Op-Ed

Walter Bruno

"Pollution is in the details: Court of Justice prioritises Air Quality Directive's highest standards over the Industrial Emissions Directive derogations (Case C-375/21 *Sdruzhenie' Za Cemyata – dostap do pravosadle' and Others*)"

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“Pollution is in the details: Court of Justice prioritises Air Quality Directive’s highest standards over the Industrial Emissions Directive derogations (Case C-375/21 *Sdruzhenie’ Za Cemyata – dostap do pravosadle’ and Others*)”

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On 9 March 2023, the Court of Justice (Second Chamber) delivered a preliminary ruling in case C-375/21, *Sdruzhenie’ Za Cemyata – dostap do pravosadle’ and Others*, about the coordination of two EU measures against air pollution: the Industrial Emissions Directive and the Ambient Air Quality Directive. As a result of assessing the two acts, 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 Op-Ed finds that slightly different reasoning between the AG Opinion and the final judgment reveals differing fundamental approaches. While the AG’s Opinion 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.

The necessary coordination of Industrial Emissions and Air Quality directives

The two directives have different yet overlapping scopes. The Industrial Emissions Directive (IED, 2010/75/EU) covers the emissions, i.e. the entry into the air of specific polluting agents by industrial plants, at the source. Essentially, the IED establishes the obligation for the industrial plant to hold a permit based on criteria known as Best Available Techniques (BAT). The BAT set the standard to achieve a high level of environmental protection while guaranteeing economically and technically viable conditions.

The Ambient Air Quality Directive (AQD, 2008/50/EC) does not focus on emissions at the source but on concentrations in the air, evaluating the impact of certain polluting agents on the people and the environment through representative sampling points. With the ‘limit values’, the AQD defines an objective to be

attained within a given period and not to be exceeded once attained (Article 2). This last standard represents an obligation of result for the Member States. Once polluting concentrations exceed the limit values, a local 'air quality plan' must be implemented to guarantee that the exceedance is kept as short as possible. A plan can include a variety of measures of prompt reaction, e.g. limiting the circulation of vehicles on public roads.

In the present case, C-375/21, the Supreme Administrative Court of Bulgaria filed a request for a preliminary ruling for the interpretation of the two directives in reference to the thermal power plant 'Maritsa-iztok 2 EAD', situated in the proximity of Municipality of Galabov, 50 km from the border with Greece and Türkiye. The plant is fueled with lignite, which produces highly polluting sulphur emissions (especially sulphur dioxide, SO_2).

In November 2018, the Bulgarian authorities had already taken measures to reduce the SO_2 pollution, including a programme for desulphurising the power plants, with a target desulphurisation level of 98%. At this stage, it already offered a lower rate compared to the BAT standard for SO_2 emissions, equal to a 98,32% level. Moreover, despite these targets, one month later, the Bulgarian Executive Agency for the Environment updated the plant 'Maritsa-iztok 2 EAD' permit, envisaging a desulphurisation target of 97% and 97,5% for the different units. To understand these rates, one must consider that a slight percentage variation entails a significant change. Increasing the desulphurisation rate by 1% (namely, from 97% to 98%) results in cutting by one-third the SO_2 emissions. However, the costs of desulphurisation variate significantly: a 98,32% level corresponds to EUR 156 million, against the EUR 20 million needed to reach a 97% rate.

The derogation imposed in the renovated permit had a specific legal basis in the IED. Article 15(4) allows imposing less strict emissions limit values if the targets described by the BAT standards would lead to disproportionately higher costs compared to the environmental benefits.

On this basis, the Administrative Court of Stara Zagora dismissed the action brought against the new permit by a Bulgarian environmental NGO. The same NGO, a Greek environmental NGO and a Greek individual filed an appeal before the Supreme Administrative Court of Bulgaria, whose judges filed this preliminary reference.

