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C-61/21 *Ministre de la Transition Écologique*: Putting the Individual-centered CJEU Case Law on Air Quality on Hold

Justine Richelle*

PhD candidate, Hasselt University & Maastricht University

Abstract

*In its judgment in C-61/21 *Ministre de la Transition écologique* rendered on 22 December 2022, the Grand Chamber of the CJEU decided, against the Opinion of Advocate General Kokott, that Articles 13(1) and 23(1) of Directive 2008/50/EC on air quality did not give rise to individual rights. This decision implies that these articles cannot be invoked to request compensation for health damage suffered as a result of a breach of obligations by Member States. The CJEU came to this conclusion by arguing that the Directive only serves a general purpose of protection of human health and the environment, which does not satisfy the conditions for State liability established in *Francovich*.*

This judgment seems to put a stop to the trend observed in earlier case law on air quality, rather focusing on individuals. This case note aims at reflecting upon this judgment in light of previous case law, and in the context of the revision of the Directive on air quality.

Introduction

According to the World Health Organisation, ‘air pollution is one of the biggest environmental threats to human health, alongside climate change’.¹ Zooming in on Europe, air pollution is also identified as ‘the biggest environmental health risk’.² In order to combat air pollution and increase air quality, the EU adopted Directive 2008/50/EC on ambient air quality and cleaner air for Europe, which entered into force in 2008 (hereinafter: the Air

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¹ World Health Organisation, ‘New WHO Global Air Quality Guidelines aim to save millions of lives from air pollution’ (WHO.int, 22 September 2021) <www.who.int/news/item/22-09-2021-new-who-global-air-quality-guidelines-aim-to-save-millions-of-lives-from-air-pollution> accessed 30 January 2023.

² European Environment Agency, ‘Air pollution is the biggest environmental health risk in Europe’ (EEA.europa, 24 November 2022) <www.eea.europa.eu/themes/air/air-pollution-is-the-single> accessed 30 January 2023.

Quality Directive or the Directive).³ The Directive plays a prominent role in the fight against air pollution, with its main objectives, as stated in its Recitals 1 and 2, being the protection of human health and the environment against air pollution. For this purpose, the Directive regulates the concentration of certain pollutants in the ambient air. The key elements of the Directive are the target and limit values on specific pollutants established on an hourly, daily, or yearly basis for the zones and agglomerations identified by the Member States throughout their territory.⁴ In particular, the term ‘limit value’ is defined in Article 2(5) of the Directive as a:

‘level fixed on the basis of scientific knowledge, with the aim of avoiding, preventing or reducing harmful effects on human health and/or the environment as a whole, to be attained within a given period and not to be exceeded once attained’.⁵

Concretely, the Directive provides that Member States must comply with the limit values, and that the limit values must not be exceeded.⁶ The limit values are closely monitored by competent authorities and, in case they are breached, Member States are under the obligation to adopt air quality plans for the specific zones and agglomerations in which the breaches occur in order to improve air quality, and to construe the plans in order to keep the exceedance period as short as possible.⁷ Based on Article 22 of Directive 2008/50/EC, Member States were allowed to postpone the deadline to comply with limit values of pollutants, under some circumstances, until a few years after the entry into force of the Directive.

The Air Quality Directive has, over the years, given rise to various cases before the Court of Justice of the European Union (the ‘CJEU’). European citizens have addressed the Court on multiple occasions seeking to have their individual

3 Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe [2008] OJ L152/01.

This Directive merges together: Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management; Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air; Directive 2000/69/EC of the European Parliament and of the Council of 16 November 2000 relating to limit values for benzene and carbon monoxide in ambient air; Directive 2002/3/EC of the European Parliament and of the Council of 12 February 2002 relating to ozone in ambient air; and Council Decision 97/101/EC of 27 January 1997 establishing a reciprocal exchange of information and data from networks and individual stations measuring ambient air pollution within the Member States.

4 Dir 2008/50/EC (n 3), art 4 compels Member States to divide their territory into zones and agglomerations.

5 Dir 2008/50/EC (n 3), art 2(5).

6 *ibid*, art 13(1).

