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JP v. *Ministre de la Transition écologique*

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Human rights and ineffective public duties: the Grand Chamber judgment in *JP v. Ministre de la Transition écologique*

By Mario Pagano

In [*JP v. Ministre de la Transition écologique*](#), the CJEU has been recently called upon to rule on the possibility for an individual to seek compensation for the health issues caused by poor air quality under [Directive 2008/50/EC](#) (hereinafter 'the Air Quality Directive').

Factual background

In the case at stake, JP (the plaintiff) sought compensation before the administrative tribunal of Cergy-Pontoise (France). Before the domestic court, the applicant claimed, first, the annulment of the decision by which the local public authority refused to adopt the measures deemed necessary to help solve the air quality-related health issues of JP; second, the applicant also sought compensation (for the amount of €21 million) for the damage to his health caused by the poor air quality of the area since 2003. The national court of first instance dismissed the case, while the *Cour administrative d'appel de Versailles* (the appellate court) suspended the proceedings and asked the CJEU whether Articles 13 and 23 of the Air Quality Directive can be interpreted as conferring upon individuals the right to compensation in case of breaches of the obligations stemming from the same Directive.

The two provisions of the Air Quality Directive read as follows:

Article 13(1) – *Member States shall ensure that, throughout their zones and agglomerations, levels of sulphur dioxide, PM10, lead, and carbon monoxide in ambient air do not exceed the limit values laid down in Annex XI. [...]*

Article 23(1) – *Where, in given zones or agglomerations, the levels of pollutants in ambient air exceed any limit value or target value, plus any relevant margin of tolerance in each case, Member States shall ensure that air quality plans are established for those zones and agglomerations in order to achieve the related limit value or target value specified in Annexes XI and XIV.*

In the event of exceedances of those limit values for which the attainment deadline is already expired, the air quality plans shall set out appropriate measures, so that the exceedance period can be kept as short as possible. The air quality plans may additionally include specific measures aiming at the protection of sensitive population groups, including children.

The Court's reasoning

The Grand Chamber's ruling was expected to further advance the [Janecek](#) case law (C-237/07), in which the CJEU already in 2008, recognised a right of natural or legal persons who are directly concerned by a risk that the limit values of PM10 or alert thresholds are exceeded, to require the competent authorities to draw up an action plan where such a risk exists. Indeed, the key question at stake in *JP v. Ministre de la Transition écologique* went slightly beyond the issue in *Janecek*: may an individual who has suffered health damage caused by the lack of an adequate air quality plan be *compensated* for a breach of Articles 13 and 23 of the Air Quality Directive?

On this point, the Court ultimately denied the existence of a right to compensation under these provisions. It did so based on the following reasoning. First, it recalled the principle of State liability for damages suffered by individuals for violations of EU law obligations caused by any public authority of a Member State. The Court also recalled that, in order to have a right to compensation, the applicant has to satisfy three conditions, namely that: i) the EU law provision that was breached must be intended to confer rights upon individuals; ii) the violation of such provision is sufficiently serious; iii) there is a direct causal link between the damage suffered and the violation of the EU law provision at stake (paras 43-46). The Court's ruling is limited to the analysis of the first condition.

The Court of Justice confirmed its *Janecek* judgment and also its relevance in the dispute at stake (para 59). It re-stated that, indeed, rights upon individuals can be acknowledged

not only when EU law explicitly mentions them in the words of the law, but also in relation to positive or negative obligations that EU law clearly imposes upon individuals, Member States and EU institutions (para 46). However, the Court, in the case at stake, argued that the relevant provisions of the Air Quality Directive impose upon the EU Member States a double obligation (paras 48-50). The first one being to guarantee that the levels, in particular of PM10 and NO₂, do not go beyond – within their respective territories and starting from specific dates – the limit values established under EU law. The second one being that, where such limit values are exceeded, the Member State concerned adopts adequate measures to remedy its violations. However, the EU judges maintained that Articles 13 and 23 – in accordance with Article 1 and the second recital of the Air Quality Directive – pursue the general objective of protecting human health and the environment (para 55). Therefore, the Court dismissed the argument according to which the EU law provisions at stake could be interpreted as conferring (not even implicitly) a right to compensation upon individuals for the damages occurred as a consequence of violations of the obligations stemming from Articles 13 and 23 of the Air Quality Directive (para 56).

