



# **Fundamental Rights and Climate Change**

## **Exploring New Perspectives and Corresponding Remedies**

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EDITED BY

**Alicja Sikora-Kalèda • Inga Kawka**

Krakow Jean Monnet  
Research Papers



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**4**

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Alicja Sikora-Kalèda  
Jagiellonian University, Kraków, Poland  
ID <https://orcid.org/0009-0001-1204-7020>  
✉ [alicja.1.sikora@uj.edu.pl](mailto:alicja.1.sikora@uj.edu.pl)

Inga Kawka  
Jagiellonian University, Kraków, Poland  
ID <https://orcid.org/0000-0001-6909-5798>  
✉ [inga.kawka@uj.edu.pl](mailto:inga.kawka@uj.edu.pl)

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# INTRODUCTION

*The environment is where we all meet;  
where we all have a mutual interest;  
it is the one thing all of us share.*

Lady Bird Johnson

The monograph outlines the growing importance of fundamental rights in the European Union, particularly in the context of environmental protection and the fight against climate change. These rights have become a cornerstone in shaping policies that address ecological challenges while balancing economic and social aspects. The European Green Deal (EUGD), a landmark initiative, embodies the EU's commitment to transitioning into a climate-neutral, modern economy by 2050. This ambitious goal requires comprehensive legislative action and coherence in implementing policies across various sectors, ensuring that all measures align with and uphold fundamental rights as enshrined in the EU legal framework.

This monograph is the culmination of scholarly work inspired by discussions from the conference titled 'Fundamental Rights and Climate Change in EU Law and Beyond – Mapping Fundamental Rights, Nature's Rights, and Corresponding Legal Remedies,' organized in September 2023 as part of the Jean Monnet Module project, 'Sustainability and Climate Change in EU Law.' This academic event, hosted by the Chair of European Law at the Jagiellonian University, brought together experts from diverse fields to discuss and exchange perspectives on sustainability and the legal frameworks within the EU. The insights shared during the conference laid the foundation for the analyses presented in this book, highlighting the complex interplay between fundamental rights, environmental challenges, and legislative coherence.

The chapters of this book reflect a collective scholarly effort to explore diverse aspects of fundamental rights and their intersections with environmental law within the EU framework. The opening chapter, authored by Alicja Sikora-Kalèda investigates the limits of human rights as instruments to advocate for global climate action. It examines how climate litigation impacts human rights and evaluates the potential evolution of environmental rights in EU law. Ilona Przybojewska contributes with an analysis of how poor environmental conditions can lead to state liability, referencing a notable 2021 Polish Supreme Court resolution. Her work probes the extent to which environmental issues can be recognized as affecting personal rights and the broader implications of this recognition.

This monograph aims to serve as a comprehensive resource for legal practitioners, scholars, and policymakers, encouraging further dialogue on the integration of environmental and human rights within the EU legal system.

*Alicja Sikora-Kalèda*

*Inga Kawka*

MARIUSZ BARAN<sup>1</sup>

## DAMAGE ACTION FOR THE INDIVIDUAL – CHALLENGES FOR THE NATIONAL COURTS IN THE ENFORCEMENT OF EU ENVIRONMENTAL LAW

REMARKS ON THE JUDGMENT OF THE COURT  
OF JUSTICE IN THE CASE C-61/21 *MINISTRE  
DE LA TRANSITION ÉCOLOGIQUE (JP)*\*

**ABSTRACT:** This chapter aims at discussing the enforcement of EU legislation on the protection of ambient air quality through 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. The full effectiveness of EU rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain reparation when their rights are infringed by a breach of EU law for which a Member State can be held responsible. Accordingly, individuals who have suffered damage have a right to compensation if three conditions are met, namely that the rule of EU law infringed is intended to confer rights on them, that the infringement of that rule is sufficiently serious and that there is a direct causal link between that infringement and the damage suffered by those individuals. The analysis demonstrates the first requirement of non-contractual liability of Member States for infringement of EU law, namely the question as to whether the provisions of Directive 2008/50 establish rights for individuals. The purpose of the analysis is clarification of the extent to which an infringement of the limit values for the protection of ambient air quality under EU law can in fact give rise to entitlement to compensation. Finally, State

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<sup>1</sup> Dr Mariusz Baran, Environmental Law Centre, Jagiellonian University, <https://orcid.org/0000-0003-1896-7378>.

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liability is discussed further, i.e. conditions under which a possible infringement of Directive 2008/50 is sufficiently serious, and the proof of a direct causal link between the infringement and the damage.

**KEYWORDS:** damage action, state liability, enforcement of EU environmental law, air quality, individual right in EU environmental law

## Introduction

Given the urgent need for significant improvements of air quality in many areas of Europe and concerns about insufficient climate action and ambition around the world, NGOs and individuals are increasingly turning to the courts to trigger states and public authorities to adopt more ambitious measures to protect the environment and hold them accountable through environmental litigation. Environmental litigation has become a strategic tool for pushing for environmental justice.<sup>2</sup>

The purpose of this chapter is to analyse the judgement of the Court of Justice of the European Union (hereinafter “CJEU” or “the Court”) in Case C-61/21 *Ministre de la Transition Écologique (JP)*.<sup>3</sup> In this regard, a key question is whether an individual has the legal capacity to trigger effective measures to ensure compliance with the limit values required by Directive 2008/50 on Air Quality and Cleaner Air for Europe?<sup>4</sup> And, if not, may they seek compensation (redress) for the damage suffered as a result of air pollution?

In the case at hand, the CJEU faced the question of the prerequisites for state liability and damages in the case of health and personal injury resulting from a Member State’s failure to comply with EU air law. Yet, the Court did not – as will be discussed further below – deliver a landmark judgement, but it did confirm previous case law<sup>5</sup>

<sup>2</sup> On the concept of in international law, legal philosophy and environmental ethics – see, e.g., S.A. Atapattu, C.G. Gonzalez, S.L. Seck (eds), *The Cambridge Handbook of Environmental Justice and Sustainable Development*, Cambridge 2021; R.A. Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, “University of Colorado Law Review” 2007, vol. 78, p. 1625; R.R. Kuehn, *A Taxonomy of Environmental Justice*, “Environmental Law Reporter” 2000, vol. 30; C.G. Gonzalez, *Environmental Justice and International Law* [in:] *Routledge Handbook of International Environmental Law*, S. Alam et al. (eds), London 2013, p. 77.

<sup>3</sup> C-61/21, *Ministre de la Transition écologique i Premier ministre (Responsabilité de l’État pour la pollution de l’air)*, ECLI:EU:C:2022:1015.

<sup>4</sup> See for a discussion on Directive 2008/50: M. Baran, *Dyrektywa 2008/50/WE w sprawie jakości powietrza i czystszo powietrza dla Europy oraz jej implementacja w prawie polskim*, “Europejski Przegląd Sądowy” 2017, no. 7, pp. 19–20 and the literature and case law therein.

<sup>5</sup> See: J. Richelle, *C-61/21 Ministre de la Transition Écologique: Putting the Individual-centered CJEU Case Law on Air Quality on Hold*, “Review of European Administrative Law” 2023, vol. 16,

and systematise the role of individuals in enforcing before national courts the obligations imposed on the Member States by the EU environmental legislation.

## 1. Can an individual take effective action through the courts to comply with the limit values under Directive 2008/50?

Admittedly, the addressees of the norms of directives are, in accordance with Article 288(3) TFEU, the Member States, as a result of the implementation requirement. Notwithstanding, the provisions of directives may also have a protective effect in relation to private parties if Member States are obliged to establish individual rights.<sup>6</sup>

Interpreting the provisions of a directive according to the interpretation method recoin in the case law of the Court, it is to be determined whether a provision of EU law in this context is intended to establish subjective rights.<sup>7</sup> The decisive factors in this regard are the wording, the purpose of the relevant provisions and the motives guiding the Union legislature, which are apparent from the preambles of the EU acts (directive) concerned.<sup>8</sup>

The Court used the concept of “individual rights” in several judgements in environmental cases handed down in the early 1990s, in the context of proceedings for breach of EU obligations in cases under Article 258 TFEU. At first in cases

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no. 2, pp. 109-122 and the literature and case law therein; M. Pagano, *Human Rights and Ineffective Public Duties: The Grand Chamber Judgment in JP v. Ministre de la Transition écologique*, “European Law Blog” 2023; D. Misonne, *The Emergence of a Right to Clean Air: Transforming European Union Law through Litigation and Citizen Science*, “RECIEL” 2020, vol. 30, no. 1, p. 1; U. Taddei, *A Right to Clean Air in EU Law? Using Litigation to Progress from Procedural to Substantive Environmental Rights*, “Environmental Law Review” 2016, vol. 18, no. 1, p. 3ff.

<sup>6</sup> According to definition, a directive is addressed only to the Member States in the sense of being binding in purpose. In the *Francovich* case, the disputed claim for compensation in the event of the employer’s bankruptcy was to accrue to the employee only as a result of the transposition and enactment of the relevant national legislation. However, the Court confirmed the individual’s claim for compensation.

<sup>7</sup> See generally on the principles of interpretation recognised by the case law – e.g. judgments: C-1/96, *Compassion in World Forming*, ECLI:EU:C:1998:113, para. 49; C-102/96, *Commission v Germany*, ECLI:EU:C:1998:529, para. 24. When interpreting a provision of EU law, it is necessary to take into account not only the wording, but also the context in which the provision is used and the objectives of the legislation in which it appears.

