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1. October 2018

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by Germany with article 9, paragraph 3 of the Convention in connection with the Environmental Appeals Act

Dear Mrs. Marshall,

I refer to your letter from 19th September 2018 and provide the following answers:

1. Please state the environmental regulations which in your opinion have been violated by the "file" filed by the DUH before the administrative courts of Schleswig and Düsseldorf. Please also include the text of these provisions of national law together with an English translation.

In the two complaints, DUH demands compliance with the NOx emission limits for passenger cars and the prohibition of the use of inadmissible defeat devices.

The violated regulation is Article 5(2), first sentence of the Regulation of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger cars and commercial vehicles[Euro 5 and Euro 6] and on access to vehicle repair and maintenance information, as last amended by Regulation (EU) No 459/2012 of 29 May 2012, in short: **Regulation (EC) 715/2007**.

The rule is:

"The use of defeat devices that reduce the effectiveness of emission control systems is prohibited."

As an EU regulation, the regulation is a direct component of German national law.

Type approval for a new motor vehicle model may only be granted according to Art. 4 para. 1 subpara. 2 of Regulation 715/2007/EC if the limit values specified in Annex I of Regulation 715/2007 are complied with. Regulation (EC) No 715/2007 contains in particular rules on the type approval of motor vehicles with regard to emissions from light passenger cars and commercial vehicles. Regulations on emission protection are one of the core areas of environmental law.

The emission limit values serve to keep the air clean and to protect the environment. The environmentally protective purpose of Art. 5 para. 2 of Regulation 715/2007 results clearly from the overall system of the EU legal concept of air pollution control.

According to recital (1), Regulation 715/2007 aims at ensuring a high level of environmental protection. Recital (6) calls in particular for a significant reduction in nitrogen oxide emissions from diesel vehicles. Recital (7) states that the setting of emission limit values must take into account the overall improvement of air quality.

The company Opel (as one of the defendant in our cases) uses four defeat devices in its engines, without the German authorities having taken any action to date. Volkswagen has removed certain defeat devices, but still uses other defeat devices, especially at temperatures that are normal in autumn and winter. The German authorities are not taking action against this either. As a result, the nitrogen dioxide limits in more than 60 German cities have been significantly exceeded.

2. Please indicate the various bodies through which the judgments of the administrative courts of Schleswig and Düsseldorf can be challenged to the highest instance, together with evidence supporting your claim that national remedies usually take 2-5 years to become final.

The rulings of the administrative courts in Schleswig and Düsseldorf have been appealed to the competent Higher Administrative Court. An appeal against a decision of the Higher Administrative Court may be lodged with the Federal Administrative Court if the appeal

is admitted by the Higher Administrative Court. If it is not approved, an application for approval of the appeal can be filed with the Federal Administrative Court.

The duration of the procedure:

The courts publish annually the average duration of their proceedings.

The Higher Administrative Court of Münster (appeal proceedings in Düsseldorf) had an average duration of 9.9 months in 2017,

Annex 1.

We translate this document in extracts as follows: The headline says „Annual Press talk 22 February 2018 Oberverwaltungsgericht für das Land Nordrhein-Westfalen“. Sheet 2 on page 9 states: „Total duration of proceedings (in months). 2017: 9.9 months.“

The Higher Administrative Court of Schleswig Holstein (Schleswig appeal proceedings) had an average duration of 16.1 months in 2017. This results from

Annex 2.

We translate this document in extracts as follows: in the heading is the business situation of the Schleswig-Holstein Administrative Court and Higher Administrative Court in 2017. Page 6 in the first sentence of sheet 2 says: in 2017 the duration of proceedings in the main proceedings of the first instance has increased from 12 to 16.1 months.

In 2017, the Federal Administrative Court had an average trial duration of twelve months and nine days,

Annex 3.

We translate this document in extracts as follows: the headline states the business situation of the Federal Administrative Court in 2017, and sheet 2 states that the average duration of the proceedings in 2017 was twelve months and nine days.

Result: an average trial duration for the Düsseldorf trial of another 21.9 months. The average duration of the proceedings in Schleswig is another 28.1 months.

However, it should be borne in mind that the *average* duration of proceedings should be set too low for cases like ours. This is because the average duration of proceedings also includes proceedings that have been settled in the meantime or in which the actions are withdrawn. Proceedings that are actually decided by judgment take correspondingly longer than the average times stated above. In addition, ours trials are very complex procedures for which expert opinions may still have to be obtained.

It is therefore to be expected that these procedures will take considerably longer.

A process duration of 2 - 5 years is realistic.

3. Please attach a copy, together with an English translation thereof, of the refusal of the competent authorities to address your client's request for direct appeal to the highest court. If not in the text of the rejection itself, please also include the text of the reasons given by the authorities for the rejection together with an English translation.

In the Düsseldorf proceedings, the defendant notified by letter dated 16 February 2018 that he did not agree to the appeal directly to the highest court. We enclose the letter as

Annex 4.

An English translation of the contents of the letter is attached as

Annex 5.

In the Schleswig case, we sent an e-mail on January 3, 2018 asking the defendant to approve the jump revision. The letter is attached as

Annex 6.

An English translation is attached as

Annex 7.

The defendant did not reply to the letter.

