



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 22 September 2022¹

Case C-375/21

Sdruzhenie ‘Za Zemyata – dostap do pravosadie’ and Others

(Request for a preliminary ruling
from the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria))

(Reference for a preliminary ruling – Directive 2010/75/EU – Industrial emissions – Integrated prevention and reduction of pollution – Setting of less strict emission limit values – Compliance with environmental quality standards – Obligations of the competent authority – Directive 2008/50/EC – Ambient air quality – Air quality limit values for the protection of human health – Exceedance – Air quality plan)

I. Introduction

1. The present reference for a preliminary ruling concerns the relationship between two different types of limit values and between the directives from which they derive. Under the Industrial Emissions Directive,² *emission limit values* are set for industrial installations. In addition, the Ambient Air Quality Directive³ contains *air quality limit values*. Both sets of rules are intended to ensure a high level of protection for the environment when it comes to air quality; however, they operate at different levels. The emission limit values of the Industrial Emissions Directive apply directly to a source of air pollutants – to the chimney, so to speak. By contrast, the air quality limit values of the Ambient Air Quality Directive address the overall result of all sources of air pollutants in the ambient air, that is to say the air that people breathe. Nevertheless, it is obvious that the application of both sets of rules must be coordinated.

2. The original case arose from the fact that the existing permit for a lignite-fired power plant was updated on the basis of the Industrial Emissions Directive. Since compliance with the limit values for the release of sulphur dioxide to be applied under that directive would cause disproportionately higher costs, less strict emission limit values were set, which was in principle allowed under a derogation clause within the directive.

¹ Original language: German.

² Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (OJ 2010 L 334, p. 17).

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

3. However, the air quality limit values for sulphur dioxide laid down by the Ambient Air Quality Directive are exceeded in the area affected by the power plant, and an air quality plan adopted for that reason with the aim of complying with those limit values lays down stricter requirements for emissions from the power plant, which were not taken into account when the permit was updated.

4. It is therefore necessary to clarify, in particular, whether a derogation from the emission limit values normally applicable under the Industrial Emissions Directive may be granted even though the air quality limit values for the pollutant concerned provided for in the Ambient Air Quality Directive are being exceeded and air quality plans contain more stringent requirements. In addition, the questions referred ask whether, in such a situation, it may be necessary to set even more stringent requirements on emission limit values than would normally be applicable under the Industrial Emissions Directive. On both points, it will be shown that the air quality plan under the Ambient Air Quality Directive is the relevant instrument to coordinate the application of the two directives.

II. Legal context

A. *Industrial Emissions Directive*

5. Recital 16 of the Industrial Emissions Directive sets out the possibility of setting less stringent emission limit values:

‘In order to take into account certain specific circumstances where the application of emission levels associated with the best available techniques would lead to disproportionately high costs compared to the environmental benefits, competent authorities should be able to set emission limit values deviating from those levels. Such deviations should be based on an assessment taking into account well-defined criteria. The emission limit values set out in this Directive should not be exceeded. In any event, no significant pollution should be caused and a high level of protection of the environment taken as a whole should be achieved.’

6. Article 3 of the Industrial Emissions Directive defines various terms:

‘For the purposes of this Directive the following definitions shall apply:

...

2. “pollution” means the direct or indirect introduction, as a result of human activity, of substances, vibrations, heat or noise into air, water or land which may be harmful to human health or the quality of the environment, result in damage to material property, or impair or interfere with amenities and other legitimate uses of the environment;

...

6. “environmental quality standard” means the set of requirements which must be fulfilled at a given time by a given environment or particular part thereof, as set out in Union law;

...’

7. Article 13 of the Industrial Emissions Directive provides that the European Commission, together with representatives of the Member States, the industries concerned and non-governmental organisations promoting environmental protection, shall present the best available techniques (BAT) in BAT reference documents and BAT conclusions and update these documents regularly. The plant at issue, a lignite-fired power plant, is covered by Implementing Decision (EU) 2017/1442 on conclusions on best available techniques for large combustion plants.⁴

8. The basic requirements for a permit are set out in Article 14(1) of the Industrial Emissions Directive:

‘Member States shall ensure that the permit includes all measures necessary for compliance with the requirements of Articles 11 and 18.

...’

9. According to Article 14 of and Annex II to the Industrial Emissions Directive, emission limit values, in particular for sulphur dioxide, must be laid down in the permit for an installation.

10. Article 15(3) and (4) of the Industrial Emissions Directive contain the rules on the setting of emission limit values which are relevant in the present case:

‘3. The competent authority shall set emission limit values that ensure that, under normal operating conditions, emissions do not exceed the emission levels associated with the best available techniques as laid down in the decisions on BAT conclusions referred to in Article 13(5) through either of the following:

- (a) setting emission limit values that do not exceed the emission levels associated with the best available techniques. Those emission limit values shall be expressed for the same or shorter periods of time and under the same reference conditions as those emission levels associated with the best available techniques; or
- (b) setting different emission limit values than those referred to under point (a) in terms of values, periods of time and reference conditions.

Where point (b) is applied, the competent authority shall, at least annually, assess the results of emission monitoring in order to ensure that emissions under normal operating conditions have not exceeded the emission levels associated with the best available techniques.

4. By way of derogation from paragraph 3, and without prejudice to Article 18, the competent authority may, in specific cases, set less strict emission limit values. Such a derogation may apply only where an assessment shows that the achievement of emission levels associated with the best available techniques as described in BAT conclusions would lead to disproportionately higher costs compared to the environmental benefits due to:

- (a) the geographical location or the local environmental conditions of the installation concerned; or

⁴ Commission Implementing Decision of 31 July 2017 establishing best available techniques (BAT) conclusions, under Directive 2010/75/EU of the European Parliament and of the Council, for large combustion plants (OJ 2017 L 212, p. 1) (‘BAT conclusions for large combustion plants’).

