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4 K 1178/13.WI(V)

[Stamp: received on 29 July 2015, Geulen & Klinger, lawyers]

Pronounced on 30 June 2015  
Koss, court registrar

**ADMINISTRATIVE COURT WIESBADEN**



**SENTENCE  
IN THE NAME OF THE PEOPLE**

In the contentious administrative proceedings

Deutsche Umwelthilfe e.V., represented by its  
Board of Management  
Fritz-Reichle-Ring 4, 78315 Radolfzell am Bodensee

- Plaintiff -

authorised lawyers:

Dr. Reiner Geulen and Colleagues  
Schaperstraße 15, 10719 Berlin

v e r s u s

The Federal State of Hesse  
represented by the Hesse Ministry for Environment, Climate Protection,  
Agriculture and Consumer Protection,  
Mainzer Strasse 80, 65189 Wiesbaden

- Defendant -

interested party:

City of Offenbach am Main,  
represented by the Municipal Administration,  
Berliner Strasse 100, 63065 Offenbach,

i n t h e m a t t e r o f

Immission Control Law

the 4th Chamber of the Administrative Court Wiesbaden adjudges in the persons of

Dr. Wittkowski, Vice President of the Administrative Court

Ms Diedrich, judge at the Administrative Court

Mr Hartmann, judge at the Administrative Court

Ms Fehr honorary judge,

Mr Krassnig, honorary judge

at the hearing on 30 June 2015:

The Defendant shall be obliged to revise the applicable clean air plan of the City of Offenbach to include the necessary measures for achieving the fastest possible compliance with the agreed averaged emission limit for NO<sub>2</sub> to the amount of 40 µg/cbm over a calendar year in the Offenbach urban area.

The costs of the proceedings shall be borne by the Defendant, except for the extrajudicial costs of the interested party, which shall be borne by said party itself.

The sentence is provisionally enforceable as far as the costs are concerned. The Defendant has the right to avert compulsory enforcement by way of security or by deposit to the amount of costs to be determined, unless the Plaintiff furnishes a security in the same amount prior to the compulsory enforcement.

### **FACTS OF THE CASE**

The Plaintiff is an environmental protection association, operating across Germany, which has mainly been active in the field of air pollution control for many years, and which is recognised in accordance with Art. 3 of the Environmental Appeals Act (UmwRG).

In 2005, a clean air plan, partial plan Offenbach, was drawn up for the Rhine-Main conurbation. The currently valid version is the 2nd update from November 2014. Since the

N02 (nitrogen dioxide) limit values have been regularly exceeded in Offenbach, the clean air plan envisages an improvement to the air quality by a night driving ban for trucks on Mainstrasse, a basic renewal and/or rehabilitation of the renovation of the road surface on Mainstrasse, an optimisation of the traffic management and the reallocation of road space, an improvement of the emissions standards of local public transport, the introduction of low emission zone as of 1 January 2015 and the saving of energy in the area of building heating.

On 13 November 2013 the Plaintiff brought an action requesting that the Defendant revise the clean air plan applicable for the city of Offenbach so as to include the necessary measures for achieving the fastest possible compliance with the agreed averaged emission limit for N02 to the amount of 40 micrograms per cubic meter over a calendar year in the urban area of Offenbach. Referring to the jurisprudence of the Federal Administrative Court, the Plaintiff considers itself to have the right to bring an action. Further, the action is also well-founded because the Plaintiff has the right by way of the general action for performance to request a revision/update of the applicable Offenbach clean air plan. The 2nd update of the clean air plan, drawn up for Offenbach in November 2014 fails to meet the provisions under European law too, since the Plan does not include any measures with respect to nitrogen dioxide that are likely to reduce the risk of exceeding the limit values to a minimum and to return the values to a level below the limit values as soon as possible. The plan does not provide forecasts as to when and how the limit value can be complied with. It was merely stated - without giving any reasons - that compliance with the limit values cannot be achieved because "currently it is not possible to achieve compliance with the N02-limit by taking local measures." It is, however, necessary to demonstrate the planning of conceptually specific local measures with which the objective of the limit compliance can be achieved. Compared with other urban situations in Germany, the total load indicated in the plan was not so blatantly high that it cannot be reduced by other local measures. The 2nd update of the plan ended simply with the statement that "it (will) still take some time until the emissions can be reduced to an extent necessary to comply with the N02 limit values." According to the Defendant's statements, a legal status cannot even be reached beyond 2020. Such an approach is unlawful. Both the amendment to the Air Quality

Directive following the Janecek sentence passed by the ECJ and the recent case law of the ECJ lead to the conclusion that an air quality action plan must achieve more. In line with Art. 7 (3) of Directive 96/62/EC, measures have to be specified that are suitable to reduce the risk of exceeding the limit values to a minimum and to gradually return to a level below those values. This refers to the most comprehensive and fastest possible measures. To continue exceeding the limits for nitrogen dioxide in almost the entire city centre of Offenbach five years after the plan entered into force was therefore incompatible with the above requirement.

