

# **Air quality legislation of the EU and its implementation in the Member States based on the case law of the Court of Justice of the European Union**

Legal Analysis

*Justice and Environment 2012*

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### Introduction

Justice and Environment (J&E) is an association of public interest environmental law organizations, thus having double roots: primarily its staff consists of lawyers but they are also environmental activists. Therefore **the general objective of J&E is to contribute to a better status of environment and human health in the European Union and its Member States where J&E is active.** The secondary objective of J&E is to **promote the use of law (European and national environmental laws)** and to improve access to information, public participation and access to justice in environmental matters by legal means.

**Due to our experiences, the main factors determining the environmental quality of settlements are air pollution, noise pollution,** the existence or lack of urban green areas, the condition of residential buildings and the rehabilitation of abandoned industrial areas.

Works that J&E has done lately in the health field are mostly about air pollution and noise emission. In 2011, J&E prepared an analysis – adjacent to the review of the Environmental Noise Directive, the END – and a position paper on a citizen-friendly environmental noise regulatory framework. J&E also participated at the commenting of the air protection acquis, giving input into the consultation process.

**Regarding air pollution,** due to the report of the European Environmental Agency in 2012<sup>1</sup>, the most problematic pollutants are at present PM and O<sub>3</sub> EU-wide in terms of harm to human health. Domestic emissions, intercontinental transport of pollution are the main sources contributing to increased impacts on health, ecosystems and our economy.

Air pollution's most important effects on European ecosystems are eutrophication, acidification and damage to vegetation resulting from exposure to O<sub>3</sub>. Air pollution (indoor and outdoor as well) is a major environmental health problem, associated with numerous effects, like pulmonary, cardiac, vascular, and neurological impairments.<sup>2</sup> Several air pollutants are also climate forcers, having a potential impact on the planet's climate and contributing to global warming.

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<sup>1</sup> Air quality in Europe — 2012 report. EEA, Copenhagen, 2012.

<sup>2</sup> World Health Organization Europe: Air Quality Guidelines, Global Update 2005. World Health Organization 2006.

## The Air Quality Framework Directive

**Council Directive 96/62/EC on ambient air quality assessment and management** is commonly referred to as the **Air Quality Framework Directive**. It describes the basic principles as to how air quality should be assessed and managed in the Member States. It lists the pollutants for which air quality standards and objectives will be developed and specified in legislation.

The Directive aims to set the basic principles of a common strategy which:<sup>3</sup>

- define and establish objectives for ambient air quality in the Community designed to avoid, prevent or reduce harmful effects on human health and the environment as a whole,
- assess the ambient air quality in Member States on the basis of common methods and criteria,
- obtain adequate information on ambient air quality and ensure that it is made available to the public, inter alia by means of alert thresholds,
- maintain ambient air quality where it is good and improve it in other cases.

**Main obligations of Member States, based on the provisions of the Air Quality Framework Directive:**

Section of the Directive	Obligation
<b>Planning</b>	
Art. 2.	Designate zones and agglomerations covering the whole territory.
Art. 3.	Designate competent authorities and other bodies to implement the requirements of the Directive.
Art. 5.	Undertake a series of representative measurements, surveys or assessments to obtain preliminary data on the levels of specified pollutants in the air.
Art. 7.	In areas where there is a risk of air quality limit values being exceeded, draw up action plans to ensure that the levels are not exceeded, for example by controlling activities (such as motor vehicle traffic) that contribute to the air pollution.
Art. 8.	Draw up list of zones and agglomerations where the level of pollutants is higher than prescribed limit values plus margin of tolerance as well as of those between the limit value and the margin of tolerance.
	Draw up plans or programmes to ensure that the limit values are complied with within a specified time limit.

<sup>3</sup> Article 1. of Council Directive 96/62/EC on ambient air quality assessment and management.

