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DIESELGATE AS AN ISSUE OF URBAN PLANNING – GERMAN APPROACHES

Michael Bothe*

Having had the honour and pleasure to teach courses on environmental law and urban planning together with Julian Juergensmeyer, or on his invitation, a contribution to his *Liber Amicorum* must address this subject matter. The starting point chosen, however, is a series of events which, at a first glance, has nothing to do with urban planning, but is of current German-American relevance. This is “Dieselgate”, which invites in particular a European-American comparison.

1. THE PROBLEM: WHAT DOES DIESELGATE HAVE TO DO WITH URBAN PLANNING?

The fact that Volkswagen diesel cars, under normal conditions of operation, did not comply with the prescribed NOx emission standards, which the company pretended to respect, has led to a broad array of legal problems. In the relationship between the car producing company and its customers, this is a matter of contract or tort law. Despite recent leading decisions of the Federal Supreme Court, relevant litigation is still going on in Germany.¹ The Federal Republic has adopted a new law facilitating class actions² and a settlement has been reached between Volkswagen and a consumer protection organization (Verbraucherzentrale Bundesverband)³ for about 240,000 customers who had joined that action and accepted the settlement. Individual law suits remain possible subject to the statute of limitation. German customers will certainly get compensation lower than that obtained by customers in the U.S., a

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¹ For a recent stocktaking of the relevant case law see Stiftung Warentest, ‘Abgasskandal: Chronik der Ereignisse’, published 19.12.2019, <https://www.test.de/Abgasskandal-4918330-5092747/>. In two leading decisions, the Federal Supreme Court first held that VW has to pay damages (Judgement of 25 May 2020, VI ZR 252/19, Court Press Release 63/2020), but added that that the amount is reduced to the extent a person used the car in the meantime (Judgement of 30 July 2020, VI ZR 354/19, Press Release 98/2020).

² Act to introduce a model declaratory action in civil procedure (Gesetz zur Einführung einer Musterfeststellungsklage), 12.07.2018, BGBl. (Federal Statutes) 2018 I, 1151.

³ Zeit online 02.01.2020, <https://zeit.de/wirtschaft/2020-01/abgasskandal-vw-dieselfahrer-vergleich-verbraucherschutz>, Frankfurter Allgemeine Zeitung, 3.1.2020, p. 15.

prognostication based on the differences of tort law and court practices in the two countries.⁴

There are also questions of criminal law: fraud committed by employees or high level managers of the company to the detriment of the customers; criminal acts of persons responsible to the detriment of the company by causing the company's exposure to damage claims amounting the several billion dollars; criminal acts to the detriment of the revenue service because the fraud led to a wrong calculation of taxes based on car emissions; and, criminal acts in relation to the shareholders as Dieselgate caused a drop in share values which shareholders could have avoided had the situation been publicly reported early enough as required by law.

Yet in addition, the violations of emission standards which occurred had a knock-on effect: higher emissions cause poorer air quality. Thus, the violation of emission standards contributes to the violation of ambient air standards. Dealing with these ambient air standards is an issue of urban planning. This is how Dieselgate has rendered more difficult and exacerbated a debate about urban planning and city management in relation to air quality.

The debate is particularly bitter because an essential element of efforts to improve air quality in cities has become a ban on traffic by certain cars in certain areas, in particular, but not only cars with diesel engines causing high level NOx emissions. These bans would, and already do, hurt thousands of people, in particular commuters and local service providers. The fact that a sizable number of diesel cars, due to the cheating software, do not comply with the emission standards they are supposed to respect makes the owners of such cars more likely to be affected by such traffic bans. This contribution will show how air quality management, and its legal regulation, in German cities affects car owners, in particular owners of diesel cars, what is done to solve this problem, and how this is at least in part related to Dieselgate.

