied by noise and vibration, especially in the case of highways. In Grimkovskaya v. Ukraine, the Court reaffirmed that the hazard at issue necessary to raise a claim under Article 8 must attain a level of severity resulting in a "significant impartment of the applicant's ability to enjoy her home, private or family life" and that the assessment of all circumstances of the case is needed to decide on the threat level. In this case, the Ukrainian authorities routed in 1998 a motorway through a street which had been constructed as a residential street. It had no drainage system, pavement or proper surfacing able to withstand high volumes of heavy goods traffic. In addition, potholes which appeared were occasionally filled up by the road authorities with cheap materials including waste from coal-mines which were high in heavy metal content. The applicant claimed that her house had become unusable and the people living in it suffered from constant vibrations provoked by the traffic and from noise and pollution. This case was not built upon the substantial nature infringements of the Convention, but on the procedural basis of Articles 6 § 1 and 13. However, the Court overlooked them, establishing that there is no need to examine the complaints under them, and returned back to the substantive part of the case and held that there has been a violation of Article 8 of the Convention.

II. Procedural elements of building up an administrative or a litigation strategy

II.1. Selection between administrative or court procedures

On the procedural side a primary strategic decision if the community or organisation fighting for cleaner air is willing and able to continue their cases on the administrative court level when they are discontent with the decisions or with the general passivity of the environmental authorities. While judges might represent a fresh and more radical environmental protection approach, the professional basis for examining the deeper professional and legal content of the air protection cases might be missing at their side. In the majority of the European countries, we have not found specialized environmental courts or at least environmental chambers in the administrative courts, at all.

II.2. Alternative routes: ombudspersons, state auditors, prosecutors

While we see our chances in clean air cases shaky at the national level administrative bodies and courts, local communities and environmental NGOs have to take into consideration all the available alternative ways of managing their conflicts. Such solutions vary from country to country, but usually our human rights, or in more elaborated national level legal terms, constitutional legal complaints could be raised at the ombudspersons or parliamentary commissioners. The advantage of such bodies can be at the same time their disadvantage, too: they are independent from the government and its administrative system, while, naturally, their findings and suggestions are formally not binding to the authorities relevant in air pollution cases. However, ombudspersons have high professional and social prestige, therefore their reports on cases are well accepted and mostly obeyed, too. In some countries state auditors' offices fill in a similar legal-social role in controlling the administrative organisations' work, although they mostly deal with general, structural problems, even if they are able and willing to delve into several environmental protection matters. Their contribution could be especially valuable for large, mainstream professional environmental NGOs whose goals are of mostly strategic level.

In some countries, especially in the Central and Eastern European region prosecutors' offices have civil and administrative legal departments, too. They are crowded with excellent, experienced lawyers, who usually both run general issue surveys and respond to complaints from citizens in individual cases. Mentioning prosecutors, we cannot avoid the question of using criminal law in air protection cases. This seems to be a less promising legal pathway, because of the rigid legal requirements on linear causal link between the act of perpetration and the harmful results. Because of their physics, in air pollution cases, the success of such proving is next to impossible. While, naturally, there are environmental crimes in the criminal codes of the European countries, they are typically reserved for the most serious abuses of hazardous materials and wastes.

II.3. Selection of the complainants, plaintiffs, complained and defendant persons/bodies

A major strategic decision of clean air campaigns is the selection of the complainants or in court cases, plaintiffs. In larger coalitions, such as in the Bulgarian case, where one professional NGO and 4 natural persons took part in the case, this was a well-designed arrangement, because under some old, more conservative administrative procedural laws, concerned individuals can have access to standing more easily than an NGO (this is the case not only in Bulgaria, but also for instance in the Czech Republic, too). Considering that clean air protection issues concern a lot of persons and not seldom receive large media coverage, one cannot be surprised that certain political parties, especially their local branches become active in such cases, too, as happened in the Madrid Low Emission Zone case with a group of socialists.

