INFORMATORISCHE ÜBERSETZUNG

Field | Collection of decisions of the Federal Administrative Court (*BVerwGE*): yes

Immission protection law | Specialist press: yes

Legal sources:

Federal Immission Control Act (*BImSchG*)	Section 47 subsection (1)
Code of Administrative Court Procedure (*VwGO*)	Section 42 subsection (2) and Section 82 subsection (1), sentence 2
Act on Supplementary Provisions on Appeals in Environmental Matters in accordance with EC Directive 2003/35/EC (*UmwRG*)	Section 3
Aarhus Convention	Art. 9 (3)
Directive 2003/35/EC	Art. 2 (3) and Art. 3, number 1
Directive 2008/50/EC	Art. 23 (1)

Key words:

Ambient air quality maintenance plan; ambient air quality plan; nitrogen oxide; minimisation imperative; low-emission zone; representative action; standing to bring proceedings; subjective right; application; clarity of the law

Headnote:

As understood in line with EU law, Section 47 subsection (1) of the Federal Immission Control Act grants to a recognised environmental protection organisation rights of its own within the meaning of Section 42 subsection (2) of the Code of Administrative Court Procedure (in connection with ECJ, judgments of 25 July 2008 – C-237/07, Janecek – Reports of Cases 2008 1-06221 and of 8 March 2011 – C-240/09, Lesoochranárske zoskupenie VLK <“Slovak Brown Bear”> Reports of Cases 2011, 1-1255).

Judgment of the 7th Senate of 5 September 2013 – BVerwG 7 C 21.12

I. Wiesbaden Administrative Court of 16 August 2012 – ref.: VG 4 K 165/12.W(1) –

FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

JUDGMENT

BVerwG 7 C 21.12
VG 4 K 165/12.WI(1)

Proclaimed
on 5 September 2013
Ende
as Registrar of the Court Registry

In the contentious administrative case

between Deutsche Umwelthilfe e.V.,
represented by the Managing Director,
Fritz-Reichle-Ring 4, 78315 Radolfzell,

plaintiff and defendant in the appeal on points of law only,

- authorised representatives:
Lawyers Geulen & Klinger,
Schaperstraße 15, 10719 Berlin -

a g a i n s t

the *Land* Hesse,
represented by the Hesse Ministry of the Environment, Energy, Agriculture and Consumer Protection,
Mainzer Straße 80, 65189 Wiesbaden,

defendant and plaintiff in the appeal on points of law only,

- authorised representatives:
  Lawyers Redeker, Sellner and Dahs,
  Mozartstralle 4-10, 53115 Bonn -

Other parties:

The Representative of the Federal Interest at
the Federal Administrative Court,
Alt-Moabit 101 D, 10559 Berlin,

the 7th Senate of the Federal Administrative Court
on the basis of the oral hearing held on 5 September 2013,
with the participation of Presiding Judge at the Federal Administrative Court Dr. Nolte,
of Federal Administrative Court Judge Krauß,
of Federal Administrative Court Judge Dr. Philipp
and of Federal Administrative Court Judges Guttenberger and Brandt

hereby rules:

The appeal on points of law made by the defendant against the judgment of Wiesbaden Administrative Court of 16 August 2012 is herewith rejected.

The defendant is herewith ordered to meet the costs of the proceedings for the appeal on points of law.

G r o u n d s :

I

1 The plaintiff, a national environmental protection organisation recognised in accordance with Section 3 of the Act on Supplementary Provisions on Appeals in Environmental Matters in accordance with EC Directive 2003/35/EC, requests an amendment to the ambient air quality maintenance plan for Darmstadt.

2 There has been an ambient air quality maintenance plan for the agglomeration of the Rhine-Main Area since 2005. The sub-plan for Darmstadt was further developed in February 2011. The ambient air quality maintenance plan provides for a number of local measures aiming to reduce the pollutant concentrations for particle matter and nitrogen oxide ($N0_x$) in the municipal area of Darmstadt by the target year of 2015. The measures contained in the ambient air quality maintenance plan from 2005 are to be retained. These include in particular bans on through traffic for HGVs. The ambient air quality maintenance plan presumes that ambient air quality limit values can certainly be adhered to in 2015 for particle matter on all roads in Darmstadt, whilst this does not apply to nitrogen dioxide (NO_2). According to the prognosis, the immissions for NO_x would be reduced by 22.1 %, and direct NO_2 immissions by almost 9 %, merely because of the more stringent European standards for pollutant emissions from motor vehicles. Nitrogen oxide air pollutant emissions are expected to fall by another 11.6 % because of the steps that Darmstadt has taken to reduce traffic volume. The prognosis reaches the conclusion that the ambient air quality limit values for NO_2 will not be complied with on the three busiest roads in Darmstadt by 2015, but that they can nonetheless be considerably reduced.

3 After the plaintiff had applied to the defendant by letter of 10 January 2012 for an amendment to be made to the ambient air quality maintenance plan, therein stating as grounds that a low-emission zone had not been considered despite it not being guaranteed that the limit value would be complied with by 2015, it filed an action to the Administrative Court on 14 February 2012.

4 The Administrative Court granted the action by judgment of 16 August 2012, and placed the defendant under an obligation to amend the ambient air quality maintenance plan applicable to Darmstadt such that it contains the necessary measures to ensure compliance with the ambient air quality limit value for NO_2 of 40 µg/m^3, averaged over a calendar year, in the municipal area of Darmstadt as quickly as possible. As grounds, it essentially stated that the request, which was filed as a general application for an injunction, was admissible as an altruistic representative action. This was said to ensue from the ruling of the European Court of Justice of 8 March 2011 in the case C-240/09, according to which a court must interpret national procedural law so as to enable an environmental protection organisation that was recognised in accordance with Section 3 of the Act on Supplementary Provisions on Appeals in Environmental Matters in accordance with

