

5. Healthy air as an obligation of result in the whole European Union: definitely a matter of time

Delphine Misonne

It is hard to keep pace with the evolution of recent case law and institutional decisions on the protection of ambient air quality. The field has been particularly dynamic in this decade. Even if similarities with the current wave of climate litigation can be observed, it presents by contrast the specificity of revolving around one specific law in the European Union, and of opting for the classic legality review pathway, still mainly based on existing positive law. The protection of ambient air has been considerably strengthened due to interpretations that have been provided by the Court of Justice of the European Union (CJEU), on the meaning of Directive 2008/50 of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (Ambient Air Quality Directive or AAQD).¹ In most of the recent cases, it is the relation to human health protection that vitalized the potential of such legislation. The field of ambient air quality law was *re-humanized* by numerous decisions of the CJEU placing human beings, rather than administrative discretion and economic considerations, at their center.

However, one can be intrigued by the scope of such advances, still specifically linked to one specific directive (and its predecessors), the Ambient Air Quality Directive. That directive, even if it occupies a central position due to its focus on the required quality of the air we breathe outdoors, only deals with a small number of pollutants, and it does not embrace the full story of air pollution prevention in Europe today. There is no such thing as a Clean Air Act in the European Union that truly oversees all related aspects of air pollution prevention and management.² Is this something we should regret and repair?

¹ Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe [2008] OJ L 152, 1–44.

² As further explained in Delphine Misonne, ‘EU Dieselgate: Unveiling the Weirdness of the EU’s Attitude to Compliance on Environmental Matters’ (2018) *elni Review* 2, 52–59, <https://doi.org/10.46850/elni.2018.010> accessed 15 November 2022.

The answer will depend on the way progressive interpretations, as recently and patiently acquired through case law on ambient air and related directives, will or will not spill over into all relevant dimensions – if they have not been made void in the meantime by the recast of the Ambient Air Quality Directive.

If the new logic of ever tighter duties finds its core motivation in human health protection and related legislative frameworks, these new guarantees should expand beyond the field of ambient air quality, for the reference to human health is present in many other key European laws. But does their text and a more global context also allow for the absorption of a similar evolutive interpretation? This is the question I want to raise in the present chapter: is air quality law moving interestingly but unevenly beyond a former status quo in the European Union, or is the move far more general, towards a stricter approach to human health protection in most pollution-related matters?

The present chapter is structured as follows. First, it captures the most recent state of interpretation of the Ambient Air Quality Directive by the CJEU. Second, it explains the scope of such developments and potential mutual influences between European legislatures. Third, it analyses the novelty of such interpretations in context. Fourth, it further reflects on the issue of rights and associated tensions, also taking recent domestic judicial decisions as support. Finally, some prospective concluding remarks are shared, in light of the proposed recast of the Ambient Air Quality Directive³ and of the issue of time.

THE SETTLED MEANING OF THE AMBIENT AIR QUALITY DIRECTIVE

Health Protection Is the Main Driver

Reference to human health was decisive in *Janecek*, in 2008, for giving citizens a say in the need to adopt air quality plans aimed at achieving certain objectives,⁴ with the consequence that these persons directly concerned must be in a position to require the competent authorities to establish an air quality

³ Proposal for a Directive of the European Parliament and of the Council on ambient air quality and cleaner air for Europe (recast), COM(2022)542, 26 October 2022.

⁴ It is incompatible with the binding effect that article 288 TFEU ascribes to Directive 2008/50 to exclude, in principle, the possibility of the obligation imposed by that directive being relied on by the persons concerned. That consideration applies particularly in respect of a directive whose objective is to control and reduce atmospheric pollution and which is designed, therefore, to protect public health. (Case C-237/07, *Dieter Janecek v Freistaat Bayern*, 25 July 2008, EU:C:2008:447, para 37)

plan, if necessary by bringing an action before the courts having jurisdiction, where a risk exists that limit values may be exceeded. Reference was made to several cases of the early nineties where the Court held that ‘whenever the exceeding of the limit values could endanger human health the persons concerned must be in a position to rely on mandatory rules in order to be able to assert their rights’.⁵ The impact on human health was crucial for allowing the case *Client Earth v UK*⁶ to reach the CJEU through a preliminary ruling and to obtain a landmark judgment in which the Court declared that it is up to the national court having jurisdiction to take any necessary measure such as an order in the appropriate terms, should a case be brought before it, so that the authority establishes the plan required by the directive. The relation to human health also became pivotal in *Craeynest*⁷ where the Court declared that it is up to a national court, hearing an application submitted for that purpose by individuals directly affected by the exceedance of the limit values referred to in article 13(1) of the Ambient Air Quality Directive, to verify whether the sampling points located in a particular zone have been established in accordance with the criteria laid down in the directive. In *Deutsche Umwelthilfe*,⁸ the Grand Chamber decided that the right to an effective remedy is all the more important because, in the field covered by the Ambient Air Quality Directive, failure to adopt the measures required by that directive would endanger human health. In *Commission v Italy*, in 2020, the Grand Chamber of the CJEU asserted that the achievement of the objective of protection of human health, as referred to in article 1(1) of the Ambient Air Quality Directive, is not left to the sole discretion of the Member States.⁹

The CJEU has indeed proven to be keen to affirm and strictly protect air quality needs, as guaranteed by the European lawmaker in the binding requirements of that directive, because they relate closely to basic human health protection.¹⁰ Furthermore, as suggested by Advocate General Kokott in the *Craeynest* case, in terms which the CJEU implicitly subscribed to, ‘in

⁵ Ibid., paras 37–39, with reference to cases C-361/88 *Commission v Germany*; C-59/89 *Commission v Germany*, para. 19; and C-58/89 *Commission v Germany*.

⁶ Case C-404/13, *Client Earth v UK*, 19 November 2014, ECLI:EU:C:2014:2382, para. 58.

⁷ Case C-723/17, *Craeynest*, 26 June 2019, ECLI:EU:C:2019:533, paras 33 and 56.

