Why Procedures Matter and Sanctions Much Less

Why procedures matter and sanctions much less: "second-round" infringement proceedings in environmental matters and the CJEU's ruling European Commission v Bulgaria

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Case Comment

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Treaty on the Functioning of the European Union art.260

E.L. Rev. 458 **Abstract**
This case analysis discusses the CJEU's judgment in European Commission v Bulgaria . This case concerned an action brought by the Commission under art.260(2) TFEU . The Commission launched this infringement procedure claiming that Bulgaria did not comply with an earlier judgment on air quality, limit values exceedances, and the duty to draft air quality plans. Eventually, the CJEU declared the action inadmissible. This case analysis considers the arguments and discussion presented in the Advocate General's Opinion and in the CJEU's ruling with respect to three core points, namely: the importance of pre-litigation steps in proceedings under art.260(2) TFEU , the way in which scientific complexity is dealt with in infringement proceedings, and the availability and desirability of financial sanctions to repair environmental law breaches. The analysis is concluded by a general discussion on the contribution of this judgment to EU air quality policy and its enforcement at the national level.

Introduction

On 16 March 2023, the Court of Justice of the European Union (hereinafter: the CJEU or the Court) delivered a ruling in proceedings brought under art.260(2) TFEU (Treaty on the Functioning of the European Union).[1] This judgment follows an earlier ruling dating back to 2017,[2] in which the CJEU found that Bulgaria had failed to fulfil its obligations under the Air Quality Directive.[3] While the CJEU declared the action under art.260(2) TFEU inadmissible, three crucial issues can be identified from this case, namely: the importance of pre-litigation steps in proceedings brought under art.260(2) TFEU, the way in which scientific complexity is dealt with in infringement proceedings and the availability and suitability of financial sanctions in environmental law cases. These issues are discussed in this analysis and, more ***E.L. Rev. 459*** broadly, the contribution of this judgment to EU (European Union) air quality policy is also examined. For this purpose, this analysis is structured as follows: the next section describes the facts of the case. Thereafter, the Advocate General's Opinion and the CJEU's judgment will be examined. The analysis of the case will focus on the three core issues identified above. Following this analysis, the relation between such case law and the development and respect of EU air quality at national level is tackled.

The facts of the case

As mentioned in the introduction, the case at hand is a follow-up of an earlier ruling, in which the Court established that Bulgaria had failed to fulfil its obligations under EU air quality legislation. [4]

A clear timeline of events is crucial to understand the Opinion given by the Advocate General and the judgment of the Court.

In its judgment of 5 April 2017, the Court found that first, limit values for PM_{10} (particulate matter) had been exceeded in all zones and agglomerations in Bulgaria between 2007 and 2014, which represents a breach of art.13 of the Air Quality Directive. This article indeed compels Member States to comply with limit values, defined in art.2(5) 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]

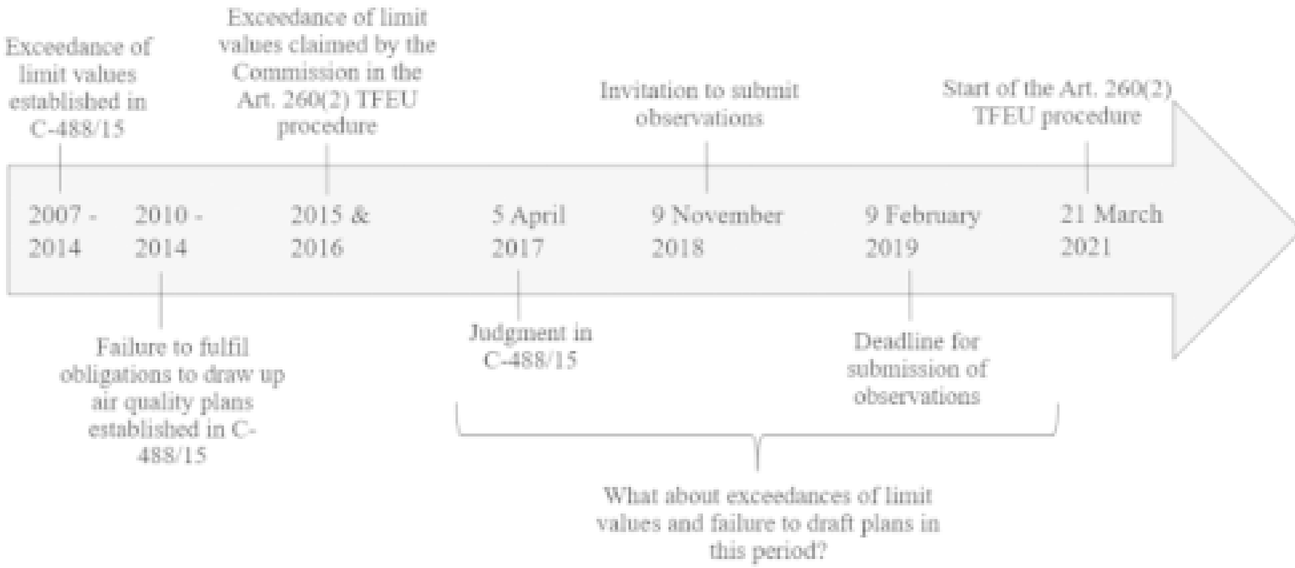
Second, in the same 2017 judgment, the Court declared that the competent authorities had failed to draw up adequate air quality plans, as per art.23 of the Air Quality Directive, from 2010 to 2014 included. The purpose of such plans is, in the case of breaches of limit values, to keep the exceedance periods as short as possible by setting out appropriate measures.