EC Directive 2003/35/EC to challenge before a court a decision liable to be contrary to EU environmental law. It was said to be immaterial that such standing to bring proceedings was not (yet) explicitly provided for in national procedure law. The action was also said to be well-founded. The defendant was obliged in accordance with Section 47 subsection (1) of the Federal Immission Control Act (*Bundes-Immissionsgesetz*) and Section 27 subsection (2) of the Thirty-Ninth Ordinance Implementing the Federal Immission Control Act (*39. BImSchV*) to take all suitable and proportionate measures within the framework of the ambient air quality maintenance plan for Darmstadt to keep the period during which the applicable limit value for NO_2 was exceeded as short as possible. The defendant was said to not have discretion as to the question of “whether” an ambient air quality maintenance plan would be drafted, but only as to “how” the normative provisions would be the implemented. It was said to be obliged to issue an ambient air quality maintenance plan with the goal of adhering to the limit value within the framework of what was actually possible and legally proportionate. The ambient air quality maintenance plan was said not to meet these requirements, given that the limit values for NO_2 would not be adhered to or improved upon even if all measures for which it provided were to be implemented. Given the imperative limit values which served the purpose of health protection, this only had to be accepted if all suitable, proportionate measures to reduce the nitrogen dioxide concentration in Darmstadt had been exhausted. This was already not the case because a low-emission zone, which had in the meantime come to be recognised as a completely suitable measure, had not been included in the ambient air quality maintenance plan. In view of the protected interest constituted by the limit values for NO_2, the introduction of a low-emission zone was also not disproportionate, regardless of any financial burdens on the population and on the economy. There was no legal right for concrete measures to be stipulated in ambient air quality maintenance planning, but the discretion available in planning was limited by the normative goals; it was said that these would not be achieved if urgent measures were not included in the plan despite the fact that the limit value was continually exceeded.

5 The defendant is pursuing its motion to reject the action with its appeal on points of law in lieu of an appeal on fact and law (*Sprungrevision*), which was admitted by the Administrative Court and filed with the consent of the plaintiff, and submits the following as grounds: The action is said to be inadmissible. The plaintiff is said not to have standing to bring proceedings in accordance with Section 42 subsection (2) of

the Code of Administrative Court Procedure, which was also said to be necessary for a general application for an injunction. Nothing else was said to emerge from the judgment of the European Court of Justice of 8 March 2011, which was said not to be convincing and to relate to a different type of case (cf. also Schink, *Die Öffentliche Verwaltung – DÖV* 2012, 622). It was said not to be possible to derive a representative action from Art. 9 (3) of the Aarhus Convention aimed at compliance with European environmental law. Unlike Art. 9 (2) of the Aarhus Convention, Art. 9 (3) was said not to have any direct effect in EU law. There was certainly no provision of national law that was amenable to interpretation, and the ECJ's ruling was conditional on such a provision. It was also said not to be helpful here to regard enforceable individual rights, which were granted by EU law, as subjective rights within the meaning of Section 42 subsection (2) of the Code of Administrative Court Procedure. In particular, Art. 9 (3) of the Aarhus Convention was said not to grant any enforceable rights. Furthermore, Art. 9 (3) of the Aarhus Convention was said to not be implemented by the EU Air Quality Directive. By contrast, Art. 26 (1) of the latter was said to merely stipulate that the public was to be informed; it did not provide for any collaboration rights whatever for associations which might form a starting point for a representative action – if indeed there was one.

6 The motion was said to be uncertain, not enforceable and hence inadmissible.

7 The action was also said not to be well-founded. The plaintiff was said not to be entitled to an amendment of the ambient air quality maintenance plan. Whilst the defendant had been obliged to draw up an ambient air quality maintenance plan with the aim of gradually bringing about a reduction in the exceedance of the ambient air quality limit value for NO_2 and for keeping the period of non-adherence as brief as possible. The defendant was however said to have already complied with this obligation.

8 The Administrative Court was also said to ultimately grant a disguised right to the introduction of a low-emission zone, given that no further measures were recognisable. Individual measures of ambient air quality maintenance planning could however not be brought about by court action because of the defendant's margin of appreciation when it came to planning. It was said that the defendant was obliged to enact ambient air quality maintenance planning which was not in line with the

principle of proportionality. A low-emission zone in Darmstadt was not the appropriate measure to reduce the exceedance of the limit value for nitrogen oxide because of the nature of the emissions-control windscreen sticker scheme provided for in the Thirty-Fifth Ordinance Implementing the Federal Immission Control Act – Ordinance on the Marking of Vehicles with a low Pollution Load (*Fünfunddreißigste Verordnung zur Durchführung des Bundes-Immissionsschutzgesetzes – Verordnung zur Kennzeichnung der Kraftfahrzeuge mit geringem Beitrag zur Schadstoffbelastung – 35. BImSchV*); the Administrative Court had disregarded the defendant's submission in this respect and had acted in violation of the principle of official investigations. The evaluation of low-emission zones in other towns and cities was said not to provide evidence that they were suitable to reduce NO_2.

The establishment of a low-emission zone was also said not to be necessary because the share of HGV transit traffic would be considerably reduced as a result of road construction work that was about to be completed. Finally, the introduction of a low-emission zone was also said to be disproportionate in the strict sense of the term.

9 The defendant moves

1. to rescind the judgment of Wiesbaden Administrative Court of 16 August 2012 and reject the action,

2. alternatively, to stay the proceedings and obtain a preliminary ruling from the ECJ in accordance with Art. 267 TFEU on the following legal questions:

   a) Is Art. 9 (3) of the Aarhus Convention, taking account of the judgment of the ECJ of 8 March 2011 – C-240/09 –, to be interpreted such that a national legal provision which makes the admissibility of an action contingent on the plaintiff's rights being violated enables an environmental protection organisation which has declared the promotion of and compliance with EU environmental law a purpose in its Statutes to challenge before a court a decision which is contrary to EU environmental law?

   b) Does Art. 23 (1) of the Ambient air quality Directive (Directive 2008/50/EC of 21 May 2008, OJ EC L 152 of 11 June 2011, p. 1) give environmental protection organisations an entitlement with regard to compliance with the limit values of Annexes XI B and XIV D of this Directive for NO_2?

c) Does Art. 23 of the Ambient air quality Directive give environmental protection organisations a legal right for an ambient air quality maintenance plan to be issued the effect of which is that the limit values of the Ambient air quality Directive for NO_2 are complied with as soon as possible?