(b) the technical characteristics of the installation concerned.

The competent authority shall document in an annex to the permit conditions the reasons for the application of the first subparagraph the result of the assessment and the justification for the conditions imposed.

The emission limit values set in accordance with the first subparagraph shall, however, not exceed the emission limit values set out in the Annexes to this Directive, where applicable.

The competent authority shall in any case ensure that no significant pollution is caused and that a high level of protection of the environment as a whole is achieved.

...’

11. Article 18 of the Industrial Emissions Directive provides for additional requirements to meet environmental quality standards:

‘Where an environmental quality standard requires stricter conditions than those achievable by the use of the best available techniques, additional measures shall be included in the permit, without prejudice to other measures which may be taken to comply with environmental quality standards.’

B. Ambient Air Quality Directive

12. The first two recitals of the Ambient Air Quality Directive describe its overarching objectives:

- ‘(1) The Sixth Community Environment Action Programme ... establishes the need to reduce pollution to levels which minimise harmful effects on human health, paying particular attention to sensitive populations, and the environment as a whole, to improve the monitoring and assessment of air quality including the deposition of pollutants and to provide information to the public.
- (2) In order to protect human health and the environment as a whole, it is particularly important to combat emissions of pollutants at source and to identify and implement the most effective emission reduction measures at local, national and Community level. Therefore, emissions of harmful air pollutants should be avoided, prevented or reduced and appropriate objectives set for ambient air quality taking into account relevant World Health Organisation standards, guidelines and programmes.’

13. Recital 18 of the Ambient Air Quality Directive addresses its relationship with other directives:

‘... Full account will also be taken of the ambient air quality objectives provided for in this Directive, where permits are granted for industrial activities pursuant to Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control.’^[5]

⁵ OJ 2008 L 24, p. 8.

14. Pursuant to Article 81(3) of the Industrial Emissions Directive, references to Directive 2008/1 are deemed to be references to the latter directive as, according to the first recital of that directive, it recast, inter alia, the former directive.

15. Article 1(1) of the Ambient Air Quality Directive sets out its key objective:

‘This Directive lays down measures aimed at the following:

1. defining and establishing objectives for ambient air quality designed to avoid, prevent or reduce harmful effects on human health and the environment as a whole;

2. ...’

16. Article 2(5) of the Ambient Air Quality Directive provides that the term ‘limit value’ shall mean ‘a level 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’.

17. Article 13(1) of the Ambient Air Quality Directive lays down an obligation to comply with various air quality limit values:

‘Member States shall ensure that, throughout their zones and agglomerations, levels of sulphur dioxide, PM₁₀, lead, and carbon monoxide in ambient air do not exceed the limit values laid down in Annex XI.

In respect of nitrogen dioxide and benzene, the limit values specified in Annex XI may not be exceeded from the dates specified therein.

Compliance with these requirements shall be assessed in accordance with Annex III.

...’

18. According to Annex XI, Section B, the hourly limit value of 350 µg/m³ may not be exceeded for sulphur dioxide more than 24 times in a calendar year and the daily limit value of 125 µg/m³ may not be exceeded more than 3 times in a calendar year. Those air quality limit values have been applicable in Bulgaria on the basis of Directive 1999/30/EC⁶ since the accession of that Member State to the European Union on 1 January 2007.⁷

19. Article 23(1) of the Ambient Air Quality Directive provides that where air quality limit values are exceeded in given zones or agglomerations, air quality plans must be established in order to achieve those values:

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

⁶ Council Directive of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air (OJ 1999 L 163, p. 41).

⁷ Judgment of 12 May 2022, *Commission v Bulgaria (Limit values – SO₂)* (C-730/19, not published, EU:C:2022:382, paragraph 17).

In the event of exceedances of those limit values for which the attainment deadline is already expired, the air quality plans shall set out appropriate measures, so that the exceedance period can be kept as short as possible. ...

Those air quality plans shall incorporate at least the information listed in Section A of Annex XV ... Those plans shall be communicated to the Commission without delay, but no later than two years after the end of the year the first exceedance was observed.

...’

20. In addition, Article 19 of the Ambient Air Quality Directive provides for the public to be informed when an alert threshold is exceeded. According to Section A of Annex XII, the alert threshold for sulphur dioxide is 500 µg/m³, measured over three consecutive hours. According to Article 24, when the alert threshold for sulphur dioxide is exceeded, Member States must draw up short-term action plans in addition to the warnings.

III. The facts and the request for a preliminary ruling

21. The ‘Maritsa-iztok 2 EAD’ thermal power plant is the largest of the four thermal power plants located in the ‘Maritsa-iztok’ energy complex in the territory of the Republic of Bulgaria, with a total installed capacity of 1 602 MW. It was built in the territory of the municipality of Radnevo, approximately 24.5 km as the crow flies from the town of Galabovo, and is composed of eight generating units with built-in desulphurisation units.

22. The combustion plant of the Maritsa-iztok 2 thermal power plant uses local lignite, which is characterised by a high content of sulphur and ash and a low calorific value. The power plant’s boilers are designed to burn local lignite only and therefore cannot burn any other type of fuel. The technical limitations of the installations are brought about, in essence, by the inability of the metal structure of the boilers to withstand the linear thermal expansion that would result from the use of a heating fuel with a higher calorific value and a lower sulphur and ash content, that is to say, the use of a different type of coal.

23. The power plant is considered to be one of the main sources of industrial pollution in the territory of the municipality of Galabovo. Exceedances of the hourly and daily average sulphur dioxide limit values are regularly recorded there, including above the alert threshold of 500 µg/m³.

