ADMINISTRATIVE COURT OF DÜSSELDORF
IN THE NAME OF THE PEOPLE
JUDGMENT

3 K 7695/16

In the administrative court matter

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

(Plaintiff)

Counsel: Dr. Geulen and Klinger, attorneys at law,
Schaperstrasse 15, 10719 Berlin

v.

The Federal State of North Rhine-Westphalia, represented by Düsseldorf district council,
Cecilienallee 2, 40474 Düsseldorf

(Defendant)

Counsel: Lenz and Johlen, attorneys at law
Kaygasse 5, 50676 Cologne
Ref.: 00169/16 18/no

Joined party: The City of Düsseldorf, represented by the Lord Mayor of
the City of Düsseldorf
40200 Düsseldorf
Ref.: 30 R 15580028

For Air quality protection law (Düsseldorf air quality plan)

The Third Division of the Düsseldorf Administrative Court
In the light of the oral hearing of 13 September 2016

Sitting in the persons of

Presiding Administrative Court Justice	Schwerdtfeger
Administrative Court Justice	Dr. Palm
Justice	Hemmer
Honorary justice	Lütke
Honorary justice	Schwitt

Finds in **law** as follows:

The Defendant is ordered to amend the Düsseldorf air quality plan 2013 such that it includes the measures required to comply with the average limit over a calendar year for NO_2 of 40 µg/m^3 in the joined party's city area as soon as possible.

The Defendant is ordered to pay the costs in the case, except the invited party's out of court costs, which it will bear itself.

The judgment may be enforced on an interlocutory basis against furnishing security at 110% of the amount to be enforced in each case.

Leave is given to appeal and leapfrog appeal.

Facts of the case:

The Plaintiff is an environmental organisation (recognised under § 3 UmwRG) which is involved throughout Germany, mainly in the field of air quality. It has applied that the Düsseldorf air quality plan 2013 which Düsseldorf district council issued in 2012 be amended to comply with the average concentration limit for nitrogen dioxide (NO2) of 40 micrograms per cubic meter (µg/m3) within the joined party's City area.

On the subject of nitrogen dioxide, section 1.3.2 (p. 14 et seq.) of the introduction to the air quality plan above states that:

> As an irritant pungent-smelling gas, NO_2 can be detected even at low concentrations. Inhalation is the only relevant intake route. NO_2 is relatively insoluble in water, which means the toxin is not trapped in the upper respiratory tract but also penetrates to deeper areas of that tract (bronchioles, alveoli).
>
> Nitrogen dioxide can damage human health permanently. An increase in the nitrogen dioxide concentration levels in the outside air affects the lung functions and increases the frequency of infection-induced respiratory tract infections such as coughing and bronchitis. For every 10 µg/m^3 by which NO_2 levels increase, the frequency of bronchitis symptoms or occurrence of bronchitis may be expected to increase by around 10%.
>
> Those particularly affected are persons whose health has already been damaged by respiratory tract disease and children and young people; but cardiovascular diseases and mortality increase amongst the population as nitrogen dioxide levels rise.
>
> It has not been possible to determine any threshold values for the concentration below which health risks may be ruled out to date, although reducing the levels even slightly improves health protection.
>
> The 'Fine dust cohort study of women in NRW' indicates that, when NO_2 concentration levels increased by 16 µg/m^3, mortality generally rose by 17%. The increase in specific mortality for cardiovascular disease as a cause of death was most closely associated with the increase in NO2 at 50%."

The Düsseldorf air quality plan 2013, which updated and replaced the first air quality plan for the joined party's whole city area (of 2008) shows (in section 2 "Exceeding limits") section 2.3 (p. 23 et seq.) the trend in average annual NO_2 levels in the study area for 2003 to 2011. At the testing station on Corneliusstrasse, it said the annual average had risen continuously up to 2008 (up to values over 70 µg/m^3), but had fallen since 2009, i.e. since the 2008 air quality plan was implemented (although still well over 60 µg/m^3 in 2010 and 2011), although no fall had been recorded at the test station on Merowingerstrasse (including due to improved measuring systems).

Section 3 of the current air quality plan contains a cause and effect analysis and section 4 presents how the levels are expected to develop. Section 5 contains the updated and new measures under the air quality plan, and encouraging electromobility and bicycles in particular (M 5/35 and 5/68), increasing the environmental zone area (M 5/49), the green environmental zone as of 1 July 2014 (M 5/50), using reduced-emission construction equipment (M 5/67) and incentives to use local public transport (M 5/69). Section 6 forecasts what will happen to levels, considering the measures planned; section 6.2 (p. 144 et seq.) says that, while concentrations can be expected to improve both on Corneliusstrasse and Merowingerstrasse, neither of these testing stations are expected to achieve the

NO_2 limit by the forecast year 2015. Section 7 lists ways in which the air quality could be improved further, including abolishing the government subsidy on diesel fuel, retrofitting service vehicles and promoting retrofitting SCRT filter systems in local public transport fleets.

