ARTICLES

GONE WITH THE WIND: *JP* AND THE RIGHT TO CLEAN AIR UNDER EU LAW

LUCA CALZOLARI*

ABSTRACT: If the *JP* ruling were a book, it would be a thriller: not only the reader may be surprised by its outcome and by the arguments developed by the CJEU to support it, but it also contains a genuine "plot twist", as until the end one is led to believe that the CJEU would have decided in the opposite way. While in previous cases it has constantly sought to enhance the *effet utile* of the EU regime on air quality, here the CJEU decided that individuals cannot claim compensation for damages suffered due to Member States' infringements of that regime. By holding that Directive 2008/50/EC cannot confer rights to individuals because it pursues a general objective, the ruling seems inconsistent not only with the case law in this field, but also with several profiles that characterize the EU legal order from a broader perspective, such as the relation between direct effect and Member States' liability. In addition to undermining the argument that EU law may recognize a substantive right to clean air, the ruling reduces the deterrent effect of Directive 2008/50/EC eliminating civil damages from the expected costs of air quality standards violations. The revision of Directive 2008/50/EC is currently under discussion and the Commission's proposal – drafted before the *JP* ruling – recognizes the right to damages. The hope is that this point will survive the legislature procedure, reducing the relevance of the *JP* ruling: however, this is a feeble expectation considered the (need for Council's approval and the) impact on Member States.

KEYWORDS: clean air – air pollution – directive 2008/50/EC – damages – private enforcement – conferral of rights.

* Associate Professor of European Union law, University of Turin, luca.calzolari@unito.it.

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I. Introduction

In the *JP v Ministre de la Transition écologique e Premier ministre* case (hereinafter *JP*),[1] the CJEU was asked to decide whether Member States can be held liable – under the *Francovich* doctrine[2] – for damages caused to individuals by the violation of Directive 2008/50/EC on air quality protection (hereinafter *AQD*).[3]

Recasting the previous regulatory framework,[4] the AQD establishes concentration limit and target values for many pollutants,[5] whose respect is compulsory for Member States.[6] In case of exceedances in a given zone or agglomeration within their territory, Member States must therefore prepare so-called air quality plans envisaging the adoption of adequate measures to end the infringement.[7]

In *JP*, the claimant was a French citizen who suffered from health issues related to air pollution. As the levels of air pollutants in the area where he lived and lives exceeded the values set by AQD, the claimant argued that his health problems were caused by the deterioration of air quality which was, in turn, attributable to the French authorities' failure to comply with arts 13 and 23 AQD. The claimant thus applied to the competent domestic Courts seeking, inter alia, compensation for the amount of EUR 21 million.

It was worth to mention the amount claimed because this highlights what is probably the main (if not the only)[8] reason that, replying to the preliminary reference request submitted by the Administrative Court of Appeal of Versailles, led the CJEU to hold that the *Francovich*'s doctrine stops at the gates of clean air. Not embracing the opposite solution proposed by AG Kokott,[9] the CJEU ruled that individuals cannot claim compensation for the damages suffered as a consequence of Member State's breach of arts 13 and 23 of AQD. Even though they have direct effect, according to the CJEU these provisions pursue the "general objective of protecting human health and the environment as a whole"[10]

[1] Case C-61/21 *Ministre de la Transition écologique e Premier ministre (Responsabilité de l'État pour la pollution de l'air)* ECLI:EU:C:2022:1015. H van Eijken and J Krommendijk, 'Does the Court of Justice Clear the Air: A *Schutznorm* in State Liability After All? *JP v Ministre de la Transition Écologique*' (10 January 2023) EU Law Live eulawlive.com.

[2] Joined cases C-6/90 and C-9/90 *Francovich* ECLI:EU:C:1991:428.

[3] 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.

[4] See footnotes 27-29.

[5] *E.g.* sulphur dioxide, nitrogen dioxide, oxides of nitrogen, particulate matter (PM_{10} and $PM_{2,5}$), lead, benzene and carbon monoxide (Annex I to AQD cit.).

[6] Art. 13 AQD cit.

[7] Art. 23 AQD cit.

[8] M Pagano, 'Human Rights and Ineffective Public Duties: The Grand Chamber Judgment in JP v. Ministre de la Transition écologique' (2 February 2023) European Law Blog europeanlawblog.eu.

[9] Case C-61/21 *Ministre de la Transition écologique e Premier ministre (Responsabilité de l'État pour la pollution de l'air)* ECLI:EU:C:2022:359, opinion of AG Kokott.

[10] *JP* cit. para. 55.

and, therefore, "are not intended to confer rights on individuals capable of entitling them to compensation from a Member State under the principle of State liability".[11]

This cautious (to say the least) approach seems indeed to be inspired by the CJEU's desire to address the concerns that, especially after AG Kokott's opinion was issued, were expressed by many Member States about the risk of being exposed to a virtually unlimited liability *vis-à-vis* their residents,[12] essentially because – as shown by the Commission's enforcement efforts *ex* art. 258 TFEU,[13] also as a result of its commitment to increase control over Member States' conducts under the "Clean Air Program for Europe"[14] – the infringements of AQD are countless.

Apart from this realpolitik consideration, the *JP* judgment is quite surprising (and disappointing):[15] not only because the decision is not consistent with previous CJEU's case law (not only on the AQD), but mainly because it could end the possibility of arguing that EU law confers to individuals not only a procedural but also a substantive right to clean air[16], *i.e.* not only a (justiciable) right to have the Member States taking all the measures and actions (e.g. air monitoring, drafting of action plans) prescribed by the AQD, but also a (likewise justiciable) right to live in a place where air quality standards are met.

After a brief overview of the legal framework adopted at the EU level in order to tackle air pollution (in section II) and an equally brief discussion of the relevant CJEU's case law (in section III), this *Article* will focus (in section IV) on the main critical profiles of the *JP* judgment, in order to show the main reasons why the CJEU's decision is not consistent not only with the CJEU's case law on the application of AQD but also with several profiles that mark the EU legal order from a much more systematic perspective.

II. Air quality and EU law

An overview of both the regulatory framework adopted at the EU level to protect air quality and the CJEU's case law in this field[17] is essential not only to understand the content and scope of the *JP* judgment but even more so to grasp its inconsistency with the previous

[11] *JP* cit. para. 65.

[12] AG Kokott correctly noted that the fear "to expect a large number of claims for compensation" and the consequent "financial risks" and "considerable burden on the courts of the Member States" cannot and "do not militate against the recognition of rights that can establish entitlement to compensation, because the large number of persons potentially affected shows, above all, the importance of adequate air quality" (AG Kokott in *JP* cit. paras 97-98).

[13] See section III.1.

[14] Communication COM(2013) 918 final from the Commission of 18 December 2013 on a Clean Air Programme for Europe. As part of this commitment, the Commission brought the first proceeding *ex* art. 260(3) TFEU, which however was dismissed (case C-174/21 *Commission v Bulgaria* ECLI:EU:C:2023:210).

[15] E van Calster, 'Significant EU Environmental Cases: 2021–2022' (2023) JEL 251, 254, also noting (at 255) that the ruling could be motivated by the "ambition to cap the number of cases that might otherwise reach the CJEU".

[16] Before *JP*, this possibility was suggested by many authors (see notes 199-201).

[17] See *infra* section III.

judgement rendered by the CJEU and its impact on the nature of the (now faltering) right of individuals to clean air under EU law, which is the main purpose of this *Article*.

While initially the EU dealt with atmospheric and air pollution mainly in the light of its effects on the internal market[18] or to cope with its obligation under international law,[19] since the 1980s many pieces of EU secondary law have been adopted precisely to protect the atmospheric environment.

The EU action in this field developed around two main and interrelated lines of intervention: the establishment of limits to the concentration of pollutants and the adoption of measures to reduce emissions. Initially, the approach was sectoral: secondary law was used to impose limit values on concentrations of specific harmful substances[20] and, similarly, efforts were made to reduce pollutant emissions from individual sources, such as industry,[21] land (road[22] and non-road)[23] and other transports.[24]

[18] *E.g.* Council Directive 70/220/EEC of 20 March 1970 on the approximation of the laws of the Member States relating to measures to be taken against air pollution by gases from positive-ignition engines of motor vehicles.

[19] The EU is a contracting party to the 1979 Geneva Convention on long-range transboundary air pollution (Council Decision 81/462/EEC of 11 June 1981 on the conclusion of the Convention on long-range transboundary air pollution) and to the 1985 Vienna Convention Vienna Convention for the Protection of the Ozone Layer (Council Decision of 14 October 1988 concerning the conclusion of the Vienna Convention for the protection of the ozone layer and the Montreal Protocol on substances that deplete the ozone layer), as well as to their respective protocols.

[20] *E.g.* Council Directive 80/779/EEC of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates; Council Directive 82/884/EEC of 3 December 1982 on a limit value for lead in the air; Council Directive 85/203/EEC of 7 March 1985 on air quality standards for nitrogen dioxide.

[21] *E.g.* Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions; Directive (EU) 2015/2193 of the European Parliament and of the Council of 25 November 2015 on the limitation of emissions of certain pollutants into the air from medium combustion plants; Directive 94/63/EC of the European Parliament and of the Council of 20 December 1994 on the control of volatile organic compound (VOC) emissions resulting from the storage of petrol and its distribution from terminals to service stations; Directive 2009/126/EC of the European Parliament and of the Council of 21 October 2009 on Stage II petrol vapour recovery during refuelling of motor vehicles at service stations.

[22] *E.g.* Regulation (EC) 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information; Commission Regulation (EC) 692/2008 of 18 July 2008 implementing and amending Regulation (EC) 715/2007 of the European Parliament and of the Council on type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information; Commission Regulation (EU) 582/2011 of 25 May 2011 implementing and amending Regulation (EC) 595/2009 of the European Parliament and of the Council with respect to emissions from heavy duty vehicles (Euro VI). See also Directive 98/70/EC of the European Parliament and of the Council of 13 October 1998 relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EEC.

[23] Regulation (EU) 2016/1628 of the European Parliament and of the Council of 14 September 2016 on requirements relating to gaseous and particulate pollutant emission limits and type-approval for internal combustion engines for non-road mobile machinery.

[24] *E.g.*, for maritime transport, Directive (EU) 2016/802 of the European Parliament and of the Council of 11 May 2016 relating to a reduction in the sulphur content of certain liquid fuels.

Although the sectoral approach has not been abandoned,[25] the scope of intervention of EU secondary law has been gradually but significantly expanded. Firstly, a global ceiling for emissions of each Member State was established through what has now become the so-called NEC Directive.[26] Secondly, the regime to protect air quality was developed in a systematic manner in the mid-1990s by the so-called Framework Directive,[27] under which "four daughter directives"[28] and a decision[29] were subsequently adopted.