24. Accordingly, the Court of Justice recently found that Bulgaria had failed to fulfil its obligations under Articles 13 and 23 of the Ambient Air Quality Directive since 2007 in the area BG0006 (south-east Bulgaria), where the municipality of Galabovo and the Maritsa-iztok 2 power plant are located,⁸ due to exceedance of the air quality limit values for sulphur dioxide and insufficient air quality plans.⁹

⁸ Judgment of 12 May 2022, *Commission v Bulgaria (Limit values – SO₂)* (C-730/19, not published, EU:C:2022:382, paragraphs 21, 23 and 29).

⁹ Judgment of 12 May 2022, *Commission v Bulgaria (Limit values – SO₂)* (C-730/19, not published, EU:C:2022:382).

25. On 30 November 2018, the municipal council of Galabovo, in application of Article 23 of the Ambient Air Quality Directive, adopted a programme for the period 2019 to 2023 to reduce pollution levels and achieve the air quality limit values for sulphur dioxide.¹⁰ The programme listed the four thermal power plants in the region, including the Maritsa-iztok 2 thermal power plant, and residential heating as the main sources of sulphur dioxide pollution.

26. That programme provides, inter alia, for the following measure to reduce pollution by sulphur dioxide: ‘Implementation of projects for the conversion of desulphurisation plants and achievement of a minimum desulphurisation level of 98% and prohibition of the operation of boiler units without functioning desulphurisation plants’.¹¹

27. By decision of 21 December 2018, the Executive Director of the Executive Agency for the Environment (‘the IAOS’) updated the integrated permit granted to the Maritsa-iztok 2 thermal power plant. The decision was issued on the basis of the Bulgarian transposition of the Industrial Emissions Directive, read in conjunction with Implementing Decision 2017/1442.

28. By that decision, the Executive Director set, inter alia, a minimum desulphurisation level of 97% for desulphurisation units 1/2, 3/4, 7 and 8, which corresponds to SO_x emissions of 570 mg/Nm³, and a minimum desulphurisation level of 97.5% for desulphurisation units 5/6. However, in order to achieve the emission limit value of 320 mg/Nm³ normally laid down for SO_x, a desulphurisation level of 98.32% would have to be applied.

29. The ‘Za zemiata – dostap do pravosadie’ association brought an action against that decision before the Administrativen sad – Stara Zagora (Administrative Court, Stara Zagora, Bulgaria), which dismissed the action by judgment of 28 August 2020. The administrative court particularly refused to consider and assess the significance of the air quality programme of the municipality of Galabovo.

30. The court of first instance found, inter alia, that a desulphurisation level of 98.32% would entail costs of 312 200 000 leva (BGN) (approximately EUR 156 000 000). On the other hand, a desulphurisation rate of 97% would entail costs of BGN 40 000 000 (approximately EUR 20 000 000) for a 12-year operating period.

31. Sdruzhenie ‘Za Zemiata – dostap do pravosadie’ (‘For the Earth – Access to Justice’ Association), Sofia (Bulgaria), ‘The Green Tank – grazhdansko sdruzhenie s nestopanska tsel’ (‘The Green Tank – non-profit civil association’, Hellenic Republic) and NS (Hellenic Republic) brought an appeal against that judgment.

32. The Varhoven administrativen sad (Supreme Administrative Court, Bulgaria) therefore addresses the following questions to the Court of Justice:

(1) Must Article 4(3) TEU, read in conjunction with Article 18 of [the Industrial Emissions Directive] and Articles 13 and 23 of [the Ambient Air Quality Directive] be interpreted as meaning that, when considering a request for a derogation under Article 15(4) of [the Industrial Emissions Directive], the competent authority must assess whether the granting of

¹⁰ Актуализация на програмата за управление на качеството на атмосферния въздух в Община Гълъбово, разработена за замърсителите: фини прахови частици (ФПЧ10) и серен диоксид (SO₂), 2019 – 2023 г. (Update of the air quality programme in the municipality of Galabovo, developed for the pollutants fine particulate matter (PM₁₀) and sulphur dioxide (SO₂), 2019 – 2023, https://galabovo.org/sites/default/files/Programa_Galabovo.pdf).

¹¹ Measure Gl_Lt_Pr_t_4, p. 287 of the programme.

the derogation may jeopardise compliance with the environmental quality standards, taking into account all the relevant scientific data on pollution, including the measures under the relevant air quality programme in a given zone or agglomeration pursuant to Article 23 of [the Ambient Air Quality Directive]?

- (2) Must Article 4(3) TEU, read in conjunction with Article 18 of [the Industrial Emissions Directive] and Articles 13 and 23 of [the Ambient Air Quality Directive] be interpreted as meaning that, when considering a request for a derogation within the meaning of Article 15(4) of [the Industrial Emissions Directive], the competent authority must refrain from setting less stringent emission limit values for air pollutants from an installation in so far as such a derogation would be contrary to the measures laid down in the relevant air quality programme adopted in the given zone or agglomeration pursuant to Article 23 of [the Ambient Air Quality Directive] and could jeopardise achieving the objective of keeping the period of exceedance of the air quality standards as short as possible?
- (3) Must Article 4(3) TEU, read in conjunction with Article 18 of [the Industrial Emissions Directive] and Article 13 of [the Ambient Air Quality Directive] be interpreted as meaning that, when considering a request for a derogation under Article 15(4) of [the Industrial Emissions Directive], the competent authority must assess whether, taking into account all the relevant scientific data on pollution, including the cumulative effect together with other sources of the pollutant concerned, the setting of less stringent emission limit values for air pollutants from an installation would contribute to the exceedance of the relevant emission limit values set in a given zone or agglomeration in accordance with Article 13 of [the Ambient Air Quality Directive], and, if so, whether it must refrain from granting a derogation which would jeopardise the attainment of the environmental quality standards?

33. The claimant Sdruzhenie ‘Za Zemiata – dostap do pravosadie’ (‘For the Earth – Access to Justice’ Association), the operator of the TETS Maritsa iztok 2 EAD power plant, the Republic of Bulgaria, the Italian Republic as well as the Commission expressed their views in writing. No hearing was held, since the Court of Justice considered that it had sufficient information.