Art. 9.	Draw up list of zones and agglomerations where the levels of pollutants are below prescribed limit values.
	In zones and agglomerations where levels of pollutants are lower than air quality limit values, ensure that the levels of pollutants are maintained below those limit values, and preserve the best ambient air quality compatible with sustainable development.
<b>Regulation</b>	
Art.7.	Take measures to ensure compliance with limit values.
Art. 9.	
<b>Monitoring</b>	
Art. 6.	Assess ambient air quality throughout the territory
<b>Information and reporting</b>	
	Inform the public of
Art. 3.	competent authorities and bodies responsible for implementing the directive
Art. 8.	plans and programmes for attaining limit values in zones where prescribed limit values have been exceeded
Art. 10.	cases where the air quality alert thresholds are exceeded
	Report to the Commission on
Art. 4.	national standards, criteria and techniques that are more stringent than Community standards or that relate to pollutants not covered by Community legislation
	measures taken to attain target value for zone that exceeds that set by the Commission
Arts. 10 and 11	cases where limit values and alert thresholds are exceeded, and reasons for the occurrence

Art. 11.	<p>competent authorities and bodies responsible for implementing the directive</p> <p>lists of zones and agglomerations drawn up pursuant to Articles 8 and 9</p> <p>methods used for the preliminary assessment of air quality</p> <p>plans and programmes adopted pursuant to Article 8, and (every three years) progress in implementing the plans or programmes</p> <p>every three years, information on reviews of the levels in zones and agglomerations referred to in Articles 8 and 9 of the Directive</p>
Art. 13.	transposition, with texts of the main provisions of national law adopted in the field covered by the directive
Art. 8.	Where there is a risk of air quality limit values being exceeded following significant pollution originating in another Member State, consult with that Member State with a view to finding a solution.

## Directive on ambient air quality and cleaner air for Europe

**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** entered into force on 11 June 2008.

The Directive includes the following key elements:<sup>4</sup>

- Consolidation of previously existing legislation into a single directive (except for the fourth Daughter Directive 2004/107/EC dealing with heavy metals in ambient air) with no change to existing air quality limit values
- New air quality objectives for PM 2.5 (fine particles) including the limit value and exposure related objectives – exposure concentration obligation and exposure reduction target
- The possibility to discount natural sources of pollution when assessing compliance against limit values
- The possibility for time extensions until 2011 for PM 10 and until 2015 for nitrogen dioxide (NO<sub>2</sub>) and benzene, for complying with limit values, based on meeting strict conditions and assessment by the European Commission

As for allowing Member States to apply for additional time to meet certain limit values recognises the fact that most Member States have had particular difficulties in achieving compliance within the original attainment dates set out in the EU legislation.

The following table gives an overview on the health based standards and objectives for a number of pollutants in air, established by the European legislation<sup>5</sup>:

Pollutant	Concentration	Averaging period	Legal nature	Permitted exceedences each year
<b>Fine articles (PM2.5)</b>	25 µg/m <sup>3</sup> ***	1 year	Target value entered into force 1.1.2010 Limit value enters into force 1.1.2015	n/a
<b>Sulphur dioxide (SO<sub>2</sub>)</b>	350 µg/m <sup>3</sup>	1 hour	Limit value entered into force 1.1.2005	24
	125 µg/m <sup>3</sup>	24 hours	Limit value entered into force 1.1.2005	3
<b>Nitrogen dioxide (NO<sub>2</sub>)</b>	200 µg/m <sup>3</sup>	1 hour	Limit value entered into force 1.1.2010	18
	40 µg/m <sup>3</sup>	1 year	Limit value entered into force 1.1.2010*	n/a
<b>PM10</b>	50 µg/m <sup>3</sup>	24 hours	Limit value entered into force 1.1.2005**	35
	40 µg/m <sup>3</sup>	1 year	Limit value entered into force 1.1.2005**	n/a

<sup>4</sup> [http://ec.europa.eu/environment/air/quality/legislation/existing\\_leg.htm](http://ec.europa.eu/environment/air/quality/legislation/existing_leg.htm)