Around a decade later, this regime was simplified by AQD, which also extended its substantive reach to new pollutants, such as $PM_{2.5}$.[30] In continuity with the previous regime, the main objective pursued by AQD is the improvement of air quality by reducing as much as possible the adverse effects of air pollutants on the environment and human health. To this end, AQD contains both substantive (*i.e.* air quality standards that need to be met) and procedural obligations (*i.e.* actions that need to be taken to meet the air quality standards).

The substantive regime is actually quite simple: to ensure air quality in the medium to long term,[31] the AQD's technical annexes set air quality standards, both in the form of "limit" and "target" values. This distinction recalls that between mandatory and best effort commitments. Limit values are binding maximum thresholds for pollutants concentration that

[25] Suffices it to recall the various regulations adopted since 2016 to cope with the so-called diesel gate. *E.g.* Commission Regulation (EU) 2018/1832 of 5 November 2018 amending Directive 2007/46/EC of the European Parliament and of the Council, Commission Regulation (EC) 692/2008 and Commission Regulation (EU) 2017/1151 for the purpose of improving the emission type approval tests and procedures for light passenger and commercial vehicles, including those for in-service conformity and real-driving emissions and introducing devices for monitoring the consumption of fuel and electric energy; Commission Regulation (EU) 2017/1151 of 1 June 2017 supplementing Regulation (EC) No 715/2007 of the European Parliament and of the Council on type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information, amending Directive 2007/46/EC of the European Parliament and of the Council, Commission Regulation (EC) 692/2008 and Commission Regulation (EU) 1230/2012 and repealing Commission Regulation (EC) 692/2008.

[26] Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants, amending Directive 2003/35/EC and repealing Directive 2001/81/EC.

[27] Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management.

[28] Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air; Directive 2000/69/EC of the European Parliament and of the Council of 16 November 2000 relating to limit values for benzene and carbon monoxide in ambient air; Directive 2002/3/EC of the European Parliament and of the Council of 12 February 2002 relating to ozone in ambient air; Directive 2004/107/EC of the European Parliament and of the Council of 15 December 2004 relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air.

[29] Commission Decision 2001/752/EC of 17 October 2001 amending the Annexes to Council Decision 97/101/EC establishing a reciprocal exchange of information and data from networks and individual stations measuring ambient air pollution within the Member States.

[30] Cf. arts 15 and 16 AQD cit.

[31] AQD also tackles emergency and/or short-term situations, when pollutants reach "critical levels", "alert thresholds" or "information thresholds", requiring immediate responses by Member States (arts 2(1)(6), (10) and (11) AQD cit.).

cannot be exceeded by Member States: in any moment and in any area of their territory, therefore, the level of pollutants in the air must be lower than the limit values established by AQD.[32] Any exceedance shall be remedied in the shortest possible period by adopting so-called air quality plans envisaging appropriate measures to achieve compliance.[33]

By contrast, target values are more ambitious air quality standards entailing lower pollutions' levels; they shall be attained by member States (only) if possible and over a given period of time.[34] If a "target value" is not achieved, Member States are required to intervene only if this result can be obtained through measures not entailing disproportionate costs.[35]

In full accordance to the textbook notion of directive, AQD leaves to Member States the choice of the methods to ensure that the levels of pollutants remain below limits and target values. As policy choices are thus made by national authorities, the effectiveness of AQD's substantive goals is supported by a complex procedural framework that shall be respected by Member States: the rationale is that, for AQD to be effective, monitoring activities shall be performed throughout the EU in a manner as uniform as possible, so that violations can be promptly discovered in any Member State.

This entails the necessity of detailed technical standards dealing with, for example, the modalities to be followed to monitor and assess air quality (e.g. to collect data),[36] in the zones and agglomerations in which Member States shall divide their territory,[37] and to report data to the Commission.[38]

Before turning to the analysis of the CJEU's case law in this field, it is worth noting that the already mentioned reference made by the AQD to the need to protect both human health and the environment[39] would seem to be an indication of a certain devotion of the AQD to the position of individuals, if only in view of the fact that the right to health and the right to environmental protection are both fundamental rights (or principles) protected also by arts 35 and 37 of the CFREU.[40]

[32] Limit values are "fixed on the basis of scientific knowledge, with the aim of avoiding, preventing or reducing harmful effects on human health and/or the environment as a whole, to be attained within a given period and not to be exceeded once attained" (art. 2(1)(5) AQD cit.).

[33] Art. 23(1) AQD cit.

[34] Art. 2(1)(9) AQD cit.

[35] Arts 15(1), 16(1) and 17(1) AQD cit.

[36] Arts 7 and 8 (for monitoring regime) and 5 and 6 (for assessment regime) AQD cit. Art. 9 AQD cit. for ozone.

[37] Art. 4 AQD cit.

[38] Art. 27 AQD cit.

[39] Recital 2 AQD cit.

[40] On art. 35 of the CFREU see for example A de Ruijter, *EU Health Law & Policy* (OUP 2019). On art. 37 of the CFREU see also *infra* footnote 197.

III. The CJEU's case law on AQD

AQD has been the subject of several CJEU's judgments,[41] rendered both in the context of infringement proceedings *ex* art. 258 TFEU and in response to preliminary questions raised by national courts *ex* art. 267 TFEU.

Indeed, AQD's public and private enforcements have not only developed in parallel but also supported each other. Although for the purposes of this *Article* the case law under art. 267 TFEU is the most relevant one,[42] it is worth to begin by briefly summarizing the main traits of the case law developed in the area of public enforcement.

III.1. Public enforcement

Due to the peculiarities of a violation of EU law that essentially consists in letting atmospheric pollution happen, the focus of art. 258 TFEU cases has been on the notion of infringement and on the exam of the justifications put forward by the Member States to attempt to justify their non-compliance with pollution limits.[43]

Beginning with art. 13 AQD, the matter is subject to a particularly strict liability regime: the objective finding of an exceedance – no matter of what extent or intensity[44] – of the limit values is per se sufficient to establish Member States' failure to fulfil their

[41] L Calzolari 'Il contributo della Corte di giustizia alla protezione e al miglioramento della qualità dell'aria' (2021) Rivista giuridica dell'ambiente 803. Moreover, see case C-220/22 *Commission v Portugal* ECLI:EU:C:2023:521; case C-70/21 *Commission v Greece* ECLI:EU:C:2023:237; case C-633/21 *Commission v Greece* ECLI:EU:C:2023:112; case C-342/21 *Commission v. Slovakia* ECLI: ECLI:EU:C:2023:87; case C-573/19 *Commission v Italy* ECLI:EU:C:2022:380; case C-286/21 *Commission v France* ECLI:EU:C:2022:319; case C-635/18 *Commission v Germany* ECLI: ECLI:EU:C:2021:437 and case C-375/21 *Sdruzhenie „Za Zemyata – dostap do pravosadie"* ECLI: ECLI:EU:C:2023:173. As part of its commitments under Communication COM(2013) 918 final cit., the Commission brought also the first proceeding *ex* art. 260(3) TFEU, which however was dismissed (case C-174/21 *Commission v Bulgaria* ECLI:EU:C:2023:210).

[42] See section III.2.

[43] While addressing these two profiles, the CJEU discussed many issues of interest also from a general viewpoint. One example is the prohibition to extend the subject matter of the case after the reasoned opinion. The CJEU clarified that this principle shall not be interpreted in an unreasonably rigid manner. If annual air quality reports prepared by a Member State show that limits were still exceeded after the reasoned opinion, such period can be considered by the CJEU, as these events are of the same kind as the ones covered by opinion (*Commission v Portugal* cit. para. 46; *Commission v Germany* (C-635/18) cit. para. 71; case C-488/15 *Commission v Bulgaria* ECLI:EU:C:2017:267 para 43; case C-336/16 *Commission v Poland* ECLI:EU:C:2018:94 para. 49; case C-638/18 *Commission v Romania* ECLI:EU:C:2020:334 para. 55; case C-644/18 *Commission v Italy* ECLI:EU:C:2020:895 paras 66-68).

[44] Therefore, there cannot be "de minimis" AQD's violations (*Commission v Portugal* cit. para. 43). Even limited (geographically or temporally) exceedances suffice to establish an infringement (*Commission v Romania* cit. para. 74). Data from the most polluted sampling point in an area can be used to prove an infringement, even if they do not represent the whole area (case C-636/18 *Commission v France* ECLI:EU:C:2019:900 para 44).

obligations under AQD.[45] The Commission has to provide no further evidence in addition to the data collected and provided by the Member State itself.[46]

Unless they have timely relied on the explicit safeguard clause provided by AQD,[47] Member States cannot justify an infringement by claiming that exceedances have been caused by circumstances beyond their will or control.[48] Partial downward trends revealed by the data collected are irrelevant too, of course unless they result in the pollutants levels being lower than the limit values.[49] An infringement cannot be justified on the basis of the peculiar socio-economic situation of the defendant Member State either.[50] Similarly, factors such as the psychological element (intent or negligence) or any difficulties faced by the Member States remain entirely irrelevant,[51] unless they are so intense to reach the (high) threshold to be qualified as an event of force majeure.[52]

Indeed, the CJEU rejected the claim that force majeure events should not be the only cases in which Member States can be exempted from liability and that more attention shall be paid to the causal link between the violation of the limit values and a conduct actually attributable to a Member State as well as to the existence of alternative causal factors.[53] Despite the peculiarity of atmospheric pollution[54] and the division of competences between the EU and the Member States in this field,[55] the CJEU held that the objective nature of Member States' liability makes it unnecessary for the Commission to prove not only the national authorities' intent or fault but also that the exceedance was

[45] *Commission v Portugal* cit. para. 42; *Commission v Bulgaria* (C-488/15) cit. para. 69; *Commission v. Poland* cit. para. 62; *Commission v Romania* cit. para. 68; *Commission v Francia* cit. paras 37-38; *Commission v Italy* (C-644/18) cit. paras 70-71.

[46] *Commission v Poland* cit. para. 64; *Commission v France* (C-636/18) cit. para. 40.

[47] Member States may yearly inform the Commission of areas where exceedances of given pollutants are caused by natural sources. If the Commission agrees, the exceedance is allowed *ex* art. 20 AQD cit.

[48] Case C-68/11 *Commission v Italy* ECLI:EU:C:2012:815 para. 61.

[49] *Commission v Italy* (C-644/18) cit. para. 77; *Commission v Poland* cit. para. 65; *Commission v Romania* cit. para. 70.