The defendants in the public interest air protection cases might be the polluters themselves especially in individual (not planning) cases, but they seldom stand alone, in the majority of the cases it is important to involve the authorities, too, who permitted their activities or failed to monitor and sanction their illegal activities. For instance, in a Romanian combustion plant emission case our J&E partner challenged the Energy Complex Oltenia SA and the Ministry of Energy.

Environmental legal cases typically concern a wide range of interests, therefore in such cases not only the complainant/plaintiff and complained/defendant but other interested parties take part, who can be in procedural terms helpers or *amicus curiae*, experts, witnesses, or just stay behind the scenes with valuable financial and professional support of the victims of air pollution. International NGO networks play a decisive role in the AQP cases, for instance, ClientEarth that has offices in several European cities (London, Warsaw) and is active in several countries (UK, Germany, Czech Republic, Poland, Slovakia, Bulgaria, Hungary). Harnessing the comparative elements, learning from each other, the members of such networks can use successful precedent cases and in certain instances can even influence the legal practice of the national courts or of the CJEU. Greenpeace is also active in certain countries in clean air protection matters with mapping out environmental liability cases or otherwise (Hungary, Spain).

Larger national environmental legal NGOs, such as ÖKOBÜRO or EMLA can play an important role, too, either initiating administrative or court cases on their own or supporting local communities. Furthermore, there are NGOs specialized in air protection matters, such as the Clean Air Action Group of Hungary (all data in this chapter are based on J&E network sources).

II.4. Standing, public participation rights, amicus curiae role

Standing was historically based on direct personal interest in the subject of an administrative case. Direct personal interest used to mean a linear causal link between the health, personal rights, real estate value and the subject of the case. This conservative legal basis is less and less tenable in environmental matters, especially in air pollution cases. In the judgments of 25 July 2008, Janecek (Case C-237/07, EU:C:2008:447), and of 19 November 2014, ClientEarth (Case C-404/13, EU:C:2014:2382), the Court of Justice of the European Union acknowledged that, as regards air quality, certain persons can assert their rights with respect to the limit values where those persons are directly concerned, in particular due to a direct danger to their health. The CJEU underlines in several cases the procedural rights of citizens to turn to court when clean air protection is not properly ensured by the authorities, for instance, when the sampling points are put on places which are not representative enough.

According to settled case-law, under the principle of sincere cooperation laid down in Article 4(3) TEU, it is for the courts of the Member States to ensure legal protection of an individual's rights under EU law. In addition, the second subparagraph of Article 19(1) TEU requires Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law. In addition, the Court has noted on numerous occasions that it is incompatible with the binding effect that Article 288 TFEU ascribes to the directive to exclude, in principle, the possibility of the obligation imposed by that directive being relied on by the persons concerned. That consideration applies particularly in respect of a directive whose objective is to control and reduce atmospheric pollution and which is designed, therefore, to protect public health. As the Advocate General pointed out, in essence, in point 53 of her Opinion, the rules laid down in Directive 2008/50 on ambient air quality put into concrete terms the EU's obligations concerning environmental protection and the protection of public health, which stem, inter alia, from Article 3(3) TEU and Article 191(1) and (2) TFEU, according to which Union policy on the environment is to aim at a high level of protection, taking into account the diversity of situations in the various regions of the European Union, and is to be based, inter alia, on the precautionary principle and on the principle that preventive action should be taken. In particular, where the EU legislature has, by directive, imposed on Member States the obligation to pursue a particular course of action, the effectiveness of such action would be weakened if individuals were prevented from relying on it before their national courts, and if the latter were prevented from taking it into consideration as an element of EU law in deciding whether the national legislature, in exercising the choice open to it as to the form and methods for implementation, has kept within the limits of its discretion set by the directive.