Nevertheless, the Court stressed that the State liability (and therefore the consequent right to compensation) cannot be completely excluded, neither under national law nor under other provisions of EU law (para 63). On the contrary, the Court encouraged individuals to seek justice before national courts (para 64). By making this argument, the Court clearly denied that the specific provisions at stake in the dispute could be interpreted as conferring rights upon individuals. Yet, it seemed to leave the door open for future claims for compensation put forward in the field of air quality brought under other legal provisions.

Critical appraisal

In my view, the preliminary ruling of the CJEU in *JP v. Ministre de la Transition écologique* can be criticised for two main reasons: the first one strictly relates to the Court's reasoning in the field of air quality; the second one – more systemic – concerns the principle of effectiveness of EU law.

Indeed, in the judgment just described, the Court quickly qualified the provisions at stake as provisions incapable of conferring rights upon individuals. The key paragraph addressing this specific point in the Court's ruling is extremely disappointing:

62. ... [t]he right thus recognised by the Court in its case-law [to require competent authorities to draw up an action plan], stemming in particular from the principle of effectiveness of EU law, effectiveness to which affected individuals are entitled to contribute by bringing administrative or judicial proceedings based on their own particular

situation, does not mean that the obligations resulting from Article 13(1) and Article 23(1) of Directive 2008/50 ... were intended to confer individual rights on interested persons, for the purpose of the first of the three conditions referred to in paragraph 44 above, and that the breach of those obligations is, in consequence, capable of altering a legal situation which those provisions sought to establish for those persons.

Here the CJEU does not adequately motivate *why* those provisions should not be interpreted as acknowledging a right to compensation upon individuals. Indeed, the EU judges provided a systemic interpretation of the two provisions, by reading them in the light of the general objective pursued by the Air Quality Directive (namely 'protecting human health and the environment as a whole', see para 55). Interestingly, the old version of the same Directive (essentially pursuing the same objective referred to in *JP v. Ministre de la Transition écologique*) was interpreted as conferring individual rights precisely in *Janecek* (see para 38). Therefore, it was not a matter of different objectives pursued by the Directive, but rather a matter of the specific wording of the provisions at stake. This implies that – if a negative answer to the question referred by the national court had to be given – another interpretative avenue probably had to be chosen, for instance a more literal reading of the provisions at stake.

In this regard, Advocate General (AG) Kokott in her [Opinion](#) in the same case provided a much richer answer to the question of whether the provisions at stake could be interpreted as conferring rights upon individuals. Indeed, the AG provided a fascinating analysis of the existing connection between limit values and individual rights (see paras 72-81). She did so by reflecting, once again, on the objectives pursued by the relevant provisions of the Air Quality Directive.

First, the AG recalled that the Air Quality Directive imposes on the EU Member States an unconditional obligation to adopt air quality plans and to take measures aiming to minimise the period of exceedance of the limit values laid down under the Directive (para 64). Second, AG Kokott stressed that such limit values are adopted to protect the environment and human health and that therefore the mere adoption of air quality plans by the public authorities of a Member State is not sufficient to fulfil the obligations stemming from the Directive (para 65). This since the plans also have to *effectively* guarantee the pursuit of the objectives of environmental and human health protection. As a consequence, the respect of the limit values should not be simply achieved, but also preserved throughout time. AG Kokott recalled that the obligation to protect the environment and human health stems directly from the EU Treaties (Articles 3 TEU and 191 TFEU) and is also rooted in the EU Charter of Fundamental Rights (Articles 2, 3 and 37). Therefore, according to the AG, there is no doubt that the limit values set out in the Directive are intended to preserve the environment and human health (para 87). Moreover, AG Kokott also recalled that the Court, on the basis of that premiss of protection, has

already held with regard to the older directives on the protection of ambient air quality that 'individuals must be in a position to rely on the mandatory rules of those directives as *rights*' (see [C- 361/88 *Commission v. Germany*](#), para 16). Unlike the CJEU, the AG thus reached the conclusion that the relevant provisions of the Air Quality Directive are actually intended to confer rights upon individuals (para 76).