[50] The limited economic capacity of the population, hindering Member States' capability to intervene against the pollutants' sources, is therefore irrelevant (*Commission v. Bulgaria* (C-488/15) cit. para. 75).

[51] *Commission v Italy* (C-68/11) cit. para. 63.

[52] *Ibid.* para. 64.

[53] *Commission v. Italy* (C-644/18) cit. para. 41; see also *Commission v. Italy* (C-573/19) cit.

[54] As air pollution cross borders, the occurrence of the event constituting the infringement (*i.e.* a sampling point detecting an exceedance) in a jurisdiction may not always be enough to conclude that pollution was caused by the authorities of that Member State: to (over) simplify, the textbook example is the exceedance registered by a sampling point close to a national border.

[55] According to Italy (but see also *Commission v France* (C-636/18) cit. para. 32), it cannot be neglected that the EU has competence to regulate the emissions of most pollutants covered by AQD. As Member States' scope of intervention against pollutants' sources is limited, exceedances should be attributable (at least partly) also to the EU itself. The need to consider this "contributory fault" is more critical when EU legislation adopted to reduce emissions has proved to be inadequate to reach that goal, as in the so-called diesel gate (*Commission v Italy* (C-644/18) cit. paras 42, 43 and 84).

caused by an event attributable – in an objective sense, *i.e.* in line with the strict liability regime under art. 258 TFEU – to the defendant Member State.[56]

A similar approach, aimed at safeguarding the *effet utile* also of art. 23 AQD, has been followed with regard to the Member States' duty to establish effective air quality plans. From a formal viewpoint, the CJEU had to acknowledge that, in this case, the mere exceedance of limit values is not an infringement[57]. While art. 23 AQD compels Member States to reduce as much as possible the period of exceedance,[58] drafting air quality plans requires Member States to strike a balance between opposing (public and private) interests[59]: therefore, the plan's adequateness shall be assessed on a case-by-case basis and a breach of art. 23 AQD cannot be presumed simply because the exceedance continued after its adoption.[60] However, in practice, the CJEU has always found that such detailed assessment was unnecessary: the inadequateness of the plans can be presumed if the exceedance has continued over a large area of the national territory or for a long time after their adoption,[61] or the envisaged measures have not been implemented.[62]

If only, the above analysis shows the strict and resolute approach that the CJEU has traditionally taken with regard to violations of AQD: the analysis of the case law *ex* art. 258 TFEU was therefore of interest precisely to highlight the eccentric nature of the *JP* judgment, which has broken this "tradition".

[56] *Commission v Italy* (C-644/18) cit. para. 41. This approach seems too favourable to the Commission and probably not necessary to safeguard the objective nature of Member States' liability for EU law violations. If the CJEU did not consider it appropriate to place on the Commission the burden to identify the potential alternative causal factors, a different – and arguably sounder – approach would have been to acknowledge that, if a Member State suggests the existence of an alternative causal factor, the Commission should not be permitted to disregard it by merely relying on the objective nature of Member States' liability *ex* art. 258 TFEU. The CJEU endorsed this approach in other areas, such as the presumption of incompatibility of certain practices with art. 102 TFEU (case C-413/14 P *Intel* ECLI:EU:C:2017:632 para. 138).

[57] *Commission v Portugal* cit. para. 92; *Commission v Bulgaria* (C-488/15) cit. para. 107; *Commission v Poland* cit. para. 94; *Commission v Romania* cit. para. 117.

[58] This obligation limits the Member States' leeway in deciding the measures to adopt (*Commission v Portugal* cit. para. 93; *Commission v Italy* (C-573/19) cit. para. 156).

[59] *Commission v Portugal* cit. para. 91; *Commission v Bulgaria* (C-488/15) cit. para. 106; *Commission v Poland* cit. para. 93; *Commission v Romania* cit. para. 116.

[60] *Commission v France* (C-636/18) cit. paras 79-82; *Commission v Bulgaria* (C-488/15) cit. para. 108; *Commission v Poland* cit. para. 96; *Commission v Romania* cit. para. 119.

[61] *Commission v France* (C-636/18) cit. paras 87-91; *Commission v Bulgaria* (C-488/15) cit. para. 117; *Commission v Poland* cit. para. 99; *Commission v Romania* cit. para. 120.

[62] *Commission v Portugal* cit. paras 95-97.

III.2. Private enforcement

Turning to private enforcement, the starting point cannot but be the *Janecek* case,[63] which was correctly labelled as "a landmark ruling and one of the most important environmental cases in recent years".[64]

The case concerned so-called action plans that must be adopted by the Member States to rapidly reduce pollution levels when alert thresholds are exceeded[65]. A German court asked the CJEU to establish if individuals have the right to ask national courts to compel national authorities to indeed develop action plans capable of promptly reducing pollution if alert thresholds are exceeded.

In other words, the preliminary question concerned the direct effect of what is now art. 24 AQD and the CJEU did not shy away from stating that this provision can be relied upon by individuals against national authorities.[66] The margin of discretion conferred to the latter with regard to the specific measures to be taken was not considered enough to "shield" action plans from judicial review.[67] Moreover, the fact that the goal of reducing atmospheric pollution is linked to the aim of protecting public health was considered by the CJEU as a further reason to recognize the direct effect of art. 24 AQD.[68]

Direct effect and judicial review are also the focus of later cases, including the famous *ClientEarth* and *Craeynest* ones.[69] The first case exemplifies also another trend in this area, *i.e.* the environmental associations' activism. The issue was the intensity of judicial review by national courts over the adequateness of "ordinary" air quality plans, *i.e.* those that art. 23 AQD compels national authorities to draft when pollutants' concentrations exceed limit or target levels.

As noted also in public enforcement cases[70], the CJEU confirmed that the margin of discretion of national authorities is limited in many respects: plans must not only include at least the information required by the AQD and its technical annexes, but also "set out

[63] Case C-237/07 *Janecek* ECLI:EU:C:2008:447. See G Vitale, 'L'"autonomia procedurale" nel caso *Janecek* e le possibili ricadute sull'ordinamento giuridico italiano' (2009) Diritto dell'Unione europea 403; H Doerig, 'The German Courts and European Air Quality Plans' (2014) JEL 139.

[64] U Taddei, 'A Right to Clean Air in EU Law: Using Litigation to Progress from Procedural to Substantive Environmental Rights' (2016) Environmental Law Review 3, 5.

[65] The case concerned Directive 96/62/EC cit. but the outcome is still relevant as the AQD did not change the action plans' regime.

[66] *Janecek* cit. para. 39.

[67] *Ibid.* para. 46.

[68] The incompatibility "with the binding effect which Article [288 TFEU] ascribes to a directive" of excluding "the possibility of the obligation imposed by that directive being relied on by persons concerned [...] applies particularly in respect of a directive which is intended to control and reduce atmospheric pollution and which is designed, therefore, to protect public health" (*Janecek* cit. para. 7).

[69] Case C-404/13 *ClientEarth* ECLI:EU:C:2014:2382 and case C-723/17 *Craeynest* ECLI:EU:C:2019:533.

[70] See section III.1.

appropriate measures" to keep the non-compliance period "as short as possible".[71] The mere drafting of a plan, thus, is irrelevant to determine if Member States have respected art. 23 AQD. To this end, it is necessary to evaluate the actual content of the plan and its adequacy toward the objectives pursued. This explains why plans, their content and adequacy must be subject to judicial review and national courts must be entitled to "take all necessary measures" to ensure that national authorities bring plans into conformity with AQD.[72]

More interestingly for the purposes of this *Article*, any individual concerned by an exceedance must have the right to bring an action before national courts to have the adequacy of the air quality plan assessed.[73] Acknowledging that art. 23 AQD imposes on Member States "a clear obligation [...] to establish an air quality plan that complies with certain requirements",[74] the CJEU had no hesitation in establishing that it too has direct effect[75] and can be relied upon by individual before national judges.

The intensity of national courts' judicial review, and thus the extent of the power of initiative of individuals[76] have been interpreted rather broadly by the subsequent case law. This is particularly evident in *Craeynest*, where the CJEU confirmed that the right of individuals to bring actions before national courts extends also to disputes concerning national authorities' compliance with AQD's provisions having a purely technical nature. The case concerned the complex regime that guide – and bind – Member States with regard to the installation of sampling points in order to have a uniform regime of control in the whole EU.[77]

The referring court doubted to have the power to review the violation of the national authorities' obligation to install the sampling points in the areas "where the highest concentrations occur",[78] let alone to order the installation of new sampling points.[79] By contrast, the CJEU confirmed that also these (and virtually all the) technical provisions of AQD enjoy direct effect:[80] also technical measures are therefore invokable by individuals and must be applied by national courts to assess the national authorities' conducts.[81] The

[71] *ClientEarth* cit. para. 41.

[72] *Ibid.* para. 58.

[73] *Ibid.* para 56.

[74] *Ibid.* para. 53.

[75] *Ibid.* para. 55.

[76] Being this a preliminary step for any judicial activity at the national level.

[77] This goal explains why detailed technical rules and criteria are set by AQD, not only to determine the modalities to be followed to measure pollutants' levels – Arts 11 (for ozone), 8 (for other pollutants) and Annex VI to AQD cit. for the detailed technical rules – but also with respect to several parameters that Member States shall respect when installing the sampling points, such as the location – see Arts 10(1) and Annex VIII to AQD cit. (for ozone) and art. 7(1) and Annex III to AQD cit. (for other pollutants) – and the minimum number – see Arts 10(2) and point A of Annex IX to AQD cit. (for ozone) and art. 7(2) and point A of Annex V to AQD cit. (for other pollutants).

[78] This Member States' obligation stems from art. 7(1) and Annex III, Section B, point 1(a) of AQD cit.

[79] *Craeynest* cit. para. 23.

[80] *Ibid.* paras 42-43.

[81] The principles of equivalence and effectiveness of course apply (*Craeynest*, cit. para. 54).

(limited) margin of discretion conferred to the latter is irrelevant,[82] and national courts must be able to take any measure necessary to force Member States' compliance.[83]

The focus of the case law later shifted to the issue of existing remedies: what happens if national authorities fail or refuse to conform – not only to AQD but also – to a national judicial order requiring them to comply with procedural or substantive obligations set by AQD? The point was notoriously addressed in the *Deutsche Umwelthilfe* case,[84] which is emblematic of the above scenario: not only the German *Land* of Bavaria refused for more than 6 years to comply with a final judgement of the Court of Munich ordering the revision of the air quality plan for that city, but some of its representatives publicly stated that the *Land* would have never complied with the order, no matter the amount of financial penalties imposed against it.[85] Due to the blatant ineffectiveness of the fines to deter the violation of AQD, an environmental organization asked the issuance of coercive custodial measures against the *Land*'s President and Minister of the Environment.