IV. Legal assessment

34. The purpose of the reference for a preliminary ruling is to clarify the relationship between the rules on the granting of permits for industrial installations under the Industrial Emissions Directive and the air quality requirements under the Ambient Air Quality Directive.

35. Article 13 of and Annex XI to the Ambient Air Quality Directive set limit values for certain pollutants in ambient air (air quality limit values). They address the amount of pollutants present in the ambient air and the concentration of those pollutants is therefore measured with sampling points in specific locations that are representative of the pollution load.¹²

36. Although the reference for a preliminary ruling also mentions mercury, which is covered as an air pollutant by 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

¹² See, in that regard, judgment of 26 June 2019, *Craeynest and Others* (C-723/17, EU:C:2019:533, paragraph 37 et seq.).

hydrocarbons in ambient air,¹³ so far the European Union has not set a separate air quality limit value for the concentration of that substance in ambient air. Therefore, the mercury emissions from the power plant at issue are irrelevant to the reference for a preliminary ruling.

37. By contrast, in Article 13 of and Annex XI to the Ambient Air Quality Directive, the EU legislature laid down air quality limit values for sulphur dioxide which, according to the reference for a preliminary ruling, are exceeded in the area of impact of the Maritsa-iztok 2 power plant, that is to say, in the area where its emissions are noticeable, in particular in the municipality of Galabovo. The Court has recently arrived at the same finding.¹⁴ This appears to be the only area in the European Union where the air quality limit values for sulphur dioxide are being exceeded.¹⁵

38. The municipality of Galabovo therefore issued an air quality plan which, among other things, stipulates that the Maritsa-iztok 2 power plant should achieve a desulphurisation level of 98%.

39. The specific setting of emission limit values for an installation such as the power plant referred to is based on the Industrial Emissions Directive, in particular Article 15. Emission limit values are by their nature different from air quality limit values. They relate to the amount of pollutants released by a plant over a period of time and measured at the point of release or emission. The pollutants released are subsequently dispersed in the ambient air and are thus reflected in the readings taken at the sampling points under the Ambient Air Quality Directive.

40. Pursuant to Article 15(3) of the Industrial Emissions Directive, the emission limit values of an installation must not exceed the emission levels associated with the best available techniques; however, if those limit values would lead to disproportionately higher costs, Article 15(4) allows less stringent limit values to be set.

41. According to the reference for a preliminary ruling, in setting the emission limit values for sulphur dioxide in the permit at issue for the Maritsa-iztok 2 power plant, the competent authority relied on the latter exception. It therefore set a minimum desulphurisation level of 97% for various desulphurisation units at the power plant and a minimum desulphurisation level of 97.5% for other units. Increasing the desulphurisation level to 98%, as provided for in the air quality plan, would reduce emissions of sulphur dioxide by one third and one fifth respectively. According to the reference for a preliminary ruling, in order to achieve the emission limit value of the best available techniques, an even greater desulphurisation level of 98.32% would be necessary.

42. However, irrespective of whether a derogation is granted under Article 15(4) of the Industrial Emissions Directive, Article 18 of that directive requires the imposition of additional requirements than those to be met by the application of best available techniques where more stringent requirements are necessary in order to comply with an environmental quality standard.

43. Against that background, in posing the three questions the Varhoven administrative sad (Supreme Administrative Court) seeks answers as to whether the derogation according to Article 15(4) of the Industrial Emissions Directive in the permit at issue is already inapplicable

¹³ OJ 2005 L 23, p. 3.

¹⁴ Judgment of 12 May 2022, *Commission v Bulgaria (Limit values – SO₂)* (C-730/19, not published, EU:C:2022:382).

¹⁵ European Environment Agency, Air quality in Europe – 2020 report, EEA Report No 09/2020, p. 86 (https://www.eea.europa.eu/publications/air-quality-in-europe-2020-report/at_download/file).

because the air quality limit values for sulphur dioxide according to the Ambient Air Quality Directive have been exceeded (questions 1 and 3), or whether it is inapplicable due to the air quality plan (question 2).

44. It does not, however, seem reasonable to me to work through the questions referred in the order in which they have been posed. Rather, I will start by discussing the requirements for a derogation under Article 15(4) of the Industrial Emissions Directive in the light of the air quality limit values and the air quality plan (see A) and then, as an additional point, the requirements arising from Article 18 of that directive (see B).

A. Article 15(4) of the Industrial Emissions Directive

1. The regulatory context of Article 15(4) of the Industrial Emissions Directive

45. Pursuant to Article 15(3) of the Industrial Emissions Directive, emission limit values must be set for industrial installations to ensure that emissions do not exceed the emission levels associated with the best available techniques, as laid down in the decisions on the BAT conclusions.

46. By way of derogation from Article 15(3) of the Industrial Emissions Directive, the first sentence of the first subparagraph of Article 15(4) allows the competent authority to set less stringent emission limit values in special cases. That power applies without prejudice to Article 18, which will be discussed later.¹⁶

47. The second sentence of the first subparagraph of Article 15(4) of the Industrial Emissions Directive specifies that derogations within the meaning of the first sentence may only be applied if an assessment shows that, for specific reasons, achieving the emission levels associated with the best available techniques would lead to disproportionately higher costs compared to the environmental benefits. Those reasons must lie in the geographical location and local environmental conditions of the installation concerned or in its technical characteristics.

48. The granting of a derogation thus requires a weighing up of the interests involved.

49. The third subparagraph of Article 15(4) of the Industrial Emissions Directive limits the possibility of higher emission limit values by stating that any emission limit values laid down in the annexes to the directive must nevertheless be complied with.

50. According to the reference for a preliminary ruling, the application of those conditions does not raise any issues in the case at issue.