⁸ Case C-752/18 (Grand Chamber), *Deutsche Umwelthilfe v Freistaat Bayern*, 19 December 2019, ECLI:EU:C:2019:1114 para. 38.

⁹ Case C-644/18 (Grand Chamber), *Commission v Italy*, 10 November 2020, ECLI:EU:C:2020:895, para. 80.

¹⁰ See Case C-237/07 25 July 2008 *Janecek*, EU:C:2008:447, para. 37, and Case C-404/13, *Client Earth v UK*, 19 November 2014, ECLI:EU:C:2014:2382, para. 55.

essence'¹¹ the protection of ambient air – with its aim to prevent premature deaths – is indissociable from the fundamental right to life under article 2(1) of the Charter of Fundamental Rights of the European Union (EU Charter of Fundamental Rights)¹² and the high level of environmental protection required under article 3(3) TEU, article 37 of the EU Charter of Fundamental Rights and article 191(2) TFEU. Measures which may impair the effective application of the Ambient Air Quality Directive are thus comparable, in their significance, with the serious interference with fundamental rights on the basis of which the Court already made other rules subject to strict review, suggested the Advocate General. In her conclusions of 5 May 2022 in *JP v Ministre de la Transition écologique*, Advocate General Kokott also invited the Court to affirm that limit values for pollutants in ambient air and the obligations to improve ambient air quality, under the AAQD and its predecessors, confer rights on individuals, under the meaning of an entitlement to compensation for adverse effects to health resulting from an established exceedance of the limit values.¹³

We dared to affirm that a subjective right to healthy air has emerged from the jurisprudence of the CJEU, within the meaning of the current Ambient Air Quality Directive, and that it is now even made indissociable from the fundamental right to life, with all the consequences this entails.¹⁴ However, on

¹¹ Case C-723/17, *Craeynest*, 26 June 2019, ECLI:EU:C:2019:533, para. 33:

As the Advocate General pointed out, in essence, in point 53 of her Opinion, the rules laid down in Directive 2008/50 on ambient air quality put into concrete terms the EU's obligations concerning environmental protection and the protection of public health, which stem, inter alia, from Article 3(3) TEU and Article 191(1) and (2) TFEU, according to which Union policy on the environment is to aim at a high level of protection, etc.

¹² Charter of Fundamental Rights of the European Union (2012) OJ C326, 391–407.

¹³ Case C-61/21 *JP v Ministre de la Transition écologique*, 5 May 2022, ECLI:EU:C:2022:359, Opinion of AG Kokott, para. 142:

[It] requires that the injured party proves a direct link between that adverse effect and his or her stay at a place where the respective applicable limit values were exceeded without there having been an air quality improvement plan which satisfied the requirements of Annex IV to Directive 96/62 or Section A of Annex XV to Directive 2008/50 and which also did not contain any manifest defects in other respects.

¹⁴ Delphine Misonne, 'The Emergence of a Right to Clean Air: Transforming European Union Law through Litigation and Citizen Science' (2021) 30 *RECIEL* 34–45; Ugo Taddei, 'A Right to Clean Air in EU Law? Using Litigation to Progress from Procedural to Substantive Environmental Rights' (2016) 18 *Journal of Environmental Law* 3–16; Ugo Taddei, 'Case C-723/17 *Craeynest*: New Developments for the Right to Clean Air in the EU' (2020) 32 *Journal of Environmental Law* 151–160; Sava Jancovic, 'Conceptual Problems of the Right to Breathe Clean Air' (2021) 22 *German Law Journal* 168–183; Ludwig Krämer, '480.000 Dead per Year Are Enough: The CJEU

22 December 2022, in the case *JP v Ministre de la Transition écologique* and in the specific context of the Francovich doctrine on State extra-contractual liability with regard to EU law, the Grand Chamber made an unexpected move backwards. It decided that the AAQD and its predecessors must be interpreted as meaning that they are not intended to confer rights on individuals, capable of entitling them to compensation from a Member State under the principle of State liability for loss and damage caused to individuals as a result of breaches of EU law attributable to that Member State.¹⁵ Those directives only pursue ‘a general objective of protecting human health and the environment as a whole’, according to the Grand Chamber.¹⁶

The Same Ambient Air Quality for the Whole Union

The abundant case law of the CJEU on the meaning of the Ambient Air Quality Directive is mainly organized around two of its articles: article 13 and article 23. Article 13 and its related annexes establish limit values for sulphur dioxide, PM10, lead, carbon monoxide, nitrogen dioxide and benzene.¹⁷ Article 23 imposes the adoption of air quality plans in zones and agglomerations where the levels of pollutants in ambient air exceed any limit value or target value, plus any relevant margin of tolerance. Moreover, provisions on measurement and models have also entered the sphere of judicial control.

It is important to note that limit values under article 13 of the Ambient Air Quality Directive are uniformly fixed for the European Union as a whole, without making any differentiation between countries, nor even between different types of ambient air ‘uses’ or functions. All Europeans are the ben-

Opens a New Way to Better Enforce Air Quality Laws’ (2018) 15(1) JEEPL 111–121; Aine Ryall, ‘Enforcing EU Environmental Law against Member States: Air Pollution, National Courts and the Rule of Law’ (2015) 6(2) European Journal of Risk Regulation 305–308. On international aspects, see: David R. Boyd, ‘The Human Right to Breathe Clean Air’ (2019) 85 Annals of Global Health 146; Yulia Yamineva, ‘Is Law Failing to Address Air Pollution? Reflections on International and EU Developments’ (2017) 26(3) RECIEL 189–200; Sava Jankovic, ‘The Still Emerging Universal Human Right to Adequate Air Quality’ (2020) Review of International, European and Comparative Law 18.

¹⁵ Case C-61/21 (Grand Chamber) *JP. v Ministre de la Transition écologique*, 22 December 2022, ECLI:EU:C:2022:1015, decision and para. 56.

¹⁶ Idem, para. 55. See Delphine Misonne, ‘Arrêt JP: les directives européennes sur l’air ambiant n’ont (done) pas (encore) pour objet de conférer des droits individuels aux particuliers’ (2023) Journal de droit européen 1(298) 188–194.