<sup>5</sup> Source: <http://ec.europa.eu/environment/air/quality/standards.htm>

<b>Lead (Pb)</b>	0.5 µg/m <sup>3</sup>	1 year	Limit value entered into force 1.1.2005 (or 1.1.2010 in the immediate vicinity of specific, notified industrial sources; and a 1.0 µg/m <sup>3</sup> limit value applied from 1.1.2005 to 31.12.2009)	n/a
<b>Carbon monoxide (CO)</b>	10 mg/m <sup>3</sup>	Maximum daily 8 hour mean	Limit value entered into force 1.1.2005	n/a
<b>Benzene</b>	5 µg/m <sup>3</sup>	1 year	Limit value entered into force 1.1.2010**	n/a
<b>Ozone</b>	120 µg/m <sup>3</sup>	Maximum daily 8 hour mean	Target value entered into force 1.1.2010	25 days averaged over 3 years
<b>Arsenic (As)</b>	6 ng/m <sup>3</sup>	1 year	Target value enters into force 31.12.2012	n/a
<b>Cadmium (Cd)</b>	5 ng/m <sup>3</sup>	1 year	Target value enters into force 31.12.2012	n/a
<b>Nickel (Ni)</b>	20 ng/m <sup>3</sup>	1 year	Target value enters into force 31.12.2012	n/a
<b>Polycyclic Aromatic Hydrocarbons</b>	1 ng/m <sup>3</sup> (expressed as concentration of Benzo(a)pyrene)	1 year	Target value enters into force 31.12.2012	

*\*Under the Directive a Member State can apply for an extension of up to five years (i.e. maximum up to 2015) in a specific zone. Request is subject to assessment by the Commission. In such cases within the time extension period the limit value applies at the level of the limit value + maximum margin of tolerance ( 48 µg/m<sup>3</sup> for annual NO<sub>2</sub> limit value).*

*\*\*Under the Directive a Member State is able to apply for an extension until three years after the date of entry into force of the new Directive (i.e. May 2011) in a specific zone. Request was subject to assessment by the Commission. In such cases within the time extension period the limit value applies at the level of the limit value + maximum margin of tolerance (35 days at 75µg/m<sup>3</sup> for daily PM<sub>10</sub> limit value, 48 µg/m<sup>3</sup> for annual Pm<sub>10</sub> limit value).*

*\*\*\*Standard introduced by the Directive.*

Under EU law a limit value is legally binding from the date it enters into force subject to any exceedances permitted by the legislation. A target value is to be attained as far as possible by the attainment date and so is less strict than a limit value.

**Assessing the main provisions of the European legislation relating to air quality**, there is an obligation for Member States to divide their territory into a **number of zones and agglomerations**.<sup>6</sup> Zones and agglomerations are declared by the Member States, covering complete territory of the given Member State. The zones represent basic areas for which assessment and management provisions are prescribed. In these zones and agglomerations, Member States should undertake assessments of air pollution levels using measurements and modelling and other empirical techniques. Where levels are elevated, the Member States should prepare an air quality plan or programme to ensure compliance with the limit value before the date when the limit value formally enters into force. In addition, information on air quality should be disseminated to the public.<sup>7</sup>

**Regarding the requirement of assessment**,<sup>8</sup> the Directive also requires the assessment of the ambient air quality existing in Member States. Assessment of ambient air quality through monitoring, modelling, and objective estimation provides information on the compliance with the environmental standards and informs further air pollution abatement effort. This assessment shall be done with continuous monitoring or modelling, on the basis of common methods and criteria introduced by the European legislation. In the Directives, the minimum assessment requirements are described, however additional assessment shall be needed as well, performed by the Member States, such as source apportionment, in particular in those agglomerations and areas, where the pollution is high. They are linked to the specific concentration thresholds as well as the population within each air quality zone or agglomeration.

As regards **management of air pollution in the Member States**, it is needed to ensure that limit values are complied with throughout the territory of Member States, by their respective attainment dates, and that target values are respected to the extent possible. Action is required before the attainment dates when certain assessment thresholds set in the Directives are exceeded, generating a requirement to prepare and implement air quality plans or programmes. The necessary air pollution reduction measures are compiled in air quality plans or programmes which describe how the measures are bringing concentrations below respective limits or target values by the attainment date defined in the Directive. Minimum requirements of such plans and programmes are set in the Directive.