<sup>8</sup> The CJEU analyses the wording and the purpose of the provisions of the directive in the light of their protective purpose and takes into account, in particular, the recitals of the preamble (see the judgments: C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, *Dillenkofer and Others*, ECLI:EU:C:1996:375, paras 30ff.; C-127/95, *Norbrook Laboratories*, ECLI:EU:C:1998:151, para. 108).

in procedure under 258 TFUE against Germany, linking this concept to the content of the obligations imposed on the Member States by various directives in the field of environmental law, which were aimed at increasing the level of protection of environmental components.<sup>9</sup> “Therefore that whenever non-compliance with the measures required by the directives in question might endanger the health of persons, those concerned should be able to rely on mandatory rules in order to enforce their rights.”<sup>10</sup> However, firstly, this finding does not precisely determine the nature of the concept of “rights of individuals” as used in this context (the content and rights’holder) and it is highly vague and imprecise. Secondly, it is not clear by what legal means such unspecified rights are to be enforced before the national courts.<sup>11</sup> The concept of rights referred to by the Court in implementation cases may refer to “rights” that are not protected under the liability regime according to *Francovich* principle.<sup>12</sup> With respect to the role of individuals in the enforcement of EU environmental law, the Court had occasion to express itself on several occasions using the formula (construc-

<sup>9</sup> See, for example, case C-361/88, *Commission v Germany*, ECLI:EU:C:1991:224, para. 16: “The obligation on Member States to prescribe limit values not to be exceeded within specified periods and under specified conditions, laid down in Article 2 of Directive 80/799 on air quality limit values and guide values for sulphur dioxide and suspended particulates, is imposed «in order to protect human health in particular». It implies, therefore, that in all cases where the exceeding of the limit values could endanger human health, individuals must be in a position to rely on mandatory rules in order to be able to assert their rights. Furthermore, the fixing of limit values in a provision whose binding nature is undeniable is also necessary in order that all those whose activities can give rise to nuisances can ascertain precisely the obligations to which they are subject”; or in case C-186/91, *Commission v Kingdom of Belgium*, ECLI:EU:C:1993:93; see also the opinions of Advocate General F. Jacobs in C-237/90, *Commission v Germany*, ECLI:EU:C:1992:65, para. 15; or the opinions of Advocate General W. Van Gerven in C-131/88, *Commission v Germany*, ECLI:EU:C:1990:332, para. 7: “clear and precise implementing provisions, it was added, are particularly important where a directive is intended to create rights for individuals; imprecise legislation which leaves those individuals uncertain as to their rights (in the case of directives concerning the protection of the environment it may well be a question of obligations) under Community law and their right to rely on Community law before the national courts is not sufficient to satisfy the duty imposed by Article 189 of the EEC Treaty”; see also: C-59/89, *Commission v Germany*, EU:C:1991:225, para. 19; C-58/89, *Commission v Germany*, ECLI:EU:C:1991:391, para. 14; C-298/95, *Commission v Germany*, ECLI:EU:C:1996:501, para. 16.

<sup>10</sup> Cases: C-361/88..., para. 16; C-58/89..., para. 14.

<sup>11</sup> See M. Dougan, *Addressing Issues of Protective Scope within the Francovich Right to Reparation*, “European Constitutional Law Review” 2017, vol. 13, no. 1, pp. 152-153 and the literature and case law therein; J.H. Jans, H.H.B. Vedder point out that the CJEU does not always apply the concept of individual rights consistently and that the concept may have one meaning in the context of direct effect, another in the context of liability for damages and yet another in the context of correct transposition of the directive (J.H. Jans, H.H.B. Vedder, *European Environmental Law*, Groningen 2008, pp. 205-206).

<sup>12</sup> B. Thorson, *Individual Rights in EU Law*, Cham 2016, pp. 353-354.

tion) of a “person affected or likely to be affected” by the content of certain EU rules as justification for the right of an individual to rely on EU legislation in proceedings before a national court.<sup>13</sup>

The concept of “person affected or likely to be affected” describes the relationship (impact) of the content of EU law provisions/obligations imposed on the Member States on the factual situation of the individual concerned.

Indeed, the protection of health against adverse environmental effects has been repeatedly identified by the CJEU as an (additional)<sup>14</sup> basis for allowing an individual to rely on the direct effect<sup>15</sup> of EU environmental law provisions.<sup>16</sup>

In the *Gruber* case,<sup>17</sup> in the context of the interpretation of Article 11 of Directive 2011/92,<sup>18</sup> the problem has occurred as to whether an EU law precludes national legislation under which an administrative decision finding that there is no obligation to carry out an environmental impact assessment for a project has binding force vis-à-vis neighbours, who are deprived of the right to challenge that administrative decision. The CJEU recalled that, according to the definition in Article 1(2) of Directive 2011/92, the “public concerned” means the public affected or likely to be affected by, or having a legal interest in, environmental impact assessment decision-making procedures. That is, not all natural or legal persons or organisations falling within the concept of “public concerned” should have access to the review procedure within the meaning of the aforementioned Article 11, but only those who have a sufficient legal interest or possibly allege an infringement of the national law. Since K. Gruber was a “neighbour”

<sup>13</sup> A. Sikora, *Constitutionalisation of Environmental Protection in EU Law*, Zutphen 2020, pp. 268–277; A. Sikora, Konstytucjonalizacja ochrony środowiska w prawie Unii Europejskiej, “Europejski Przegląd Sądowy” 2021, vol. 2, p. 14.

<sup>14</sup> See *echtsschutz im Umweltrecht – Weichenstellung in der Rechtsprechung des Gerichtshofs der Europäischen Union*, “Deutsches Verwaltungsblatt” 2014, vol. 129, p. 132.

<sup>15</sup> According to the concept of direct effect of EU law norms, an individual may invoke before a national court an EU norm that is clear, precise and unconditional. In the case of directives, as they require implementation, the direct effect of their provisions is generally excluded. Unless it is a matter of vertical disputes and the assertion by individuals of the protection of their rights under the provisions of a non-implemented or incorrectly implemented directive. See e.g. C-435/97, *World Wildlife Fund*, ECLI:EU:C:1999:418, para. 69; C-404/13, *ClientEarth*, ECLI:EU:C:2014:2382, para. 55 and case law therein; see further N. Półtorak, *Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych*, Warszawa 2010, p. 202; M. Lenz, D. Sif Tynes, L. Young, *Horizontal What? Back to Basics*, “European Law Review” 2000, vol. 25, vol. 3, p. 509.

<sup>16</sup> See for example cases: C-237/07, *Janecek*, EU:C:2008:447, para. 37; C-165/09 to C-167/09, *Stichting Natuur en Milieu and Others*, EU:C:2011:348, para. 94.

<sup>17</sup> C-570/13, *Gruber*, ECLI:EU:C:2015:231.

<sup>18</sup> Directive 2011/92/EU of the European Parliament and of the Council on the Assessment of the Effects of Certain Public and Private Projects on the Environment, “Official Journal of the European Union” 2011, L 26/1, pp. 1–21.



of the planned project and this concept covers persons for whom the construction, existence or operation of an economic activity facility may create a danger or nuisance or endanger their property or other rights in rem, this means that persons covered by the concept of “neighbour” may belong to the “public concerned” within the meaning of Article 1(2) of Directive 2011/92.<sup>19</sup> And by limiting the right to challenge decisions determining the need to carry out an environmental impact assessment of a project only to the applicants for approval of the project, the authorities involved, the environmental ombudsman (Umweltanwalt) and the municipality of the site of the project, the national legislation deprives, according to the CJEU, a large number of individuals of that right, including in particular the category of “neighbours.”<sup>20</sup>

In the *Folk* case,<sup>21</sup> the formula “affected or likely to be affected” (by environmental damage) was applied in the context of interpretation of Article 12 of Directive 2004/35<sup>22</sup> on environmental liability with regard to the prevention and remedying of environmental damage in relation to the request for preventive or remedial action and the granting of standing to bring actions for access to court. Article 12 of Directive 2004/35 provides for three distinct categories of persons who may initiate the procedures referred to in Articles 12 and 13 of that Directive.<sup>23</sup> “Although the Member States have discretion to determine what constitutes a ‘sufficient interest’, a concept provided for in Article 12(1)(b) of Directive 2004/35, or ‘impairment of a right’, a concept laid down in Article 12(1)(c) of that directive, they do not have such discretion as regards the right to a review procedure for those persons affected or likely to be affected by environmental damage, as follows from Article 12(1)(a) of that directive.”<sup>24</sup> It follows that “An interpretation of national law which would deprive all persons holding fishing rights of the right to initiate a review procedure following environmental damage resulting in an increase in the mortality of fish, although those persons are directly affected by that damage, does not respect the scope of Articles 12 and 13 and is thus incompatible with that directive.”<sup>25</sup>

<sup>19</sup> C-570/13..., para. 42.

<sup>20</sup> *Ibidem*.

<sup>21</sup> C-529/15, *Folk*, ECLI:EU:C:2017:419.

<sup>22</sup> Directive 2004/35/CE on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage, “Official Journal of the European Union” 2004, L 143, pp. 56-75.