10 The plaintiff moves

to reject the appeal on points of law only,

or alternatively,

to stay the proceedings and to obtain a preliminary ruling of the ECJ on the following legal questions:

1. Is Art. 9 (3) of the Aarhus Convention, taking account of the judgment of the Court of 8 March 2011 – C-240/09 –, to be interpreted in such a way

   that the provision opposes national case-law which – unless otherwise provided by law – makes the admissibility of an action dependent on the plaintiff asserting that his/her rights were violated by the omission of the state's action,

   if the subject-matter of the legal dispute is the action of an environmental protection organisation that is recognised under national law which requests the establishment of an ambient air quality plan in line with Directive 2008/50/EC of 21 May 2008?

2. Is Art. 23 of Directive 2008/50/EC of 21 May 2008 to be interpreted in such a way that environmental protection organisations are able to assert a legal right to the issuance of an ambient air quality maintenance plan containing measures with which the limit values of the Ambient air quality Directive for nitrogen dioxide are complied with as soon as possible?

11 The plaintiff defends the impugned judgment, and particularly claims in detail that it has standing to bring proceedings, interpreting Section 42 subsection (2) of the Code of Administrative Court Procedure, Section 47 subsection (1) of the Federal Immission Control Act in conjunction with Art. 9 (3) of the Aarhus Convention in conformity with EU law (cf. also Klinger, *Neue Zeitschrift für Verwaltungsrecht* – NVwZ 2013, 850; *Zeitschrift für Europäisches Umwelt- und Planungsrecht – EurUP* 2013, 95).

12 The Representative of the Federal Interest stresses with regard to the question of deriving standing to bring proceedings from Art. 9 (3) of the Aarhus Convention the latitude which the Aarhus Convention is said to afford to the Signatory States. This understanding of Art. 9 (3) of the Aarhus Convention is however said to be contested. It is said not to be possible to implement the judgment of the European Court of Justice in German administrative procedure law. The amenability to other statutory regulations provided for in Section 42 subsection (2) of the Code of Administrative Court Procedure is said not to be material here. However, the group of subjective, public rights with regard to which a complaint could be made in interpretation of the ruling of the European Court of Justice could be expanded further. The Representative of the Federal Interest proposes a submission to the European Court of Justice. He defends the statements of the Administrative Court on the merits of the action.

II

13 The appeal on points of law in lieu of an appeal on fact and law, which was lodged after having been admitted by the Administrative Court and with the consent of the plaintiff, is admissible but not well-founded, and hence should be rejected (Section 144 subsection (2) of the Code of Administrative Court Procedure). The judgment of the Administrative Court violates revisable law insofar as it affirms the plaintiff's standing to bring proceedings by applying considerations which are not correct (1.); the ruling however proves to be correct in this regard for other reasons (Section 144 subsection (4) of the Code of Administrative Court Procedure; 2.). The ruling is in concordance with federal law in other respects (3.).

14 1. a) The Senate is not prevented by Section 134 subsection (4) of the Code of Administrative Court Procedure from examining the statements of the Administrative Court on the plaintiff's standing to bring proceedings. The appeal on points of law in lieu of an appeal on fact and law therefore cannot be based on shortcomings in the proceedings. Section 42 subsection (2) of the Code of Administrative Court Procedure is a provision of procedural law. However, the examination of standing to bring proceedings is not concerned with the review of the proceedings of the previous instance, which is ruled out by Section 134 subsection (4) of the Code of Administrative Court Procedure. Making a judgment on whether there is standing to bring proceedings, rather, requires an evaluation of preliminary questions of

substantive law that is not covered by Section 134 subsection (4) of the Code of Administrative Court Procedure (cf. judgments of 10 October 2002 – Federal Administrative Court (*BVerwG*) 6 C 8.01 – Decisions of the Federal Administrative Court (*BVerwGE*) 117, 93 <95> = Buchholz 442.066 Section 30 of the Telecommunications Act (*TKG*) No. 1 sentence 2, of 12 March 1998 – BVerwG 4 C 3.97 Buchholz 406.19 Neighbourhood protection No. 149, as well as of 26 April 2006 – BVerwG 6 C 19.05 – juris marginal no. 11 < not reproduced in Buchholz in this regard 451.45 Section 113 of the Handicrafts Regulation Act (*HwO*) No. 6 >; Pietzner, in: Schoch/Schneider/Bier, *VwGO*, Section 134 marginal no. 77).

15 b) The Administrative Court presumes that the requirement of standing to bring proceedings in accordance with Section 42 subsection (2) of the Code of Administrative Court Procedure applies accordingly to the right to have the ambient air quality maintenance plan supplemented that is asserted by means of a general application for an injunction. The plaintiff was said not to be asserting rights of its own. It was nonetheless said to have standing to bring proceedings against the background of the ruling of the Court of Justice of the European Union of 8 March 2011 in case C-240/09, Lesoochranárske zoskupenie VLK (“Slovak Brown Bear” – Reports of Cases 2011, 1-1255), which was said to require an interpretation of national procedural law which is friendly to legal protection, even if such standing was not (yet) explicitly provided for in national procedural law.

16 It emerges sufficiently clearly from these brief statements, which explicitly refer to the mandate for interpretation that was given by the European Court of Justice, that the Administrative Court does not wish to derive the plaintiff’s standing to bring proceedings directly from stipulations of EU law, independently of national law. If the Administrative Court applies EU law in order to affirm standing to bring proceedings in the sense of an altruistic representative action which is not yet available in national procedural law, and does so regardless of the fact that no personal rights are affected, this refers to the opening clause that is provided in Section 42 subsection (2) first clause of the Code of Administrative Court Procedure, which is to be satisfied in compliance with EU law.

