# Access to Justice within the European Union in cases relating to air quality

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# Outline of presentation

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# I - The Notice on Access to Justice in Environmental Matters*: the Commission's Approach to its drafting

**Create no new** legal obligations but draw inferences from EU legal principles and CJEU case-law (38 cases mentioned) in case of gaps in EU secondary legislation

**Cover** all relevant aspects of access to justice in a comprehensive way, i.e. rights, standing, scope of review, effective remedies, costs, at the same time keeping the length reasonable

**Scope of the Notice**: **Decisions, acts and omissions by public authorities of the Member States**; it does **not** address litigation between private parties and the judicial review of acts of EU institutions via EU courts

**Provide clarity and aim at being a reference source** for national administrations, national courts, legal practitioners, economic operators, NGOs and general public.

*Commission **Notice (Interpretative** Communication) published in Official Journal C 275 of 18 August 2017

## II – Access to justice against Decisions, acts and omissions at the national level

**Parliament:** national primary legislation

**Minister:** regulatory acts (statutory instruments)

**Government and government departments:** plans, consent systems, enforcement

**Local government and specialised bodies:** environmental infrastructure, monitoring, plans, consents, enforcement

# II – (2) Decisions, acts and omissions at the national level: what can go wrong in air quality?

**- Primary legislation and regulatory acts: adopted late; content incomplete or too narrow**

**- Monitoring the state of the environment (Articles 5 to 11 of Air Quality Directive*): inadequate**

**- Quality standards (Article 13 of Air Quality Directive): breaches**

**- Environmental action plans (Articles 23 and 24 of Air Quality Directive): delayed or inadequate**

* Directive 2008/50/EC of 21 May 2008 (OJ L152 of 11,06,2008, page 1), amended by Commission Directive (EU) 2015/1480 of 28 August 2015 (OJ L226 of 29.08.2015, page 4).

## II – (3) Role of national courts in environmental litigation, including in air quality

National courts are not only in charge of oversight of national measures (decisions, acts or omissions) but are also '***the ordinary courts***' **for implementing EU law** within the legal systems of the Member States (Opinion CJ 1/2009, ground 80).

## III- Access to justice in environmental matters: general notion

A set of guarantees to allow **court challenges** by **individuals and their associations** against **decisions, acts and omissions** of **public authorities**

Guarantees relate, amongst others, to:

- **Legal standing;**
- **Scope of review;**
- **Effective remedies;**
- **Costs;**
- **Practical information**

**Only legal standing and scope of review are treated in this presentation relating to access to justice relating to air quality.**

## III – (2) Dual approach: rights of the public and obligations on Member States – Notice Section C1

Access to justice can be based on

- **Procedural and substantive rights** envisaged in EU law for individuals or Environmental NGOs and

- **Obligations on Member States arising from provisions of a directive which are unconditional and sufficiently precise;** incompatible with the binding effect laid down in Art. 288 TFEU to exclude the possibility of the obligation imposed by a directive being relied on by persons concerned. The CJEU mentioned initially **directives on air quality and drinking water to protect health** but **this rationale goes beyond** and covers other rights.

## IV - Legal Standing: a key issue to bring a legal challenge - Notice, Section C2

**Legal standing is fundamental**. Individuals or Env NGOs can only be heard by a judge if they have the right to bring a legal challenge.

- **Only a few acts of EU secondary law explicitly provide for legal standing** for certain grievances*.

**- However, the CJEU has recognised legal standing for individuals or Env NGOs** in several contexts**.** Individuals need to show a sufficient interest or the impairment of a right to obtain legal standing. Recognised Env NGOs meeting the criteria envisaged by national laws enjoy legal standing *ex lege*.

* EIA Directive 2011/92/EU, Industrial Emissions Directive 2010/75/EU, Seveso Directive 2012/18/EU, Environmental Information Directive 2003/4/EC, Environmental Liability Directive 2004/35/EC.