<sup>23</sup> C-529/15..., para. 44: “those three categories are persons affected or likely to be affected by environmental damage, or having a sufficient interest in environmental decision-making relating to the damage, or alleging the impairment of a right, where administrative procedural law of a Member State requires this as a precondition”.

<sup>24</sup> C-529/15..., para. 47.

<sup>25</sup> *Ibidem*, para. 49.

With regard to the air quality, the CJEU has on several occasions confirmed<sup>26</sup> referring to the right of a “the natural or legal persons directly concerned by a risk that the limit values or alert thresholds may be exceeded” that such persons should be in a position to require the competent authorities to draw up an action plan to improve air quality, if necessary by bringing an action before the competent courts.<sup>27</sup> “It would be contrary to the binding nature conferred on the Directive by Article 249 EC [288 TFEU] to exclude in principle that the obligation established by it could be invoked by the persons concerned. That observation remains valid in particular in relation to a directive which aims to control and reduce atmospheric pollution and which therefore seeks to protect public health.”<sup>28</sup>

In this context, the Court also referred to the formula of a “directly affected person,”<sup>29</sup> and thus a person actually interested in the Member States’ compliance (fulfilment) with the obligations imposed by the Directive’s provisions.<sup>30</sup> Such a person, being in such a factual situation (“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”)<sup>31</sup> must “be able to rely on the mandatory rules included in those directives.”<sup>32</sup> The Court has concluded 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.”<sup>33</sup>

<sup>26</sup> E.g. in cases: C-237/07..., paras 34-42 and C-404/13..., paras 54-56.

<sup>27</sup> See for an analysis of the C-237/07... case e.g.: J. H. Jans, *Harmonization of National Procedural Law Via the Back Door? Preliminary Comments on the ECJ's Judgment in Janecek in a Comparative Context* [in:] *Views of European Law from the Mountain: Liber Amicorum Piet Jan Slot*, M. Bulterman, L. Hancher, H.G. Sevenster (eds), Alphen aan den Rijn 2009, p. 267; H. Doerig, *The German Courts and European Air Quality Plans*, “Journal of Environmental Law” 2014, vol. 26, no. 1, p. 139; A. Ryall, *Enforcing EU Environmental Law against Member States: Air Pollution, National Courts and the Rule of Law*, “European Journal of Risk Regulation” 2015, vol. 6, no. 2, p. 305.

<sup>28</sup> C-237/07..., para. 37; C-404/13..., para. 56; C-723/17, *Lies Craeynest and Others*, ECLI:EU:C:2019:168, para. 67.

<sup>29</sup> See e.g.: C-237/07..., para. 39; C-570/13..., paras 48-49; C-404/13..., para. 58; C-61/21..., paras 58-61.

<sup>30</sup> See e.g.: A. Sikora, *Constitutionalisation...*, pp. 268-277; A. Sikora, *Rola sądów krajowych w egzekwowaniu unijnych norm prawa ochrony środowiska*, “Rocznik Administracji Publicznej” 2021, vol. 7, p. 153.

<sup>31</sup> C-237/07..., para. 38.

<sup>32</sup> *Ibidem*. See also cases: C-361/88... and C-59/89..., as well as C-58/89...

<sup>33</sup> C-237/07..., para. 39.

Thus, an individual finding himself in such a factual situation (i.e. a breach of environmental quality standards which is likely to endanger the health of the individual concerned) has a right to invoke the mandatory provisions of EU directives. It is clear from this formulation of the CJEU that the provisions of the directives on the quality of the components of the environment which were intended to protect public health set standards for water or air quality do not confer a substantive right to air or water of a particular quality, but the only right is to invoke the mandatory (directly effective) provisions contained in those directives in order to seek judicial enforcement or assessment of the manner in which the Member States (competent national authorities) have complied with the obligations imposed by the Directive's provisions.

The jurisprudence of the Court, not always in a consistent and precise manner, distinguishes between, on the one hand, the assertion of rights (entitlements) arising from EU rules (more on this below) and, on the other hand, the right to invoke EU rules before a national court as a feature of the EU rule independent of whether it confers subjective rights on the individual concerned (as regards the effects of such invocation, this will depend on the type of proceedings and the nature of the EU rule).<sup>34</sup> EU law has still not developed a coherent framework on the possible interaction between individual rights and collective (rights) interests in the context of the protection of the proper state of environmental quality (of its various components).<sup>35</sup>

Invoking a norm of EU law may cover a range of situations, as is apparent, for example, from the nature of individual EU norms, but also gives rise to a variety of effects, as is apparent from the specific framework of the proceedings before the national court in which the EU norm is invoked.<sup>36</sup>

It is worth pointing out that, with regard to environmental legislation, one does not have to do with regulatory framework that formulates rights 'for the benefit of specific persons', the content and enforcement of which are both for the 'direct benefit and interest of the holders of those rights'.<sup>37</sup> On the contrary, obligations imposed on the Member States in environmental legislation concerning the state of environmental quality are clearly intended to benefit society as a whole, since they are aimed at improving and guaranteeing the proper state of the elements of the environment, and not any specific person(s).<sup>38</sup>

<sup>34</sup> M. Dougan, *Addressing Issues...*, pp. 162-165 and the literature and case law cited therein.

<sup>35</sup> *Ibidem*, pp. 144, 154-155.

<sup>36</sup> *Ibidem*, pp. 145-149.

<sup>37</sup> *Ibidem*, pp. 152-155 and the literature and case law cited therein.

<sup>38</sup> *Ibidem*; see H. Somsen, *The Private Enforcement of Member State Compliance with EC Environmental Law: An Unfulfilled Promise?* [in:] *Yearbook of European Environmental Law*, H. Somsen (ed.), Oxford 2000, p. 311.

In this context, it is possible to point to the different nature of EU norms. Indeed, one can distinguish between, on the one hand, norms formulating rights of a substantive nature, which introduce a certain level of protection within a given dispute or relationship, and, on the other hand, procedural rights/obligations, which formulate rights to participate in decision-making processes (e.g. the right to participate in an environmental impact assessment procedure), but without prejudging its final outcome.<sup>39</sup>

For the possibility of claiming compensation from a Member State for breach of UE law, a distinction should be made between, on the one hand, rules aimed at conferring subjective rights on individuals, the breach of which enables the right holder to claim compensation from the Member State for breach of EU law; and, on the other hand, the right to invoke UE provisions, usually in defence of some collective interest, the breach of which does not give rise to a claim for damages against a Member State.<sup>40</sup>

It is for these reasons, *inter alia*, that environmental legislation implies the need for a broad access to the courts (standing) to ensure its effective enforcement, not necessarily by individuals themselves (unless they fall within the category of ‘directly affected person’), but by environmental organisations, as well as appropriate, though not necessarily individual, remedies.<sup>41</sup>

With these two factors in mind, it should be pointed out that EU law has created a wide spectrum of possible legal constructions in the application of environmental standards by national courts. First, the applicant may rely on an individual right under EU law (which is a rare situation and generally concerns a right of a procedural nature). Second, the applicant may only be entitled to enforce, before the national courts, procedural obligations (imposed in the general interest) incumbent on the competent national authorities.

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<sup>39</sup> M. Dougan, *Addressing Issues...*, pp. 145-146. H.C.H. Hofmann, C. Warin, *The Concept of an Individual Right under Union Law* [in:] *Contemporary Concepts of Administrative Procedure between Legalism and Pragmatism*, Z. Kmiecik (ed.), Warsaw 2023, pp. 49-63.

<sup>40</sup> *Ibidem*.

<sup>41</sup> J. Darpö, *Pulling the Trigger: ENGO Standing Rights and the Enforcement of Environmental Obligations in EU Law* [in:] *Environmental Rights in Europe and beyond: Swedish Studies in European Law*, S. Bogojevic, R. Rayfuse (eds), pp. 274-275; M. Dougan, *Addressing Issues...*, pp. 151-155.

## 2. Do the air quality provisions of Directive 2008/50 (and the preceding directives) confer rights on individuals?

With regard to the possibility of enforcing legislation in the field of air quality protection by means of a State's liability for damages caused to individuals as a result of infringements of EU law,<sup>42</sup> the answer is to what extent the infringement of limit values laid down by Union law for the protection of air quality can actually justify a claim for damages. In other terms, are the conditions for claiming liability for damages under EU law fulfilled?

In general terms, the full effectiveness of EU law, as confirmed by the case law of the CJEU, would be limited and the protection of rights conferred thereunder weakened if an individual were not able to obtain compensation for the infringement of his rights as a result of a breach of EU law attributable to a Member State.<sup>43</sup>

The institution of the Member States' liability for damages (as formulated in *Francovich case*) identifies three conditions for the right to compensation:

- the purpose of the infringed provision of EU law is to confer a right on individuals,
- the breach is sufficiently serious, and
- there is a direct causal link between that infringement and the harm suffered by those individuals.<sup>44</sup>

As a general rule, specific provisions that the CJEU interpreted as conferring individual rights were characterised either by the fact that they conferred civil law

<sup>42</sup> See: C-752/18, *Deutsche Umwelthilfe*, EU:C:2019:1114, paras 54-55; D. Misonne, *Arm Wrestling around Air Quality and Effective Judicial Protection: Can Arrogant Resistance to EU Law-related Orders Put You in Jail? Judgment of the Court (Grand Chamber) of 19 December 2019 in Case C-752/18 – Deutsche Umwelthilfe eV v Freistaat Bayern*, "Journal for European Environmental & Planning Law" 2020, vol. 17, no. 4, p. 409. Indeed, the 'intention to confer rights' criterion has attracted considerably less scholarly analysis than either the 'sufficiently serious breach' or the 'direct causal link' requirement – though there are some notable exceptions, e.g. J.H. Jans, A.P.W. Duijkersloot, *State Liability* [in:] *Europeanisation of Public Law*, J.H. Jans, S. Prechal, R.J. Widdershoven (eds), Zutphen 2015, pp. 445-485.

