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CASE NOTES

Air Pollution *as a Whole*: The Court of Justice Strengthens Environmental Standards in the Ambient Air Quality Directive over Contrasting Industrial Emissions Directive Derogations

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Case C-375/21, Sdruzhenie' Za Zemyata – dostap do pravosadle' and Others, [2023] ECLI:EU:C:2023:173

Abstract

On 9 March 2023, the Court of Justice (Second Chamber) delivered a preliminary ruling about the coordination of two European Union measures against air pollution: the Industrial Emissions Directive and the Ambient Air Quality Directive. Upon assessment, the Court reinforced the mandatory nature of the air quality limit values vis-à-vis possible derogations foreseen in the Industrial Emissions Directive. In this case, both AG Kokott and the Second Chamber affirmed the primacy of the air quality standards. However, this Case Note finds that slightly different reasoning between the AG Opinion and the final Judgment reveals differing underlying approaches. Whilst the AG focuses on air quality plans and leaves more room for discretion to national authorities, the final Judgment anchors the coordination of the two Directives to strict and objective pollution limit values, further strengthening the Ambient Air Quality Directive as an effective instrument of environmental protection litigation.

Keywords: Air pollution; air quality plans; best available techniques; causal link; environmental standards; Industrial Emissions Directive derogations; preliminary ruling; strategic litigation in EU environmental law

Articles 3, 14, 15(3), 15(4), 18 of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), OJ L 334, 17.12.2010, pp 17–119, the "IED"

Articles 1, 2, 13, 23 of 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, OJ L 152, 11.6.2008, pp 1–44, the "AAQD"

I. Introduction: coordinating two rules – the Industrial Emissions Directive and the Ambient Air Quality Directive

Air pollution represents one of the most sensitive issues in environmental protection and climate change, having major impacts on human health and several ecosystems. The

Industrial Emissions Directive 2010/75/EU (IED)[1] and the Ambient Air Quality Directive 2008/50/EC (AAQD)[2] are two cornerstones of European Union (EU) environmental law and policy in guaranteeing high standards for clean air.

The two Directives have different yet overlapping scopes. The IED covers emissions (ie "the direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into air, water or land").[3] With regard to air pollution, the Directive regulates the entry into the atmosphere of specific polluting substances[4] *directly at the source*, such as the chimney of a combustion plant. Essentially, the IED establishes the obligation for the installation to hold a permit issued by national environmental authorities, aiming at achieving "a high level of protection of the environment as a whole" through specific emission parameters (eg the "emissions limit value").[5] All conditions underlying the permit award refer to best available techniques (BAT) criteria.[6] The BAT are technologies or methods that most effectively allow for the prevention or reduction of impacts to the environment based on the current scientific developments under "economically and technically viable conditions, taking into consideration the costs and advantages" and accessibility by the industrial operator.[7]

The AAQD does not focus on emissions at the source but on "concentrations of a pollutant in ambient air",[8] evaluating the impacts of specific pollutants on people and the environment through representative sampling points. The Directive also considers human health and "the environment as a whole" as common goods to safeguard.[9] With the "limit values", the AAQD defines a concentration level "to be attained within a given period and not to be exceeded once attained".[10] Each Member State commits to bringing and keeping the concentrations of determined pollutants below the limits set. Therefore, achieving such standards represents an obligation of result.[11] Local "air quality plans" shall set out measures to attain those values. Since the limit values must not be exceeded once attained, the air quality plans guarantee that a potential exceedance is kept as short as possible.[12]

II. The facts (and the technicalities) of the case

In the present case, the Supreme Administrative Court of Bulgaria filed a request for a preliminary ruling regarding the interpretation of the two Directives for their application in the context of the thermal power plant "Maritsa-iztok 2 EAD", situated in proximity to the village of Galabov, approximately 50 km from Bulgaria's borders with Greece and Türkiye.