From the "Summary annual indicators" of the Federal State office for nature, the environment and consumer protection (LANUV) website, the readings on Corneliusstrasse (DDCS) have developed since 2012 as follows:

DDCS 2012 64 µg/m^3 2013 61 µg/m^3 2014 60 µg/mm3 2015 59 mg/^{3}

It was with this in mind that the Plaintiff contacted Düsseldorf district council in mid-August 2015, complaining that the measures taken to date were clearly inadequate and applying that Düsseldorf's current air quality plan be amended immediately to include the measures required to comply with the NO_2 limit throughout the city area as soon as possible.

In his letter in reply, the Secretary of State of the Ministry of the Environment of NRW (MKULNV) stressed that the health protection required for the residents was not assured yet and further reduction measures were to be taken. The Federal State government was currently considering all promising legislative and other measures. In its letter to the Plaintiff of 11 September 2015, Düsseldorf district council listed a series of measures from the air quality plan 2013 (such as encouraging electromobility and cycling and making local public transport more attractive) and what progress was being made with implementing them, and referred to further measures the joined party was taking outside the air quality plan, such as developing a roof, façade and courtyard greening programme. Finally, it gave assurances that it would work together with local councils to do everything it could to reduce NO_2 levels.

The Plaintiff brought its action on 18 November 2015.

In support of its action, it argued as follows: the Defendant had an obligation of results under European law. The nitrogen dioxide limit should have been met since 1 January 2010, and any exceedance periods should be kept as short as possible. All measures taken must be measured against the goal of meeting the limit as soon as possible. Continuing to exceed it in Düsseldorf (also) indicated that measures to date were not 'suitable' in this sense. It had an obligation to take all objectively possible measures, and was not allowed to restrict them to those which could be funded and/or which were proportionate. On the other hand, minor changes were to be made in terms of the proportionality of the measures which could be considered. Nor could a planning authority justify this on the grounds that other authorities in law could take more effective action. What was needed was a comprehensive total plan. It said the Düsseldorf air quality plan 2013 was not equal to this, given also that the plan itself said that the levels would still be exceeded in 2015. It did not say by when the measures proposed could achieve the limits; but the Defendant had limited itself essentially in its letter of reply of September 2015 to the measures to date. It did not give any prospects that it would update the plan or intensify the measures being taken. One possible measure which could be taken to meet the limit more quickly was to promote local public transport by way of free local public transport; and clearer incentives to switch to low-emission mobility resources, such as car sharing, cycling and electromobility and a city toll for counter funding could also be considered. Consideration could also be given to reducing parking facilities, reducing speeds and a low-pollutant taxi fleet and fitting buses with SCRT filters. Banning heavy duty vehicles from driving through could also be considered. Lastly, reducing the nitrogen dioxide levels would require reducing traffic volumes considerably, particularly as far as diesel vehicles were concerned. This could be done by tightening up the environmental zone through using blue badges and objectively limited driving bans. While blue badges would require amending the 35th BImSchV, driving bans were already possible under Federal law.

The Plaintiff applies that

> **The Defendant be ordered to amend the Düsseldorf air quality plan 2013 to include the measures required to comply with the NO_2 limit determined over a calendar year of 40 µg/m^3 in the joined party's city area.**

The Defendant applies that

The action be dismissed

The first issue it raises is whether the Plaintiff has capacity to sue and possibly preclude it (under § 2 para. 1 (3) UmwRG) because it did not make any comments during the consultation process on the air quality plan concerned which was held in 2012.

It also claims the action is unfounded, on the grounds that it (the Defendant) had done everything it was allowed to do in law to keep the period in which concentration limits which had already been introduced were exceeded as short as possible. The planning authorities had some discretion when it came to selecting the specific measures which were actually to be included in the plan; rather, they had to be planned with regard to the various public interests involved and in particular, the interest in maintaining local authority self-regulation, aspects of whether individual measures could be funded and traffic law interests and private interests. The measures being considered also had to be proportionate, meet the principle of causality in particular and did not have to reach the target at one blow. While protecting people's health against air pollution was very important, it did not take absolute priority over all other interests. The planning authority's room to manoeuvre could also be restricted by competence for measures which could be considered being distributed amongst a number of different authorities. Taken as a whole, the air quality plan could not replace legislation as a local coordination instrument, and moved within narrow limits of competence. For the tax rates on diesel to be brought in line with those for petrol or to make it possible for local councils to ban diesel cars from environmental areas (including those up to euro 5 emission standards), the law would have to be changed at Federal level which the Federal States cold only urge, but not do so themselves. Also, the measures would have to allow for the goal of an integrated environmental protection as enshrined in § 45 para. 2 BImSchG, that is, consider how they affected the environment as a whole. Measured by these requirements, the catalogue of measures in the Düsseldorf air quality plan 2013 could not be complained of in law, given also that it related not only to NO_2 burden but also to PM_{10} burden, which was already being met.