7 *ibid*, art 23.

right to clean air recognised.⁸ The right to clean air is not explicitly mentioned in the Directive, but there is a general trend in CJEU case law towards the development of a substantive right to a healthy environment, including clean air.⁹ Since the Directive's entry into force, the Court has been called upon to rule on numerous matters, including the individual right to request the drawing up of air quality action plans.¹⁰ In addition, a plethora of infringement procedures have been launched against Member States for alleged non-compliance with the Air Quality Directive.¹¹

On 26 October 2022, the European Commission proposed a revision of the Air Quality Directive, with the aim to set interim 2030 air quality standards.¹² The ultimate goal of the EU is to reach zero air pollution by 2050. The proposed revision contains new rules strengthening the position of citizens in the fight against air pollution. Indeed, the proposal sets out new and improved rules on compensation, access to justice, and public participation and information.¹³ The Commission presented its proposal to environment ministers on 20 December 2022.¹⁴

In parallel, the CJEU had to decide on a request for a preliminary ruling arising from a French administrative Court of Appeal in a case concerning individual compensation for damage to health linked to deterioration of air quality

⁸ See for example: Case C-752/18 *Deutsche Umwelthilfe eV v Freistaat Bayern* EU:C:2019:1114; Case C-404/13 *ClientEarth v Secretary of State for the Environment, Food and Rural Affairs* EU:C:2014:2382; and Case C-723/17 *Lies Craeynest and Others v Brussels Hoofdstedelijk Gewest and Brussels Instituut voor Milieubeheer* EU:C:2019:533.

⁹ D Misonne, 'The emergence of a right to clean air: Transforming European Union law through litigation and citizen science' (2020) 30 *RECIEL* 1, 1; U Taddei, Opinion: 'A right to clean air in EU law? Using litigation to progress from procedural to substantive environmental rights' (2016) 18 *Environmental Law Review* 1, 3. Key CJEU decisions on air quality are discussed in this case note.

¹⁰ See Case C-237/07 *Dieter Janecek v Freistaat Bayern* EU:C:2008:447.

¹¹ For instance: Case C-220/22 *Commission v Portugal*, pending; Case C-633/21 *Commission v Greece* EU:C:2023:112; Case C-342/21 *Commission v Slovakia* EU:C:2023:87; and Case C-286/21 *Commission v France* EU:C:2022:319.

The CJEU has already issued several judgments finding breaches of the Air Quality Directive by Member States, for instance in: Case C-365/10 *Commission v Slovenia* EU:C:2011:183; Case C-479/10 *Commission v Sweden* EU:C:2011:287; Case C-34/11 *Commission v Portugal* EU:C:2012:712; Case C-68/11 *Commission v Italy* EU:C:2012:815; Case C-488/15 *Commission v Bulgaria* EU:C:2017:267; Case C-336/16 *Commission v Poland* EU:C:2018:94; Case C-635/18 *Commission v Germany* EU:C:2021:437; Case C-636/18 *Commission v France* EU:C:2019:900; Case C-638/18 *Commission v Romania* EU:C:2020:334; Case C-644/18 *Commission v Italy* EU:C:2020:895; and Case C-664/18 *Commission v United Kingdom* EU:C:2021:171.

¹² Commission, 'Proposal for a Directive of the European Parliament and of the Council on ambient air quality and cleaner air for Europe (recast)' COM (2022) 542 final, Brussels.

¹³ See for instance the newly proposed Articles 27 on access to justice and 28 on compensation.

¹⁴ V Halleux, 'Revision of the Ambient Air Quality Directives' (European Parliament Legislative Train Schedule, 20 January 2023) <<https://www.europarl.europa.eu/legislative-train/theme-a-european-green-deal/file-revision-of-eu-ambient-air-quality-legislation>> accessed 14 February 2023.

in the Paris agglomeration, received early 2021: C-61/21 *Ministre de la Transition écologique*.¹⁵ This case, therefore, connects the issues of air quality and State liability, as discussed in the renowned CJEU case *Francovich*.¹⁶

Soon after the release of the proposal for the recast of the Directive, the CJEU rendered its verdict in case C-61/21 on 22 December 2022, deciding that the Directive did not confer any individual right to compensation for health damage when Member States breach air quality legislation.

This case note discusses the CJEU decision in that case and its connection to the revision proposal submitted by the European Commission. Section 1 discusses the facts of the case and the preliminary questions referred to the CJEU. Section 2 delves into the Advocate General's (AG) Opinion on the case, which the CJEU decided not to follow. Section 3 presents the CJEU judgment in case C-61/21. Section 4 reflects on the trends set by the CJEU in rulings on ambient air quality, on the decision in C-61/21, and on the link with the proposed revision of the Directive. Section 5 contains concluding remarks.