<sup>43</sup> See e.g. C-6/90 and C-9/90, *Francovich*, EU:C:1991:428, para. 33; C-420/11, *Leth*, EU:C:2013:166, para. 40; C-573/17, *Popławski*, EU:C:2019:530, para. 56; C-752/18..., para. 54; M.L. Ogren, *Francovich v. Italian Republic: Should Member States be Directly Liable for Nonimplementation of European Union Directives*, "Transnational Lawyer" 1994, vol. 7, no. 2, p. 583; J.T. Lang, *New Legal Effects Resulting from the Failure of States to Fulfill Obligations under European Community Law: The Francovich Judgment*, "Fordham International Law Journal" 1992, vol. 16, p. 1.

<sup>44</sup> See e.g.: C-46/93 and C-48/93, *Brasserie du pêcheur*, EU:C:1996:79, para. 51; C-445/06, *Danske Slagterier*, EU:C:2009:178, para. 20; C-735/19, *Euromin Holdings (Cypr)*, EU:C:2020:1014, para. 79.

claims for damages on a specific group of individuals (employees or consumers) or by the claims of individuals against national authorities (administrations) for a specific benefit as defined in the directive.<sup>45</sup> These were cases where, on the basis of the wording and purpose of the provision in question, both the right holder and the content of the right (claim) could be determined with sufficient clarity.<sup>46</sup>

As far as the provisions of Directive 2008/50 are concerned – as discussed in more detail below – the wording of its provisions does not make it possible, in the sense indicated above, to establish both the right holder and the content of the right (claim).

The doctrine of subjective law confirms the existence of a right when a mandatory provision serves not only the public interest, but – at least also – the interest of individuals.<sup>47</sup> In order to assert a claim of state liability, the question is whether the infringed provision confers a right on the affected person in the sense of a legally protected position.<sup>48</sup>

The criteria to be applied to the question of personal entitlement in the case of transposition of a directive and direct effect of directives can be applied. According to these criteria, a subjective right exists if a provision of EU law, in accordance with its objective purpose, protects an individual's interests, which, however, must be real and distinct.<sup>49</sup>

<sup>45</sup> See e.g. Opinion of Advocate General V. Trstenjak in C-445/06, *Danske Slagterier*, paras 60–64.

<sup>46</sup> T.A. Downes, Ch. Hilson, *Making Sense of Rights: Community Rights in EC Law*, “ELRev” 1999, vol. 24, no. 2, p. 121; W. Van Gerven, *Of Rights, Remedies and Procedures*, “CMLR” 2000, vol. 37, p. 501; T. Eilmansberger, *The Relationship between Rights and Remedies in EC Law: In Search of the Missing Link*, “CMLR” 2004, vol. 41, p. 1199; S. Beljin, *Rights in EU Law* [in:] *The Coherence of EU Law: The Search for Unity in Divergent Concepts*, S. Prechal, B. van Roermund (eds), Oxford 2008; M. Dougan, *Who Exactly Benefits from the Treaties? The Murky Interaction between Union and National Competence over the Capacity to Enforce EU Law*, “Cambridge Yearbook of European Legal Studies” 2010, vol. 12, p. 73.

<sup>47</sup> Opinion of Advocate General V. Trstenjak in C-445/06..., para. 72; see also, e.g. C-453/99, *Courage*, paras 19 and 23; see further, e.g. W. Van Gerven, *Harmonization of Private Law: Do We Need It?*, “CMLR” 2004, vol. 41, p. 505; S. Drake, *Scope of Courage and the Principle of “Individual Liability” for Damages: Further Development of the Principle of Effective Judicial Protection by the Court of Justice*, “ELRev” 2006, vol. 31, p. 841; N. Reich, *Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in Case of Breaches of EC Rights*, “CMLR” 2007, vol. 44, p. 705; M. Dougan, *Addressing...*, pp. 147–149; C. Warin, *Individual Rights and Collective Interests in EU law: Three Approaches to a Still Volatile Relationship*, “CMLR” 2019, vol. 56, pp. 463–488.

<sup>48</sup> The CJEU generally uses the term ‘individual right’, however, in doing so it obviously has ‘subjective right’ in mind; see e.g. Opinion of Advocate General V. Trstenjak in C-445/06...

<sup>49</sup> See C. Calliess, M. Ruffert (eds), *Kommentar zu EUV/EGV*, München 2007, p. 2358 – I invoke for Opinion of Advocate General V. Trstenjak in C-445/06..., footnote 18; N. Póltorak, *Ochrona uprawnień...*, pp. 172–180 and case law and literature therein.



The Court has found in a number of infringement proceedings that Member States have failed to meet the air quality standards required by Directive 2008/50 (including even a systematic and persistent failure to do so).<sup>50</sup> Does this mean, however, that the purpose of the provisions of Directive 2008/50 (or its predecessor directives) was to confer a right to a certain ambient air quality, the violation of which could justify a claim for damages?

That would mean, if the answer to that question is in the affirmative, that Member States would be exposed to claims for damages on account of breaches of air quality standards if it is assumed that the content of the legal standards setting those standards confers rights on individuals.<sup>51</sup>

### **2.1. Case law before the judgement in Case C-61/21 *Ministre de la Transition Écologique (JP)* and the liability of the Member States for damages for breach of EU environmental law**

In the *Deutsche Umwelthilfe* case,<sup>52</sup> in response to a question from a national court whether EU law, and in particular the first paragraph of Article 47(1) of the EU Charter of Fundamental Rights (hereinafter “the Charter”), in circumstances characterised by a national authority’s persistent refusal to comply with a judicial decision ordering it to enforce a clear, precise and unconditional obligation under that law, and in the context of Directive 2008/50, whether EU law empowers or even obliges the national court having jurisdiction to order the coercive detention of office holders involved in the exercise of official authority, the CJEU, *orbiter dicta* of the main line of argument, pointed out (recalled) the importance of the institution of the Member States’ liability for damages. The Court recalled that “[t]he full effectiveness of EU law and effective protection of the rights which individuals derive from it may, where appropriate, be ensured by the principle of State liability for loss or damage caused to individuals as a re-

<sup>50</sup> See: Opinion of Advocate General J. Kokott in C-61/21..., para. 96; see: cases: C-479/10, *Commission v Sweden (PM10)*, EU:C:2011:287; C-34/11, *Commission v Portugal (PM10)*, EU:C:2012:712; C-68/11, *Commission v Italy (PM10)*, EU:C:2012:815; C-488/15, *Commission v Bulgaria (PM10)*, EU:C:2017:267; C-336/16, *Commission v Poland (PM10)*, EU:C:2018:94; C-636/18, *Commission v France (Exceedance of Nitrogen Dioxide Limit Values)*, EU:C:2019:900; C-638/18, *Commission v Romania (Exceedance of PM10 Limit Values)*, EU:C:2020:334; C-644/18, *Commission v Italy (Limit Values – PM10)*, EU:C:2020:895; C-637/18, *Commission v Hungary (Limit Values – PM10)*, EU:C:2021:92; C-664/18, *Commission v UK (Limit Values – Nitrogen Dioxide)*, EU:C:2021:171; C-635/18, *Commission v Germany (Limit Values – NO2)*, EU:C:2021:437; C-286/2, *Commission v France (Limit Values – PM10)*, EU:C:2022:319.

<sup>51</sup> This fact is also noted by Advocate General J. Kokott – see Opinion of Advocate General J. Kokott in C-61/21..., paras 97-100.

<sup>52</sup> C-752/18...



sult 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.”<sup>53</sup>

In the context of liability for damages, the CJEU has already had occasion, in its earlier case law on environmental matters,<sup>54</sup> notably in the *Wells* case<sup>55</sup> to clarify the concept of ‘a provision conferring a right(s) on an individual’ (nature of such rights) and the corresponding entitlement to judicial protection (instruments of such protection), appeared in the *Wells* case.<sup>56</sup> In that case, the Court, for the first time in relation to legislation in the field of environmental law, indicated, on the margins of the fundamental problem (i.e. the question of the existence of an obligation to carry out an environmental impact assessment procedure for a project and the legal remedies to be taken in the event of a failure to comply with that obligation)<sup>57</sup> that “the competent authorities are obliged to take all general or particular measures for remedying the failure to carry out such an assessment”<sup>58</sup> (...) “it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project in question to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered.”<sup>59</sup> An individual seeking to enforce the provisions of Directive 85/337,<sup>60</sup> i.e. the obligation to carry out the necessary environmental impact assessment, should also be able to claim damages for a breach by a Member State of its obligations under EU law.