¹⁷ A limit value is a level fixed on the basis of scientific knowledge, with the aim of avoiding, preventing or reducing harmful effects on human health and/or the environment as a whole, to be attained within a given period and not to be exceeded once attained (AAQD, article 2(5)).

eficiaries of the same limit values, everywhere,¹⁸ for the listed pollutants, and are supposed to be equal in their legitimate expectations concerning the air they breathe. Air quality limit values must, in principle, be complied with at all times and anywhere in the European Union, says the Court.¹⁹ This is in sharp contrast to many other regimes on ambient air in the world, which allow differences between industrial and residential areas.²⁰ This also differs from the EU approach to water protection, where quality requirements vary according to the water uses (drinking water, bathing water, etc.). Zones and agglomerations exist under the Ambient Air Quality Directive but they are defined for the sole purpose of assessment and management, not for allowing any differentiation of air limit values or of alert thresholds.

Another important caveat concerns the type of judicial control through which interpretation was obtained from the CJEU. Infringement procedures against Member States and preliminary rulings requests emanating from national judges, with the purpose of obtaining unified interpretations at the scale of the European Union, were the main drivers. At their very source, one must observe that it is only because non-governmental associations and citizens decided to refer those many cases to the judges, through various channels, even though most ways were still very unsure or constrained,²¹ that answers were obtained. Associations and citizens, rather than governmental authorities or the European Commission, have thus proved to be the frontline guardians of the air we breathe, due to their faith in the power of law.

The result of their dedication and perseverance, not to say activism, impacts the role of national courts and tribunals today: they have been attributed the power to take ‘all necessary measures in respect of the national authority concerned’, and orders have accumulated in the last few years at the domestic level, imposing the adoption of adequate plans,²² including low emissions

¹⁸ Even if compliance with the limit values directed at the protection of human health shall not be assessed at locations enumerated by the AAQD, such as locations situated within areas where members of the public do not have access and there is no fixed habitation, or on the carriageway of roads; or on the central reservations of roads except where there is normally pedestrian access to the central reservation (AAQD, Annex III.A).

¹⁹ Case C-375/21, *Maritsa iztok 2*, 9 March 2023, ECLI:EU:C:2023:173.

²⁰ Eloise Scottford and Delphine Misonne, *Regulating Air Quality: The First Global Assessment of Air Pollution Legislation* (UNEP, 2021) 1–102.

²¹ Luc Lavrysen, ‘Standing. Who can sue to protect clean air?’ (conference on European Environmental Rights and their Enforcement: The Right to Clean Air, Paris, May 2017).

²² See, for instance, *Amis de la terre*, Council of State (France) 12 July 2017 No. 394254 ECLI:FR:CECHR:2017:394254.20170712.

zones, and even, as in Brussels, the installation of new measurement stations.²³ In that regard and in contrast to climate change litigation, one hardly ever hears complaints about the surge of a '*gouvernement des juges*' in relation to ambient air quality. This acceptance can be explained by the tight framework in which judicial action takes place: binding European Union-wide legislation, which must be implemented by Member States, in due respect of the principles of loyal cooperation and primacy of EU law over national regimes. The control is one of legality in light of European Union law, even if different kinds of cases have emerged more recently, calling upon civil law and the issue of liability.²⁴

The settled interpretation: an obligation to achieve limit values and to implement appropriate plans

On ambient air quality, the CJEU excels in providing a uniform application of EU law thanks to the cohesion and clarity it builds around its interpretation.

On article 13, it is now settled, for all listed pollutants, that limit values amount to *obligations to achieve a result* resting on the Member States and within a given period, and to subsequently maintain that result.²⁵ Exceeding limit values in ambient air is in itself sufficient for a finding to be made that there has been an infringement of the provisions of that article 13, in conjunction with the annexes.²⁶ This is true for all pollutants, as listed in the article, without the need to make any difference between them (even if the wording differs) as to the kind of obligations.²⁷ Once attained, a given limit must be maintained²⁸ and a partial downward trend is not a demonstration of compliance.²⁹ The objective of protection of human health is not left to the

²³ *Craeynest*, Court of first instance of Brussels 29 January 2021 No. 2016/3659/A.

²⁴ CA The Hague, *Milieudefensie and Stichting Adem v The Netherlands*, 7 May 2019, C/09/516573/HA ZA 16-975.

²⁵ Case C-644/18 (Grand Chamber), *Commission v Italy*, 10 November 2020, ECLI:EU:C:2020:895, para. 79: 'Member States are required to achieve the result referred to in article 13(1) of Directive 2008/50 and Annex XI thereto, that is, that the limit values laid down by those provisions are not exceeded.'

²⁶ *Idem*, para. 71, confirming Case C-488/15, *Commission v Bulgaria*, 5 April 2017, EU:C:2017:267, para. 69, and Case C-638/18, *Commission v Romania*, 30 April 2020, EU:C:2020:334, para. 68, and the case law cited.

²⁷ Case C-635/18, *Commission v Germany*, 3 June 2021, ECLI:EU:C:2021:437, para. 84; Case C-636/18, *Commission v France*, EU:C:2019:900, para. 77.

²⁸ Case C-644/18 (Grand Chamber), *Commission v Italy*, 10 November 2020, ECLI:EU:C:2020:895, para. 75: 'as is apparent from the very definition of "limit value" in Article 2(5) of Directive 2008/50, that value must, in order to avoid, prevent or reduce harmful effects on human health and/or the environment as a whole, be attained within a given time limit and not be exceeded once attained'.

