Moalem Weitemeyer

Moalem Weitemeyer
Advokatpartnerselskab
Amaliegade 3
DK–1256 Copenhagen

Tel. +45 7070 1505
moalemweitemeyer.com

CVR 3162 7885

News about the Deutsche Umwelthilfe v Germany (“Volkswagen”) Case

13 March 2022

Introduction

Undertakings risk that the approval of their product(s) could be reviewed by national courts on environmental grounds in connection with legal proceedings brought by an approved environmental organization against the competent authority. That could be

the case as a result of primary EU law if the Court of Justice decides to follow the Opinion of Advocate General Rantos[1] when ruling in the "*Volkswagen*" case[2].

The Background to the Volkswagen dispute and the referral of preliminary Questions to the Court of Justice

Volkswagen has inter alia manufactured VW Golf Plus TDI motor vehicles, equipped with a Euro 5 generation EA 189-type diesel engine with a capacity of 2 litres.

The competent body[3] in Germany for granting EC type-approval approved by decision of 20 June 2016 the up-dated software installed by Volkswagen in the electronic engine controller of the vehicles concerned. This software device reduces, under specific external temperature conditions, the recirculation of exhaust gases (a so-called "temperature window"). That increases, in turn, the nitrogen oxide ("NOx") emissions. The device becomes active when the average temperatures existing in Germany are reached.

The German environmental association, Deutsche Umwelthilfe ("DUW"), held that this software device created an unlawful "defeat device", which would be prohibited – according to DUW - by the applicable EU regulation[4].

With a view to challenging the validity of the approval decision, DUW brought a legal action before the Administrative Court of Land Schleswig-Holstein ("the AC") seeking the annulment of that decision by the competent German authorities.

The AC held that DUW did however not have standing under German (procedural) law to bring legal proceedings challenging the approval decision. In the view of the AC, DUW's lack of standing under German law is a result of DUW not having any subjective rights under the applicable regulation (Regulation (EC) No 715/2007), which could – in turn - be "impaired" by the approval decision taken by the competent authorities in favour of Volkswagen.

[1] Opinion of Advocate General Rantos delivered on 3 March 2022 in case Case C-873/19, *Deutsche Umwelthilfe v the Federal Republic of Germany, joined party: Volkswagen AG*.
[2] Case C-873/19, *Deutsche Umwelthilfe v the Federal Republic of Germany, joined party: Volkswagen AG*.
[3]The Kraftfahrt-Bundesamt (the Federal Motor Transport Authority).
[4] Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information.

The AC took the position that the prohibition on defeat devices laid down in Regulation (EC) No 715/2007 does not confer any subjective right on a natural person since that provision is not intended to protect a group of persons who are decisively distinct from the general public.

Therefore, the AC held that the outcome of the main proceedings would depend on whether DUW may claim standing to bring the proceedings directly based on EU law.

Against this background, the AC referred inter alia the following preliminary question to the Court of Justice:

"Is Article 9(3) of the [Aarhus Convention,] in conjunction with Article 47 of the [Charter], to be interpreted as meaning that it must in principle be possible for environmental associations to challenge before the courts a decision approving the manufacture of diesel passenger cars with defeat devices that are potentially in breach of Article 5(2) of Regulation [No 715/2007]?"

The Opinion of Advocate General Rantos

In his Opinion, Advocate General Rantos proposes that the Court answer above-referred question in the affirmative.

According to the Advocate General, Article 9 (3) of the Aarhus Convention - read in conjunction with Article 47 of the Charter of Fundamental Rights - imposes on Member States an obligation to ensure effective judicial protection of the rights conferred by EU environmental law.

The Advocate General recalls in that regard that the rules of EU environmental law are most frequently in the general interest, rather than simply in the interests of certain individuals. Moreover, it is indeed environmental associations that have the objective of defending that general interest.