**Plans and programmes need to be available to the public**.<sup>9</sup> Public participation requirements contain minimum amount of information that needs to be provided to the public as regards to assessment of concentrations. It also requires the public availability of abatement plans and programmes. Specific actions are needed when information and alert thresholds are exceeded, which inform the public on the health hazards and the recommended personal behaviour to minimize exposure.<sup>10</sup>

Due to the **reporting requirements of the Directive**, a Community-wide procedure for the exchange of information and data on ambient air quality in the European Community is established by the Council Decision 97/101/EC. The decision introduces a reciprocal exchange of information and data relating to the networks and stations set up in the Member States to measure air pollution and the air quality measurements taken by those stations. The information exchange relates to the pollutants listed in Annex I of Directive 96/62/EC. The Annexes of the Decision were amended by Commission Decision 2001/752/EC.<sup>11</sup>

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<sup>6</sup> <http://ec.europa.eu/environment/air/quality/legislation/zoning.htm>

<sup>7</sup> <http://ec.europa.eu/environment/air/quality/standards.htm>

<sup>8</sup> <http://ec.europa.eu/environment/air/quality/legislation/assessment.htm>

<sup>9</sup> <http://ec.europa.eu/environment/air/quality/legislation/management.htm>

<sup>10</sup> [http://ec.europa.eu/environment/air/quality/legislation/public\\_info.htm](http://ec.europa.eu/environment/air/quality/legislation/public_info.htm)

<sup>11</sup> <http://ec.europa.eu/environment/air/quality/legislation/reporting.htm>

Directive 2001/81/EC of the European Parliament and the Council on National Emission Ceilings for certain pollutants (NEC Directive) sets upper limits for each Member State for the total emissions in 2010 of four pollutants (sulphur dioxide, nitrogen oxides, volatile organic compounds and ammonia), regarded as responsible for acidification, eutrophication and ground-level ozone pollution. The NEC Directive leaves the decision largely to the Member States which measures they want to take in order to comply with the directive, on top of Community legislation for specific source categories.

The aim of the NEC Directive is to limit emissions of acidifying and eutrophying pollutants and ozone precursors in order to improve the protection in the Community of the environment and human health against risks of adverse effects from acidification, soil eutrophication and ground-level ozone. In addition the NEC Directive aims at moving towards the long-term objectives of not exceeding critical levels and loads and of effective protection of all people against recognised health risks from air pollution by establishing national emission ceilings, taking the years 2010 and 2020 as benchmarks.

Member States shall each year, report their national emission inventories and their emission projections for 2010 established in accordance with Article 7 to the Commission and the European Environment Agency. They shall report their final emission inventories for the previous year but one and their provisional emission inventories for the previous year. Emission projections shall include information to enable a quantitative understanding of the key socioeconomic assumptions used in their preparation.<sup>12</sup>

Revision of the NEC Directive can be expected in the following years, the proposal to amend the NECD is under preparation by the European Commission.

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<sup>12</sup> Art. 8.

## Judgement of the Court of Justice of the European Union (ECJ) in joined cases C-165/09 to C-167/09

### Antecedents of the case

The judgement was taken in a procedure for preliminary ruling under Article 234 EC from the Raad van State (Netherlands). In the antecedent cases, actions were brought before the Raad van State (Council of State, Netherlands) concerning permits for the construction and operation of three power stations fuelled by pulverised coal and biomass.

In case 165/09 College van Gedeputeerde Staten van Groningen (Provincial Executive of the Province of Groningen) granted the company RWE Eemshaven Holding BV, formerly RWE Power AG a permit for the construction and operation of a power station fuelled by pulverised coal and biomass in the province of Groningen. This decision was challenged by two environmental organizations and by four natural persons.

In cases C-166/09 and 167/09 the College van Gedeputeerde Staten van Zuid-Holland (Provincial Executive of the Province of South Holland) granted permit for the companies Electrabel and E.On Benelux N.V. for the construction and operation of two power stations fuelled by pulverised coal and biomass in the province of South Holland. These permits were challenged by four environmental organizations.

### Legal context

All of the cases concern provisions of the IPPC directive<sup>13</sup> on the one hand and certain provisions of the NEC Directive<sup>14</sup> on the other hand.