²⁹ Case C-336/16, *Commission v Poland*, 22 February 2018, EU:C:2018:94, para. 65; Case C-638/18, *Commission v Romania*, 30 April 2020, EU:C:2020:334, para. 70.

sole discretion of the Member States (a national interpretation pleading for the gradual reduction of pollutants would, moreover, leave the achievement of the objective of protection of human health, referred to in article 1(1) of Directive 2008/50, to the sole discretion of the Member States, says the Court, ‘which is contrary to the intentions of the EU legislature, as is apparent from the very definition of the concept of “limit value”, set out in paragraph 75 of the present judgment, requiring that compliance be guaranteed within a given period and subsequently maintained’).³⁰

The achievement of that objective (protecting human health) falls under the control of the CJEU, based on the requirements of the directive, and of national courts. The limit values do already encompass a level of compromise: the Court explains that limit values were laid down by that directive in order to protect human health and the environment, *while taking full account* of the fact that air pollutants are produced by multiple sources and activities and that various policies, both at national and EU level, may have an impact in that regard.³¹ Therefore, the CJEU does not accept the arguments brought forward by Member States to exempt themselves from compliance due to various circumstances, not even those related to questionable EU policies on car type approval, nor those related to specific topographical and climatic features.

On article 23 and air quality plans, which must be adopted in case of exceedance of limit values, it is settled that, while Member States have a degree of discretion in deciding which measures to adopt (there is a notion of balance of interests governing the making of the requested plans: they are meant to incorporate a balance between the aim of minimizing the risk of pollution and the various opposing public and *private* interests),³² those measures must, in any event, ensure that the period during which the limit values are exceeded is kept as short as possible.³³ They need not ensure immediate compliance with those limit values but they must ensure that the period during which the limit values are exceeded is kept as short as possible. These terms ‘kept as short as possible’, says the Court, are stricter than previously applicable under Directive 96/62, which merely required the Member States to adopt measures to bring air

³⁰ Case C-644/18 (Grand Chamber), *Commission v Italy*, 10 November 2020, ECLI:EU:C:2020:895, para. 80.

³¹ *Idem*, para. 82. This resonates with the US case *Whitman v American Trucking Associations, Inc.*, case 531 US 457 (2001) where, by contrast, the Supreme Court of the United States decided that ‘the Clean Air Act contains no support for the view that Congress intended cost to be a relevant factor in the agency’s determinations in fixing air quality standards’.

³² Case C-237/07, 25 July 2008, *Janecek*, EU:C:2008:447, paras 45, 46; Case C-488/15, *Commission v Bulgaria*, 5 April 2017, EU:C:2017:267, para. 106; Case C-636/18, *Commission v France*, 24 October 2019, EU:C:2019:900, para. 79.

³³ Case C-644/18 (Grand Chamber), *Commission v Italy*, para. 136.

quality into line with the limit values for PM10 ‘within a reasonable period’.³⁴ On the basis of case-by-case analysis,³⁵ time spans of eight and ten years have been judged inappropriate. Article 23(1) must not be misinterpreted as ‘an additional scenario for a generalized, potentially indefinite extension of the deadline for complying with limit values which are intended to protect human health’.³⁶ Those plans must incorporate at least the information listed in the related annexes of that directive. The content of such plans, and not only their adoption, is a matter for judicial control. The CJEU invites national judges to verify whether plans are apt to keep exceedances of limit values as short as possible and, if not, to make judicial orders in that regard. The obligation is not only to adopt but also to implement appropriate measures in an air quality plan.³⁷

The Court also expanded its scrutiny to an apparently more technical part of the directive, measurement, and explained why it must also fall within judicial control, both on the location of sampling points and on the impact of exceedances at one sampling point.

On the geographical location of measurement stations, the Court decided that the very purpose of the Ambient Air Quality Directive would be compromised if sampling points were not established in accordance with the criteria laid down therein.³⁸ National authorities must choose the location of sampling points in such a way as to minimize the risk that incidents in which limit values are exceeded may go unnoticed.³⁹ In that regard also, the discretion of the competent national authorities is limited by the purpose and objectives of the directive. Since individuals are entitled to have a court verify whether national legislation and its application remained within the limits of the margin of discretion allowed in the Ambient Air Quality Directive when the location of sampling points was chosen, ‘the court designated for this purpose by national law also has jurisdiction to take all necessary measures in respect of the national authority concerned, such as an order, to ensure that such points are sited in accordance with the criteria laid down in that directive’.⁴⁰

The need to correctly measure the state of ambient air pollution is related to a concrete concern: because the Ambient Air Quality Directive aims to protect human health and, to this end, provides for measures to combat emissions of

³⁴ *Idem*, para. 149.

³⁵ *Idem*, para. 137.

³⁶ *Idem*, para. 153.

³⁷ *Idem*, para. 150.

³⁸ Case C-723/17, *Craeynest*, 26 June 2019, ECLI:EU:C:2019:533, para. 49.

³⁹ Case C-723/17, *Craeynest*, 26 June 2019, ECLI:EU:C:2019:533, para. 50.

⁴⁰ Case C-723/17, *Craeynest*, 26 June 2019, ECLI:EU:C:2019:533, para. 53.

pollutants *at source*,⁴¹ it is necessary to determine the actual air pollution to which the population or part of it is exposed and to ensure that appropriate measures are taken to combat the sources of such pollution, says the Court. Consequently, the fact that a limit value has been exceeded at a single sampling point is sufficient to trigger the obligation to draw up an air quality plan.⁴² The Grand Chamber also insists on that aspect in *Commission v Italy*: there is no de minimis threshold with regard to the number of zones in which an exceedance may be detected or with regard to the number of measuring stations in a given zone for which exceedances are recorded.⁴³ Because the zones concerned include the largest agglomerations in Italy, which have several tens of millions of inhabitants, ignoring this fact ‘would be tantamount to disregarding the objectives pursued by Directive 2008/50, in particular the protection of human health and of the environment as a whole’.⁴⁴

SPILLING-OVER POTENTIAL AND MUTUAL INFLUENCES

The impact of the CJEU case law on the Ambient Air Quality Directive is considerable on the transformation of policies at national level in the European Union that are meant to combat pollution by NO₂ and PM₁₀, through very concrete measures flourishing in many countries, such as on transport (restriction of car use (low emissions zones), bans on car use (diesel bans) or speed limits on traffic) and on agriculture (restrictions on agricultural discharge of nitrogen into the environment).

Due to the primacy of EU law, these harmonizing messages delivered by the CJEU are now also reflected in the jurisprudence of many national courts and tribunals, including at Supreme Court level, such as in Germany,⁴⁵ France,⁴⁶ and Belgium.⁴⁷

⁴¹ Recital 2 of the Directive 2008/50 and article 1.

