Dutch NGO wins summary proceedings against Dutch State on air quality

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Publication date
2017
Document Version
Final published version

BLOG

DUTCH NGO WINS SUMMARY PROCEEDINGS AGAINST DUTCH STATE ON AIR QUALITY

September 8, 2017

A trend of European case-law on air quality

The 7th of September, the Dutch NGO *Milieudefensie* won summary proceedings against the Dutch State on air quality. This case fits in a true trend following from the European Union Air Quality Directive 2008/50/EC, which regulates the maximum tolerable levels of pollution in the air caused by *inter alia* nitrogen and particulate matter. In the UK, the NGO *Clientearth* has litigated on failing air policy all the way up to the CJEU and back to the UK High Court again, winning every case against the government. In France, *Les amis de la terre France* obtained a similar result last July before the *Conseil d'État*. And only one day before the Dutch judgment, the German NGO *Deutsche Umwelthilfe* reached a comparable outcome before the *Verwaltungsgericht Stuttgart*. In this blogpost, I focus on the Dutch case.

Milieudefensie's case in the Netherlands

As reported on this blogpost, in August 2016, the Dutch NGO *Milieudefensie* started tort proceedings against the Dutch State because Dutch policy on air quality would be insufficient. Interestingly, this claim did not only rely on the legally binding European directive on air quality, but also on soft law WHO

guidelines in a complex private law construction echoing the reasoning of the controversial Dutch *Urgenda* case.

To speed up the proceedings, however, this summer *Milieudefensie* started summary proceedings ("kort geding") concerning only the violation of the European directive. The 7th of September 2017, the judge decided in *Milieudefensie*'s favour: The Dutch State must, as of now, do everything possible to comply with the European norms as soon as possible. A decision on the more ambitious WHO guidelines will follow after the substantive proceedings ("bodemprocedure") to be held at the 14th of November 2017.

Admissibility

In her judgment, the judge Mrs. Groeneveld-Stubbe rejects the State's argument that the claim would be inadmissible because it would rather be an issue for administrative law proceedings rather than private law proceedings. In Dutch law, only individual cases can lead to administrative review, whereas this dispute is about a national plan on air quality, she reasons. Private law proceedings are the only option (§4.2).

Furthermore, the judge finds that the case is sufficiently pressing to justify a judgment in summary proceedings – the earlier measures are taken to improve air quality, the earlier these measures are likely to have effect (§4.4). Neither is the case too complex for summary proceedings, because both parties agree on most of the facts (§4.5).

The air quality plan

The State recognizes that in certain areas, the critical levels demanded by EU Directive 2008/50/EC are surpassed and that required deadlines have been missed, since these were fixed in 2015 (for nitrogen) and 2011 (for particulate matter), respectively (§4.6). The judge does not agree with the State that it lacks the competences to solve local issues, because it was the State itself that choose to decentralize its duty to guarantee air quality (§4.7). Furthermore, the judge deems irrelevant the State's observation that Dutch air quality is better than before; after all, what matters is not the comparison with earlier times, but the comparison of Dutch air quality with the quality demanded by the Directive (§4.8).

The judge agrees with *Milieudefensie* that the Dutch "Nationaal Samenwerkingplan Luchtkwaliteit" (national cooperation plan on air quality) does not comply with the Directive: The Directive requires an air quality plan to keep exceedance periods 'as short as possible', which cannot be said with certainty of the Dutch plan (§4.11). Furthermore, the Dutch plan lacks detailed analyses of problem situations, demanded by Annex XV of the Directive (§4.12).

Judgment

For these reasons, the judge orders the State to do everything possible, within two weeks after the

judgment, to make its air quality plan comply with the Directive. Which measures the air quality plan should contain, is for the Dutch State to decide (§4.13). The judge does not agree with *Milieudefensie* that critical levels should per se be met within 2018 – she cannot say with certainty whether this time-frame would be the 'shortest possible', since she does not know yet which measures the State will adopt (§4.14).

She does however agree with *Milieudefensie* that the State must immediately begin to identify the locations where exceedances take place – such is necessary to come to a sound air quality plan (§4.15). Measures can only be taken after the plan is made in detail, not, as *Milieudefensie* asked, immediately after the identification of these locations (§4.16).

Moreover, the judge follows *Milieudefensie* in forbidding the State to take measures that are expected by the RIVM (the Dutch national institute for public health and the environment) to statistically contribute to new exceedances, since this is already required by the EU Directive and the national environmental statute ("Wet Milieubeheer"). The State tried to invoke Article 6:168 of the Dutch Civil Code, which gives the judge the possibility not to forbid torts by the State in so far as they should be allowed because of imperative societal interests. The judge does however not follow this argument, since the State did not pinpoint which measures would be of imperative societal interest.

What's next?

Secretary of State Sharon Dijksma has reportedly announced to immediately act upon the judgement.[1] The judgement is likely to pre-empt plans of the government to raise the maximum speed on highways – unless, of course, the government comes with a plan effective enough to compensate for the extra pollution caused by faster riding traffic. Thus, the outcome of the summary proceedings can be called significant. For those interested in judicial law-making in European private law, the substantive proceedings of *Milieudefensie*'s claim will be truly exciting. There, the Court will decide whether the Dutch State indeed commits a general tort under the doctrine of hazardous negligence ("gevaarzetting") by not doing even more against air pollution than required by the European Directive, endangering its citizens' health, as argued by the NGO.

The judgment's ECLI number is ECLI:NL:RBDHA:2017:10171

[1] Marcia Nieuwenhuis 'Kabinet versnelt plannen tegen luchtvervuiling: 'Hoop voor longpatiënten'' *Algemeen Dagblad 7 September 2017*

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