Due to these peculiar factual circumstances the case is famous mainly because the referring court, doubting to have such power under national law, asked the CJEU whether the possibility (or even a duty) to adopt coercive measures against individuals could be found in EU law.[86] While recognizing that the effectiveness of final judgments is an essential element of the right to an effective remedy enshrined in art. 47 CFREU (and of a legal order respectful of the rule of law),[87] the CJEU correctly followed a cautious approach to the matter, not least on account of the (equally fundamental) rights that had to be balanced with the right to an effective remedy, including the right to liberty[88].

For the purposes of this *Article*, however, two further points (briefly) discussed by the CJEU are more interesting. Firstly, the CJEU acknowledged the paramount role of human health in this field: the need to protect human health (and not the right to health of single individuals) is indeed considered by the CJEU one of the main reasons that makes it all the more necessary to ensure that individuals have an effective judicial remedy available

[82] The technical discretion of national administrations is therefore limited to the possibility of choosing between two or more locations if they all respect the technical criteria set by AQD (C*raeynest*, cit., para. 44).

[83] *Craeynest* cit. para. 53.

[84] Case C-752/18 *Deutsche Umwelthilfe* ECLI:EU:C:2019:1114.

[85] *Ibid.* paras 15-19.

[86] *E.g.* thanks to the right to judicial protection under art. 47 CFREU or to the obligations of loyal cooperation and effective implementation of EU law under arts 4(3) TEU and 197 TFEU.

[87] *Deutsche Umwelthilfe* cit. paras 35-37.

[88] *Ibid.* paras 42-47. The CJEU therefore established that EU law does not provide a legal basis for imposing custodial sanctions on individuals but, if the national legal order contains a sufficiently accessible, precise and foreseeable legal basis for the adoption of such measures, the principle of effectiveness compels national courts to use that legal basis also to protect the *effet utile* of AQD (see *ibid.* para. 52), especially if compliance with a final judgment is not guaranteed by less intense measures.

to them.[89] Therefore, the fact that AQD is intended to protect, in a general perspective, human health seems to have been considered by the CJEU as an additional *raison d'être* for the existence of individual judicial remedies designed to promote its effectiveness and deterrent effect on Member States, rather than as a motive to limit such remedies.

But above all, almost as if it were attempting to apologize for not being able to accommodate the claimant's request related to EU-based coercive measures, the CJEU pointed out that other remedies exist to tackle EU law infringements committed by national authorities, including Member States' liability.[90] Even if only as an *obiter dictum*, therefore, the CJEU explicitly affirmed the applicability of the *Francovich* doctrine to AQD's violations, (apparently) paving the way for the possibility that individuals harmed by a breach of the AQD committed by a Member State could claim compensation for the harm suffered.[91]

IV. The *JP* Judgement: No Right to Seek Damages Caused by Air Pollution

The brief review of the case law just completed shows that, in line with the founding principles of EU environmental law,[92] the CJEU has always strived to foster the *effet utile* of AQD in particular by developing interpretative solutions capable of strengthening both its public and private enforcement. In this context, the CJEU's decision in *JP* came like the proverbial bolt from the blue, suddenly interrupting the last mile of what appeared to be a settled path leading to the recognition of the right of individuals to be compensated by Member States for damages suffered as a result of AQD's infringements.

As mentioned, the case was brought by a resident of the Paris region who suffered from health issues related to air pollution since 2003. Noting that France failed to maintain the levels of NO_2 and PM_{10} in the area where he lived below the limits posed by AQD, the claimant argued that his health problems were caused by the poor air quality caused by French authorities' infringement of arts 13 and 23 AQD. Mr JP asked the Administrative Court of Cergy-Pontoise not only the annulment of the (implied) decision by which the prefect of Val-d'Oise refused to take the necessary measures to tackle air pollution but also the issuance of an order against France to pay so-called *Francovich* damages for EUR 21 million. As the request was not granted, Mr JP appealed the decision before the Administrative Court of Appeal of Versailles, which stayed the proceeding and asked the CJEU to clarify

[89] Indeed, "[t]he right to an effective remedy is all the more important because, in the field covered by Directive 2008/50, failure to adopt the measures required by that directive would endanger human health" (*ibid.* para. 38).

[90] D Misonne, 'Arm Wrestling around Air Quality and Effective Judicial Protection. Can Arrogant Resistance to EU Law-related Orders Put You in Jail?' (2020) Journal for European Environmental and Planning Law 409, 422.

[91] The "full effectiveness of EU law and effective protection of the rights which individuals derive from it may, where appropriate, 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" (*Deutsche Umwelthilfe* cit. para. 54).

[92] See arts 3 TEU and 191 TFEU.

whether, and under what conditions, individuals can seek compensation from a Member State for damages to their health resulting from a violation of the limit values set by AQD.[93]

If the ruling in *JP* were a book, it would be a thriller, and a masterpiece one: not only the reader may be surprised by its outcome and by the arguments developed by the CJEU to support it, but it also contains a genuine "plot twist", as until para. 55 of the decision one is led to believe that the CJEU would have decided in the opposite way, as it will be discussed below.

IV.1. Damages are no longer a necessary corollary of direct effect

Starting from the general outcome, as said, the CJEU denied that individuals can claim compensation for damages to their health suffered as a consequence of Member States' breaches of arts 13 and 23 AQD.[94]

Before the judgment was out, the prevailing view was that the CJEU would have recognized – at least in principle – the right of individuals to seek[95] *Francovich* damages for violations of AQD. This seemed to be the most likely scenario for several reasons. Firstly, in the mentioned *Janeck*, *Client Earth* and *Craeynest* cases, the CJEU had already recognized the direct effect of arts 13(1) and 23 AQD. The text-book definition of direct effect is that directly effective EU rules can affect the position of individuals – and, in particular, confer rights upon them[96] – without the need of national implementing measures. Individuals can therefore rely on directly effective EU rules and national courts shall ensure that they can benefit from the EU provision at stake,[97] enjoying rights (if any) conferred upon them.

Prior to the *JP* judgment, the EU legal order provided virtually no basis for arguing that, in given circumstances, the right of individuals to invoke directly effective EU rules before national courts could be limited – sic et simpliciter – to what is necessary to obtain the intended result of the rule (e.g. Member States' fulfilment of their obligations) and could not, by definition, extend to the right to seek damages in case of that result cannot be achieved. According to settled case law, if the infringement of directly effective EU rules affect individuals, their

[93] *JP* cit. para 33.

[94] *Ibid.* para 66.

[95] Seeking damages is obviously different from obtaining them, which depends on further conditions. See sections IV.2 and IV.3.

[96] On the possible existence of EU provisions having direct effect but not conferring rights see *infra*. [Please clarify the section you are referring to]

[97] Indeed, "[d]irect effect is a term used to designate whether a given provision of EU law is suitable for enforcement by a national authority or court" and "[a] precondition for enforcement, and thus for direct effect, is that a right (claim) or obligation is vested in the provision which determines all aspects relevant for enforcement and thus renders the provision fully operational" (T Jaeger, *Introduction to European Union Law* (Facultas 2021) 155). "Gli effetti diretti consistono nella produzione di posizioni soggettive individuali negli ordinamenti nazionali le quali possono essere invocate direttamente nei procedimenti di fronte ai giudizi nazionali. Tali posizioni soggettive – diritti, obblighi, poteri e così via – sono stabilite direttamente dall'ordinamento dell'Unione e sono pertanto indipendenti da un atto di volontà degli Stati membri" (E Cannizzaro, *Il diritto dell'integrazione europea* (Giappichelli 2022) 85).

right to seek compensation "is the necessary corollary of the direct effect of the [EU] provision whose breach caused the damage sustained".[98] Therefore, the fact that the *Janeck*, *Client Earth* and *Craeynest* rulings had already established that individuals can rely on arts 13 and 23 AQD[99] seemed to support (rather than disprove) that they should also be entitled to seek compensation for damages caused by a breach of these provision. After all, the possibility to invoke before national courts rights granted by directly effective EU rules "is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty".[100] Moreover, Member States' liability has always been understood as the "last arrow" at the disposal of individuals, *i.e.* as a remedy that, having a residual nature,[101] cannot but be available in those cases when individuals cannot benefit from EU law. In other words, the circle representing the scope of application of direct effect has a smaller diameter than the one representing the scope of Member States' liability, and not vice versa.

According to *JP*, by contrast, the violation of directly effective EU rules may not entail a right to compensation, but only the possibility for individuals to ask national courts to force national authorities to comply with said rules: national courts cannot award damages but can impose financial penalties upon "reluctant" authorities[102]. The issue is closely related to the equivalence (but after *JP* perhaps only similarity) between the conditions to be met for a rule to have direct effect and those triggering Member States' liability, a point on which we will return immediately.

First, however, it should be noted that the belief that the CJEU would have confirmed *Francovich* applicability to air pollution was strengthened also by the two additional factors. First, embracing the suggestion made by the CJEU in *Deutsche Umwelthilfe*,[103] AG Kokott expressed the view that a violation of AQD could lead to Member States' liability *vis-à-vis* individuals.[104] Secondly, probably believing that the CJEU would have followed – its own precedents, and thus – AG Kokott's opinion, in October 2022 the Commission submitted a proposal for the revision of AQD, whose art. 28 explicitly enshrines the right of individuals to be compensated for damages to human health.[105]

[98] Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur* ECLI:EU:C:1996:79 para. 22.

[99] For example, asking national courts to compel national authorities to comply with AQD and to order them to adopt or revise adequate air quality plans.

[100] *Brasserie du Pêcheur* cit. para. 20.

[101] This remedy does not allow individuals to enjoy what EU law intended to confer to them, but only to receive damages, so that "[t]he primary course of action for individuals will be to seek the act or omission that EU law directly entitles them" (T Jager, *Introduction to European Union Law* cit. 174).

[102] *JP* cit. para. 64.

[103] *Deutsche Umwelthilfe* cit. para. 54. This case is understandably referred several times by AG Kokott in *JP* cit. paras 29, 30, 76, 92, 96 and 102.

[104] *JP*, opinion of AG Kokott, cit. paras 103 and 142.

[105] Communication COM(2022) 542 final/2 of 26 October 2022 Proposal for a directive of the European Parliament and of the Council on ambient air quality and cleaner air for Europe (recast), art. 28. To facilitate these claims, the introduction of a rebuttable presumption in favour of claimants is also envisaged.