I. Facts and Preliminary Questions

The case at hand was referred to the CJEU by the Versailles Administrative Court of Appeal on 2 February 2021. The request for a preliminary ruling emanated from the fact that limit values for ambient air quality have been exceeded in various instances in the Paris agglomeration.¹⁷ Based on this observation, the applicant in the main proceedings, 'M. JP', requested that the Prefect of the *Département du Val-d'Oise*, an area inside the Paris agglomeration, take action to comply with the limit values prescribed by the Air Quality Directive. The applicant claimed that he had been suffering from various health problems since 2003, and that his health had been deteriorating ever since. The applicant linked his health issues with the poor air quality of the Paris ag-

¹⁵ Case C-61/21 *Ministre de la Transition écologique and Premier ministre* EU:C:2022:1015. For an analysis of the case, see: M Pagano, 'Human rights and ineffective public duties: the Grand Chamber judgment in JP v Ministre de la Transition écologique' (European Law Blog, 2 February 2023) <<https://europeanlawblog.eu/2023/02/02/human-rights-and-ineffective-public-duties-the-grand-chamber-judgment-in-jp-v-ministre-de-la-transition-ecologique/>> accessed 10 February 2023.

¹⁶ Joined Cases C-6/90 & C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* EU:C:1991:428. For a discussion on the *Francovich* judgment, see for instance: MI Ogren, 'Francovich v. Italian Republic: Should Member States be Directly Liable for Nonimplementation of European Union Directives' (1994) 7 *Transnational Lawyer* 2, 583; JT Lang, 'New Legal Effects Resulting from the Failure of States to Fulfill Obligations under European Community Law: the Francovich Judgment' (1992) 16 *Fordham International Law Journal* 1, 1.

¹⁷ See the following judgments: Case C-636/18 *Commission v France* (exceedance of limit values for PM₁₀) EU:C:2019:900; and Case C-286/21 *Commission v France* (exceedance of limit values for PM₁₀) not published, EU:C:2022:319.

glomeration, where he lives. Arguing that his health problems resulted from the breach of their obligations under the Directive by the French authorities, the applicant sought to obtain compensation of €21 million for health damage on the basis of State liability. After an unsuccessful action before the Administrative Court of Cergy-Pontoise, an appeal was filed before the Administrative Court of Appeal of Versailles. This Court of Appeal requested clarification from the CJEU on the scope of Article 13(1) on limit values and Article 23(1) on air quality plans of the Air Directive and asked the following questions:

‘(1) Must the applicable rules of EU law resulting from the provisions of Article 13(1) ... and of Article 23(1) ... of Directive [2008/50] be interpreted as entitling individuals, in the event of a sufficiently serious breach by an EU Member State of the obligations resulting from those rules, to claim compensation from the Member State concerned for damage to their health in cases where there is a direct and certain causal link with the deterioration in air quality?’

‘(2) On the assumption that the provisions referred to above may indeed give rise to such an entitlement to compensation for damage to health, to what conditions is that entitlement subject, in particular with regard to the date on which the existence of the failure attributable to the Member State concerned must be assessed?’¹⁸

2. Advocate General Opinion

The Opinion of Advocate General Kokott (hereinafter: the AG) was delivered on 5 May 2022. In order to answer the two abovementioned questions, the Advocate General recalled the principle of State liability as established in *Francoovich* and *Brasserie du Pêcheur*. Accordingly, the AG lists three cumulative conditions that must be met for individuals to claim compensation under EU law: the rule of EU law infringed must be intended to confer rights on the individuals in question, the infringement of the rule must be sufficiently serious, and there must be a direct causal link between the infringement and the damage suffered by the individuals requesting compensation.¹⁹

The first point addressed by the AG is therefore whether the rules laid down in Articles 13(1) and 23(1) of the Air Quality Directive confer rights on individuals.

¹⁸ Case C-61/21 *Ministre de la Transition écologique and Premier* EU:C:2022:1015, Opinion of AG Kokott, para 27.

¹⁹ *ibid*, para 31. This paragraph refers to: Joined Cases C-6/90 & C-9/90 (n 16), para 40; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factorame* EU:C:1996:79, para 51; Case C-420/11 *Leth* EU:C:2013:166, para 41; and Case C-129/19 *Presidenza del Consiglio dei Ministri* EU:C:2020:566, para 34.