[1] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), OJ L 334, 17.12.2010, pp 17–119, hereafter also "Industrial Emissions Directive" or "IED".

[2] 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, OJ L 152, 11.6.2008, pp 1–44, hereafter also "Ambient Air Quality Directive" or "AAQD".

[3] Art 3(4) of the IED.

[4] A substance being "any chemical element and its compounds" according to Art 3(1) of the IED, and with the exception hereby affirmed.

[5] For the definition of "emission limit value" under the IED, see its Art 3(5), which reads "the mass, expressed in terms of certain specific parameters, concentration and/or level of an emission, which may not be exceeded during one or more periods of time".

[6] Recital (12) of the IED.

[7] See Art 3(10) of the IED.

[8] Art 2(3) of the AAQD.

[9] Art 1(1) of the AAQD.

[10] Art 2(5) of the AAQD.

[11] G Van Calster and L Reins, *EU Environmental Law* (Northampton, MA, Edward Elgar Publishing 2017) p 244.

[12] Art 23(1) of the AAQD.

The plant can only be fuelled with local lignite, which produces highly polluting sulphur emissions (especially sulphur dioxide (SO_2), a pollutant regulated in both Directives), despite each generating unit being equipped with desulphurisation units. In fact, in the plant area (south-east Bulgaria), the concentration of SO_2 consistently exceeds limit values and alert thresholds. The degraded situation in the local atmosphere eventually resulted in a successful action for infringement brought against Bulgaria for failing to fulfil the obligations under the AAQD.[13]

In November 2018, the Bulgarian authorities had already taken measures to reduce SO_2 pollution, with a target desulphurisation level of 98%. This target offered a lower rate than the BAT standard for SO_2 emissions, equal to 98.32%. The latter level was also necessary to meet the SO_2 emission limit values under the IED.[14] Moreover, despite these targets, one month later, the Bulgarian Executive Agency for the Environment updated the plant "Maritsa-iztok 2 EAD" permit and lowered the standards even more, envisaging desulphurisation targets of 97% and 97.5% for the different units.

What might look like a minor technical detail entails, in reality, significant consequences. To understand these rates, one must consider that a slight percentage variation has serious repercussions. Increasing the desulphurisation rate by 1% (namely, from 97% to 98%) results in cutting the SO_2 emissions by a third. However, the costs of desulphurisation vary significantly: a 98.32% level corresponds to a €156 million expense against the €20 million needed to reach a 97% rate.[15]

The derogation imposed in the renovated permit had a specific legal basis in Article 15(4) of the IED, which allows less strict emissions limit values when the BAT standards result in disproportionately higher costs compared to the environmental benefits.

In the aftermath of the renewal of the permit, an environmental association Za Zemyata – dostap do pravosadie (For the Earth – Access to Justice) filed a case before the Bulgarian Administrative Court of Stara Zagora to challenge the permit. The local court dismissed the action in August 2020, refusing to assess the content of the Municipality of Galabovo's air quality plan. Moreover, the Court considered that the expense required to reach the desulphurisation target of 98.32% was excessive compared to the environmental advantages to be thus obtained.

Against the dismissal, a trans-border coalition of environmental non-governmental organisations (NGOs) formed for the public interest to pursue legal action further. The Greek association The Green Tank and a Greek individual joined the already mentioned Za Zemyata Bulgarian association. They placed an appeal before the Supreme Administrative Court of Bulgaria against the first instance court's decision. The Bulgarian Supreme Administrative judges referred the case to the Court of Justice.[16]

III. AG Kokott Opinion and the Judgment of the Court: same outcome, but differing reasoning

The request submitted to the Court of Justice tackles technical but fundamental questions: whether the stricter limits under the AAQD should prevail over the derogations granted

[13] Case C-730/19, *European Commission v. Republic of Bulgaria "Limit values SO_2"* [2022] ECLI:EU:C:2022:382.