The judgment of 5 April 2017 therefore established that Bulgaria had failed to fulfil its obligations under art.13(1) of the Air Quality Directive from 2007 until (and including) 2014, and that Bulgaria had also failed to fulfil its obligations with respect to art.23(1) of the Directive in the period running from June 2010 until (and including) 2014.

As a follow up, the Commission requested information from Bulgaria showing compliance with the 2017 judgment on several occasions. Although Bulgaria did provide various pieces of information, the European Commission launched a procedure under art.260(2) TFEU on 9 November 2018, inviting Bulgaria to submit observations by 9 January 2019. This deadline was later extended to 9 February 2019. The Commission claimed that Bulgaria had not complied with its EU law obligations, since limit values were exceeded also in 2015 and 2016, that revised air quality plans were not submitted, and that there were issues with the implementation of national measures to improve air quality.

Subsequently, in its reply received by the Commission on 18 January 2019, Bulgaria acknowledged that the limit values were exceeded also in 2017, but asserted that air quality plans were drafted, and that national measures had been taken accordingly. Nonetheless, on 21 March 2021, the European Commission decided to bring an action under art.260(2) TFEU, requesting a declaration of non-compliance of Bulgaria with the 2017 judgment, and asking the Court to impose a lump sum and a daily penalty payment until full compliance. Bulgaria claimed that the Court should dismiss this action as inadmissible, as, in its view, the Commission did not refer to any exceedances occurring since the 2017 judgment.

This complex timeline of rulings, obligations, plans and exceedances is schematised below. ***E.L. Rev. 460***



The Opinion of the Advocate General

The Opinion of AG Kokott was delivered on 17 November 2022, and consisted of an examination of three main points: the admissibility of the action, its merits, and the potential imposition of a lump sum and/or penalty payment. [6]

First, with respect to admissibility, the Advocate General focused on the exceedance of limit values. While the European Commission referred to exceedance of limit values in 2015 and 2016 in its invitation to submit observation, the Advocate General noted that the Commission omitted, in its letter of formal notice, to assert an infringement of the limit values after the 2017 judgment. This omission was not remedied by the Commission in the later pre-litigation steps. On this basis, the Advocate General concluded that 'despite the Commission's clear intentions, the letter of formal notice lacked, with regard to exceedance of limit values, a decisive element for a pre-litigation procedure under art.260(2) TFEU, namely the statement that, in the Commission's view, the limit values had in fact been exceeded since the judgment of 5 April 2017'. [7]

The Advocate General reached a different interim conclusion on the point of admissibility with respect to failure to draw up appropriate air quality plans. [8] Indeed, for that part of the claim relating to the obligation to draft air quality plans, the Advocate General recognised that the Commission had relied on evidence and had sufficiently detailed the alleged infringement in its letter of formal notice. [9] This point will be considered more in detail below.

Having considered the action partly admissible, the Advocate General went on to analyse the compliance of Bulgaria with the obligation to draw up air quality plans in conformity with the 2017 judgment. The Advocate General clearly stated that 'as at 9 February 2019, Bulgaria was required to ensure that air quality plans that met the requirements of art.23 of the Ambient Air Quality Directive were established'. [10] The Advocate General assessed that the Member State had failed to fully comply with that judgment, with regard to the requirement to draw up appropriate air quality plans. [11] Based on evidence presented by the ***E.L. Rev. 461*** Commission, indeed the Advocate General recognised that the exceedance of limit values until 2020 is a 'strong indication that the air quality plans in place on 9 February 2019 were not sufficient to keep the exceedance period as short as possible'. [12]