If cases in which the CJEU decides to deviate from the opinions rendered by Advocates General are per se a rare occurrence[106], even more surprising are the arguments developed by the CJEU to deny the right of compensation.

IV.2. Member Staes liability for violation of EU law

Saying that the *JP* ruling is surprising (and disappointing) is not arguing that individuals should always be entitled to recover damages for any AQD's violation. No one disputes that Member States' liability is subject to strict conditions[107], whose fulfilment can be particularly challenging precisely with regard to environmental rules. However, what appears questionable is the CJEU's choice to (almost) definitively close the door to the possibility that this remedy could be developed before national courts, rather than elaborating criteria to guide (and limit) its development.

In other words, the problem is that the CJEU decided to focus on the first of the three conditions that regulate Member States' liability. Already established when the CJEU created this remedy, the three conditions were initially modelled on the background of the *Francovich* case, which notoriously dealt with Italy's failure to transpose a directive.[108] Shortly after, however, the CJEU held that Member States' liability for violation of EU law is a remedy of general scope.[109] Damages can therefore be sought for violations of both not-directly (e.g. untransposed directives) and directly (e.g. economic fundamental freedoms) effective EU rules, in the latter case because the breach may hinder their application.[110] The three conditions were therefore slightly revised: individuals can claim compensation if "the rule of law infringed [is] intended to confer rights on individuals; the breach [is] sufficiently serious; and there [is] a direct causal link between the breach of the obligation resting on the State and the damage".[111]

[106] C Arrebola, A Mauricio and H Portilla, 'An Econometric Analysis of the Influence of the Advocate General on the Court of justice of the European Union' (2016) CJICL 82.

[107] Indeed, Member States' liability does not automatically follow from the unlawfulness of their conduct, but quite the opposite (F Ferraro, *La responsabilità risarcitoria degli Stati per violazione del diritto dell'Unione* (Giuffrè 2012) 89. The three conditions (on which see immediately *infra*) were established by the CJEU precisely to limit the application of this remedy to those instances where it is necessary to react to serious violations of EU law, while avoiding the development of trifling litigation.

[108] Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer. Therefore, individuals could claim damages vis-à-vis Member States if "the result prescribed by the directive should entail the grant of rights to individuals", it is "possible to identify the content of those rights on the basis of the provisions of the directive" and there is "a causal link between the breach of the State' s obligation and the loss and damage suffered by the injured parties" (*Francovich* cit. para. 40).

[109] *Brasserie du Pecheur* cit.

[110] *Ibid.* para 22.

[111] *Inter alia* case C-392/93 *British Telecommunications* ECLI:EU:C:1996:131 para. 39; joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer* ECLI:EU:C:1996:375 para. 21.

To the best of our knowledge, prior to the *JP* judgment, the first condition was found not to be fulfilled by the CJEU only in two occasions, namely in the *Paul* and *Berlington Hungary* cases[112]. As already explained by the legal literature,[113] however, the remarkable peculiarities of these cases did not make them particularly suitable precedents to provide a clear indication of what the boundaries of the first condition of Member State liability are.

In the first case, the Court ruled out, already from the angle of the first condition, that the defective performance of the monitoring obligations imposed on the Member States' banking supervisory authorities by Directives 77/780, 89/299 and 89/646,[114] caused by their late transposition in the national legal order, could give rise to the right of individuals to receive compensation in the event of the loss of their deposits due to the default of banks and credit institutions. What could seem to be relevant is that the CJEU ruled out this possibility even though it recognized that these directives also aimed at protecting depositors:[115] indeed, the CJEU found that, notwithstanding the above, said directives pursued mainly other and more general objectives related to achievement of the freedom of establishment and of the freedom to provide services in the credit sector.[116]

While this distinction may appear *prima facie* similar to the one made by the *JP* judgment between the protection of general and individual interests,[117] it is worth noting that in the *Paul* case this distinction was quite reasonable: fostering the internal market in the banking sector can indeed be considered as a different aim than protecting individual depositors; by contrast, drawing a line as sharply as the CJEU did between the protection of public health and the protection of the health of individuals appears to be a less crystal clear exercise, as it will be discussed below. In any case, it seems tenable to hold that in *Paul* the CJEU reached the conclusion that the directives at stake could not confer rights on individuals mainly because they already provided a mandatory deposit-guarantee scheme pursuant to which depositors were protected in the event of the insolvency of the credit institution with which they had deposited their money up to a certain amount and the liability of the Member State was invoked to exceed that limit.[118] As the directives

[112] Case C-222/02 *Paul and others* ECLI:EU:C:2004:606 and case C-98/14 *Berlington Hungary and Others* ECLI:EU:C:2015:386.

[113] M Fisicaro, 'Norme intese a conferire diritti ai singoli e tutela risarcitoria di interessi diffusi: una riflessione a margine della sentenza *JP c Ministre de la Transition écologique*' European Papers (European Forum Insight of 30 May 2023) www.europeanpapers.eu 131, 134 ff.

[114] See First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions, Council Directive 89/299/EEC of 17 April 1989 on the own funds of credit institutions and Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC.

[115] *Paul and others* cit. paras 37-39.

[116] *Ibid.* paras. 40.

[117] See *infra* section IV.4.

[118] *Paul and others* cit. paras 30-32 and 50, according to which "Directives 94/19, 77/80, 89/299 and 89/646 do not confer rights on depositors in the event that their deposits are unavailable as a result of

at stake pursued several (general and individual) interests, only their part establishing this deposit-guarantee scheme was deemed to confer rights to individuals.

The second case dealt with arts 8 and 9 of Directive 98/34/EC,[119] pursuant to which Member States are obliged to notify to the Commission any draft of new technical standards falling within the scope of application of such directive. In some earlier cases, the CJEU had already held that the previous (but identical) regime enshrined in arts 8 and 9 of Council Directive 83/189/EEC of 28 March 1983[120] could be invoke by individuals before national courts in order to seek the disapplication of unnotified new technical standards and, therefore, that the case pending before that national court is decided pursuant to the previous regime provided by national law.[121] What is worth noting, is that these rulings concerned cases between individuals, and therefore the CJEU was somehow struggling to overcome the well-established principle according to which non-transposed directives cannot have horizontal direct effects.[122]

Primarily for this reason, the CJEU was careful to differentiate the situation brought to its attention from the "ordinary" one where an individual is seeking to benefit from a non-transposed directive. In this perspective, the CJEU noted that the case-law related to the lack of horizontal direct effect did "not apply where non-compliance with Article 8 or Article 9 of Directive 83/189, which constitutes a substantial procedural defect, renders a technical regulation adopted in breach of either of those articles inapplicable".[123] To further remark the difference between this scenario and the (prohibited) horizontal direct effect of non-transposed directives, the CJEU added that Article 8 or Article 9 of Directive 83/189 create "neither rights nor obligations for individuals",[124] essentially because they do not define the substantive scope of the legal rule (*i.e.* the technical standard) on the basis of which the national court must decide the case before it.

While it is therefore not surprising that in *Berlington Hungary* the CJEU repeated this statement also when the question first arose with regard to the issue of the liability of Member States for the violation of these provisions,[125] it is also clear that this ruling did not appear as a suitable precedent to provide clear guidance as to the correct interpretation of the first *Francovich* condition.

defective supervision on the part of the competent national authorities, if the compensation of depositors prescribed by Directive 94/19 is ensured".

[119] Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations.

[120] Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations.

[121] See case C-443/98 *Unilever* ECLI:EU:C:2000:496 and Case C-194/94 *CIA Security International SA* ECLI:EU:C:1996:172.

[122] Inter alia case 152/84, *Marshall*, para. 48; case C-91/92 *Faccini Dori* ECLI:EU:C:1994:292 para. 20.

[123] *Unilever* cit. paras 50-51.

[124] *Ibid.* para. 51.

[125] *Berlington Hungary and Others* cit. paras 107-110.

The second and the third conditions represent the hurdles against which most damages actions against Member States fail. Beginning with the sufficiently serious (or qualified) nature of a violation, this feature depends on the margin of discretion enjoyed by the Member State in implementing EU law.[126] Many factors shall be evaluated,[127] but the basic principle is that the wider the Member States' discretion, the narrower the possibility of qualified breaches to occur.[128]

A corollary of this principle is that a qualified breach is likely to occur when a Member State disregard the CJEU's case law on a certain issue. This requirement was certainly met in the *JP* case: not only is it clear from the case law examined above that the Member States have no alternative but complying with AQD, but the CJEU had also already established, in the context of two recent public enforcement proceedings brought by the Commission, that, at least between 2010 and 2017, France failed to take appropriate measures to reduce the period of exceedance for both NO_2 and PM_{10},[129] including in the area where Mr. JP resided.

Thus, if one wished to gamble on the reasons that might have led the CJEU to answer (more or less) negatively to the request of the referring court, the third condition were the horse to back. As proved also by the great attention devoted to this point by AG Kokott, the real difficulty in enforcing a claim for compensation like the one brought by Mr JP lies exactly "in proving a direct causal link between the serious infringement of air quality rules and concrete damage to health",[130] especially because in this field it is rather difficult to exclude the existence of alternative causal factors.[131] Therefore, AG Kokott even discussed the possibility to mitigate the claimants' burden of proof by introducing a sort of rebuttable

[126] See already *Brasserie du Pecheur* cit. para. 55.

[127] *E.g.* "the degree of clarity and precision of the rule breached, the scope of the room for assessment that the infringed rule confers on national authorities, whether the infringement and the damage caused were intentional or involuntary, whether any error of law was excusable or inexcusable, and the issue, where applicable, of whether the position taken by an EU institution may have contributed to the adoption or maintenance of national measures or practices contrary to EU law" (*e.g.* case C-620/17 *Hochtief Solutions Magyarországi Fióktelepe* ECLI:EU:C:2019:630 para. 42). By contrast, it is irrelevant to establish which body of a Member State violated EU law, as Member States are liable for all their branches, including infra-state entities (case C-302/97 *Konle* ECLI:EU:C:1999:271 paras 23 and ff.) and national courts (case C-224/01 *Kobler* ECLI:EU:C:2003:513 para. 59).

[128] Conversely, if there is no discretion, the violation is likely to be a qualified one, as with regard to the national authorities' duty *ex* art. 108(3) TFEU to notify to the Commission state aids before implementing them (see *infra* section IV.4).

[129] *Commission v France* (C-636/18) cit. and *Commission v France* (C-286/21) cit.

[130] *JP*, opinion of AG Kokott, cit. para 126. The issue of the causal link is dealt in paras 126-142.

