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Breaking down silos: the ECJ on the interactions between different sources of EU environmental legislation

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The [European Green Deal](#) aims to make the EU's economy sustainable – and its list of actions is long. Two reforms focus on clean air: the [revision](#) of the Industrial Emissions Directive ([2010/75/EU](#), 'IED') as the most practical law to tackle industrial pollution at the source, and the [revision](#) of the Ambient Air Quality Directive ([2008/50/EC](#), 'AQD') that regulates the concentration of air pollutants per area. While the legislative processes are entering the decisive phase at EU level, the new judgment of the ECJ in *Sdruzhenie 'Za Zemyata – dostap do pravosadie' and Others* ([C-375/21](#)) could not be more timely. It interprets the interactions between the two directives from which follows: one law cannot be effectively implemented without the other. This clarification is much needed – both for practice and for the ongoing legislative revision process.

The case at hand

In 2018, the Bulgarian government granted the biggest Bulgarian coal power plant, Maritsa East 2, an updated permit for its operation. The permit includes a derogation allowing it to emit harmful sulphur dioxide ('SO₂'), for an indefinite time, for almost twice the amount usually allowed under the Industrial Emissions Directive. At the same time, SO₂ emissions also originate from other industrial and domestic sources. The industrial complex around Galabovo in Bulgaria, where the power plant is located, is ranked [28th of the top 50](#)

[anthropogenic SO2 emission hotspots worldwide](#). No other EU Member State is on this list. In an infringement action brought by the Commission, the ECJ confirmed in 2022 that Bulgaria failed to address SO2 emissions exceeding the limits under the Ambient Air Quality Directive in the area in question since 2007 (*Commission v Bulgaria*, [C-730/19](#)).

The environmental association 'Za Zemyata – dostap do pravosadie' and others challenged the environmental permit before the Bulgarian courts which refused to consider the effects of existing pollution while permitting further emissions damaging to the environment and human health. The Bulgarian Supreme Administrative Court referred questions to the ECJ to clarify the interactions between the two EU environmental acts, in particular how to set permit conditions according to the Industrial Emissions Directive in circumstances where the resulting industrial activity would contribute to breaches of the air quality requirements under the Ambient Air Quality Directive.

What the Industrial Emissions Directive and Ambient Air Quality Directive have in common and what makes them different

Both the Industrial Emissions Directive and Ambient Air Quality Directive share common objectives by seeking to ensure a high level of protection of the environment as a whole and to protect human health (Recital 29 and Article 1 IED; Recitals 2, 30 and Article 1 of the AQD). Nevertheless, they follow different approaches:

The Industrial Emissions Directive sets permit conditions for the operation of each industrial installation, following in particular the 'polluter pays' principle and the pollution prevention principle whilst giving priority to intervention at the source (Recital 2 IED). The Directive covers pollution from the most environmental and climate damaging activities – be it from the energy, steel, cement, chemicals, livestock, and other sectors. It follows an integrated approach to address various environmental issues. Therefore, its permit conditions can include emission limit values for pollutants into air coming out of a chimney, such as SO₂ (Articles 14, 15 IED). Those limits are based on EU-wide determined 'best available techniques' (Articles 3(10), 13 IED). However, Member State authorities may allow less strict emission limits by granting derogations – e.g., when stricter limits would lead to disproportionately higher costs for the operator than benefits for the environment, provided that further conditions are met (Article 15(4) IED).

The Ambient Air Quality Directive defines the quality that has to be achieved for ambient air, by setting out limit values for certain pollutants, such as SO₂ (Article 13 AQD). The air quality limit values apply irrespective of the source of pollution, as they aim to ensure that the population is not exposed to unhealthy air. Furthermore, when the limit values are violated, Member States are required to adopt air quality plans that set out appropriate measures, so that compliance with air quality limit values is achieved as quickly as possible (Article 23 AQD).

Connecting the two Directives: the ECJ judgment

The ECJ judgment assesses the linkages between the two directives. When looking at the derogation for emission limit values in Article 15(4) of the Industrial Emissions Directive, there are three entry points where the Ambient Air Quality Directive comes into play:

(1) First of all, the competent authority shall 'in any case' ensure that a derogation does not cause significant pollution (subparagraph 4 of Article 15(4) IED). While pollution is defined, among others, as the introduction of harmful substances into air (Article 3(2) IED), there is no definition of 'significant'. The Court has now clarified that, having regard to the objectives of the Ambient Air Quality Directive, the exceedance of air quality limits for SO₂ 'must necessarily be held to be 'significant pollution'' (para 50).