Finally, however, when deciding on the imposition of a penalty payment, the Advocate General looked at the current situation in Bulgaria, i.e. the situation as of 2022, so as to establish that the subject matter of the dispute had not, in the meantime, become devoid of purpose. [13] In this context, the Advocate General considered that the Commission had not succeeded in showing that the measures adopted by Bulgaria after the 2017 ruling were not suitable to comply with the earlier ruling. This is because, first of all, the Commission had not considered the local plans put in place by Bulgaria and, therefore, failed to discharge the burden of proof required in arts 258 and 260(2) TFEU proceedings. Secondly, according to Bulgaria, exceedances of PM_{10} will be eliminated completely by 2024. Because Member States enjoy leeway in balancing the various interests at stake, and had the possibility to postpone compliance for a long period of time under the Air Quality Directive, the Advocate General established that a period of almost seven years (i.e. the time span between the 2017 ruling and 2024) to comply with PM_{10} limit values should not be deemed excessive. [14] The Advocate General recognised that Bulgaria could have adopted certain measures faster in order to improve air quality, although she argued that this alone did not prove that such measures would have alone led to compliance with limit values.

Based on the above observations, the Advocate General concluded that the Commission did not manage to prove that, as of 2022, Bulgaria was not in compliance with the 2017 ruling, and, consequently there was no reason to impose a penalty payment. With respect instead to the imposition of a lump sum, the Advocate General concluded that such sanction would not be desirable, since, although Bulgaria did fail to comply with the 2017 ruling, public money should rather be spent on improving air quality. [15]

The judgment of the Court

In its ruling, the Court recalled the objective of the procedure under art.260(2) TFEU, namely 'inducing a defaulting Member State to comply with a judgment establishing a breach of obligations'. [16]

The Court indicated that, in such procedures, the Commission has the duty to 'ascertain, throughout the pre-litigation procedure and before issuing the letter of formal notice, whether or not the judgment in question has been complied with in the meantime, but also to allege and establish, prima facie, with clarity, in that letter of formal notice, that the judgment remains to be complied with on the reference date'. [17] According to the Court, in the present case, the requirements of clarity and prima facie evidence were missing from the Commission's letter of formal notice because the Commission had only provided evidence of non-compliance for the years of 2015 and 2016, omitting therefore crucial information for the period after the 2017 judgement and until the reference date (i.e. 9 February 2019). The Court therefore cut the discussion short by stating that the Commission did not lawfully allege that Bulgaria had failed to comply with its obligation to follow its earlier ruling, and to take appropriate measures for that purpose.

On this basis, the Court ultimately dismissed the action as inadmissible. The Opinion delivered by the Advocate General is therefore much more thorough than the Court's judgment, since the Court did not enter the discussion of the timeline to comply with the obligation to draw up air quality plans following the 2017 judgment. ***E.L. Rev. 462***

Analysis

Article 260(2) TFEU and the importance of procedures

As mentioned in the introduction, this ruling has been handed down under art.260(2) TFEU. Through this procedure, the Commission can prompt the respect of an earlier judgement under art.258 TFEU through the imposition of a lump sum or periodic penalty payment.

As the 'first-round' proceedings, the system set up under art.260(2) TFEU foresees a pre-litigation phase before the case eventually arrives before the CJEU. Since the entry into force of the Lisbon Treaty, the pre-litigation phase has been shortened so that only the letter of formal notice must be sent, without the need for an additional reasoned opinion. In this context, the CJEU has, over time, developed several procedural principles underpinning the working of 'second-round' infringement proceedings, in order to provide legal certainty and ensure the right of defence for Member States. Several of these standards mirror those developed in the context of art.258 TFEU proceedings.

Importantly for the purposes of the case being considered in this contribution, the CJEU has emphasised the importance of the prohibition for the Commission to extend the scope of the complaint beyond that identified in its formal pre-litigation phase. [18]

In this case, the infringement declared by the Court in the 2017 ruling pertained to both the obligation to draft air quality plans and the exceedance of PM_{10} limit values, and the legal question revolved around the admissibility of the Commission's action in light of the pre-litigation procedure.

When it comes to the exceedance of PM_{10} limit values, AG Kokott noted that the Commission omitted, in its letter of formal notice, to assert an infringement of the limit values after the 2017 judgment. This omission was not remedied by the Commission in the later pre-litigation steps. This crucial point was the main ground for dismissal in the later Court of Justice's ruling.

This conclusion is in perfect continuity with the earlier case law [19] and goes to show that the Court will continue to underline the importance of procedural fairness and will not condone the Commission's attempts to by-pass it. In turn, this confirms Prete and Smulders' observations pointing to an 'increased stringency' with respect to procedural fairness and correctness in the Court's approach in the latest case law concerning infringement proceedings. [20]

With respect instead to the obligation to draft air quality plans, the Commission claimed that Bulgaria had failed to ensure the establishment of appropriate air quality plans in order to keep the exceedances as short as possible. Bulgaria maintained that the claim was inadmissible, since the Commission failed to recount, in its invitation to submit observations, that the limit values had been exceeded since the 2017 judgment. The Advocate General concluded instead that the Commission had sufficiently detailed the alleged infringement in its letter of formal notice, as to make the action partially admissible. In its judgment, the Court of Justice, however, found the whole action to be inadmissible, without distinguishing between the exceedance of limit values and the drawing up of air quality plans.