In those three actions, the applicants submitted in essence that, given the fact that the emission ceilings laid down for the Kingdom of the Netherlands by the NEC Directive would not be complied with at the end of 2010,<sup>15</sup> the competent authorities should not have granted the permits or should, at least, have granted them subject to stricter conditions.

### Environmental authorization procedures and the NEC directive

By its first question, the Raad van State asked, in essence, whether Article 9(1), (3) and (4) of the IPPC Directive must be interpreted as meaning that, when granting an environmental permit for the construction and operation of an industrial installation, the competent national authorities are obliged to include among the conditions for grant of that permit the national emission ceilings for SO<sub>2</sub> and NO<sub>x</sub> laid down by the NEC Directive.

Due to the opinion of the ECJ Article 9(1), (3) and (4) of the IPPC Directive must be interpreted as meaning that, when granting an environmental permit for the construction and operation of an industrial installation, such as those at issue in the main actions, the Member States are not obliged to include among the conditions for grant of that permit the national emission ceilings for SO<sub>2</sub> and NO<sub>x</sub> laid down by the NEC Directive.

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<sup>13</sup> Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control

<sup>14</sup> Directive 2001/81/EC of the European Parliament and the Council on National Emission Ceilings for certain pollutants.

<sup>15</sup> The deadline prescribed by the NEC Directive for the limitation of the annual national emissions of certain pollutants.

Member States must comply with the obligation arising from the NEC Directive to adopt or envisage, within the framework of national programmes, appropriate and coherent policies and measures capable of reducing, as a whole, emissions of inter alia those pollutants to amounts not exceeding the ceilings laid down in Annex I to that directive by the end of 2010 at the latest.

The reason of that is, that the NEC 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, within the framework of national programmes concerning all sources of pollution, in order progressively to achieve a structural reduction of emissions of inter alia SO<sub>2</sub> and NO<sub>x</sub> to amounts not exceeding, at the end of 2010 at the latest, the emission ceilings laid down in Annex I to the directive. **It follows that attainment of the objectives set by the directive cannot interfere directly in the procedures for grant of an environmental permit.**

### **Positive and negative obligations arising from the NEC directive**

By its second and third questions the national court asked in essence, first, **what obligations are owed by the Member States under the NEC Directive during the period between 27 November 2002**, when the time-limit for its transposition expired, **and 31 December 2010**, the deadline after which the Member States must comply with the emission ceilings laid down by it.

Second, the national court was uncertain whether, in light of those obligations, **the competent national authorities might be obliged to refuse or to attach restrictions to the grant of an environmental permit, or to adopt specific compensatory measures**, where the national emission ceilings for SO<sub>2</sub> and NO<sub>x</sub> under the NEC Directive are exceeded or risk being exceeded.

Based on the reasoning of the ECJ, first of all Article 4(3) TEU, the third paragraph of Article 288 TFEU and the NEC Directive require the Member States to refrain from adopting any measures liable seriously to compromise the attainment of the result prescribed by the directive.

Adoption by the Member States of a specific measure relating to a single source of SO<sub>2</sub> and NO<sub>x</sub> however does not appear liable, in itself, seriously to compromise the attainment of the result prescribed by the NEC Directive. Based on the judgement, it is for the national court to review whether that is true of each of the decisions granting an environmental permit for the construction and operation of an industrial installation such as the permits at issue in the main actions.

The third paragraph of Article 288 TFEU and Articles 6, 7(1) and (2) and 8(1) and (2) of the NEC Directive require the Member States, first, **to draw up, to update and to revise as necessary programmes** for the progressive reduction of national SO<sub>2</sub> and NO<sub>x</sub> emissions, which they are **obliged to make available to the public and appropriate organisations** by means of clear, comprehensible and easily accessible information, and to **notify to the Commission** within the time-limit prescribed, and second, **to prepare and annually update national inventories of those emissions and national emission projections** for 2010, which they must report to the Commission and the European Environment Agency within the time-limit prescribed.

**The third paragraph of Article 288 TFEU and the NEC Directive itself do not require the Member States to refuse or to attach restrictions to the grant of an environmental permit for the construction and operation of an industrial installation such as the permits at issue in the main actions, or to adopt specific compensatory measures for each permit granted of that kind, even where the national emission ceilings for SO<sub>2</sub> and NO<sub>x</sub> are exceeded or risk being exceeded.**

### **Direct effect of the provisions of the NEC directive**

By its fourth, fifth and sixth questions the national court asked in essence whether and, if so, to what extent an individual can rely directly before the national courts upon the obligations imposed by Articles 4 and 6 of the NEC Directive.