In this respect, the AG considers the clarity of the rules on air quality, and the level of detail of the obligations laid down in the two Articles. The conclusion of this first analysis is that, according to the AG:

Article 13(1) of Directive 2008/50 [...] establishes a precisely defined, directly effective obligation on the part of the Member States to prevent exceedance of the limit values for the air pollutants covered. [...] Article 23(1) of Directive 2008/50 imposes a clear independent obligation to establish air quality plans, which is triggered by the infringement of limit values.²⁰

When discussing the purpose of imposing limit values and the obligation of drawing up air quality plans, the AG acknowledged that the rules of the Air Quality Directive do impose responsibility on Member States on the basis that ambient air pollution is generated from various sources, and therefore it is up to the Member States to decide to what extent certain polluters must decrease their emissions.²¹

The AG also addressed the French Republic's objection that, while previous CJEU judgments on State liability for infringement of EU law concerned financial claims, the case at hand did not relate to individuals' rights to payments or economic benefits.²² In this regard, the AG recalled that, as enshrined in Article 3 of the Charter of Fundamental Rights, everyone has the right to respect for his or her physical and mental integrity, thereby confirming that there is an important change of legal interests in case of adverse health effects due to failure of a Member State to ensure compliance with the rules on limit values.²³

In conclusion, the AG determined that the obligations under Articles 13 and 23 of the Directive do confer rights on individuals.

In order to answer the second question on entitlement to damages, the AG analysed whether there was a sufficiently serious infringement and, if so, whether there was a direct causal link between the infringement of air quality rules and the damage to the health of the applicant. The AG found that there was indeed a serious infringement, as the French Republic did not adopt appropriate measures to reduce the temporal scope of the exceedance of limit values.

The intention to confer rights and the sufficiently serious breach having been proven in this case, the AG then turned to the more difficult issue of causality, and enumerated which conditions must be met in order to prove the direct causal link:

²⁰ Case C-61/21 Opinion of AG Kokott (n 18), paras 68-69. In para 69, the AG refers to: Case C-420/11 (n 19) paras 45 to 47; and Case C-420/11 *Leth* EU:C:2013:166, Opinion of AG Kokott, points 50 to 55.

²¹ Case C-61/21 Opinion of AG Kokott (n 18), para 81.

²² *ibid*, paras 88-94.

²³ *ibid*, para 91.

(1) the injured party must first prove that he or she has stayed, for a sufficiently long period of time, in an environment in which limit values for ambient air quality under EU law have been seriously infringed. The duration of that period is a medical question that requires a scientific answer. [...] (2) Second, anyone seeking compensation for air pollution must prove the existence of damage that can be linked to the relevant air pollution in the first place. (3) And third, the injured party must prove a direct causal link between the abovementioned stay at a place where a limit value for ambient air quality was seriously infringed and the damage claimed.²⁴

If these conditions are met, then the injured party would be able to request compensation in theory. The only exception would be the ability of Member States to show that the infringement of limit values and the resulting damage to health would have taken place even under a good air quality plan. Indeed, the AG concluded by stipulating that it remains possible for Member States to exonerate themselves by proving that the exceedances of the limit values would have occurred even if air quality plans meeting the requirements of the Directive would have been adopted in due time.²⁵ Although it remains to be seen how Member States can in fact prove such a thing, the AG does not exclude this possibility.

3. CJEU Judgment

In its ruling, the CJEU Grand Chamber first assessed whether the conditions for State liability, namely a sufficiently serious violation of an EU law rule intending to grant rights to individuals, and a direct causal link between the violation and the damage sustained by the individuals, are met in this case.

The CJEU limited its analysis to the question of whether Articles 13(1) and 23(1) of the Air Quality Directive do in fact grant rights to individuals. The CJEU explained that these Articles impose a double obligation on Member States.²⁶ While the Court acknowledged that Articles 13(1) and 23(1) lay down clear and precise obligations of results, the Court took the view that these obligations only serve a general purpose of protection of human health and the environment

²⁴ *ibid.*, paras 131, 135 & 136.

²⁵ *ibid.*, para 141.

²⁶ Case C-61/21 *Ministre de la Transition écologique and Premier ministre (Responsabilité de l'État pour la pollution de l'air)* EU:C:2022:1015, paras 48-50.

as a whole.²⁷ According to the Court, the rules that are breached should alter the legal situation of the individual claiming damages.²⁸ The Court therefore interpreted the obligations and the general objective of the Directive as neither explicitly attributing rights to individuals, nor implicitly granting rights to individuals that would potentially give rise to State liability for damage caused to these individuals.²⁹

Following this reasoning, the Court deduced that individuals are not allowed to claim compensation from Member States based on infringement of rights contained in the Air Quality Directive. The Court does not answer the second preliminary question.