17 This legal view is in violation of revisable law.

18 aa) The Administrative Court has however correctly presumed that the alleged right for an ambient air quality maintenance plan to be issued, which by its legal nature is similar to a procedural provision (orders of 29 March 2007 – BverwG 7 C 9.06 – BVerwGE 128, 278 = Buchholz 451.91 *Europ. UmweltR* No. 27 marginal no. 27 and of 11 July 2012 – BVerwG 3 B 78.11 – Buchholz 442.151 Section 45 of the Road Traffic Code (*StVO*) No. 49 marginal no. 10; Jarass, *BImSchG*, 9th ed. 2012, Section 47 marginal no. 47), is to be pursued by means of a general application for an injunction. In concurrence with the constant line of rulings (most recently for instance judgment of 15 June 2011 – BVerwG 9 C 4.10 – BVerwGE 140, 34 = Buchholz 11 Art. 28 of the Basic Law (*GG*) No. 161), the Administrative Court accordingly also applied the precondition of a judgment on the merits for standing to bring proceedings that is provided for in Section 42 subsection (2) of the Code of Administrative Court Procedure to the general application for an injunction. This case-law is to be concurred with. Section 42 subsection (2) of the Code of Administrative Court Procedure expresses a general structural principle of protection under administrative law. Against the background of Art. 19 (4) of the Basic Law (*GG*), it primarily targets the protection of individual rights, cf. for instance judgment of 29 April 1993 – BVerwG 7 A 3.92 – BVerwGE 92, 263 <264> = Buchholz 310 Section 42 Code of Administrative Court Procedure No. 196 p. 46). It does not however do so exclusively (cf. Section 42 subsection (2) clause 1 of the Code of Administrative Court Procedure). If one wished to remove the general application for an injunction – unlike the enforcement action as a particular application for an injunction – from this benchmark ruling, this would lead to contradictions in evaluation which could not be justified as to the merits. The de facto problem of the admissibility of a representative action that occurs in the proceedings is hence to be dealt with regardless of the legal nature of the desired official act, and consequently of the procedural allocation of the request for legal protection.

19 bb) The Administrative Court has rightly taken as an orientation the ruling of the European Court of Justice when examining whether the plaintiff may file a representative action.

20 In the judgment of 8 March 2011, the European Court of Justice made a statement on the legal impact of Art. 9 (3) of the Convention of 25 June 1998 on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention; Act of 9 December 2006, Federal Law

Gazette [*BGBl*] Part II p. 1251). The Aarhus Convention has not only been ratified by all Member States of the EU, but also by the EU itself (Council Decision of 17 February 2005, OJ EU L 124 p. 1). As a “mixed convention”, it is part of EU law, and as such it was the subject-matter of the judgment of the European Court of Justice of 8 March 2011 in case C-240/09.

21 The European Court of Justice first of all found that the EU, and hence the Court, is certainly competent for the implementation and interpretation of Art. 9 (3) of the Aarhus Convention when it comes to questions of participation and of legal protection in proceedings the content of which relates to the implementation of EU environmental law. It went on to state that Art. 9 (3) of the Aarhus Convention does not currently apply directly because of the reserve of design which it contains. The national courts are nonetheless obliged to interpret their national administrative procedural law as far as possible in concurrence with both the goals of Art. 9 (3) of the Aarhus Convention, and with the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.

22 (1) In their legal considerations, the national courts are obliged to regard the ruling as constituting part of EU law (cf. Karpenstein, in: Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union*, TFEU Art. 267 marginal no. 104). The criticism faced by the argumentation that is contained in the judgment changes nothing in this regard. It is manifest that the boundary to a legal act reaching beyond the available competence (“*ausbrechender Rechtsakt*”) has not been overstepped in a way that might result from an alleged breach of Art. 5 (1) sentence 1 EU, the presumption of which would moreover trigger an obligation of “remonstration” in the sense of a recent preliminary ruling (BVerfG, Order of 6 July 2010 – 2 BvR 2661/06 – BverfGE 126, 286 <303 et seq.>), (cf. Berkemann, *Deutsches Verwaltungsblatt – DVBl* 2013, 1137 <1143 et seq.>).

23 (2) The interpretation guideline of the European Court of Justice also encompasses the case constellation at hand. The ambient air quality maintenance planning in accordance with Section 47 subsection (1) of the Federal Immission Control Act (in the version of the Eighth Act Amending the Federal Immission Protection Act of

31 July 2010, Federal Law Gazette Part I p. 1059) serves to transpose 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 EU L 152 p. 1). In contradistinction to the legal view taken by the defendant, this is the sole issue there.

24 The correct understanding of a ruling which was handed down in preliminary ruling proceedings (interpretation judgment) emerges against the background of the subject-matter of the dispute in the initial proceedings. This related to the procedural status of the association filing the action. Nothing else can however be deduced from the grounds for the judgment which might lead one to conclude that the obligation that is incumbent on the national courts to apply latitude in interpretation in the sense that environmental protection organisations are assumed to be entitled to act as a plaintiff relates solely to procedural law, and that only rights of participation which have already been granted are to be enhanced in procedural terms (for instance also Berkemann, loc. cit. p. 1145; Schlacke, *Zeitschrift für Umweltrecht – ZUR* 2011, 312 <315>).

25 cc) The European Court of Justice instructs the courts, in accordance with provisions of national law which are open to interpretation, to afford environmental protection organisations access to the courts that is as broad as possible in order to thus guarantee the implementation of the environmental law of the Union. The Administrative Court is wrong to presume that this matter can be dealt with via the provision contained in Section 42 subsection (2) clause 1 of the Code of Administrative Court Procedure.

26 This legislative alternative permits exceptions to be made to the requirement to assert a violation of one’s own rights. It is however as such not a provision that is open to interpretation within the meaning of the ruling of the European Court of Justice, but only a reserve clause or opening clause which must be implemented by a decision on the part of the competent legislature enacting the statute. Section 42 subsection (2) clause 1 of the Code of Administrative Court Procedure itself is however open to interpretation in the sense that, in addition to provisions of Federal and *Land* law, provisions of EU law can also afford independent rights to act as a plaintiff, detached from substantive entitlements, as a separate statutory provision. It is only on the basis

of such a normative ruling that the question arises of latitude for interpretation that is directed by EU law.

27 The Administrative Court does not designate a provision which satisfies the reserve clause or opening clause which it interprets as an expansion against the background of the judgment of the European Court of Justice. There is in fact no such provision that is amenable to such an interpretation.

28 Special standing to bring proceedings within the meaning of Section 42 subsection (2) clause 1 of the Code of Administrative Court Procedure, facilitating an objective review of laws, has only been statuted in national law in narrowly-restricted areas. The existing interests, serving the interests of the enforcement of environmental interests, are not material.