**Based on the decision of the ECJ Article 4 of the NEC Directive is not unconditional and sufficiently precise for individuals to be able to rely upon it before the national courts before 31 December 2010.**

**However Article 6 of the NEC Directive grants rights to individuals directly concerned which can be relied upon before the national courts in order to claim that, during the transitional period from 27 November 2002 to 31 December 2010, the Member States should adopt or envisage, within the framework of national programmes, appropriate and coherent policies and measures capable of reducing, as a whole, emissions of the pollutants covered so as to comply with the national ceilings laid down in Annex I to the directive by the end of 2010 at the latest, and should make the programmes drawn up for those purposes available to the public and appropriate organisations by means of clear, comprehensible and easily accessible information.**

**Summarizing the key findings of the decision:**

- Attainment of the objectives set by the NEC directive cannot interfere directly in the procedures for grant of an environmental permit.
- During the transposition period of the NEC Directive Member States have to refrain from adopting any measures liable seriously to compromise the attainment of the result prescribed by the directive. Adoption by the Member States of a specific measure relating to a single source of SO<sub>2</sub> and NO<sub>x</sub> (like giving permission to a certain activity) however does not appear liable, in itself, seriously to compromise the attainment of the result prescribed by the NEC Directive.
- There are certain positive obligations of Member States arising from the NEC Directive itself (preparation of programmes, inventories etc.), however the NEC Directive do not require the Member States to refuse or to attach restrictions to the grant of an environmental permit for the construction and operation of an industrial installation, or to adopt specific compensatory measures for each permit granted of that kind, even where the national emission ceilings for SO<sub>2</sub> and NO<sub>x</sub> are exceeded or risk being exceeded.
- Article 4 of the NEC Directive is not unconditional and sufficiently precise for individuals to be able to rely upon it before the national courts before 31 December 2010.
- However Article 6 of the NEC Directive grants rights to individuals directly concerned which can be relied upon before the national courts in order to claim that, during the transitional period of the directive, the Member States should adopt or envisage, within the framework of national programmes, appropriate and coherent policies and measures capable of reducing, as a whole, emissions of the pollutants covered so as to comply with the national ceilings laid down in Annex I to the directive by the end of 2010 at the latest, and should make the programmes drawn up for those purposes available to the public and appropriate organisations by means of clear, comprehensible and easily accessible information.

**It follows from the decision of the Court, that a national emission ceiling that has been exceeded or is at risk of being exceeded does not prevent an environmental permit from being granted for an individual IPPC installation, insofar as this installation, in accordance with the regulations of the IPPC Directive, meets the relevant legal requirements and does not seriously jeopardise the meeting of the national emission ceiling.**

The revision of the NEC Directive is part of the implementation of the Thematic Strategy on Air Pollution.<sup>16</sup> The proposal to amend the NEC Directive is still under preparation by the European Commission.

The evaluation of the implementation of the 2010 national ceilings of the current NEC directive shows<sup>17</sup> that twelve Member States exceeded one or more of the emission limits set by the NEC directive, according to the official preliminary data for 2010 reported to the EEA. In some instances, the limits are reported to be exceeded by significant amounts. About 20 EU Member States face infringement procedures for failing to meet the limit values for particulate matter in one or more zones or agglomerations within their territories, almost always urban hotspots. The pollutant for which most exceedances were registered was NOX based on the status report published by the European Environmental Agency in 2012.