The Court nevertheless mentioned that individuals must be able to bring proceedings at national level in order to request their national authorities to adopt relevant measures in case the limit values under Article 13(1) are exceeded.³⁰ In fact, the Court's conclusion in this case does not prevent individuals from claiming damages from the State on the basis of national law. Moreover, the Court stated that national judicial bodies may have to issue orders and coercive fines to the State for failures to comply with Articles 13(1) and 23(1) of Directive 2008/50, as was done for instance by the French Council of State in recent judgments.³¹

Since this case stems from a preliminary question to the CJEU, the referring Court – the Versailles Administrative Court of Appeal in this case – will ultimately decide on the case at hand on the basis of the interpretation given by the CJEU.

²⁷ Case C-61/21 Opinion of AG Kokott (n 18), paras 54-55. On obligations of result in air quality in France, see for example: E Tête, 'Qualité de l'air: une obligation de résultat', (2017) 17 *Droit, Déontologie & Soin* 4, 410.

²⁸ Case C-61/21 (n 26), para 47.

²⁹ *ibid*, para 56.

³⁰ *ibid*, para 58.

³¹ See for instance: Conseil d'État, Decision N° 394254, FR:CECHR:2017:394254.20170712, 12 July 2017, in which the French Council of State ordered the French Government to take all necessary measures to decrease NO₂ and PM₁₀ amounts and bring them back under limit values in 13 zones. See also: Conseil d'État, Décision N° 428409, FR:CEASS:2020:428409.20200710, 10 July 2020, in which the French Council of State threatened to impose fines of € 10 million per semester if the Government does not take appropriate measures to reduce pollution in accordance with the 2017 judgment. This is the highest fine pronounced by an administrative judge to the State. On 4 August 2021, the French Council of State imposed a fine of € 10 million to the French State for the first semester of 2021, as limit values were still breached in 5 zones (Decision N° 428409, FR:CECHR:2021:428409.20210804, 4 August 2021). Following this judgment, the French Council of State recently ordered the French State to pay two fines of € 10 million each, for the second semester of 2021, and the first semester of 2022: Decision N° 428429, FR:CECHR:2022:428409.20221017, 17 October 2022).

4. Comments

4.1. Evolution of the Jurisprudence

This judgment seems to put a stop to the individual-oriented evolution of jurisprudence on the Air Quality Directive.³² Litigation by individuals and environmental NGOs at national and European levels can serve the purpose of raising concerns about environmental issues and bringing these issues to the fore and encouraging discussion and can lead, ultimately, to legislation change.³³ In the case at hand, the CJEU was faced with the question of State liability and compensation for health damage arising out of non-respect of EU air quality law by a Member State for the first time, but the Court did not seize the opportunity to issue a landmark judgment, affirming previous case law, giving responsibility to Member States, and empowering citizens. This judgment may come as a surprise when looking at earlier case law.

In the 2007 *Janecek* case, the Court of Justice declared that any natural or legal person directly affected by an exceedance of limit values or alert thresholds must be able to require the competent authority to draw up an action plan, if necessary through action in court.³⁴ The Court therefore interpreted the earlier version of Directive 2008/50/EC as intended to confer rights upon individuals. The *Janecek* ruling came as a confirmation of an older case, *Commission v Germany*, decided in 1991, which dealt with limit values for lead in ambient air.³⁵ In its judgment in 1991, the Court emphasised that the limit values were designed to protect human health and stated that ‘persons concerned must be in

³² For a discussion on the upward trend in air quality litigation, see: D Misonne, ‘The emergence of a right to clean air: Transforming European Union law through litigation and citizen science’, (2020) RECIEL, 1.

³³ For a few examples of litigation at national level on air quality, see for instance: I Burgers, ‘Dutch NGO wins summary proceedings against Dutch State on air quality’ (Judges in Utopia, 2017) <https://pure.uva.nl/ws/files/36812866/Dutch_NGO_wins_summary_proceedings_against_Dutch_State_on_air_quality_Judges.pdf> accessed 30 January 2023.

