
**INDIVIDUAL RIGHT TO CLEAN AIR INCLUDING
COMPENSATION FOR HEALTH DAMAGE — COMMENT ON
*JP v MINISTRE DE LA TRANSITION ÉCOLOGIQUE, C-61/21***

JUSTYNA BAZYLIŃSKA-NAGLER*

KEYWORDS

right to clean air, human rights, air quality directives, C-61/21 *JP v Ministre de la Transition écologique*, state liability for damages, C-46/93 and 48/93 *Brasserie du Pêcheur*

ABSTRACT

On the one hand, the EU member states are to manage ambient air quality in line with the Air Quality Directive (dir. 2008/50/EC) provisions that put forward local air quality targets. On the other hand, EU citizens have their right to demand that their local authorities pass ‘air quality plans’ for towns or districts where air quality standards were below the so-called limit values. In 2008, in the *Janecek*¹ case the Court of Justice of the EU (the CJEU) for the first time recognised the direct effect of Articles 13 and 23 of this directive, and in this way granted rights to individuals to challenge local air quality plans for their inefficiency.

The main point of this article is to prove that EU citizens have a subjective, justiciable right to clean and healthy air, and to examine whether this right entitles them to compensation for health damage due to air pollution, as was the subject matter of the commented case: *JP v Ministre de la Transition écologique*.

* Justyna Bazylińska-Nagler, PhD, DSc, Faculty of Law, Administration and Economics, University of Wrocław, Wrocław, Poland, E-mail: justyna.bazylińska-nagler@uwr.edu.pl

¹ Judgement of the Court of Justice of 25.07.2008, C-237/07 *Dieter Janecek v. Freistaat Bayern* EU:C:2008:447.

Therefore, it is necessary to examine the three conditions of the *Francovich* rule for state liability established in the *Brasserie du Pêcheur* case: ‘1. the rule of law infringed must be intended to confer rights on individuals; 2. the breach must be sufficiently serious, 3. and there must be a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties’².

INTRODUCTION

A right to compensation for damage to people’s health that occurred because of a violation of air pollution standards has been long-awaited in EU law. The case law of the Court of Justice of the EU (CJEU) until now was developing very well to guarantee an individual right to clean and healthy air³. However, the latest judgment of 22 Dec. 2022 in the case *JP v Ministre de la Transition écologique*⁴ turned out to be a big disappointment. This ruling was expected to further advance the case law following seminal *Janecek* in which the CJEU already recognised rights of directly concerned individuals to demand their local administration authorities to draw up remedial air quality plans in case of heavy air pollution⁵. Regrettably, in the commented decision the CJEU, unlike Advocate General Kokott held that the Ambient Air Quality Directive (AAQD)⁶ does not grant any right to compensation in case of violation of the air quality limits. The CJEU basically stood firmly by its previous case law according to which *Frankovich* liability rule is only applicable to EU law cases concerning individual rights to payments or economic benefits. Since the AAQ Directive confers no economic rights that could be invoked to demand compensation from member states, the CJEU did not allow for the application of *Francovich* rule to protect individuals harmed by air pollution maintained by local authorities breaching EU air quality rules.

² Judgement of the Court of Justice of 5.03.1996, C-46/93 and 48/93 *Brasserie du Pêcheur* EU:C:1996:79.

³ *Dieter Janecek v Freistaat Bayern* (n 1); Judgment of the Court of Justice of 26.06.2019, C-723/17 *Craeynest and Others* EU:C:2019:533.

⁴ Judgement of the Court of Justice of 22.12.2022, C-61/21 *JP v Ministre de la Transition écologique, Premier ministre* EU:C:2022:1015.

⁵ ‘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’ - *Dieter Janecek v Freistaat Bayern* (n 1) para 38-39, 42.

⁶ 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, OJ 2008 L 152, p. 1, as amended by Commission Directive (EU) 2015/1480 of 28 August 2015, OJ 2015 L 226, p. 4.

In this context, the purpose of this paper is to prove that individual right to clean and healthy air in EU law has its legal consequences among which the crucial one is to be compensated for health damage suffered due to notorious air pollution crisis. This research is mainly based on the analysis of the most recent CJEU decision concerning compensation claims for health pollution - *JP v Ministre de la Transition écologique*. The diverging arguments both from the CJEU and the Advocate General side in the light of the three conditions of state liability for EU law violation have been presented.

I. FACTUAL AND LEGAL BACKGROUND

The case originated in a domestic claim brought by a Paris resident – *J. P.* against the French state, seeking compensation of 21 million euro on the grounds that, in his view, the increasing air pollution in Paris damaged his health. He argued that France was liable because its local authorities failed to comply with the EU air pollution limit values. In parallel, in 2019 and 2022 the CJEU in the course of infringement proceedings initiated by the European Commission found that the values for NO₂ in Paris agglomeration had been permanently exceeded since 2010⁷. On the 12 Dec. 2017 the tribunal administrative of Cergy-Pontoise rejected claims of the plaintiff *J.P.* on the grounds that, as the court said, Articles 13 and 23 of the AAQD did not confer individual rights to compensation for a loss sustained as a result of the deterioration of air quality. On the 25 April 2018 *J.P.* appealed that decision before the administrative appellate court of Versailles, at the same time the Minister for Ecological Transition advocated for dismissal of this appeal. In this situation, the French appellate court raised questions to the CJEU under the preliminary ruling procedure⁸. The key issue concerned

⁷ Judgement of the Court of Justice of 24.10.2019, C- 636/18 *Commission v France* EU:C:2019:900 para 93; Judgment of the Court of Justice of 28.04.2022, C-286/21 *Commission v France* EU:C:2022:319 para 81.