Further, the Court refers explicitly to the precautionary principle and adds that national authorities cannot grant a derogation where there remain 'uncertainties' whether less strict emission limit values will lead to significant pollution (para 53, with reference to *Luonnonsuojeluyhdistys Tapiola*, [C-674/17](#), para 66). Derogations require a comprehensive assessment 'taking account of all sources of pollutants and their cumulative effect, in order to ensure that even if a derogation is granted for one of the sources, the sum total of their emissions does not cause any exceedance of the air quality limit values' (para 54). Hence, the Court significantly stretches the obligations of permitting authorities to look beyond the impact of the individual industrial activity. In her [Opinion](#), Advocate General Kokott also concludes that 'it would be almost impossible to achieve compliance with the air quality limit values if each source of pollution were assessed independently of other sources' (para 62). She stresses that 'the absence of significant pollution is only guaranteed in any case if any reasonable scientific doubt as to that outcome can be ruled out' (para 69, with further references).

Hence, already following this first reasoning of the Court, the national authority should likely not have granted the derogation in the case at hand.

(2) But the ECJ does not stop here. It continues with a second entry point for the requirements under the Ambient Air Quality Directive. Derogations must also ensure a 'high level of protection of the environment as a whole' (subparagraph 4 of Article 15(4) IED). The Court stresses that the Ambient Air Quality Directive puts into concrete terms the EU's obligations concerning the protection of the environment and public health (para 51 with reference to *Craeynest and Others*, [C-723/17](#), para 33). In the same vein, AG Kokott concludes that the EU legislature has already defined what is meant by a high level of environmental protection with regards to air pollutants by setting air quality limit values under the Ambient Air Quality Directive (Opinion, para 58). So again, it is clear that no derogation can be granted if it 'contributes' to the exceedance of the Ambient Air Quality Directive's air quality limit values for SO₂ (Judgment, para 52).

(3) Finally, the ECJ assessed a third entry point: derogations shall only apply 'without prejudice to Article 18' of the Industrial Emissions Directive (subparagraph 1 of Article 15(4) IED). This entry point was meant to be the key question referred to the ECJ, as it makes an explicit reference to legal requirements outside of the Industrial Emissions Directive: Article 18, in conjunction with Article 3(6) of the Industrial Emissions Directive,

asks for stricter permit conditions when environmental quality standards deriving from EU law so require. The ECJ confirms that the air quality limit values of the Ambient Air Quality Directive are such 'environmental quality standards' (paras 56 et seq.). Their exceedance triggers Article 18. But most importantly, the Court demonstrates again that the industrial activity does not have to be the sole reason for non-compliance with the air quality standards. On the contrary, in cases of cumulative impacts from different polluters, the national authority must assess whether the derogation would 'contribute' (para 62) – or even is (only) 'capable of contributing' (paras 67, 68) – to the exceedance of the air quality limit values. Moreover, the authority must refrain from granting a derogation which would 'jeopardise' compliance with environmental quality standards (para 62). This draws a red line for situations where the limit values are not *per se* violated, but where there is a risk that they will be violated. In other words: ensuring compliance with the Ambient Air Quality Directive is a priority in any case.

(4) Interestingly, while not being a new entry point, but to be read in conjunction with the points above, the EJC adds that a derogation is also not possible if it would contradict a measure in an air quality plan adopted pursuant to Article 23 of the Ambient Air Quality Directive, as it would 'jeopardise' the plan's objective (paras 65, 66). AG Kokott clarifies that even shortcomings in such a plan cannot have the effect of permitting a less strict derogation but 'mean that one condition of the derogation is not met' (Opinion, paras 68, 72).

Finally, the Court makes another crucial statement when assessing the situation on the ground: the competent authority must take into account 'all the relevant scientific data on pollution including the cumulative effect with other sources of the pollutant concerned and the measures under the relevant air quality plan' (para 67, 68). The obligation of taking into account all scientific data on pollution should be a given – but this emphasis is still necessary in practice.

Key takeaways for practice

The ECJ's decision could have a significant impact on the permitting practice beyond derogations: all three entry points for the Ambient Air Quality Directive have relevance for the general permitting regime under the Industrial Emissions Directive.

