

AVOSETTA MEETING

24TH & 25TH MAY 2019

**Country Questionnaire Responses:
Air Quality Law**

A	1	2	a)	3	4
	sources	Reported exceedances	Completeness of data	Infringement proceedings	Prior law
Austria	No2+PM10	yes	yes	2009 (closed) 2016 (pending)	No
Belgium	Most below (O3)	Real time online reporting	Yes	2009 (closed) 2018 (pending)	Only for lead
Czech R	PM- solid fuels, industry, coal, energy non renewables traffic NOx traffic	real time online reporting (including 2019)	Yes	2015, 2016, 208 (pending)	1991
Denmark	NOX and PM	Only private exceedances are sanctioned if infringement of IPPC permit or after adm order.		2016 exceedance of NOx and siting of station (pending)	Same as EU
France	NO2 transport PM residential	Annual reports		Reasoned opinion in 2010, 2013 (PM10), and 2017 (NO2) 2018 Pending case	yes
Germany	PM (agriculture) NOX (traffic energy)	Yes online for 2017		2018 Nox (pending) Legal change (driving prohibitions are now disproportional when AQS are almost meet) weakens standards and EC did nothing	No (only emission setting approach)
Greece	Energy, industry, heating, agriculture PM	Annual reports Daily online	Not available in real time (Q8)	2019	No (?)
Hungary	PM (residential heating) and NOx (traffic)	Reports Mostly compliance	Automated data are transparent Manual monitoring does not represent the real problems	Yes still pending	Yes?
Ireland	1 excedence in 2009 NOx Exceedences of WHO PM, NOx, O3 Illegal agricultural burning	EPA reports		no	yes
Italy	PM2,5 and NOx	Accessible in yearly reports		2018 PM10 2017 NO2	Yes (mere transposition)
Latvia	Traffic Domestic heating NOx PM	There were exceedances	(delayed information 2014 Q8.)	2009 (pending)	No

B	1	2	a)	3	4
	sources	Reported exceedances	Completeness of data	Infringement proceedings	Prior law
Norway	traffic, fireplaces, industry, ships and ferries	Hard to find data		2014 Efta case (Norway lost) Significant effects, new policy measures	No
Poland	Commercial and residential (PM) Transport Installations Energy	Inspection Monitoring		2009 PM exceedances Judgement 2018 (failed to fulfil) Will require through revision Amendments under way	Yes, in line with previous directives
Portugal	The worst are: PM (industry) NOx traffic and heating. SO2 (energy)	Before 2019: outdated information, too technical information. Repeats EU information After 2019: new website	No alerts for exceedances. Reports on efforts rather than on results	2012. National infringement was declared but did not reflect the full extent of exceedances. No practical effects	yes
Spain	Nox PM Traffic	Yearly reports		no	Yes (emission values)
Sweden	PM NOx Traffic, heating Suffer from pollution originated in the UK (will remain after Brexit!) and eastern countries	Information available online	not very accessible tables	2011 2014 EU pilot NO2 2019 (no transposition NOx O3)	No
Switzerland	NOx PM O3	(Q7) Available online Mobile app « air Check »	...	--	Measurements begun in the 60s
Netherlands	NOx (road traffic) PM10 (farming and ports)	Reported to the EC.		No (deadlines postponed)	There were some prior AQ standards
Turkey	PM10, So2, No2 (power plants, transport, residential heating, fertilizer production)	Annual reports. Online data		--	Yes emission values
UK	No2 (power, industry, transport), O3 benzopyrene	43, 37 exceeded No2, 34 exceeded for O3	2 databases	2018 The effect is drawing up a lawful plan	No.

A	5	6	7	8	9
	implementation	Gold plating	Monitoring networks	Monitoring problems	Modelling
Austria	Federal law implemented by the lander	Yes but	Larger	Quality but controversial siting	n.a.
Belgium	Regional regulations (literal)	No but other pollutants are monitored	Today there are less stations than before	Bad siting (preliminary ruling 2017) No reporting to European Commission	Street level modelling
Czech R	Authorities are bound by limit values	Yes, PM10 alert thresholds	corresponds	Bad siting and equipment in bad condition	no
Denmark	"environmental demands without an addressee". No sanctions (even 2017) Env Protection act+ministerial Statutory order	no	Same criteria Small territory	Bad siting	no
France	Transposed	yes	650 yes		
Germany	Government (not parliament)	no	Ipsis verbis Discussion on bad sitting	Bad siting too close to pollution sources vandalism	no
Greece	Transposed	no	33 corresponds	Undersized network, not all pollutants are measured all the time No measurement of general population exposure	no
Hungary	Transposition	Yes Sox Nox	52 corresponds	Stations out of order Data missing for long term Data not real	no
Ireland	Transposition A framework structure oversees the implementation of the monitoring programme	NO	31 stations (but n. will increase). Citizen science	Few staff, insufficient equipment, outdated locations, insufficient realtime reporting	Should be upscaled
Italy	Transposed	No	Same criteria	No problem is officially admitted	Similar to directive
Latvia	Standards+ permits	No but WHO guidelines are taken into account	Respects EU criteria for number of sampling point	Siting sampling points	Modelling based on presumptions

B	5	6	7	8	9
	implementation	Gold plating	Monitoring networks	Monitoring problems	Modelling
Norway	Law (pollution control regulation)	Yes, PM10 and PM25	Yes compliance with AQD	Small number of stations Differences between seasons	Modelling is recent. There are guidelines on best practices
Poland	Transposition. administrative fines for negligence in the preparation and implementation of air protection programs and short-term action plans Risk of pollution of transborder origin	no	Number of agglomerations was reduced (from 170 to 46)	...	Not used
Portugal	Administrative sanctions (fines and additional sanctions). Shortage of human resources	no	Larger number of stations	Bad siting, obsolete equipment, unconfirmed results, no consequences.	Yes, bad modelling techniques
Spain	Transposition	No, but autonomous communities may go beyond	800 stations	Bad siting. Regional discrepancies. Scarce data collection.	
Sweden	Transposition	Yes, NO2	No problems	Monitoring by authorities that don't have resources (Municipalities)	No problems
Switzerland	...	Hard to compare but goes beyond EU	no	No	no
Netherlands	Transposition	No	40 stations	Not enough data in densely populated areas. Quality of data varies.	Surprising outcomes
Turkey	Transposition	no	Funded by EU Not entirely in conformity	Bad siting. Data not reliable. Insufficient data. Unqualified equipment	No information
UK	Transposition	Minor differences	More extensive	Inconsistent results, bad siting. (Citizen science measurements are more accurate)	Inconsistencies Prospective modelling is particularly difficult

A	10	11	12	13	14
	Plans	Key measures and weaknesses	Short term plan	Bodies	coordination
Austria	Lander yes National no	Transport, agriculture, energy, buildings	Currently no	Governors (rule) Federal minister (exception)	No but exceptionally yes
Belgium	Regional yes National no	Industries, combustibles, heating, fuel tax differentiation and incentives. 2018 low emission zones	Yes Brussels	Regional governments	Yes, during crisis
Czech	Not national, only for zones and agglomerations Public can challenge plans in administrative courts for non-compliance	Subsidies to change old boilers Low emission zones Not granting permits to prevent industrial pollution hotspots	No, but measures are adopted: slowing down factories and interdicting traffic during crisis (effective tool)	National (Minister of the env.) and regional (air protection authorities)	Yes, between air and building authorities
Denmark	1 for NOx in Copenhagen	Plans are not binding	no	EPA	No but some coordination with building sector
France	Yes. National interministerial plan on the reduction of atmospheric pollutants emissions	Public aid (vehicles, households), taxation and restrictions (transports), regulations (agriculture)	Not but the government was called by the Court to take all necessary measures	National (Ministry of ecological transition) and Regions (prefet)	
Germany	161 AQP	Older cars are not allowed in inner cities ("Environmental zones"). Courts ordered authorities to ban traffic in inner city Ridicule measures (driving restrictions on single streets)	Several in force (measures: banning heavy traffic from environmental zones")	Regional states (Lander) But can delegate in municipalities	Yes with traffic and city planning authorities
Greece	no	BAT not observed by powerplants, tax incentives for renewables in heating, financial incentives to replace old cars, public transport	yes	Central (min. env.) and regional	no
Hungary	Yes for PM10	Residential yard waste burning strictly forbidden Smog alert	Yes but some were inexecutable	Minister of env., National Transporta authority, local authorities and Mayors	yes
Ireland	No	3 general laws Residential heating with coal ban in cities and larger towns	No	Department of agriculture, environment, culture EPA, local authorities	yes
Italy	Not national Several regional for the areas with detected exceedances	Transport, industry	No	State (Ministry of the env.) Regions Mayors (urgent deliberations)	Permanent coordination team
Latvia	Only one regional plan (Riga)	Traffic (no clean air zones yet), public transport (electrification), cycling, centralized heating, industry, ports, management	no	Shared competence Minister env+local governments	no

B	10	11	12	13	14
	Plans	Key measures and weaknesses	Shortterm plan	Bodies	coordination
Norway	National guidelines Local plans	Economic incentives (exemptions of road tolls and taxes for electric cars and subsidies for fireplaces), lowering speed limits, electricity for ships I ports, Industrial permits	no	Central government (3 ministries: env. Health, transport) and delegation of power to municipalities	General governance rules
Poland	Yes national and regional	Restrictions of solid fuels for heating, clean air zones, paid parking zones, low emission public transport, cycling, fees for industrial exceedances. Too general regulations No deadlines for benzopyrene Remedial actions are insufficient Several other weaknesses	yes	Central (Minister for Env., for energy, for technology, Environmental inspectorate) Regional (voivodships) Local (community heads)	some
Portugal	Yes, national and autonomous regions	Several measures to address monitoring, emissions, governance, research. Geographic and meteorological peculiarities Taxes on fossil fuels, reduces emission areas (in paper) electric vehicles. No execution schedule,	No but they should have been produced	Competent authorities at national (for plans and inspections) and regional level (plans and monitoring)	In theory yes, in practice no.
Spain	yes	Taxes, traffic, agriculture, residential, industrial	yes	national and autonomous regions	Si (art 6)
Sweden	no	Municipal, regional and national authorities	
Switzerland	Action plan elaborated by cantonal authorities	Stage 1 preventive limitations: Requirements for industrial installations, and for secondary emissions (shopping centre, sports stadium) limited parking places, mobility pricing. Stage 2 excessive emissions (action plan) Further instruments	Doesn't exist	Confederation has legislative competence Cantons have enforcement competence	Yes. Intercantonal cooperation fostered by an association of experts and academia (Cerle'Air)
Netherlands	Yes	Air quality improved due to the plan. Prevent traffic in inner cities. Measures on poultry farming. Lots of regulatory measures on traffic, electric buses	Yes if risk of smog	Central government and local	yes
Turkey	No. Only 7 regional AQ plans (2010-2013)	Promotion of renewables and natural gas, bicycle roads, reduced tax for electric vehicles,	No	Ministry of the env. Provincial directorates	Yes...
UK	yes	Clean air zones, ultra low emission vehicles, upgrading bus fleets, walking and cycling strategies) Disproportionate responsibility of local authorities. Not consider costs, proportionality, obligation to adopt measures to make it likely (not possible) to achieve results. Ban solid fuels, Ultra low emission zones,	no	Secretary of state + local authorities	No