On the specific Plaintiff's proposals, the Defendant said as follows:

Banning heavy goods vehicles from driving through would make the main traffic routes relieved more attractive to other traffic, as it could flow more quickly here. Given the high diesel component and the fact that every truck removed made space for two or three cars meant this would not necessarily reduce emissions; and diverting traffic could also mean that vehicles would have to travel further and so increase emission levels as a whole and so contribute to background city levels. It had considered expanding the truck route concept of 2005. Instructions had been issued that heavy goods vehicles were to be banned from Corneliusstrasse and Merowingerstrasse 'except delivery traffic'; extending it to Ludenbergerstrasse could not be considered as there were no alternative routes. The Defendant said it regarded promoting local public transport as very important, as was apparent from the OPNVG NRW and plans for the RRX Rhein-Ruhr Express; but how much effect district councils could have was limited as far as financial subsidies were concerned. Instructions to local public transport bodies were at the limits of fares law (under § 39 PBefG). It also said experience with free local public transport or reduced rate citizens' tickets were not consistent; in any case, there was already a plethora of reduced-rate tickets and hence comprehensive incentives to encourage people to use them further. Equipping the bus fleet with SCRT filters encounters hurdles because of financial and, to some extent, technical limits. Euro VI emission standards had already applied to new buses since January 2014 in any case, so that reduction systems were being introduced successively as vehicle fleets were modernised. Rheinbahn had tested various and, in some cases, extremely cost-intensive technologies and/or used them in practical trials to use new, environmentally friendly technologies. It had been trying to use only buses with the highest technical emission standards on Corneliusstrasse since 2004. The legal requirements to apply Tempo 30 (accident blackspots) did not apply in the downtown access roads concerned; and implementing traffic limiting measures like the city toll and 'time- and type-limited driving bans' faced fundamental problems in fact and law. There was no foundation in law for the 'city toll' to date. As for driving bans, it should be borne in mind that only the traffic signs as shown in the StVO or which the Federation published in its catalogue of traffic signs [VzKat] could be used. No traffic signs which gave full details of alternating traffic bans had been published to date: which was why vehicle bans could only be applied using the sign 250 StVO ('no vehicles of any kind') combined with the additional signs in question. It was possible in principle that

the supreme Federal State transport authorities could approve new additional signs; but the NRW Ministry of Transport was not prepared to approve the additional signs required for reasons of transparency and traffic safety, because the above sign 250 StVO would need to be provided with numerous additional signs and 270.1 StVO ("Start of a traffic prohibition zone to reduce harmful air pollution in zone") would be required at the place where the sign was affixed; heaping up traffic and additional signs in one place would constitute an information overload which is incompatible with road traffic law rules. Introducing an alternating traffic ban on vehicles with odd/even registration numbers would also be contrary to the principle of proportionality, as it would also affect petrol vehicles, even though diesel vehicles emit around 10 times as much in urban traffic, up to 20 times as much, as petrol driven vehicles. Banning diesel vehicles would also be disproportionate, because blocking inner-city commerce, construction, trades, crafts, industry and local public transport (buses on scheduled routes), the consequences of which would be unforeseeable, unless they were cushioned by exemptions. Another point to consider was the size of the environmental zones in North Rhine-Westphalia, which went beyond the actual city centres; if one wished to restrict the traffic ban to smaller areas, this would first need to be defined (by criteria which were consistent within the Federal State) and signs posted accordingly. As diesel vehicles are not marked, such a traffic ban could not be monitored. Alternative routes with 'relaxed' air quality levels would also have to be signed to avoid displacement effects; this ruled out the 'freight ring', South Ring and Dorotheenstrasse as an alternative route for Corneliusstrasse. The Federation would have to enshrine the blue badge in the 35th BImSchV; including a clause in the air quality plan as demanded whereby the Defendant would apply to the *Bundesrat* with specific draft amendments to the 35th BISchV was not suitable as a specific measure because it was not within the planning authority's competence. Finally, the Defendant cited the report by engineering agency Lohmeyer on "Establishing NO_2 reduction potentials for the situation on Corneliusstrasse, Düsseldorf/DDCS air quality situation" of May 2016 ('Exhibit 7' in the secondary files volume 4).

The joined party did not make any applications.

For further details of the facts and disputes see the contents of the Court's files and secondary files.

Grounds for the judgment:

The appeal is successful, as it is admissible (I.) and founded (II.).

I.
Federal Administrative Court case law (on the Darmstadt air quality plan) has established that actions for performance generally and the application as made specifically are admissible and that the Plaintiff has privity under § 42 para. 2 clause 2 VwGO.

Cf. BVerwG judgment of 5 September 2013 – 7 C 21. 12-, juris paras. 18 et seq., 52 et seq. and 38 et seq.

Nor does the fact that the Plaintiff did not take part in the consultation process on the air quality plan at issue which was conducted in 2012 preclude it under § 2 para. 1 (3) UmwRG. The debate on the scope of the European Court's judgment

of 15 October 2015 – C 137/14, juris para. 77 et seq.

on the preclusion rules in § 2 para. 3 UwRG and § 73 para. 4 clause 3 VwVfG may be left aside, as the Federal Administrative Court made it clear that the scope of the environmental remedies in law act could not be extended by analogy with Art. 9 para. 3 of the Aarhus Convention.

Cf. BVerwG op. cit. paras. 30 et seq.