This difference in approach is worthy of further discussion because it is centred around a crucial point of infringement proceedings, namely *what* needs to be proven, *by whom*, and *when*, in cases of 'systemic' breaches of EU law (such as the one which was established by the Court in the first ruling concerning Bulgaria). This notion of a systemic breach first appeared in the *Irish Waste* case, in which the CJEU recognised, in the context of infringement proceedings, that a breach of EU (environmental) law for the ***E.L. Rev. 463** purposes of art.258 TFEU could be constituted not only by individual failures to comply with EU, but also by 'general and persistent' deficiencies, of which the individual breaches 'simply constitute examples'. [21]

For those cases, the CJEU has admitted that the subject-matter of infringement proceedings may extend to events which took place after the reasoned opinion, provided that they are of the same kind as the events to which the opinion referred and constitute the same conduct. [22] The Court has thus confirmed that the right of defence is not violated if, during the procedure, the Commission adds to the evidence, by merely providing new examples of the conduct complained of. [23]

The Advocate General found this case law applicable also in art.260(2) TFEU proceedings, all the more because in art.260(2) TFEU proceedings the Commission is not required to prove that the infringement took place at the moment of the time limit set in the letter of formal notice, but that it persists at the moment of the Court's ruling. [24] She concluded that the Commission had 'unambiguously' complained about the alleged failure to establish appropriate air quality plans in the letter of formal notice. From this observation, it followed, first, that the question of whether the evidence relied upon by the Commission was convincing is not a question of admissibility, but rather a question of merit. Second, the Commission's stance implied, in the Advocate General's view, that new evidence proving alleged non-compliance would not imply a broadening of the subject-matter of the dispute.

In this way, the Advocate General shows some sensitivity towards the peculiar nature of a claim by the Commission of 'general and persistent' breach on the part of a Member State, and, in this case, of a claim that a ruling declaring such breach has not been respected. [25] This is not mirrored in the CJEU's ruling, which conflates the two allegations in one single line of reasoning. In this sense, the CJEU's approach is a missed opportunity to clarify the extent to which the special nature of general and persistent breaches would also necessitate a different approach in art.260(2) TFEU proceedings.

The Commission's burden of proof in infringement proceedings and the unbearable lightness of data

While, as mentioned above, the Court declared the entire action inadmissible, the Advocate General's Opinion did engage with the question of whether Bulgaria had indeed failed to comply with the 2017 ruling.

This passage of the Opinion is worth highlighting because it shows the ways in which the burden of proof is discharged in infringement proceedings, and the way in which the Court seeks to avoid engagement with complex scientific questions, especially in cases of systemic breaches.

As the Court has consistently held, in infringement proceedings it is incumbent upon the Commission to prove the alleged failure and to provide the Court with the information necessary for it to verify the existence of the infringement. [26] For this purpose, the Commission may not rely on any 'presumptions or schematic causations'. [27] This point is repeated in the Advocate General's Opinion. In this context, the case law shows that the Court is not easily convinced by the Commission when the evidence produced is not ***E.L. Rev. 464** regarded as sufficiently persuasive—especially—of the systemic nature of the breach. [28] The

Opinion of the Advocate General is, from this perspective, in continuity with this case law, when it criticises the Commission's lack of engagement with the entirety of the available evidence (in this case, of all of the available air quality plans drafted by Bulgaria). Interestingly, in this way, the Opinion also managed to 'dodge the bullet' of the need to deal with the question of whether the measures adopted are sufficient to keep the excess 'as short as possible' as is required by EU law. By claiming that the Commission's fact-finding has not been thorough enough, the Advocate General could effectively avoid answering the question of whether the plans were *suitable* to bring Bulgaria into compliance with the limit values. Similarly, when it came to Bulgaria's allegation that air quality will be fully compliant with EU law standards by 2024, and the Commission's rebuttal that compliance could have been achieved earlier, the Advocate General reverts to the question of the thoroughness of the Commission's analysis of the available data and avoids engaging with the causal inferences to be drawn by certain national measures and their capacity to effectuate the necessary changes in the Bulgarian air quality.