A	15	16	17	18	19
	enforcement	Court cases	challenges	vehicles	manufacturers
Austria	Restrictive system based on subjective rights 2018 ENGOS can as well	yes	n.a.	Federal competence Sanctions are applicable	Authorities no Court cases mostly unsuccessful. A few successful cases
Belgium	Administrative and criminal	yes	Undefined legal status of plans	General sanction provisions are applicable	2016 Consumer org. class action against VW (pending, agreement)
Czech	Administrative liability, also criminal (gross negligence cases)	Yes Supreme Adm C for annulment of a plan and won	Transboundary pollution (Poland) Vehicle checks	Yes, but legislation is not strict	Some pending actions (private owners against manufacturers)
Denmark	Enforcement only of private emissions and IPPC infringements	No (NGO's self-restraint, they prefer other methods for influencing)	Air quality plans are "environmental demands without an addressee"		No
France	Similar to other areas of environmental law	NGOs and doctors suing the State for failure to give effect to previous judgement		Responsibility for conformity tests shifted from private to public. Independent committee for real time emissions	2 Judicial investigations
Germany		Numerous. Several on driving bans. In others, authorities were fined. Preliminary ruling asking if jail in mandatory for administrators (pending)	(11b) Can economic aspects be taken into consideration?	There was implementation but not regarding criminal sanctions (for fraud). Commission started infringement proceedings in 2016	50000 cases related with the diesel gate. Decision on whether vehicle approval expired due to defeat devices, by the Federal Court is expected.
Greece	Administrative fines (only in theory) Criminal sanctions	Council of State uphold the decision of the Ministry of Environment to reject the application of an industry to change natural gas to petcoke.	Insufficient staff No comprehensive data covering all the territory		
Hungary	Environmental authorities can enforce, Governmental authorities, NGOs and indiv, ombudsman for future generations can initiate processes	Yes, NGO against public authorities. Criminal judgements for burning waste	Burning low quality lignite for heating should be forbidden	Transposed. No controversies	no
Ireland	Local authorities and EPA can prosecute	yes	Lack of consistency in enforcement. Limited resources at the local level	Transposed	1 case (individual owner of a VW car against the manufacturer)
Italy	Regions			2017 infringement procedure (Fiat Chrysler)	Legal measures (certification withdrawn, fines)
Latvia	Local plans and permits	Few cases of industrial operators challenging mitigation measures	Height of individual behaviours (preference for private cars). Not a priority policy. Authorities don't act.	(no information)	No action

B	15	16	17	18	19
	enforcement	Court cases	Challenges	vehicles	manufacturers
Norway	Central instructions and long-term local plans	no	No tradition of enforcement of public policy in court	Technical standards and not regulations	no
Poland	Both operators and authorities can be fined if inspections reveal failures Also, criminal and civil liability	Resident against the State Treasury. Compensations were granted. Resident against the State Treasury, dismissed, appeal, (pending)	Not possible for individuals or NGOs to challenge programs.	transposed	No disputes
Portugal	Administrative sanctioning	no	...	Transposed no	Consumer NGO alerted consumers but no measures
Spain	Authorizations, inspections, fines	2018 Ecologistas en acción v. government Audiência Nacional (pending) Several judgements in the courts of autonomous communities	No political will, (Q8) broad inconsequential measures	2007 collective lawsuit against VW by consumers NGO. Individual cases: 9 dismissed. 1 accepted (5000€ compensation to the consumer)	Audiência Nacional transferred the case to German courts
Sweden		2011 NGO v. city of Stockholm PM10	Plans are merely programmatic	Discussed, not proposed yet	General legal means are available (criminal-fraud, civil remedies, compensations)
Switzerland	Conditions in permits Contraventions	Courts leave room for political discretion. There are cases	Smaller cantons have less resources. Cantonal plans need to review measures on agriculture and transport.	Implemented to mirror EU law	NGO representing 6000 consumers filed a declaratory action against VW and importers, but the court denied the interest of the complainants.
Netherlands	No judicial review of absence of effective Air Q plans. General administrative enforcement for projects (permits, zoning schemes)	2017 - 2 cases of NGOs against the state (rejected) 2018 – Amsterdam residents against secretary of state	Does the plan provide enough ways to achieve AQ? Money has been affected to the implementation	no	no
Turkey	Monitoring, inspections, administrative penalties (including compensation for clean-up damages), and criminal	Council of State upholds the decision of the administration to impose the use of natural gas although not mandatory according to the wording of the regulation	Lack of technical capacity, objectivity impartiality.	Surveillance system	Several measures (withdrawal of product and of certification)
UK	Difficult implementation, expensive policing, low public acceptance, diffuse responsibility for air.	3 brought by Client Earth	Budget, coordination, and time (aiming at "shortest time can be counterproductive).	Regulations to punish manufacturers.	No.

AUSTRIA

Avosetta Questionnaire: Air Quality Law

London 24-25 May 2019

Answers for Austria by Verena Madner*

Most of the questions below relate to implementation of the EU Ambient Air Quality Directive (Directive 2008/50/EC [2008] OJ L152/1, 'AQD'), looking beyond direct transposition to actual implementation and the legal and structural challenges in meeting EU air quality standards. Some questions extend beyond the AQD to examine other controversial or emerging aspects of EU law relating to air quality.

Please spend more time answering questions that are particularly relevant to the experience in your Member State.

Please answer these questions in maximum 8 pages (not including the questions), which may require being succinct with some answers. We can flesh out any points further in our discussion when we meet in London.

Please return your answers to Eloise Scotford (eloise.scotford@ucl.ac.uk), along with your short report on national environmental law developments over the last year, by **1 May 2019** in time for preliminary analysis and advance circulation to other attendees.

Air Quality: National Context

1. What are the main sources of unlawful levels of air pollution in your Member State?

The most problematic air pollutants in Austria are NO₂ and PM₁₀. For these air pollutants, the main source is road traffic, and more specifically diesel cars which make up a high percentage of the motor vehicles on the market. In fact, it is in particular areas in proximity to highways but also urban areas which are exposed to traffic (rush-hour routes etc).²

Overall, the situation for PM₁₀ has slowly improved over the past few years. However, exceedances of the limit values still occur occasionally due to specific weather conditions (e.g. thermal inversion in basins during winter, especially in Graz).

For other air pollutants such as SO₂, the main source here is local industrial emissions.

2. How extensive is reported non-compliance with AQD air quality standards in your Member State?

* I would like to thank Birgit Hollaus LL.M for the valuable support and research assistance. I would further like to thank Niklas Hartmann LL.B, Evelyn Pleschberger LL.B and Klaus Wolfsgruber for their helpful research assistance.

² Environment Agency Austria, *Jahresbericht der Luftgütemessungen in Österreich 2017* (2018) p. 7, available at <<http://www.umweltbundesamt.at/fileadmin/site/publikationen/REP0643.pdf>> accessed 15 May 2019.

In 2017, exceedances of the following air quality standards (ADQ) were reported:³

- PM₁₀: the exceedance of the limit value (daily averaging period) was determined at 2 sampling points
- NO₂: the annual average limit value of 40 µg/m³ was exceeded at 11 sampling points

Further exceedances of more stringent national air quality standards⁴ were reported as well:

- NO₂: the annual average of 30 µg/m³ was exceeded at 28 sampling points
- SO₂: the limit value criterion (200 µg/m³) was exceeded once
- Benzo(a)pyrene: the annual average of 1 ng/m³ was exceeded at one sampling point
- Lead: the limit value was exceeded at 2 sampling points

For AQD air quality standards, please refer to AQD, Articles 12-19.

Please refer to data either reported to the Commission or otherwise available in your Member State. It may be easiest to set this information out in a table for different standards for certain pollutants (NO₂, PM₁₀, PM_{2.5}, SO₂ are likely to be the main pollutants for which there may be reported non-compliance with AQD standards).

- a. If data on compliance with air quality standards is incomplete, please indicate the extent of the non-compliance with requirements of Article 26 AQD (public information requirements).

The Federal Environmental Agency (UBA) reports to the Commission and the European Environmental Agency in accordance with the reporting requirements under the AQD, and draws up annual reports in accordance with national reporting requirements. The reporting obligations are always met on time, and the reports are made available to the public online.⁵

3. Have EU infringement proceedings been brought against your Member State for failure to comply with the AQD?
 - a. If so, what was the outcome of this enforcement action and its impact on air quality law and policy in your Member State? (If enforcement action is ongoing, answer this question as best you can in terms of the effects of this action on your Member State's approach to air quality law and policy.)

³ Environment Agency Austria, *Jahresbericht* p. 8, available at <http://www.umweltbundesamt.at/fileadmin/site/publikationen/REP0643.pdf> accessed 15 May 2019.

⁴ See below, question 6.

⁵ See http://www.umweltbundesamt.at/umweltsituation/luft/luftguete_aktuell/jahresberichte/. In addition, the Laender also produce reports annual reports regarding air quality within their territory.

In 2009, the Commission opened infringement proceedings against Austria in view of exceedances of fine dust limit values (PM₁₀), especially in Graz.⁶ Due to an improvement of the situation regarding fine dust, the case was closed in 2015.