Directive 2008/50 lays down detailed rules for the use and location of sampling points to measure air quality in zones and agglomerations established by the Member States in accordance with Article 4 of the directive. (…) Article 7 of Directive 2008/50 concerns the location and minimum number of sampling points. In accordance with paragraph 1 thereof, the location of sampling points for the measurement of sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter (PM10 and PM2,5), lead, benzene and carbon monoxide in ambient air is to be determined in accordance with the criteria set out in Annex III to that directive. Section B of that annex sets out the criteria for the 'macroscale siting' of sampling points. It follows from paragraph 1(a) thereof that sampling points directed at the protection of human health must be sited in such a way as to provide data on air quality (i) in the areas within zones and agglomerations where the highest concentrations of the pollutants in question occur to which the population is likely to be directly or indirectly exposed for a period which is significant in relation to the period under consideration for the limit values concerned and (ii) in other areas within the zones and agglomerations which are representative of the exposure of the general population. Paragraph 1(f) of Section B of that annex specifies that sampling points are, where possible, also to be representative of similar locations not in their immediate vicinity. Thus, the provisions of paragraph 1(a) and (f) of Section B of Annex III to Directive 2008/50 require sampling points to provide representative data for locations in a zone or agglomeration characterised by a certain level of pollution. It is apparent from paragraph 1(b) of Section B of Annex III to that directive that sampling points must be sited in such a way as to avoid measuring very small 'micro-environments' in their immediate vicinity and that the air sampled must, as far as possible, be representative of the air quality in an area of a certain size. That provision requires that the measurements reflect air quality, at traffic-orientated sites, for a street segment no less than 100 m in length and, at industrial sites, for a plot of at least 250 m × 250 m. In addition, the rules provided for in Annex V to Directive 2008/50, to which Article 7(2) and (3) of that directive refers, make it possible to determine the minimum number of sampling points in a zone or agglomeration and the ratio between the points for measuring background pollution and those for measuring traffic-based pollution (Case C-723/17).

Indirect connection between the parties and the subject of the cases at the environmental authorities opens the possibility for environmental associations to use more legal tools for their environmental protection purposes. The Aarhus Convention, as ratified by the EU and the Member States plays a key role in this legal development.

The right to bring proceedings set out in Article 9(3) of the Aarhus Convention would be deprived of all useful effect, and even of its very substance, if it had to be conceded that, by imposing those conditions, certain categories of 'members of the public', a fortiori 'the public concerned', such as environmental organisations that satisfy the requirements laid down in Article 2(5) of the Aarhus Convention, were to be denied of any right to bring proceedings (judgment of 20 December 2017, Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation, Case C-664/15, EU:C:2017:987, paragraph 46) (Case C-197/18).

II.5. Criteria of standing for NGOs in environmental court cases

Environmental NGOs play a specific role in public participation for a number of reasons: their professional basis is deeper, professional networks are usually wider than those of the spontaneous local communities or individuals. Their organisational and management rules maintain transparent and accountable operation, mostly apt from individual biases or arbitrary decisions. Environmental NGOs, especially the larger, so-called mainstream ones are able and willing to represent larger environmental cases, where the interests of larger social groups (or future generations) are at stake, less than direct concern of a community. It is important to stress for instance, that three of the four cases to defend the clean air protection measures of Madrid Central were filed by Spanish NGOs. According to Spanish Law on Access to Information, Public Participation and Access to Justice in Environmental Matters (Aarhus Law), the NGOs have standing to sue in environmental matters when they meet the following criteria:

- their by-laws include as the association's goal the protection of the environment or of any of its elements;

- the association must be legally constituted at least for 2 years before the date in which the action is initiated; it must be active in achieving its goals;

- a geographical connection (established in their by-laws) with the area affected by the act or omission (J&E)

Similar conditions for NGO participation in environmental administrative cases exist across Europe, while the associations' role in such cases is not yet self-understood everywhere. In this aspect, an Austrian landmark ruling, which had a feed-back effect on the underlying law, made the legislator amend the Air Pollution Control Act and add new access to justice provisions thereto.