⁸ The questions were as follows: ‘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) ... 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?’ *JP v Ministre de la Transition écologique* (n 4) para 33.

interpretations of Articles 13(1) and 23(1) of said directive as possibly entitling EU citizens to claim financial compensation for damage to their health⁹.

In fact, the key question concerning pecuniary compensation at stake in *JP v. Ministre de la Transition écologique* went beyond the pure principle of the direct effect of the above-mentioned provisions that was the key issue in *Janecek*. This preliminary reference raised novel problems that were yet to be examined thoroughly by the CJEU in relation to the Air Quality Directive. But it has to be mentioned that the CJEU in *Deutsche Umwelthilfe* case of 2019 had already noted that violation of this directive could give rise to claims for damages in line with EU state liability rule: ‘the full effectiveness of EU law and effective protection of the rights which individuals derive from it may be ensured by the principle of State liability for loss or damage caused to individuals as a result of breaches of EU law for which the State can be held responsible, as that principle is inherent in the system of the treaties on which the Union is based.’¹⁰

The picture of the EU legal background of the commented case shows that despite a global trend to recognise the right to healthy environment, EU law does not explicitly recognise neither the right to healthy environment nor an individual right to clean air as a substantive element of such right¹¹. However, based on extensive and consistent CJEU case law we assume that the AAQD provisions read in the light of their purpose and systemic values guarantee EU citizens’

⁹ These two crucial provisions read as follows:
‘Article 13(1) – Member States shall ensure that, throughout their zones and agglomerations, levels of SO₂, PM₁₀, lead, and CO 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’.

¹⁰ Judgment of the Court of Justice of 19.12.2019, C-752/18 *Deutsche Umwelthilfe* EU:C:2019:1114 para 54; to that effect see also: *Brasserie du pêcheur and Factortame*, paras 20, 39 and 52, and C-168/15 *Tomášová* EU:C:2016:602 para 18; Compare: AG J. Kokott, *Opinion*, para 102.

¹¹ For further context, see the most relevant in public international law documents: historical UN General Assembly Resolution recognising a clean, healthy and sustainable environment as a human right, see GA Res, 28 July 2022, A/76/L.75; or - UNHRC Res, 18 Oct. 2021, A/HRC/RES/48/13; in Europe: Council of Europe Resolution 2396 (2021), Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe, 29.09.2021, see: para 8: “The Assembly considers that an explicit recognition of a right to a healthy and viable environment would be an incentive for stronger domestic environmental laws and a more protection-focused approach by the Court. It would make it easier for victims to lodge applications for (financial – author’s note) remedies and would also act as a preventive mechanism to supplement the currently rather reactive case law of the Court (ECHR – author’s note)”; para 9: “Recognising an autonomous right to a healthy environment would have the benefit of allowing a violation to be found irrespective of whether another right had been breached and would therefore raise the profile of this right.”

rights to air quality with safe for human health levels of pollutants¹². CJEU case law to date made it manifestly clear that Articles 13 and 23 of the AAQD are clear, precise and unconditional enough to confer rights justiciable before domestic courts¹³. Just to recall, a few exemplary citations, in the *Janecek* case in 2008, the CJEU noted that: ‘Article 7(3) of Directive 96/62 (now: Article 13 of AAQD) must be interpreted as meaning that, where there is a risk that the limit values or alert thresholds may be exceeded, persons directly concerned must be able to require the competent national authorities to draw up an action plan, even if under national law, those persons may have other courses of action available for requiring those authorities to take action against atmospheric pollution’¹⁴. Likewise, in the *ClientEarth* case in 2014 the CJEU consistently held that ‘individuals may rely against public bodies on the provisions of a directive which are unconditional and sufficiently precise. It is for the competent national authorities and courts to interpret national law, as far as possible, in a way that is compatible with the purpose of that directive’¹⁵. In addition, in *Lies Craeynest* case in 2019 the CJEU noticed - that ‘it would be incompatible with the binding effect of directive to exclude the possibility that the citizens concerned relied on the obligation imposed by that directive. This is particularly true in respect of a directive whose objective is to control and reduce atmospheric pollution and which is designed to protect public health’¹⁶.

Effective application of the AAQD provisions via direct effect before national courts depends on domestic procedural standards. A recent study on national practices in recognising the right to a healthy environment, by the UN Special Rapporteur on human rights and the environment, shows that all of the EU member states have recognized this individual right to clean air directly in their constitutional laws or indirectly *via* their international commitments, mainly

¹² Delphine Misonne, ‘The emergence of a right to clean air: Transforming European Union law through litigation and citizen science’ (2020) RECIEL 4; Taddei Udo, ‘A Right to Clean Air in EU Law? Using Litigation to Progress from Procedural to Substantive Environmental Rights’ (2016) 1 Environmental Law Review; Baran Mariusz, ‘Dyrektywa 2008/50/WE w sprawie jakości powietrza i czystsze powietrze dla Europy oraz jej implementacja w prawie polskim’ (2017) 7 Europejski Przegląd Sądowy 15; ClientEarth Org, ‘Individual right to clean and healthy air in the EU. An analysis of the existing system of legal protection and possible options to strengthen the legal framework’ (June 2021) <<https://www.clientearth.org/media/adtcznde/individual-right-to-clean-and-healthy-air-in-the-eu-pdf.pdf>> accessed 1 September 2024, 2, 8.

¹³ *ibid.* 8-9.