[14] The emission limit values under the IED differ from the limit values under the AAQD, the latter of which being parameterised on concentration in the ambient air. See Art 3(5) of the IED and Art 2(5) of the AAQD.

[15] AG Opinion, paras 30 and 41. For an exhaustive reference to the BATs applicable to large combustion plants, as well as other regulated sources of pollution, see the relevant BAT Reference document (BREF) by the Joint Research Centre and the BAT Conclusions by the European Commission, regularly updated and available on the website of the European Integrated Pollution Prevention and Control Bureau (EIPPCB) at <https://eippcb.jrc.ec.europa.eu/reference> (last accessed 31 January 2024).

[16] Judgment paras, 22–33 and AG Opinion, paras 21–31.

under the IED. This first point leads to a further, subtle question: where the highest standards of the AAQD prevail, should the derogation be declared unlawful because it contributed to the exceedances of the AAQD limit values *directly* (under Article 13 of the AAQD) or because it violates the air quality plan (established under Article 23 of the AAQD), which enforces the same limit values?[17]

Under Article 15(4) of the IED, the authority may set less strict emission limit values. The derogation is possible (1) only when applying BAT standards causes disproportionately higher costs compared to the environmental benefits (first subparagraph). Moreover, (2) 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 (fourth subparagraph). Finally, (3) Article 15(4) must be applied without prejudice to Article 18, which requires applying even stricter conditions than the BAT benchmark when an environmental quality standard requires so (Article 15(4), first subparagraph).[18]

AG Kokott focused her analysis on the role of air quality plans.[19] The Directive does not specify when pollution is "significant", nor does it indicate a specific benchmark for the high level of environmental protection as a whole. However, they must be respected "in any case". AG Kokott reads this provision in the light of Recital 18 of the AAQD, which urges taking into "full account" the objectives of the AAQD where permits are granted under the IED. Therefore, the limit values established under the AAQD can be considered a benchmark for assessing "significant" pollution and for a "high level of environmental protection as a whole".[20]

A vital issue in this assessment is the causal link between the IED permit derogation and the exceedance of the SO_2 limit values of the AAQD in the Municipality of Galabovo. The power plant at issue is only the biggest of four similar plants contributing to the SO_2 levels in the air, together with the pollution caused by other sources, including private households.[21] Can we consider the desulphurisation derogation as the cause of the generalised exceedance of the SO_2 limit values in the Municipality of Galabovo? According to AG Kokott, this question did not need an answer since the national authorities can grant a derogation only if "in any case" it does not cause significant pollution and guarantees a high level of environmental protection.[22] The derogation depends on a comprehensive determination of the permissible emissions of all polluting sources, whose sum must not cause an exceedance of the air quality limit values.[23] In her view, this analysis must result from the air quality plans. Through them, the responsible authorities balance the interests at stake and adopt measures accordingly. In so doing, the authorities enjoy some flexibility, limited by the strict mandatory nature of the AAQD obligation to maintain the exceedances for as short a duration as possible.

Furthermore, Article 15(4) of the IED imposes that the derogation is possible "without prejudice to Article 18" of the same Directive. This norm provides additional requirements: "When an environmental quality standard requires stricter conditions [than the BAT standards], additional measures shall be included in the permit, without prejudice to the other measures which may be taken to comply." In light of AG Kokott's reasoning, the AAQD represents those "environmental quality standards" requiring stricter conditions. Thus, again, the instrument to impose the "stricter conditions" mentioned is the air quality plan. In synthesis, a derogation is possible under an adequate air quality plan.[24]

[17] See AG Opinion, para 43.
[18] Emphasis added.
[19] See Art 23 of the AAQD.
[20] AG Opinion, paras 51 et sqq.
[21] AG Opinion, paras 60 et sqq.
[22] AG Opinion, para 62.
[23] AG Opinion, para 63.
[24] AG Opinion, paras 81–90.