Regarding the second point of criticism, the Court in the present ruling seems to interpret the principle of effectiveness of EU law in a way which does not go far enough for securing the exercise of individual rights. In addition to the individual right recognised in *Janecek* (see above), in *JP v. Ministre de la Transition écologique*, individuals were – once again – encouraged by the Court of Justice to seek justice before national courts and to ask public authorities for the adoption of adequate action plans tackling air pollution. However, when damage occurs *because of* the lack of adequate national implementation of EU law in the field of air quality, EU law cannot be interpreted as also acknowledging a right to compensation for the damage suffered.

By following this line of reasoning, I argue that the CJEU falls into contradiction. Indeed, on the one hand, the Court encourages EU citizens to trigger 'altruistic' litigation before national courts and seek redress by domestic means; 'altruistic' since citizens are expected to trigger litigation while being even more uncertain of obtaining compensation. On the other hand, in this ruling, the Grand Chamber *de facto* also favours a centralised enforcement of EU environmental law, where the European Commission is the only actor capable of holding the Member States accountable for EU law violations under Article 258 TFEU. The judgment thus indicates that the Court balances the duty of securing individual rights with the need of avoiding that Member States are overwhelmed by compensation claims, clearly favouring the latter.

AG Kokott in her Opinion fairly pointed out that the acknowledgement of a right to compensation under Articles 13 and 23 of the Air Quality Directive would not automatically turn into a general right to compensation conferred upon any citizen of a Member State in breach of the limit values (para 100). The AG recalled that air pollution does not impact all citizens in the same way. Indeed, the cost of air pollution (and – let me add – of environmental degradation in general) is mostly borne by the most vulnerable and disadvantaged people, who tend to live in highly polluted areas, with limited possibilities of moving elsewhere. Hence, in this passage of her Opinion, AG Kokott reminded us that the demands for environmental and social justice are strictly intertwined and that the burden of proof would still act as a filter for abusive claimants seeking unjustified compensation (para 101).

Finally, I also want to note how AG Kokott emphasised the role of the principle of effectiveness in the EU legal order. In this regard, some of the Member States intervened in the case argued that the CJEU has traditionally affirmed the principle of State liability (and the consequent right to compensation) in presence of a causal link between the conduct of the State and the violation of a financial interest of the party (e.g., claims of package travellers; deposit protection; entitlement to compensation of victims of crimes) (para 89). Following this line of reasoning, compensation cannot be acknowledged where no specific financial interest or economic right has been breached. To this argument, the AG responded by maintaining that, indeed, the prolonged violation of the limit values laid down under the Air Quality Directive would not directly impact the financial interests of the plaintiff. However, it creates a situation which deeply affects interests going much beyond the parties' financial interests and is capable of harming the enjoyment of citizens' human rights, such as the right to physical and mental integrity protected under Article 3 of the EU Charter (para 91). Furthermore, AG Kokott stressed that the principle of State liability was affirmed not to preserve citizens' financial interests but to guarantee the effectiveness of EU law by 'protecting the rights it confers on individuals' and that this is 'inherent in the system of the treaties on which the European Union is based' (para 92). Regrettably, this is not reflected in the Grand Chamber's judgment.

Conclusion

In the present analysis, I showed how the reasoning of the Court in *JP v. Ministre de la Transition écologique* does not go far enough to truly guarantee the effectiveness of EU law. While encouraging citizens to trigger litigation before national courts and seek redress via domestic means, the CJEU also favours a centralised enforcement of EU law: the breach of the positive obligations that EU law imposes upon national public authorities can be sanctioned only via infringement proceedings initiated by the European Commission. This means that citizens are expected by the CJEU to trigger 'altruistic' domestic litigation, without any certainty that EU law will secure their right to compensation. As stressed by AG Kokott, this is particularly problematic from a human rights point of view, as the most vulnerable and disadvantaged social groups are also those mostly impacted by air pollution and – to use AG Kokott's words – also those 'who are particularly reliant on judicial protection' (para 100). In this regard, the final ruling of the Court falls short in reconciling the more strictly regulatory angle of the case with the evident human rights component of the dispute. It is true that the Court's ruling leaves the door open for future claims for compensation brought either under national law or under other provisions of EU law, but many questions remain unanswered, especially those wondering what kind of positive obligations can be interpreted as conferring individual rights under EU environmental law.