2. The fourth subparagraph of Article 15(4) of the Industrial Emissions Directive – no significant pollution

51. However, the fourth subparagraph of Article 15(4) of the Industrial Emissions Directive contains an additional condition which could preclude a derogation in the case at issue. According to that provision, the competent authority shall *in any case* ensure that no significant

¹⁶ See below, point 77 et seq.

pollution is caused and that a high level of protection of the environment as a whole is achieved. The last sentence of the recital 16 also states in that regard that, *in any event*, no significant¹⁷ pollution should be caused and a high level of protection of the environment taken as a whole should be achieved.

52. Thus, the derogation in Article 15(4) of the Industrial Emissions Directive is not intended to cover all cases where compliance with the general emission limit values entails particularly high costs. Rather, that derogation may only be applied if the less stringent emission limit values do not cause significant pollution and a high level of protection of the environment as a whole is achieved despite the derogation.

53. According to the definition in Article 3(2) of the Industrial Emissions Directive, ‘pollution’ means the direct or indirect introduction, as a result of human activity, of substances, vibrations, heat or noise into air, water or land which may be harmful to human health or the quality of the environment, result in damage to material property, or impair or interfere with amenities and other legitimate uses of the environment.

54. According to that definition, any release of sulphur dioxide into the air constitutes pollution. This is because, according to the heading to Annex XI to the Ambient Air Quality Directive, the EU legislature established the air quality limit values for sulphur dioxide for the protection of human health. The legislature thereby demonstrates that the release of sulphur dioxide may harm human health or the quality of the environment.¹⁸

55. However, the Industrial Emissions Directive does not specify when pollution is to be considered *significant*. Equally, it does not specify what is meant by a high level of protection of the environment as a whole. However, it is not necessary to fully clarify what is meant by those terms in the present proceedings.

56. This is because, according to the reference for a preliminary ruling and a more recent judgment of the Court,¹⁹ the air quality limit values of the Ambient Air Quality Directive for sulphur dioxide are likely to be exceeded in the area affected by the power plant in question. According to recital 18 of that directive, *full* account will be taken of the directive’s ambient air quality objectives where permits are granted for industrial activities pursuant to the Industrial Emissions Directive.

57. As stated above, the EU legislature has adopted the air quality limit values to protect human health and the obligation to comply with them applies throughout the territory of the Member States,²⁰ permanently and without exception.²¹ Unlike for other pollutants, that directive does

¹⁷ The term ‘wesentliche’ (significant) pollution in the German version is likely to have the same meaning as the term ‘erhebliche’ (considerable) pollution since other language versions use the same term in both cases, for example, ‘significant’ (EN), ‘importante’ (FR) or ‘значително’ (BG).

¹⁸ See also the first and fourth recitals of Council Directive 80/779/EEC of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates (OJ 1980 L 229, p. 30).

¹⁹ Judgment of 12 May 2022, *Commission v Bulgaria (Limit values – SO₂)* (C-730/19, not published, EU:C:2022:382, in particular paragraphs 23 and 29).

²⁰ To that effect, judgments of 30 April 2020, *Commission v Romania (Exceedance of limit values for PM₁₀)* (C-638/18, not published, EU:C:2020:334, paragraphs 73 and 74), and of 10 November 2020, *Commission v Italy (Limit values for PM₁₀)* (C-644/18, EU:C:2020:895, paragraphs 96 and 97).

²¹ To that effect, judgments of 19 December 2012, *Commission v Italy (PM₁₀)* (C-68/11, EU:C:2012:815, paragraphs 64 and 65); of 19 November 2014, *ClientEarth* (C-404/13, EU:C:2014:2382, paragraph 42); of 5 April 2017, *Commission v Bulgaria (PM₁₀)* (C-488/15, EU:C:2017:267, paragraph 70); of 10 November 2020, *Commission v Italy (Limit values for PM₁₀)* (C-644/18, EU:C:2020:895, paragraphs 78 to 81); and of 12 May 2022, *Commission v Bulgaria (Limit values – SO₂)* (C-730/19, not published, EU:C:2022:382, paragraphs 76 and 78).

not even provide for the possibility of extending the deadline for compliance with air quality limit values for sulphur dioxide. Therefore, an exceedance of the air quality limit values for sulphur dioxide cannot be regarded as insignificant pollution, but is necessarily significant.

58. At the same time, by setting air quality limit values, the EU legislature has defined what is meant by a high level of protection of the environment with regard to the proportion of the various pollutants in the ambient air.

59. The derogation contained in Article 15(4) of the Industrial Emissions Directive cannot justify the exceedance of air quality limit values and thus rule out the significance of the pollution. The very wording of that provision only permits a derogation from the emission limit values normally applicable to industrial installations under that directive. And the weighing up of the costs of compliance with limit values and the environmental benefits provided for in the provision is only aimed at the costs for the respective installation. As will be shown below, a derogation from the air quality limit values due to overriding interests can only, however, be justified – within very narrow limits and temporarily – within the framework of the Ambient Air Quality Directive and in this regard when establishing air quality plans.²²

3. Fourth subparagraph of Article 15(4) of the Industrial Emissions Directive – causing significant pollution

60. It follows from the reference for a preliminary ruling that the application of the derogation at issue would not be the sole cause of an exceedance of the air quality limit values for sulphur dioxide. Rather, that exceedance is based on emissions from four different power plants together with emissions due to the heating of residential premises. According to the air quality plan of the municipality of Galabovo, the latter contributes as much as between 10.1% and 79% of the hourly average sulphur dioxide concentration in the different settlements within the municipality.²³

61. Doubts could therefore arise as to whether the derogation for only one of those sources of pollution caused a significant pollution within the meaning of the fourth subparagraph of Article 15(4) of the Industrial Emissions Directive.