¹⁴ *Dieter Janecek v Freistaat Bayern* (n 1) para 42.

¹⁵ Judgement of the Court of Justice of 19.11.2014 C-404/13 *ClientEarth v. The Secretary of State for the Environment, Food and Rural Affairs* EU:C:2014:2382 para 54.

¹⁶ Judgement of the Court of Justice of 26.06.2019 C-723/17 *Lies Craeynest i in. v. Brussels Hoofdstedelijk Gewest i Brussels Instituut voor Milieubeheer* EU:C:2019:533 para 32; Bazylińska-Nagler Justyna, ‘Monitorowanie przez państwo jakości powietrza (w świetle orzeczenia TS w sprawie Craeynest)’ (2023) 2 Państwo i Prawo 94.

the Aarhus Convention¹⁷. Nonetheless, the execution of this right depends on good practices relating to access to justice and effective procedural remedies in domestic environmental laws. In line with the CJEU case law, EU citizens should have *locus standi*—that means the right to claim the adoption of air quality plans that would guarantee compliance with specific limit values set in AAQD before a local court¹⁸. To address the problems of divergent domestic interpretations of procedural aspects of environmental rights the European Commission passed an instructional notice on access to justice in environmental matters¹⁹. Nonetheless, access to justice barriers persist in Central and Eastern Europe jurisdictions where national courts, by denying individuals and NGOs standing to challenge air quality plans, routinely ignore the EU law procedural standards, for instance in Bulgaria²⁰ or Hungary²¹. In Poland, direct effect of Article 23 (1) of the AAQD is severely limited. Due to procedural barriers, either individuals or NGOs cannot challenge air quality plans before domestic courts²². Judicial decisions of Polish administrative courts correspond neither with CJEU case law standards nor with the binding international law agreements. Thus far Polish courts have decided very few cases concerning air quality plans due to limited admissibility²³. To get access to court, claimants hardly proved their legal interest—based on constitutional provisions and European Convention on Human Rights, specifically

¹⁷ UN Special rapporteur on human rights and the environment, *Recognition of the Right to a Healthy Environment in Constitutions, Legislation and Treaties* (Annual thematic report, 30 December 2019) A/HRC/43/53 8 <<https://undocs.org/A/HRC/43/53>> accessed 22 November 2022; See: Annex VI Eastern Europe and Annex VIII Western Europe to this UN report that summarises the recognition of the right to healthy environment at the national level in the 27 EU member states.

¹⁸ *Client Earth* (n 15) para 56; Łyszkowski Michał, ‘Sądowa kontrola wojewódzkich programów ochrony powietrza’ (2022) 67(3) *Kontrola Państwowa* 78.

¹⁹ Commission Notice on access to justice in environmental matters, C/2017/2616, (18 August 2017) OJ C 275 1–39, paras 9–11: ‘By gathering all the relevant CJEU case-law, and by drawing clear and careful inferences from it, Commission provided a reference source for the national administrations, courts and finally for the public - i.e. individuals and environmental NGOs, who exercise a public-interest advocacy role’; See also: Baran Mariusz, ‘Dostęp do wymiaru sprawiedliwości w obszarze ochrony środowiska w państwach członkowskich’ (2020) 11 *Europejski Przegląd Sądowy* 15.

²⁰ On the 1st June 2023, the European Commission decided to send a reasoned opinion to Bulgaria INFR(2020)2106 for failing to remove barriers to access to justice in relation to air quality plans under the Air Quality Directive.

²¹ See: Judgment of the Hungarian Supreme Court of 19 January 2021, no. Kfv.IV.37.700/2020/5.

²² See: Judgment of the Court of Justice of 2.03. 2023, C-432/21 *European Commission v Republic of Poland* EU:C:2023:139 – the CJEU for the first time in history ordered Poland to guarantee legal standing for NGOs supervising Forest Management Plans.

²³ Warszo-Buchanan Agnieszka, Jakubowski Miłosz ‘Programy ochrony powietrza – prawo do sądu (w świetle orzecznictwa Trybunału Sprawiedliwości oraz sądów krajowych)’ (2020) 10 *Europejski Przegląd Sądowy*.

violation of their rights to privacy and home protection (Article 8 of ECHR)²⁴. In some jurisdictions, as a matter of fact, procedural remedies exist but are not effective at all in enforcing compliance with air quality standards and preventing damages to human health, for instance: in the Netherlands²⁵, Germany²⁶, Czech Republic²⁷, Slovakia²⁸ and Austria²⁹.

II. RIGHT TO COMPENSATION FOR HEALTH DAMAGE CAUSED BY AIR POLLUTION IN DIVERGING VIEWS OF THE CJEU AND ADVOCATE GENERAL

By way of introduction, it has to be mentioned that now, more than 30 years after *Francovich* case³⁰ the state liability principle is very well founded in EU law, however still not particularly popular before domestic courts of member

²⁴ However, on the 28.05.2021 Polish Supreme Court by Resolution, III CZP 27/20 decided that “1. Right to clean environment cannot be considered as personal right (Articles: 23-24 civil code, Article 448 civil code). 2. Contrary to such personal rights as: health, liberty or privacy...”; Polish Supreme Court decision 6.05.2010 r., II CSK 640/09, OSNC-ZD 2011, nr A, poz. 4.; moreover - Supreme Administrative Tribunal on 18.05.2020 passed decision - OSK 2710/19, in which expressly gave priority of application to domestic laws on procedural legitimacy in environmental cases before Aarhus Convention provisions (sic!); see: Anna Kalisz, ‘Right to Court in Climate Matters in the Light of the Aarhus Convention and the Case Law of Polish Administrative Courts’ (2021) *Studia Iuridica Lublinensia*, 5, 276-293; Adam Bodnar, ‘Prawo do (korzystania ze) środowiska jako dobro osobiste i jego naruszenie’ V.7200.17.2018.LK, III Ca 1548/18.