This is backed with even more clarity by the wording of Directive 2008/50/EC. According to Art. 23 of said directive, measures have to be taken to ensure that "the period of non-compliance can be kept as short as possible". According to the decisions of the ECJ, purely financial reasons or mere effectiveness considerations cannot justify refraining from possible measures and accepting an exceedance of the limit values. The margins of discretion conceded by the ECJ to the Member States refer to discretion when selecting the measures to be included. Specific measures to reduce the nitrogen load in Offenbach could include, for example, equipping the bus fleet with SCRT filters, purchasing new buses with the Euro 6 Standard, introducing a new traffic control system, free use of public transport, flat-rate tickets [*Bürgerickets*], introducing a nationwide "blue badge" and a city toll, refitting the taxi fleet to natural gas or gasoline hybrid taxis, faster development of bicycle mobility, better promoting the performance of electromobility, a speed limit of 30 km/h and presenting a proposal to the Federal Council of Germany to revise the 35th German Federal Emission Protection Directive (BlmSchV). It is, however - as decided by the Sigmaringen Administrative Court - not enough to include only individual actions in the planning process and to be unclear about when and how the overall objective is to be achieved. The measures laid down in the clean air plan are not sufficient, as they are not suitable to sufficiently reduce the nitrogen dioxide pollution. If the Defendant maintains that compliance with the limit values can be expected upon enforcement of the Euro 6 Standard 2020, this is a forecast that has, however not been sufficiently researched into or substantiated.

## The Plaintiff claims

that the Defendant should be obliged to revise the applicable clean air plan of the City of Offenbach to include the necessary measures for achieving the fastest possible compliance with the agreed averaged emission limit for NO<sub>2</sub> in the amount of 40 microgrammes per cubic meter over a calendar year in the urban area Offenbach.

## The Defendant contends that the action

should be dismissed.

The Defendant is of the opinion that only a technical solution is suitable since the NO<sub>2</sub> load is mainly caused by city traffic. Despite the introduction of an environmental zone, due to significant emissions from vehicles of the Euro 5 Standard - especially those with diesel engines - compliance with the limit values cannot be expected until the introduction of the Euro 6 Standard - which is forecast to take place in 2020 and which cannot be predicted with more certainty. The other measures foreseen in the clean air plan are not sufficient to achieve values that are below the limit values. However, the clean air plan contains a lot of possible and reasonable measures to minimise traffic emissions. Measures according to Art. 47 (4) Federal Immission Control Act (BImSchG) should be proportionate. Insignificant reductions of loads which are associated with a very high level of investment would have to be assessed from this point of view. Neither the case law of the ECJ nor that of the Federal Administrative Court assume that the principle of proportionality can no longer be applied. The measures proposed by the Plaintiff have already been implemented in part or their implementation is in planning. Although free use of public transport could indeed provide incentives to reduce single-driver car journeys, a stronger reduction in the prices of public transport or a higher frequency on bus rides could, however, not be financed, the plaintiff maintains. Moreover, introducing such measures does not guarantee that public transport would actually be used. The introduction of a flat-rate ticket has not been tested so far. The introduction of a blue badge, a city toll as well as refitting the taxi fleet is not possible from

the legal point of view, the plaintiff added. Furthermore, it cannot be expected that air quality will improve with the introduction of a speed limit of 30 km/h. In addition, other measures, such as the introduction of a night driving ban for trucks and a low emission zone had been included in the Clean Air Plan. The introduction of a Federal Council initiative, proposed by the Plaintiff, does, however, not constitute an effective measure for a clean air plan.

The interested party did not make any statements.

For further details of the state of affairs and the dispute, reference is made to the contents of court records. The administrative files (2 folders) have been made the subject matter of the hearing.

### **REASONS FOR THE DECISION**

The action is admissible.

The action is admissible as a general action for performance. The general action for performance is the admissible type of lawsuit in the event of a failure contrary to obligations to establish a clean air planning process (see VG Wiesbaden, sentence dated 10 Oct 2011 -4 K 757/11.WI with further references).

The Plaintiff is entitled to bring proceedings as a recognised environmental association according to Art. 3 of the Environmental Appeals Act (see Federal Administrative Court (BVerwG), sentence dated 5 September 2013 -.7 C 21/12, NVwZ 2014, 64).