4. Please briefly document the appeals of the DUH from the judgments of the administrative courts in Schleswig and Düsseldorf. What is the current status of each complaint procedure?

The DUH has appealed the judgements within one month. The DUH has extensively justified these appeals. The pleadings in each of the proceedings are approximately 80 pages long.

Both, the defendant authorities and the companies Opel and Volkswagen, have responded to the appeals.

The DUH will comment on this in the next few weeks.

We will then have to wait and see when the courts of appeal will schedule oral hearings.

5. In relation to your statement that the party concerned "did not report fully and truthfully in the proceedings before the Committee", either clearly substantiate that statement with evidence in the re-submitted communication or refrain from making that claim.

In the Fourth Progress Report by the Federal Government concerning the implementation of decision V/9h on compliance by the Federal Republic of Germany with obligations under the UN ECE Aarhus Convention the German government should answer to the request by the Committee for a more detailed explanation with regard to the implementation of Article 9 paragraph 3 of the Aarhus Convention.

The Committee stated as follows in paragraph 54:

"To be able to evaluate if the "Aarhus" amendment would nevertheless fully meet the requirements of paragraph 2(b) of decision V/9h, the Committee will need a more detailed explanation of which acts and omissions by private persons and public authorities

that could contravene the provisions of the Party concerned's national law relating to the environment would be covered by the proposed provisions, which possibly not, and for what reasons. The explanation should take into account the concerns raised by the Committee in the preceding paragraphs."

The German government answered *evasive*:

"In order to implement decision V/9h, number 1(b), the Federal Government proposed in its Government draft to broaden the scope of section 1 subsection (1), sentence 1, numbers 4 to 6 of the EAA, as well as section 64 subsection (1) of the Nature Conservation Act. As far as the Federal Government is aware, the German Bundestag will shortly be adopting the Act unamended with regard to these provisions. As is customary in German legislative practice, the material provisions determine in abstract terms the prerequisites so that the provision becomes applicable when they are satisfied.

The Federal Government asks the Committee to understand that the requested detailed explanation of which specific acts and omissions will constitute acts and omissions that are subject to judicial review within the meaning of Article 9 paragraph 3 of the Aarhus Convention in accordance with German law in future cannot be provided.

The reasoning of the draft EAA also does not contain such a list of the decisions covered by the scope of the material provisions. According to an understanding of good legislation, the abstract norms stand for themselves; their concrete application in individual cases is left to the legal practitioners concerned (environmental associations and authorities), and the review of this application is a matter for the courts. The only exception found in the reasoning refers to section 1 subsection (1), sentence 1, number 4 of the draft EAA on page 32 (page 35 of the Deutsche Version) of the reasoning, which makes it clear by way of an example: "Amongst other things, [...] also covers development plans (land use plans and zoning plans)..."

But during the legislative process, the German Federal Ministry of Transport attempted to influence the legislative text by having the Minister's State Secretary, Mr Rainer Bomba, present it to the Federal Ministry for the Environment in a letter dated 8 March 2016:

"Furthermore, the draft law (...) should make it clearer that "administrative acts on monitoring and supervisory measures" do not mean product approvals (§ 1 Paragraph 1 No. 6). This clarification is important for the BMVI [German ministry for traffic] with regard to type approvals of the Federal Motor Transport Authority for motor vehicles and corresponds in substance to the common understanding of the ministries."

The English translation of the second paragraph on page 2 is attached as

Annex 9.

The German government was therefore already aware when the committee was informed that these permits were not to fall within the scope of application of the law, according to the government's wish. However, the Committee has not been informed of this aspect, despite the Committee's request.

The report of August 2, 2017 confirms that this aspect was of importance to the Committee.

In the Report of the Compliance Committee regarding the Compliance by Germany with its obligations under the Convention (Decision V/9 h) from 2 August 2017 (ECE/MP.PP/2017/40) the Committee noted the following in paragraph 50:

"The Committee points out that article 9, paragraph 3, of the Convention is not primarily directed at the licensing or permitting of development projects; rather it concerns acts and omissions that contravene provisions of national law relating to the environment. Moreover, the concept of "acts" under article 9, paragraph 3, of the Convention, is to be given a broad interpretation, the decisive factor being whether the act or omission in question can potentially contravene provisions of national law relating to the environment. The Committee therefore considers that, if it were to be shown that the courts of the Party concerned were to refuse standing to challenge measures such as emission limits for cars on the basis that they do not relate to "projects" in the sense of section 1, subsection (1), sentence 1, number 5, of the Environmental Appeals Act, this may constitute non-compliance with article 9, paragraph 3, of the Convention. However, in the absence of any concrete examples under the amended Environmental Appeals Act as applied in practice, and bearing in mind the considerations in paragraph 36 above, the Committee does not make such a finding in the abstract. Accordingly, while noting that uncertainties remain, the Committee considers that this factor as such does not prevent the Party concerned from meeting the requirements of paragraph 2 (b) of decision V/9h.". Therefore, the term "project" must not be understood to include only projects within the meaning of the national Environmental Impact Assessment Act. The Committee has explicitly pointed out that, for example, "regulatory acts concerning emission limits of cars" may "not (be) excluded".

I hope your questions have been answered sufficiently.

Best regards,



Prof. Dr. Remo Klinger