29 (1) The area of application of the representative action under the law on nature conservation in accordance with Section 64 subsection (1) of the Federal Nature Conservation Act (*BNatSchG*) is not available. The same applies to Section 1 of the Act on Supplementary Provisions on Appeals in Environmental Matters in accordance with EC Directive 2003/35/EC. The restrictive offence-related prerequisites of subsection (1), which also serves to transpose Art. 9 (2) in conjunction with Art. 6 of the Aarhus Convention through Art. 10a of Council Directive 85/337/EEA of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ No. L 175 p. 40) in the version of Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ EU L 156 p. 17), do not apply (cf. Federal Parliament Printed Paper [*BTDrucks*] 16/2497 p. 42).

30 (2) The area of application of the Environmental Appeals Act (*Umwelt-Rechtsbehelfs-gesetz*) cannot be expanded to cover Art. 9 (3) of the Aarhus Convention by means of analogy (cf. also Schlacke, loc. cit. p. 316; unclear Kahl, *JuristenZeitung – JZ* 2012, 667 <673>). There is no gap in the regulation that is in violation of the plan.

31 As already emerges from its official designation (Act on Supplementary Provisions on Appeals in Environmental Matters in accordance with EC Directive 2003/35/EC), as well as from the official note on the transposition of provisions of EU law, the Environmental Appeals Act serves to transpose Art. 9 (2) of the Aarhus Convention. By contrast, and as is shown by the Memorandum on the Ratification of the Aarhus Convention (*Denkschrift zur Ratifizierung der Aarhus-Konvention*), the legislature did not consider there to be any need to amend domestic law (Federal Parliament Printed Paper 16/2497 pp. 42 and 46) in order to satisfy the obligations emerging from Art. 9 (3) of the Aarhus Convention. In this respect, the Environmental Appeals Act was understood when it was enacted as a regulation outlining its area of application with final effect. This has not changed in the meantime. Regardless of the ruling of the European Court of Justice of 8 March 2011, the legislature has also retained the explicit restriction of the scope in the Act Amending the Environmental Appeals Act and other Environmental Provisions (*Gesetz zur Änderung des Umwelt-Rechtsbehelfsgesetzes und anderer umweltrechtlicher Vorschriften*) of 21 January 2013 (Federal Law Gazette Part I p. 95). This only inserts the amendments required by the judgment of the Court of Justice of 12 May 2011 (C-115/09, Trianel – Reports of Cases 2011, 1-3673) with the objective of “complete 1:1 transposition” of Art. 10a of the Directive on the assessment of the effects of certain public and private projects on the environment, as well as of Art. 9 (2) of the Aarhus Convention (Federal Parliament Printed Paper 17/10957 p. 11); an extension to the circumstances covered by Art. 9 (3) of the Aarhus Convention is hence ruled out.

32 A gap in the regulation being in violation of the plan can also not be presumed to exist because there is much in favour of the presumption that the legal view put forward by the legislature when ratifying the Aarhus Convention on the lack of a need to adjust national law is incorrect. It does not concur with the understanding of the contractual obligations forming at international level.

33 On the basis of Art. 15 of the Aarhus Convention, the Signatory States established a body – in the shape of the Compliance Committee – which is to assess compliance with the Convention without however prejudicing formal arbitration proceedings in accordance with Art. 16 of the Aarhus Convention (cf. on the modus operandi of the Compliance Committee The Aarhus Convention: An Implementation Guide, Second Edition, 2013, pp. 234 et. seqq.). Its case-law is to lend clear contours to the Convention for all Signatory States. Even if the Compliance Committee satisfies itself

with giving recommendations, the legal views which it expresses nonetheless take on considerable weight; this emerges not lastly from the fact that, to date, all findings of the Compliance Committee on the unconventionality of the law in a Signatory State have been approved at the meetings of the Signatory States (Art. 10 of the Aarhus Convention) (cf. Implementation Guide, p. 238).

34 In accordance with a constant line of rulings on Art. 9 (3) of the Aarhus Convention, the margin of appreciation granted to the Signatory States in accordance with the wording of the provision is ultimately less broad than presumed by Germany in particular. The Compliance Committee explained its understanding of the “third pillar” of the Aarhus Convention on Access to Justice in accordance with Art. 9 (3) of the Aarhus Convention in a series of recommendations (essentially ACCC/C/2005/11 <Belgium> of 16 June 2006, marginal nos. 35 et. seqq.; ACCC/C/2006/18 <Denmark> of March 2008 marginal nos. 29 et seqq.; ACCC/C/2008/32 Part I <EU> of 14 April 2011, marginal no. 77 et. seqq.; ACCC/C/2010/48 <Austria> of 16 December 2011, marginal no. 68 et. seqq.; cf. on this also Implementation Guide, pp. 197 et. seqq. and 207 et seq.). Here, it initially stresses – also following on from ruling II/2, which was accepted during the meeting of the Signatory States held from 25 to 27 May 2005, marginal nos. 14 to 16 of which call for a manifestly legal protection-friendly understanding of Art. 9 (3) of the Aarhus Convention (ECE/MP.PP/2005/2/Add.3 of 8 June 2005) – the freedom of interpretation of the national legislature and the need for an overall view of the normative environment. The following statements however permit no doubts to be formed that, in the view of the Compliance Committee, the environmental protection organisations must as a matter of principle be granted a possibility to have the application of environmental law reviewed in court. The Signatory States do not have to introduce a popular action system such that anyone could challenge any act that had an environmental connection. In the view of the Compliance Committee, however, the wording “where they meet the criteria, if any, laid down in its national law” cannot justify the introduction or retention of such strict criteria, which ultimately prevent all or almost all environmental protection organisations from challenging acts which contradict national environmental law. In the view of the Compliance Committee, the wording rather indicates the voluntary restriction of the Signatory States not to impose criteria that are too stringent. There should be a presumption in favour of access to review proceedings; this may not be the exception. Application of the criteria of being affected or having an interest can be considered. In the proceedings against Austria,

the Compliance Committee explicitly considered it not to be sufficient that a representative action is provided for within the scope of Art. 9 (2) of the Aarhus Convention (ACCC/C/2010/48 marginal nos. 71 et. seqq.).

35 If, accordingly, the question of “whether” a representative action under environmental law can be lodged is resolved by the Convention, the Signatory States nonetheless retain a margin of appreciation as to the question of “how”. The implementation of an international obligation by the national legislature which is hence outstanding is not the same as a gap in the regulation being in violation of the plan.