This approach—again—mirrors the attitude displayed by the Court on several occasions when complex scientific or technical questions are at stake. It is indeed not uncommon that the Court navigates around scientific problems through the apportionment of the burden of proof. While the approach of the Advocate General in this case seems justified in light of the rather clearly defective fact-finding activity on the part of the Commission, certain concerns can be expressed in respect of the Court's overreliance on the Commission's role in producing evidence, in light of the Commission's limited investigatory tools.[29]

The decision not to impose lump sums or penalty payments

In general, art.260 TFEU foresees the possibility for the CJEU to impose either lump sums or penalty payments. Penalty payments are generally imposed as a means of inducing Member States to address a breach of their EU obligations, whereas lump sum payments 'are intended to reflect the degree of admonition the CJEU wishes to impose in respect of the adverse impact(s) that it perceives have been generated as a result of the defendant's non-compliance between first- and second-round judgment'.[30] In the past, these financial sanctions were used separately. Nowadays, the European Commission imposes both penalties 'automatically and simultaneously'.[31] In this way, the Commission secures that Member States are penalised by lump sums, even if they manage to escape penalty payments through late compliance.

The CJEU enjoys a discretionary and autonomous power in deciding whether to impose fines and, if so, of how much.[32] The terminology used in art.260(2) TFEU confirms this principle: the Court 'may' impose sanctions. ***E.L. Rev. 465** [33]

At the end of her assessment, the Advocate General declared: 'On the basis of the findings to date, there is no reason to impose a penalty payment. Nor does a lump sum on account of the insufficient compliance with the judgment as at 9 February 2019 seem logical to me, as Bulgaria should instead invest the scarce resources in air quality improvement'.[34] This observation raises two significant points: first, the legal question of when lump sums and penalty payments can be imposed; and, second, the question of the desirability and suitability of penalty payments and lump sums to repair violation of environmental rules.

With respect to penalty payments, the Advocate General's conclusion follows from the CJEU's settled case law, according to which imposing a penalty payment 'is, in principle, justified only in so far as the failure to comply with an earlier judgment of the Court continues up to the time of the Court's examination of the facts'.[35] In the case at hand, since the Advocate General established that the Commission did not manage to prove that Bulgaria had not complied with the 2017 judgment as of the time of the second infringement proceedings, this conclusion appears to be logical.

When it comes instead to lump sums, the Advocate General's reasoning is about the usefulness of such sanction in the case at stake. The approach of the Advocate General should be regarded as reasonable. While the vast majority of cases under the art.260(2) TFEU procedure relate to economic or environmental issues (which led Jack to underline, already in 2013, that 'this reveals Member State reluctance to comply with judgments concerning EU environmental law')[36] the question of whether the procedure under art.260(2) TFEU and the accompanying financial sanctions are useful to repair environmental law breaches remains open, for several reasons.[37]

First, the suitability of the imposition of financial sanctions in the environmental sectors can be questioned from the perspective of the length of infringement proceedings. Hedemann-Robinson has calculated that the average length of time needed to complete first- and second-round infringement proceedings in environmental cases was almost 12 years,[38] with second-round proceedings alone lasting for almost three years for non-transposition cases and six and a half years for bad application situations, such as the one at stake in this case.[39] Beyond the desirability of financial sanctions in the environmental sector, this fact in itself casts doubts on the effectiveness of such a system to repair any environmental degradation which, after so many years, may very likely have caused irreparable damage. Looking at the case at hand, the Commission was seeking the imposition of financial sanctions for breaches of air quality legislation dating back to several years ago. Should the CJEU have decided on fining Bulgaria, the air quality damage had already occurred and could not have been repaired by means of a payment *a posteriori* —or, in fact, at all.

Furthermore, in the specific case of Bulgaria, data from the European Environment Agency show that Bulgaria is the Member State with the second highest percentage of population living above PM_{10} limit ***E.L. Rev. 466** values in the EU.[40] The issue of air pollution in Bulgaria and other Eastern Member States has been addressed by the CJEU on various occasions, in cases relating to air quality.[41] When looking at the poor state of air quality in Central and Eastern Europe, and Southeast Europe compared to other EU Member States, Petric argues that it is a manifestation of environmental injustice.[42] Krämer, on the other hand, disagrees as he underlines that EU air quality legislation applies to all Member States.[43] The Air Quality Directive lays down minimum harmonisation provisions, thereby allowing Member States to introduce stricter measures. Accordingly, in Krämer's view, each Member State is responsible for their own policy decisions to comply with the Directive.[44] Krämer furthermore relies on the abovementioned recent CJEU case law investigating the breaches of air quality measures in Eastern Member States, including Bulgaria, and recalls that the CJEU rejected the argument that people in Bulgaria had to use wood or coal for heating, as they were poorer than people in other Member States.[45] These observations echo the Advocate General's remark on the desirability of a lump sum, with resources better spent and invested in techniques to improve air quality and reduce air pollution.

The implication of the ruling for the protection of air quality

With respect to EU air quality legislation and its impact on (national) air quality, a few points can be made, following this judgment.