The Court did not expressly rule that Directive 85/337 was intended to confer rights on individual “members of the public” (individuals or environmental organisations) in the context of being able to claim compensation. It appears that the possibility of ‘redress for the harm suffered’, as indicated in the *Wells* judgment, must be read in the context that it is for national law, in accordance with the principle of procedural autonomy and the requirements of the principle of equivalence and

<sup>53</sup> *Ibidem*, para. 54; see similarly cases: C-46/93 and C-48/93, *Brasserie du pêcheur and Factortame*, EU:C:1996:79, paras 20, 39, 52; C-168/15, *Tomášová*, EU:C:2016:602, para. 18 and the case law cited therein.

<sup>54</sup> This is *Directive 85/337/EEC on the Assessment of the Effects of Certain Public and Private Projects on the Environment*, “Official Journal of the European Union” 1985, L 175; subsequently replaced by *Directive 2011/92/EU*...

<sup>55</sup> C-201/02, *Wells*.

<sup>56</sup> *Ibidem*, paras 62–70.

<sup>57</sup> *Ibidem*, paras 33–70.

<sup>58</sup> *Ibidem*, para. 68.

<sup>59</sup> *Ibidem*, para. 69.

<sup>60</sup> *Directive 85/337/EEC*..., pp. 40–48.

effectiveness, to provide a mechanism for redressing any harm caused to an individual as a result of a failure to carry out an environmental impact assessment as required by EU law (as required by the Directive).<sup>61</sup> As the literature rightly argues, the problematic nature of the *Wells* judgment arises first and foremost from the fact that, so far as the carrying out of an environmental impact assessment in accordance with Directive 85/337 is concerned, the purpose of the applicable legislation is not to confer a subjective right on an individual which should be subject to redress in the form of compensation in the event of its infringement, but it is a legislation of a public nature, i.e. it protects a general interest and not an individual interest.<sup>62</sup>

However, in the later *Leth* case,<sup>63</sup> the Court explicitly confirmed that EU law also requires that a Member State, irrespective of any grounds of liability arising under national law, must also be liable on the basis of the *Francovich* principle (EU law). The Court's conclusion in the *Leth* case was preceded by a finding that the purpose of Directive 85/337<sup>64</sup> is to protect the environment and the quality of life; exposure to noise from a qualifying project can have a significant impact on the quality of life and potentially also on the health of individuals.<sup>65</sup> The issue was whether provisions of Directive 85/337 confers certain rights on the individual, i.e. determining the scope of the protective purpose of the directive. An analysis of the normative nature of Directive 85/337 provisions led to the conclusion that it only contains procedural norms,<sup>66</sup> and not provisions of a substantive nature specifying requirements/conditions for the implementation of certain projects subject to an impact assessment procedure. However, a negative result of the assessment does not automatically prohibit the implementation of the project, nor does the assessment directive itself contain provisions on offsetting negative environmental effects by other factors.<sup>67</sup>

<sup>61</sup> See: M. Dougan, *Addressing Issues...*, pp. 153-154; M. Baran, *Odpowiedzialność odszkodowawcza państwa członkowskiego (doktryna Francovich) za szkody wyrządzone naruszeniem unijnego prawa ochrony środowiska (wybrane problemy)* [in:] *Prawo zarządzania środowiskiem. Aspekty sprawiedliwości ekologicznej*, M. Nyka, T. Bojar-Fijałkowski (eds), Gdańsk 2017, pp. 163-178.

<sup>62</sup> See further, for critical discussion, e.g.: S.L. Prechal, L. Hancher, *Individual Environmental Rights: Conceptual Pollution in EU Environmental Law* [in:] *Yearbook of European Environmental Law*, H. Somsen et al. (eds), Oxford 2001, p. 89; P. Wennerås, *State Liability for Decisions of Courts of Last Instance in Environmental Cases*, "Journal of Environmental Law" 2004, vol. 16, p. 329.

<sup>63</sup> C-420/11...; H. Vedder, *Leth: Court Rules Out Francovich Claim on the Basis of the Environmental Impact Assessment Directive*, "European Law Blog" 2013.

<sup>64</sup> Directive 85/337/EEC..., pp. 40-48. Directive 85/337/EEC... was repealed by Directive 2011/92/EU... on the assessment of the effects of certain public and private projects on the environment (pp. 1-21).

<sup>65</sup> C-420/11..., paras 34-35.

<sup>66</sup> See on EU environmental law legislation of a procedural nature e.g. M. Lee, *EU Environmental Law: Challenges, Change and Decision-Making*, Oxford 2005, pp. 151-152, 163.

<sup>67</sup> C-420/11...

The CJEU then analysed whether the provisions of Directive 85/337 are intended to confer a subjective right to an assessment of the environmental effects of a project and to protection against property damage in the form of loss of value as a direct result of the failure to carry out such an assessment, despite the fact that “the environmental impact assessment as provided for in Article 3 of Directive 85/337 does not include an assessment of the effects of which the project under examination has on the value of material assets.”<sup>68</sup> But this does not mean “that an environmental impact assessment has not been carried out, contrary to the requirements of that directive” (in particular an assessment of the effects on one or more of the factors set out in that provision other than that of material asset), “does not entitle an individual to any compensation for pecuniary damage which is attributable to a decrease in the value of his material assets.”<sup>69</sup> This conclusion is justified by the fact that “the prevention of pecuniary damage, in so far as that damage is the direct economic consequence of the environmental effects of a public or private project, is covered by the objective of protection pursued by Directive 85/337.”<sup>70</sup> What is important is that, in terms of defining the full scope of protection under Directive 85/337, the reasoning of the Court in *Leth* case concerning the material scope of the individual interests protected by the directive refers only to its economic dimension (diminution in the value of property), but no longer covers the intangible interests of individuals, or more generally the interests of the environment as a whole (the state of the quality of the various components of the environment).<sup>71</sup>

As rightly pointed out in the scholarship, the Court’s approach in *Leth* case to understand the protective scope of the Directive for the purpose of establishing a ‘grant of rights to the individual’ is debatable.<sup>72</sup>

First, the Court has been quite creative in extracting the subjective rights of the individual from the provisions of Directive 85/337: on the one hand, the procedural rights relating to the carrying out of the assessment and the right to participate in the assessment in the environmental impact assessment procedure,<sup>73</sup> and, on the other

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<sup>68</sup> *Ibidem*, pkt 30.

<sup>69</sup> *Ibidem*, pkt 31.

<sup>70</sup> *Ibidem*, pkt 36.

<sup>71</sup> M. Dougan, *Addressing Issues...*, pp. 135-136.

<sup>72</sup> *Ibidem*, pp. 153-155.

<sup>73</sup> Indeed, the EIA Directive confers certain rights on the persons concerned when a project is made subject to an environmental impact assessment. In particular, they are entitled, in the context of the procedure created by the Directive, to be informed of the environmental impact of the project in question (in particular Articles 5 and 6) and to express their views on the matter during that procedure (Articles 6 and 7). The results of public participation should also be taken into account

hand, the substantive right, granting protection against the direct economic consequences (reduction in the value of the property).<sup>74</sup>

Second, although the *Leth* case took a very expansive approach to interpreting the scope and protective purpose of the Directive 85/337, the Court's approach was then narrow in its subsequent analysis of the conditions for liability, i.e. verifying the direct causal link between the Member State's breach of the Directive 85/337 and the property damage for which the individual seeks compensation.<sup>75</sup> This, in turn, significantly limits the potential scope of claims for damages in view of this understanding of the concept of a 'right' falling within the scope of the protection of the Directive 85/337.<sup>76</sup> To satisfy the condition of a causal link, it must be determined whether the correct implementation/application of the directive (in the *Leth* case the correct application of the directive would have been to carry out an environmental impact assessment of the project) could have prevented the damage.<sup>77</sup>

In the *Leth* case, in view of the procedural nature of the Member State's obligations under Directive 85/337, which did not prejudge the substantive decision as to whether the proposed project should be authorised, the mere fact that an assessment was not carried out does not in itself, in principle, affect the value of the property, even if the decrease in that value is directly attributable to the environmental effects of authorising the project.

## **2.2. Do the limit values and the obligation to comply with air quality standards under Directive 2008/50 aim to confer (substantive) rights on the individual?**

For liability to be claimed for damages on the grounds that EU law has been infringed by the Member States, it must first be established that the purpose of the provision of EU law infringed is to confer rights on the individual claiming damages.<sup>78</sup> In the context of air quality standards, this requires a positive finding that the purpose of the limit values and the obligation to improve air quality under Directive 2008/50 (or its predecessor: Directives 96/62 and 1999/30) is to confer rights on individuals who have suffered damage to their health as a result of air pollution.

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when deciding on the project (Article 8) and the essential information concerning the decision on the project should be made available to the public (Article 9).

<sup>74</sup> M. Baran, *Odpowiedzialność odszkodowawcza...*, pp. 170-178; M. Dougan, *Addressing Issues...*, pp. 153-155.

<sup>75</sup> C-420/11..., paras 45 and 47.

<sup>76</sup> M. Dougan, *Addressing Issues...*, pp. 154-155.

<sup>77</sup> N. Półtorak, *Ochrona uprawnień...*, p. 473.

<sup>78</sup> See, for example, C-6/90 and C 9/90..., para. 40; C-46/93 and C-48/93..., para. 51; C-420/11..., para. 41; C-129/19, *Presidenza del Consiglio dei Ministri*, EU:C:2020:566, para. 34.