36 An interpretation contra legem – in the sense of a methodically impermissible judicial adjudication – is not required by EU law (cf. ECJ, judgments of 4 July 2006 – C-212/04, Adeneler – Reports of Cases 2006,1-6057 marginal no. 110 and of 16 June 2005 – C-105/03, Pupino – Reports of Cases 2005,1-5285 marginal no. 44, 47). The plaintiff wrongly invokes the judgment of the Federal Court of Justice of 26 November 2008 – VIII ZR 200/05 – (Decisions of the Federal Court of Justice in Civil Matters – BGHZ 179, 27). An obligation to refine the law in line with the directives by means of the teleological reduction or extension of a provision of national law is certainly contingent on a sufficiently certain, that is a clear, precise and unconditional provision of EU law which as a matter of principle is directly applicable. This is not available here, given the failure of the Commission’s Proposal for a Directive on access to justice in environmental matters of 24 October 2003 – COM(2003) 624 – final, because Art. 9 (3) of the Aarhus Convention has yet to be transposed into EU law.

37 (3) It emerges at the same time that no such provision can even be identified in EU law which is open to interpretation. This already follows imperatively from the fact that Art. 9 (3) of the Aarhus Convention is not directly applicable. A provision which is not directly applicable cannot however be a starting point of an interpretation which makes this provision applicable as to the merits. Such an argumentation would be circular (cf. Seibert, NVwZ 2013, 1040 <1042 et seq.>; legislative action is probably also demanded by Epiney, EurUP 2012, 88 <89>; dissenting probably Berkemann, loc. cit. pp. 1147 et seqq.).

38 2. The violation of rights which has been identified is however not material. The Administrative Court has, ultimately, rightly affirmed the plaintiff’s standing to bring

proceedings. It follows from Section 42 subsection (2) clause 2 of the Code of Administrative Court Procedure. The plaintiff can claim that its rights were violated by the refusal to establish an ambient air quality maintenance plan in compliance with the requirements of Section 47 subsection (1) of the Federal Immission Control Act in conjunction with Section 27 of the Thirty-Ninth Ordinance Implementing the Federal Immission Control Act – Ordinance on Ambient Air Quality Standards and Emission Ceilings (*Neununddreißigste Verordnung zur Durchführung des Bundes-Immissionsschutzgesetzes – Verordnung über Luftqualitätsstandards und Emissionshöchstmengen – 39. BImSchV*) of 2 August 2010 (Federal Law Gazette Part I p. 1065). Section 47 subsection (1) of the Federal Immission Control Act affords not only to natural persons who are directly affected, but also to environmental protection organisations that are recognised in accordance with Section 3 of the Act on Supplementary Provisions on Appeals in Environmental Matters in accordance with EC Directive 2003/35/EC, the right to demand the establishment of an ambient air quality maintenance plan meeting the imperative provisions of the law on ambient air quality.

39 a) In accordance with Section 47 subsection (1) of the Federal Immission Control Act, the competent authority must draw up a clean air plan if the immission limits specified, including any margins of tolerance that are defined in an ordinance that defines the necessary measures for achieving a durable reduction of air pollution and conforms to the requirements of the ordinance, are exceeded. The same applies if an ordinance regulates an ambient air quality maintenance plan to be established in order to ensure compliance with target values. The measures of an ambient air quality maintenance plan must be suited to shorten as far as possible the period during which ambient air quality limit values which are already to be complied with are exceeded.

40 Ambient air quality law pursues two overlapping protective purposes with this provision: Harmful impacts on both human health, and on the environment as a whole, are to be avoided, prevented or reduced by implementing the established ambient air quality goals (Art. 1 No. 1 of Directive 2008/50/EC).

41 aa) A right to file suit for the natural persons directly affected by exeedance of the ambient air quality limit value follows from the protection of human health intended to

be brought about by the Act. The European Court of Justice makes this clearer. The case-law which it handed down on the action plans in accordance with Art. 7 (3) of Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management (OJ EC L 296 p. 55) in the version of Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 (OJ EU L 284 p. 1), Section 47 subsection (2) of the Federal Immission Control Act, old version (ECJ, judgment of 25 July 2008 – C-237/07, Janecek – Reports of Cases 2008, 1-6221 marginal no. 42), can certainly also be transferred in this respect to the ambient air quality maintenance plans in accordance with Art. 23 (1) of Directive 2008/50/EC and Section 47 subsection (1) of the Federal Immission Control Act, new version (cf. Hansmann/Röckinghausen, in: Landmann/Rohmer, *Umweltrecht*, Federal Immission Control Act Section 47 marginal no. 29e; Jarass, *BImSchG*, 9th ed. 2012, Section 47 marginal no. 50 with further indications; Köck/Lehmann, ZUR 2013, 67 <72>).

42 As the plaintiff is a legal entity, its health cannot have been affected; it is unable to assert the violation of a subjective right to maintenance of the ambient air quality limit values following from a guarantee of physical integrity. In accordance with the traditional understanding of the term “subjective right”, the same would apply where the law on ambient air quality serves to protect the environment as such, and hence a general interest.

43 bb) EU law however requires a broader interpretation of the subjective right positions following from the law on ambient air quality.

44 The European Court of Justice presumes that directly-affected legal entities are entitled to file suit in the same way as natural persons (judgment of 25 July 2008 loc. cit. marginal no. 39). It has not explained in detail the criteria for the party affected as an indicator or a subjective legal position on which an action could be based. The expansion of the possibilities to enact legal protection over and above the assertion of individual legal positions is nonetheless set out therein.

45 (1) Whilst the fact of being affected is determined by a geographical relationship with the radius of action of the immissions (understanding the ECJ thus Ziekow, NVwZ 2010, 793 <794>), it nonetheless follows from this case-law that the legal entity –

measured by the protection orientation of the provision as it is emphasised in marginal no. 38 of the judgment – may make a third-party interest its own concern, for example in that an enterprise which is established in such a location might consider the health of its workers.