[131] Limit values being "based on the assumption of significant damage, in particular premature deaths, due to air pollution [...] does not prove that the suffering of certain people is due to exceedances of the limit values and to deficient air quality plans". Indeed, this "can also be caused by other factors, such as predisposition or personal behaviour, such as smoking". Moreover, "[s]ince the World Health Organisation now recommends stricter limit values, it also cannot be ruled out that the air is sufficiently polluted to cause such illnesses despite compliance with" AQD (*JP*, opinion of AG Kokott, cit. para 130).

presumption that damages to health can be considered as "attributable to a sufficiently long stay in an environment in which a limit value has been exceeded".[132]

IV.3. Arts 13 and 23 AQD: rights whose infringement has no consequences attached

While guidance on causation was therefore expected (potentially even in restrictive terms), what came as a surprise is that the CJEU decided to stop one step ahead and, in addressing the first requirement for Member States' liability, ruled that arts 13 and 23 AQD "are not intended to confer rights on individuals capable of entitling them to compensation from a Member State".[133] Although such provisions have direct effect, they cannot confer rights on individuals because they pursue the "general objective of protecting human health and the environment as a whole".[134]

The first requirement, therefore, is not – and virtually cannot be – met when it comes to AQD's violations, so that that the *Francovich*'s doctrine stops at the gates of clean air, and probably of several fields of environmental and climate law, as it is obviously far from uncommon that in these areas the legislation pursue (also) general objectives and interests. Without a EU law remedy, individuals can seek compensation only if, under national law, Member State can incur liability under less strict conditions,[135] as in this case the principle of equivalence would apply. Of course, the situation would have been different if the CJEU had instead provided guidance on how to determine the causal link between pollution exceedances and damages to individuals' health, perhaps even in restrictive terms: the application by the referring court of these instructions might have led to the dismissal of Mr. JP's case, but perhaps some room could have been spared for future action (depending, of course, on the content of such hypothetical guidance).

As mentioned, the *coup de théâtre* begins at para. 55 of the judgment.[136] Anyone reading the judgment up to this point would hardly have any doubt on the outcome of the case: continuing with the gambling metaphor, she would probably go all in that, within a few lines, the CJEU would have boldly affirmed the right of individuals to compensation.

[132] However, AG Kokott did not consider it appropriate for the CJEU to decide on this point, as neither the referring Court nor the parties raised this question (AG Kokott in *JP* cit. paras 138-139). As mentioned, a similar regime is envisaged also by art. 28 of Communication COM(2022) 542 final/2 cit.

[133] *JP* cit. paras 65 and 56 ("it cannot be inferred from the obligations laid down in those provisions, with the general objective referred to above, that individuals or categories of individuals are, in the present case, implicitly granted, by reason of those obligations, rights the breach of which would be capable of giving rise to a Member State's liability").

[134] *Ibid.* para 55.

[135] *Ibid.* para 63.

[136] Where the CJEU "frena e trae conclusioni poco coerenti con le osservazioni fin qui svolte" (see P De Pasquale, "'*Francovich* ambientale"? Sarà per un'altra volta. Considerazioni a margine della sentenza *Ministre de la Transition écologique*' (4 gennaio 2023) BlogDUE www.aisdue.eu).

Indeed, until para. 55 of the judgment the CJEU seems to have carefully paved the way for the opposite solution. From a general perspective, the CJEU firstly reminded the reader that the remedy of Member States' liability for violation of EU law "is inherent in the system of the treaties".[137] While is true that only breaches of EU rules conferring rights on individuals can originate this liability, the CJEU promptly recalled that EU rules can grant rights not only explicitly but also implicitly, *i.e.* by reason of positive or negative obligations imposed in a clearly defined manner on Member States,[138] as their breach can hinder the exercise of these implicit rights by the beneficiaries.[139] Moving to the air quality regime, the CJEU continued the reasoning by affirming that arts 13(1) and 23(1) AQD impose on Member States a primary obligation to ensure that pollutants do not exceed the limit values and a secondary obligation to remedy any exceedance in the shortest possible period:[140] both are "fairly clear and precise obligations as to the result to be achieved",[141] and – as already established in previous case law – have therefore direct effect.

As discussed above, the fact that the *JP* judgement concerned provisions whose direct effect had already been established by the CJEU is precisely what increased the level of astonishment. At least as a matter of principle, the conferral of rights to one or more individuals is a requirement of both direct effect and Member States' liability. A brief clarification becomes necessary. The legal literature has noted that, while the conferral of a right to individuals strongly characterized the traditional (grand) *arrêts* that established the principle of direct effect,[142] in more recent times this element seems to have somehow lost its centrality. Many believe, therefore, that today direct effect can be decoupled from the conferral of rights or, in other words, that certain EU rules may have direct effect without conferring rights on individuals.[143] The perfect candidates are EU rules that are invoked before national courts not to be applied and regulate the matter of the dispute from the substantive viewpoint but, rather, to be used as a parameter of legality of national law or national authorities' conducts: these exclusionary effects are deemed independent from the conferral of rights.[144]

This is not the place to deepen the analysis of this complex theoretical issue, also because the point does not seem to be paramount for the purposes of this *Article*, as it will be shown below.[145] However, it is worth noting that those who suggest that the conferral of rights is not a precondition of direct effect seem still to agree that what makes

[137] *JP* cit. para. 43.

[138] *Ibid.* paras 45-46.

[139] *Ibid.* para. 47.

[140] *Ibid.* paras 48-50.

[141] *Ibid.* para. 54.

[142] Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1 (D Gallo, 'Rethinking direct effect and its evolution: a proposal' (2022) European Law Open 576, 581).

[143] See generally D Gallo, 'Rethinking direct effect and its evolution: a proposal' cit. 576.

[144] *Ibid.* 581.

[145] See below section IV.4.

an EU rule invokable by individuals before national courts is the fact that such individuals wish to use it to protect their interest or privilege stemming from EU law.[146]

Whether or not the term *right* can encompass also such cases is theoretically very relevant, being able to represent the dividing line between instances of direct and indirect effect.[147] At the risk of over-simplifying, however, arguing that an individual is entitled to rely on EU law to defend her *interest* does not seem entirely dissimilar from saying that the EU rule at stake confers to such individual a *right* to obtain that national law or authorities comply (and can be ordered to comply) with it[148]. And the conferral of this *right* is what makes the provision invokable before national courts: as the result is the disapplication of national law, the case seems to fall outside the realm of indirect effect of EU law, regardless of whether the consequence of this disapplication is the applicability of another national provision rather than an EU one. After all, even *Van Gend en Loos* led to the application of the pre-1957 national custom regime to the ureaformaldehyde imported by the applicant, not of art. 12 EEC.[149]

Furthermore, one should consider that the term *right* is used by the CJEU in a broad, functional and not formalistic way and, above all, in a sense that is untied from the – by no means similar – legal traditions of the single Member States. Therefore, the term *right* is not intended to include only perfect, subjective and/or absolute rights, but rather any favourable status or position (or interest or privilege) pertaining to one or more individuals. The important point is that EU law entitles them with a legal position that can be justiciable before a national court, *i.e.* that EU law confers them a justiciable claim.[150]

[146] Indeed, "the advantage entailed by disapplication shall be intended as an interest or a 'privilege'" and "[t]he EU provision is invoked as a means of defending the individual interest deriving from its fair application, even if not linked to the existence of a right recognised therein" (D Gallo, 'Rethinking direct effect and its evolution: a proposal' cit. 581 and 587).

[147] *E.g.* M Wathelet, 'Du concept de l'effet direct à celui de l'invocabilité au regard de la jurisprudence récente de la Cour de justice', in M Hoskins and W Robinson (eds), *A True European: Essays for Judge David Edward* (OUP 2004) 367.

[148] *CIA Security International SA* cit. is often quoted to support the opposite view. As seen above (see text around notes 125-131), the case dealt with arts 8 and 9 of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations, which compelled Member States to notify to the Commission any draft of new technical standards covered by the Directive. These being sufficiently precise and unconditional obligations, individuals can invoke them before national courts asking the disapplication of unnotified standards. Nevertheless, Directive 83/189/EEC cit. is not deemed to confer rights to those individuals, because it does not contain substantive rules (*i.e.* standards). However, one could argue that Member States' failure to notify new standard entails the right of individuals to have their economic activity regulated by the previous regime, a right conferred upon them by EU law. Once again, it is worth noting that, in this case, it was necessary to distinguish this situation from an ordinary case of direct horizontal effect, given that it involved a directive that had not been transposed.

[149] *Van Gend en Loos* cit.

[150] The conferral to individuals of a justiciable claim seems to distinguish between EU rules that have direct effect (interpreted broadly, including both the application of EU rules to regulate the matter and their use as a parameter of legality) and EU rules that cannot enjoy direct effect, for example due to their wording general nature or because they do not affect the position of those wishing to rely on them.

While it is completely correct to state that the conferral of a perfect, subjective and/or absolute right is not a prerequisite of direct effect, it seems tenable to hold that the conferral of a justiciable claim is; whether this *claim* can be called a *right*, or whether that of *claims* is a broader category including also the one of *rights*[151], do not seem to be relevant.

By contrast, what matters is that, as mentioned, the CJEU has traditionally referred to the term *right* in the context of both direct effect and Member States's liability.[152] Whatever is a *right* for one of these purposes should reasonably be a *right* also for the other one, so that if a EU rule confers a *right*, it has direct effect and its violation entitles individuals who can benefit from that *right* to claim damages: in this vein, the opinion of AG Tesauro in the *Brasserie du Pêcheur* case is self-explanatory.[153]

The point is relevant because even in the very first case in which it established the remedy of Member States' liability, the CJEU decided that Mr Francovich and the other individuals concerned by the breach of Directive 80/987/EEC had to be compensated in the face of what, under national law, was at most as a so-called "legitimate interest" and not a right of those individuals.[154] Nevertheless, the CJEU notoriously decided that "[t]he result required by that directive entails the grant to employees of a *right* to a guarantee of payment of their unpaid wage claims".[155]

The case law therefore confirms that the conferral of something less than a right (*i.e.*, a justiciable claim) to one or more individuals suffices both for EU law to have direct effect and for the beneficiaries of that justiciable claim to be entitled to claim compensation in case of its infringement. This threshold is arguably met by arts 13(1) and 23 AQD, which ensure that individuals must be "in a *position* to require the competent authorities, if necessary by bringing an action before the courts, to establish an air quality plan", if limit values or other thresholds are exceeded.[156] This *position* is precisely the justiciable claim conferred to individuals and thus what makes arts 13(1) and 23(1) AQD invokable by them before national courts: as the latter seem to confer *rights* upon individuals, their breach

[151] The requirement that "la norma violata debba essere preordinata a conferire diritti ai singoli non ha mai rappresentato un reale ostacolo per l'accesso al rimedio risarcitorio nella giurisprudenza della Corte di giustizia" (M Fisicaro, 'Norme intese a conferire diritti ai singoli e tutela risarcitoria di interessi diffusi: una riflessione a margine della sentenza *JP c Ministre de la Transition écologique*' cit. 135).