In 2016, the Commission launched infringement proceedings against Austria in view of the exceedance of the annual limit value for nitrogen dioxide (NO₂, limit value for the protection of human health per year: 40 µg/m³) at eleven sampling points.⁷ The infringement case is still active, however no reasoned opinion has been served yet.

Air Quality Standards

4. Was there pre-existing national law relating to air quality standards (similar to the AQD), or did the AQD introduce something new in your country?

Prior to the harmonisation of air quality law at EU level, there was not law in Austria that would set out air quality standards to be achieved within the Austrian territory. Rather, the topic of air pollutant emissions was dealt with in permitting procedures for different air pollutant sources such as industrial installations.

With Austria's accession to the EU, the then Air Quality Framework Directive 96/62/EC gave reason for a new law explicitly dedicated to air quality standards.

5. How are AQD air quality standards implemented in law in your Member State?

The air quality standards of the AQD were essentially implemented in the Austrian Air Pollution Control Act (IG-L),⁸ a federal law which is executed by the Laender. Standards for ozone are laid down in the Ozone Act.⁹ The Air Pollution Control Act refers for the purpose of ozone to the Ozone Act.

The obligation to develop an air quality programme (air quality plan according to Art 23 AQD) lies with the Governors of the nine Laender as the competent authority.¹⁰ The air pollutants to be addressed in the air quality programme are PM_{2.5}, PM₁₀, NO₂, SO₂, arsenic, cadmium, nickel and benzo(a)pyren. § 9a(1)(5) IG-L specifies which values are to be observed respectively. In addition, the programme must take into account i.a. the Ozone Act and any plans or programmes put into place according to that law.

Every air quality programme under the IG-L must i.a. set out any measures, which shall be taken in case of an exceedance of limit values. In case of an exceedance of limit values, the competent public authority must then order any measures set out in the air quality

⁶ Infringement case No 20082183.

⁷ Infringement case No 20162006.

⁸ Immissionsschutzgesetz Luft (IG-L), Federal Law Gazette I 1997/115, last amended by Federal Law Gazette I 2018/73.

⁹ Ozongesetz, Federal Law Gazette 1989/39, last amended by Federal Law Gazette I 2003/34.

¹⁰ § 9a IG-L.

programme which the authority deems necessary for keeping exceedances 'as short as possible'.¹¹ This order takes the legal form of an ordinance ('air quality measure ordinance').

6. Does any law in your Member State provide for air quality standards that go beyond those set out in the AQD, imposing any more stringent standards, for example, in relation to PM_{2.5}?

The Austrian legislator chose to go beyond certain requirements of the AQD in implementing the latter's air quality standards:¹²

- The limit value for sulphur dioxide (one-hour averaging period) must not be exceeded on any day in a calendar year whereas the AQD permits its exceedance up to 3 times in a calendar year.
- The limit value for nitrogen dioxide (calendar year averaging period) is 30 µg/m³ whereas the respective limit value in the AQD is 40 µg/m³. In addition, the limit value relating to the one-hour averaging period must not be exceeded at all. In contrast, the AQD would permit its exceedance up to 18 times in a calendar year.
- Furthermore, Austrian law only permits the average emission limit value for PM¹⁰ (one-hour averaging period) to be exceeded 25 times in a calendar year whereas the AQD permits its exceedance up to 35 times in a calendar year.
- Regarding arsenic, cadmium, nickel and benzo(a)pyrene, while the respective Directive includes target values only, the Austrian implementation incorporates them as limit values.

However, even though certain aspects of the Austrian implementation are more stringent than what the AQD requires, these aspects are not enforceable at national level. The respective obligations for the public authorities with regard to air quality programmes refer explicitly to the standards set by the Directive. Only with regard to these standards, individuals and environmental organisations (eNGOs) have access to legal remedies.¹³

Air Quality Monitoring and Modelling

7. How are air quality monitoring networks set up in your Member State (briefly)? Do these go beyond the monitoring requirements set out in Chapter II AQD (eg in terms of the number and location of monitoring stations)?

In Austria, an ordinance (IG-L-Messkonzeptverordnung 2012) determines how many monitoring stations are necessary within the Austrian territory, and indeed in each federal

¹¹ §§ 10 to 13 IG-L.

¹² See § 9a(1) IG-L.

¹³ See below, questions 15-17.

state (Land) in view of each air pollutant. Due to the national topography, there are far more monitoring stations than required by the AQD.¹⁴

In Austria, the nine federal states (*Laender*) as well as the Federal Environmental Agency (UBA) operate monitoring stations. The *Laender*, on the one hand, operate monitoring stations in locations and areas with high pollution, which are mostly located in cities, larger municipalities, at traffic junctions and near industrial installations. On the other hand, UBA runs background-monitoring stations that provide information about the amount of large-scale background pollution, the expected trends of such pollution and the long-range transport of air pollutants from abroad.

8. What sort of problems are encountered in monitoring of air quality in your Member State?

Problems might include: inconsistent results given by different schemes for monitoring air quality, improper siting of measurement equipment, unreliable equipment used, no monitoring established in key areas, unconfirmed results etc.

All data collected and analysed within the monitoring network is based on quality assurance. The air quality monitoring network works well and has a high standard. However, I understand that the siting of monitoring stations appears to be a controversial topic as occasionally, the exact siting may not be ideal for accurate monitoring, e.g. for local and ground level air pollutants.

9. As far as you can determine, are there limitations or problems with the modelling techniques used in your Member State to assess air quality (where modelling is permitted as a method for assessment under Chapter II AQD)?

n.a.

National Air Quality Plans and Governance

10. Does your Member State have a national Air Quality Plan under Article 23?

In Austria, the obligation to develop an air quality plan within the meaning of Article 23 AQD lies with the *Laender* ('air quality programme').¹⁵ Hence, each of the nine *Laender* is required to draw up such an air quality programme.

To date, in all of the nine *Laender* an air quality programme exists. There is, however, no national air quality programme. For the purpose of the following questions, I thus use the example of Styria to illustrate the system.

¹⁴ For details on these monitoring stations see the recent report of the Environment Agency Austria, *Luftgütemessstellen in Österreich* (2017) p. 9 et seqq., available at <<http://www.umweltbundesamt.at/fileadmin/site/publikationen/REP0607.pdf>> accessed 15 May 2019.

¹⁵ § 9a IG-L.

- a. If so, to which pollutants does the plan relate (eg NO₂ or PM₁₀) and what **key** measures does the plan outline to keep exceedances 'as short as possible'? *Please also indicate if you think there are any **weaknesses** in the plan.*

In Styria, used here as an example for one of the nine Laender, the air quality programme was last amended in 2014 to extend its scope to PM₁₀ and nitrogen oxide (NO_x). The current programme thus relates to PM_{2.5}, PM₁₀, sulphur dioxide (SO₂), benzol and benzopyrene.¹⁶

This air quality programme refers to various measures deemed suitable for keeping exceedances as short as possible. These measures relate to different sectors (sector-specific measures):¹⁷ For the transport sector, for example, the programme refers to measures such as driving restrictions for older trucks, the amendment of procurement rules, measures to support and incentivise public-bicycle usage, pedestrian traffic and e-mobility. In the field of agriculture, the programme refers for example to measures on manure management. For the energy and building sectors, measures such as the renewal of district heating networks and subsidies for building refurbishments are mentioned.

Some of the measures referred to in the programme have already been operationalised by means of an ordinance, e.g. speed limits on the highway A 2 and highway A 9, restrictions for bonfires, driving restrictions for older trucks, restrictions on the use of fuel oil, the storage of manure and the usage of manure.¹⁸

- b. If your Member State has such a plan, how is the legal requirement of keeping exceedances 'as short as possible' satisfied? *Please outline any challenges (legal or otherwise) in meeting this requirement in your Member State.*

To be discussed at the meeting as I do not fully grasp the question.

11. Whether or not your Member State has an Air Quality Plan, please outline the **key** national regulatory measures that contribute towards compliance with EU air quality standards in your Member State.

The Austrian Air Pollution Control Act refers to several measures which the competent Laender could put into effect as part of their air quality action, e.g.

- measures for industrial installations (requirement to use low-emission fuels, restrictions or prohibitions on the use mobile appliances with high specific emissions);¹⁹

¹⁶ For more detail see <http://www.umwelt.steiermark.at/cms/beitrag/12140060/69765542/>.

¹⁷ For more details see Amt der Steiermärkischen Landesregierung, *Luftreinhalteprogramm Steiermark. Maßnahmenkatalog* (2014), available at <http://app.luis.steiermark.at/berichte/Download/Fachberichte/LRP_Steiermark_Nf2014.pdf> accessed 15 May 2019.

¹⁸ Ordinance of the Governor of Styria on air quality measures, Styrian Law Gazette 2/2012, last amended by Styrian Law Gazette 11/2018.

¹⁹ § 13 IG-L.

- measures for motor vehicles (speed limits or temporal and territorial restrictions on traffic, labelling of motor vehicles according to their emission standards);²⁰
- measures for substances and their preparations, and products (restrictions on use)²¹
- permitting requirements for industrial installations which are capable of emitting significant amounts of air pollutants²²

12. Has your Member State ever issued a Short-term Action Plan under Article 24? If so, please outline any notable features of the plan or aspects of its implementation (briefly).

Currently, there is no action plan in place in any of the nine Laender. However, an ordinance specifies what measures such a plan may include.²³

13. Which public bodies have legal responsibilities for meeting air quality standards in your Member State?

In order to achieve the air quality objectives, the Governors of the nine Laender (Landeshauptmann) are required to draw up an air quality programme for their respective territory,²⁴ and to pass appropriate measures based on this programme in order to keep any exceedance of air quality standards as short as possible.²⁵ Under specific circumstances, also the federal minister can pass such measures.²⁶

14. Are there any legal requirements for different public bodies who have control over different air pollution sources to coordinate their efforts in any way to work towards air quality standards? (For example, different regulators may control highways, airports, local urban planning decisions, large industrial installations, and so on.)

An air pollution source such as a highway or an industrial installation would need a permit for its operation. While it might be necessary to obtain multiple permits from different authorities,²⁷ e.g. the nature protection authority in view of impacts on a protected area and the water protection authority in view of impacts on the water quality of a surface water body, the topic of air pollutant emissions would be dealt with by only one authority. This authority would then also be competent to ensure emission limits are observed. There is no thus requirement of these multiple permitting authorities to coordinate their efforts.

