

# **Business and human rights – access to remedy**

## **Germany - Case study 2019**

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<b>1. Country where the incident took place</b>	Germany
<b>2. Country where the remedy was sought</b>	Germany
<b>3. Type of remedy used</b> <i>(reasons why this remedy was used)</i>	Administrative law Administrative law was chosen because the objective of the claim related to the conduct of the authorities (prohibition of vehicle use).
<b>4. Deciding body - (in original language /and in English)</b>	Administrative Court Düsseldorf ( <i>Verwaltungsgericht Düsseldorf</i> )
<b>5. Date (month/year) when the remedy was initiated</b> <b>Date, if available, of the (final) decision</b>	The claimant approached the defendant with its claim on 13 April 2017. The claim was denied. In response, the claimant initiated legal proceedings on 10 July 2017 before the Administrative Court of Düsseldorf. The Administrative Court delivered its decision on 24 January 2018.
<b>6. Reference details, (type and title of court/body; in original language and English [official translation, if available])</b>	Administrative Court Düsseldorf, Decision of 24.01.2018 – 6 K 12341/17 Verwaltungsgericht Düsseldorf, Urteil vom 24.01.2018 - 6 K 12341/17
<b>7. Web link to the decision/procedure (if available)</b>	<a href="https://openjur.de/u/2135877.html">https://openjur.de/u/2135877.html</a>
<b>8. Did the incident receive media attention? If so, please provide links</b>	<a href="https://www.spiegel.de/auto/aktuell/stillegung-von-dieselaautos-in-duesseldorf-gericht-weist-klage-der-umwelthilfe-ab-a-1189628.html">https://www.spiegel.de/auto/aktuell/stillegung-von-dieselaautos-in-duesseldorf-gericht-weist-klage-der-umwelthilfe-ab-a-1189628.html</a> <a href="https://www.lto.de/recht/nachrichten/n/vg-duesseldorf-6k12341-17-deutsche-umwelthilfe-schummel-diesel-keine-stillegung/">https://www.lto.de/recht/nachrichten/n/vg-duesseldorf-6k12341-17-deutsche-umwelthilfe-schummel-diesel-keine-stillegung/</a>
<b>9. Legal basis in national/EU /international law of the rights under dispute</b>	Article 2, Paragraph 1, in conjunction with Article 1, Paragraph 1, Sentence 1, Number 6, Environmental Appeals Act, in the version of 2 June 2017. (§ 2 Abs. 1, i.V.m. § 1 Abs. 1 Satz 1 Nr. 6, Umwelt-Rechtsbehelfsgesetz (UmwRG) in der Fassung vom 2. Juni 2017) Article 1, Paragraph 1, Sentence 1, Number 5, Environmental Appeals Act, in the version of 2 June 2017. (§ 1 Abs. 1 Satz 1, Nr. 5, Umwelt-Rechtsbehelfsgesetz (UmwRG) in der Fassung vom 2. Juni 2017) Article 9, paragraph 3, UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998 (Aarhus Convention), in conjunction with Article 47, paragraph 1, Charter of Fundamental Rights of the European Union) (Art. 9 Abs. 3 der Aarhus-Konvention i.V.m. Art. 47 Abs. 1 der Grundrechte Charta der Europäischen Union)