AG Kokott's Opinion and the Judgment of the Court: same outcome but differing reasoning

The questions referred to the Court of Justice tackle a technical but fundamental question: whether the derogation established by the national authority while implementing the IED was contrary to EU law because it contributed to the exceedances of the AQD limit values (under Article 13 of the AQD) or because it violated the air quality plan (established under Article 23 of the AQD to enforce the same limit values).

Under Article 15(4) of the IED, the derogation is possible (1) only when the respect of the 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, first subparagraph) 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.

AG Kokott focused her analysis on the role of air quality plans (Article 23 AQD). The Directive does not specify when pollution is 'significant', nor does it indicate a specific benchmark for the high level of environmental protection. However, they must be respected 'in any case'. AG Kokott read this provision in the light of Recital 18 of the IED, which urges to take into 'full account' the objectives of the AQD where permits are granted under the IED. Therefore, the limit values established under the AQD can be considered a benchmark for assessing 'significant' pollution and for a 'high level of environmental protection'.

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 AQD 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. Can we consider the desulphurisation derogation as the cause of the generalised exceedance in 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 guarantee a high level of environmental protection (para 62). The derogation depends on a comprehensive determination of the permissible emissions of all polluting sources, whose sum must not cause an exceedance in the air quality limit values (para 63). In her view, this analysis must result from the air quality plans. Through them, the national authorities conduct the balance of interests at stake, including the possibility of IED derogations and how to deal with their consequences regarding limit values. In so doing, the authorities enjoy some flexibility, limited by the strict mandatory nature of the AQD obligation to maintain the exceedances as short as possible. Also, under article 18, the instrument to impose the 'stricter conditions' mentioned is again the air quality plan. In synthesis, a derogation is possible under an adequate air quality plan.

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 judgment rendered in May 2022 about the degraded air quality situation in this area (*Commission v. Bulgaria – Limit values SO_2*, C-730/19). However, this preliminary ruling presented a more significant focus on the objectives of the AQD, not mediated by its air quality plans. The judges agreed with the Advocate General that the limit values of the AQD 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*'. Following a mention by the AG, the judges highlighted the importance of the precautionary principle, which includes the obligation to provide for *preventive* actions. Therefore, the derogation cannot be granted if

it *contributes* to the exceedance (para 52). The assessment must be comprehensive and consider all possible pollution sources. Here lies the divergent approach: 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 prompt reaction to an excess of pollutants. Nevertheless, the air quality plan still represented a benchmark in this case, especially regarding the desulphurisation policy decided thereby.

Conclusions: pollution is in the details

Under both the Opinion and the judgment, Bulgaria must establish adequate air quality plans and comply with the air quality limit values when issuing an IED permit. Nevertheless, 'Devil is in the details'. Firstly, relying on the air quality plans leaves some discretion to the national authorities regarding the policy to adopt within all the relevant standards. Air quality plans have territorial scope. This local dimension implies a coordination duty for the national authorities since disconnected plans can jeopardise the effectiveness of the Directives. This is well acquainted in the AG's Opinion when she calls for coordination among measures and authorities (para 67). It is even more in the Chamber's reasoning. The comprehensive analysis of all pollution sources and environmental measures is at the Judgment's core and can be thought to be the main reason why the Court prefers to rely on the limit values directly. The strict obligation of establishing air quality plans is an issue the EU judges know very well as causing struggles *vis-à-vis* some (sub)national authorities. Indeed it is not the first case of strategic litigation filed by NGOs resulting in preliminary questions (see *Deutsche Umwelthilfe*, C-752/18, analysed here, which even touched upon the coercive detention of government officials). Therefore, behind the Court's differing reasoning lies an attempt to anchor the implementation of the environmental EU policy to a more objective and stricter parameter, such as the limit values. This interpretation prevents any action 'capable of contributing to exceedance', with a more significant duty to consider all relevant scientific data and comprehensively look at all possible pollution sources (judgement, para 67).

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