# IV – (2) Legal Standing in the Aarhus Convention

Access to Justice in the Aarhus Convention :

- Requests for environmental information (Art.9(1) AC)

**- Specific activities subject to public participation (Art. 9(2) AC)**

- Requests for action under the environmental liability rules (Art. 9(3) AC)

**- Other subject-matter, including national implementing legislation, general regulatory acts, plans and programmes (Art. 9(3) AC)**

# IV – (3) Legal standing - Article 9(2) of the Aarhus Convention - case C-243/15 LZ II and its effects

**Article 9(2)** of the Aarhus Convention:

Each Party shall (…) ensure that members of the public concerned having a sufficient interest or, alternatively, maintaining impairment of a right (…) have access to a review procedure before a court of law (…) to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of **Article 6** (…)

**Article 6(1)(b)** of the Aarhus Convention

Each Party shall (…) also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions

**Article 6(1)(b) of the Aarhus Convention applies to the procedure laid down in Article 6(3) of the Habitat Directive 92/43/EEC (appropriate assessments). Therefore, Article 9(2) applies to all decisions taken in the framework of Article 6(3) of the Habitat Directive.**

## IV – (4) Legal standing: C-243/15 - *LZ II*
## Effects of the judgment

Rationale of the case LZ II can be applied **to other sectors of EU environmental law** (e.g. Water Framework Directive **C-664/15 – *Protect Natur***).

Challenge **procedural and substantive legality** of the contested decision or act in its entirety (CJEU judgment 15.10.2015, C-137/14, point 80),

# IV - (5) Legal standing: (3) Article 9(3) of the Aarhus Convention

**Article 9(3):** "Each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."

**C-240/09 – *LZ 1, "Slovak Brown Bear"***: "it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law" (point 51).

# V - Legal standing - Article 288 TFEU – Risks for human health

## Air quality cases:

**C-237/07 - *Janecek*** – Air quality plan

**C-404/13 – *Client Earth*** – Air quality plan

**C-165 to 167/09 – *Stichting Milieu*** – National emission ceiling

## V – (1) CJEU judgment of 25 July 2008 – case C-237/07 *Janecek*

The Janecek case concerned air quality in Munich:

'*Whenever the failure to observe the measures required by the **directives which relates to air quality** and drinking water, and which are **designed to protect public health**, could endager human health, **the persons concerned** must be in a position **to rely on the mandatory rules included in those directives***' (point 38).

# V - (2) CJEU judgment of 26 May 2011 – joint cases C-165/09 to C-167/09 - *Stichting Natuur en Milieu*

The Stichting Milieu cases dealt with national emission ceilings for atmospheric pollutants. Member States had to draw up programmes for progressive reduction of national emissions of certain pollutants, with the aim of complying with national emission ceilings laid down in Annex I (NEC Directive) by the end of 2010.

Based on the jurisprudence Janacek, the CJEU indicated that '***the natural and legal persons directly concerned*** *must be able to require the competent authorities,* ***if necessary by bringing the matter before the national courts****, to observe and implement* ***such rules of European Union law***' (point 100). It added:' *Whilst the Member States have a discretion,* ***Article 6 NEC Directive involves limits on its exercise****, which are* ***capable of being relied upon before the national courts****,* ***relating the appropriateness of the body of policies and measures adopted or envisaged*** *within the framework of the respective national programmes …'* (point 103).

## V – (3) Conclusions to be drawn by the CJEU judgment of 26 May 2011 - *Stichting Natuur en Milieu*

The Stichting Milieu judgment applied **the same rationale** to **air quality legislation** which operates at **national level** – and not only at the local level as it was in Janecek case (concerning the town of Munich).

Therefore, the Commission considers that the **protection of human health is not be seen as confined to immediate, local threats**, as it can be deducted by point 94 of the judgment.

# V – (4) CJEU judgment of 19 November 2014 - case C-404/13 - *Client Earth*

Article 23(1) of Air Quality Directive applies, without being limited in time, to breaches of any pollutant limit value established by that Directive, after the deadline fixed by Directive itself.

'***Individuals*** *are entitled,* ***as against public bodies****, to rely on the* ***provisions of a directive*** *which are* ***unconditional and sufficiently precise****. It is for* ***competent national authorities and courts*** *to interpret national law, as far as possible, in a way compatible with the purpose of that directive. Where such interpretation is not possible, they must disapply the rules of national law which are incompatible with the directive concerned'* (point 54). '**The natural or legal persons directly concerned** by the limit values being exceeded after 01.01.2010 must be in position to require the competent authorities, **if necessary by bringing an action before the courts having jurisdiction**, to establish an air quality plan which complies with … Article 23(1)…' (point 56). *'As regards the content of the plan, it follows from the 2nd subparagraph of Article 23(1) … that,* ***while Member States have a degree of discretion*** *in deciding which measures to adopt, those measures* ***must****, in any event,* ***ensure that the period*** *during which the limit values are exceeded* ***is as short as possible'*** (point 57).