³⁴ Case C-237/07 (n 10) para 39. The case was reported in: V Edwards, ‘European Court of Justice – Significant Environmental Cases 2008’, (2009) 21 Journal of Environmental Law 1, 151.

For an analysis of the *Janecek* case, see for instance: JH Jans, ‘Harmonization of National Procedural Law Via the Back Door? Preliminary Comments on the ECJ’s Judgment in *Janecek* in a Comparative Context’ in M Bulterman et al (eds), *Views of European Law from the Mountain; Liber Amicorum Piet Jan Slot*, Kluwer Law International (Kluwer Law International 2009), 267; H Doerig, ‘The German Courts and European Air Quality Plans’, (2014) 26 Journal of Environmental Law, 139.

³⁵ C-59/89 *Commission v Germany* EU:C:1991:391. See in Case C-237/07 (n 10) paras 38 & 39: ‘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 (see Case C-361/88 *Commission v Germany*; Case C-59/89 *Commission v Germany*; and Case C-58/89 *Commission v Germany*)’.

a position to rely on mandatory rules in order to be able to assert their rights'.³⁶ However, the decision in *Janecek* does not mean that individuals are granted a right that the limit values will not be exceeded. While the CJEU recognised the relevance of *Janecek* in its judgment in *Ministre de la Transition écologique*, the question of compensation for health damage suffered as a result of a breach of EU law goes beyond what was decided in *Janecek*.³⁷

In *ClientEarth v United Kingdom*, the CJEU confirmed that the findings of *Janecek* applied to Directive 2008/50.³⁸ The Court moreover clarified that Article 13 of the Directive produced obligations of results.³⁹ In *ClientEarth*, the Court also allowed individuals to bring proceedings to ensure compliance of national law with Article 23 of the Directive. In this sense, it can be argued that the Court views Article 23 as having direct effect. This judgment is consistent with the approach adopted by the Court when called upon to explain the scope of environmental directives, especially those protecting human health like the Air Quality Directive.⁴⁰

In *Deutsche Umwelthilfe*, the CJEU discussed enforcement of EU law on air quality and, in this respect, recalled the principle of State liability in cases where States can be held responsible for breaches of EU law leading to damage suffered by individuals. As the Advocate General notes, the request in *Ministre de la Transition écologique* sheds light on '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'.⁴¹ Still, as Misonne notes, the *Deutsche Umwelthilfe* case is 'essential in the way it embraces human health and adds a higher step in the ascending line gradually constructed by the ECJ on the binding force of EU law on air quality standards'.⁴² This observation stems from

³⁶ Case C-59/89 (n 35), paras 19-22.

³⁷ Case C-61/21 (n 26), para 59.

³⁸ The *Janecek* case concerned the predecessor of Dir 2008/50/EC: Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management. C-404/13 (n 8), para 56.

The judgment is reported in I. Squintani, 'Case Law of the Court of Justice of the European Union and the General Court', Reported Period 15.7-15.12.2014, (2015) 12 Journal for European Environmental & Planning Law, 57.

³⁹ A Ryall, 'Enforcing EU Environmental Law against Member States: Air Pollution, National Courts and the Rule of Law', Case Note on Case C-404/13, *The Queen, on the application of ClientEarth v Secretary of State for the Environment, Food and Rural Affairs* EU:C:2014:2382, (2015) 6 European Journal of Risk Regulation 2, 305.

⁴⁰ *ibid.*

⁴¹ *Supra* n 18.

⁴² 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*', (2020) 17 Journal for European Environmental & Planning Law, 409.

the declaration of the Court that, under Directive 2008/50, ‘failure to adopt the measures required by that Directive would endanger human health’.⁴³

While the Court does not question these earlier cases, the judgment in *Ministre de la Transition écologique* interrupts the construction of this ascending line. In fact, the Court refutes the idea that prior case law means there should be a right to compensation for damage caused under Articles 13(1) and 23(1) of the Air Quality Directive. The Court specifically refers to the cases mentioned above but does not consider that the two Articles give rise to individual rights to claim compensation.⁴⁴ The reasoning of the Court in this case could therefore be tagged as quite conservative, as it does not make individual rights in the field of air quality progress.