Seen in this light, a rule which limits protection in law such as § 2 para. 1 (3) can definitely not be held against the Plaintiff; nor are the circumstances of fact which are stated there to be entitled to be party to proceedings under § 1 para. 1 UwRG met here, because drawing up and amending air quality plans and the public consultation procedures they involve under § 47 paras. 5 and 5 a BImSchG is neither a decision within the meaning of § 1 para. 1 clause 1 (1) UmwRG in conjunction with § 2 para. 3 UPVG, nor does it come under § 1 para. 1 clause 1 (2) UwRG.

Lastly, the Plaintiff points out, correctly, that it did not challenge the Düsseldorf air quality plan 2013 but the omission of a dynamisation of the air quality plan, i.e. a new amended plan.

II.
The action is also founded, in that the Plaintiff can sue the Defendant to change the air quality plan for the joined party to the effect that the latter is required to take the measures required to comply with the average for NO2 determined over a calendar year of 40 µg/m^3 as soon as possible.

§ 47 para. 1 clause 1 BImSchG, which transposes Art. 23 para. 1 sub-para. 1 of Directive 2008/50/EC of the European Parliament and Council of 21 May 2008 on air quality and cleaner air in national law, requires the competent authority to draw up an air quality plan if the concentration limits laid down by legal regulations under § 48 a para. 1 BImSchG including their established margin of tolerance are exceeded. Under § 47 para. 1 clause 3 BImSchG, the measures in an air quality plan must be suited to keeping the period in which concentration limits already set are exceeded as short as possible.

Under Art. 13 para. 1 sub-para 2 in conjunction with Annexe XI letter B of the said directive, which was transposed into national law via § 48 a para. 1 BImSchG in conjunction with § 3 para. 2 of the 39th BImSchV, the concentration limit for NO2 measured over a calendar year is 40 µg/m3. Under the provisions of the directive as stated above, the deadline for complying with this limit passed on 1 January 2010.

While NO_2 levels in the joined party's city area are decreasing, they were still 60 µg/m^3 (DDCS and DBIL monitoring stations) in 2014 and 59 µg/m^3 (DDCS testing station) in 2015, still well above the 40 µg/m^3 limit which has been in place for more than six and a half years.

As it is still being exceeded, the Defendant is bound under Art. 23 para. 1 sub-para. 2 clause 1 of Directive 2008/50/EC, § 47 para. 1 clauses 1 and 3 and § 27 para. 2 clause1 (1) of the 39th BImSchV to include suitable measures in the air quality plan to keep the exceedance time as short as possible. Pollutant levels in the air should be reduced to the extent still considered reasonable as demonstrated by the emission limit as soon as possible in the interests of protecting health effectively. The authority's decision must be guided by this minimum condition, which at the same time is also the benchmark in law which governs how much room to manoeuvre the authority has. The instruction to stop the concentration limit being exceeded as soon as possible requires the measures which are suited to reducing the emissions and proportionate to be assessed precisely with a view to realising the air quality objectives promptly. This may limit the planners' discretion if only selecting a suitable measure means that the limit can be expected to be observed soon. Nor is it assumed that the measures to be taken will achieve the goal at a stroke; rather, a multiple step procedure may be provided here, subject to the principle of proportionality.

Cf. BVerwG op. cit. para. 59

How much time is required to keep the exceedance as short as possible cannot be determined in the abstract. It depends on local conditions and on what measures are required. The time required may be shorter or longer, depending on how long it would take to implement the measures in each case. Whether the competent authority has met its obligations is something which can only be determined if there is an overall strategy behind the plans which aims to achieve the values. It is not enough to deal with some individual measures in the plan, leaving it open when the total goal will be achieved and based on what measures. Should it not be possible in law or in fact to reach the goal in the medium term, an air quality plan would also have to say so.

Cf. VG Sigmaringen judgment of 22 October 2014 – 1 K 154/12 -, juris para. 49.

An air quality plan can only work if it shows what suitable options for action are available to all those who are (jointly) responsible for keeping the air clean, assesses how effective they are and so provides the basis for deciding in favour of one or other method(s) with the foreseeable consequence that the limits can be complied with in time.

Cf. VG Wiesbaden, judgment of 30 June 2015 – 4 K 97/15 WI -, para. 94

The Düsseldorf air quality plan 2013 fails to meet these requirements (any longer). In respect of the irritant gas nitrogen dioxide which alone is at issue here, the Division cannot find any overall strategy

(which includes the time from the current year) which lists all effective measures which have not been excluded from the start in fact or law, assesses them and decides whether they can be implemented or not; in particular, no specific deadlines are specified for meeting the limit.

In terms of time, the Düsseldorf air quality plan limits itself to the concentration limit reductions which are expected both on Corneliusstrasse (DDCS: 64 µg/m^3) and on Merowingerstrasse (DBIL: 62 µg/m^3) for the 'forecast year 2015', but does not find that the NO_2 limit is being met (cf. section 6.2 p. 144 et seq.). There is nothing in the 'summary' beyond the chronological conditions going beyond the 'Target year 2015'; when the annual average of 40 µg/m^3 might be achieved (cf. section 8 p. 154 et seq.): it merely says that, even if they comply, (...) the planning authorities and towns and cities and communities in Nord-Rhine Westphalia still face major challenges.

