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Strategic litigation concerning air quality in the Czech Republic

I would like to present what can be called as "3stage-strategic litigation for improving of the air quality in the Czech Republic". This strategy was developed and executed by Climate & Energy program of a public interest law organization Frank Bold Society. It concerns the overall air pollution situation in the areas with concentrations of pollutants exceeding the limit values and relevant obligations of the public authorities. The key issue of the presentation is efficiency of legal remedies – not only with respect to individual court proceedings, but primarily as concerns the practical results, namely improvement of the air quality.

Absence of the air quality plans

The first step of the litigation was challenging the fact that until 2016, despite the obligations according the EU and national law[1], there were no air quality plans adopted in the Czech Republic for areas in which limit values of pollutants in ambient air were exceeded. In 2011, this was subject of an "encroachment lawsuit" filled against a regional administrative authority by 2 individuals from the industrial city of Ostrava, where the limit values of particulate matters (PM_{10} and $PM_{2,5}$ and NO_2) Benzo(a)pyren and arsenic had been exceeded for a long term period. The lawsuit referred i.a. to the decision of the CJEU in the *Janecek* case, in which the court stated that "*the natural or legal persons directly concerned by a risk that the limit values or alert thresholds may be exceeded must be in a position to require the competent authorities to draw up an action plan where such a risk exists, if necessary by bringing an action before the competent courts.*" [2] They also referred to art. 9 par. 3 of the Aarhus Convention to support their standing.

The regional court accepted the procedural standing of the individuals to bring such a lawsuit. It however refused it on merits, as it found that the claimants were not individually affected by the omission of the administration to issue the action plan, which is a necessary condition to allow an encroachment lawsuit.

The Supreme Administrative Court, however, did not confirm this conclusion. It found that in the perspective of the *Janecek* and other CJEU case law, the condition of "individual encroachment" should be considered as fulfilled with regard to the claimants. On the basis of this judgement, the regional court declared the omission to issue the air quality plan as illegal.

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[1] Article 7 of the Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management, Article 23 of the 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, Czech Air Protection Acts 86/2002 Coll. and 201/2012 Coll.
[2] Case C-237/07, Dieter Janecek v Freistaat Bayern, par. 39

Poor quality of the 2016 air quality plans

In 2016, the Czech Ministry of Environment (finally) issued the air quality plans in the meaning of art. 23 of the 2008/50/EC (Ambient Air Quality) Directive for the agglomerations in which the levels of pollutants in ambient air exceed the limit values. However, the content of the plans was insufficient. Namely, they did not include specific measures to achieve compliance with the limit values and concrete timeframes and priorities of implementation of the measures.

For these reasons, four of the air quality plans were challenged by lawsuits filled by the individuals, local and national NGOs, in cooperation with the ClientEarth. The applicants again referred to the case law of the CJEU, including the (that time brand new) judgment in the *ClientEarth* case.[3] They argued that the natural or legal persons directly concerned by exceeding of the air pollution limit values in a specific area must not only have right to require the competent authorities to issue the air quality plan, but also to claim that the plans includes measures which ensure that the period during which the limit values are exceeded is as short as possible.[4]

The district court in Prague accepted procedural standing of all kinds of applicants to sue the air quality plans. It however refused the actions on merits, with the basic argument that the plan is an instrument of general, conceptual nature and it is therefore correct that also the measures for improving the air quality envisaged by it are formulated in a general manner.

However, the Supreme Administrative Court again disagreed with these conclusions and it canceled substantive parts of all four plans. The Court aligned with the *ClientEarth* case which stated that the mere existence of plan does not provide that the state fulfilled its obligations under the Air Quality Directive. It stated that the plans failed to comply with the directive by not incorporating a detailed timeframe of implementation of individual measures, clear prioritization of proposed measures and qualified estimate of how much each measure is to contribute to diminishing air pollution.

Compensation cases

The 2 (successful steps) of the strategic litigation as described so far resulted, first, in the declaration of unlawfulness of the situation without issuing any air quality action plan and, second, canceling the 2016 air quality plans which did not include sufficient measures to improve the air quality in agglomerations with exceeded limits. These results, however, did not as such improve the air quality nor granted that such goal will be achieved in a short term. It is quite likely that the new air quality plans will again be insufficient. Therefore, we were considering other ways which could force the public authorities to change their approach and take faster and more efficient measures to improve the air quality.

There is a specific act[5] in the Czech legal system, according to which the state is responsible for both material and non-material damages caused by the illegal decisions and other unlawful official actions or omissions by the public authorities. Any person can claim recovery of such damages if he or she can

[3] Case C-404/13, ClientrEarth v The Secretary of State for the Environment, Food and Rural Affairs,
[4] *Janecek,* par. 47, *ClientrEarth*, par. 57
[5] Act 82/1998 Coll.

prove that there is a casual link between the illegal decision or illegal action or omission and the damage (harm) they suffered.

On the basis of this act, a number of individuals form the city of Ostrava (as one of the most polluted areas) filled civil lawsuits aiming to recover damages resulting from the above failures of the authorities (i.e. not issuing any air quality action plan for many years and then issuing an insufficient one).

In the "first round" of these lawsuits, the applicants claimed that living in the area in which the concentrations of pollutants are exceeding the limit values for a long term period shall be considered as non-material damage, directly related to the unlawful actions and omissions by the public authorities related to the air quality plans.

The first stage and appeal courts accepted procedural standing of the applicants. They also approved that as the administrative courts decided before, the public authorities committed illegal actions and omissions. They however found that there was no specific damage caused by that to the applicants. The appeal court stated that living in the area with exceeded the limit values of air pollutants for decades shall be considered as "normal discomfort related to living in a large modern city".

The claimants therefore appealed to the Supreme Court, arguing that the public authorities were responsible to achieve a specific result – not exceeding the limit values, presumed by the EU law. Failing to achieve such result is in direct casual link with improper situation in the area where the claimants live, which threatens their health. The Supreme Court has not decided yet. It can be mentioned that a similar case has been recently successful in Poland. The Polish court accepted a right to live in a clean, uncontaminated environment as an enforceable personal right.

Next to that, a second round" of civil actions of was filled. That time, the applicant from the same area is ill with lung cancer. This lawsuit was brought under the scope of the "Right to Clean Air" joint project by DUH and Frank Bold Society with support from European LIFE funding.[6]

Conclusions

The current outcomes of the "3stage-strategic litigation", as described, show that effective promotion of the right to clean air needs more than challenging acts or omissions of the public authorities which contravene the respective laws. Especially in the countries where the court decisions are often not fully respected by the administrative bodies, it seems to be necessary to search for alternative avenues to convert partial legal successes change in a real world, specifically diminishing the level of air pollution. This is compatible with the established position of the ACCC, according to which compliance of a Party with article 9, paragraph 4 of the Convention requires that, taking into attention the general picture regarding access to justice in the Party, "*effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced*".[7] Suing the government for damages caused by bad air quality and insufficient measures in that respect can be tried as one of these alternatives.

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[6] https://www.right-to-clean-air.eu/en/ This project provides environmental and consumer protection organisations in Germany, the Czech Republic, Poland, Hungary, France, Italy and Slovakia with information on participation processes, e.g. participation in the development of air quality maintenance plans. This also reinforces the competent administrations in the implementation of effective measures aimed at reducing emissions. The Right to Clean Air project (LIFE15 GIE/DE/795 LEGAL ACTIONS) is funded within the context of the European Commission's LIFE Programme.

[7] Findings on communication ACCC/C/2006/18 (Denmark), par. 30.