## V – (5) General Court judgment of 13 December 2018 - joint cases T-339/165, T-352/16 and T-391/16 – Ville de Paris, Ville de Bruxelles, Ayuntamiento de Madrid v European Commission

Paris, Brussels and Madrid attacked the Commission Regulation (EU) 2016/646. By this act the European Commission used its implementing powers to introduce Real Driving Emissions (RDE) testing to the latest Euro 6 standard. Alongside the new test procedure, the Commission also introduced 'not-to-exceed' (NTE) emissions limits to be applied in the new tests. The NTE limit is the legal emission limit plus a margin called the 'conformity factor'. However, the proposed conformity factors would allow vehicles to temporarily emit more than double the emission limit for oxides of nitrogen (NOx) set by the Euro 6 Regulation.

## V – (6) General Court judgment of 13 December 2018 - joint cases T-339/165, T-352/16 and T-391/16 – Ville de Paris, Ville de Bruxelles, Ayuntamiento de Madrid v European Commission

Question on admissibility of the action based on Article 263 (4) TFEU*: 'Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against … a regulatory act which is of direct concern to them and does not entail implementing measures'.*

The Court confirmed that Regulation 2016/646 was a regulatory act which did not require implementing measures. It had to be established that the act was '*of direct concern*' for the cities. Based on competition and agricultural cases, it established that **a State entity is directly concerned where it is prevented from exercising its powers as it sees fit.**

From the analysis of Article 4(3) of Directive 2007/46, the Court held that this provision prevented cities from banning cars that meet the Euro 6 standard with the conformity factor under Regulation 2016/646 (instead of preventing from banning only cars meeting the stricter emission limit that would apply in absence of the conformity factor).

The rest of the judgment deals with rules concerning institutional aspects.It can not be excluded that the Commission will appeal this judgment to the EU Court of justice on the basis of an error in law.

## V- (7) Other general remedies available to the European Commission - *Recours en manquement* – Article 258 TFEU

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it could initiate a procedure (so-called '*recours en manquement'),* which can be concluded by a judgment of the EU Court of Justice about the alleged failure. The EU CJ examines the substance of the facts and pleas ('*pleine jurisdiction*'), by contrast with the preliminary ruling. This remedy is general and cover any obligation arising from EU law.

# VI - Scope of review: intensity of scrutiny

EU law does not provide specific rules for the intensity of scrutiny

CJEU: '*in the absence of further detail in EU law, it is for the legal systems of the Member States to determine that extent, subject to observance of the principles of equivalence and effectiveness*' (**C-71/14 – *East Sussex*** – access to information context, point 53)

**Conclusion: The level of scrutiny is determined by the objectives of the substantive EU law (C-71/14, point 58).**

This approach was confirmed by the judgment of the CJEU (Grand Chamber) of 16.05.17, in Case C-682/15 in administrative co-operation between Member States in fiscal matters and, indirectly, by the Case C-664/15 ***Protect Natur***.

# VI - (2) Scope of review: intensity of scrutiny

Both procedural and substantive legality need to be scrutinized

Procedural legality (e.g. public participation requirements)

Substantive legality

- **Facts of the case**
- **Assessment of the merits of a decision, act or omission (examples: significant effect on a Natura 2000 site, significant effect in an EIA context, appropriateness of measure in an air quality plan -** see slides V(2) and V(4) of this presentation)

# VI - (3) Scope of review: intensity of scrutiny

## Additional aspects:

Scrutinizing **regularisation decisions**

Scrutinizing decisions on **plans, including on air quality**

Scrutinizing **national legislation and regulatory acts**

***New case*** **(after the adoption of the Notice)**:

***Comune di Corridonia***, 26 July 2017, joint cases C-196/16 and C-197/16. Clarifies role of national courts in scrutinizing regularization decisions linked to the Environmental Impact Assessment Directive and related effective remedies (relevant to paragraphs 135 and 164 of the Notice).