While the Düsseldorf air quality plan 2013 contains considerable measures on reducing toxic road traffic emissions like the green environmental zone, it does not deal specifically with the particular problem of diesel vehicles which it is not disputed contribute disproportionately (compared with petrol vehicles) to exceeding the NO_2 limit. Section 7 may contain ways in which air quality could be improved, such as abolishing the government subsidy on diesel fuel (section 7.1 p. 149 et seq.), changing taxes on company vehicles (section 7.2 p. 150 et seq.) and encouraging retrofitting SCRT filter systems to local public transport fleets (section 7.7. p. 153), these are in the context of further regulations at European and national level. It does not even consider effective measures within the Defendant's competence or that of the joined party itself to limit the emissions from diesel vehicles, however, even though section 7.1 of the air quality plan indicates the Defendant already knew how things stood in 2012.

The problem of emissions from diesel vehicles, which became generally known in September 2015 at least, which, while immaterial to the obligation to comply with the limits

cf. VG Munich judgment of 21 June 2016 – M 1 K 25.5714-, juris para. 30

must now cause the Defendant to assess matters as they now stand and consider decisive measures in respect of diesel vehicles as well which reflect the high proportion they cause (cf. § 47 para. 4 clause 1 BImSchG). It must deal with this in an amended and/or updated air quality plan itself, as the particularly effective measure demanded by the Plaintiff in the shape of the (limited) driving ban on (certain) diesel vehicles is not excluded *ex ante* in law (or in fact), as the Defendant itself admitted in its written pleadings and at the oral hearing.

That limiting diesel road traffic offers immense potential for reduction is evident per se from the report which the joined party commissioned and the Defendant has produced from engineering agency Lohmeyer on "Establishing NO_2 reduction potentials for the situation at the Düsseldorf Corneliusstrasse air quality station DDCS" of May 2016.

The Defendant's (undisputed) lack of competence to introduce a blue badge (under the 35th BImSchV), which would certainly be the better solution if it were uniform and could be monitored throughout Germany cannot be relied on successfully, precisely because of the government's obligation to protect which applies to it under Art. 2 para. 2 clause 1 of the Constitution [GG] (against threats to physical integrity and health): for, even today, the provisions of Federal law allow the Defendant and/or together with the joined party to impose driving bans on (certain) diesel vehicles.

The Defendant has not raised any overriding concerns in law against the Plaintiff's proposal to use sign 251 from Annexe 2 to § 41 StVO (no powered vehicles allowed) with additional signs relating to (certain) diesel vehicles, nor are any such concerns apparent.

That these banning signs are part of the (final) Federal law catalogue of traffic signs is just as evident as the fact that they could be considered to impose traffic restrictions proposed in an air quality plan under § 40 para. 1 clause 1 BImSchG (as also signs 253, 255, 260 and sign 270.1 indicating an environmental zone, as introduced in 2007).

Cf. only *Scheider* in *Feldhaus*, [Federal concentration limit] protection law], commentary, second edition, state of192 file June 2016, § 40 BImSchG para. 31; *Fisahn/Raschke* in *Kotulla*, [Federal concentration limit protection law]

With the additional signs, which under § 39 para. 3 clause 1 StVO are also traffic signs, the traffic sign catalogue (VzKat) (Annexe to § 39 StVO) Part 8 ('additional signs') does not have one tailored to (certain) diesel vehicles; but as there is no final list of additional signs, the Defendant's Ministry of Transport is free to approve additional signs other than those as stated in that catalogue for North Rhine-Westphalia.

Cf. *Janker/Hühnermann* in *Burmann/Heiss/Hühnermann/Jahnke/Janker*, [Road traffic law], commentary, 24th edition 2016, § 39 StVO para. 7 and the VwV reprinted before starting the commentary in § 39 StVO – StVO to §§ 39 to 43 para. 46 ("... no variations are allowed from the additional signs listed in this catalogue; any other additional signs must be approved by the appropriate supreme Federal State authority or its delegated office.")

If, on the other hand, sign 251 could be given an additional sign "Diesel", it is the Defendant's duty to express any restrictions on certain diesel vehicles (which perform worse in terms of emissions), as the principle of proportionality (§ 47 para. 4 clause 1 BImSchG) requires by formulating it in a manner which is generally understandable and non-contradictory.

The Division cannot see how a Federal regulation in law is required pursuant to § 40 para. 3 in addition to the traffic signs stated above, given that the 35th BImSchV already has such a provision on exemptions from traffic bans under § 40 para. 1 BImSchG which is not limited to environmental areas.