62. However, according to the fourth subparagraph of Article 15(4) of the Industrial Emissions Directive, the competent authority must *in any case ensure* that no significant pollution is caused, that is to say that the air quality limit values are not exceeded due to the derogation. If, however, the contribution of emissions from other sources were not taken into account when granting the derogation, there could be cases where significant pollution is at least contributed to. Moreover, it would be almost impossible to achieve compliance with the air quality limit values if each source of pollution were assessed independently of other sources.

63. Therefore, a derogation under Article 15(4) of the Industrial Emissions Directive requires a comprehensive determination of the permissible emissions of *all* sources of pollutants, which ensures that even if a derogation is granted for one of the sources, the sum total does not cause the air quality limit values to be exceeded.

²² See below, point 64 et seq.

²³ The reference for a preliminary ruling might be referring to Figure VI.2.7 on p. 256 of the air quality plan (cited in footnote 10).

64. The air quality plan, which the competent national authorities must establish under Article 23 of the Ambient Air Quality Directive, that is, on the basis of another directive, is the instrument for that determination. In the event that air quality limit values are being exceeded, Member States must ensure that such a plan is drawn up and contains appropriate measures to minimise the period of non-compliance with air quality limit values. In other words: the air quality plan must set out the measures necessary to comply with the air quality limit values as quickly as possible. In essence, this will involve measures to reduce the release of the relevant pollutants, for example, stricter emission limit values for certain sources.

65. In contrast to the granting of permits for individual installations and activities, it is possible under that plan to ensure a balance between the objective of compliance with the air quality limit values and the various public and private interests concerned.²⁴ So doing, all the interests associated with the respective sources must be jointly assessed and weighed up against each other and against the objective of compliance with the air quality limit values. A decision can be made on that basis as to which emission source shall be placed under more stringent restrictions or to what extent putting a stop to the exceedance shall be delayed because a faster restriction of emissions would lead to disproportionate harm to overriding interests. However, the Ambient Air Quality Directive does not provide for any curtailments to the objective of compliance with air quality limit values. Only the period during which the limit values are exceeded is subject to a certain degree of flexibility, but even this must be kept as short as possible²⁵ and must not be extended indefinitely under any circumstances.²⁶

66. While Bulgaria and the operator of the power plant dispute that the municipality of Galabovo was permitted to determine, in its air quality plan, the emissions of the power plant at issue since it is located in the territory of another municipality, an air quality plan can only ensure compliance with the air quality limit values if it can lay down provisions for all relevant emission sources – that is to say including for sources located outside an area affected by limit values being exceeded.

67. That does not mean that the air quality plan must be established in a single legal act or by a single authority. Member States are free to organise the responsibilities of the competent authorities in such a way that the air quality plan is laid down in different legal acts by different authorities. Member States must ensure, however, that those legal acts collectively satisfy the requirements laid down in Article 23 of the Ambient Air Quality Directive. They must therefore ensure, in particular, that the various authorities coordinate their measures in order to achieve that common objective.

68. Only if it is clear from those provisions that the air quality limit values will be complied with even if higher emission limit values are set, can it be guaranteed that the derogation provided for in Article 15(4) of the Industrial Emissions Directive will not cause significant pollution under any circumstances. Where air quality limit values are being exceeded within the area affected by an installation, the granting of a derogation for additional emissions is therefore subject to the condition that one or more air quality plans pursuant to Article 23 of the Ambient Air Quality Directive ensure that the period of non-compliance can be kept as short as possible throughout the area affected and that the derogation complies with the requirements of those air quality

²⁴ Judgments of 25 July 2008, *Janecek* (C-237/07, EU:C:2008:447, paragraphs 45 and 46); of 10 November 2020, *Commission v Italy (Limit values for PM₁₀)* (C-644/18, EU:C:2020:895, paragraph 134); and of 12 May 2022, *Commission v Bulgaria (Limit values – SO₂)*, (C-730/19, not published, EU:C:2022:382, paragraph 130).

²⁵ Judgments of 5 April 2017, *Commission v Bulgaria* (C-488/15, EU:C:2017:267, paragraph 109); of 10 November 2020, *Commission v Italy (Limit values for PM₁₀)* (C-644/18, EU:C:2020:895, paragraph 136); and of 12 May 2022, *Commission v Bulgaria (Limit values – SO₂)* (C-730/19, not published, EU:C:2022:382, paragraph 132).

²⁶ Judgement of 10 November 2020, *Commission v Italy (Limit values for PM₁₀)* (C-644/18, EU:C:2020:895, paragraph 154).

plans. If, on the other hand, a derogation were granted without such plans being in place, there would be a risk that that would create a *fait accompli* which would subsequently make it difficult or impossible to comply with the air quality limit values as fast as possible.

69. According to the precautionary principle which underlies the Union’s environmental policy under Article 191(2) TFEU, the absence of significant pollution is only guaranteed in any case if any reasonable scientific doubt as to that outcome can be ruled out.²⁷ The specifications of air quality plans must therefore satisfy that standard if they are to permit a derogation under the fourth subparagraph of Article 15(4) of the Industrial Emissions Directive.

70. That – admittedly strict – standard is, moreover, in line with the principle of interpreting exceptions to general rules narrowly.²⁸ Nor does it affect the effect of Article 15(4) of the Industrial Emissions Directive²⁹ because that derogation remains applicable if the relevant air quality limit values are not exceeded in the area affected by the emissions in question. However, in the European Union, as far as I am aware, only the area surrounding the power plant at issue was affected due to air quality limit values for sulphur dioxide being exceeded in 2019.

71. According to that interpretation of the fourth subparagraph of Article 15(4) of the Industrial Emissions Directive, it is ultimately irrelevant whether the provisions of the air quality plan of the municipality of Galabovo are binding with regard to the permit at issue. According to the above considerations, given that the air quality limit values for sulphur dioxide in the area affected by the power plant were found to have been exceeded, that derogation is permissible *only if* there is an air quality plan in place that contains provisions regarding the relevant emission sources.