The ambient air control stations in the region of Salzburg regularly showed violations of the limit values for nitrogen levels (NOx). An Austrian environmental protection civil organization, ÖKOBÜRO has chosen the three worst stations regarding their NOx levels and turned to the regional government to ask for additional measures to combat the transgressions. The government of Salzburg, even though the Air Pollution Control Act did not include access to justice provisions, allowed the application to be heard, but ruled against it. ÖKOBÜRO appealed the case to the regional administrative court but was dismissed due to lack of standing. This ruling was appealed to the Supreme Administrative Court in 2015, which in turn in 2018 ruled in favour of the standing for ÖKOBÜRO, following the CJEU Case C-664/15 Protect. The case went back to the regional administrative court, which found in favour of the application this time, and ruled the regional air pollution action plan to be overhauled by the regional government. This case has influenced the environmental legislation of Austria, too. It seemed obvious that air protection is part of environmental administrative law, including all its general (zonal planning) and individual (permitting, EIA etc.) measures. It can be interpreted, therefore, that the national transposition of the Aarhus Convention prevails in air protection cases, too. Even if so, for the sake of unambiguous legal practice, an inclusion of the proper provisions into the Act was a necessary step.

II.6. Evidence, causal link

In the contemporary air protection cases one of the most problematic parts is that our civil and administrative laws and legal practices are based on a several hundred years old positivist thinking. Considering evidence based on even high level and convincing probability meets difficulties, courts and authorities tend to accept only linear and direct causation. This view contradicts with such new principles of environmental law as the precautionary principle.

According to the current practice of Czech courts, the right to clean environment and right to private and family life of an individual living in an area with above-the-limit polluted air cannot be breached, unless the individual suffers a physical damage and the causal link between the damage and the polluted air is proven beyond reasonable doubt. To prove the damage beyond reasonable doubt is interpreted so that the individual must show that specifically in their case, the specific illness was contracted due to the polluted air. As proving the causal link in any individual case is scientifically impossible (it is only possible to prove increased probability of contracting the illness with epidemiological studies that are not accepted as sufficient evidence), the current practice of Czech courts de facto excludes access to justice for any individual seeking damages for living in areas with polluted air. As concludes, living in the area with above-the-limit polluted air is not considered to be a breach of right to private and family life and right to clean environment in itself unless a specific illness is contracted in relation with the air pollution. Furthermore, epidemiological studies are not accepted as sufficient evidence, although from a scientific perspective, there is not any better way to prove the damage.

In sum, long causal links and stochastic probabilities instead of linear, deterministic relationships – all that make it especially difficult to prove administrative liability. In addition to that, we have to note here that the arrangement of the burden of proof in such cases is not equitable, either, because the victims of the pollution are usually not in the position to hire the best experts to prove their case.

In the ECtHR case Fadeyeva v. Russia the Court established that the burden of proof shall be on the side of the State when justifying an interference with an individual's right for the benefit of the general public. The major argument here was not only the asymmetry of information and expertise between the parties in such cases, but also that the members and associations of the public exercise their participation rights in the interest of the victims of environmental pollution. The Court held that "the onus is on the State to justify, using detailed and rigorous data, a situation in which certain individuals bear a heavy burden on behalf of the rest of the community." (Para. 128 of the ECtHR judgment in Fadeyeva v. Russia).

The causal link between industrial emissions and health was examined by the ECtHR in an Italian case. Seemingly the burden of proof rested on the shoulder of the complainant. There is a long way to go in this respect.

This case concerned the effect of environmental nuisance, caused by the activity of a steelworks, on the health of the first applicant, who died from leukaemia. Her husband and children, who have pursued the application, alleged in particular that the existence of a causal link between the harmful emissions from the plant and the development of her cancer had been demonstrated. The Court declared the application inadmissible as being manifestly ill-founded. Examining the first applicant's complaint under the procedural aspect of Article 2 of the Convention, the Court held in particular that she had had the benefit of adversarial proceedings in the course of which investigations had been carried out at her request. In the Court's view, the first applicant had not demonstrated that, in the light of the scientific data available at the time of the events, there had been a breach of the procedural aspect of her right to life (Smaltini v. Italy 24 March 2015).

II.7. Costs and time

Last, but not least, local communities and environmental NGOs will have to calculate with the cost and time factors of the case at hand when designing the legal side of their air protection campaigns. As the case goes ahead, the increasing court fees in cassation proceedings and the likelihood of awarding very high costs for the adversary party may create hurdles for access to justice. In other instances, the length of the judicial procedures might render the efforts of the NGOs to protect the air of certain regions futile.