The action is also well-founded.

According to Art. 47 (1) sentence 1 BImSchG, the competent authority is obliged to draw up

a clean air plan if the emission limits established by an ordinance pursuant to Art. 48a (1) BImSchG, including fixed tolerance margins, are exceeded; said plan has to establish appropriate measures for the permanent reduction of air pollution and comply with the requirements of the ordinance. This is the case with regard to the City of Offenbach. Art. 3 (2) of the 39th BImSchV sets the limits for nitrogen dioxide (NO<sub>2</sub>) at 40 µg/m<sup>3</sup>. This limit is indisputably exceeded in Offenbach. Pursuant to the requirements of Art. 47 (1) BImSchG and 27 (2) of the 39th BImSchV, the clean air plan to be created must contain appropriate measures to keep the period of non-compliance with the limit values as short as possible (see also Federal Administrative Court (BVerwG), sentence dated 5 September 2013 - 7 C 21/22, NVwZ 2014, 64 recitals 59, 60, according to which an exceedance of the emission limit values must be discontinued as soon as possible and the mere gradual striving for compliance with the emission limits is insufficient). The Defendant is not entitled to any discretion in terms of "whether" to prepare the clean air plan, but only in terms of "how" to implement the normative requirements. The Defendant is therefore also obliged to draw up a clean air plan with the aim of complying with the limit value in the context of what is actually possible and legally proportionate.

The context of Art. 47 (1) sentence 1 and 3 BImSchG establishes that the plan must include (all) measures which are necessary to achieve objectives and that the period that is required for achieving compliance with the limit values is to be kept - as mentioned - as short as possible. The sentencing chamber follows the Administrative Court Sigmaringen in its sentence dated 22 October 2014 (1 K 154/12) regarding the fact that the question of whether the competent authority has fulfilled its obligations can only be answered if the planning contains an overall concept that aims for compliance with the values. It is not enough to include only individual actions in the planning process and to fail to specify when and how the overall objective is to be achieved. The Administrative Court Sigmaringen rightly states that it is only possible to check whether the content of an effective clean air plan is satisfactory if the clean air plan contains the corresponding statements.

This means that it is necessary to draw up a concept with a time schedule listing with what measures and when the limit value is to be reached. The concept must include all

conceivable measures to reduce the nitrogen dioxide pollution and their effectiveness (reduction values). Only in a second step, i.e. after all possible measures have been identified, does the question about the proportionality of the measures or the legal and/or financial feasibility arise, whereby it is questionable whether economic aspects should play a role at all. According to the ECJ sentence dated 19 December 2012 (C-68/11 recitals<sub>59-64</sub>) it must be assumed that financial or economic aspects may not justify refraining from introducing measures to comply with the emission limits. The ECJ makes an exception to this principle only in the event of force majeure (recital 64). The decision of the Federal Administrative Court dated 5 September 2013, according to which a procedure in several stages might be permitted in case of difficulties with implementing the measures to be taken in accordance with the principle of proportionality, moves in a similar direction (BVerwG reference as above, recital 59). But even this would have to be presented in a clean air plan.

The 2nd update of the clean air plan for the Rhine-Main conurbation, partial plan Offenbach am Main, dated November 2014 is not sufficient to meet the requirements set out above. With respect to the planned measures that have already been implemented (7.2 of the clean air plan) the actions taken are - as requested by the Chamber - described and their likely effectiveness is also presented (forecast reduction). Such presentation has, however, not been made with respect to the further measures addressed in the clean air plans (8.7 and 8.8 of the clean air plan). An efficacy prognosis for the individual measures is given only very vaguely or not at all. The implementation of the various possible measures to reduce the emission limits has not been checked from the outset, questioned or is considered to be barely useful. The introduction of a flat-rate ticket has, for example, not been tested at all (8.8.12 of the clean air plan). An attempt to introduce a speed limit of 30 km/h on major roads (8.8.11) was not taken into consideration, but excluded from the outset as not really being appropriate, despite the lack of a test run. A complete passage ban for trucks in Offenbach was not checked at all, an expansion of the truck traffic ban to other roads (8.7 of the clean air plan) was rejected as "not justified" without specifying the effectiveness of such a measure. With respect to the improved traffic flow (8.8.2) it is stated that prioritising public transport would set limits to the achievable outcome. With regard to increasing the attractiveness of public transport (8.8.3) it is stated that it is in the interest of cities and local

authorities to offer (potential) passengers easy access, high frequency rates and a pleasant environment anyway, because public transport is regularly a subsidised business. Under figure 8.8.5 of the clean air plan (purchase of Euro VI buses) it is stated that the bus fleet has already reached a very good immission level. These are all arguments that are much too vague. As already mentioned above, it must be demanded that the concept first of all includes all the practical measures with their projected effectiveness before, in a second phase, an implementation of the outlined measures can be considered or ruled out (indicating the reasons).