	<p>Article 42, paragraph 2, first half-sentence, Code of Administrative Court Procedure, in conjunction with Article 9, paragraph 3, Aarhus Convention (§ 42 Abs. 2 1. Hs. Verwaltungsgerichtsordnung i.V.m. Art. 9 Abs. 3 AK)</p> <p>Article 42, paragraph 2, second half-sentence, Code of Administrative Court Procedure (§ 42 Abs. 2 2. Hs. Verwaltungsgerichtsordnung)</p>
<b>10. Parties</b>	<p>Claimant: Environmental Action Germany (<i>Deutsche Umwelthilfe e.V.</i>)</p> <p>Defendant: Vehicle License Authority Düsseldorf (Kraftfahrtzulassungsstelle Düsseldorf)</p> <p>Volkswagen Group participated in the proceedings as an interested party (<i>Beigeladene</i>)</p>
<b>11. Form of abuse/violation, and rights involved <sup>1</sup></b>	<p>Right to life</p> <p>Right to health</p> <p>Right to clean air</p>
<b>12. Type of business involved</b> <i>(sector of activity, name of the company perceived as being responsible for the abuse, country of origin of the company, form of business entity)</i>	<p>Volkswagen AG</p> <p>Sector: Automotive industry</p> <p>Country of origin: Germany</p>
<b>13. Profile of the victim(s) - individuals /population affected - can be broader than actual parties to the proceedings</b> <i>(e.g. country of origin, belonging to a particular minority – ex. ethnic, gender, age, occupation, social status, relations with the responsible company)</i>	<p>Environmental Action Germany filed this case as an environmental association. The victims-population includes all persons suffering from air pollution by nitrogen oxide emissions within the jurisdiction of the Federal Motor Transport Authority. Such pollution causes severe cardio-vascular and respiratory diseases and particularly affects children and elderly people. According to the European Environmental Agency, 13,100 persons in Germany died prematurely due to nitrogen oxide emissions in 2015.<sup>2</sup></p>

<sup>1</sup> The rights affected may include the entire spectrum of internationally recognised fundamental rights – civil and political rights, as well as economic, social and cultural rights; for example: the right to non-discrimination, the right to private and family life, freedom of expression, the right to health, the right to protection of life and physical integrity, property rights, consumer rights or environmental rights.

<sup>2</sup> European Environmental Agency, *Air quality in Europe – 2018 report*, EEA Report No 12/2018, 64.

<p><b>14. Any legal or institutional factors in the Member State that facilitated the abuse of the (fundamental) rights in questions?</b></p>	<p>The automobile industry is at the heart of the German economy and as such of high national importance. Relations between the industry and policy makers are traditionally close and German governments tend to defend the industry's interests at the European and international level. Volkswagen Group is the largest automobile manufacturer in Europe and partially state-owned.</p> <p>The role of public authorities in the Dieselgate scandal and the ensuing impacts on the rights to life, health and clean air is controversial and has led to the creation of a parliamentary investigation committee. According to opposition parties, the authorities did not investigate the scandal appropriately. They speak of 'complicity between politics and industry' and 'organized government failure'.<sup>3</sup></p>
<p><b>15. Key facts of the case</b></p>	<p>Environmental Action Germany is an environmental association, whose statutory objective is the promotion and protection of the right to clean air and the enforcement of national and international environmental law.</p> <p>The Federal Motor Transport Authority is the federal agency responsible for road traffic, including type approvals of vehicles. These approvals confirm that vehicles comply with legal safety and environmental standards and constitute a prerequisite for their distribution and operation in Germany.</p> <p>The claim relates to the Dieselgate scandal. In 2015, it became public that diesel engines of the Volkswagen Group of the series EA 189 EU5 were equipped with a software to reduce their exhaust emissions during testing procedures to ensure compliance with emission limits. In normal operation, these vehicles exceed emission limits, contributing significantly to air pollution through nitrogen oxides according to the claimant.</p> <p>The Federal Motor Transport Authority had granted type approvals for the EA 189 EU5 diesel engine series. In response to the Dieselgate scandal, it declared this software to constitute an illicit switch-off device, ordering producers to remove it and ensure compliance of the vehicles already on the market. The producers reacted with a call back to conduct a software update of the affected vehicles. The claimant considers these measures as insufficient and argues that the vehicles continue to emit nitrogen oxide above limits.</p> <p>Against this background, the claimant requested the court to extinguish the type approval of motor vehicles equipped with EA 189 EU5 engines of the Volkswagen Group, to prohibit the operation of these vehicles on public roads and to take them out of service.</p>
<p><b>16. With respect to the case described in this template - <u>what worked well</u> from the standpoint of the complainant/victim? What were the reasons for it?</b></p>	<p>The interviewees did not raise any positive aspects with respect to this specific case from the perspective of the claimants. In general, the interviewees see administrative law as the most suitable remedy mechanism to address business-related human rights violations involving environmental damage in Germany. This mechanism addresses the authorities to act against a company and does not aim at compensation, but rather at prevention of further damage. With respect</p>