⁴² Case C-723/17, *Craeynest*, 26 June 2019, ECLI:EU:C:2019:533.

⁴³ Case C-644/18 (Grand Chamber), *Commission v Italy* with reference to Case C-638/18, *Commission v Romania*, 30 April 2020, EU:C:2020:334, para. 74.

⁴⁴ Case C-644/18 (Grand Chamber), *Commission v Italy*, para. 97.

⁴⁵ Federal Administrative Court Germany 27 February 2018 – BVerwG 7 C 30.17 ECLI:DE:BVerwG:2018:270218U7C30.17.0.

⁴⁶ *Amis de la terre*, Council of State (France) 12 July 2017 No. 394254, ECLI:FR:CECHR:2017:394254.20170712 and the follow-up decision to impose penalties (ten million euros per semester) for non-compliance: Council of State (France) 10 July 2020, No. 428409, ECLI:FR:CEASS:2020:428409.20200710.

⁴⁷ Constitutional Court Belgium, case 43/2021, 11 March 2021, para. B. 32.1, by reference to article 23, al.3, 2° & 4° of the Belgian Constitution. Also Constitutional Court Belgium, case 37/2019 of 28 February 2019; Council of State Belgium case No.

However, we still miss the same dynamic as to the control and prevention of dozens of other harmful pollutants which also impact the air people breathe, but raise less litigation activism, for various reasons that should be further explored. Most cases brought before the CJEU on air quality concerned pollution arising from cars (like ozone or PM) or from mixed sources involving cars and agriculture in particular (NO₂).

Recent scandals like the impact on inhabitants provoked by the atmospheric emissions from industrial sites in Europe recall that, even if progress is made on the interpretation of one directive in particular, this does not yet encapsulate the whole story. Today, air quality is better protected against some pollutants than against others, even those that may be as harmful, or even more harmful, due to the way strengthened interpretations arose, little by little, with a focus on cities rather than on the countryside and industry.

The Industrial Emissions Directive⁴⁸ refers explicitly to health protection and is also supposed to put in concrete terms what a high level of environmental protection means for industrial installations. It mentions that *the competent authority shall in any case ensure that no significant pollution is caused and that a high level of protection of the environment as a whole is achieved*. The problem is that many of its provisions are like a tapestry still waiting to be woven. They are rather vague (take for instance the concept of ‘significant pollution’) and there is only scarce case law – demands for clarification not yet being frequently observed – on the meaning of its essential elements, as far as they could relate to human health protection and restrictions to administrative discretion, in relation to 52,000 installations in the European Union. Finally, on 9 March 2023, in the case *Maritsa iztok 2*,⁴⁹ the Court delves into the concept of significant pollution and ties it to the AAQD:

exceedance of the air quality limit values for SO₂ cannot be regarded as insignificant pollution, but must necessarily be held to be ‘significant pollution’ for the purposes of the fourth subparagraph of article 15(4) of Directive 2010/75, having regard to the objectives pursued by Directive 2008/50, designed to avoid, prevent or reduce harmful effects on human health and the environment as a whole.⁵⁰

254.571, 21 September 2022 and case No. 247.966, 30 June 2020. See Luc Lavrysen, ‘Air Quality Law in the EU and in Belgium’ in Riet Leysen et al. (eds), *Semper Perseverans : Liber Amicorum André Alen* (Intersentia, 2020) 881–896.

⁴⁸ Directive 2010/75/EU of the European Parliament and the Council on industrial emissions (integrated pollution prevention and control) of 24 November 2010, OJ L 334, 17.12.2010, 17–119, hereinafter: ‘Industrial Emissions Directive’.

⁴⁹ See above, n 19.

⁵⁰ Paras 46 and 38.

It decides that the competent authority must assess whether the setting of less strict emission limit values for air pollutants from a given installation would contribute to the exceedance of the air quality limit values for the concentrations of such sources of pollution in the zone or agglomeration concerned in accordance with article 13 of Directive 2008/50 and, if this should be the case, refrain from granting a derogation which would jeopardize compliance with environmental quality standards.

The proposed revision of the Industrial Emissions Directive⁵¹ does not make the regime much clearer on health-related pollution prevention (a detailed analysis is beyond the scope of the present chapter). Strangely enough, for it might tend to normalize situations of industrial pollution in Europe, the proposed revision suggests a regime for compensating situations where damage to human health has already occurred, to individuals or even groups of individuals, as a violation of national measures implementing the Directive.

Another key European law is the Directive on National Emissions Reductions Commitments,⁵² which is similarly governed by a need ‘to move towards achieving levels of air quality that do not give rise to significant negative impacts on and risks to human health and the environment’. As to related national emissions ceilings, attempts to gain clarity echoed and reproduced elements of the *Janecek* case in *Stichting Natuur en Milieu* in 2011, demonstrating how case law builds transversal influences and contributes to a more general dialogue. However, with regard to that legislation and in that very case, attempts to obtain stricter interpretations were severely curtailed by the CJEU (‘that directive is based on a purely programmatic approach under which the Member States enjoy wide flexibility as regards the choice of the policies and measures to be adopted or envisaged’).⁵³

By contrast to the considerable impact of the Habitat and Birds Directives on development projects today, based upon the requirement to ensure the integrity of protected sites, there is as yet no such plain black-and-white requirement to be found in relation to people’s exposure, and particularly to children’s exposure, were they to be at risk of project-related air pollution. Nature is better

⁵¹ Proposal for a Directive of the European Parliament and the Council amending Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) and Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste, COM/2022/156 final, see article 79a.

⁵² Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants, OJ L 344, 17.12.2016, 1–31.