72. Shortcomings in an air quality plan do not therefore have the effect of permitting a derogation that is contrary to its requirements but, by contrast, mean that one condition of the derogation is not met.

73. Furthermore, for a derogation to be granted under Article 15(4) of the Industrial Emissions Directive, it is not sufficient that it complies with an air quality plan which sets out the measures necessary to comply with the air quality limit values for part of the area affected by the installation. Rather, the competent authorities must ensure that the air quality limit values are complied with everywhere in that affected area.

74. However, the air quality plan of the municipality of Galabovo contains suggestions that the power plant at issue, together with the other industrial sources, would contribute to the air quality limit values and the alert threshold being significantly exceeded even after the

²⁷ Cf. on Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 58), and of 10 October 2019, *Luonnonsuojeluyhdistys Tapiola* (C-674/17, EU:C:2019:851, paragraph 66), and on waste law, judgment of 24 October 2019, *Prato Nevoso Termo Energy* (C-212/18, EU:C:2019:898, paragraph 58). See also Christoph Sobotta, ‘Recent applications of the precautionary principle in the jurisprudence of the CJEU – a new yardstick in EU environmental decision making?’, *ERA Forum*, 2020, 723.

²⁸ Cf. judgments of 12 September 2000, *Commission v Ireland* (C-358/97, EU:C:2000:425, paragraph 55); of 4 October 2011, *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraph 162); and of 14 July 2022, *Porsche Inter Auto and Volkswagen* (C-145/20, EU:C:2022:572, paragraph 61).

²⁹ Cf. judgments of 18 November 2004, *Temco Europe* (C-284/03, EU:C:2004:730, paragraph 17); of 14 June 2007, *Horizon College* (C-434/05, EU:C:2007:343, paragraph 16); and of 13 January 2022, *Termas Sulfurosas de Alcafache* (C-513/20, EU:C:2022:18, paragraph 25)

implementation of the desulphurisation rate of 98% outside the municipality required by the plan.³⁰ Other sources, such as the heating of residential premises, have apparently not yet been taken into account.

75. If that were true, which it is for the competent national courts to examine, a derogation under Article 15(4) of the Industrial Emissions Directive would not be permissible even if it were compatible with the air quality plan of the municipality of Galabovo. This is because, in granting the derogation, the competent authority would not be able to ensure that no significant pollution occurs at the locations for which the air quality plan assumes that the air quality limit values are exceeded.

4. Preliminary conclusion

76. According to the fourth subparagraph of Article 15(4) of the Industrial Emissions Directive, the granting of a derogation under Article 15(4) of that directive for the release of an air pollutant whose air quality limit value under Article 13 of and Annex XI to the Ambient Air Quality Directive is exceeded in the area affected by that emission therefore has to fulfil two conditions: first, one or more air quality plans under Article 23 of the Ambient Air Quality Directive must ensure beyond reasonable scientific doubt that the period of non-compliance can be kept as short as possible throughout the affected area. Second, the derogation must comply with the requirements of those air quality plans.

B. Article 18 of the Industrial Emissions Directive

77. While it seems likely that, according to the above considerations, the main proceedings can be decided solely on the basis of Article 15(4) of the Industrial Emissions Directive, without recourse to Article 18 thereof, the reference for a preliminary ruling explicitly refers to the latter provision as well and the parties discuss it intensively. This is logical in so far as the Commission correctly states that an application of Article 15(4) is only excluded if Article 18 is applicable. This is particularly evident from the fact that Article 15(4) applies without prejudice to Article 18. I will therefore examine the requirements of Article 18 below.

78. Article 18 of the Industrial Emissions Directive applies when an environmental quality standard requires stricter conditions than those achievable by the use of the best available techniques. In that case, additional measures shall be included in the permit, without prejudice to other measures which may be taken to comply with environmental quality standards. Accordingly, the first subparagraph of Article 14(1) of the directive also states that the permit for the installation includes all measures necessary for compliance with the requirements of Article 18.

79. It must therefore first be clarified whether the air quality limit values for certain pollutants must be regarded as environmental quality standards (see 1), and then whether they require stricter requirements than those laid down in the contested provision (see 2).

³⁰ p. 304 et seq. of the air quality plan, in particular Figures VIII.4.3.1 to VIII.4.3.3 (cited in footnote 10).

1. The concept of ‘environmental quality standard’

80. Article 3(6) of the Industrial Emissions Directive defines ‘environmental quality standard’ as the set of requirements which must be fulfilled at a given time by a given environment or particular part thereof, as set out in Union law. The Court understands this to mean specific qualitative requirements, relating to concentrations of pollutants that must be met at a given time in a particular environment.³¹

81. While it is true that the Industrial Emissions Directive does not expressly mention the Ambient Air Quality Directive, contrary to Bulgaria’s view, Article 3(6) and Article 18 of the Industrial Emissions Directive are clearly aimed, at least implicitly, at regulations such as air quality limit values for certain pollutants.

82. This is because air quality limit values must, in principle, be complied with at all times and anywhere in the European Union.³² It is thus a question of requirements which must be met at a given time in a given environment or in a given part of it under Union legislation, or, in the words of the Court, specific qualitative requirements, relating to concentrations of polluting substances, that must be met at a given time by that particular medium.³³ As I have shown some time ago, these are therefore environmental quality standards within the meaning of Article 3(6) and Article 18 of the Industrial Emissions Directive.³⁴

83. Contrary to the view of Bulgaria, it is also irrelevant in this respect that the air quality limit values must be complied with on a permanent basis even though the definition of environmental quality standards only refers to a given time. That definition merely shows that environmental quality standards also include requirements that must not be observed permanently but at a specific point (or several points) in time. This may, for instance, be requirements in connection with bird migration or on the occasion of certain environmental conditions that change over time. That said, permanent requirements certainly constitute environmental quality standards because they apply at any given point in time.