[152] S Prechal, 'Member State Liability and Direct Effect: What's the Difference After All?' (2006) European Business Law Review 299.

[153] Indeed, "the first condition, to the effect that the result prescribed by the directive should entail the grant of rights to individuals, is concerned with identifying the legal position of the individuals whose infringement may give rise to compensation. [...] it must be considered that the Court intended by those words to refer generally to all individual legal positions protected by Community law; hence – by definition – this condition is always met in the case of provisions having direct effect" (joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur* ECLI:EU:C:1995:407, opinion of AG Tesauro para. 56).

[154] Referring to actions "against public authorities for unlawful conduct for which they can be held responsible in the exercise of their powers", case C-261/95 *Palmisani* ECLI:EU:C:1997:351 para. 39 is even more explicit.

[155] *Francovich* cit. para. 44.

[156] *ClientEarth* cit. para. 56; *Janeck* cit. para. 42.

should have been considered by the CJEU as capable of originating Member States' liability, of course without prejudice to the second and third requirements.

This statement could be subject to opposing views: in the light of what has been discussed above, one could argue that that *position* simply corresponds to the possibility to challenge the lawfulness of a national authority's conduct and that mere access to judicial review is not a substantive right nor an example of direct effect. Moreover, if in previous case law the CJEU had only established that AQD could have direct effect, it could be still deemed necessary to ascertain whether, in the present case, we were dealing with one of those EU rules which, according to this line of interpretation, can have direct effect without conferring rights on individuals.

However, this is not the case, as the CJEU had already affirmed not only that AQD enjoys direct effect but also, and explicitly, that it confers *rights* to individuals.[157] For the sake of completeness, the same conclusion had already been reached also with reference to one of the first EU directive dealing with air quality.[158] As Germany failed to transpose such directive into national law, the CJEU acknowledged that Member States' obligation "to prescribe limit values not to be exceeded" is imposed "to protect human health in particular": therefore, "whenever the exceeding of the limit values could endanger human health, the persons concerned must be in a position to rely on mandatory rules in order to be able to *assert their rights*".[159]

If words have value, a right (for the purposes of direct effect) is a right (also for the purposes of Member States' liability): if an EU rule entitles individuals to begin a proceeding before national courts to obtain from a Member State a given result (*i.e.* compliance), it seems difficult to hold, as the CJEU did in *JP*, that no compensation is due if the Member State fails to achieve that result. This interpretation run counter the very *raison d'être* of the Member States' liability, which as mentioned is a residual or secondary remedy meant to be applicable to safeguard the position of individuals exactly when the result that EU law intended to achieve could not be achieved.

Hence a further and blatant inconsistency between the *JP* decision[160] and the CJEU's previous case law, in addition to the one – actually, even more glaring[161] – regarding the "invitation" made in *Deutsche Umwelthilfe*.[162]

[157] "[I]t is clear from the Court's case-law that, in the absence of EU rules, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding *rights which individuals derive from EU law, such as Directive 2008/50*" (*Craeynest* cit. para. 54),

[158] Directive 80/779/EEC cit.

[159] Case C-361/88 *Commission v Germany* ECLI:EU:C:1991:224 para. 16.

[160] *JP* cit. para. 62, where the CJEU again – and incoherently – refers to the position that Member States shall recognize to individuals as a "right" conferred by AQD.

[161] Especially if one considers the limited period of time passed between the two judgments and the fact that the CJEU sat in both cases in a very similar formation.

[162] *Deutsche Umwelthilfe* cit. para. 54.

IV.4. Between general and individual interests

In order to depart from what seemed to be a coherent and well-established legal framework regulating the relation between direct effect and Member State's liability, the CJEU essentially relied on a single argument, *i.e.* the fact that AQD pursues "a general objective of protecting human health and the environment as a whole".[163] This general objective underlying the Member States' obligations under AQD precludes that individuals can be "implicitly granted [...] rights the breach of which would be capable of giving rise to a Member State's liability for loss and damage".[164]

While it is true that, already in the aftermath of the *Francovich* case, a debate started in the legal literature on whether the provisions of EU environmental law, being mainly designed to protect general interests, could be considered as intended to confer rights on individuals for the purposes of damages actions,[165] the legal literature has already pointed out that the CJEU chose one of the least suitable cases to affirm this principle:[166] contrary to many other examples of environmental legislation,[167] the general objective pursued by AQD is actually intrinsically linked to the position of each individual, being particularly difficult to identify aspects that are more individual than health. It is true that health protection is also a matter of public interest, but considering that air pollution is "the greatest environmental risk to health"[168] and that "[e]ach year in the EU, it causes about 400 000 premature deaths"[169] a case dealing with a violation of ADQ was probably not the most adequate one to reshape the system of remedies offered to individuals by the EU legal order on the ground of an alleged lack of connection with the interest of individuals.

Indeed, as mentioned, the fact that ADQ also aims "to protect public health" – or even more directly, "human health",[170] without any reference to the public perspective – was considered in previous decisions as a plus, rather than as a minus, for acknowledging the need of private remedies so that individuals can contribute to the achievement of its objective, *i.e.* to control and reduce atmospheric pollution.[171] The connection with the

[163] *JP* cit. para. 55.

[164] *Ibid.* para. 56.

[165] See, for instance, H Somsen, 'Francovich and its Application to EC Environmental Law' in H Somsen (ed) *Protecting the European Environment: Enforcing EC Environmental Law* (Blackstone Press 1996) 135; S Prechal and L Hancher, 'Individual Environmental Rights: Conceptual Pollution in EU Environmental Law' (2002) Yearbook of European Environmental Law 89.

[166] M Fisicaro, 'Norme intese a conferire diritti ai singoli e tutela risarcitoria di interessi diffusi: una riflessione a margine della sentenza *JP c Ministre de la Transition écologique*' cit. 143.

[167] Suffices to mention cases of EU secondary law that, also in line with art. 13 TFEU, protects the welfare of animals: although potentially existing, the link between EU law and human health is certainly more blurred.

[168] World Health Organization, *Ten threats to global health in 2019* www.who.int.

[169] European Court of Auditors, Air pollution: Our health still insufficiently protected, Special Report no 23/2018, 6.

[170] *Commission v Germany* cit. para. 16.

[171] *Janecek* cit. para. 37; *ClientEarth* cit. para. 55.

purpose of protecting human health was used by the CJEU also to support the conclusion that there cannot be AQD's *de minimis* violations.[172] The CJEU, therefore, would have had no difficulty in justifying a more permissive approach – not only on the basis of the case law on direct effect and Member States' liability, but – also on the basis of the environmental purposes pursued by arts 13(1) and 23(1) AQD, all the more so given that the protection of human health[173] is a central objective of EU environmental policy.[174]

From a more radical viewpoint, the distinction between general and individual interests does not seem in itself appropriate to distinguish between provisions whose breach may or not entail Member States' liability. There are several cases in which the CJEU has followed the opposite approach, holding that even violations of EU provisions that pursue a general interest can originate Member States' liability toward individuals. Also in this respect, the decision in *JP* could therefore have systematic consequences: Member States are likely to try to rely on *JP* to extend their area of immunity from the *Francovich* doctrine by arguing that breaches of rules protecting (also) a general interest cannot (any longer) entail individuals' right to compensation, even if such provisions attribute to them a legal position worthy of judicial protection. Two examples suffice to illustrate the above: art. 108(3) and – perhaps, also – art. 267(3) TFEU.

Beginning with State aids, one cannot reasonably hold that the stand-still obligation enshrined in art. 108(3) TFEU does not pursue a general objective. The (procedural) duty to notify to the Commission all envisaged aids and to await the Commission's decision before implementing them is indeed aimed at protecting the effectiveness of the substantive discipline provided by art. 107 TFEU, *i.e.* the prohibition of State aids. And one cannot seriously argue that the control over State aids is not a matter of public interest in the EU legal order, if only considered that this sector is one of the pillars – together with the fundamental freedoms and antitrust rules – ensuring the existence of a competitive internal market.[175] Yet, acknowledging its direct effect,[176] the CJEU established that individuals, and in particular the competitors of the beneficiary of an illegal aid, can claim damages against the Member States that breach art. 108(3) TFEU.[177] As put it by the Commission, the requirement of the

[172] See above footnote 45.

[173] Moreover, art. 2(1) ADQ actually establishes that limit values aim at avoiding, preventing and reducing "harmful effects on human health and/or the environment as a whole", so that one could argue that the adverb "as a whole" refers only to the environment.

[174] Case C-157/96 *National Farmers' Union and Others* ECLI:EU:C:1998:191 para. 63.

[175] F de Cecco, *State Aid and the European Economic Constitution* (Hart Publishing 2013).

[176] Case 120/73 *Lorenz v Germany* ECLI:EU:C:1973:152 para. 8; case C-354/90 *Fédération nationale du commerce extérieur* ECLI:EU:C:1991:440 para. 11.

[177] *E.g.* case C-368/04 *Transalpine Ölleitung in Österreich* ECLI:EU:C:2006:644 para. 56; case C-199/06 *CELF* ECLI:EU:C:2008:79 para. 53; case C-334/07, *Freistaat Sachsen* ECLI:EU:C:2008:709 para. 54; case T-289/17 *Keolis CIF* ECLI:EU:T:2019:537 para. 102. See also L Calzolari, 'La responsabilità delle amministrazioni nazionali e delle imprese beneficiarie per la violazione degli artt. 107 e 108 TFUE fra diritto dell'unione e autonomia procedurale degli ordinamenti nazionali' (2017) Diritto del Commercio Internazionale 223.

conferral of rights is certainly met by art. 108(3) TFEU, as the CJEU "not only repeatedly confirmed the existence of individual rights under [art. 108(3) TFEU] but has also clarified that the protection of these individual rights is the genuine role of national courts".[178]

One could argue that the same holds true also with regard to the duty of last instance courts to make preliminary references under art. 267(3) TFEU, although in this case the matter is certainly more controversial. It is true that in *Kobler* the CJEU voluntarily chose not to directly address the question of whether or not art 267(3) TFEU is capable of conferring rights to individual, and rather focused on the substantive EU rule applicable to the case and with regard to which the court of last instance decided not to submit a preliminary question to the CJEU.[179] However, if one reads the very same *Kobler* ruling, as well as the subsequent case law, it seems tenable to hold that, at least implicitly, the CJEU has not gone too far from identifying the non-compliance of last instance courts with their obligation to make a reference to the CJEU as an autonomous instance of violation of a EU rule capable of leading to the Member States' liability vis-à-vis individuals.[180]

While the question of whether or not art. 267(3) TFEU is capable of conferring a right to individuals remains therefore the subject of possible debate and divergent opinions,[181] if one (even for the sake of argument) accepts that option, then cannot reasonably consider that the (only[182]) function of the preliminary reference procedure is to protect individuals' rights. Indeed, the preliminary reference procedure is the "keystone" of the whole EU judicial system: allowing the dialogue between national courts and the CJEU, art. 267 TFEU "has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties".[183]

[178] Commission notice on the enforcement of State aid law by national courts (2009/C 85/01) para. 46.