The analysis of the judges differed in some key details. The Court strongly reaffirmed the obligation to establish an air quality plan. In doing so, it also confirmed the abovementioned Judgment rendered in May 2022 about the degraded air quality situation in this area.[25] However, this preliminary ruling presented a more significant focus on the standards of the AAQD that was not mediated by its air quality plans.

The judges agreed with the Advocate General that the limit values of the AAQD substantiate the meaning of "significant pollution" in the IED. Moreover, they stressed the importance of the "high level of protection of the environment *as a whole*". The judges highlighted the importance of the precautionary principle, which includes the obligation to provide for *preventative* actions. Therefore, the derogation cannot be granted simply because it *contributes* to the exceedance.[26] The "granting of a derogation under Article 15(4)" of the IED "requires a comprehensive assessment taking account of all pollutants and their *cumulative effect*, in order to ensure that even if a derogation is granted for one of the sources, the sum total of their emissions does not cause any exceedance of the air quality limit as defined by" the Directive.[27] Ultimately, the Court invokes the AAQD standards directly: the environmental authorities must assess whether the prospective derogation would contribute to an exceedance. If yes, they should refrain from granting such a derogation.[28] Furthermore, the Court adds that where the limits are exceeded, the derogation may be granted under a duly implemented air quality plan, as such plans represent the framework of an "exceedance context".[29]

IV. Pollution is in the details

The Court of Justice considered the protection of the environment "as a whole" as the cornerstone of its reasoning. This reflects multiple passages of the two Directives. The Court, by affirming the necessity of taking into consideration the "cumulative effect" of all pollutants vis-à-vis the environmental protection *as a whole*, ultimately preserved the basic principles of environmental law. The system of derogations under the IED has already raised some doubts in the literature. The best *available* techniques – elaborated through coordination with industry rather than imposition – are already per se developed to include any necessary socio-economic considerations.[30] Article 15(4) then offers a further layer of exception to be interpreted strictly not to hinder the high level of environmental protection as an objective of the Directive.[31] In this case, the Court intervened to limit the margin of appreciation regarding this exception.

Thus, the intervention of the Court limited the margin of appreciation left to the national authorities. Bulgaria must establish adequate air quality plans and comply with the air quality limit values when issuing an IED permit. Nevertheless, pollution, as with the devil, is in the details. Relying on the air quality plans leaves some discretion to the national authorities regarding the policy to adopt within all of the relevant standards. Air

[25] C-730/19, *Commission v. Bulgaria*, supra, note 13.

[26] Judgment, para 52.

[27] Judgment, para 54 (emphasis added).

[28] Judgment, para 62.

[29] Judgment, para 63.

[30] D Langlet and S Mahmoudi, *EU Environmental Law and Policy* (Oxford, Oxford University Press 2016) p 200. The so-called "Sevilla process" elaborating BAT standards is debated in the literature. For even more critical remarks, see A Zeri, "Deconstructing the Industrial Emissions Directive's (2010/75/EU) regulatory standards: a tale of cautious optimism" (2013) 2(1) UCL Journal of Law and Jurisprudence 187.

[31] J Sanden, "Coherence in European Environmental Law with Particular Regard to the Industrial Emissions Directive" (2012) 21(5) European Energy and Environmental Law Review 232–35. This author has already highlighted possible threats to a coherent IED enforcement with regards to the combined application of the IED with the Water Framework Directive.

quality plans have territorial scope. This local dimension implies a coordination duty for the Member States upon their territories since disconnected plans can jeopardise the effectiveness of the Directives. The Advocate General acknowledged it in her Opinion.[32] So did the judges in the Chamber's reasoning. One of the virtues of the Directives is precisely the space for policy choices being left to national and local authorities. Therefore, reducing their margin of appreciation, even if only with regards to the approach used, should be a solution to be adopted only with caution. However, here lies the divergent approach between the Chamber and the Advocate General: according to the judges, the derogation is to be evaluated directly in the light of the limit values. The respect for the air quality plan appears in this analysis as a simple "consequence" of this primary obligation – as a reaction to an exceedance.