²⁵ European Commission called on the Netherlands and Slovakia to ensure broad access to justice in environmental matters, and on the 7th Feb. 2024 decided to open infringement procedures by sending letters of formal notice to the Netherlands INFR(2023)2149 and Slovakia INFR(2023)2177.

²⁶ Non-compliance of local authorities with their obligations under the AAQD is threatened by financial penalties of such a low amount that they do have no dissuasive effect, compare: *Deutsche Umwelthilfe* (C-752/18), about the ineffectiveness of such penalties; see also: (Bundesverwaltungsgericht) z 27.02.2018 r., BVerwG 7 C 30.17.

²⁷ Procedural remedies are considered as ineffective, i.e., in Prague, Brno, Ostrava and Ustecky regions, in 2018, national courts quashed the air quality plans but they had no power to issue an order to the government to adopt a new plan by a set deadline. Two years later, the government has not yet adopted new plans, see: Nejvyšší správní soud Česká republika, 20.12.2017 r., sp. zn. 6 As 288/2016 – 146, <<http://www.jurilogie.cz/ecli/ECLI-CZ:NSS:2017:6.AS.288.2016:146>>; *Městský soud v Praze* (7 February 2018 r) 10A 173/2016–119.

²⁸ Judgment of the Bratislava Regional Court (*Krajský súd v Bratislave*) on 13 November 2018 in Case 5S/31/2017–141 ICS: 1017200235.

²⁹ Commission called on Austria to improve its legislation on public participation in decision-making and access to justice in environmental matters by sending reasoned opinion to Austria (INFR(2014)4111) to correctly implement into national legislation all the requirements of the Aarhus Convention.

³⁰ C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* ECLI:EU:C:1991:428.

states³¹. For the last years European Commission has repeatedly reprimanded member states for non-compliance with this rule. And finally brought a few direct actions for violation of the treaty, for instance against Italy³² in 2011 for notorious nonconformity of Italian rules on professional responsibility of judges with EU law. Though, preliminary ruling in case *Traghetti del Mediterraneo*³³ had already made it very clear in 2006. It is worth remembering that in line with the procedural autonomy rule, EU law does not impose procedural standards, as long as there is no discrimination and effectiveness is guaranteed for the claims based on EU law. Some of the member states follow a monistic approach and apply the same procedural standard for compensation claims in both types of violation of either EU or domestic law. Most of the states, nonetheless take a dualistic approach that entails the application of different procedures for domestic claims and for the ones based on EU law. The facts of the above cited *Commission v. Italy* case of 2011 show that member states are very bound to their legal traditions considering compensation claims and are very reluctant to adapt them to EU law. It also proves that limitation by the national in this case Italian legislature of the state's liability to cases of intentional fault or serious misconduct committed by such a domestic court is contrary to the *Francovich* rule³⁴.

Member states routinely consider this rule not to be well founded in the treaties, however, after the Lisbon Treaty amendments one could hardly agree with this objection³⁵. Since 90. of the XX century Article 340 TFEU as the central Treaty provision in the context of liability regime of the Union has been regarded as the legal basis for compensation claims against the EU. As such, the very notion of 'general principles common to the laws of the Member States' of paragraphs 2 and 3 of the same Article was used by the CJEU to actively create judge-made law and to dynamically develop the Union's legal order. Concerning the liability of member states in any case of a breach of Union law, reference should be made in particular to the principle of loyalty in Article 4 para 3 TEU as legal basis. After Lisbon, treaty-based legitimacy of the *Francovich* rule was

³¹ Nina Półtorak, 'Odpowiedzialność odszkodowawcza państwa za naruszenie prawa UE po 20 latach od orzeczenia w sprawie *Francovich*' (2014) 1 Europejski Przegląd Sądowy 76; Marie-Pierre Françoise Granger, 'National application of *Francovich* and the construction of a European administrative *jus commune*' (2007) 2 European Law Review 157.

³² Judgement of the Court of Justice of 24.11.2011, C-379/10 *Commission v. Italy* ECLI:EU:C:2011:775.

³³ Judgement of the Court of Justice of 13.06.2006, C-173/03 *Traghetti del Mediterraneo* ECLI:EU:C:2006:391.

³⁴ *Commission v. Italy* (n. 32) para 49.

³⁵ Nina Półtorak, 'State liability in EU law: have the member states learnt anything in 20 years after "*Francovich*"?' in Julia Iliopoulos-Strangas, Stanisław Biernat, Michael Potacs (eds), *Responsibility, accountability and control of the constitutional state and the European Union in changing times* (2014).

significantly strengthened. First of all, Article 19 TEU (para. 1 subpara. 1) according to which the member states are obliged to configure their own system of legal protection in a way that ensures an effective protection in the fields covered by EU law. This duty relates to laws and acts of the member states institutions which must be compatible with Union law. The CJEU itself has by its case law developed the idea that the procedural court rules must be interpreted in a way enabling citizens to sue this state for damages, if domestic laws, administrative acts or even court judgements have breached the EU law³⁶. Effective judicial protection principle is also confirmed by Article 47 of the Charter of Fundamental Rights of the EU (CFR) that guarantees access to an effective remedy – including a legality review of an EU or domestic act and right to fair trial. This principle was also cited by the CJEU in the *Francovich* decision itself to justify the new rule that was formed there³⁷. This is why codification of effective judicial protection principle by the Lisbon treaty also strengthens the normative grounds of the *Francovich* rule. Another very important procedural right involving right to compensation under its paragraph 3 is the right to good administration found in Article 41 of the Charter of Fundamental Rights of the EU³⁸. This provision repeats merits of Article 340 TFEU. Both Articles upgrade public administration liability to general principle of EU law and confirm its status as a fundamental right, even though they guarantee right to compensation from the EU institutions not from member states³⁹. Concluding, in words of Advocate General Mengozzi: ‘The right to reparation of persons harmed by an infringement of EU law is a fundamental principle of the Union based on the rule of law established by the treaties and a specific variation on the principle of effective judicial protection’⁴⁰.