Furthermore, this decision raises the question of the applicability of the *Francovich* doctrine to the field of environmental law. Scholarship is divided on the matter, with on the one hand scholars like, for instance, Somsen, who is favourable to the application of the State liability principle to environmental matters⁴⁵ and other authors, on the other hand, who highlight that the ‘anthropocentric bias’ of the *Francovich* doctrine makes it ‘ill-suited to providing an effective remedy in respect of breaches of EU environmental legislation’.⁴⁶ This claim is understood as meaning that *Francovich* is intended to protect human beings, and would therefore not easily be applied to the protection of the environment.⁴⁷ The limits of applying *Francovich* to environmental cases can be noticed in the *Leth* case, concerning the Environmental Impact Assessment Directive, in which the Court has ruled that, in order to apply the *Francovich* doctrine and establish a direct causal link between the breach of an EU rule and damage suffered, the nature of the rule breached must be taken into account.⁴⁸ In that particular case, the claim for compensation was denied, as the

⁴³ *ibid.*

⁴⁴ C-61/21 (n 26), para 62. Even if the Court confirms the judgment in *Janecek* in relation to the obligation to draft air quality plans, the Court does not grant a right in *Ministre de la transition écologique*, as it considers that the Directive’s general purpose is not to attribute rights to individuals. This raises the question of whether the Court hints that there may be two types of individual rights involved.

⁴⁵ H Somsen, ‘Francovich and its Application to EC Environmental Law’ in H Somsen (ed), *Protecting the European Environment: Enforcing EC Environmental Law* (Blackstone Press, Glasgow 1996), 135.

⁴⁶ M Hedemann-Robinson, *Enforcement of European Union Environmental Law* (2nd edn, Routledge 2015), 348, as referred to in: KP Purnhagen & J Saurer, ‘Climate Change Litigation – Liability of EU Member States under EU law’, (2020) Wageningen Law Series, Law Group 2020/03, 17.

⁴⁷ KP Purnhagen & J Saurer, ‘Climate Change Litigation – Liability of EU Member States under EU law’, (2020) Wageningen Law Series, Law Group 2020/03, 17.
It must be noted that, in this case, since *Ministre de la transition écologique* also concerns human health – in addition to the environment – the argument about environmental protection could have been easily circumvented.

⁴⁸ Case C-420/11 (n 19).

Court held that carrying an impact assessment is a procedure that does not guarantee substantive environmental protection. Following this decision in *Leth*, Vedder argues that a *Francovich* claim made with regard to an environmental directive would only work provided that the directive in question prescribes an environmental protection standard, such as limit values.⁴⁹ Linking this reflection to the Air Quality Directive and the jurisprudence, it seems that the CJEU is only ready to grant a right to the drafting of an air quality plan, but not more at this stage.

4.2. Proposal for a Revision of the Air Quality Directive

The display of the Court's jurisprudence in the previous section shows that the judgment in *Ministre de la Transition écologique* does not follow the path initiated by the Court in earlier case law on air quality. One of the potential reasons behind this decision is that the Commission's proposal to revise the Air Quality Directive is currently pending. In fact, the proposal, released on 26 October 2022, contains a newly added article, Article 28, entitled 'Compensation for damage to human health'.

If this new provision is adopted, natural persons as well as environmental NGOs bringing collective action would be able to claim compensation 'where damage to their health has occurred wholly or partially as a result of a violation of rules prescribed on limit values, air quality plans, short-term action plans or in relation to transboundary pollution'.⁵⁰

The Commission makes it clear in its Proposal that the rules on compensation pursue the goal of protecting human health and the environment from the harmful effects of air pollution.⁵¹ The Article also stipulates that Member States must ensure that national law is designed and applied in a way that does not render claims for compensation excessively difficult. A new script might therefore emerge from this Article 28, with rules on State liability and causality that might make it easier for individuals to claim damages.

In the context of the revision of the Directive, with this judgment the CJEU shows itself to be respectful of the legislator. Indeed, the Commission's proposed revision is still a proposal, which has to pass through the European Parliament and the Council in accordance with the ordinary legislative procedure. The proposal is pending, and the CJEU could not foresee the outcome of the nego-

⁴⁹ H Vedder, 'Leth: Court Rules Out Francovich Claim on the Basis of the Environmental Impact Assessment Directive' (European Law Blog 27 March 2013) <<https://european-lawblog.eu/2013/03/27/leth-court-rules-out-francovich-claim-on-the-basis-of-the-environmental-impact-assessment-directive/>> accessed 30 January 2023.

⁵⁰ Commission, Proposal for a Directive of the European Parliament and of the Council on ambient air quality and cleaner air for Europe (recast), COM (2022) 542 final, 16.