Cf. *Krauff* in *Führ*: [Community commentary on Federal concentration limit protection law], 2016 § 40 para. 37

As well as § 2 para. 3 of the 35th BImSchV which exempts certain motor vehicles (such as ambulances and medical vehicles marked as such) whether badged or otherwise from (all) traffic bans which an air quality plan proposes, § 1 para. 2 of the 35th BImSchV must be mentioned in particular: this provision allows the competent authority to permit circulation of vehicles affected by traffic bans within the meaning of § 40 para. 1 BImSchG to and from certain establishments, insofar as this is in the public interest, particularly if this is necessary to supply the population with essential goods and services or if the overwhelming and unpostponable interests of individuals so require, and in particular if manufacturing and production processes cannot be maintained otherwise. Exceptions to this provision may be allowed by administrative act, including by way of general order:

Cf. *Krauff* in *Führ*, op. cit., § 40 para. 51; [Official grounds in support of first amending regulations in Federal publication 819/07], reprinted in *Feldhaus*, op. cit, 35th BImSchV

Together with the authorisation for exemptions in § 40 para. 1 clause 2 BImSchG, as extended by the 35th BImSchV,

Cf. *Jarass*, [Federal concentration limit protection law], Commentary, 11th edition 2015, § 40 para. 39

there is therefore a sufficient toolkit available to meet the Defendant's fears that banning traffic in the inner cities would have unforeseeable consequences for commerce, construction, trades, crafts, industry and local public transport (scheduled buses) and cause them to collapse unless cushioned by exemptions. It goes without saying that the exemption quota will need to be included when amending and/or updating the air quality plan (as the report by engineers Lohmeyer also found) precisely when determining what the potential reductions might be.

The same applies to the question of areas within which such a (limited) ban on diesel vehicles (based on uniform national criteria to be defined, as the case may be) could be considered. This has to be considered and assessed not only in terms of the possible displacement effects of the irritant gas nitrogen dioxide. The only objective, of course, cannot be to ensure better air quality around the DDCS monitoring station on Corneliusstrasse; instead, this must include all the 'NO_2 problem sections' as shown in the Defendant's annual air measurement reports (including any alternative routes). Measures to relieve a road which bring displacement effects with them cannot be ruled out *ex ante*, as part of the integrated environmental protection within the meaning of § 45 para. 2 a) BImSchG.

Cf. Jarass, op. cit., § 45 para. 13

but must not result in the limit being exceeded at other points even more than it was before.

Cf. VG Sigmaringen, op. cit. para. 53

The Defendant's argument that such a traffic ban could not be monitored 'as diesel vehicles are not marked' does not stand up. While keeping in mind that extending the 35th BImSchV to include a blue badge would certainly be preferable, fields 14 ("Designation of national emissions class", e.g. EURO4) and P. 3 ("Fuel type or energy source", e.g. DIESEL) of the vehicle approval certificates (Part I) would enable a clear and rapid identification, even today.

And, finally, in view of the requirement of 'as quickly as possible' and the considerations the Defendant has already raised in the present proceedings, a guideline timeframe for amending/ updating the Düsseldorf air quality plan 2013 within around one year would be reasonable.

III.
The order as to costs is made pursuant to §§ 154 paras. 1 and 3, 162 para. 3 VwGO.

The order as to immediate enforceability is made pursuant to § 167 paras. 1 and 2 in conjunction with § 790 ZPO.

Cf. on limiting the immediate enforceability to costs in accordance with § 167 para. 2 VwGO also to the context of an action for performance to amend an air quality plan: VG Hamburg judgment of 5 November 2014 – 9 K 1280/13 -, juris para. 53 with further notes

IV.
Leave to appeal is granted pursuant to § 124a para. 1 clause 1 in conjunction with § 124 para. 1, para. 2 (3) VwGO. The case here is of fundamental importance and must be clarified to ensure uniformity in law. For this reason, leave to leapfrog appeal is also granted under § 134 para. 2 clause 1 in conjunction with § 132 para. 2 (1) VwGO. This applies above all to the issue of what is substantively required of an air quality plan in terms of dealing with a possible transport ban on (certain) diesel vehicles within the constraints of the Federal law requirements of concentration limit protection and road traffic law.

Appeals:

(1) This judgment may be appealed within one month of the full judgment being served to the Administrative Court Düsseldorf (Bastionstrasse 39, 40213 Düsseldorf or P.O. Box 2008 60, 40105 Düsseldorf) in writing or electronically subject to the regulations on electronic correspondence in law at the administrative and financial courts in the Federal State of North Rhine-Westphalia (electronic legal correspondence regulations administrative and financial courts – ERVVO VG/FG) of 7 November 2012 (GV. NRW p. 548), naming the judgment disputed.

Grounds for appeals must be submitted within two months of the full judgment being served, where not submitted with the appeal itself, to the Administrative Court of Appeal for the Federal State of North Rhine-Westphalia (Aegidikirchplatz, 48143 Münster or P.O. Box 6309, 48033 Münster) in writing or electronically subject to the provisions of the ERVVO VG/FG. The time allowed in which to submit grounds may be extended by the Division Chairman on application before it expires. The grounds must include a specific application and the individual grounds for the appeal (appeal grounds).

All parties must be represented by counsel in the appeal proceedings. The only counsel admitted are those persons and organisations as described in § 67 para. 1 clause 1 and clause 2 (3) to (7) VwGO and those designated as equivalent to them. Authorities and entities in public law, including their combinations formed to meet their public duties may have themselves represented by their own employees who qualify as judges or by employees of other authorities who qualify as judges or entities in public law including combinations formed to meet their public duties. This also includes proceedings by which cases are brought.

Statements of appeals and grounds for appeals should be entered in triplicate if possible. No copies are required if entered electronically under the provisions of the ERVVO VG/FG.