1. “Conferring rights on individuals” as a 1st condition for state liability

Judicial decision in the case *JP v Ministre de la Transition écologique* at first sight looks laconic and offers only fragmentary juridical picture of such a complex issue that is the state liability principle in the EU law. Opinion of Advocate

³⁶ Rudolf Geiger, Daniel-Erasmus Khan, Markus Kotzur (eds), *European Union Treaties. A Commentary* (Munich 2015) 109.

³⁷ *Andrea Francovich and Danila Bonifaci* (n 30), para 32-33, 42-43.

³⁸ ‘Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States’.

³⁹ Manuel Kellerbauer, Marcus Klamert, Jonathan Tomkin, *The EU Treaties and the Charter of Fundamental Rights. A commentary* (OUP 2019) 2205.

⁴⁰ Opinion of Mr Advocate General Mengozzi, delivered on 2 Sept. 2010 C-279/09 *DEB*, para 46.

General Kokott otherwise, is very insightful, extensive and considering all possible arguments in for and against the application of *Francovich* rule when individuals suffered health damages due to air pollution. Regrettably, the Court did not enter into polemic discussion with most of the Advocate's General valuable arguments.

To explain reasons for its decision the CJEU began with recalling the principle of state liability for damages suffered by individuals for violations of EU law by any public authority of a state⁴¹. The three-limbed test established in *Brasserie du Pêcheur* was mentioned as a basis for further examination of the disputable AAQD provisions⁴². Then, the CJEU dwelled on the subject of the direct effect principle with a reminder that only a breach of an EU law rule that confers rights on individuals gives rise to state liability⁴³. Furthermore, the CJEU also confirmed that according to its consistent case law, the individual rights arise not only where they are explicitly granted by EU law provisions, but also due to positive or negative obligations imposed clearly on the member states by EU law. Public administration duties (imposed under Articles 13 and 23 of the AAQD) to supervise limit values of air pollution and alert thresholds for the protection of human health or state obligation to pass remedial air quality plans for polluted areas in order to achieve the safe or target air quality values (specified in Annexes XI and XIV AAQD) would serve here as an excellent example. It has already become common knowledge that Articles 13(1) and 23(1) of the AAQD lay down fairly clear, precise and unconditional obligations as to the result to be met by the states. The full effectiveness of these state obligations and the protection of the rights conferred by them require that individuals have the guarantee of obtaining redress. Regrettably, the CJEU in next few short words stated that the mentioned Articles 13 and 23 of the AAQD neither confer express rights to compensation on individuals nor can it be interpreted from the state's obligations laid down therein. Furthermore, that the claimant *JP* was only implicitly granted rights that in case of violation could trigger French state liability for loss and damage caused. According to the CJEU Articles 13(1) and 23(1) of the AAQD must be interpreted as meaning that they were not intended to confer compensation rights on individuals under the principle of state liability for damages caused to them by the state breaching EU laws. In this way, as the CJEU said, the 1st of the 3 *Brasserie du Pêcheur* cumulative conditions has not been satisfied.

At the same time, the CJEU confirmed, that well established direct effect of Articles 13 and 23 of the AAQD should be fully operational before domestic courts where individuals may perfectly execute the adoption of local air quality

⁴¹ *JP v Ministre de la Transition écologique* paras 43-46.

⁴² *Brasserie du Pêcheur* para 51.

⁴³ *JP v Ministre de la Transition écologique* para 45.

plans. If necessary, they should also have the procedural guarantees for claiming damages from the state. Eventually, the domestic courts may issue orders accompanied by coercive fines in order for the state to comply with its obligations under EU law⁴⁴.

By sending EU citizens to their domestic levels of judicial protection to obtain, if necessary, a court order forcing local authorities to pass recovery air quality plans, the CJEU suggested that it is for the national law to be more generous in remedies⁴⁵. At the same time, the CJEU knowingly accepted the unfortunate consequences of no level playing field for individuals claiming damages in line with *Francovich* liability rule. This solution of course is an encouragement of a certain amount of forum shopping.

2. “Sufficiently serious breach” and a “Causal link” as a 2nd and a 3rd conditions for state liability

The CJEU, due to the negative answer to the 1st question, did not analyse the 2nd nor the 3rd condition of the state liability principle. However, the analysis done by Advocate General Kokott sheds some new light on the subject and therefore is definitely worth a few comments. First of all, the national court when deciding compensation claim must take into account all the factors that could point to a sufficiently serious infringement of EU law. To begin with, the rule infringed on has to be clear and precise. Then, the court has to examine the level of discretion left by that rule to the authorities, and if the violation was intentional or involuntary, if any error of law was excusable or not. Finally, whether the position taken by an EU institution might have contributed to this violation⁴⁶ will be determined. It also follows from the well-established case-law that a violation of EU law would clearly be sufficiently serious if it persisted despite of a judicial decision proving this breach or in spite of a preliminary ruling or settled CJEU case law making it clear that the state conduct in question was a breach⁴⁷.