<sup>3</sup> Deutscher Bundestag, *Abgas-Ausschuss übergibt Abschlussbericht an Norbert Lammert*, 22.06.2017, <https://www.bundestag.de/dokumente/textarchiv/2017/kw25-pa-ua-abgas-abschlussbericht-511540>

	<p>to such violations, one positive aspect is that nongovernmental organizations enjoy legal standing to initiate proceedings against the authorities for environmental matters (although legal standing is limited to certain areas). Another positive aspect is access to internal documents of the authorities, which are required by law to provide claimants with access to their files.</p> <p>However, the main reason why administrative law seem to be most suitable mechanism is not because it is completely effective, but because alternative civil law mechanisms to directly address the company are almost useless, given the many legal barriers they involve.</p>
<p><b>17. With respect to the case described in this template – what did <u>not</u> work well from the standpoint of the complainant/victim? What were the reasons for this?</b></p>	<p>The case did not go well at all, given that it was dismissed in the admissibility stage for a lack of legal standing of the association filing the claim. This reflects a major barrier to address business-related human rights violations concerning the environment through administrative law. While there have been some advances in terms of legal standing of associations with the Environmental Appeals Act, legal standing does not extend to all relevant fields of environmental protection.</p> <p>In an interviewee’s opinion this case shows, that there are important gaps in the implementation of the Aarhus Convention in Germany. In the excluded fields, individuals can file administrative claims, but have to prove legal interest to do so. This is very difficult in practice, especially with respect to proving damage and causation. Another obstacle is that German administrative law only provides claimants with a right to claim error-free enacting of discretionary powers (Ermessensanspruch), rather than a binding responsibility for authorities to act (Verpflichtungsanspruch). This limits the effectiveness of this mechanism in the sense that the authorities, which, according to some interviewees, often follow political objectives, enjoy a margin of discretion with respect to the measures they take.</p> <p>It was noted that in this case (and related cases), the administrative court invited the car manufacturers as interested parties and that the complainants therefore had to face both the authorities and the businesses in practice, indicating imbalance of arms as a major obstacle.</p>
<p><b>18. Main reasoning / argumentation (of the parties and the court: key issues /concepts clarified by the case)</b></p>	<p>The main issue in the case was whether the claimant, as an environmental association, enjoyed legal standing to claim the withdrawal of type approvals and licenses and the prohibition of the use of the respective vehicles on public roads.</p> <p>The claimant based legal standing, amongst other grounds, on the Environmental Appeals Act (Umwelt-Rechtsbehelfsgesetz)<sup>4</sup>, which provides recognized associations with legal standing to initiate administrative proceedings against the authorities for environmental authorisation decisions, without having to establish a subjective rights violation. This law implemented EU Directive</p>

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<sup>4</sup> Umwelt-Rechtsbehelfsgesetz in der Fassung der Bekanntmachung vom 23. August 2017 (BGBl. I S. 3290), das durch Artikel 4 des Gesetzes vom 17. Dezember 2018 (BGBl. I S. 2549) geändert worden ist.

	<p>2003/35<sup>5</sup>, which in turn implemented the Aarhus Convention<sup>6</sup>, and constituted a fundamental break with German administrative procedural law that is based on the principle that legal standing generally depends on a violation of the subjective rights of the claimant.<sup>7</sup> In this context, the issue in the proceedings was whether the authorisation of vehicles falls within the law's material scope of application, which the court declined.</p> <p>In addition, the claimant argued that it enjoyed legal standing on the basis that the Aarhus Convention was directly applicable by German courts and, alternatively, on recent jurisprudence of the Federal Administrative Court and the European Court of Justice, according to which environmental associations should be granted far-reaching legal standing to enforce EU environmental law.<sup>8</sup> However, the court also rejected this line of argumentation.</p>
<p><b>19. What was the outcome?</b></p>	<p>In its decision, the court dismissed the claim, admitting appeal and revision bypassing the appeal instance, which means that an appeal would go directly before the Federal Administrative Court (<i>Sprungrevision, Bundesverwaltungsgericht</i>). In January 2018, the claimant announced to file an appeal.<sup>9</sup> The respondent did not agree to the bypassing of the appeal instance. Therefore, the case is now pending with the appeal instance, the Higher Regional Court (Oberlandesgericht) of Münster.</p>
<p><b>20. Did the case lead to legislative or policy developments?</b></p> <p><i>(including more general measures introduced to stop future incidents)</i></p>	<p>The case did not lead to legislative or policy developments thus far.</p>
<p><b>21. In case the remedy sought was not of a judicial nature, was there eventually any follow up on the case in the court? Or followed</b></p>	<p>The remedy was of judicial nature (administrative law).</p>