²⁰ §§ 14, 14a IG-L.

²¹ § 15 IG-L.

²² § 16 IG-L.

²³ Ordinance of the Federal Minister for Agriculture, Forestry, Environment and Water Management regarding the action plan under the Air Pollution Control Act, Federal Law Gazette II 207/2002.

²⁴ § 9a IG-L.

²⁵ §§ 10 et seqq. IG-L.

²⁶ § 10(1) IG-L.

²⁷ For undertakings falling within the scope of the EIA and the IPPC Directive, such as certain highways and large-scale industrial installations, Austria opted for a concentrated procedure in its national laws. Hence, one single authority applies all laws relevant to the undertaking and issues one single permit.

However, the Air Pollution Control Act requires the public authorities competent to draw up air quality programmes, i.e. the Governors of the Laender, to work together in one specific scenario.²⁸ In case exceedances of the limit value for the same air pollutant have occurred in several Laender, the Governors of those Laender are required to draw up a joint air quality programme in order to ensure compliance with the limit values; this is particularly relevant with respect to highways which of course cross the borders of the Laender. Specifically, this programme should be drawn up in cooperation with the Governor of the federal state, from whose territory the emissions which contributed significantly to exceeding the limit values originated.

Enforcement of Air Quality Law

Preliminary remarks and background for Austria

The Austrian legal system is a rights-based system. For the present situation, this is significant as legal remedies are available to individuals (only) for the protection of their subjective-public rights. Such rights are either explicitly identified in the applicable law,²⁹ or they can be deduced from a norm where it is conceived to not only protect the general public ('Schutznorm').³⁰

The legal remedies available for defending subjective-public rights relate to the legal form in which a public authority can act according to constitutional law.³¹ This is either by a decision, an ordinance or by a direct exercise of administrative power of command and enforcement. Where the act of a public authority cannot be classified as either of these legal forms, there is no legal remedy unless explicitly provided for in the law.³²

Furthermore, the legal remedy relating to ordinances is quite restrictive. Here, the Constitutional Court as the sole competent court assesses, under specific circumstances, an ordinance upon application of an individual in view of it being contrary to the law.³³ If there is however no ordinance, i.e. a public authority was under the legal obligation to issue one but has failed to do so, a right of an individual to ask for this ordinance does not exist.³⁴

These legal circumstances have created significant problems in the context of Austrian air quality law where it sought to implement EU law. I will outline these problems below.

15. What is the primary mode for enforcing of air quality law in your Member State?

²⁸ § 9a(5) IG-L.

²⁹ E.g. Neighbour rights in Viennese building and planning law, §134a Wr BauO, Viennese Law Gazette I 1930/11, last amended by Vienna Law Gazette I 2018/69.

³⁰ Grabenwarter and Fister, *Verwaltungsverfahrenrecht und Verwaltungsgerichtsbarkeit* (5th edn, Verlag Österreich 2016) 25; Raschauer, *Allgemeines Verwaltungsrecht* (4th edn, Verlag Österreich 2013) mn 1093.

³¹ Öhlinger and Eberhard, *Verfassungsrecht* (11th edn, facultas 2016) mn 81a.

³² Article 130(2) Federal Constitutional Law (B-VG), Federal Law Gazette I 1930/1, last amended by Federal Law Gazette I 2019/14.

³³ Art 139(1) and (3) B-VG.

³⁴ Öhlinger and Eberhard, *Verfassungsrecht* (11th edn, facultas 2016) mn 1004a.

In each of the nine Laender, the competent public authority is under the obligation to develop an air quality programme for its territory (air quality plan according to Art 23 AQD).³⁵ This programme i.a. sets out any measures, which shall be taken in case of an exceedance of limit values. The legal form of this programme is disputed,³⁶ hence it was unclear whether and which legal remedy would apply.

In case of an exceedance of limit values, the competent public authority must then order any measures set out in the air quality programme which the authority deems necessary for keeping exceedances 'as short as possible'.³⁷ This order takes the legal form of an ordinance ('air quality measure ordinance'), for which legal remedies are limited.³⁸ A right to ask for an ordinance to be issued does not exist.

Despite this challenging situation, individuals and indeed environmental organisations have tried to enforce EU air quality standards in Austrian courts. Until 2015, individuals have remained unsuccessful in their attempts though.³⁹ Then, finally, the deciding Court acknowledged that in certain situations, EU law requires the Austrian legal system to be less rigid when it comes to legal remedies for the protection of rights granted to individuals by EU law.⁴⁰ In view of the CJEU's findings in *Janecek*,⁴¹ EU air quality law would be such a case. Hence, the Austrian Administrative Court (VwGH) found that individuals can file an application for an air quality measure ordinance to be issued. Where the competent authority finds that it is not under the obligations to issue such an ordinance, for example because the limit values are not exceeded, it must issue a decision in that regard. This decision can then be challenged before the administrative courts within the existing system of legal remedies.

Recently, and in view of further developments in the case-law of the CJEU,⁴² the Austrian legislator amended the Austrian Air Pollution Control Act and included certain legal remedies for individuals and environmental organisations in the act.⁴³

With this amendment, eNGOs now have the right to ask for the revision of an air quality programme,⁴⁴ and for the revision or the passing of an air quality measure ordinance which

³⁵ § 9a IG-L.

³⁶ Potacs, 'Subjektives Recht gegen Feinstaubbelastung' [2010] ZfV 874, at 875.

³⁷ §§ 10 to 13 IG-L.

³⁸ Article 139(1) and (3) B-VG.

³⁹ E.g. A citizen in Lower Austria was not successful to introduce an arrangement of sufficient fine dust measuring network, see VwGH, Judgment of 26 June 2012, Ra 2010/07/0161. For environmental organisations, it took even longer, despite the CJEU's findings in *ClientEarth*, see VwGH, Judgment of 19 February 2018, Ra 2015/07/0074. For the Austrian legal system, the main challenge here was to reconcile the concept of subjective-public rights with organisations instead of individuals. See further Alge and Rametsteiner, 'VwGH stärkt Rechtsschutz durch Aarhus-Konvention und EuGH-Rechtsprechung' [2018] RdU 137.

⁴⁰ VwGH, Judgment of 28 May 2015, Ro 2014/07/0096.

⁴¹ Judgment of 25 July 2008, *Janecek*, C-237/07, EU:C:2008:447.

⁴² For a more detailed account, see the report on recent developments in Austria submitted for the 2019 Avosetta meeting.

⁴³ Aarhus Participation Act (Aarhus-BeteiligungsG), Federal Law Gazette I 2018/73.

⁴⁴ § 9a(1a) IG-L.

puts air quality measures into effect.⁴⁵ Where the competent authority finds the conditions for this right are not fulfilled, it is required to issue a decision to the eNGO against which the latter has access to a legal remedy.⁴⁶

16. Have there been court cases concerning the enforcement of air quality law in your Member State? *Please outline major cases or themes in key cases only.*

- VwGH (Administrative Court), Judgment of 26 June 2012, 2010/07/0161: In this case, the individual requested for one, the putting into place of a sufficient fine dust measuring network, and the drawing up of an adequate air quality programme for Lower Austria. However, the individual was deemed not being directly affected by the exceedance of the limit value as i.a. the request related to the entire territory of Lower Austria.
- VwGH (Administrative Court), Judgment of 19 February 2018, Ra 2015/07/0074: In this case, the court found, referring i.a. to the CJEU's findings in the *Protect* case, that non-governmental organizations promoting environmental protection (and individuals who are deemed to be directly affected) have the legal right to file an application in matters of air quality law.
- VwGH (Administrative Court), Judgment of 28 May 2018, Ro 2014/07/0096: In this case, the court found that for the protection of rights granted to individuals by EU law, these individuals can file an application for the issuing of a new air quality programme or the amending of an existing one, despite such a right not being enshrined in national law.
- VwGH (Administrative Court), Court order of 3 October 2018, Ra 2018/07/0359: This case refers to the preliminary reference procedure *Craynest*⁴⁷ currently pending before the CJEU. The Austrian proceedings have thus been stalled until the CJEU's ruling. In this Austrian case, the court is required to assess to what extent the siting of monitoring stations is subject to the control of national courts. The second question at the heart of this case is when exactly a limit value is 'exceeded'. Is this already where an exceedance has been established on the basis of data from one single monitoring stations or it is only when an exceedance becomes apparent based on the average of data from all monitoring stations in a specific zone?

17. Please outline any other major challenges faced in your Member State for enforcing the AQD, or any other applicable air quality law.

n.a.

A Controversial Source of Air Pollution: Regulation of Vehicle Emissions Systems

Many Member States are currently subject to infringement proceedings by the Commission in relation to vehicle type approval rules. This is currently prescribed under Framework

⁴⁵ § 9a(11) IG-L.

⁴⁶ § 9a(12) IG-L.

⁴⁷ Request for a preliminary ruling, *Craynest*, C-723/17.

Directive 2007/46/EC establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles [2007] OJ L263/1 and Regulation (EC) No 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 [2007] OJ L171/1.

Amongst other things, this legislation requires Member States to have 'effective, proportionate and dissuasive' penalty systems in place to deter car manufacturers from illegal practices, such as installing defeat devices. This legislation was overhauled in 2018 by Regulation (EU) 2018/858 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC [2018] OJ L151/1, which will apply from 1 September 2020.

18. How has your Member State implemented these EU vehicle type approval rules?
Have there been any controversies in transposing these rules?

Issues of motor traffic fall within the legislative competence of the federal legislator.⁴⁸ The Framework Directive was implemented by an amendment to the Motor Vehicle Act⁴⁹ and relating statutory instruments. In doing so, it provides for the technical characteristics of vehicles, the procedure for their approval and their admission to traffic, largely by referring to the Framework Directive or the relating Regulation (EC) No 715/2007.