2. THE TWO LEVEL REGULATION OF AUTOMOBILE EMISSIONS

As Dieselgate has caused a violation of emission standards, we must first have a look at their regulation in Germany. These standards were first established by European directives which had to be implemented by national law, and more recently by EU regulations, which are directly applicable and therefore do not need national implementing legislation. The directives, however, did not leave much room for national variation. In Germany, the directives have been implemented by the Federal Pollution Control Act

⁴ Frankfurter Allgemeine Zeitung, 3.1.2020, p. 15.

(*Bundesimmissionsschutzgesetz*), which empowers the competent authority to adopt regulations containing the necessary detail.

These standards have been rendered more severe over time. The most recent standards for NO_x emissions of diesel cars are Euro 4 (since 1 Jan. 2005),⁵ Euro 5 (since 1 Jan. 2011)⁶ and Euro 6 (since 1 Sept. 2015).⁷

Complying with these standards is the condition of the admission of certain types of cars for traffic. This compliance has to be tested by the competent authority. At this point, the cheating software becomes relevant. Under the specific conditions of testing, the engines comply with the prescribed standard, although under normal working conditions, they do not.

3. THE FOUR LEVEL REGULATION OF AIR QUALITY

The limits of permissible concentration of pollutants in ambient air are also determined by European Union directives, for NO_x Directive 2008/50/EC,⁸ which sets limit values for a number of pollutants, a yearly average value as well as for some pollutants, including NO_x, limit values for one hour. This is an approach comparable to the National Ambient Air Quality Standards established by the United States Environmental Protection Agency (EPA). The European Directive has to be implemented by national law. The basis for implementation in Germany is also the Federal Pollution Control Act and regulations adopted pursuant to this Act as well as subnational law. National regulations may prescribe stricter limits than the European ones.

The relevant Federal Regulation⁹ transposes the concentration limits of the EU Directive into German law. In areas where air quality is not in conformity with the regulation, the competent state authority must adopt a clean air plan (“*Luftreinhaltplan*”, sec. 47 Pollution Control Act) which contains measures to bring air quality in the relevant area into conformity with the regulation. This approach is comparable to the State Implementation Plans which States have to adopt for non-attainment areas in the U.S. In Germany, the essential criterion for those measures to be lawful is that they are appropriate to achieve the necessary reduction of pollution within a reasonable time. According to sec. 40 of the Pollution Control Act, they may include traffic

⁵ Commission Directive 2002/80/EC, 3.10.2002.

⁶ Regulation (EC) 715/2007 of the European Parliament and of the Council, 20. 6. 2007; Commission Regulation (EU) 459/2012, 29.5.2012.

⁷ Commission Regulation 692/2008, 18.7.2008; Commission Regulation 459/2012, 25.5.2012; Commission Regulation 2016/646, 20.4.2016

⁸ Regulation 2008/50/EC of the European Parliament and of the Council, 21.5.2008, on ambient air quality and on cleaner air in Europe.

⁹ 39. BImSchV (Pollution Control Regulation no. 39).

limitations, but also measures of urban planning which are within the competence of local communities.

These rules are enforced by two totally different actors, namely by the European Union on the one hand, and by national environmental associations, on the other.

As to the enforcement by European institutions: if air quality in certain areas, practically in certain cities, is not in conformity with the European Directive, this constitutes a violation of EU law which the European Commission is empowered to enforce by an infringement procedure (Art. 258 *et seq.* TFEU). This is a stepwise procedure. After hearing the state in question, the Commission can bring the case before the European Court of Justice. The Court may state that there is indeed a violation, and it may impose a sizeable financial sanction on a member state who does not comply with the judgment. This has happened to a number of member states, and the European Commission pursues a systematic policy of enforcing European ambient air standards throughout Europe.¹⁰ There are, in different procedural stages, infringement procedures against 13 member states concerning nitrogen dioxide and 16 procedures concerning particulate matter. The first Member State condemned in such a procedure was Bulgaria.¹¹ Quite recently, the Court also condemned France for failure to comply with the European Air Quality Directive in a number of big French cities.¹² Germany may face a similar fate.