⁵³ Case C-165/09, *Stichting Natuur en Milieu*, 26 May 2011, ECLI:EU:C:2009:393, para. 75.

protected than children today in environmental law, in terms of industrial air pollution. In the case *Commission v Germany* of 2006,⁵⁴ the Court condemns an incorrect transposition of article 6(3) of the Habitats Directive,⁵⁵ because the system put in place by national law on installations causing air pollutants is not, in the absence of established scientific criteria, capable of ensuring that the projects or plans relating to installations causing emissions which affect protected sites situated outside their area of impact do not adversely affect the integrity of those sites, within the meaning of article 6(3) of the Directive. In a case on nitrogen deposition, *Coöperatie Mobilisation for the Environment* in 2018,⁵⁶ the Court decides that ‘even below the threshold values or limit values at issue in the main proceedings’, it must be ascertained that no risk of significant effects is produced which may adversely affect the integrity of the sites concerned. There is no such discourse today in relation to the limitation of industrial air pollution affecting residential areas, recreation grounds or schools.

Should a connection be made between that notion of integrity, characteristic of nature protection law in the EU, and the absence of any impact on human health, in similar contexts of pollution control?

Interestingly, while it is the concern for human health guarantees that authorized the CJEU in *Commission v Italy* to declare that meeting limit values on ambient air should not be left to the discretion of national authorities, it is the notion of European heritage that deprives national authorities of a broad discretion to decide on the way they protect threatened habitats and species. Because they form part of the European Community’s natural heritage and because the threats to them are often of a transboundary nature, the adoption of conservation measures is a common responsibility of all Member States.⁵⁷

Approaches to air and nature join in the definition of obligations of results (in article 13 of the Ambient Air Quality Directive and in article 6 of the Habitats Directive) and in the need to maintain a status of quality/conservation once attained. Case law on the Habitats Directive is strict on the control of the content of related plans, as demonstrated in the field of nitrogen deposition, where it is established that in circumstances where the conservation status of a natural habitat is unfavorable, ‘the possibility of authorising activities which may subsequently affect the ecological situation of the sites concerned

⁵⁴ Case C-98/03, *Commission v Germany*, 10 January 2006, ECLI:EU:C:2006:3, para. 51.

⁵⁵ Directive (EU) 92/43 of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora OJ 1992 L 206.

⁵⁶ Case C-293/17, *Coöperatie Mobilisation for the Environment*, 7 November 2018, ECLI:EU:C:2018:882, para. 111.

⁵⁷ Case C-98/03, *Commission v Germany*, para. 59 and reference cited.

seems necessarily limited'.⁵⁸ On industrial pollution and ambient air quality standards, the *Maritsa iztok 2* case of March 2023 demonstrates that the Court is now moving in a similar direction. Asked to clarify the meaning of the apparently very broad derogation clause (article 15 of the Industrial Emissions Directive), allowing an opt-out of limit values based upon best available technologies in situations where such values would lead to disproportionately higher costs compared to the environmental benefits on account of the geographical situation of the installation or the technical characteristics thereof,⁵⁹ the Court explains, in 2023, that the derogation is

not intended to cover all situations in which compliance with the general emission limit values entails disproportionate costs for the operator of an installation. Such a derogation may be granted only if less strict emission limit values do not cause 'significant pollution' and a 'high level of protection of the environment as a whole' is achieved despite that derogation.⁶⁰

The competent authority must refrain from granting such a derogation when that derogation is capable of contributing to exceedance of the air quality standards defined pursuant to article 13 of Directive 2008/50 or being contrary to the measures included in the plan intended to ensure compliance with those standards and to keep the period of exceedance thereof as short as possible.⁶¹

NOVELTY IN CONTEXT

The strict interpretation of the Ambient Air Quality Directive, built on a special deference to human health, is a novelty by contrast to the attitude which was until recently usually observed in Europe where questions were asked on the attitude of public authorities towards ambient air pollution prevention. The stumbling block was the wide margin of appreciation left to the States where complexity, mainly political, imposed difficult choices. That discourse became established and prevailed for years. It discouraged the idea of bringing air quality issues before a judge, in order to challenge the lack of adequate preventative measures, let alone the difficult question of access to justice.

If we turn to the judgments of the European Court for Human Rights in Strasbourg, it is noticeable – in the absence of direct and explicit recognition of a right to a healthy environment in the European Convention on Human

⁵⁸ Case C-293/17, *Coöperatie Mobilisation for the Environment and Vereniging Leefmilieu*, ECLI:EU:C:2018:882, para. 103.

⁵⁹ Article 15, §4 Industrial Emissions Directive.

⁶⁰ Para. 47.

⁶¹ Case C-375/21, *Maritsa iztok 2*, 9 March 2023, ECLI:EU:C:2023:173, decision.

Rights⁶² – that a certain degree of pollution is still considered as normal and not falling anyway within the judicial power of the Court. But a change in attitude, towards less indulgence, can also be observed, where source-related atmospheric pollution (rather than diffuse pollution) is concerned.

In the sense of maintaining a status quo, one can mention the decision in *Ward v United Kingdom*, 2004⁶³ where it was decided that ‘while increasingly authorities are taking on responsibility for minimising or controlling pollution, no right can be derived from Article 8 that they provide housing, or conditions for housing, *that meet particular environmental standards* or in any particular location’. The ECtHR observed that some measures had been taken against air pollution from cars, like the bans on leaded petrol, and found no basis for imposing any obligation on the authorities above and beyond those existing in domestic law. In the decision in *Greenpeace v Germany*, 2009,⁶⁴ the Court admitted that soot and respirable dust particles can have a serious detrimental effect on health, especially in densely populated areas with heavy traffic, and that the applicants⁶⁵ were all sufficiently affected by soot and dust to be able to claim to be victims of the alleged violation under article 8 of the Convention. However, the Court could not find any manifest error of appreciation by the national authorities in refusing to take the specific measures requested by the applicants for curbing the pollution further. It was uncontested that Germany had taken measures to curb diesel-vehicle emissions and the documents submitted did not demonstrate that Germany, when it refused to take the specific measures requested by the applicants, exceeded its discretionary power by failing to strike a fair balance between the interests of the individual and those of the community as a whole. Hence, the avenue of human rights, as guaranteed by the ECHR, was not appropriate for deciding that authorities were in breach of a need to fill the content of their positive duties differently, in relation to air quality planning.