In short, in Austria, EC type-approvals of motor vehicles are granted by the Federal Minister for Transport, Innovation and Technology (BMVIT) as the competent authority.⁵⁰ The detailed rules concerning the information document, the procedure, the quality assurance, the checks to be carried out and the specific EU directives to be complied with as well as the content of the EC certificate of conformity are laid down in an ordinance.⁵¹

Individual approvals for vehicles of categories M, N and O falling within the scope of Directive 2007/46 are granted by the Governors of the Laender (Landeshauptmann).⁵²

The obligations of manufacturers (Article 5 of the Framework Directive) are incorporated in § 28c KFG. § 33(6a) KFG prohibits changes to emission-related components of a vehicle which may impact on their characteristics or their effect on emissions performance. In addition, the placing on the market, the making available on the market, the offering and the promoting of defeat devices, defeat strategies or objects to deactivate or manipulate emission control devices are prohibited. The same is true with regard to the deactivating, removing or otherwise modifying of emission control devices that may reduce their effectiveness. The provision explicitly refers to the offering or the promoting of unauthorized chip tuning.

⁴⁸ Article 10(9) B-VG.

⁴⁹ Kraftfahrzeuggesetz (KFG), Federal Law Gazette 267/1967, last amended by Federal Law Gazette 19/2019.

⁵⁰ § 28a KFG.

⁵¹ § 28a Abs 4 KFG.

⁵² § 31a KFG.

In case of a violation of § 33(6a) KFG, the competent authority can impose a fine of up to EUR 5000 or, in the event of default thereon, of up to six weeks' imprisonment.⁵³ Specifically, in case of an infringement of the provisions of Regulation (EC) No 715/2007 by a manufacturer or by the authorized representative of the manufacturer, the competent authority can impose a fine of up to EUR 5000 or, in the event of default thereon, of up to six weeks' imprisonment.⁵⁴

19. What legal measures have been taken in your Member State (if any) against car manufacturers which have failed to comply with vehicle type approval rules? *These legal measures might include court cases, including between car buyers and manufacturers.*

There is no information available as to whether or indeed how often the competent authority under the KFG has imposed fines on car manufacturers in Austria based on § 134 KFG.

However, the civil courts in Austria have seen several cases between car buyers and (German) car manufacturers or (Austrian) car dealers in view of defeat devices in diesel cars. In these cases, some car buyers attempted to challenge the respective purchase contract as it had only been concluded as a result of deceit on behalf of the other party (wilful deceit), and to claim damages. Other car buyers relied on a warranty claim before the courts as the car with the defeat devices would not dispose of the 'required characteristics'.

However, the case law emerging from these cases is quite casuistic, and predominantly dismissing the claims of car buyers.⁵⁵ The following problems can be identified:

- The Supreme Court has denied a causal link between the effects of the defeat device and the car purchase in a case against the shareholder of the (German) car manufacturer. Hence, the conditions for a damage claim based on wilful deceit were not fulfilled.⁵⁶
- Courts have also refused to accept that a certain emission standard would constitute a 'required characteristic' of the purchased car.⁵⁷ Hence, there was no basis for a warranty claim. Other courts have denied a warranty claim as the car buyers had not given the car dealer the opportunity to exchange or repair the car.⁵⁸

However, there have also been a few successful cases in which the respective courts acknowledged that the higher emission standards (i.e. emission without defeat device) would not be a 'negligible defect' and, as a repair of the car/its exchange would be

⁵³ § 134(1) KFG.

⁵⁴ § 134(1a) KFG.

⁵⁵ 'OLG-Urteil zur Abgasaffäre: VW-Käuferin erhält Kaufpreis zurück' (*kurier.at*, 8 November 2018) available at <<https://kurier.at/wirtschaft/olg-urteil-zur-abgasaffaere-vw-kaeuferin-erhaelt-kaufpreis-zurueck/400317897>> accessed 15 May 2019. See further Buchleitern, 'Abgasskandal: Gewährleistung oder Irrtum oder doch beides?' [2019] *ecolex* 300.

⁵⁶ Supreme Court (OGH), Judgment of 18 July 2018, E5Ob62/18f.

⁵⁷ Regional Court (LG) Wels 26Cg4/16s; LG Wels 26Cg181/15v.

⁵⁸ Higher Regional Court (OLG) Linz, 1R105/16s.

unreasonable, ordered the rescission of the purchase contract and accorded damages.⁵⁹ Here, the car buyers could prove that their intention was to buy an environmentally-friendly car, hence the courts took the position that the specific emission standard was a required characteristic of the purchased good.

As the Austrian legal order does not provide for a class action, motorist associations and consumer associations have recommended Austrian car buyers to subscribe to the declaratory action initiated in Germany.

Case Study

Martha is living in an urban area in your Member State, and her children have developed asthmatic symptoms (i.e. a diagnosed respiratory illness). She becomes aware that the local air quality exceeds standards laid down in the AQD. Her house is next to a main road, which is a heavily used bus route on which bus operators use diesel vehicles. The town also has a number of industrial plants, a coal-fired power station, and a number of intensive farms. It is unclear to her precisely which pollution source is causing the breaches of air quality standards, or what their respective contributions might be to the local air quality problem.

What sort of legal action could Martha take in your Member State? And against whom? What remedies do the courts possess? What are the financial implications of bringing such a case? Might there be other regulatory avenues available to Martha instead?

Preliminary remarks

According to the facts of the case, it is not Martha but her children who experience impacts on their health as a consequence of the exceedance of air pollutant limit values. For minors, parents or legal guardians can generally exercise rights accorded to the first by the law. However, depending on the legal remedy, or indeed, whether it is a civil or public law procedure, there may be specific procedural requirements to fulfil. For reasons of simplicity, this is only pointed out where relevant, but is not dealt with in detail.

Option 1: Legal remedies in Austrian air quality law

See Question 15 for background information on enforcing air quality law in Austria.

Recently, and in view of further developments in the case-law of the CJEU,⁶⁰ the Austrian legislator amended the Austrian Air Pollution Control Act and included certain legal remedies for individuals and environmental organisations in the act.⁶¹ The following remarks refer to this new legal situation.

⁵⁹ OLG Wien, Judgment of 17 January 2018, 3R38/18g; LG Wels, Judgment of 18 October 2017, 22R201/17s.

⁶⁰ For a more detailed account, see the report on recent developments in Austria submitted for the 2019 Avosetta meeting.

⁶¹ Aarhus Participation Act (Aarhus-BeteiligungsgG), Federal Law Gazette I 2018/73.

Air quality programme – adequacy to keep exceedances as short as possible

The air quality programme must be reviewed every three years. During such a review cycle, anyone can submit comments to the competent authority.⁶² This would thus be an option for Martha to voice her concerns.

Further options within this regular review cycles exist for individuals who are directly affected by the exceedance of a specific limit value.⁶³ An individual is deemed being 'directly affected' by the exceedance of a specific limit value where the exceedance is having a negative effect upon the individual's health; this is to be demonstrated by the individual (prima facie evidence).⁶⁴ According to the preparatory materials, the decisive criteria here are the local and temporal exposure to the exceedance of limit values.⁶⁵ Based on the facts of the case, Martha, in representing her children, would fulfil these conditions.

Within 8 weeks of the publication of the reviewed air quality programme, individuals who are directly affected can file a request with the public authority to review the air quality measures set out in the programme in view of their overall suitability for keeping exceedances as short as possible.⁶⁶ This, however, does not provide the individual with the right to ask for specific air quality measures to be included in the programme, such as low, ultra or zero emission zones found in other countries. This would contravene the administrative discretion of the public authority.⁶⁷

Outside these regular triennial review cycles, individuals who are directly affected by the exceedance of a specific limit value can still request the review of the existing air quality programme. If the competent authority finds, however, that the legal requirements for such a review (i.e, the unsuitability of the programme for keeping exceedances as short as possible), are not fulfilled, it can reject the request⁶⁸ The individual can then challenge this decision before the respective Administrative Court of First Instance at Laender level.⁶⁹

As a rule, the Administrative Courts of First Instance decide on the merits of the case.⁷⁰ However, in the present case, the requested action would be the review of the air quality programme. This is an action not within the competence of the court. Thus, the court would annul the decision of the public authority and assert the public authority's obligation to review the programme.

Air quality measures – putting air quality measures into effect

⁶² § 9a(6) IG-L.

⁶³ § 9a(1)(5) IG-L. The air pollutants to be addressed in the air quality programme are PM_{2.5}, PM₁₀, NO₂, SO₂, Arsenic, Cadmium, Nickel and Benzo(a)pyren. § 9a(1)(5) IG-L specifies which values are to be observed respectively.

⁶⁴ § 9a(1a) IG-L.

⁶⁵ Ministerial draft law 61/ME 26.GP, 6.

⁶⁶ § 9a(1a) IG-L.

⁶⁷ Ministerial draft law 61/ME 26.GP, 5.

⁶⁸ § 9a(6) IG-L.

⁶⁹ § 9a(12) IG-L.

⁷⁰ § 28 Federal Act on Proceedings of Administrative Courts (VwGVG), Federal Law Gazette I 2013/33, last amended by Federal Law Gazette I 2018/57.

Individuals such as Martha who are deemed directly affected by the exceedance of a specific limit value can also request the competent public authority to order measures set out in the air quality programme in order to keep the exceedances as short as possible.⁷¹ Again, this does not provide the individual with the right to ask for specific air quality measures to be put into place.

If the public authority finds that the requested measures are not necessary in order to keep the exceedances as short as possible, it can reject the request.⁷² Again, the individual can then challenge this decision before the respective Administrative Court of First Instance at Laender level, which decides, as a rule, on the merits of the case. The requested action here is an ordinance. As this is outside the Court's competence, it would annul the decision in case it is found unlawful and assert the public authority's obligation to order any measures necessary for keeping exceedances as short as possible.

Costs

The requests for a review of the air quality programme or the ordering of air quality measures are governed by the General Administrative Procedure Act.⁷³ Accordingly, the individual, here Martha, is liable to bear her own costs but nothing more.⁷⁴ Most relevantly, these costs would be expenses for legal representation, if Martha chooses to be represented by a lawyer in the proceedings,⁷⁵ and expenses for a private expert witness.

There is no requirement for Martha to provide an expert opinion together with her request. However, as she has to demonstrate i.a. why the air quality measures are not adequate to keep exceedances as short as possible,⁷⁶ it is very likely that she would provide such (privately funded) technical or scientific expertise in order to substantiate her claim.

In the proceeding at the Administrative Courts of First Instance, the same principle applies: every party to the proceedings bears his or her own costs. Court fees are limited by a lump sum to be borne by whoever files the complaint with the respective Administrative Court of First Instance.⁷⁷

For judicial review procedures at the Administrative Court or the Constitutional Court, no appeal fees apply. Court fees and liability for costs in these procedures are limited by fixed lump sum amounts the losing party is ordered to bear.⁷⁸

⁷¹ § 9a(11) IG-L.