The Bulgarian case pointed out the costs of the complicated and expert-based air protection administrative and court cases. Four individuals and one NGO (claimants) and the Sofia Municipal Council Toplofikacia Sofia JSC had to pay for the attorney fees only for the cassation instance in the amount of BGN 54,000 (appr. EUR 27,000) – this is only a fragment of the total expenses, including the expert(s) work, court fees and expenses of the other party in case of losing the case. Such costs may restrict the applicants from appealing against other administrative acts and thus restrict access to justice (J&E).

As a positive experience, in Spain the NGOs can request the court to allow access to legal aid for them. Primarily this implies that no court fee must be paid. Although in Spain the loser pays principle applies, when an environmental NGO is granted legal aid under the provisions of the national Aarhus Law this entails that even if it does not win the case, it will not have to bear the costs of the case. This is especially important, because the so-called loser pays principle, which is generally used in the administrative and especially in the court cases everywhere in Europe, might have a prohibitive effect on the members and associations of the public. This has been recently recognized by an order of the Spanish Supreme Court in a case that IIDMA, the Spanish member organization of Justice and Environment filed. The Supreme Court in its order of 13 March 2019 has interpreted that when an environmental NGO is granted legal aid under the Aarhus Law it does not have to prove the insufficiency of economic resources to litigate. Consequently, the fact that legal aid is granted (without consideration of the economic position of an environmental NGO, just because of the public interest nature of the case represented by it) implies that legal aid includes the coverage of the whole costs of a case.

The time factor has multiple effects on the effectiveness of environmental NGOs in air protection cases. When they try to challenge a proposed plan, the delay in the administrative and court procedure might make the civil effort futile: by the time a possibly positive decision with full legal force they receive, the designed facility is built up and no one will be willing to pull it down. Too long cases, furthermore, can totally consume the energy and the resources of the public, while, in some instances the lengthy procedure could be disadvantageous for the investors, too. Injunctive relief – a temporary decision by the authority or the court to halt an investment – could be helpful in such situations.

Both general and individual decisions can have different time dimensions: prevention of (more) future pollutions or responding to prevailing situations of unacceptable air pollution. The former study of Justice and Environment has collected some talking examples of (missing) timeliness of the air protection cases:

- In Austria, the case started in 2014, thereafter it went from the regional government to the regional administrative court to the supreme administrative court and back to the regional administrative court. The case was finished in April 2019.
- The Bulgarian case started with filing a complaint by several citizens and an NGO asking to repeal the ruling of the first instance Administrative Court of Sofia City in 2017. The next hearing in the case was scheduled for December 2020, but the clients are not aware how many more hearings are to come.
- The Hungarian AQP case was started in March 2018 as part of a concerted European effort by ClientEarth, encouraged by the Warsaw office of CE. First, the NGO issued a request for amending the Budapest AQP, and when this request was denied, it issued a complaint to the second instance environmental authority. When failed, a court complaint in November 2018 was submitted. The Capitol Court brought its decision in July 2020, which was attacked by an extraordinary remedy at the Supreme Court, which case was just finished in January 2021 with the final dismissal of the case.
- The Romanian case started in 2017 and finished apart from any legal procedures in our days (December 2020), while
- The Czech case started in December 2018 when the lawsuit was filed and expectedly will be finished in early 2021.

We note here that an injunctive relief procedure should be expedited by the nature of the issue at stake. In contrast with the above-mentioned cases, the judge in the already quoted Spanish case granted an expedited injunction decision upon the request of the NGO Ecologistas en Acción. Thus, the judge ordered the immediate suspension of the agreement halting the Madrid Central infringement system and gave a period of three days to the municipality to file their allegations to take a final decision on the granted injunction.

II.8. Fighting legal protectionism in air protection cases

Legal practice, especially the older cases, shows that the heavy economic (and connected social, such as labour) interests have to be balanced with the clean air regulations. Case C-346/08 between the Commission and the United Kingdom is a talking example, which we can name with stronger words of environmental protectionism.