Thus, based on the experiences apparent from the national implementation reports and based on the case law of the ECJ, the following suggestions can be formulated in relation to the review process of the NEC directive:

- Prompt action would be needed to **further reduce air emissions** derived from the most problematic pollutants such as particulate matter, nitrogen dioxide, methane and ground-level ozone. The revised directive with ambitious targets could also contribute to attain climate change policy goals of the EU.
- The revised NEC directive shall **set stricter emission ceilings** for the adjacent years in order to further improve protection of health and the environment. **Ceilings for emissions of particulate matter (PM2.5) shall be also introduced.**
- **The improvement of the reporting scheme would be also necessary;** introduction of those measures taken by Member States and the contribution of these measures to the compliance with the national emission ceilings would contribute to enhanced transparency of the current reporting system.
- Integrated approach is a progressive approach by managing environmental problems. Pollution must be prevented as far as possible and it is vital to identify the causes of pollution and to tackle emissions at source. **The improvement of the EU legislation regarding source-based measures** would be therefore essential.

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<sup>16</sup> Communication from the Commission to the Council and the European Parliament. Thematic Strategy on air pollution {SEC(2005) 1132} {SEC(2005) 1133}

<sup>17</sup> NEC Directive status report 2011 Reporting by the Member States under Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants. EEA, Copenhagen, 2012.

## Judgement of the Court of Justice of the European Union (ECJ) in case C-237/07

### **Antecedents of the case**

The reference for a preliminary ruling has been made in the course of proceedings between Mr Janecek and the Freistaat Bayern.

Mr Janecek lives on the Landshuter Allee on Munich's central ring road, approximately 900 metres north of an air quality measuring station.

Measurements taken at that station have shown that, in 2005 and 2006, the limit value fixed for emissions of particulate matter PM10 was exceeded much more than 35 times, even though that is the maximum number of instances permitted under the Federal Law on combating pollution.

An air quality action plan exists in respect of the city of Munich, that action plan having been declared mandatory on 28 December 2004. However, Mr Janecek brought an action before the Verwaltungsgericht (Administrative Court) Munich for an order requiring the Freistaat Bayern to draw up an air quality action plan in the Landshuter Allee district, so as to determine the measures to be taken in the short-term in order to ensure compliance with the maximum permitted number of instances – 35 per year – of the emission limit value for particulate matter PM10 being exceeded.

The Verwaltungsgericht Munich dismissed that action as unfounded.

On appeal, the Verwaltungsgerichtshof (Higher Administrative Court) took a different view, holding that the residents concerned may require the competent authorities to draw up an action plan, but that they are not entitled to insist that it must include the particular measures that would guarantee compliance in the short-term with the emission limit values for particulate matter PM10. According to the Verwaltungsgerichtshof, the national authorities are required only to ensure that such a plan pursues that objective to the extent to which it is possible and proportionate for it to do so. Consequently, it ordered the Freistaat Bayern to draw up an action plan complying with those requirements.

Mr Janecek and the Freistaat Bayern appealed to the Bundesverwaltungsgericht (Federal Administrative Court) against the judgment of the Verwaltungsgerichtshof. According to the Bundesverwaltungsgericht, Mr Janecek cannot rely on any entitlement to have an action plan drawn up. The Bundesverwaltungsgericht takes the view, moreover, that neither the spirit nor the letter of Article 7(3) of Directive 96/62 confers a personal right to have an action plan drawn up.

### **Legal context**

The reference for a preliminary ruling concerns the interpretation of Article 7(3) of Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management.

### **Direct effect of Article 7(3) of the ambient air quality directive**

The main question in the court proceeding was, whether an individual can require the competent national authorities to draw up an action plan in the case – referred to in Article 7(3) of Directive 96/62 – where there is a risk that the limit values or alert thresholds may be exceeded.

Due to the reasoning of the ECJ Article 7(3) places the Member States under a clear obligation to draw up action plans both where there is a risk of the limit values being exceeded and where there is a risk of the alert thresholds being exceeded. That interpretation, which follows from a straightforward reading of Article 7(3) of Directive 96/62, is, moreover, confirmed in the 12th recital in the preamble to the directive. What is laid down in relation to the limit values applies all the more with regard to the alert thresholds, in respect of which, moreover, Article 2 – which defines the various terms used in the directive – provides that ‘immediate steps shall be taken by the Member States as laid down in this Directive’.

In addition, the Court has consistently held that individuals are entitled, as against public bodies, to rely on the provisions of a directive which are unconditional and sufficiently precise.<sup>18</sup> As the ECJ stated, it is for the competent national authorities and courts to interpret national law, as far as possible, in a way that is compatible with the purpose of that directive.<sup>19</sup> Where such an interpretation is not possible, they must disapply the rules of national law which are incompatible with the directive concerned.