⁷² § 9a(12) IG-L.

⁷³ General Administrative Procedure Act (AVG), Federal Law Gazette I 1991/51, last amended by Federal Law Gazette I 2018/58.

⁷⁴ § 74(1) AVG. According to the preparatory work of the Act, the consequences of the loser pays principle would have a chilling effect on prospective parties of a proceeding and therefore would not contribute to an effective access to justice.

⁷⁵ In administrative proceedings, there is no requirement to be represented by a lawyer (§ 10 AVG).

⁷⁶ § 9a(1a) IG-L.

⁷⁷ Grabenwarter and Fister, *Verwaltungsverfahrenrecht* 215; Raschauer, *Allgemeines Verwaltungsrecht* mn 1389.

⁷⁸ Grabenwarter and Fister, *Verwaltungsverfahrenrecht* 215.

Legal aid is not available in administrative proceedings and in proceedings at the Administrative Courts of First Instance, except for administrative penal proceedings where legal aid is available by providing for a defence lawyer.⁷⁹

Option 2: Review of legality in view of human and constitutional rights

In Austria, the European Convention on Human Rights (ECHR) forms part of constitutional law. Hence, the guarantees of the Convention can serve i.a. as the basis for a review of legality of laws and ordinances before the Constitutional Court.⁸⁰

Martha is thus arguably in a position to claim the unlawfulness of an existing air quality measure ordinance based on an infringement of Articles 8 ECHR, and potentially Article 2 ECHR. However, in view of the ECHR's case-law on these provisions, even considering their dynamic interpretation, it appears rather unlikely that the Austrian Constitutional Court would limit the discretion of the public authority and conceive a clear obligation to act.

Option 3: Public liability claim against air quality authority

The Liability of Public Bodies Act⁸¹ provides the basis for a claim for damages to a person or to property caused by 'unlawful acts of persons at fault when implementing the law'.⁸² The issuance of an ordinance is an act of the executive and thus an act to implement the law.⁸³ If authorities fail to issue an ordinance, and thus the law is not implemented, this failure to act can amount to an 'unlawful act'.⁸⁴ Indemnity is paid in terms of money.⁸⁵

In the present case, two aspects appear quite difficult. On the one hand, the damage has occurred to Martha's children not Martha herself. The question of *locus standi* might thus need further consideration. On the other hand, and more importantly, it may be difficult to prove causation between the failure to issue an air quality measure ordinance and the asthmatic symptoms diagnosed in Martha's children.

Option 4: Complaint with the Austrian Ombudsmen

The Austrian Ombudsman Board is an independent organ at federal level.⁸⁶ Everyone has the right to lodge complaints in view of maladministration in the executive branch of the government with the Austrian Ombudsman Board after having exhausted all legal means, if there are any.⁸⁷ Based on such a complaint or indeed own its own initiative, the Ombudsman Board can investigate any form of potential maladministration, in particular alleged violations of human rights; the concept of maladministration is far broader though than

⁷⁹ § 40 VwGVG.

⁸⁰ Article 140 (1) B-VG.

⁸¹ Liability of Public Bodies Act (AHG), Federal Law Gazette I 1949/20, last amended by Federal Law Gazette I 2013/33.

⁸² § 1(1) AHG.

⁸³ Mader, in Schwimann and Kodek (eds), *ABGB Praxiskommentar* (4th edn, LexisNexis 2016) § 1 AHG mn 20 et seqq.

⁸⁴ Öhlinger and Potacs, *EU-Recht und staatliches Recht* (6th edn, LexisNexis 2017) 205.

⁸⁵ § 1(1) AHG.

⁸⁶ §§ 148a to 148j B-VG.

⁸⁷ Öhlinger and Eberhard, *Verfassungsrecht* mn 584 et seqq.

unlawfulness.⁸⁸ The Ombudsmen examine the case, make enquiries on their own, and inform the individuals concerned of the result of their efforts.

In the present case, this may be an option for Martha after having exhausted the legal remedies available in Austrian air quality law for entering into more of a dialogue with the competent authority.

Option 5: Request for stricter permit conditions regarding emissions from industrial installations

In Austria, the installations mentioned in the present case fall – mainly depending on their size in terms of capacity – within the scope of the EIA Act⁸⁹ or the Industrial Code.⁹⁰ The possibilities available to individuals affected by air pollutants from such installations are, however, identical.⁹¹

The concept of ‘neighbours’ embodied in the Industrial Code essentially refers to individuals who are living within the immission zone of industrial installations and are potentially affected by those immissions.⁹² In the present case, Martha quite clearly qualifies as a neighbour.

Neighbours can request the competent authority to issue further permit conditions for an industrial installation in case the conditions already set in the permit of an industrial installation do not protect them adequately either from a threat to their life or health, or from nuisances through noise, odours or other emissions.⁹³ In case the current permit conditions prove indeed not to be adequate, the competent authority must order further permit conditions according to the state-of-the-art in the relevant areas.⁹⁴ The competent authority has some discretion in order to observe the proportionality of further permit conditions.

Where a neighbour had not yet been a neighbour at the time of the industrial installation’s permitting but later moved to the neighbourhood (‘subsequent neighbour’), his or her rights are limited.⁹⁵ The public authority is only required to order further permit conditions in his or her favour insofar as these permit conditions are necessary to protect the subsequent neighbour’s life or health. If air pollutant emissions do not amount to such a hazardous level, but still reach a considerable degree, the competent authority is required to order

⁸⁸ Stelzer, *An Introduction to Austrian Constitutional Law* (3rd edn, LexisNexis 2014) 34.

⁸⁹ EIA Act (UVP-G), Federal Law Gazette I 1993/697, last amended by Federal Law Gazette I 2018/80.

⁹⁰ Industrial Code (GewO), Federal Law Gazette I 1994/194, last amended by Federal Law Gazette I 2018/112.

⁹¹ In Austria, the EIA procedure is conceptualized as a one-stop shop (‘concentrated procedure’). This means that in the permitting procedure, the competent authority applies all relevant laws, whether federal laws or federal state laws, environmental or others, in this one procedure. Similarly, for further obligations such as the possibility to request further permit conditions, the EIA Act refers to the relevant laws, § 21(4) UVP-G. See further Raschauer, in Ennöckl, Raschauer and Bergthaler (eds), *UVP-G Kommentar* (3rd edn, Jan Sramek Verlag 2013) § 21, mn 9 ; Baumgartner and Petek, *Kurzkomentar UVP-G 2000* (Verlag Österreich 2010) § 21, 221.

⁹² Feik, ‘Gewerberecht’, in Bachmann et al. (eds), *Besonderes Verwaltungsrecht* (12th edn, Verlag Österreich 2018) 288 ff.

⁹³ § 79a(1) and § 79(3) GewO.

⁹⁴ § 79(1) GewO.

⁹⁵ § 79(2) GewO.

further permit conditions only insofar as this is reasonable and proportional with regard to the installation operator.

In either case, Martha would arguably be in a position to request further permit conditions to protect her health.

Option 6: Civil law suit against operators of installations

In view of air pollutant emissions from industrial installations, the Civil Code⁹⁶ permits a landowner to file an injunctive relief against the respective operators under two conditions: First, these emissions must exceed the normal degree of acceptability in accordance with local levels ('ortsüblich'). Second, these emissions must significantly impair on the usage of the landowner's property.⁹⁷ Health damages, which are a consequence of such emissions, are also covered by this claim, and are in any case deemed as exceeding the normal degree of acceptability ('ortsunüblich').⁹⁸

However, in case such emissions result from installations which operate under a permit the claim is limited to a claim for damages.⁹⁹ While this appears to be an avenue open to Martha, in any case where she can exercise the rights of her children, a monetary compensation for the health damages caused to her children does not seem satisfactory.

As for costs, court fees according to 'the value of the case' (Streitwert) apply in civil law procedures. According to the loser pays principle, the losing party not only has to bear his or her own costs of the proceedings but also the "necessary" litigation costs.¹⁰⁰ What is "necessary" is based on judicial discretion, hence there is a certain degree of uncertainty about the monetary amount for which the losing party may be liable to.¹⁰¹ However, lawyer's costs are reimbursed according to fixed tariffs which somewhat limits the uncertainty.¹⁰² Nevertheless, the risk of litigation costs is higher in civil judicial proceedings than in administrative (judicial) proceedings.

Option 7: Request a diesel ban in view of diesel vehicles operated on the main route

In view of air pollutant emissions from diesel vehicles, the Austrian Air Pollution Control Act provides for various legal measures.¹⁰³ These measures include speed limits or temporal and territorial restrictions on traffic for motor vehicles, or for certain types of motor vehicles. For example, bans on older diesel vehicles emitting higher amounts of pollutants than newer models could be imposed or clean air zones could be introduced.

⁹⁶ Civil Code (ABGB), Federal Law Gazette I 1811/946, last amended by Federal Law Gazette I 2018/100.

⁹⁷ § 364(2) ABGB.

⁹⁸ Winner, in Rummel and Lukas (eds), *ABGB* (4th edn, Manz Verlag 2014) § 364 ABGB, mn 30 et seqq.

⁹⁹ § 364a ABGB.

¹⁰⁰ § 41(1) Code of Civil Procedure (ZPO), Federal Law Gazette I 1895/113, last amended by Federal Law Gazette I 2018/109.

¹⁰¹ Klauser and Kodex, in Klauser and Kodek (eds), *JN-ZPO* (18th edn, Manz Verlag 2018) § 41 ZPO, 126 et seqq.

¹⁰² Austrian Statute on Lawyers' Tariffs (Rechtsanwaltstarifgesetz), Federal Law Gazette I 1969/189, last amended by Federal Law Gazette I 2017/10.

¹⁰³ §§ 10 to 16 IG-L.

While these are options quite lively discussed in the legal community,¹⁰⁴ it must be pointed out that, unfortunately, Martha has no right to ask for specific air quality measures such as diesel bans. In case of a breach of a limit value, individuals such as Martha, deemed directly affected by the exceedance of a specific limit value can only file a request with the public authority to impose a new air quality programme, to review an existing programme or to review the air quality measures set out in a programme. It is within the margin of appreciation of the Governors of the Laender (Landeshauptmann), to choose a suitable set of measures in order to ensure compliance with the limit values and keep exceedances as short as possible.