[179] Case C-224/01 *Köbler* ECLI:EU:C:2003:513 paras 99-102.

[180] *Ibid.* para. 55, where "non-compliance [...] with its obligation to make a reference for a preliminary ruling" under art. 267(3) TFEU is listed among the factors that need to be taken into consideration in order to evaluate whether an error committed by a national court can lead to Member States' liability for damages, such as "the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable". While these other factors seem all to refer to the substantive rule, the failure to make a reference for a preliminary ruling seems to be unrelated to them and self-standing. See also case C-224/01 *Kobler* ECLI:EU:C:2003:207, opinion of AG Léger para 148, according to whom "it is logical and reasonable to consider that manifest breach by a supreme court of an obligation to make a reference for a preliminary ruling is, in itself, capable of giving rise to State liability". See also case C-173/03 *Traghetti del Mediterraneo* ECLI:EU:C:2006:391 para. 43.

[181] See Z Varga, *The Effectiveness of the Köbler Liability in National Courts* (Hart 2020).

[182] Albeit in a slightly different perspective, the point is addressed by F Ferraro, 'Corte di giustizia e obbligo di rinvio pregiudiziale del giudice di ultima istanza: nihil sub sole novum' (23 October 2021) Giustizia Insieme www.giustiziainsieme.it and F Munari, 'Il «dubbio ragionevole» nel rinvio pregiudiziale' (2022) Federalismi www.federalismi.it 162, discussing case C-561/19 *Consorzio Italian Management* ECLI:EU:C:2021:799.

[183] *E.g.* case C-204/21, *Commission v Poland*, ECLI:EU:C:2023:442 para. 275; case C-284/16 *Achmea* ECLI:EU:C:2018:158 para. 37.

It seems difficult to align the above with the approach followed in *JP*.

V. Conclusions

This *Article* has sought to highlight the main critical profiles of the *JP* judgment, focusing in particular on those elements showing why the CJEU's decision is not consistent not only with the CJEU's case law on the application of AQD but also with several profiles that mark the EU legal order from a much more systematic perspective. To continue with the analogy of the thriller book, the CJEU's only "motive" seems therefore to be its determination to close the door to the development of such litigation, mainly on account of the very significant dimensions that it could have assumed before national courts due to the (unfortunately) not yet very high level of compliance by Member States with the ADQ.

Moreover, the CJEU's decision risks to hamper some of the typical remedial effects provided for by a legal order. The first relates to the consequences of infringements.[184] Managing the consequences of infringements includes establishing secondary mechanisms to punish wrongdoers and compensate aggrieved parties. The *JP* judgment clearly affects the position of the parties who bear the negative consequences of a breach of AQD, *i.e.* individuals. Without a EU law remedy, individuals can seek compensation only if, under national law, Member State can incur liability under less strict conditions than those set by the CJEU.[185] Even assuming that there are national legal orders in which this is actually the case, the practical effect[186] of the ruling is to give the green light to the development of potentially different practices in each Member State, in defiance of the level playing field.

Moreover, individuals are worse off not only because the *JP* judgment reduced the likelihood of health damages being compensated but also (and more importantly) because it increases the likelihood that these damages can occur in the first place. Under this perspective, the distinction made by the CJEU between the enforcement efforts of private parties that are allowed and welcome (*i.e.* actions to obtain orders and injunctions against national authorities)[187] and damages is not convincing. Compliance with any set of rules, including the AQD, occur mainly if the recipients are provided with sufficient incentives to avoid violations. The main incentive to ensure compliance is that the expected costs of a breach exceed its expected benefits. Public fines and civil damages are very similar in this perspective, as they both attach potential costs to unlawful conducts, making them less attractive.[188] Eliminating civil damages from the scene entails an

[184] For further references L Calzolari, *Il sistema di enforcement delle regole di concorrenza dell'Unione europea* (Giappichelli 2019) 5 ff.

[185] *JP* cit. para 63.

[186] Or the "unfortunate consequence" (E van Calster, 'Significant EU Environmental Cases: 2021–2022' cit. 255).

[187] *JP* cit. paras 62 and 64.

[188] P Giudici, *La responsabilità civile nei mercati finanziar*i (Giuffrè 2008) 38-39.

immediate and obvious reduction of the expected costs of AQD violations, and thus of its deterrent effect on national authorities.

In principle, this theorical framework applies also to Member States and national authorities,[189] but of course there are peculiarities compared to the – ordinary scenario – in which the recipients are undertakings or individuals. While having to consider budgetary consequences, national authorities base their decisions also – and perhaps mainly – on political considerations, sometimes worthy of attention, other times more related to short-term needs, such as increasing citizens' consensus. Although they pursue a particularly worthy interest, measures necessary to comply with AQD are often costly and unpopular and national authorities may lack the political incentives to adopt them.[190] Moreover, financial penalties may not be sufficiently deterrent for national authorities: not only because these costs are borne through public resources but also because the fines' payer and receiver, although formally different, may substantially coincide, as demonstrated by *Deutsche Umwelthilfe*.[191] While the accountability (and perhaps liability) of the persons in charge of the national authorities would probably be the most effective solution to increase the deterrent effect of AQD[192], private damages would have at least increased the expected costs of arts 13 and 23 AQD breaches and per se eliminated the possibility of fines being mere reallocations of funds within the public administration.

Moving to the substantive viewpoint, denying the individuals' right to damages for violations of ADQ reduces the (already narrow) margin to argue that, differently from international law,[193] the EU legal order may recognize an autonomous fundamental right to clean air. The configurability of this right had indeed been suggested precisely on account of the strengthening of the role of individuals[194] and national judges[195] at the

[189] The cost-benefit analysis of breaching EU law is, after all, the basis of both art. 260(3) TFEU and conditionality mechanisms.

[190] Moreover, "[b]ecause attainment measures are decided at the local level and policy options and incentives there are limited, often costly measures are chosen that disproportionately affect lower socio-economic groups" (E Van Gool, 'Searching for "Environmental Justice" in EU Environmental Law' (2022) European Energy and Environmental Law Review 334, 337.

[191] *Deutsche Umwelthilfe* cit. para 21 ("payment of a financial penalty does not result in any economic loss for the Land of Bavaria [as] the financial penalty is paid by entering the amount fixed by the court as a debit item under a given heading of the budget of the Land concerned and crediting the same amount to its central funds").

[192] But, as seen above, other important interests need to be balanced with this one.

[193] International law does not recognize a right to clean air, which is (only) "one of the vital elements of the right to a healthy and sustainable environment" (Report of the UN Special Rapporteur on Human Rights and the Environment of 8 January 2019, Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/40/55, 4; see also DR Boyd, 'The Human Right to Breathe Clean Air' (2019) Annals of Global Health 146).

[194] "EU citizens have a legal right to clean air» as they «have the right to go before national courts to demand that action is taken through the development of robust air quality plans" (U Taddei, 'Case C-723/17 Craeynest: New Developments for the Right to Clean Air in the EU' (2020) JEL 151, 152).

[195] The "strengthening of the national court's powers in the enforcement of EU environmental standards for air protection in the context of judicial proceedings initiated by natural and legal persons is

expense of the national authorities.[196] The right to damages is an inherent and necessary element to support the shift of the right to clean air from a procedural perspective to a substantive one, so that its denial – which of course weakens, rather than strengthening the position of individuals – could also delay (or halt) any innovative reading of the provision on which such theoretical construction would be based, *i.e.* art. 37 CFREU.[197]

While the *JP* decision leaves, at the moment, little room for any development in this field, what can be hoped, *de jure condendo*, is that the CJEU's ruling will not affect the new version of the AQD, which as mentioned is currently being discussed by the Council and the EU Parliament. As the Commission's proposal was submitted after AG Kokott's opinion but before the CJEU ruling, it explicitly compels Member States to ensure that natural persons who suffer damage to human health caused by a violation of rules on limit values, air quality plans and short-term action plans shall have the right to claim and obtain compensation for that damage[198]. Should this provision survive to the legislative procedure, the *JP* ruling would likely lose its pertinence, at least with regard to the scope of AQD private enforcement,[199] thanks to such a strong indication by the EU legislator.

Although a working document of the EU Parliament issued after the *JP* ruling still refers to the right of individuals to damages,[200] this is obviously a scenario on which it is – unfortunately – quite unrealistic to place much expectation: for Member States (and therefore the Council), this would consist in something not too dissimilar for the proverbial shooting themselves in the foot, in the light of the financial consequences.

certainly a step towards the recognition of a right to clean air in EU law" (A Sikora, *Constitutionalisation of Environmental Protection in EU law* (Europa Law Publishing 2020) 277).

[196] A "substantive right to clean air has emerged from [EU] legislation, the corollary of duties made ever tighter by the [CJEU]" (D Misonne, 'The emergence of a right to clean air: Transforming European Union law through litigation and citizen science' (2020) RECIEL 30).

[197] *E.g.* M Reis Magalhães, 'The Improvement of Article 37 of the EU Charter of Fundamental Rights – A Choice Between an Empty Shell and a Test Tube? ', in J Jendroska and M Bar (eds), *Procedural Environmental Rights in Practice* (CUP 2018) 97; E Scotford, 'Environmental Rights and Principles: Investigating Article 37 of the EU Charter of Fundamental Rights', in S Bogojevic, R Rayfuse, *Environmental Rights in Europe and Beyond* (OUP 2020) 133.

[198] Art. 28 Communication COM(2022) 542 final/2 cit.

[199] By contrast, the more systematic profiles discussed above in section IV would not be affected by the potential adoption of the new AQD.

[200] European Parliament, *Briefing on Revision of EU air quality legislation Setting a zero pollution objective for air* www.europarl.europa.eu.