There is yet another procedure through which enforcing ambient air standards may come before the Court, namely the reference procedure whereby national courts may or must (if it is a court of last instance) submit a question of EU law to the European Court of Justice (Art. 267 TFEU). In a recent case, the Court has backed efforts by citizens and citizen organizations to enforce European air quality standards in Brussels.¹³ This procedural avenue really belongs to the second possibility, namely enforcement by national courts.

4. THE CASE LAW CONCERNING TRAFFIC BANS

This second possibility, namely actions brought by environmental associations, leads to the ongoing German controversy concerning traffic bans (*Fahrverbote*) for diesel cars. Such cases have recently been decided by, or are

¹⁰ Communication from the Commission, 'A Europe that protects: Clean air for all', COM(2018) 330 final, 17.5.2018.

¹¹ Commission v. Bulgaria, case C-488/15, Judgment of 5.4.2017.

¹² Commission v. France, case C-636/128, Judgment of 24.10.2019.

¹³ *Craynest et al. v. Brussels Capital Administration (Brussels Hoofstedelijk Gewest) et al.*, case C-7823/17, Judgment of 26.6.2019.

still pending before, a number of national courts, for instance in Belgium¹⁴ and France. In Germany, a number of cases have been decided by administrative courts, and the Federal Administrative Court, the highest German court for matters of public law, has rendered a landmark decision. About thirty German cities are the object of such procedures, *inter alia* Berlin, Hamburg, Frankfurt, Cologne and Stuttgart.¹⁵ All these cases are systematically brought before the administrative courts (i.e. the court locally competent for a given city) by the *Deutsche Umwelthilfe*, an environmental association. Its standing is based on a special provision of the Environmental Remedies Act.¹⁶ The defendant is the state agency competent to adopt the relevant *Luftreinhalteplan*, a state government ministry or the intermediate level state administration, called *Regierungspräsident* or *Bezirksregierung*. The cities must be joined to the process and have procedural rights (so called *Beigeladene*). The goal of the action is to enjoin the relevant state agency to adopt, amend or update a *Luftreinhalteplan* in a way which makes sure that the prescribed ambient air standards are met in the future. This includes, and this is the bitterly discussed crucial point, traffic bans for diesel cars, as well as for gasoline cars of a certain age, be it in certain city areas, certain streets, or in particular thoroughfares. These bans affect, in particular, local service providers and thousands of commuters. This is why they are rather unpopular with the public at large, and state and local politicians do everything to avoid them. Thus, the first measure taken by public defendants was resistance in the courts. The jurisprudence of the Federal Administrative Court has only in part solved this problem.

In the first and still leading decision concerning the city of Stuttgart,¹⁷ the court held that traffic bans could be necessary and thus, lawful as a last resort. The first step of the argument put forward by the plaintiff, and accepted by the courts, is a prognostication that traffic bans are the only means which can effectively, and within reasonable time, bring air quality in the relevant area into conformity with the applicable quality standard. That being the case, the traffic bans requested by the plaintiffs had to be ordered by the competent agency. A general traffic restriction in certain city areas (environmental protection areas – *Umweltzonen*) had already earlier been adopted by a Federal Regulation,¹⁸ with

¹⁴ See note 13.

¹⁵ See the overview in <https://www.autozeitung.de/grossstaedte-diesel-fahrverbot-131634.html>, last visited 09.12.2019. For an overview of decisions of lower administrative courts following this precedent established by the highest federal court, see M. Pagenkopf, “Demobilisierung der Städte” – Frage der Grenzen für die Rechtsprechung”, 38 *Neue Zeitschrift für Verwaltungsrecht* 185-194 (2019).

¹⁶ §§ 2 and 3 Umwelt-Rechtsbehelfsgesetz, last published 25.8.2015, BGBl. (Federal Statutes) I, 3290.

¹⁷ Bundesverwaltungsgericht, Judgment of 27 February 2018, concerning Stuttgart, 37 *Neue Zeitschrift für Verwaltungsrecht* 883 (2019).