¹⁰⁴ Klinger, 'Dieselfahrverbote – europarechtliche Vorgaben und Situation in Deutschland', in Kerschner (eds), *Jahrbuch des österreichischen und europäischen Umweltrechts 2019* (Manz Verlag 2019), 125 et seqq; Storr, 'Dieselfahrverbote - Europarechtliche Verpflichtungen, rechtsvergleichende Überlegungen und die Rechtslage in Österreich' [2019] VbR 14; Schwarzer, 'Die Dieselerurteile des deutschen Bundesverwaltungsgerichts - freie Bahn für Fahrverbote auch in Österreich?' [2018] ÖZW 148.

BELGIUM

AIR QUALITY LAW IN BELGIUM

Avosetta Meeting London 24-25 May 2019

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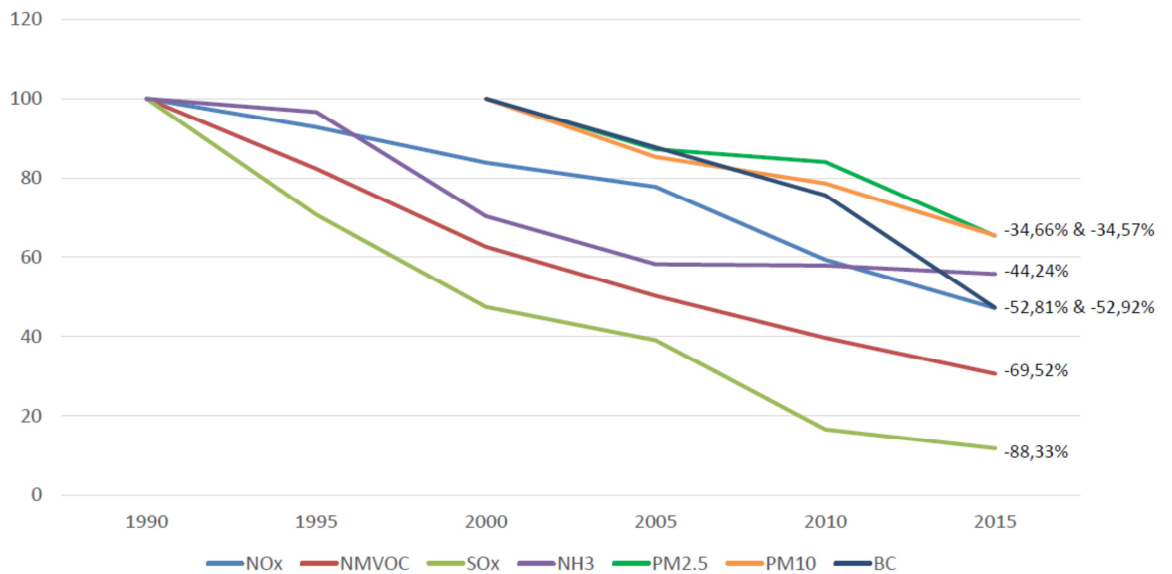
Air Quality: National Context

1. Most concentrations of air pollutants in Belgium are below EU limits. WHO targets, however, are generally not met in Belgium.

Averaging time	1-hour		Max 8-hour		24-hour		Year	
	EU	WHO	EU	WHO	EU	WHO	EU	WHO
SO ₂	😊	😊			😊	😞		
NO ₂	😊						😞	😞
PM ₁₀					😊	😞	😊	😞
PM _{2.5}						😞	😊	😞
O ₃			😞	😞		😞		

1

Evolution of the emissions of air pollutants in Belgium (from 1990, in % - Source: NEC 2017)



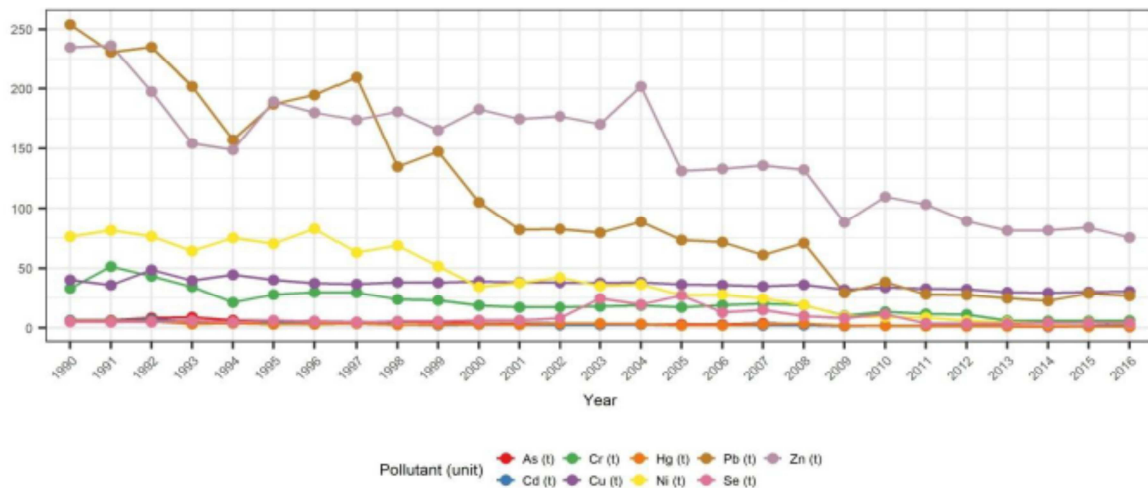
¹ Thanks to Delphine Misonne for her valuable remarks on an earlier draft and to Sofie Vereycken for editing.

Even though air quality has improved over the past years, air pollution still has a significant health and economic impact in Belgium. A large share of the air pollutants originates from non-ETS sectors. Put together, transport and domestic heating represent more than half of the emissions for most air pollutants.² (See also the Appendix)

Emissions from *energy production* and from *the most important industrial sectors* (petroleum, iron and steel, chemicals, food processing, beverages and tobacco...) all went down for the majority of pollutants. *Cement production* is the key source for NO_x, SO_x, Hg, Se and PCB. It becomes the most important source for PCB emissions due to the large decrease of PCB emissions in the iron and steel sector. The absolute SO₂ and Hg emissions remained stable between 1990 and 2016, but the emissions of other sectors have decreased. *Road transport* remains the largest source of NO_x emissions. The *residential sector* becomes the principal key source of dioxins due to the huge emission decline in the electricity sector and the sector of waste incineration. This sector is the most important key source for particulate matter, dioxins and PAH's due to the high contribution of wood for residential heating. It furthermore becomes a key source for heavy metals. As the absolute heavy metal emissions remain rather stable, this is mainly due to emission changes in other sectors. *Manure management* becomes the second most important key sector for NMVOC because absolute emissions from the chemical and coating sector decreased strongly since 1990. It is one of the most important key sources for NH₃ emissions. Emissions of animal manure applied to soils decreased in 2016 compared to 1990, but this sector remains the most important key sector for NH₃ emissions.³

2

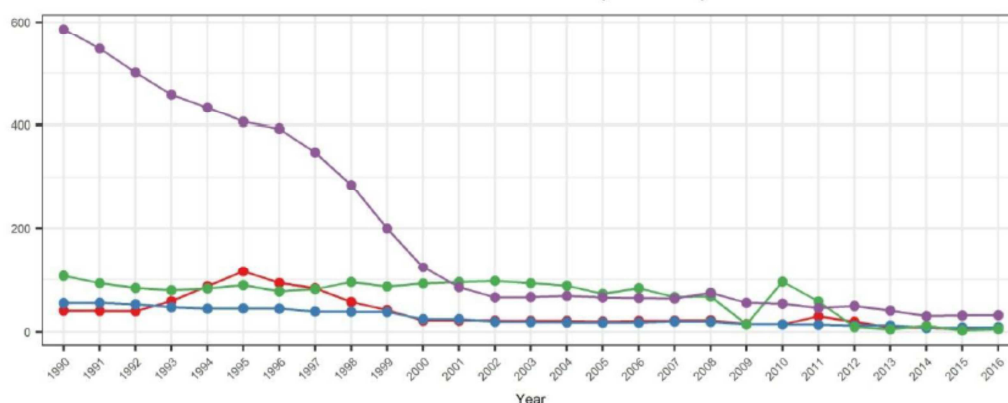
Total emission trend of (heavy) metals



² Charlotte VANPOUCKE, *Air Quality In Belgium. Road transport sector*, Belgian National Debate on Carbon Pricing, Brussels, 2017, https://www.climat.be/files/8515/3111/9866/14_Air_quality_CV.pdf.

³ *Informative Inventory Report about Belgium's air emissions submitted under the Convention on Long Range Transboundary Air Pollution CLRTAP and National Emission Ceiling Directive NECD*, March 2018, p. 18-19; http://www.ircel.be/nl/luchtkwaliteit/emissies/IIR_BE.pdf.

Total emission trend of Dioxins, PAHs, HCB and PCB



2. On the website of the *Belgian Interregional Environment Agency (IRCEL - CELINE)*⁴ the results of the measurements of the main pollutants covered by the EU Ambient Air Quality Directive through the automatic measurements stations can be found in nearly real-time. The website also informs on exceedances of the EU limit values. They show that, in recent years, there were no exceedances of the limit values of *particular matter*. For *nitrogen dioxide* in recent years there are exceedances in 3 to 4 measurements stations in the Brussels and Antwerp region. According to the provisional data of last year (very dry with a hot summer) for *ozone*, several measurements stations recorded exceedances of the target value for the protection of human health.