There are also numerous other possible measures which might be capable of taking the NO<sub>2</sub> load below the limit value. The Federal Environment Agency has created a list of 130 standard activities within the framework of the research project "Inventory and effectiveness of measures to improve air quality" from 2013, which are provided for in German clean air plans in order to reduce particulate matter and/or NO<sub>2</sub> concentrations. According to the information specified in the clean air plans, 110 of these measures are appropriate to reduce the NO<sub>2</sub> concentrations.

In summary, it should be noted that the clean air plan for the Rhine-Main agglomeration, partial plan Offenbach am Main, 2nd update, lacks a serious analysis of appropriate measures. A deliberate acceptance of non-compliance with the limit values of 40 µg/m<sup>3</sup> for a longer period or the hope or assumption that an approximation to the limit can be reached with the introduction of Euro VI Standards for cars (fig. 9 of the clean air plan) is not sufficient to meet the legal requirements. It is true that there is no legal claim to have specific measures set in the clean air planning, because there is room for discretion in the choice of measures. This means that the defendant Land has quite a wide range of possibilities within the context of clean air planning because, from the normative point of view, the respective limit values only refer to the targets to be observed, but not the specific measures to be taken. This wide range of possibilities for planning is however limited by the normative targets, so that not only all measures included in the plan but also all measures not included in the plan must be measured by this as well. This calls for an overall approach in the form described in the foregoing by the Chamber. It may, however, not be disregarded

that the central goal of fixing the limit values and the clean air planning necessary for compliance with the limit values serves the protection of human health. In order to achieve this goal as soon as possible, financial and economic aspects must be subordinated, where appropriate,

As unsuccessful party involved, the Defendant shall pay the costs of the proceedings pursuant to Art. 154 (1) of the Rules of Administrative Courts (VwGO) The extra-judicial costs of the interested party are not reimbursable, as the interested party did not file any application (Art. 154 (3), 162 (3) VwGO).

The decision on the provisional enforceability results from Art. 167 VwGO in connection with Art. 708 No. 11,711 German Code of Civil Procedure (ZPO).

### **I n f o r m a t i o n   o n   l e g a l   r e m e d i e s**

The parties involved may apply for an appeal against this sentence. The motion for appeal must be submitted within one month following service of the complete sentence to the

**Verwaltungsgericht (Administrative Court) Wiesbaden**  
**Mainzer Strasse 124**  
**65189 Wiesbaden**

The motion must name the sentence being challenged. The reasons as to why the appeal should be admitted must be stated within t w o m o n t h s following service of the complete sentence. In the event that the reasons have not been submitted together with the motion, they must be submitted to the

**Hessische Verwaltungsgerichtshof (Administrative Court of the Federal State of Hesse)**  
**Brüder-Grimm-Platz 1**  
**34117 Kassel.**

An appeal shall only be admitted if

1. serious doubts concerning the correctness of the sentence exist,
2. or if the legal case shows particular, actual or legal difficulties,
3. the case is of principal importance,

4. the sentence diverges from a decision of the Higher Administrative Court (Oberlandesgericht), the Federal Administrative Court (Bundesverwaltungsgericht), the Joint Senate of the Higher Courts of the Federation (Gemeinsamer Senat der obersten Gerichtshöfe des Bundes) or the Federal Constitutional Court (Bundesverfassungsgericht) and is based on this divergence, or
5. an irregularity in the proceedings is presented and actually exists thus providing the basis for a decision, which is subject to the assessment of the Court of Appeal

In line with Art. 67 (4) VwGO, legal representation is obligatory before the Administrative Court of the Federal State of Hesse. This also applies to procedural acts which initiate proceedings before the Administrative Court of the Federal State of Hesse.

Electronic documents may be submitted to the administrative courts in Hesse and the Administrative Court of the Federal State of Hesse in accordance with the Ordinance of the Regional Government on electronic legal relations with courts and prosecutors in Hesse, dated 26 October 2007 (Legal Gazette I, p. 699). We hereby inform you of the necessity of a qualified digital signature on documents which are equal to a document to be signed in writing (Art. 55a (1), phrase 3 VwGO).

Administrative Court Judge  
Hartmann cannot sign, since he  
is on holiday.

**Dr. Wittkowski**

**Dr. Wittkowski**

**Diedrich**

Certified:

Wiesbaden, 29 July 2015

Koss, judicial employee

[stamp of the Administrative Court Wiesbaden]