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## **THE RIGHT TO BREATHE CLEAN AIR: THE EUROPEAN JUDGE IS CALLED UPON TO GIVE A DECISIVE RULING**

To Our Clients and Friends:

Overshadowed in the media by the historic judgment of 3 February 2021 by the Administrative Court of Paris in the “Affaire du siècle” (the Case of the century), a ruling by the Versailles Administrative Court of Appeal (the Court) on 29 January 2021 could also result in a historic ruling by the Court of Justice of the European Union (the CJEU). Indeed, upon referral by the Court, the CJEU will be called upon to rule on the existence of a right to breathe clean air and on the liability incurred by the Member States of the European Union in the case of disregard of their obligations in terms of air quality (Case C-61/21).

### **I. Context of the ruling rendered by the Court**

Under Directive 2008/50/EC of 21 May 2008 on “*ambient air quality and cleaner air for Europe*” (the Directive), Member States must establish zones and agglomerations throughout their territory in which air quality is assessed (Article 4).

Article 13-1 of the Directive requires Member States to ensure that levels of fine particulate matter (PM10), carbon monoxide or nitrogen dioxide (NO<sub>2</sub>) do not exceed limit values set out in an annex.

Article 23-1 of the Directive provides that where these limit values are exceeded by levels of pollutants in ambient air, Member States must, in the given zone or agglomeration, adopt “*air quality plans*”. If the limit values are exceeded after the deadline for their application, the air quality plans provide for appropriate measures to ensure that the period of exceedance is as short as possible.

At the end of 2019, following an action for failure to fulfil obligations brought by the European Commission, the Court of Justice of the European Union ruled that France had failed to fulfil its obligations under Articles 13(1) and 23(1) of the Directive with regards to NO<sub>2</sub> for several French regions, including the Paris region (CJEU, 24 October 2019, case C-636/18). On 30 October 2020, the European Commission announced that it would bring a new action against France before the CJEU for failure to fulfil obligations, it being specified that the failures this time deal with the excessive level of PM10 in the air.

For its part, the Conseil d’Etat (Council of State, France), the highest administrative court in France, had already ruled in 2017 that, given the persistence of observed exceedance of PM10 and NO<sub>2</sub> concentrations in the air, the air quality plans for certain areas, including the Paris region, had to be considered insufficient with respect to the obligations and thresholds set by the Directive. The Conseil d’Etat had then enjoined the State to take the necessary measures to bring PM10 and NO<sub>2</sub> concentrations below the limit values (CE, 12 July 2017, No. 394254). In a decision dated 10 July 2020, the Conseil

d'Etat considered that the French State had not complied with the injunctions requested in the decision of 12 July 2017, and imposed a €10 million penalty on them if they did not justify having taken the required measures within six months of the decision (CE, ass., 10 July 2020, No. 428409). In light of the publicly available information, the Conseil d'Etat should soon rule on whether the French State has finally fulfilled its obligations.

It is in this context that the Court, sitting in plenary session, was called upon to rule on the action for damages brought by an applicant, resident of the Paris region, who attributed his various allergies to air pollution. The applicant considered that the deterioration of the air quality resulted in particular from the disregard by the French authorities of the obligations set by Articles 13(1) and 23(1) of the Directive.

## II. Reasoning steps followed by the Court

It has been consistently held that “*the principle of State liability for loss and damage caused to individuals as a result of breaches of [Community] law for which it can be held responsible is inherent in the system of the [Treaty on the Functioning of the European Union]*” (CJEU, 5 March 1996, cases C-46/93 and C-48/93).

The CJEU also recalls that a right to reparation is recognized by European law if the following three conditions are met:

1. the rule of law infringed must be intended to confer rights on individuals;
2. the breach must be sufficiently serious, it being specified that this is the case if the breach has persisted despite a judgment by the CJEU finding the infringement in question to be established;
3. 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.

In the present case, since it was seized of a claim for damages based on the breach of the Directive, *i.e.* of a norm of European law, the Court had to verify whether the three conditions mentioned above were met.

In order to determine whether the first condition had been met, the Court had first to decide whether Articles 13(1) and 23(1) of the Directive, which the applicant claimed had been disregarded, gave him a “*right*”. In other words, the Court had to determine whether these Articles conferred a “*right to breathe clean air*” eligible of giving rise to a compensation claim.

As early as 2014, the CJEU had indicated that Articles 13(1) and 23(1) allowed “*persons directly concerned by the limit value being exceeded*” to obtain, before the national authorities and courts, the establishment of an air quality plan in accordance with the requirements of Article 23 (CJEU, 19 November 2014, case C-404/13). It is, moreover, this right that was implemented by the Conseil d'Etat in the 2017 and 2020 decisions outlined above.

The Court probably considered that the right thus available to individuals to compel Member States to implement the obligations laid down by the Directive did not necessarily imply the recognition for their benefit of a “right to breathe clean air”, the disregard of which is likely to give rise to an action for damages.

Since the answer was uncertain and the issue was related to the scope of a European norm, the Court chose to refer two questions to the CJEU for a preliminary ruling on Articles 13(1) and 23(1) of the Directive in order to obtain the appropriate interpretation of these Articles.

The first question is relative to whether Articles 13(1) and 23(1) of the Directive give individuals, in the event of a sufficiently serious breach by a Member State of the European Union of the obligations arising therefrom, a right to obtain from the Member State in question, compensation for damage to their health which has a direct and certain causal link with the deterioration of air quality.

If the answer to the first question is affirmative, the Court then asked the CJEU to specify the conditions for the opening of this right, in particular with regards to the date on which the existence of the breach attributable to the Member State in question must be assessed.

### **III. Possible consequences of the Court’s ruling**

If the CJEU were to answer the first of the questions asked by the Court in the affirmative, it would then be for the Court to determine whether the other two conditions for the French State’s liability to be characterized are met.

Insofar as France has already been subject of a breach judgment for failure to comply with its obligations with respect to NO<sub>2</sub> (CJEU, 24 October 2019, cited above), the condition relating to the sufficiently serious breach of a right conferred on individuals does not seem to pose any particular difficulty.

It will then be up to the Court to assess whether there is a direct causal link between the violation and the damage claimed by the applicant, it being specified that this demonstration will depend on the answer given by the CJEU to the second question, namely from what date the existence of the violation attributable to the Member State in question must be assessed, and will probably require recourse to a medical expert opinion.

The recognition of a right to breathe clean air likely to be subject of an action for compensation would very probably constitute a strong constraint weighing on the Member States of the European Union. In this respect, it should be emphasized that France is far from being the only country in the European Union to have been condemned for failure to comply with the obligations set out in Articles 13(1) and 23 of the Directive: Italy has been condemned for systematic and persistent exceeding of the PM 10 limit values (CJEU, 10 November 2020, case C-644/18), the United Kingdom and Germany have been condemned in the same way, but for NO<sub>2</sub> (CJEU, 4 March 2021, case C-664/18 and CJEU, 3 June 2021, case C-635/18). The question of a possible compensation claim based on the disregard of the right to breathe clean air could thus have a repercussion in all of the European Union States.



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