46 The legal power which is thus awarded by EU law, when Section 42 subsection (2) clause 2 of the Code of Administrative Court Procedure is interpreted in conformity with EU law, is to be recognised in the interest of the principle of effectiveness following from Art. 4 (3) EU as a subjective right (cf. for instance Gärditz, *VwGO*, 2013, Section 42 marginal nos. 69 et seq. with further indications). It determines at the same time the understanding of the provisions issued by the Member States to transpose EU law, and results in an expansion of the term “subjective right”. Only such an understanding does justice to the development of EU law. It was determined from the outset by the tendency, through generous recognition of subjective rights, to also mobilise citizens for the decentralised assertion of EU law. The citizen then simultaneously has “procuratory” legal status, related to the objective interest in ensuring the practical effectiveness and unity of EU law. This can also come into the foreground (cf. on this – with various emphases – for instance Masing, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle, *Grundlagen des Verwaltungsrechts – GVwR* Vol. 1, 2nd ed. 2012, Section 7 marginal nos. 91 et. seqq., 98 et. seqq., 112 et. seqq.; Schmidt-Allmann/Schenk, in: Schoch/Schneider/Bier, *VwGO*, introduction marginal no. 21a; Schmidt-Aßmann, in: *Gedächtnisschrift Brugger*, 2013, pp. 411 et. seqq.; Hong, JZ 2012, 380 <383 et. seqq.>; Gärditz, EurUP 2010, 210 <219 et. seqq.>).

47 (2) The directly-affected legal entities to which a right to act as a plaintiff is granted by Section 47 subsection (1) of the Federal Immission Control Act include the environmental protection organisations recognised in accordance with Section 3 of the Act on Supplementary Provisions on Appeals in Environmental Matters in accordance with EC Directive 2003/35/EC.

48 An interpretation of Section 47 subsection (1) of the Federal Immission Control Act such that, in addition to directly-affected natural persons, environmental protection organisations also have the right to demand compliance with the imperative provisions of the law on ambient air quality, is required by Art. 23 of Directive 2008/50/EC and Art. 9 (3) of the Aarhus Convention. With regard to circumstances

which are subject to EU law – as is the case with the drawing up of ambient air quality maintenance plans in the case at hand – the Court of Justice of the European Union demanded in its judgment of 8 March 2011 broad access to justice for environmental protection organisations; it gave as grounds for this that “safeguarding an individual’s rights under EU law” must be guaranteed (loc. cit. marginal nos. 48 and 51). On this basis, the plaintiff’s rights, which the Court of Justice recognised in its judgment of 25 July 2008 (loc. cit.) in terms of air pollution control, must also cover environmental protection organisations. As was stated above, a fundamental negation of such rights of environmental protection organisations would furthermore be incompatible with the Compliance Committee’s case-law on Art. 9 (3) of the Aarhus Convention.

49 Neither EU law nor Art. 9 (3) of the Aarhus Convention however demand that each environmental protection organisation be granted a right to compliance with the imperative provisions on drawing up an ambient air quality maintenance plan. In the same way as natural persons, environmental protection organisations can only be holders of substantive subjective rights if they belong not only to the general public, but also to the “public concerned”. Art. 2 No. 5 of the Aarhus Convention and – for the environmental impact assessment – the identical wording contained in Art. 3 No. 1 of Directive 2003/35/EC define the “public concerned” as the public affected or likely to be affected by, or having an interest in, the environmental decision-making; non-governmental organisations campaigning for environmental protection which meet all the prerequisites that are applicable in accordance with domestic law have an interest within the meaning of this definition (cf. also Art. 2 (3) of Directive 2003/35/EC). These groups are to be able to make public environmental protection interests their own concern.

50 What preconditions an environmental protection organisation must satisfy in accordance with domestic law in order to be entitled to make the environmental protection interests their own concern when drawing up an ambient air quality maintenance plan is not explicitly regulated. Section 3 of the Act on Supplementary Provisions on Appeals in Environmental Matters in accordance with EC Directive 2003/35/EC only regulates which environmental protection organisations may lodge appeals in accordance with the Environmental Appeals Act. It is however possible to derive from this provision the fundamental principle that only those environmental protection organisations which are recognised in accordance with this provision are to be entitled to assert before a court that legal provisions serving environmental

protection have been violated. The rights to become involved and lodge appeals in accordance with Sections 63 and 64 of the BNatSchG are linked with recognition in accordance with Section 3 of the Act on Supplementary Provisions on Appeals in Environmental Matters in accordance with EC Directive 2003/35/EC. No normative indication is manifest that, in the drawing up of ambient air quality maintenance plans, the right to demand compliance with the imperative provisions of the law on ambient air quality, which as a matter of principle is also granted to environmental protection organisations, could be contingent on further prerequisites.

51 3. The impugned judgment is not based on a violation of revisable law in other respects.

52 a) The defendant wrongly complains about an inadmissible motion.

53 This complaint is also not countered by Section 134 subsection (4) of the Code of Administrative Court Procedure. The question of whether the motion is adequately certain in view of the legal protection request can only be answered against the background of the substantive right that has been asserted.

54 The need for a specific motion is only structured as a recommendation in Section 82 subsection (1), sentence 2 of the Code of Administrative Court Procedure; it must however be satisfied when the motion is lodged in the oral hearing (Section 103 subsection (3) of the Code of Administrative Court Procedure). The nature and the scope of the requested legal protection are to be designated in a specific motion, which must be comprehensible per se. This defines the subject-matter of the dispute and outlines the framework of the court's power to hand down a ruling. What is more, the defendant is permitted to make a detailed defence. Finally, a judgment which grants the motion should be expected to lead to coercive enforcement which does not overburden the enforcement proceedings with factual questions by continuing the dispute (cf. Ortloff/Riese, in: Schoch/Schneider/Bier, *VwGO*, Section 82 marginal no. 7 et. seqq.; Foerste, in: Musielak, *ZPO*, 10th ed. 2013, Section 253 marginal no. 29, in each case with further indications). What requirements emerge from this depends on the particularities of the respective substantive law and on the circumstances of the individual case.