⁴⁴ For further context see: Obligation to adopt appropriate measures to ensure that any exceedance of air pollution period is very short, C-752/18 *Deutsche Umwelthilfe eV* (n 10), para 51, 57; Delphine 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) *Journal for European Environmental & Planning Law* 17, 409-425.

⁴⁵ The same conclusion was reached in the previous CJEU case law i.e.: *Dieter Janecek* (n 14) *Client Earth* (n 15) *Lies Craeynest* (n 16).

⁴⁶ *Brasserie du pêcheur and Factortame*, para 56; C-620/17 *Hochtief Solutions Magyarország Fióktelepe*, EU:C:2019:630 para 42.

⁴⁷ *Brasserie du pêcheur and Factortame*, para 57; *Test Claimants in the FII Group Litigation* C-446/04, EU:C:2006:774, para 214; *Safa Nicu Sepahan v Council* C-45/15 P, EU:C:2017:402, para 31; *Thelen Technopark Berlin* C-261/20, EU:C:2022:33, para 47.

The above condition unfortunately, could be easily met by most of the EU member states, having considered the high frequency of their violations of the EU air quality laws. Up to the moment when French citizen *JP* brought his compensation claim before the French Administrative Court of Appeal (Versailles), the CJEU found at least in 16 infringement cases in which member states (including France) failed to meet ambient air quality standards. In the latest 9 judgments the CJEU even found that infringement of the air quality standards was systematic and persistent⁴⁸. Air pollution crisis across Europe have also been the subject of numeric domestic proceedings, for example, in the United Kingdom, Belgium, France, and Germany⁴⁹. What needs to be emphasised, as Advocate General Kokott conveyed in her opinion that just only the ‘exceedance of the air quality limit values’ should suffice to prove seriousness of the infringement. Since the obligation to comply with these limits is so clear that leaves no discretion to the state authorities. Such an infringement is serious by its very nature and perfectly may establish right to compensation⁵⁰.

In order to meet the 3rd *Francovich* liability condition—a ‘direct causal link’ between the violation and the damage, the injured party must first prove his or her sufficiently long stay at work or at home—in an environment where air quality standards have been seriously infringed. Secondly, the health damage, for instance specific disease linked to the air pollution in this place has to be diagnosed. And finally, a direct causal link between the abovementioned harmful stay and the damage claimed must be proved. The duration of that period is a medical question that requires a scientific answer. Thus far, in the EU member states there are no available expert medical assessments that could serve as evidence in compensation claims. There was only one, high-profile case that happened in Dec. 2013 in UK when London Coroner officially named air pollution exposure as a cause of death

⁴⁸ Commission Staff Working Document, ‘Fitness Check of the Ambient Air Quality Directives SWD’ (28 November 2019) 427 final, Brussels; See: Annex 6: Infringements and litigation under the AAQ Directives; 1. EU Court proceedings against Member States for failure to fulfil obligations under ambient air quality legislation (2008 to 2019), 129-132; *Commission v Sweden* C 479/10, not published, EU:C:2011:287; *Commission v Portugal* C 34/11, EU:C:2012:712; *Commission v Italy* C 68/11, EU:C:2012:815; *Commission v Bulgaria* C 488/15, EU:C:2017:267; *Commission v Poland* C 336/16, EU:C:2018:94; *Commission v France* (C 636/18, EU:C:2019:900); *Commission v Romania* C 638/18, not published, EU:C:2020:334; *Commission v Italy* C 644/18, EU:C:2020:895; *Commission v Hungary* C 637/18, not published, EU:C:2021:92; *Commission v United Kingdom*, C 664/18, not published, EU:C:2021:171; *Commission v Germany* C 635/18, not published, EU:C:2021:437; *Commission v France* C 286/21, not published, EU:C:2022:319; *Commission v Italy* Cases C 573/19, C-573/19, EU:C:2022:380; *Commission v Bulgaria* C- 730/19, EU:C:2022:382; *Commission v Spain* C-125/20, EU:C:2022:1025; *Commission v Greece* C-70/21, EU:C:2023:237; *Commission v Slovakia* C-342/21, EU:C:2023:87; *Commission v Greece* C-633/21, EU:C:2023:112; *Commission v Portugal* C-220/22, EU:C:2023:521.

⁴⁹ AG Kokott, Opinion, para 96.

⁵⁰ AG Kokott, Opinion, para 108, 112.

of a 9-year-old Ella Kissi Debrah after the child died of asthma attack and a cardiac arrest⁵¹.

In practice, domestic rules on causality and burden of proof make it impossible or excessively difficult to obtain compensation for damage suffered for breaches of the AAQD. It would be beneficial for the effective protection of individuals if the CJEU considered introducing specific mitigations that are necessary to facilitate these claims⁵². As AG Kokott rightly suggested, that burden of proof could be alleviated by application of a rebuttable presumption that a representative type of health damage occurs as a result of one's exposure to heavily polluted ambient air. As an example, in cases involving fundamental rights before the European Court of Human Rights the need to alleviate the burden of proof of individuals has been raised quite often⁵³. Presumption that excessive air pollution is harmful to human health, has already been applied by the ECHR in *Fadeyeva v. Russia*: 'it possible to assume that the applicant's health deteriorated as a result of her prolonged exposure to the industrial emissions from the Severstal steel plant. Even if the pollution did not cause any quantifiable harm to her health, it inevitably made the applicant more vulnerable to illnesses. Moreover, there can be no doubt that it adversely affected her quality of life at home. In this way, the Court accepted that the actual detriment to the applicant's health and well-being reached a level sufficient to bring it within the scope of Article 8 of the Convention'⁵⁴. Likewise, Advocate General Kokott stressed that under EU law, the burden of proof should be reduced for the sake of the principle of effectiveness where the full standard of proof, undoubtedly would make it hardly possible to obtain compensation⁵⁵. At the same time, AG Kokott expressed her concern that the *Francovich* rule may not have been developed enough yet for the common acceptance of such a reversed burden of proof. This issue of a