Nevertheless, the air quality plan still represented a benchmark in this case, especially regarding the desulphurisation policy decided thereby. On the one hand, the Court does not intervene in the content of the policy choices. On the other hand, it seems that the Court chose a stronger anchor as an emergency break. The strict obligation of establishing air quality plans is an issue that EU judges know very well, causing struggles vis-à-vis some (sub)national authorities. AG Kokott and the judges mention in their reasoning the infringement proceeding *Commission v. Bulgaria*,[33] in which the same national and local authorities lacked an adequate plan. However, this is not the first case of strategic litigation being filed by NGOs relying on the obligation to establish air quality plans and action plans resulting in preliminary questions. For instance, the Judgment[34] in the case *Deutsche Umwelthilfe*, analysed previously by the author,[35] even touched upon the coercive detention of government officials, who systematically refused to establish such plans. Therefore, behind the Court's differing reasoning one can read an attempt to anchor the implementation of the environmental EU policy to a more objective and stricter parameter by referring to the limit values directly.[36]

Lastly, from a broader perspective of strategic litigation, this case shows the decisiveness of the Court when adjudicating on pollution. The leading case *Janecek*[37] in 2008 opened wider access to justice, establishing the right for a concerned individual to require the competent national authorities to draw up an action plan.[38] Together with the mentioned *Commission v. Bulgaria* and *Deutsche Umwelthilfe*, the case law shows, as has already emerged in the literature, that the AAQD can be an effective instrument in the toolbox of environmental plaintiffs.[39] It is even more important if one thinks that ex post damage actions have particularly limited efficacy. Effective actions are needed to "substantiate the commitments" of decision-makers towards environmental and climate targets.[40] This Judgment contributes to the further strengthening of the AAQD as a basis for strategic litigation. By leveraging the protection of the environment "as a whole" to be respected "in any case", the Court's reasoning re-sizes the importance of the causal link

[32] AG Opinion, para 67.

[33] C-730/19, *Commission v. Bulgaria*, supra, note 13.

[34] Case C-752/18, *Deutsche Umwelthilfe eV v Freistaat Bayern* [2019] ECLI:EU:C:2019:1114.

[35] B Hess and W Bruno, "Judgment of the Court of Justice of the European Union (Grand Chamber) of 19 December 2019, Deutsche UmWelthilfe eV v Freistaat Bayern, C-752/18" in D Sarmiento, H Ruiz Fabri and B Hess (eds), *Yearbook on Procedural Law of the Court of Justice of the European Union – 2021* (3rd edition, MPILux Research Paper Series 2022 (5)) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4212945> (last accessed 3 December 2023).

[36] See Judgment, para 67.

[37] Case C-237/07, *Dieter Janecek v Freistaat Bayern*, [2008] ECLI:EU:C:2008:447.

[38] Van Calster and Reins, supra, note 11, 245.

[39] K Pedrosa and B Vanheusden, "EU Air Pollution Law: Comprehensive but Insufficient" in M Peeters and M Eliantonio (eds), *Research Handbook on EU Environmental Law* (Cheltenham, Edward Elgar 2020) p 311.

[40] M Clément, *Droit Européen de L'Environnement: Jurisprudence Commentée* (Brussels, Bruylant 2021) p 399.

between the pollution stemming from this single industrial installation (amongst many) and the degradation of the ambient air in the surrounding towns. It is unnecessary to assess *the extent to which* the single plant contributes to severe pollution. Being "capable of contributing to the exceedance" per se is sufficient to preclude the granting of a derogation. The direct duty of the authorities is to safeguard the high level of environmental protection "in any case". It constitutes a stricter constraint regarding the straightforward enforcement of air quality standards and related litigation.

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