84. Bulgaria also takes the view that only emission limit values specifically set under Bulgarian law for certain installations constitute environmental quality standards. However, that view fails to convince for the simple reason that Article 3(6) of the Industrial Emissions Directive expressly refers to requirements of Union law.

85. The fact that air quality limit values constitute environmental quality standards is confirmed, a contrario, by the concept of ‘target values’ for certain other pollutants in ambient air. That concept was introduced by Directive 2004/107³⁵ and the Ambient Air Quality Directive also sets air quality target values for ozone³⁶ and, transitionally, for fine particulate matter PM_{2.5}.³⁷ While, according to Article 2(5) of the latter directive, air quality limit values must be complied with without restriction once attained, target values according to Article 2(9) must only be attained

³¹ Judgment of 26 May 2011, *Stichting Natuur en Milieu and Others* (C-165/09 to C-167/09, EU:C:2011:348, paragraph 62).

³² To that effect, judgments of 30 April 2020, *Commission v Romania (Exceedance of limit values for PM₁₀)* (C-638/18, not published, EU:C:2020:334, paragraphs 73 and 74), and of 10 November 2020, *Commission v Italy (Limit values for PM₁₀)* (C-644/18, EU:C:2020:895, paragraphs 96 and 97).

³³ Judgment of 26 May 2011, *Stichting Natuur en Milieu and Others* (C-165/09 to C-167/09, EU:C:2011:348, paragraph 62).

³⁴ Opinion in Joined Cases *Stichting Natuur en Milieu and Others* (C-165/09 to C-167/09, EU:C:2010:775, point 62).

³⁵ Cited in point 36.

³⁶ Article 17 and Annex VII, Section B.

³⁷ Article 16(1) and Annex XIV, Section D.

where possible. Furthermore, recital 6 of Directive 2004/107 explicitly states that target values are not environmental quality standards, and according to recital 5 they do not require measures for industrial installations that go beyond the application of best available techniques.

86. Air quality limit values for certain pollutants under Article 13 of and Annex XI to the Ambient Air Quality Directive are thus environmental quality standards within the meaning of Article 18 of the Industrial Emissions Directive.

87. According to that interpretation, Article 18 of the Industrial Emissions Directive fleshes out the basic obligation under Article 11(c) of that directive that no significant pollution is caused during the operation of the installation. Since – as has already been stated³⁸ – exceeding the air quality limit values would constitute such pollution, there need to be instruments to ensure that those limit values can be complied with at all in areas affected by installations. Otherwise, there would be a risk that installations, despite meeting the standard of best available technology, would nevertheless contribute to the exceedance of the abovementioned limit values.

2. Necessity of more stringent requirements

88. When dealing with the question of whether stricter requirements are necessary, as with the question of the causation of significant pollution as discussed above, the various causes of the air quality limit values being exceeded are of key importance. Since there are several polluters, namely four power plants and residential heating, Article 18 of the Industrial Emissions Directive, even in conjunction with the Ambient Air Quality Directive, does not directly determine the extent to which the various sources must reduce their sulphur dioxide emissions. Rather, that decision is the responsibility of the competent Bulgarian authorities.

89. As in the context of the fourth subparagraph of Article 15(4) of the Industrial Emissions Directive, this is only possible on the basis of an air quality plan (or several coordinated plans) where the permissible emissions are determined for all sources. It must be apparent therefrom whether the emission limit values set for the respective installation are sufficient or whether additional conditions are necessary.

90. Therefore, the air quality plan is a prerequisite for the granting of a permit when applying Article 18 of the Industrial Emissions Directive with regard to air quality limit values. This is because, according to the first subparagraph of Article 14(1) of the directive, the permit must include all measures necessary to fulfil the conditions for the grant of a permit as set out in Article 18. However, when air quality limit values are exceeded, it is usually not possible in the absence of an air quality plan to determine what additional conditions are necessary for a specific emission source in order to sufficiently improve air quality.

91. Unlike in the context of granting a derogation, however, the Ambient Air Quality Directive does not require the competent authority to ensure compliance with the environmental quality standard in every case when imposing additional conditions. It is therefore not necessary to exclude every reasonable scientific doubt that the additional conditions are sufficient. Rather, it is sufficient if the requirements of the air quality plan are based on the comprehensible belief of the competent authorities that the period of non-compliance can be kept as short as possible by employing the measures envisaged.

³⁸ See above, point 56.

3. *Preliminary conclusion*

92. The grant of a permit for an industrial installation for which, under Articles 11, 14, 15 and 18 of the Industrial Emissions Directive, limit values are to be set for the release of an air pollutant whose air quality limit value under Article 13 of and Annex XI to the Ambient Air Quality Directive is being exceeded in the area affected by that release is also subject to two conditions: first, one or more air quality plans under Article 23 of that directive must ensure that the period of non-compliance can be kept as short as possible. Second, the permit must comply with the requirements of those air quality plans.

V. **Conclusion**

93. I therefore propose that the Court rule as follows:

- (1) According to the fourth subparagraph of Article 15(4) of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), the granting of a derogation under Article 15(4) of that Directive for the release of an air pollutant whose air quality limit value under Article 13 of and Annex XI to 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 is exceeded in the area affected by that emission has to fulfil two conditions: first, one or more air quality plans under Article 23 of Directive 2008/50 must ensure beyond reasonable scientific doubt that the period of non-compliance can be kept as short as possible throughout the affected area. Second, the derogation must comply with the requirements of those air quality plans.
- (2) The grant of a permit for an industrial installation for which, under Articles 11, 14, 15 and 18 of Directive 2010/75, limit values are to be set for the release of an air pollutant whose air quality limit value under Article 13 of and Annex XI to Directive 2008/50 is being exceeded in the area affected by that release is also subject to two conditions: first, one or more air quality plans under Article 23 of Directive 2008/50 must ensure that the period of non-compliance can be kept as short as possible. Second, the permit must comply with the requirements of those air quality plans.