Exceeding limit values under the Air Quality Directive is a continuing, re-occurring issue. Already in the earlier version of the Directive concerning air quality,[46] the Commission hinted at the possibility of pollutant levels being higher than limit values in certain zones, without however clearly envisaging that these limit values would be breached.[47] This 1996 Directive refers to 'action plans', to be drawn up in the short term, where there is a risk that the limit values are being exceeded, 'in order to reduce that risk and to limit the duration of such an occurrence'.[48] The current Air Quality Directive, dating back to 2008, softens the ambitions set out in the 1996 Directive, and leaves room for accepting the possibility that limit values can be breached.[49] The CJEU also embraced this realistic approach, as it recognised in the *Janecek* ruling that any natural or legal person directly concerned by an excess of limit values or alert thresholds must be able to require the authorities to draw up an action plan, if necessary through legal action in court.[50]

That exceeding limit values continues to be an issue is shown by the fact that, since the first infringement proceedings against Bulgaria and the CJEU decision of April 2017 (establishing an infringement of the limit values applicable to PM_{10} and leading to the ruling under art.260(2) TFEU discussed in this contribution), there have been multiple examples of similar infringement procedures. ***E.L. Rev. 467**[51]

It is worth mentioning that the rules on EU air quality are currently being revised.[52] In the proposed revision of the Air Quality Directive, the European Commission has included, in art.19 on air quality plans (replacing the current art.23), a new section stipulating that air quality plans must aim at keeping the excess period as short as possible, and *in any case no longer than three years for limit values* (emphasis added). The newly proposed version of this article also provides that Member States must perform regular updates of air quality plans if they do not achieve compliance. This provision clearly shows the Commission's attempt to reduce cases of non-compliance with the obligation to draft air quality plans and appropriate measures to reduce the duration of excesses effectively. If this provision is adopted, it remains to be seen what effect its more precise wording and deadlines could have on infringement procedures dealing with breaches of limit values and failures to draft appropriate air quality plans.

Lastly, considering the 'diffuse' nature of environmental values (and air quality in this case), one final word ought to concern the system of enforcement of air quality legislation. When it comes to infringement proceedings, concerns continue to exist about transparency and access of citizens and environmental NGOs to the infringement proceedings.[53] While citizens and NGOs can notify the Commission about Member States' alleged breaches of EU law, once infringement proceedings are launched, they are not part of the procedure. Krämer qualifies the procedures under arts 258 and 260 TFEU as a 'diplomatic, public international law-type' of procedure, taking place between the Commission and the Member States only, with individual citizens and NGOs having practically no right to participate in the procedures.[54] Looking at the national level, the CJEU has, until recently, developed a line of jurisprudence recognising the binding force of EU air quality law and the role of citizens and NGOs in protecting rights associated therewith.[55] However, one of the most recent rulings of the CJEU in the field of air quality does not look encouraging for air quality protection. Indeed, in its judgment in *Ministre de la Transition écologique*,[56] the CJEU made the decision not to grant EU individuals a right to compensation from a Member State in cases of breaches of EU air quality law under the principle of State liability established in the *Francovich* case.[57] Therefore, following the judgment in *Ministre de la Transition écologique* and the failed infringement procedure in *European Commission v Bulgaria*, concerns can be expressed on the available judicial tools to repair violations of EU air quality law, and on the fact that there seem to be very limited opportunities for citizens and NGOs to access courts to hold Member States accountable for breaches of air quality rules. ***E.L. Rev. 468***

Conclusions

The above analysis of the judgment in *European Commission v Bulgaria* shows that, although the ruling could seem straightforward at first sight, because of the decision of the CJEU to declare the action inadmissible, the facts of the case raise important questions both for the workings of the infringement proceedings (especially in cases of systemic breaches of EU environmental law) and for the enforcement of EU air quality legislation. First, with respect the procedure under art.260(2) TFEU, this case confirms the importance afforded by the CJEU to procedural requirements and the pre-litigation steps and the delicate balance which the Court is called to strike between the respect of the right of defence of the Member States and the peculiarities of a declaration of a 'general and persistent' breach of EU law obligations. Second, this judgment tackles the issue of scientific and technical complexity in infringement proceedings. The case in point confirms the duty for the Commission to provide sufficient and reliable evidence, and Court's approach to shy away from engaging with scientific claims by apportioning the burden of proof. Third, the case poses the question of the availability and desirability of financial sanctions to repair environmental breaches. Indeed, since environmental damage has already occurred—in this case, poor air quality and breach of EU air quality limit values—there is doubt as to the usefulness of imposing fines on the defending Member State. In the case of Bulgaria in particular, the Advocate General underlined the fact that resources should be used towards a green transition, rather than to pay a lump sum to the EU budget. This point is linked with the more general argument presented in Section 6, on the implication of this ruling for the protection of air quality. Since individuals see their rights under the Air Quality Directive restrained in recent CJEU decisions, and since the Commission, acting as the guardian of the treaties, did not manage to ensure compliance with air quality rules in this case, some concerns can be raised with respect to the protection of air quality in Europe.

