

EU Harmonisation

Is there a problem with restrictions on uses?

Prof. Dr. Delphine Misonne



Topical issue – Transversal issue – Ban on uses



What's the problem? Is there any problem?

- **Control of uses = a typical dimension of environmental policies**
- Necessary
- Rectification at source
- Some uses, some places, everywhere
- **Why are they still on the market?**
- Does the ban on uses conflict with access-to-the market?

Recent trend: **diesel bans** – New actors

° NATIONAL JUDGES

- **ECJ, Client Earth Case C-404/13, 2014:** “it is for the national court having jurisdiction, should a case be brought before it, to take, with regard to the national authority, any necessary measure, such as an order in the appropriate terms, so that the authority establishes the plan »

• CITIES

- **National courts:** cities can impose diesel bans in an attempt to cut down pollution (Leipzig)
- At the request of the judge or not
- Germany: Berlin, Bonn, Köln, Stuttgart, Hamburg, Frankfurt, etc
- “Other measures taken by the state have not led to an effective reduction of nitrogen dioxide emissions.”

Low emissions zones

- 200 LEZ in the EU
- **All different – By lack of harmonisation**
- Base: **Directive 2008/50 on air quality** (**an update could help!**)
 - in zones...MS shall **maintain the levels of pollutants below the limit values**
 - air quality plans **shall set out appropriate measures**, so that the exceedance period can be kept as short as possible.
 - short term: “ those action plans may include **measures in relation to motor-vehicle traffic** »
- **Variability, the consequence of “subsidiarity”**

LEZ

- “Spontaneous”

One of the newest: Brussels

Belgian Constitutional Court 28
February 2019: no problem with right to
property – ECHR: “**shall not in any way
impair the right of a State to enforce
such laws as it deems necessary to
control the use of property in
accordance with the general interest »**
- No primacy above public health – Be
conform with **EU law** on air protection -
Balanced

**Frankfurt facing toughest ban yet on
diesel cars after court order, affecting
60,000 vehicles in city alone**

- “**Forced**” upon cities, via Court orders,
at citizen’s or NGO’s requests
- “Citizens are asked to pay for the
failure of Government”
- **Diesel protests...**



Diesel ban : diesel stop? = impact on sales?

- German government not happy
- Plans to legislate in order to...limit bans....but MIND...

Action brought on 11 October 2018 — European Commission v Federal Republic of Germany (Case C-635/18)

Pleas in law and main arguments

Since 2010, the Federal Republic of Germany has systematically and continuously exceeded the annual and hourly NO₂ limit values set out in Annex XI in 26 and 2 areas respectively, and has thereby infringed Article 13(1) of, in conjunction with Annex XI to, Directive 2008/50/EC of 21 May 2008 on ambient **air quality** and cleaner **air** for Europe.

Contrary to the second and third subparagraphs of Article 23(1) of, in conjunction with Annex XV to, the directive, since 11 June 2010, the Federal Republic of Germany has failed to adopt measures in the **air quality** plans of the 26 zones in question which would be appropriate to keep the exceedance period as short as possible. The inappropriateness of the measures results from, inter alia, the duration, trend and severity of the exceedances of the limit values and the examination of the **air quality** plans established for the zones in question.

My question: are there limits to uses bans, due to other harmonisation frameworks?

- **Case T-339/16, 13.12.2018**
- **Ville de Paris & Ville de Bruxelles & Madrid c. Commission**
- Annuls Regulation 2016/646 on real-driving condition test about Euro 6 type-approval
- Exceeds discretion – Breach of essential elements
- **Access to Justice for Cities?**
- « a regulatory act which is of direct concern to them? »
- **Yes,**
- Because could not impose restrictions on uses of vehicles conform to the latest applicable standards
- What?
- Reason: ***effet utile* of only one harmonization framework: the type-approval of vehicles**
- And effet utile of the air quality directive + right to clean air?
- Anyway, only access to justice here/ issue of standing...or more?

Classical distinction

- **No harmonization**

Limitations on uses v. Free movement

Discourage the use, discourage the purchase?

Can fall under art.34 (*Swedish Watercraft 2009*)

If total ban – Also if heavy restriction
– De minimis?

BUT, anyway, can be justified for environmental reasons

- **Harmonisation**

- **Full harmonisation**

- Depends if provides for derogation
- Check the content of free movement clauses (intern)
- Open or locked?

If LOCK = STOP?

- But how to conciliate harmonisation 1 and 2 ?
- Internal market > air quality?
- Back to subordination?
- Nothing to do if comply with the latest requirements?

OR Air quality = lex specialis

- INTEGRATION
- High level of protection
- Right to clean air



Discretion

Autonomy

“The rise of deference”

Health issues

Logic (or rather not – waiting for the decision in appeal)....BUT what if no gradation (Euro 5, 6, etc)?



- Same type of situation
- BUT clearer perhaps
- Regulation of access to the market – Harmonisation 1
- Directive on “sustainable use” – Harmonisation 2

Is a full ban OK?

Similar questions start being raised at national level **uses v. access to the market**

- Belgian Constitutional Court
- **Typically a Belgian issue**
 - Conditions laid to access the market = **federal state level** competence (ex: recent ban on the sales of Glyphosate for non-professional users)
 - Uses of pesticides = **regional competence**
- **Restriction on uses is not a trade ban**
- **But be loyal..."respect the federal competence"**
- **Not allowed: full ban on the whole territory of the Walloon Region...the impact of which would be to provoke an "exclusion of the market"**
- **Conclusion: OK...if some derogation possibilities remain?**

Q: Is a full regional ban OK?

Discussion...

INTRA-harmonisation conflicts

Placing on the market – Restriction on uses - ...impact on property

Rule 1 v. Rule 2 - Subordination

Rule 1 + Rule 2 - Combination

(Rule 1) + (Rule 2) – Dilution

Or no reason to worry?

Do MS still need to fear the ECJ?

Article 17 Charter

- Right to property
- 1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions.
(...) **The use of property may be regulated by law in so far as is necessary for the general interest.**

Thank you

delphine.misonne@usaintlouis.be