For an assessment of whether EU law provision confers a right on an individual for the purpose of a claim for damages, it is not decisive whether the provision in question is of direct effect.<sup>79</sup> Determining the content of the right conferred by the EU law measure is crucial for the assertion of a claim for damages against a Member State.<sup>80</sup> Although the direct effect of a rule does not necessarily mean that it acquaints a particular group of individuals with rights, it may be, as Advocate General J. Kokott points out, “an important indication in favour of the granting of rights.”<sup>81</sup>

In her opinion on the *JP* case, Advocate General J. Kokott, in analysing whether the provisions of Directives 96/62 and 1999/30 as well as Directive 2008/50 (which replaced Directives 96/62 and 1999/30 in 2008 with effect from 11 June 2010) confer rights on individuals, focused her consideration on whether the provisions are clear (definite) and unconditional and what the purpose of the provision is.<sup>82</sup>

- *The clarity and precision of the provision*

The feature of an EU law provision that it is “sufficiently determinate”; is linked to the fact that it has the capacity of conferring a right on an individual.<sup>83</sup> In the case of provisions which leave the Member States a scope of discretion, the fact that an individual may seek redress before national courts in respect of the limits of that discretion<sup>84</sup> may also confirm the conferral of a right by Union legislation.<sup>85</sup> The question of the limits of the discretion which the EU legislation confers on the Member States may, in the view of the Advocate General, be relevant to the question whether the infringement is material,<sup>86</sup> but not to the fact that it confers rights on individuals.<sup>87</sup>

<sup>79</sup> See e.g. judgments: C-46/93 and C 48/93..., paras 21-22; C-735/19..., para. 81.

<sup>80</sup> Cases: C-6/90 and C-9/90..., para. 40; C-212/04, *Adeneler et al.*, EU:C:2006:443, para. 112; C-616/16 and C-617/16, *Pantuso et al.*, EU:C:2018:32, para. 49.

<sup>81</sup> Opinion of Advocate General J. Kokott in C-61/21..., para. 34; see also judgments: C-445/06..., paras 22-26; C-429/09, *Fuß*, EU:C:2010:717, paras 49-50; C-501/18, *Balgarska Narodna Banka*, EU:C:2021:249, paras 63, 86.

<sup>82</sup> See Opinion of Advocate General J. Kokott in C-61/21..., paras 35 and 72; see e.g. cases: C-178/94, C-179/94 C-188/94..., paras 33ff.; C-571/16, *Kantarev*, EU:C:2018:807, para. 102; C-735/19..., paras 88-89.

<sup>83</sup> See Opinion of Advocate General J. Kokott in C-61/21..., para. 71.

<sup>84</sup> Cases: C-237/07..., para. 46; C-488/15..., para. 105; see also cases: C-72/95, *Kraaijeveld et al.*, EU:C:1996:404, para. 59; C-723/17..., paras 34, 45; C-197/18, *Wasserleitungsverband Nördliches Burgenland et al.*, EU:C:2019:824, paras 31, 72.

<sup>85</sup> See Opinion of Advocate General J. Kokott in C-61/21..., paras 35 and 71.

<sup>86</sup> Cases: C-278/05, *Robins et al.*, EU:C:2007:56, para. 72; C-398/11, *Hogan et al.*, EU:C:2013:272, paras 50-52 and in particular to Directive 2008/50 – Opinion of Advocate General J. Kokott in C-174/21, *Commission v Bulgaria (PM10)* (C-488/15..., para. 76).

<sup>87</sup> See the opinion of Advocate General J. Kokott in C-61/21, para. 71.

Advocate J. Kokott concludes in her opinion that both Articles 7 and 8 of Directive 96/62, in conjunction with the limit values for nitrogen dioxide and PM10 pursuant to Directive 1999/30, justify a clear and unconditional obligation to comply with those limit values, which for PM10 existed from 1 January 2005 and for nitrogen dioxide from 1 January 2010, and Article 13(1) of Directive 2008/50, as well as Article 23(1) of Directive 2008/50, impose a clear and independent obligation on the Member States to prevent the limit values for air pollutants from being exceeded and to draw up, respectively, air quality plans for the protection of air quality arising from failure to comply with the limit values requirements established.<sup>88</sup>

The obligation of Member States to balance the conflicting interests and to take action to reduce the period of exceedance as far as possible (derived from Article 7(3) of Directive 96/62<sup>89</sup> and Article 23(1) of Directive 2008/50) does not set a specific time limit for ending the exceedance, but merely requires that the period of non-compliance be as short as possible. But that does not prevent it from being regarded as sufficiently clear for the assessment of a breach of the limits of the existing freedom in that regard.<sup>90</sup>

Referring in turn to the objective of Regulation 2008/50 and Directive 96/62, the Advocate General points out that that objective is (in accordance with the second recital in each case and Article 1 of Directive 2008/50) to reduce, prevent or limit harmful effects on human health.<sup>91</sup>

Building on the legal arguments based on the protection of human health as an objective of Directives 96/62 and 2008/50, the Advocate General concludes that the establishment of limit values for pollutants in ambient air and the imposition of an obligation to improve air quality in Articles 7 and 8 of Directive 96/62, read in conjunction with Directive 1999/30, and in Articles 13 and 23 of Directive 2008/50 confer rights on individuals.<sup>92</sup>

#### • *Who is entitled?*

The provisions of Directive 2008/50 and its predecessor directives on air quality undoubtedly give concrete expression to the Union's obligations to protect the environment and public health arising, inter alia, from Article 3(3) TEU and Article 191(1) and (2) TFEU. According to these treaty provisions, Union policy on the en-

<sup>88</sup> Cases: C-237/07..., para. 35; C-404/13..., para. 53.

<sup>89</sup> Opinion of Advocate General J. Kokott in C-61/21..., para. 54.

<sup>90</sup> *Ibidem*, para. 71.

<sup>91</sup> C-723/17..., para. 67.

<sup>92</sup> Opinion of Advocate General J. Kokott in C-61/21..., para. 103.



vironment aims at a high level of protection, taking into account the diversity of situations in the various regions of the Union, and is based, *inter alia*, on the principles of precaution and preventive action.<sup>93</sup>

But the mere fact that, in particular, limit values (limit values for the protection of human health in Annexes II and III to Directive 1999/30 and in Article 13 of Directive 2008/50 and Annex XI thereto) are set in order to avoid, prevent or reduce harmful effects on human health or the environment as a whole does not determine what group of persons is entitled to derive a substantive right to air of a certain quality is, unless we assume that it is every person.<sup>94</sup>

The mere fact that the Member States' obligations under those directives as regards improvement of air quality arise as a result of the exceedance of those limit values and – as the Court accepted – the possibility for an individual to rely on Directives 2008/50 and 96/62<sup>95</sup> and, in that context, to point to the judicial protection of the rights of individuals, does not yet mean that Directive 2008/50 (and its predecessors) was intended to confer (substantive) rights on an individual as regards air quality.<sup>96</sup>

Analysing the content of the provisions of Directive 2008/50 and the directives which preceded it, the Court – in contrast to Advocate General Kokott – pointed out that they do not contain any express conferral of rights on individuals in that respect, it cannot be inferred from the obligations laid down in those provisions, with the general objective referred to above, that individuals or categories of individuals are, in the present case, implicitly granted, by reason of those obligations, rights the breach of which would be capable of giving rise to a Member State's liability for loss and damage caused to individuals.<sup>97</sup>

The CJEU rejected such an interpretation of the provisions<sup>98</sup> of Directive 2008/50 and its predecessor directives that were considered, as aiming to grant on individuals individual rights which would enable them to bring a claim for damages against the Member State in accordance with the principle of State liability for damage caused to individuals as a result of infringements of EU law attributable to it.

<sup>93</sup> See, for example, C-723/17..., para. 33.

<sup>94</sup> Thus the definition of the term 'limit value' in Article 2(5) of Directives 96/62 and 2008/50.

<sup>95</sup> Cases: C-237/07..., paras 37–38; C-404/13..., para. 54; C-723/17, *Craeynest et al.*, EU:C:2019:533, paras 53–54; C 752/18..., para. 38.

<sup>96</sup> C-61/21..., paras 47–56 and case law cited therein.

<sup>97</sup> *Ibidem*, para. 56.

<sup>98</sup> These were: Articles 3 and 7 of Directive 80/779, Articles 3 and 7 of Directive 85/203, Articles 7 and 8 of Directive 96/62, Articles 4(1) and 5(1) of Directive 1999/30, as well as Articles 13(1) and 23(1) of Directive 2008/50.



The CJEU reaffirmed the conclusion already drawn from its earlier case law that it is a different matter whether the Union provision in question has direct effect, since that characteristic is neither necessary<sup>99</sup> nor sufficient in itself,<sup>100</sup> in order for a provision to be considered to confer a right on individuals.<sup>101</sup> The way in which a Union provision is worded may or may not be decisive for concluding, through its interpretation, that it confers a right on individuals.

While it is true that rights of individuals may arise not only from the express conferral of a right by Union legislation, but also from the obligations, positive or negative, which it imposes in a well-defined manner on individuals as well as on Member States and the Union institutions.<sup>102</sup> But the mere fact that the provisions of Articles 13(1) and 23(1) of Directive 2008/50 establish, like the analogous provisions of Directives 96/62, 1999/30, 80/779 and 85/203, clear and precise obligations as to the result which Member States are required to ensure, does not yet mean that they confer rights on individuals.