In *Grimkovskaya v Ukraine*, 2011,⁶⁶ the applicant complained that by routing a motorway via her street and by failing to organize the road’s proper environmental monitoring and management, the municipal authorities had breached her right to enjoyment of her home and her private and family life.

⁶² Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (adopted 4 November 1950, entered into force 3 September 1953), hereinafter: ‘ECHR’.

⁶³ *Ward v The United Kingdom* (App no 31888/03) Decision as to the admissibility (ECHR 9 November 2004).

⁶⁴ *Greenpeace e.V. and Others v Germany* (App no 18215/06) Decision as to admissibility (ECHR 12 May 2009).

⁶⁵ Except for the applicant Greenpeace e.V.

⁶⁶ *Grimkovskaya v Ukraine* (App no 38182/03) (ECHR, 21 July 2011).

The Court considered that it would be going too far to render the government responsible for the very fact of allowing cross-town traffic to pass through a populated street or to establish the applicant's general right to free, new housing at the State's expense. At most, on procedural grounds, due to the lack of an adequate environmental feasibility study and lack of a meaningful opportunity to contribute to the related decision-making processes, the Court accepted that no fair balance was struck between the applicant's rights guaranteed by article 8 ECHR and the interests of the community.

More interestingly, in *Băcilă v Romania*⁶⁷ in 2010, a case about a factory discharging dangerous chemical substances into the atmosphere, the Court decided that the interest of maintaining the economic activity of the largest employer in the city could not outweigh the right of the persons concerned to enjoy a balanced and healthy environment. The existence of serious and proven consequences for the health of the applicant and the other inhabitants of Copșa Mică placed a positive obligation on the State to adopt and implement reasonable and adequate measures capable of protecting their well-being. Despite the margin of appreciation left to the State, the Court recognized the breach of article 8 ECHR. Likewise, in *Jugheli and Others v Georgia*,⁶⁸ in 2017, a case concerning a plant failing to minimize the impact of toxic substances emitted into the air and where no effective steps were taken by the competent authorities, the Court of Strasbourg condemned the passive attitude adopted by the government in the face of the resultant air pollution. 'Notwithstanding the margin of appreciation available to the national authorities in cases involving environmental issues', the Court admitted that the respondent State did not succeed in striking a fair balance between the interests of the community in having an operational thermal power plant and the applicants' effective enjoyment of their right to respect for their home and private life, and recognized a violation of article 8 of the Convention.

However, those last judgments differ from the CJEU case law in that they only condemn the worst cases of pollution and do not enter into the detail, like under European Union law, of the need to precisely comply with given limit values and any related aspects.

JUGGLING WITH INTERESTS AND RIGHTS

Conflicts between restrictions on car use due to air quality and health reasons on the one hand and the right of ownership of these cars on the other hand are more and more frequently brought forward, but also cast aside, by national

⁶⁷ *Băcilă v Romania* (App no 19234/04) (ECHR, 30 March 2010).

⁶⁸ *Jugheli and Others v Georgia* (App no 38342/05) (ECHR, 13 July 2017).

supreme courts in Europe. The Belgian Constitutional Court states that, in order to meet the constitutional obligation resting on the lawmaker's shoulders to guarantee the right to health protection and the right to the protection of a healthy environment, it is of particular importance to avoid, prevent and reduce emissions of harmful atmospheric pollutants.⁶⁹ The ambition to adopt stricter measures, especially when current limit values are less strict than the current guidelines of the World Health Organization,⁷⁰ does not necessarily mean an infringement of other rights is being caused, such as the right to own a car. The case dealt with the creation of low emissions zones in the Walloon region. In the court's verification of compliance with the proportionality principle, the observation that a traffic ban is introduced gradually over time according to the age and exhaust emission behavior of the vehicles concerned and includes exceptions plays a role.⁷¹

An appropriate timing thus definitely matters in that kind of exercise, even if in a paradoxical way. On the one hand, the settled case law of the CJEU requires, as mentioned in the Ambient Air Quality Directive and explained above, that situations of exceedances must be kept as short as possible, through the adoption of appropriate plans. On the other hand, national judges consider that conflicts of rights are not unbalanced if gradual implementation over time has been provided for. However, in *Commission v Italy* in 2020, the CJEU rejected the argument of proportionality put forward by the Italian Republic as an excuse for long deadlines in bringing the exceedances of limit values to an end.⁷²

Another tension point concerns conflicting human rights, like the right to an effective remedy (and the correct implementation of the Ambient Air Quality Directive) versus the right to liberty in an atypical case such as *Deutsche Umwelthilfe*.⁷³ The CJEU decided that EU law empowers and even obliges a national court to have recourse to the privation of liberty of a public official, like a Minister-President, if this is provided for on a domestic legal basis, which is sufficiently accessible, precise and foreseeable in its application. Make the most of what you have on enforcement at the national level, said the Grand Chamber in essence, as the right to an effective remedy is all the more important because, in terms of air quality, failure to adopt the measures

⁶⁹ Constitutional Court Belgium, case 43/2021, 11 March 2021, para. B. 32.1 with reference to article 23, al.3, 2° and 4° of the Belgian Constitution.

⁷⁰ Ibid., para. B.33.

⁷¹ Constitutional Court Belgium, case 43/2021, 11 March 2021.

⁷² *Commission v Italy*, paras 153–155.