55 Accordingly, the lodging of the motion satisfies the need for clarity in the law. The designation, complained about by the defendant, solely of the goal that can be achieved by adding to the ambient air quality maintenance plan, reflects the margin of appreciation which the Act affords to the authority with regard to planning (Orders of 29 March 2007 – BVerwG 7 C 9.06 – BVerwGE 128, 278 marginal nos. 26 et seq. = Buchholz 451.91 Europ UmweltR No. 27 and of 11 July 2012 - BVerwG 3 B 78.11 – Buchholz 442.151 Section 45 of the Road Traffic Code No. 49 marginal no. 11). In this respect, the legal situation is no different than other case constellations in which only success is owed, whilst the selection of the suitable measures remains a matter for the debtor; it is sufficient even then to merely state this success (cf. Foerste, loc. cit. marginal no. 32).

56 Justice is done to the enforceability of the granting judgment by virtue of the fact that the decision regarding the measures that are to be considered within the meaning of an order judgment may impose binding requirements which are to be taken into account in the enforcement proceedings.

57 b) Without having breached the law, the Administrative Court found as the basis of the finding in its ruling that the defendant has not yet complied with its obligations under Section 47 subsection (1) of the Federal Immission Control Act with the existing ambient air quality maintenance plan, and that the plaintiff can demand such compliance.

58 aa) The immission limit value for nitrogen dioxide that is stated in Annex 11 Part B of the Thirty-Ninth Ordinance Implementing the Federal Immission Control Act, which is to be adhered to from 1 January 2010 onwards, is exceeded in several places in the municipal area. In accordance with Section 47 subsection (1) of the Federal Immission Control Act in conjunction with Section 27 of the Thirty-Ninth Ordinance Implementing the Federal Immission Control Act, the defendant must draw up an ambient air quality maintenance plan in these circumstances which stipulates the necessary measures to permanently prevent air pollution. In accordance with Section 47 subsection (1), sentence 3 of the Federal Immission Control Act, these measures must be suited to keep the period of an exceedance of ambient air quality limit values which are already to be adhered to as short as possible.

59 In concurrence with Art. 23 (1) sub-clause (2), sentence 1 of Directive 2008/50/EC, Section 47 subsection (1), sentence 3 of the Federal Immission Control Act provides for a deadline to be set to achieve the goal of compliance with the limit values stipulated in Section 47 subsection (1), sentences 1 and 2 of the Federal Immission Control Act. In the interest of effective health protection, the air pollutant emissions are to be reduced as quickly as possible to the level that is still regarded as acceptable, as is shown in the air immission limit value. The authority's decision must be orientated in line with this minimisation imperative; it is at the same time the legal standard for judicial review, which is restricted in view of the margin of appreciation available to the authority. The requirement to terminate the exceedance of the ambient air quality limit values as quickly as possible requires an evaluation of the measures that are suitable and proportionate to reduce emissions, particularly in interest of promptly meeting the ambient air quality goals. This may lead to a restriction of the discretion for planning if solely the selection of a specific measure leads to the expectation of adhering to the limit values soon (cf. Köck/Lehmann, loc. cit. p. 70 et seq.). Also in this regard, however, no prerequisite stipulates that the measures that are to be taken immediately must lead to achieving the goal; rather – in accordance with the principle of proportionality – action in several stages can also be foreseen here (Köck/Lehmann, loc. cit. p. 71). The Administrative Court does justice to this by issuing an obligation in the ruling to achieve the goal not immediately but explicitly only as soon as possible.

60 bb) The judgment of the European Court of Justice of 25 July 2008 in case C-237/07 cannot be invoked by the defendant in support of its dissenting legal view, according to which it is sufficient for an ambient air quality maintenance plan to aim gradually to comply with the immission limit values. This judgment was handed down on another legal situation in this respect. It refers to action plans in accordance with Art. 7 (3) of Directive 96/62/EC. Apart from the divergent goals of ambient air quality maintenance plans and of action plans and plans for measures to be taken at short notice, the provision specified, unlike Art. 23 (1) sub-clause (2) of Directive 2008/50/EC, does not contain an explicit reference to the suitability of the measures that are to be taken in order to comply with the limit value as soon as possible; in accordance with Art. 7 (3) of Directive 96/62/EC, the measures are only to serve to reduce the danger of exceedance and restrict its duration. The European Court of Justice has concluded from the structure of the directive that the Member States are obliged to take measures capable of reducing to a minimum the duration of the exceedance of the

limit values, taking into account all the circumstances (judgment of 25 July 2008 loc. cit. marginal no. 45). If, accordingly, a minimisation imperative applies in this respect, it cannot be concluded from the decision that the possibility to gradually achieve the limit values is to be granted without preconditions. Rather, the measure must also be justifiable, taking the chronological aspect into account.

61 c) It is equally unobjectionable that the Administrative Court has ordered the establishment of a low-emission zone as a measure which is to be taken into account when drawing up the ambient air quality maintenance plan.

62 Where the defendant objects to the statements of the Administrative Court on the suitability of the low-emission zone to achieve the ambient air quality goal of reducing the NO_2 burden, it ultimately opposes the findings and assumptions of the trial court judge, against which, in accordance with Section 134 subsection (4) of the Code of Administrative Court Procedure, no effective procedural complaints may be lodged. The plaintiff did not claim any shortcomings to exist in the evaluation of the facts and of the evidence which would be regarded as substantive-law-type breaches of the principle of conviction of Section 108 subsection (1) of the Code of Administrative Court Procedure.

63 Finally, the Administrative Court does not establish any incorrect legal standards when examining whether the establishment of a low-emission zone could be disproportionate in the strict sense of the word. It rightly compared and weighed up the legally-protected interests concerned. Dealing with particular hardships takes account of the possibility of granting a special permit in accordance with Section 40 subsection (1), sentence 2 of the Federal Immission Control Act in conjunction with Section 1 subsection (2) of the Thirty-Fifth Ordinance Implementing the Federal Immission Control Act – Ordinance on the Marking of Vehicles with a low Pollution Load of 10 October 2006 (Federal Law Gazette Part I p. 2218).

64 The ruling on costs was handed down on the basis of Section 154 subsection (2) of the Code of Administrative Court Procedure.

Dr. Nolte Krauß Dr. Philipp

Guttenberger Brandt

O r d e r

The value of the subject-matter of the dispute for the proceedings for the appeal on points of law is set at € 10,000 in accordance with Section 47 subsection (1) and Section 52 subsection (1) of the Courts Constitution Act (*GKG*).

Dr. Nolte Krauß Brandt