The rejection of the possibility for individuals to derive rights (individual rights) from those provisions is precluded, according to the Court, because “those obligations pursue, as is apparent from Article 1 of the directives mentioned in the previous paragraph, as well as, in particular, recital 2 of Directive 2008/50, a general objective of protecting human health and the environment as a whole.”<sup>103</sup>

The general nature of the objective of Directive 2008/50 in the context of the protection of human health appears to be the argument which determined the exclusion that the provisions of that directive, which formulate certain obligations on the Member States in relation to the state of air quality, confer rights on a particular group of persons potentially concerned (affected) by the failure to comply with the levels of the permitted air quality standards.

Indeed, the primary objective of the air quality provisions of Directive 2008/50 is to improve air quality and thus the general interests of all individuals, as air is such an environmental component which is not subject to individual appropriation. Moreover, due to the physical characteristics of the air, the pollutants present in it are subject to displacement. Another important argument confirming the general objective

<sup>99</sup> C-61/21..., para. 47; see similarly C-46/93 and C-48/93..., paras 18-22.

<sup>100</sup> C-61/21..., para. 47; see also C-98/14, *Berlington Hungary and Others*, EU:C:2015:386, paras 108-109.

<sup>101</sup> C-61/21..., para. 44.

<sup>102</sup> C-61/21..., para. 46; see similarly the judgments: 26/62, *van Gend & Loos*, EU:C:1963:1, para. 23; C-6/90 and C-9/90..., para. 31; C-453/99, *Courage and Crehan*, EU:C:2001:465, para. 19; C-819/19, EU:C:2021:904, para. 47.

<sup>103</sup> C-61/21 *Stichting Cartel Compensation and Equilib Netherlands* JP, para. 55.

(protection of the entire population) of Directive 2008/50 as regards the protection of human health is the fact that, in view both of the mobility of pollutants in the air (in the environment in general) and of the mobility of individuals themselves, there are no criteria in the text of the directive which would make it possible to single out from among all the individuals to whom it confers rights.<sup>104</sup>

Articles 13(1) and 23(1) of Directive 2008/50 (as well as the analogous provisions of Directives 96/62, 1999/30, 80/779 and 85/20) impose fairly clear and precise obligations as to the result that the Member States are required to ensure, namely the adoption of measures capable of minimising the risk of a breach and its duration, regarding all the circumstances of the moment and the interests at stake.<sup>105</sup> At the same time, those provisions set limits on the exercise of the national authorities' discretion which individuals may rely on before the national courts in order to assess whether the national authorities have acted in conformity with the obligations arising under the Directive 2008/50 (concerning, *inter alia*, the adequacy of the measures which the action plan must contain for reducing the risk of a breach and its duration, having regard to the balance to be struck between that objective and the various public and private interests at stake).<sup>106</sup> In particular, individuals relying on the obligations of Member States under Directive 2008/50 should be able to require the competent authorities, if necessary through judicial channels, to adopt the measures required under those Directives.<sup>107</sup>

As regards the second subparagraph of Article 23(1) of Directive 2008/50, natural or legal persons directly concerned by the risk of those limit values being exceeded after 1 January 2010 must be able to require the competent authorities to draw up, if necessary by judicial review, an air quality plan in accordance with the second subparagraph of Article 23(1) of Directive 2008/50, where the Member State has failed to ensure compliance with the requirements of the second subparagraph of Article 13(1) of that directive and has also failed to seek a deferral of the deadline under the conditions laid down in Article 22.<sup>108</sup> Furthermore, the Member States are in any

<sup>104</sup> Indirectly also Advocate General J. Kokott in C-61/21..., paras 130-134.

<sup>105</sup> C-61/21..., para. 51; see similarly C-237/07..., paras 44-46.

<sup>106</sup> C-61/21..., paras 51 and 58; see similarly C-237/07..., paras 44-46; C-404/13..., para. 56 and case law cited therein; and from C-752/18..., para. 56.

<sup>107</sup> C-61/21..., para. 60; see similarly the cases: C-404/13..., para. 56 and the case law cited therein; and from C-752/18..., para. 56. Similarly, the CoJ ruled with regard to Article 7(3) of Directive 96/62: 'natural or legal persons directly affected by a risk of the limit values or alert thresholds being exceeded should be able to require the competent authorities, if necessary through the courts, to draw up an action plan as soon as such a risk arises (C-237/07..., para. 39; C-61/21..., para. 59).

<sup>108</sup> C-61/21..., para. 60; C-404/13..., para. 56.

event to ensure that the period of exceedance of the limit values set for a given pollutant is as short as possible.<sup>109</sup>

Again, in the context of the entitlement of individuals to rely on the obligations of the Member States under Directive 2008/50 and its predecessors<sup>110</sup> in order to bring administrative or judicial proceedings, depending on their particular situation, to require the adoption of the measures required by those directives, the Court refers to the concept of affected individuals,<sup>111</sup> that is to say, of individuals “directly concerned”.

The reasoning of the CJEU confirms that it is a different matter for individuals to be able to rely on the obligations laid down by the provisions of Directive 2008/50 and its predecessor directives in order to assess the action or omission of the national authorities. It is a separate question whether the provisions of Directive 2008/50 confer, implicitly, on individuals or categories of individuals, by reason of those obligations, individual rights the breach of which may give rise to liability on the part of the Member State for damage caused to individuals. This latter possibility was ruled out by the Court in view of the general objective of protecting human health and the environment as a whole (Article 1 of each directive and, in particular, recital 2 in the preamble to Directive 2008/50) and the directives which preceded it.

The fact that Directive 2008/50 does not confer on individuals individual rights which would enable them to bring a claim for damages against a Member State under the principle of State liability for damage caused to individuals as a result of infringements of EU law attributable to it does not preclude the State from being held liable on a less restrictive basis under national law<sup>112</sup> for breach of the obligations under Articles 13(1) and 23(1) of Directive 2008/50, as an element which may be relevant for the purposes of attributing liability to public authorities on a basis other than EU law.<sup>113</sup>

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<sup>109</sup> C-61/21..., para. 50; C-644/18..., para. 136.

<sup>110</sup> Cases: C-237/07..., paras 37-38; C-404/13..., para. 54; C-723/17..., paras 53-54; C-752/18..., para. 38.

<sup>111</sup> C-61/21..., para. 62; see cases: C-404/13..., para. 52; C-723/17..., paras 31, 54; C-752/18..., paras 33, 39, 54.

<sup>112</sup> See C-278/20, *Commission v Spain (Infringement of Union Law by the Legislature)*, EU:C:2022:503, para. 32 and case law cited therein.

<sup>113</sup> C-61/21..., para. 63.

### 3. Is there a direct causal link between the infringement and the Member State?

To successfully claim damages,<sup>114</sup> there must be a causal link between the breach of the Union provision conferring the right on the individual and the damage.<sup>115</sup> There is no harmonised standard developed at EU level for the condition of a causal link because in each country it would fall under national law.<sup>116</sup> The Court of Justice emphasises that the existence of a direct causal link is a condition for the Member State's liability for damages, and it is for the national court to determine whether such a causal link exists in a particular case (it is for the national courts to determine the precise degree of proof).<sup>117</sup> This makes it necessary to assess the existence of a causal link in accordance with the principle of procedural autonomy as it is perceived in national law,<sup>118</sup> taking into account the requirements of the principles of equivalence and effectiveness.<sup>119</sup>

In the context of air quality, it is a question of demonstrating a direct causal link between a substantial failure to comply with air quality legislation and specific health impairments.<sup>120</sup> The Advocate General J. Kokkot in her opinion on the *JP* case considers that the first condition for liability is met, since the purpose of setting limit values for pollutants in ambient air and establishing an obligation to improve air quality is to confer rights on individuals, but as regards the condition of a causal link (i.e. as regards the condition of a causal link, that is, the deterioration in health resulting from the persistence, from the expiry of the relevant time-limit, of the limit values for PM10 and nitrogen dioxide in ambient air) but it is necessary "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

<sup>114</sup> *Ibidem*, p. 224.

<sup>115</sup> C-501/18..., para. 122.

<sup>116</sup> See: A. Biondi, M. Farley, *The Right to Damages in European Law*, Hague 2009, pp. 160-162; P. Wennerås, *The Enforcement of EC Environmental Law*, Oxford 2007, pp. 160-161 and the case law and views in the literature indicated there.

<sup>117</sup> See C-420/11..., pkt 48 *in fine*: „it is for the national court to determine whether the requirements of European Union law applicable to the right to compensation, including the existence of a direct causal link between the breach alleged and the damage sustained, have been satisfied”.

<sup>118</sup> Cases: C-46/93 and C-48/93..., para. 65; C-94/10, *Danfoss and Sauer-Danfoss*, EU:C:2011:674, para. 34; C-501/12 to C-506/12, C-540/12 and C-541/12, *Specht et al.*, EU:C:2014:2005, para. 106.

<sup>119</sup> C-94/10..., para. 36 and similarly judgments: C-295/04 to C-298/04, *Manfredi et al.*, EU:C:2006:461, para. 64; C-557/12, *Kone et al.*, EU:C:2014:1317, para. 24.

<sup>120</sup> So Advocate General J. Kokott in her opinion in C-61/21, para. 126.