⁵¹ See: Report to prevent future deaths, London coroner, Philip Barlow: "Air pollution was a significant contributory factor to both the induction and exacerbations of Ella's asthma. During the course of her illness between 2010 and 2013 she was exposed to levels of NO2 and PM exceeding WHO Guidelines. The principal source of her exposure was traffic emissions" <<https://www.judiciary.uk/prevention-of-future-death-reports/ella-kissi-debrah/>>.

⁵² ClientEarth Org, 'Individual right to clean and healthy air in the EU...', 19.

⁵³ Judgement of the European Court of Human Rights of 30 Nov. 2005, *Fadeyeva v. Russia*, App. 55723/00, CE:ECHR:2005:0609JUD005572300; See also the most recent Judgment of the European Court of Human Rights of 11 October 2022, *Pavlov and Others v. Russia*, App. no 31612/09 and comment: *Schuldt Nele 'Pavlov v Russia: 'Welcoming the Court's proactive shift in its handling of environmental complaints, including their evidentiary challenges'* <<https://strasbourgobservers.com/2022/11/15/pavlov-v-russia-welcoming-the-courts-proactive-shift-in-its-handling-of-environmental-complaints-including-their-evidentiary-challenges/>>.

⁵⁴ *Fadeyeva v. Russia*, paras §87 – 88.

⁵⁵ AG Kokott, *Opinion*, para 138.

reliable method for linking air pollution with health damages still requires an intensive, scientific discussion⁵⁶.

3. Polemic comments

Having considered all the aforementioned arguments, two polemical points have to be raised. Firstly, if according to the EU state liability rule compensation is due for breach of financial interests, shouldn't it be even more just for human rights violation? And secondly, if air quality laws are to protect human health, isn't it clear that next to public health they protect individual right to health as a human right as well?

The CJEU traditionally in its case law affirms that for the application of *Francovich* rule and consequently individual right to compensation—a causal link between the State conduct adversely affecting the 'legal situation' ('*situation juridique*') of the injured individual and damage suffered is a precondition⁵⁷. An interesting point in course of the commented proceedings was developed by French state that noticed that the previous CJEU's decisions confirming state liability concerned financial claims, i.e.: wages and old-age people pensions protection in case of the employer's insolvency⁵⁸ or the claims of package travellers if the travel agency goes into bankruptcy⁵⁹, deposit protection⁶⁰ and the investors' protection against excessive prices in case of takeovers⁶¹, or the right to compensation for victims of crime⁶². Meanwhile, as AG Kokott said - adverse health effects cannot be qualified as a change in the 'legal situation' but rather as an infringement of a legal interest which is far more valuable than the asset-related interests. This is because respect for physical and mental integrity as a human right is laid down in Article 3 of the EU Charter of Fundamental Rights. And as such, it is ranked in the top position in relation to the other legal interests⁶³. Furthermore, Advocate General very rightly stated that health impairment also

⁵⁶ *ibid.* para 139.

⁵⁷ AG J. Kokott, *Opinion*, para 90-91.

⁵⁸ *Francovich and Others*; C-278/05 *Robins and Others* EU:C:2007:56; C-398/11 *Hogan and Others* EU:C:2013:272 paras 50-52.

⁵⁹ C-178/94, C 179/94 and C 188/94 to C-190/94 *Dillenkofer and Others* EU:C:1996:375 para33 et seq.

⁶⁰ C-571/16 *Kantarev* EU:C:2018:807, C-501/18 *Balgarska Narodna Banka* EU:C:2021:249.

⁶¹ C 735/19 *Euromin Holdings* (Cyprus) EU:C:2020:1014.

⁶² C 129/19 *Presidenza del Consiglio dei Ministri* EU:C:2020:566.

⁶³ See, to that effect: *De Peijper*, C- 104/75, EU:C:1976:67, para 15; *Rosengren and Others*, C 170/04, EU:C:2007:313, para 39; *Blanco Pérez and Chao Gómez* C 570/07 and C 571/07, EU:C:2010:300, para 44; *Delfarma*, C 488/20, EU:C:2021:956, para 37.

leads to financial losses because of treatment costs or loss of earnings⁶⁴. The purpose of the AAQD rules is to at least, prevent such damage. Regrettably, AG Kokott human-rights-based arguments missed the rational reasoning of the CJEU, according to which compensation could not be granted if no specific financial interest or economic right has been violated. On a side note, it has to be noticed that the CJEU in its judicial decisions could use human-rights-based arguments more often for the environmental protection. Unfortunately, so far, they have played only a limited role in the EU environmental case law⁶⁵. Besides, the well-known case-law on state liability has not been aimed to protect economic interests of individuals concerned, but its intension was first of all, to ensure the full effectiveness of EU law by protecting rights of individuals. This is what the CJEU exactly said in its milestone judgments, to begin with *Francovich and Others* of 1991 further in *Brasserie du pêcheur and Factortame* of 1996 or in *Deutsche Umwelthilfe* of 2019. For the sake of effectiveness, the principle of state liability is inherent in the system of the treaties on which the Union is based⁶⁶.