This should be most obvious for the environmental quality standards to be taken into account pursuant to Article 18. The prejudice of the environmental quality standards is also part of the core provision for permit conditions: Article 14(1) of the Industrial Emissions Directive asks Member States to ensure that permits 'include all measures necessary for compliance with the requirements of (...) [Article] 18'. Similar to Article 15(4) of the Industrial Emissions Directive, this provision makes a simple reference to the legal requirements of Article 18. Neither the wording 'necessary for compliance with the requirements of Article 18', nor the wording 'without prejudice to Article 18' modify the meaning of Article 18 itself. Consequently, the interpretation of the ECJ in this regard should be 1:1 transferable – meaning that already the risk ('jeopardise') of meeting environmental quality standards must lead to stricter permit conditions under the

Industrial Emissions Directive in any case. Likewise, AG Kokott stresses in her Opinion that Article 18 provides an instrument that air quality standards can be complied with at all in areas affected by industrial installations, and adds that '[o]therwise, there would be a risk that installations, despite meeting the standard of best available technology [i.e. beyond derogations], would nevertheless contribute to the exceedance of the [air quality] limit values' (para 87).

This clarification is much needed: the connection between EU laws is currently barely used in practice. Article 18 led in only [5 \(!\) cases across the EU](#) to stricter emission limit values, according to 2017/2018 reporting from all Member States (except Slovakia). This is particularly striking due to the fact that the Industrial Emissions Directive covers around 52.000 industrial activities being accountable for about [20% of the EU's overall pollutant emissions by mass into air](#), and that [31 infringement proceedings against 20 Member States](#) were ongoing due to failures to implement the ambient air quality directives as of February 2021. A similar contradictory picture emerges when looking at other environmental quality standards, e.g. deriving [from the Water Framework Directive](#) (2000/60/EC). Based on practical experience, the different competencies of air, water or IED authorities and others make a holistic approach more difficult – which, of course, cannot be an excuse for breaching EU law.

On top of Article 18, it is also very interesting that the ECJ highlights several entry points for the Ambient Air Quality Directive in the case at hand. Both the requirements of causing 'no significant pollution' and achieving a 'high level of protection of the environment' are not limited to granting the specific derogations under the Industrial Emissions Directive. The first requirement is a general obligation of Industrial Emissions Directive operators (Article 11(c) IED), while the second is the key objective of this Directive (Article 1 IED) and other EU environmental acts, as enshrined in Article 191(2) TFEU. None of the two requirements are linked only to the strict definition of 'environmental quality standards'. Hence, to provide those terms with added value next to Article 18, it should be possible to consider other requirements deriving from EU environmental legislation beyond environmental quality standards when granting permits for individual activities. For example, this approach could strengthen the consideration of emission limit values and reduction pathways deriving from other EU legislation that are not (yet) qualified as environmental quality standards (e.g. commitments under the National Emissions Ceilings Directive ([\(EU\) 2016/2284](#)) to reduce certain air pollutants in order to achieve a high level of environmental protection (cf. *Stichting Natuur en Milieu and Others*, [C-165/09 to C-167/09](#) and the conclusion of AG Kokott in the corresponding [Opinion](#)). This follows the logic of the Court's decision, AG Kokott's Opinion, and the EU environmental *acquis*: to achieve the objectives of the various laws, all tools in each of the laws must be used.

...and for the revision process(es)

In any case, the EU legislator should take this ECJ judgment as a crucial reminder that the time of thinking in silos has passed. The Industrial Emissions Directive revision process must be used to strengthen even more the interactions with other environmental legislation. While the Commission has taken a first step in that direction by enhancing the

cooperation between the different authorities (see in particular suggested [amendment of Article 14\(1\) IED](#)), it fails to clarify explicitly that the risk of meeting environmental quality standards triggers Article 18 in any case (beyond derogations). Moreover, to be able to achieve the EU's new [environmental and climate targets](#), a link to other environmental requirements beyond the limited definition of 'environmental quality standards' should be explicitly expanded. It is now time for the Council and the European Parliament to build synergies between all the different legal instruments – when working on the revisions of the Industrial Emissions Directive and Ambient Air Quality Directive and many other files. They will decide whether the EU's promises under the European Green Deal can become reality.