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.”<sup>121</sup>

In determining the extent of compensation, the national court may examine whether the injured party has shown reasonable diligence in order to avoid the damage or to limit its extent (the issue of whether he has contributed to the extent of the damage caused and whether he has made use in good time of all the legal remedies available to him).<sup>122</sup> As pointed out in the literature when assessing the causal link, it should be determined whether the proper implementation/application of the directive (in the *Wells* or *Leth* case – the proper application of the directive would have consisted in conducting an assessment of the project’s impact on the environment) could have prevented the damage.<sup>123</sup> An action or – as in the case of ineffective measures to improve air quality – an omission is only a cause of harm if the harm caused is directly attributable to the conduct in question. The necessary causal link does not exist if the damage would have occurred without the act or omission in question.<sup>124</sup>

The link that exists between the protective objectives pursued by the EU legislation and the harm to private property.<sup>125</sup> The scope of protection provided by the EU rules breached by a Member State has a direct bearing on the plane of causation as that element of liability for damages which delimits (and links) the types of damage caused by the nature of the breached EU norms falling within the normative construction of adequate causation (as a premise of liability).

It is theoretically possible that a party directly affected by the incorrect implementation of an environmental directive could claim damages.<sup>126</sup> If an individual had incurred certain expenses while acting in reliance on the compliance of national law with EU environmental legislation then these could be regarded as damages.<sup>127</sup> *Francovich’s principle* suggests that an action for damages is also possible under envi-

<sup>121</sup> *Ibidem*, para. 142.

<sup>122</sup> C-46/93 and C-48/93..., para. 84; P. Wennerås, *The Enforcement...*, pp. 161-162.

<sup>123</sup> N. Półtorak, *Ochrona uprawnień...*, p. 473.

<sup>124</sup> See similarly C-164/01 P, *van den Berg/Council and Commission*, EU:C:2004:665, para. 57.

<sup>125</sup> If certain types of damage are not covered by the objective of protection pursued by directive, it is therefore impossible to link such damage as being in an adequate causal relationship with an infringement of the standards of such a directive.

<sup>126</sup> For example, if the national authorities had granted an authorisation on the basis of national provisions that had not been brought into line with the requirements of the directive and subsequently, because of the need to bring the law into line, it was repealed or amended.

<sup>127</sup> A separate issue remains the problem of compensation for environmental damage caused by non-compliance of national law with the requirements of EU environmental law; J.H. Jans, H.H.B. Vedder, *European...*, p. 228.

ronmental law,<sup>128</sup> although case law has not yet clarified to what extent this liability extends to environmental damage and is not limited to property damage arising in the sphere of a private party whose rights under EU law have been infringed.<sup>129</sup>

## Conclusions

Contemporary challenges linked to the state of the environment and climate change, as well as the growing environmental awareness of modern societies, are also accompanied by the initiation of legal remedies in various for a for the enforcement of environmental liability in order to force Member States to take optimum action to improve the state of the environment.<sup>130</sup> In many cases, legal action taken by private parties through the courts is an example par excellence of complaints in the general interest.<sup>131</sup> This illustrates vividly the contrast between the global dimension of the issue of the state of the environment and the climate change taking place and the individual nature of judicial protection in the traditional sense of liability for damages.

The legal institution of state liability under EU law has been shaped in the Court's jurisprudence (starting with the *Francovich* case)<sup>132</sup> by the CJEU stating that a Member

<sup>128</sup> See examples from practice and an assessment of the effectiveness of the application of the *Francovich* rule in the recovery of damages in environmental cases discussed by A.-M. Moreno Molina, *Direct Effect and State Liability* [in:] *National Courts and EU Environmental Law*, J.H. Jans, R. Macrory, A.-M. Moreno Molina (eds), Zutphen 2013, pp. 100-102.

<sup>129</sup> See also P. Wennerås, *The Enforcement...*, p. 156; cf. also C-420/11...: „(...) the fact that an environmental impact assessment was not carried out, in breach of the requirements of Directive 85/337, does not, in principle, by itself confer on an individual a right to compensation for purely pecuniary damage caused by the decrease in the value of his property as a result of environmental effects. However, it is ultimately for the national court, which alone has jurisdiction to assess the facts of the dispute before it, to determine whether the requirements of European Union law applicable to the right to compensation, in particular the existence of a direct causal link between the breach alleged and the damage sustained, have been satisfied” (para. 47).

<sup>130</sup> Examples include the judgment of the Grand Chamber of the European Court of Human Rights in Starsburg in the case of *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, ECLI:CE:ECHR:2024:0409JUD005360020 and the decisions in *Carême v France*, ECLI:CE:ECHR:2024:0409DEC000718921 and *Duarte Agostinho and Others v Portugal and 32 Others*, ECLI:CE:ECHR:2024:0409DEC003937120. The applicants in these cases alleged that the respondent States had failed to act sufficiently on their part to prevent global warming and that this failure entailed a violation of the right to life and the right to respect for private and family life; and the impact of the consequences of the respondent States' omissions on the applicants' living conditions and health.

<sup>131</sup> *Ibidem*.

<sup>132</sup> In any event, the Court has already held in previous judgments that the Member States are, in principle, obliged to incur liability towards an injured person under the provisions of their national



State is obliged, on the basis of EU law, which confers rights on individuals, to compensate individuals for those damages caused to them by the State's breach of EU law.

The central issue of this analysis was the first condition for the non-contractual liability of Member States for breaches of Union law, namely whether the provisions of Directive 2008/50 give rise to rights for individuals. The CoJ in *JP* held that the provisions of Directive 2008/50, as well as those of its predecessor directives, do not purport to confer individual rights on individuals which would enable them to bring a claim for damages against a Member State under the principle of State liability for damage caused to individuals as a result of infringements of Union law attributable to it.

In relation to the problem of the ability to claim damages from a Member State for a breach of Union law, a distinction must be made between (on the one hand) rules aimed at conferring subjective rights on individuals, the breach of which enables the right holder to claim damages from the Member State for a breach of Union law; and (on the other hand) the right to invoke Union rules, generally in defence of some collective interest, the breach of which does not give rise to a claim for damages against the Member State.

In short, EU law has not yet developed a coherent framework for the interaction between individual rights and collective interests.<sup>133</sup> It is for these reasons, among others, that environmental legislation implies the need for broad judicial access (standing) to ensure its effective enforcement, not necessarily by individuals themselves (unless they fall within the category of 'directly affected person'), but by environmental organisations, as well as adequate, though not necessarily individual, remedies.<sup>134</sup>

Taking into account these two factors, it should be pointed out that EU law has created a wide spectrum of possible legal constructions in the application of environmental standards by national courts. First, the complainant may rely on a subjective individual right under EU law. Second, the complainant may only be entitled to enforce before national courts procedural obligations (imposed in the general interest) incumbent on the competent national authorities.

It is worth noting in this context that, at the legal level in the EU, changes are being made to existing legislation with a view to explicitly granting individuals the right to compensation in selected areas of EU environmental law. For example, in the Industrial Emissions Directive 2010/75 (IED), it is proposed that individuals will be granted the right to claim and obtain compensation (Article 79a of the IED) when

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law on the liability of the State for the consequences of damage caused to an individual by an infringement of Community law (see judgment in C-60/75, *Russo*, paras 7-9).

<sup>133</sup> M. Dougan, *Addressing Issues...*, pp. 154-155.

<sup>134</sup> *Ibidem*, pp. 145-146, 151-152; J. Darpö, *Pulling the Trigger...*, pp. 274-275.



they suffer damage to their health due to a breach of national law transposing the IED.<sup>135</sup> The right to compensation in the IED is the first of its kind in EU environmental law and is certainly the start of a new trend: amendments to the Air Quality Directive<sup>136</sup> and the Urban Waste Water Treatment Directive also include a right to compensation for individuals whose health has been affected by pollution.

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<sup>135</sup> European Commission, *Proposal for a Directive of the European Parliament and of 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*, Strasbourg 2022, art. 79a.

<sup>136</sup> V. Halleux, *Revision of the Ambient Air Quality Directives*, 2024, <https://www.europarl.europa.eu/legislative-train/theme-%20a-european-green-deal/file-revision-of-eu-ambient-air-quality-legislation> (14.05.2024).

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For many years legal thought and practice focused on the general concept of environmental rights as a legal tool meant to enforce the human right to a healthy and sustainable environment. Whilst there is an undeniable link between human rights and climate change, as illustrated notably by the global phenomenon of the climate change litigation, this monograph focuses on the growing role of potential, sectoral fundamental rights and tailored remedies available in the EU legal order in absence of a substantive fundamental right to a healthy environment in EU law. Against the background of the European Green Deal and its ambitious climate-neutrality goal by 2050, the book echoes the sustainability-based approach and its limits.

Contributors analyse two interrelated perspectives. On the one hand, authors explore the procedural dimension by discussing the climate litigation and the limits of the concept of human environmental rights, state liability for loss and damage caused to individuals as a result of breaches of EU law, national remedies available in case of bad condition of the environment as well as the limits of the public interest litigation and challenges related to climate claims against private actors in national law. On the other hand, contributors discuss substantive aspects from a global perspective of food insecurity, soil monitoring and resilience as well as digitalisation, green skills and climate-induced migration. With insights from leading experts, this work highlights the evolving tensions and expectations within the EU legal framework.

Essential for legal practitioners, policymakers, academics, and students of law and administration, this book offers a comprehensive exploration of the intersection between sustainability, climate action, and the protection of fundamental rights in EU law.



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