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Footnotes

1 *European Commission v Bulgaria (C-174/21) EU:C:2023:210*.
2 *European Commission v Bulgaria (C-488/15) EU:C:2017:267*.
3 Directive 2008/50 on ambient air quality and cleaner air for Europe (Air Quality Directive) [2008] OJ L152/1.
4 *European Commission v Bulgaria (C-488/15) EU:C:2017:267*.

5 Directive 2008/50 art.2(5).
6 Opinion of AG Kokott *European Commission v Bulgaria (C-174/21) EU:C:2022:903*.
7 *European Commission v Bulgaria (C-174/21) EU:C:2022:903* at [44].
8 *European Commission v Bulgaria (C-174/21)* at [63].
9 *European Commission v Bulgaria (C-174/21)* at [49].
10 *European Commission v Bulgaria (C-174/21)* at [69].
11 *European Commission v Bulgaria (C-174/21)* at [79].
12 *European Commission v Bulgaria (C-174/21) EU:C:2022:903* at [72].
13 *European Commission v Bulgaria (C-174/21)* at [80].
14 *European Commission v Bulgaria (C-174/21)* at [104].
15 *European Commission v Bulgaria (C-174/21)* at [108].
16 *European Commission v Bulgaria (C-174/21)* at [23].
17 *European Commission v Bulgaria (C-174/21)* at [26].
18 *Commission of the European Communities v Portugal (C-457/07) EU:C:2009:531; [2010] 1 C.M.L.R. 6*.
19 By analogy with the case law on art.258 TFEU, which requires that the letter of formal notice be drafted with sufficient clarity and precision in order to enable the defendant Member State to prepare its defence. See *Commission of the European Communities v Italian Republic (C-145/01) EU:C:2003:324*.
20 L. Prete and B. Smulders, "The Age of Maturity of Infringement Proceedings" (2021) 58 C.M.L. Rev. 304.
21 *Commission of the European Communities v Ireland (C-494/01) EU:C:2005:250; [2005] 3 C.M.L.R. 14*, particularly, [23] and [27].
22 *European Commission v Bulgaria (C-488/15) EU:C:2017:267* at [43]; *European Commission v Poland (C-336/16) EU:C:2018:94* at [49].
23 *European Commission v Romania (C-638/18) EU:C:2020:334* at [56]–[58].
24 See e.g. *Commission of the European Communities v France (C-121/07) EU:C:2008:695* at [27].
25 See further on this, M. Eliantonio, "Systemic Breaches of EU Environmental Law and Techniques of Judicial Engagement with Science: the Underused Potential of Infringement Proceedings" (2023) German Law Journal (forthcoming).
26 See e.g. *Commission of the European Communities v Ireland (C-494/01) EU:C:2005:250* at [41].
27 See e.g. *European Commission v Italian Republic (C-443/18) EU:C:2019:676* at [80].
28 See e.g. *Commission of the European Communities v Ireland (C-248/05) EU:C:2007:629*.
29 Further on this point, *M. Eliantonio and M. Krajewski, "Scientific Uncertainty before the Court of Justice and the General Court: is the Toolbox Sufficient?" in M. Eliantonio, E. Lees and T. Paloniitty (eds), EU Environmental Principles and Scientific Uncertainty before National Courts—the Case of the Habitats Directive (Oxford: Hart Publishing, 2023), pp.327–347*; M. Eliantonio, "Systemic breaches of EU environmental law and techniques of judicial engagement with science: the underused potential of infringement proceedings" (2023) German Law Journal (forthcoming).
30 *M. Hedemann-Robinson, Enforcement of European Union Environmental Law: Legal Issues and Challenges, 2nd edn (Abingdon: Routledge, 2015), p.148*.
31 *M. Smith, "Enforcing Environmental Law through Infringements and Sanctioning: Steering not Rowing" in M. Peeters and M. Eliantonio (eds), Research Handbook on EU Environmental Law (Cheltenham: Edward Elgar, 2020), p.217*.
32 *Hedemann-Robinson, Enforcement of European Union Environmental Law: Legal Issues and Challenges (2015), p.174*.
33 *Hedemann-Robinson, Enforcement of European Union Environmental Law: Legal Issues and Challenges (2015), p.174*.
34 *European Commission v Bulgaria (C-174/21) EU:C:2022:903* at [108].
35 *European Commission v Kingdom of Belgium (C-533/11) EU:C:2013:659* at [64], citing *European Commission v Ireland (C-374/11) EU:C:2012:827* at [33].
36 B. Jack, "Article 260(2) TFEU: An Effective Judicial Procedure for the Enforcement of Judgments?" (2013) 19 E.L.J. 405.