⁷³ Delphine Misonne, 'Arm Wrestling around Air Quality and Effective Judicial Protection. Can Arrogant Resistance to EU Law-Related Orders Put You in Jail?' (2020) 17(4) JEEPL 409–425.

required by that directive would endanger human health. This did not fall on deaf ears, as observed in the judgment of the French Conseil d'Etat of 10 July 10 2020,⁷⁴ where the highest administrative jurisdiction urged the French State to take measures under the threat of the highest financial penalty ever imposed (ten million euro per semester) for failure to comply, in due time, with a previous judicial decision meant to impose compliance with EU law on air quality standards and adequate associated planning, upon the request of an environmental group. Penalty payments (*astreintes*) have indeed been imposed by two new judgments of 4 August 2021⁷⁵ and 17 October 2022.⁷⁶

Interestingly, in *Deutsche Umwelthilfe*, the Court also invited the NGO to test the *Francovich* route,⁷⁷ and engage in another kind of judicial battle, from a fresh angle: the principle of State liability for loss or damage caused to individuals as a result of breaches of EU law for which the State can be held responsible, 'as that principle is inherent in the system of the treaties on which the European Union is based'.⁷⁸

The suggestion again connected air quality to the issue of rights which individuals derive from EU law and to the importance of their full effectiveness. However, as already mentioned, the Grand Chamber abruptly closed the door it had itself opened. It decided that the ambient air quality directives are not intended to confer rights on individuals capable of entitling them to compensation from a Member State under the principle of State liability for loss and damage caused to individuals as a result of breaches of EU law attributable to that Member State,⁷⁹ while altogether maintaining its position in *Janecek* and *Client Earth* on the possibility for individuals to sue a local authority for the lack of adequacy of its ambient air quality plans. That Grand Chamber judgment remains unclear on the very meaning of the notion of 'rights', including in its translations.⁸⁰ It adds to the *Francovich* conditions the requirement that

⁷⁴ *Amis de la terre*, Council of State (France) 10 July 2020 No. 428409, ECLI:FR:CEASS:2020:428409.20200710.

⁷⁵ *Amis de la terre*, Council of State (France) 4 August 2021, No. 428409, ECLI:FR:CECHR:2021:428409.20210804.

⁷⁶ *Amis de la terre*, Council of State (France) 17 October 2022 No. 428409 ECLI:FR:CECHR:2022:428409.20221017.

⁷⁷ Case C-6/90 and C-9/90, *Francovich and Others* [1996] EU:C:1991:428, para. 35; Case C-46/93 and C-48/93 *Brasserie du pêcheur* and *Factortame* [1996] ECLI:EU:C:1996:79, paras 20, 39 and 52, and Case C-168/15 *Tomášová* [2016] ECLI:EU:C:2016:602, para. 18 and the case law cited.

⁷⁸ Para. 54.

⁷⁹ Case C-61/21 (Grand Chamber), *JP v Ministre de la Transition écologique*, 22 December 2022, ECLI:EU:C:2022:1015.

⁸⁰ At paragraph 62, the wording 'faculté ainsi reconnue par la cour' in the French original version becomes a 'right' in the English version:

the breach of the EU obligations must be capable of *altering a legal situation* which those provisions sought to establish for those persons, narrowly understood as legally protected asset-related interests, while the Advocate General explained that such kind of failure

infringes a legal interest which is much more important than the abovementioned asset-related interests. This is because everyone has the right to respect for his or her physical and mental integrity, which is laid down in Article 3 of the Charter of Fundamental Rights and is ranked in first position in relation to the other legal interests,⁸¹

and recalled that the case law on State liability is not based on the protection of financial interests of the persons concerned, but is intended to ensure the full effectiveness of EU law by protecting the rights that it confers on individuals.

CONCLUSIONS AND FUTURE PROSPECTS

Air quality law has started to move interestingly but still unevenly beyond the former status quo in the European Union. Pollutants are still treated differently, depending on their legal framing. For several of them, considerable progress has been made recently thanks to clever and strategic litigation processes that radically transformed the approach to the Ambient Air Quality Directive and created the conditions, after so many years of dormancy, for its effective implementation at Member State level. The effects of such an awakening are felt in many big cities, in relation to transport policies. The litigation wave has clearly demonstrated that, without case law, such legislation would never have even started to live up to the expectations.⁸²

The driving force for such advances is found in the relation air quality builds with health and life and, therefore, calls for repetition. Because many European laws, besides the Ambient Air Quality Directive, also have an impact on the

the right thus recognised by the Court in its case-law, stemming in particular from the principle of effectiveness of EU law, effectiveness to which affected individuals are entitled to contribute by bringing administrative or judicial proceedings based on their own particular situation, does not mean that the obligations resulting from article 13(1) and article 23(1) of Directive 2008/50 and the analogous provisions of the earlier directives were intended to confer individual rights on interested persons, for the purpose of the first of the three conditions referred to in paragraph 44 above, and that the breach of those obligations is, in consequence, capable of altering a legal situation which those provisions sought to establish for those persons.

⁸¹ Case C-61/21 *JP v Ministre de la Transition écologique*, 5 May 2022, ECLI:EU:C:2022:359, Opinion of AG Kokott, para. 91.

⁸² See Ugo Taddei, n 14, on the origins of this kind of litigation process.

composition of the air we breathe and pursue altogether an explicit objective of health protection, the solid framework that has over recent years been patiently built, bit by bit, will necessarily be inspirational for any further developments; unless the framework falls like a house of cards, due to subtle changes in timelines and deadlines, made by the lawmakers themselves, on the occasion of legislative revisions or recasts.

Limit values have gained importance in case law because they are applicable now. The draft recast of the Ambient Air Quality Directive foresees new time frames for meeting limit values. Annex I, table 2, contains current limit values to be attained by ‘insert transposition deadlines’ [*sic*], which could mean not earlier than two years after the entry into force of the directive, according to article 32.1. Annex I, table 1, contains new limit values for the protection of human health, to be attained by 1 January 2030 – or even later for some pollutants due to opt-out derogations (for instance where there is a high share of low-income households in the air quality zone concerned, in a State with a lower national GDP per capita than the EU average!⁸³) that could even extend till 2040. If confirmed, such time frames could pull the rug from under the feet of potential litigants on ambient air quality and might render part of the recent case law advances ineffective.

While we started writing our chapter with potential progress in mind, our last words are devoted to fears of legislative regression, were the European Union to take the role of Penelope destroying at night what she wove during the day, in an effort to remain faithful to its own Green Deal deadlines that are articulated around the year 2030 and even 2050. Healthy air is definitely a matter of time and appropriate timing. Any changes backwards in that regard might question the legality of the chosen level of protection.

⁸³ Council, Interinstitutional file 2022/0347, Mandate for negotiations with the European Parliament, 9 November 2023, article 18.1. of the proposal.