¹⁸ 35. BImSchV (Pollution Control Regulation no. 35)

a general exception for “low” emission cars). The court held this regulation to dispose of the matter, but the effective implementation of EU prescribed standards could require going beyond this relatively soft ban. This clearly results from the case law of the EU Court of Justice. National courts are obligated to enforce the EU standard.

German administrative courts, following the precedent set by the highest administrative court, have taken this obligation seriously. In a number of cases concerning different cities, they have enjoined the competent authorities to establish traffic bans for older cars, mainly but not only diesel driven ones: Munich,¹⁹ Hamburg,²⁰ Aachen,²¹ Cologne.²² All these judgments have ordered traffic bans to be taken for certain streets where the violations of applicable air quality standard were especially serious. There are usually exceptions for local users and for cars with a hardware update – which shows the relation of the issue of traffic bans with Dieselgate. For some cities, there have been settlements between the plaintiffs and the defendants.

Generally speaking, it is with reluctance that the responsible agencies have followed the restrictive measures ordered by the courts at the request of the *Deutsche Umwelthilfe*. In the case of Bavaria, this reluctance has developed into fully fledged resistance against a court order. As early as 2012, the Munich Administrative Court had enjoined the competent Bavarian agency to adopt the necessary measures to achieve compliance with the European air quality standards everywhere in Munich. Yet the agency, under the direction of the relevant Bavarian State Ministry, refused to adopt such traffic bans, and sticks to this view until today.²³ In 2017, the Munich Administrative Court of Appeal,²⁴ however, interpreted the judgment of the lower court to exclude any discretion of the agency to renounce to traffic bans. The Court of Appeal felt it necessary to issue an order of enforcement detention against a member of the Bavarian State Government refusing to comply, a method which the European

¹⁹ VGH München (Administrative Court of Appeal for Bavaria), Judgment of 27.2.2017, 36 Neue Zeitschrift für Verwaltungsrecht 894 (2017).

²⁰ OVG Hamburg, Judgment of 31.5.2019, 38 Neue Zeitschrift für Verwaltungsrecht 1174 (2019).

²¹ OVG Münster (Administrative Court of Appeal for Nordrhein-Westphalia), Judgment of 31.7.2019, available at www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2019/8_A_2851_18 (last visited 10.1.2020).

²² OVG Münster, Judgment of 12.9.2019, available at www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2919/8_A_4775_18.

²³ Luftreinhalteplan für die Stadt München, 7th update October 2019, p. 60 *et seq.*, available at www.muenchen.de/rathaus/dam/jcr:4fdd9130-d16c-4c5f-945e-7e97cf17ccde/7_fortschr_lrp.pdf (last visited 16.1.2020).

²⁴ See note 19.

Court of Justice considered as admissible in principle.²⁵ The Government now claims that the judgment of the Court of Appeal is overtaken by the positive development of air quality throughout Munich.

Enforcing EU standards is softened by the principle of proportionality, which is part of both EU and German administrative and constitutional law. This requires a balancing between the between the health risk caused by high NOx concentrations in ambient air and the economic interest of persons who depend on using their car, which is also an economic interest of the community. The proportionality test may require certain differentiations:

- Time of previous use of a car; cars of more recent production may not be subject to the ban or enjoy longer transition periods. It is in this connection that the various generations of emission standards mentioned above have to be taken into account. But as it is the real situation of ambient air which matters, the question whether Euro 5 cars really comply with the norm is also important. If a significantly high number of cars do not comply, this affects the balancing outcome of the proportionality test. Here, the cheating becomes relevant also for traffic bans. The Federal Administrative Court expressly held that an exception may also be granted for Euro 5 Diesel cars if they had received a hardware or software update.²⁶
- There must be exceptions for certain groups of car owners or users. These are, first, people who live in a ban area, and second providers of services in the restricted area.
- The distinction between travel bans for entire areas or only for certain streets also matters for the proportionality test. In a recent decision, the Administrative Court of Appeal of the State of Hesse held²⁷ that a traffic ban for the entire *Umweltzone* of the City of Frankfurt was disproportionate and that the City was only obliged to adopt a travel ban for certain streets particularly affected by NOx pollution. Earlier, the City of Darmstadt, according to an out of court settlement with the plaintiff, prescribed a traffic ban for certain thoroughfares in order to avoid a court imposed ban for an entire area.