Last but not least, a critical remark concerns the keynote statement of the commented CJEU decision. The CJEU reiterated that the obligations arising from the AAQD do not have the purpose of conferring private rights on individuals that could be invoked against a state to obtain compensation. Even though the AAQ Directive establishes clear and precise obligations with regard to the result that states must achieve, these duties as the CJEU said, pursue a general objective of protecting human health and the environment as a whole⁶⁷. They do not contain any explicit attribution of rights to individuals. They do not allow either for the conclusion that in this case, one individual or categories of individual rights have been implicitly conferred on a person and that violation of these rights would make a state responsible for health damages. Advocate's General Kokott arguments corresponding with the above thesis appears much more convincing,

⁶⁴ Commission itself in its proposal for Directive 2008/50 emphasised not only the health consequences of air pollution, but also the estimated financial damage of EUR 189 to 609 thousand million per annum as at 2020.

⁶⁵ Jasper Krommendijk, Dirk Sanderink, 'The role of fundamental rights in the environmental case law of the CJEU' (2023) 1 European Law Open 1; Mario Pagano, 'Human rights and ineffective public duties: the Grand Chamber judgment in *JP v. Ministre de la Transition écologique*' (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 2 September 2024; Pouikli Kleoniki, Ariti Tsoukala 'Air Pollution Crisis Across Europe: The European Courts, the Governments, the Citizens and the Persistent Ineffectiveness of EU' (2023) Journal for European Environmental & Planning Law 20, 272-279.

⁶⁶ AG J. Kokott, *Opinion* para 92; *Francovich and Others* paras 31-33, 35; *Brasserie du pêcheur and Factortame* paras 20, 31; C-420/11 *Leth* EU:C:2013:166, para 40; *Tomášová* para 18; *Deutsche Umwelthilfe* para 54.

⁶⁷ *JP v Ministre de la Transition écologique*, paras 54-56.

especially valuable is the analysis of the existing connection between alert thresholds and air pollutants limiting values for the protection of human health (of Article 13 of the AAQD) and individual rights⁶⁸. The state obligations concerning air quality, aimed at protecting health, are triggered by excess of those limits. At the same time, the interest in health is highly personal and individual in nature, therefore the objective of health protection could not relate solely to the protection of the general public⁶⁹. This AG Kokott analysis concerning public (what is quite obvious) or private character of the disputable provisions (Articles 13 and 23 of the AAQD) is especially enriching the whole dispute in course of these proceedings. To summarise, as the AG said, the final decision—whether the intention of the provisions in question was to confer right to damages or not—should depend not only on the identifiability of potential rights but above all on the objectives of that legislation. Disregarding all the professional and convincing arguments of the AG Opinion, the CJEU stood firmly by its reasoning and finally denied the existence of any right to compensation under the examined Articles 13 and 23 of the AAQD.

CONCLUSIONS

By means of judicial decision in *JP v Ministre de la Transition écologique* the CJEU clearly limited the state liability rule impact on domestic legal systems. The historical ruling in *Francovich* case has always been treated as quite revolutionary both for the EU and its member states' systems⁷⁰. Discerning public interest protection as a goal of the AAQD rather than individual interests of EU citizens the CJEU avoided opening Pandora's box - full of discussions on the substance of this 'right to clean air'. This right should be based on solid foundations: the individual right to effective judicial protection, including the ability to demand compliance with the EU air quality laws, remedies to prevent harm, and finally in case of violation, a right to obtain compensation *via* effective application of the *Francovich* rule before a domestic court. What is even more disappointing about the *JP vs Ministre de la transition écologique* case, is the limited relevance of a human rights toolbox in seeking to establish liability of

⁶⁸ AG J. Kokott *Opinion* paras 72-81; See also: Mario Pagano, *op. cit.*, 3.

⁶⁹ AG J. Kokott *Opinion* para 77.

⁷⁰ Paul Craig Francovich, 'Remedies And The Scope Of Damages Liability' [1993] 109 *The Law Quarterly Review* 595; Pascal W. van Gerven, 'Bridging the unbridgeable: Community and national tort laws after Francovich and Brasserie' [1996] 6 *International and Comparative Law Quarterly* 507.

national administrative authorities for health damages of individuals due to the long-term exposure to air quality below the mandatory limit values⁷¹.

In my view, this latest CJEU decision that impacts also future compensation claims for air pollution is clearly too conservative, probably in order to avoid far reaching legal and financial implications for domestic legal systems, especially in the jurisdictions where compensation claims for health damages are not well grounded in their legal traditions⁷². It is also, too far extend inconsistent with new legislative trends. In particular, when we consider the coming new CAFE directive⁷³ with its promising Chapter VII—‘Access to Justice, Compensation and Penalties’, where Article 27 establishes detailed provisions to ensure access to justice and Article 28 that speaks about compensation for damage to human health. This new legislative act will again bring to light the necessity of harmonising rules on causation across the EU, by alleviating the burden of proof on individual claimants in lawsuits for damages due to heavy air pollution.

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⁷¹ Pouikli Kleoniki, Ariti Tsoukala ‘Air Pollution Crisis Across Europe..., *passim*.

⁷² Nina Póltorak, *op. cit.*, 80.

⁷³ Proposal for a Directive of the European Parliament and of the Council on ambient air quality and cleaner air for Europe, Brussels, 26.10.2022, COM(2022) 542 final 2022/0347 (COD).

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