<sup>5</sup> Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

<sup>6</sup> UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998.

<sup>7</sup> Article 42, paragraph 2, Code of Administrative Court Procedure.

<sup>8</sup> Bundesverwaltungsgericht, *Luftreinhalteplan Darmstadt*, Urteil vom 9. März 2013 - 7 C 21/12; European Court of Justice, *Slovak Brown Bear*, Judgment of 8 March 2011 - C-240/09; European Court of Justice, *Janecek*, Judgment of 25 July 2008 - C-237/07.

<sup>9</sup> Deutsche Umwelthilfe, *Deutsche Umwelthilfe wird gegen Urteil des Verwaltungsgerichts Düsseldorf Rechtsmittel einlegen*, 24.01.2018,

<https://www.duh.de/presse/pressemitteilungen/pressemitteilung/deutsche-umwelthilfe-wird-gegen-urteil-des-verwaltungsgerichts-duesseldorf-rechtsmittel-einlegen/>.

<p><b>by a different type of procedure?</b></p>	
<p><b>22. Any other comments relevant to case?</b></p>	<p>The case forms part of a series of claims to withdraw the vehicles affected by the Dieselgate scandal from the market. Environmental Action Germany filed similar claims before the courts of Berlin, Frankfurt am Main, Hamburg, Hannover, Köln, Mainz, München, Stuttgart and Wiesbaden.<sup>10</sup> The Administrative Court of Schleswig-Holstein dismissed a related case in December 2017, also for a lack of legal standing.<sup>11</sup></p> <p>According to an interviewee, these rulings would mean, once legally effective, that neither persons affected by nitrogen oxide emissions nor associations can bring the vehicle licensing practice of the authorities before a court to claim the withdrawal of air polluting vehicles. This could constitute a violation of the Aarhus Convention, which requires states to provide associations with legal standing relating to all kinds of violations of environmental laws.</p> <p>Further information on this litigation can be obtained on the website: <a href="https://www.right-to-clean-air.eu">https://www.right-to-clean-air.eu</a></p>

<sup>10</sup> Deutsche Umwelthilfe, *Betriebserlaubnis von Betrugs-VW ist erloschen – Deutsche Umwelthilfe reicht Klage in zehn Städten mit hoher Luftbelastung ein*, 11.07.2017, <https://www.duh.de/presse/pressemitteilungen/pressemitteilung/betriebserlaubnis-von-betrugs-vw-ist-erloschen-deutsche-umwelthilfe-reicht-klage-in-zehn-staedten-m/>.

<sup>11</sup> Schleswig-Holsteinisches Verwaltungsgericht, Urteil vom 13.12.2017, 3 A 59/17, <https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=VG%20Schleswig&Datum=13.12.2017&Aktenzeichen=3%20A%2059/17>. See also: Legal Tribune Online, *Umwelthilfe scheitert mit Klagen gegen KBA*, 14.12.2017, <https://www.lto.de/recht/nachrichten/n/vg-schleswig-holstein-weist-klage-umwelthilfe-gegen-kba-ab/>; Deutsche Umwelthilfe, *Heutiges Urteil des VG Schleswig zu den Abschaltvorrichtungen bei Opel und VW Diesel: Deutschland verstößt weiter gegen das Völkerrecht wegen unzureichender Klagerechte für Umweltverbände*, 13.12.2017, <https://www.duh.de/presse/pressemitteilungen/pressemitteilung/heutiges-urteil-des-vg-schleswig-zu-den-abschaltvorrichtungen-bei-opel-und-vw-diesel-deutschland-ve/>.