²⁵ European Court of Justice, Judgment of 3.12.2018, Case C-752/18, *Deutsche Umwelthilfe v. Freistaat Bayern*.

²⁶ Bundesverwaltungsgericht, Judgment of 27.2.2018, concerning Düsseldorf, 37 Neue Zeitschrift für Verwaltungsrecht 890 (2018).

²⁷ Hessischer Verwaltungsgerichtshof, Decision dated 10.12.2019 concerning Frankfurt, not yet published, information available at <https://www.lto.de/rect/nachrichten/n/ovg-kassel-9a269118-kein-fahrverbot-diesel-frankfurt-am-main-hessen-luftreinhalteplan-umwelthilfe7> , last visited 10.12.2019.

A somewhat controversial move to implement the proportionality principle was undertaken by the federal legislature by way of an amendment to the Federal Pollution Control Act.²⁸ It prohibits “as a rule” traffic bans in cases where the applicable limit value of 40 µg/m³ was exceeded, but NO_x concentration was not over 50µg/m³. The relevance of the provision was rendered uncertain by the addition of the words “as a rule”, but it had nevertheless to be considered as a violation of a standard established by European Union law. For the European Court of Justice has insisted on the duty of Member State implementing agencies to strictly comply with European standards.²⁹

5. IMPROVING AIR QUALITY THROUGH COMPREHENSIVE MOBILITY MANAGEMENT

It must be recalled that the cornerstone of the legal edifice implying traffic bans is the prognostication that these bans are the only way to achieve an ambient air quality complying with the EU prescribed standards. Yet the unpopular traffic bans have been criticized as leading to a “demobilization” of cities.³⁰ In order to avoid them, efforts are therefore made by local actors, in particular the municipalities, to achieve this result by other means, namely by a comprehensive mobility management.

Mobility management means influencing the mobility behaviour of a population with a view to achieving certain goals. This tool can be used for various purposes, including for bringing about a mobility behaviour which has the effect of improving air quality. This may be achieved through command and control measures, e.g. prohibitions. This is the approach discussed above. It may also be achieved through economic instruments, which may be negative (e.g. taxes on undesirable behaviour) or positive (e.g. subsidies for desirable behaviour). In particular, the State can influence mobility behaviour by creating relevant infrastructure. Thus, mobility management consists of a highly complex mix of measures which may be taken by different actors. Cooperation and coordination matter as it is important that different actors work in the same direction.

²⁸ § 47 para. 4a Bundesimmissionsschutzgesetz (Federal Pollution Control Act). On the controversy related to this amendment, see I. Appel/A. Stark, ‘Zwischen Unionsrechtswidrigkeit und Irrelevanz. Zur Bedeutung des neuen § 47 Abs. 4a BImSchG für die Luftreinhaltung’, 38 Neue Zeitschrift für Verwaltungsrecht 1552-1560 (2019); see also OVG Hamburg (Hamburg Administrative Court of Appeal), Judgment of 31.5.2019, 38 Neue Zeitschrift für Verwaltungsrecht 1774-1778 (2019).

²⁹ See *inter alia* the *Craynest* case, *supra* note 13.

³⁰ See Pagenkopf, *supra* note 15.

As far as mobility management for the purpose of fostering air quality, the following measures are relevant:

- Promoting local or regional public transport which reduces traffic emissions, i.e. transport by rail or the use of electro-mobility;
- Promoting the use of bicycles, e.g. by the construction and maintenance of safe cycling paths;
- Promoting pedestrian mobility;
- Reduction of personal transportation needs, e.g. measures to reduce the need of commuting by car;
- Reduction of cargo transportation needs;
- Reducing energy consumption by appropriate zoning and planning; and
- Reducing energy consumption by providing an environment friendly infrastructure to satisfy energy needs, e.g. long distance heating facilities.