In addition, a quick search in the Curia database search form with the subject matter 'Environment' and the reference to legislation in the grounds of judgment being 'Article 260(2) TFEU (Lisbon)' leads to 19 results, https://curia.europa.eu/juris/liste.jsf?nat=or&mat=ENV%252Cor&pcs=Oor&jur=C%2CT%2CF&for=&jge=&dates=&language=en&pro=&cit=TRT%252CC%252CCJ%252CR%252C2008E

%252C%252C%252C%252C%252C260%252C2%252C%252C%252C%252Ctrue%252Cfalse %252Cfalse&oqp=&td=%3BALL&avg=&lgrec=en&lg=&page=2&cid=2622040.

37 See on the matter: *Hedemann-Robinson, Enforcement of European Union Environmental Law: Legal Issues and Challenges (2015), p.147*.

38 *Hedemann-Robinson, Enforcement of European Union Environmental Law: Legal Issues and Challenges (2015), p.150*.

39 *Hedemann-Robinson, Enforcement of European Union Environmental Law: Legal Issues and Challenges (2015), pp.152–153*.

40 European Environment Agency (EEA), 'Bulgaria—Air pollution country fact sheet' https://www.eea.europa.eu/themes/air/country-fact-sheets/2022-country-fact-sheets/bulgaria-air-pollution-country-fact-sheet.

41 *European Commission v Bulgaria (C-488/15) EU:C:2017:267*; *European Commission v Poland (C-336/16) EU:C:2018:94*; *European Commission v Romania (C-638/18) EU:C:2020:334*; *European Commission v Republic of Bulgaria (C-730/19) EU:C:2022:382*; *Sdruzhenie 'Za Zemyata - dostap do pravosadie' (C-375/21) EU:C:2023:173*.

42 D. Petric, "Environmental Justice in the European Union: A Critical Reassessment" (2019) 15 C.Y.E.L.P. 234.

43 L. Krämer, "Environmental Justice and European Union Law" (2020) C.Y.E.L.P. 13.

44 Krämer, "Environmental Justice and European Union Law" (2020) C.Y.E.L.P. 14.

45 *European Commission v Bulgaria (C-488/15) EU:C:2017:267* at [64].

46 Directive 96/62 on ambient air quality assessment and management OJ [1996] L296/55.

47 Directive 96/62 art.8 'Measures applicable in zones where levels are higher than the limit value'.

48 Directive 96/62 art.7(3).

49 Through the inclusion of the obligation to set up air quality plans as per Directive 2008/50 art.23 for instance.

50 *Janecek v Freistaat Bayer (C-237/07) EU:C:2008:447* at [39].

51 See, for instance, *European Commission v Poland (C-336/16) EU:C:2018:94*, on breach of PM_{10} limit values and failure to adopt appropriate air quality plans; *European Commission v Italian Republic (C-644/18) EU:C:2020:895*, on breach of PM_{10} limit values and failure to adopt appropriate measures; *European Commission v United Kingdom (C-664/18) EU:C:2021:171*, on breach of NO_2 limit values and failure to adopt air quality plans; *European Commission v Federal Republic of Germany (C-635/18) EU:C:2021:437*, on breach of NO_2 limit values and failure to adopt appropriate measures to reduce exceedances; *European Commission v French Republic (C-636/18) EU:C:2019:900*, on breach of NO_2 limit values; *European Commission v Italian Republic (C-573/19) EU:C:2022:380*, on breach of NO_2 limit values; *European Commission v French Republic (C-286/21) EU:C:2022:319*, on breach of PM_{10} limit values; *European Commission v Greece (C-70/21) EU:C:2023:237*, on breach of PM_{10} limit values; *European Commission v Greece (C-633/21) EU:C:2023:112*, on breach of NO_2 limit values.

52 "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.

53 See in this respect: L. Krämer, "EU Enforcement of Environmental Laws: From Great Principles to Daily Practice—Improving Citizen Involvement" (2014) 44 Environmental Policy and Law 247–256.

54 Krämer, "EU Enforcement of Environmental Laws: From Great Principles to Daily Practice" (2014) 44 Environmental Policy and Law 247–256.

55 See in this respect: D. Misonne, "Arm Wrestling around Air Quality and Effective Judicial Protection. Can Arrogant Resistance to EU Law-related Orders Put You in Jail?" (2020) Journal for European Environmental & Planning Law 409–425.

56 *Ministre de la Transition écologique and Premier ministre (C-61/21) EU:C:2022:1015*.

57 *Francovich v Italy (C-6/90 and C-9/90) EU:C:1991:428; [1993] 2 C.M.L.R. 66*.