Under Article 4(3) of Directive 2001/80, the Member States had to achieve significant emission reductions for existing combustion plants by 1 January 2008 at the latest, either by taking appropriate measures in order that the existing plants concerned complied with the emission limit values set in the annexes to the directive or by ensuring that those plants were subject to the national emission reduction plan ('NERP'). By virtue of Article 4(6) of the directive, any Member State which elected to implement a NERP was obliged to communicate it to the Commission no later than 27 November 2003 and the Commission was obliged to evaluate, within six months of the communication, whether or not it met the requirements of Article 4(6). By letter of 27 November 2003 the United Kingdom submitted to the Commission the first version of its NERP, which included the Lynemouth power plant among the combustion plants concerned by the application of Directive 2001/80. On 28 April 2005 the United Kingdom submitted an updated NERP in which that plant was also included. However, it omitted the plant from the revised version of its NERP submitted to the Commission on 28 February 2006. By letter of 4 September 2006 the Commission indicated to the United Kingdom that in its view that omission did not comply with Directive 2001/80. In its reply of 2 February 2007, the United Kingdom contended that the Lynemouth power plant had to qualify for the general exception provided for in Article 2(7) of the directive on the ground that it was completely integrated with an aluminium smelter and had as its sole purpose the production of aluminium. The United Kingdom also stated that the power plant's environmental impact was slight and that there was a risk that Alcan would be prompted to cease operation of the aluminium smelter if the power plant had to be subject to the limitations laid down by the directive (Case C-346/08).

Connecting to the issue of environmental protectionism, many environmental laws contain a complicated set of exemptions. An extensive use of them could undermine the original goals of the environmental provisions, therefore the principle is that all exemptions in the field of environmental protection shall be interpreted restrictively.

Contrary to the United Kingdom's submissions, it is evident that the first sentence of the second subparagraph of Article 2(7) of Directive 2001/80 does not simply define the term 'combustion plant' more precisely but excludes certain plants from the directive's scope. The fact that this provision has the character of a derogation is indeed clearly expressed by its wording, because it states that the directive is to apply to plants designed for production of energy 'with the exception of those which make direct use of the products of combustion in manufacturing processes'. A restrictive interpretation of the first sentence of the second subparagraph of Article 2(7) of Directive 2001/80 is all the more necessary because the exclusion of certain combustion plants from the directive's scope runs counter to the very objective of the directive. As is apparent from recitals 4 to 6 in its preamble, the directive is intended to combat acidification by reducing emissions of sulphur dioxide and nitrogen oxides, to which large combustion plants are significant contributors. Finally, since installations for the production of electricity are identified, in recital 11 in the preamble to Directive 2001/80, as the principal combustion plants covered by the directive, to extend the exception set out in the first sentence of the second subparagraph of Article 2(7) to power plants which have direct use made of their electricity production in a manufacturing process would compromise the directive's effectiveness (Case C-346/08).

An important principle of several branches of environmental protection is that mixing several dangerous substances or wastes is to be avoided, because of the incalculable results ensuing from chemical reactions.

(…) Directive 2001/80/EC aims to regulate the emissions caused by the combustion (oxidation) of fuel and that the process by which the emission limit values are calculated is reliant on the assumption that the emissions to be expected following the combustion of the fuel used to fire the combustion plant are predictable. Where the hot flue gases from the fuel combustion pro cess become mixed with other substances not normally associated with a combustion process prior to emission, the results are not sufficiently predictable, and the emission limit values set out for fuel combustion by the directive cannot be applied (Case C-346/08).

Such environmental legal policy matters might fall outside the scope of legal enforcement and public participation in environmental decision-making. In such cases the civil air protection campaigns should take into consideration of using "non-legal" tools of protesting, legislative advocacy, media activities and the like. We note, however, that most often the use of such tools might be subject to other branches of legal regulations, such as rules of expression of opinion, lobbying laws, media acts etc.

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