As a result, recognized environmental associations cannot be deprived of the possibility of verifying that the rules of EU environmental law are being complied with. Hence, Member States' legislative discretion is limited inasmuch as they cannot proscribe standing criteria, which are so strict that it would be effectively impossible for environmental organizations to contest the actions or omissions that are the subject of Article 9 (3) of the Aarhus Convention.

Next, the Advocate General finds that the defeat device prohibition (subject to certain exceptions) laid down in Regulation (EC) No 715/2007 is directly applicable in the Member States. Consequently, that regulation must also be considered to fall within the scope of environmental law - and consequently within the scope of the Aarhus Convention – as it cannot be regarded solely as a technical regulation intended to regulate the internal market.

With regard more specifically to the prohibition in Article 5(2) of that regulation, this provision is intended to limit the emission of gaseous pollutants, thereby helping to protect the environment.

Consequently, that EU law provision must be regarded as forming part of the provisions of national law relating to the environment.

The Advocate General concludes that the effectiveness of aforesaid EU law provision necessitates that approved environmental associations must have the right to challenge an administrative decision allowing EC type-approval before the national courts.

To the extent that it is not possible for the national Court concerned to achieve this result by way of an EU law compliant interpretation of the applicable national law in question, the national Court concerned (in this case, the AC) must disapply the national law, which bars the environmental organization access to judicial review of the contested authorisation or permit decision.

Our Comments

The Advocate General proposes a solution corresponding to the one adopted by the Court in the *Protect* case[5]. In our view, it is reasonable to expect that the Court will indeed follow the Advocate General when passing its judgment.

If so, this will provide important clarification of the legal state of play of relevance to both (recognized) environmental associations[6], competent national authorities as well as private and public undertakings.

[5] Judgment of the Court of 20 December 2017 in case C-664/15, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd*.

[6] In Denmark, this wold likely apply to Danmarks Naturfredningsforening (the Danish Nature Conservation Society).

Regarding **the recognized environmental associations**, it would imply that these associations have an improved basis for bringing legal action against the competent authorities responsible for permitting or approving the product or project concerned, which the environmental association considers counteracting the environmental interests, which it seeks to safeguard.

As concerns **the competent national authorities**, it would imply that the authority concerned would have to assess whether its decision (or inaction as the case may be) falls within the ambit of "environmental law" covered by the Aarhus Convention and the Charter as read in conjunction. If so, the authority concerned should be aware of the risk that the validity of its decision (or inaction as the case may be) could be subject to legal action brought by a recognized environmental association irrespective of any provision in national procedural law barring such legal action.

Finally, it would imply that **public and private undertakings** should be aware of the risk that their product approval could be – indirectly – challenged by a recognized environmental association bringing annulment actions before the national courts to the extent that the product approval decision falls within the ambit of the Aarhus Convention and the Charter as read in conjunction.

In the event of such legal action being initiated, the undertaking concerned should be aware of the risk that the legal action would not be dismissed as inadmissible. It should take into consideration how it could best safeguard its interests under the proceedings, e.g. by way of intervening in favour of the defendant public authority, and how it may be able to substantiate that the product approval does not disregard the applicable environmental regulation (either).

In connection with the due diligence process related to M&A transactions, undertakings should examine and/or take into consideration to which extent there is a risk that the product approval of the target undertaking could be challenged by a recognized environmental association bringing annulment actions before the national courts to the extent that the product approval decision falls within the ambit of the Aarhus Convention and the Charter as read in conjunction.

We will follow up with further information once the Court has passed its judgment in the *Volkswagen* case.

Moalem Weitemeyer

If you have any questions or require further information regarding any of the above, please do not hesitate to contact us:

Pernille Nørkær
Partner
Pernille.noerkaer@moalemweitemeyer.com

Thomas Mygind
Senior Associate
Thomas.mygind@moalemweitemeyer.com

This news piece has been produced in the English language only. Are you a client or a prospective client, and should you require a Danish version, please email us at news@moalemweitemeyer.com with a link to the article that you would like to request to receive in Danish, and we will attend to your request without undue delay.