As the ECJ has noted on numerous occasions, it is incompatible with the binding effect which Article 249 EC ascribes to a directive to exclude, in principle, the possibility of the obligation imposed by that directive being relied on by persons concerned. That consideration applies particularly in respect of a directive which is intended to control and reduce atmospheric pollution and which is designed, therefore, to protect public health.

Thus, the Court has held that, whenever the failure to observe the measures required by the directives which relate to air quality and drinking water, and which are designed to protect public health, could endanger human health, the persons concerned must be in a position to rely on the mandatory rules included in those directives.<sup>20</sup>

It follows from the foregoing that the natural or legal persons directly concerned by a risk that the limit values or alert thresholds may be exceeded must be in a position to require the competent authorities to draw up an action plan where such a risk exists, if necessary by bringing an action before the competent courts.

The fact that those persons may have other courses of action available to them – in particular, the power to require that the competent authorities lay down specific measures to reduce pollution, which, as indicated by the referring court, is provided for under German law – is irrelevant in that regard.

### **The content of action plans**

As regards the content of the action plans, according to Article 7(3) of Directive 96/62, action plans must include the measures ‘to be taken in the short term where there is a risk of the limit values and/or alert thresholds being exceeded, in order to reduce that risk and to limit the duration of such an occurrence’. Due to the reasoning of the ECJ it follows from that very wording that **the Member States are not obliged to take measures to ensure that those limit values and/or alert thresholds are never exceeded.**

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<sup>18</sup> See, to that effect, Case 148/78 Ratti [1979] ECR 1629, paragraph 20.

<sup>19</sup> See, to that effect, Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8.

<sup>20</sup> See Case C-361/88 Commission v Germany; Case C-59/89 Commission v Germany; and Case C-58/89 Commission v Germany).

On the contrary, it is apparent from the broad logic of the directive – which seeks an integrated reduction of pollution – that **it is for the Member States to take measures capable of reducing to a minimum the risk of the limit values and/or alert thresholds being exceeded and the duration of such an occurrence**, taking into account all the material circumstances and opposing interests.

While the Member States thus have a discretion, Article 7(3) of Directive 96/62 includes limits on the exercise of that discretion which may be relied upon before the national courts,<sup>21</sup> relating to the adequacy of the measures which must be included in the action plan with the aim of reducing the risk of the limit values and/or alert thresholds being exceeded and the duration of such an occurrence, taking into account the balance which must be maintained between that objective and the various opposing public and private interests.

Therefore, the ECJ ruled, that the Member States are obliged, subject to judicial review by the national courts, only to take such measures – in the context of an action plan and in the short term – as are capable of reducing to a minimum the risk that the limit values or alert thresholds may be exceeded and of ensuring a gradual return to a level below those values or thresholds, taking into account the factual circumstances and all opposing interests.

## Conclusions

In the Janecek-case the Court pointed out the **principle of proportionality** and ruled that regarding the content of action plans to be prepared under Article 7(3) of Directive 96/62, Member States have a wide discretion to identify those measures which are adequate to fulfill the requirements.

Member States are obliged to take adequate measures, balancing between the objective of reducing to a minimum the risk of exceedance of the limit values and the duration of such an occurrence, and the various opposing public and private interests.

Similar considerations can be traced in case C-165/09 presented above regarding the NEC Directive, where the Court emphasized, that Member States have a wide flexibility relating to the content of programmes required by the NEC Directive. The burden of finding the balance between the various interests concerned is on the Member States.

However the level of discretion is sometimes limited by the given legal norm. In the case regarding the NEC Directive, the Court referred to the obligation to take all measures which are necessary to achieve the result prescribed by a directive. In the Janecek case, due to the judgement of the ECJ, Article 7(3) of the directive 96/62 limits the exercise of this discretion, as the adequacy of the measures have to be maintained.

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<sup>21</sup> See, to that effect, Case C-72/95 Kraaijeveld and Others [1996] ECR I-5403, paragraph 59.