(2) The parties may also appeal against this judgment to the Federal Administrative Court within one month of the full judgment being served to the Administrative Court Düsseldorf (Bastionstrasse 39, 40213 Düsseldorf or P.O. Box 2008 60, 40105 Düsseldorf) in writing or electronically subject to the regulations on electronic correspondence in law at the administrative and financial courts in the Federal State of North Rhine-Westphalia (electronic legal correspondence regulations administrative and financial courts – ERVVO VG/FG) of 7 November 2012 (GV. NRW p. 548). Appeals will also be deemed to have been submitted in time if submitted to the Federal Administrative Court (Simsonplatz 1, 04107 Leipzig) in writing or electronically subject to the Federal Government regulations on electronic correspondence in law at the Federal Administrative Court and Federal Finance Court (ERVVO BVerwG/BFH) of 26 November 2004 (BGBl. I p. 3091), naming the judgment disputed.

Grounds for appeals must be submitted within two months of the full judgment being served to the Federal Administrative Court (Simsonplatz 1, 04017 Leipzig) in writing or electronically subject to the provisions of the ERVVO VG/FG.

All parties must be represented by counsel in the Federal Administrative Court. Counsel admitted are those persons and organisations as described in § 67 para. 1 clause 1 VwGO. The organisations designated in § 67 para. 2 clause 2 (5) including entities in law they form under § 67 para. 2 clause 2 (7) VwGO are also admitted as counsel, but only in matters in law within the meaning of § 52 (4) VwGO, in staff representation matters and in matters in connection with a current or former contract of employment of staff within the meaning of § 5 of the labour tribunals law, including review matters. Those authorised under § 67 para. 4 clause 5 VwGO must be represented by persons who qualify as judges. Authorities and public law entities, including the combinations they form to perform their public duties may have themselves represented by their own employees who qualify as judges or by employees of other authorities who qualify as judges or entities in public law including combinations formed to meet their public duties. Parties who are authorised representatives under § 67 para. 4 clauses 3 and 5 VwGO may represent themselves. This also includes proceedings by which cases are brought.

Statements of appeals and grounds for appeals should be entered in triplicate if possible. No copies are required if entered electronically under the provisions of the ERVVO VG/FG.

Schwerdtfeger Dr. Palm Hemmer

Order

The value at issue is set at EUR 10,000.00

Grounds:

The value at issue has been determined in accordance with § 52 para. 1 GKG and guided by the value at issue determinations of the Federal Administrative Court in the proceedings as already cited on multiple occasions above concerning the Darmstadt air quality plan.

Appeals:

This order as to the value at issue may be appealed against in writing or electronically subject to the regulations on electronic correspondence in law at the administrative and financial courts in the Federal State of North Rhine-Westphalia (electronic legal correspondence regulations administrative and financial courts – ERVVO VG/FG) of 7 November 2012 (GV. NRW p. 548) or dictated to be recorded by the issuing officer of the business department of the Düsseldorf Administrative Court (Bastionstrasse 39, 40213 Düsseldorf or P.O. Box 20 08.60, 40105 Düsseldorf) and heard by the Administrative Court of Appeal for the Federal State of North Rhine-Westphalia in Münster unless remedied.

Applications and declarations may be submitted without engaging counsel in writing subject to the provisions of ERVVO VG/FG or lodged with the office to be recorded; the provisions of § 129 a of the civil procedural code apply *mutatis mutandis*.

Appeals must be submitted within six months of the decision in the proceedings in chief acquiring force in law or the matter being settled otherwise to be allowed; if the value at issue was determined less than one month before that deadline expired, they may still be submitted within one month of the order determining them being served or notified informally.

Appeals are not allowed if the value of the subject matter at issue does not exceed EUR 200.00.

Statements of appeals and grounds for appeals should be entered in triplicate if possible. No copies are required if entered electronically under the provisions of the ERVVO VG/FG.

If an appellant was unable to submit their appeal in time for reasons beyond their control, they may be restored to their former condition on application to the court which is to hear the appeal, provided they submit their appeal within two weeks of overcoming the impediment and show reasonable grounds in support of the facts which justify their being so restored. Appeals to be restored must be made within one year of the deadline neglected passing.

Schwerdtfeger Dr. Palm Hemmer

[Seal: ADMINISTRATIVE COURT OF DÜSSELDORF]

Certified
Seger
Administrative Court staff member as
issuing officer

VERWALTUNGSGERICHT DÜSSELDORF

IM NAMEN DES VOLKES

URTEIL

3 K 7695/15

In dem verwaltungsgerichtlichen Verfahren

der Deutschen Umwelthilfe e. V., vertreten durch ihren Vorstand,
Fritz-Reichle-Ring 4, 78315 Radolfzell,

Klägerin,

Prozessbevollmächtigte: Rechtsanwälte Dr. Geulen und Klinger,
Schaperstraße 15, 10719 Berlin,

g e g e n

das Land Nordrhein-Westfalen, vertreten durch die Bezirksregierung Düsseldorf,
Cecilienallee 2, 40474 Düsseldorf,

Beklagten,

Prozessbevollmächtigte: Rechtsanwälte Lenz und Johlen,
Kaygasse 5, 50676 Köln,
Gz.: 00169/16 18/no,