It is fair to say that the debate and controversy over ambient air quality just described has triggered a lot of creativity concerning these measures of mobility management. This is reflected in recent clean air plans adopted by the competent administrations pursuant to administrative court judgments (Stuttgart), pursuant to a provisional out of court settlement between the parties (Darmstadt)³¹ or in the light of a pending of expected court case (Wiesbaden).³²

In principle, these plans relate to all kinds of pollutants and to all kinds of sources, but currently, there is a strong emphasis on NO_x pollution caused by road traffic. In the State of Hesse, the plans start by an elaborate stocktaking of emissions from various sources and the air pollution situation in various areas. This is followed by a detailed report on measures taken or to be taken by various levels of government. On the European and/or national level, this includes new rule making. On the regional level, there exists a new concept for routing truck traffic. The most important part is the promotion of public transportation. There are measures relating to the traffic infrastructure, such as better facilities for bicycle traffic, i.e. specially protected bicycle lanes and a special regional network for such lanes, management of the car parking

³¹ The various clean air plans for cities in the State of Hesse are available by a link contained in a publication of the Hessian Ministry for the Environment, Climate Protection, Agriculture and Consumer Protection available at <https://umwelt.hessen.de/umwelt/luft-laerm-licht/luftreinhalung/luftreinhalteplanung>, last visited 15.12. 2019.

³² The current plan for Wiesbaden dates from February 2019.

infrastructure, for example by increasing the price for parking in the city and reducing it for low emission and electric cars, in particular for low emission ride-sharing cars. There are further measures to promote e-mobility, such as developing the charging infrastructure. In the field of traffic controls, there are new speed limits, including their enhanced control and measures to facilitate the smooth flow of traffic. Another important point is the reduction of emissions caused by the city vehicle fleet, including city buses, in particular by the acquisition of electric cars, truck and buses. The plan for Wiesbaden prognosticates that the cumulative effect of these measures will be that already in 2020, traffic bans like the ones considered by the Federal Administrative Court for Stuttgart and Düsseldorf will not be necessary to achieve, in the annual average, everywhere in Wiesbaden an air quality complying with the European Regulation.

The plan for Darmstadt³³ contains, on the other hand, a traffic ban for certain thoroughfares. For the time being, they will be retained despite the recent emphasis of the Hessian Administrative Court of Appeal on proportionality.³⁴

The plan for Frankfurt³⁵ dates from 2012 and has not been amended since. The judgment of the Administrative Court of Appeal has rejected the request made by the plaintiff to prescribe a traffic ban for an entire area, practically the whole inner city, but it has enjoined the competent ministry to examine the need for traffic bans for particular streets.

The current update of the plan for Munich,³⁶ as already indicated, considers traffic bans to be unnecessary, in the light of prognostication based on new developments, or at least disproportionate. It relies on the positive effect of hardware and software updates of diesel engines, but also on a mix of measures of mobility management: promotion of electro-mobility, for instance the improvement of charging stations infrastructure and a policy of changing the fleet of vehicles belonging to the city, in particular buses for public transport, development of the subway and local railway lines, better infrastructure for bicycles (such as special lanes), measures to improve the flow of traffic and other measures of “intelligent traffic management”, including the necessary data collection, distribution and use.

6. CONCLUSION

³³ See note 31.

³⁴ See note 27.

³⁵ See note 31.

³⁶ See note 23.

To sum up, the discussion on NO_x pollution, stirred by environmental activists, but also animated by Dieselgate, has led to a boost of urban mobility management. There is a long way, in terms of reasoning and causality, from Dieselgate to urban mobility management. It is fair to say that the discussion about Dieselgate has added to the political pressures for a better mobility management with a view to improving ambient air quality. The result is a complex mix of measures taken by various levels of government, necessarily in multilevel cooperation.