⁵¹ *ibid*, 28.

tiations at the time of the ruling. Following this reasoning, it can be argued that it would not have been legitimate for the Court, a few months prior to the start of negotiations on the revision proposal, to impose its view on the matter.

5. Conclusion

The judgment in *Ministre de la Transition écologique* may have come as a surprise for those involved in the field of air quality protection and the fight against air pollution. This statement is especially true when looking at the AG Opinion, which relied on earlier case law, the EU Treaties, and fundamental rights to conclude that individuals should indeed be granted a right to compensation under air quality legislation. The AG Opinion furthermore follows the judicial trend of the recognition of State liability in environment-related issues. In particular in France, the Administrative Court of Paris ruled in February 2021 about the French State's responsibility for failure to act against climate change in the 'Affaire du Siècle'.⁵²

The answer to the preliminary questions given by the CJEU in this case may not have the far-reaching effects expected by citizens and environmental non-governmental organisations (ENGOS) supporting the claims. Indeed, there have been a few cases around the EU relating to compensation requests for poor air quality and breach of individual rights by levels of air pollution.⁵³ If the Court would have paved the way to State liability and compensation for damage to the health of individuals caused by air pollution in *Ministre de la Transition écologique*, the likelihood of similar cases popping up around the EU would have been strong. Nevertheless, as shown in the last paragraphs of the Court's judgments in *Ministre de la Transition écologique*, State liability cannot be fully excluded and

⁵² Tribunal administratif de Paris, judgments No. 1904967, 1904968, 1904972, 1904976/4-1, 3 February 2021.

⁵³ Legal proceedings have taken place in France in 2019 and 2020, whereby citizens have sought compensation for physical and mental health damage caused by exceeding levels of pollution: *Farida T*, Tribunal administratif de Montreuil, Décision N° 1802202; *N*, Tribunal de Paris, Décision N°1709333/4-3; *MG*, Tribunal de Paris, Décision N°1814405/4-3; *DE*, Tribunal Administratif de Grenoble, Décision N° 1800067.

Actions have also taken place in Poland, see for instance: *Z K v Polish Ministry of Environment*, Court of Appeal of Katowice, V ACa 649/13.

In Czech Republic, in 2018 a citizen sued the Ministry of Environment for liability for health damages due to air pollution, as the citizen's husband died from lung cancer. See a press article on the matter: <https://en.frankbold.org/index.php?q=news/inhabitant-ostava-suffering-lung-cancer-sues-ministry-environment-air-pollution>.

In 2022, Belgian and German citizens have launched lawsuits against their governments over air pollution and breaches of human rights issues.

the Court leaves the door open for future claims, either under national law, or based on other EU law provisions.⁵⁴

In terms of development of EU law, the trend of granting compensation rights to individuals for harm suffered could also be noticed in the Commission's proposal for a revision of the Industrial Emissions Directive (IED), which contains a new provision on financial compensation for health damage.⁵⁵ Under this provision, individuals have the right to claim compensation if health damage occurred as a result of a violation of national measures adopted under the IED. However, the Council of the EU reached a general agreement on the proposal on 16 March 2023, which removes State liability from the text.⁵⁶

Looking ahead, a policy debate on the revision proposal is foreseen in the Environment Council on 20 June 2023.⁵⁷ The development of case law following the adoption of the revision of the Air Quality Directive, especially if the Article on compensation finds its way to the new Directive, must be watched carefully.

⁵⁴ M Pagano, 'Human rights and ineffective public duties: the Grand Chamber judgment in JP v Ministre de la Transition écologique' (European Law Blog, 2 February 2023) <<https://european-lawblog.eu/2023/02/02/human-rights-and-ineffective-public-duties-the-grand-chamber-judgment-in-jp-v-ministre-de-la-transition-ecologique/>> accessed 10 February 2023.

⁵⁵ 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', COM (2022) 156/3 final, art 79a.

⁵⁶ Council of the European Union, '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 – General approach', 7537/23. In the text of the proposed Article 79a, the following is deleted in the General approach: '[...] and, where appropriate, from the relevant competent authorities responsible for the violation'.

⁵⁷ V Halleux, 'Revision of the Ambient Air Quality Directives' (European Parliament Legislative Train Schedule, 20 January 2023) <<https://www.europarl.europa.eu/legislative-train/theme-a-european-green-deal/file-revision-of-eu-ambient-air-quality-legislation>> accessed 14 February 2023.