Beigeladene: Stadt Düsseldorf, vertreten durch den Oberbürgermeister
der Stadt Düsseldorf,
40200 Düsseldorf,
Gz.: 30 R 15580028,

w e g e n mmissionsschutzrechts (Luftreinhalteplan Düsseldorf)

hat die 3. Kammer des Verwaltungsgerichts Düsseldorf
auf Grund der mündlichen Verhandlung
vom 13. September 2016

durch

Vorsitzenden Richter am Verwaltungsgericht	Schwerdtfeger
Richter am Verwaltungsgericht	Dr. Palm
Richterin	Hemmer
ehrenamtlichen Richter	Lütke
ehrenamtliche Richterin	Schwitt

für **Recht** erkannt:

Der Beklagte wird verurteilt, den Luftreinhalteplan Düsseldorf 2013 so zu ändern, dass dieser die erforderlichen Maßnahmen zur schnellstmöglichen Einhaltung des über ein Kalenderjahr gemittelten Grenzwertes für NO_2 in Höhe von 40 µg/m³ im Stadtgebiet der Beigeladenen enthält.

Der Beklagte trägt die Kosten des Verfahrens mit Ausnahme der außergerichtlichen Kosten der Beigeladenen, die diese selbst trägt.

Das Urteil ist wegen der Kosten gegen Sicherheitsleistung in Höhe von 110 % des jeweils zu vollstreckenden Betrages vorläufig vollstreckbar.

Die Berufung und die Sprungrevision werden zugelassen.

T a t b e s t a n d :

Die Klägerin ist ein deutschlandweit tätiger – nach § 3 UmwRG anerkannter – Umweltverband, der seinen Schwerpunkt im Bereich der Luftreinhaltung hat. Sie begehrt die Änderung des 2012 durch die Bezirksregierung Düsseldorf erlassenen Luftreinhalteplans Düsseldorf 2013 zwecks Einhaltung des über ein Kalenderjahr gemittelten Immissionsgrenzwertes für Stickstoffdioxid (NO_2) in Höhe von 40 Mikrogramm pro Kubikmeter (µg/m³) im Stadtgebiet der Beigeladenen.

Zu Stickstoffdioxid heißt es im Einführungskapitel unter Ziff. 1.3.2 (S. 14 f.) des vorgenannten Luftreinhalteplans:

„Als Reizgas mit stechend-stickigem Geruch wird NO_2 bereits in geringen Konzentrationen wahrgenommen. Die Inhalation ist der einzig relevante Aufnahmeweg. Die relativ geringe Wasserlöslichkeit des NO_2 bedingt, dass der Schadstoff nicht in den oberen Atemwegen gebunden wird, sondern auch in tiefere Bereiche des Atemtrakts (Bronchiolen, Alveolen) eindringt.

B e s c h l u s s

Der Streitwert wird auf 10.000,00 Euro festgesetzt.

G r ü n d e :

Die Festsetzung des Streitwertes ist nach § 52 Abs. 1 GKG und unter Orientierung an der Streitwertfestsetzung des Bundesverwaltungsgerichts in dem bereits oben mehrfach angeführten Verfahren betreffend den Luftreinhalteplan Darmstadt erfolgt.

Rechtsmittelbelehrung:

Gegen den Streitwertbeschluss kann schriftlich, in elektronischer Form nach Maßgabe der Verordnung über den elektronischen Rechtsverkehr bei den Verwaltungsgerichten und den Finanzgerichten im Lande Nordrhein-Westfalen (Elektronische Rechtsverkehrsverordnung Verwaltungs- und Finanzgerichte – ERVVO VG/FG) vom 7. November 2012 (GV. NRW S. 548) oder zur Niederschrift des Urkundsbeamten der Geschäftsstelle bei dem Verwaltungsgericht Düsseldorf (Bastionstraße 39, 40213 Düsseldorf oder Postfach 20 08 60, 40105 Düsseldorf) Beschwerde eingelegt werden, über die das Oberverwaltungsgericht für das Land Nordrhein-Westfalen in Münster entscheidet, falls ihr nicht abgeholfen wird.

Anträge und Erklärungen können ohne Mitwirkung eines Bevollmächtigten schriftlich oder in elektronischer Form nach Maßgabe der ERVVO VG/FG eingereicht oder zu Protokoll der Geschäftsstelle abgegeben werden; § 129a der Zivilprozessordnung gilt entsprechend.

Die Beschwerde ist nur zulässig, wenn sie innerhalb von sechs Monaten eingelegt wird, nachdem die Entscheidung in der Hauptsache Rechtskraft erlangt oder das Verfahren sich anderweitig erledigt hat; ist der Streitwert später als einen Monat vor Ablauf dieser Frist festgesetzt worden, so kann sie noch innerhalb eines Monats nach Zustellung oder formloser Mitteilung des Festsetzungsbeschlusses eingelegt werden.

Die Beschwerde ist nicht gegeben, wenn der Wert des Beschwerdegegenstandes 200,00 Euro nicht übersteigt.

Die Beschwerdeschrift soll möglichst dreifach eingereicht werden. Im Fall der elektronischen Einreichung nach Maßgabe der ERVVO VG/FG bedarf es keiner Abschriften.