The other pollutants are monitored and reported separately by the regions. In *Flanders*, there were no exceedances of *sulphur dioxide*, *carbon monoxide*, *lead* or *benzene* limit values measured, but the *long term O₃ objectives for the protection of health and for the protection of vegetation* were not met in (nearly) every measurement station. Where *arsenic*, *cadmium* and *nickel* are concerned, the target values of Directive 2004/107/EC were not respected in respective 3, 1 and 1 out of 12 measurement stations, while in all 8 stations the values for *polycyclic aromatic hydrocarbons* were met.⁵

3

Yet, it appears that those results of the official measurements stations do not tell the whole story. The main question is whether the sites where the measurement stations are located are fully representative and respecting of the criteria laid down in Annex III of the AQD, in particular where it prescribes that sampling points directed at the protection of human health shall be sited in such a way as to provide data on the areas within zones and agglomerations where *the highest concentrations occur to which the population is likely to be directly or indirectly exposed for a period which is significant in relation to the averaging period of the limit value(s)* and levels in other areas within the zones and agglomerations *which are representative of the exposure of the general population*. In May 2018 a citizen science project called "*CurieuzeNeuzen Vlaanderen*" (Curious Noses Flanders) was conducted in which 20.000 citizens measured the NO₂ air quality near their own house

⁴ <http://www.ircel.be/en>.

⁵ VLAAMSE MILIEUMAATSCHAPPIJ, *Jaarrapport Lucht. Emissies 2000-2016 en 2017 luchtkwaliteit in Vlaanderen*, p. 6; http://www.vmm.be/bestanden/VMM-2017-LKT_TW.pdf.

Brussels Capital Region: <https://environnement.brussels/thematiques/air-climat/qualite-de-lair/reseau-de-mesure-de-la-qualite-de-lair>.

Walloon Region: <http://193.190.182.213/WebAirQuality/Accueil.aspx>.

during one month. In 2,3 % of the cases – mainly in street canyons – an exceedance of the limit value was measured (that would mean that around 150.000 people are concerned)⁶.

On 10 October 2018, the President of the Dutch-speaking Court of First Instance of Brussels issued an order in the case of *Greenpeace Belgium v Flemish Region*⁷. According to the applicant, the Flemish Region violated its obligations under the Air Quality Directive due to its failure to communicate the information obtained through modelling techniques and detailed studies to the European Commission. While the directive holds that measurements shall be used to assess the ambient air quality as a minimum requirement, those techniques may be supplemented by modelling techniques and/or indicative measurements to provide adequate information on the spatial distribution of the ambient air quality. Although not an absolute requirement, it is self-evident for the Court President that when data are collected through other (trustworthy and in accordance with the conditions laid down in the Directive) techniques, that information must be taken into consideration when drawing up policy, implementing the Directive 2008/50/EC and during the actual assessment of the air quality. A finding to the contrary would run counter to the Directive's objective as well as undermine the basic assumption that a fixed measurement is the optimal, most stringent technique for assessing the ambient air quality. Therefore, if the facultative methods indicate that the limit values were not respected, this amounts to a violation of the AQD. Similarly, a violation is established when a Member State has applied indicative measurements and modelling techniques but has not passed this information onto the European Commission. Given the lack of reporting to the European Commission of any data obtained outside of the fixed monitoring stations, the Flemish Region was ordered to provide all information to the European Commission within a time frame of 3 months.⁸

4

3. On 23 November 2009, the European Commission sent a letter of formal notice to Belgium for failing to fully transpose the AQD, followed by reasoned opinions on the same subject on 28 October 2010 and 16 February 2011. An additional letter of formal notice for exceeding PM₁₀ limits has been sent in 2013, followed by a reasoned opinion on 20 February 2014. As the 3 regions had meanwhile correctly transposed the AQD and no exceedances had been reported, the case did not go further and was eventually closed. On 8 November 2018, the EC again sent formal notice of failure to implement the AQD. According to that letter, Belgium has persistently failed to meet binding limit values for NO₂ in the Brussels region since they came into force in 2010. The Antwerp agglomeration also exceeds permitted values, despite already having been accorded the later deadline of 2015 for entry into force. Although some measures, such as low emission zones, were put in place to combat air pollution, the Commission is concerned that the current measures do not suffice to achieve compliance as soon as possible. Additionally, the Commission questions the way air quality is monitored in Belgium, including the location of measuring points for NO₂ in Brussels.

⁶ <https://curieuzeneuzen.be/in-english/>.

⁷ Nederlandstalige Rechtbank van eerste aanleg Brussel, 10 oktober 2018, noot A. CARETTE, *TMR* 2018, 706-729.

⁸ Sofie VEREYCKEN, A partial win for Greenpeace Belgium in air pollution case against the Flemish Region. World Commission on Environmental Law (WCEL) - International Union for Conservation of Nature (IUCN), 2018, <https://www.iucn.org/news/world-commission-environmental-law/201811/a-partial-win-greenpeace-belgium-air-pollution-case-against-flemish-region>.

Air Quality Standards

4. Prior to the first Directives with Air Quality Standards (Directive 80/779/EEC, Directive 82/884/EEC; Directive 85/203/EEC; Directive 92/72/EEC), there was only one domestic local air quality standard, namely for lead in a suburb of Antwerp (Hoboken) to combat pollution of the local non-ferro industry (introduced in 1978).

5. De AQD air quality standards are nearly literally transposed in the respective regional regulations. In the Flemish Region, they are laid down in Chapter 2.5 (and Annexes) of VLAREM II⁹, in application of the Decree of 5 April 1995 on general provisions concerning environmental policy. In the Brussels Capital Region, the air quality standards are laid down in various Regulations of the Regional Government in application of the Ordinance of 2 May 2013 containing the Brussels Code for Air, Climate and Energy. In the Walloon Region, they can also be found in a regulation of the Walloon Government.¹⁰

6. There are no standards that are more stringent compared to those of the AQD. In the Flemish region, however, there are a few air quality standards for pollutants not covered by EU legislation. That is the case for *chlorine, hydrogen chloride, monovinyl chloride, hydrogen fluoride, asbestos* and *dust deposits*. They are inspired by the German TA Luft 1986.

5

Air Quality Monitoring and Modelling

7. The automatic air quality monitoring network for NO₂, PM₁₀, PM_{2,5} and O₃ is run by the *Belgian Interregional Environment Agency (IRCEL - CELINE)* and is complemented by regional networks run by the regional administrations for measuring other pollutants. The number of measurement stations has over time gone up to 72 for PM and to 41 for O₃ and NO₂. The number of SO₂ monitoring stations has dropped from 81 in 1990 to 54 nowadays.¹¹ As mentioned before, the European Commission is questioning the location of measuring points for NO₂ in Brussels. That issue is also at the core of a reference for a preliminary ruling from the Court of First Instance of Brussels of 29 December 2017 in the case *Lies Craeynest and Others v Brussels Hoofdstedelijk Gewest and Brussels Instituut voor Milieubeheer* (Case C-723/17): “Should Article 4(3) and the second subparagraph of Article 19(1) of the Treaty on European Union, read in conjunction with the third paragraph of Article 288 of the Treaty on the Functioning of the European Union and Articles 6 and 7 of Directive 2008/50/EC of 21 May 2008 on ambient air quality and cleaner air for Europe, be interpreted as meaning that, when it is alleged that a Member State has not sited the sampling points

⁹ B.VI.Reg. van 1 juni 1995 houdende algemene en sectorale bepalingen inzake milieuhygiëne.

¹⁰ A.G.w. du 15 juillet 2010 relatif à l'évaluation et la gestion de la qualité de l'air ambiant.

¹¹ <http://www.ircel.be/en/air-quality/measurements/monitoring-stations/history>.

in a zone in accordance with the criteria set out in point B.1.(a) of Annex III to Directive 2008/50, it is for the national courts, on application by individuals who are directly affected by the exceedance of the limit values referred to in Article 13(1) of that directive, to examine whether the sampling points were sited in accordance with those criteria and, if they were not, to take all necessary measures against the national authority, such as an order, with a view to ensuring that the sampling points are sited in accordance with those criteria?”. In her Opinion AG Kokott suggest to answer that question as follows: “The national courts must, on application by affected individuals, examine whether sampling points were sited in accordance with the criteria set out in point B.1.(a) of Annex III to Directive 2008/50/EC on ambient air quality and cleaner air for Europe and, if they were not, must take all necessary measures within the scope of their judicial powers against the national authority with a view to ensuring that the sampling points are sited in accordance with those criteria. Such a judicial decision may give rise to the obligation to site sampling points at certain locations if it is clear from the available information that sampling points must be sited there. Otherwise the competent authorities may be obliged to undertake investigations in order to identify the correct locations.”¹²

8. As indicated, there is a lot of discussion on the proper siting of the measurement equipment.

9. It has been reported that “Diesel gate” played a role in some miscalculations. There was an important decrease of particulate matter (and BC) emissions due to the introduction of highly efficient diesel particulate filters (since EURO-5/6), yet NO_x emissions did not decrease as expected due to “Diesel gate”¹³. Recently, the Flemish Environmental Agency has introduced a new “Operational Street Pollution Model” that takes into account street canyons and diesel gate and is believed to collide better with reality than the former model. One can zoom in to street level.¹⁴

6

National Air Quality Plans and Governance

10. As air quality policy is a regional competence, there is no National Air Quality Plan as such. In the context of the NEC directive, a reduction program had to be drawn up in both 2002 and 2006, which describes how the emission ceilings would be met. On 9 March 2007 the Flemish Government approved the Flemish contribution to the *Belgian Reduction Program in the context of the NEC directive*¹⁵. This contribution was compiled with contributions from the other regions and the federal government into a National Program.¹⁶

¹² See also: Jeroen DE CONINCK & Tinneke HUYGHE, “Het recht op ‘schone lucht’. Luchtkwaliteitsplannen en lage-emissiezones als passende maatregelen: voldoen ze aan het (Europees) recht en het EVRM ? – Vlaanderen en Brussel doorgelicht”, *MER* 2018, p. 119.

¹³ Charlotte VANPOUCKE, *o.c.*, p. 16; Jeroen DE CONINCK & Tinneke HUYGHE, *o.c.*, p. 106-107.

¹⁴ <http://www.vmm.be/data/stikstofdioxide-no2-jaargemiddelde>.

¹⁵ https://www.lne.be/sites/default/files/atoms/files/1nec-programma_vlaanderen_2006.pdf.

¹⁶ https://www.lne.be/sites/default/files/atoms/files/6nec-programma_belgie_2006.pdf.

Furthermore, a *Flemish Air Quality Plan 2012–2015* was adopted in the context of the application of the postponement of the deadline of meeting the standards of NO₂. That plan was said to contain measures to achieve the air quality standards for NO₂ as quickly as possible and was approved by the Flemish Government on 30 March 2012. The European Commission granted Belgium on 6 July 2012 a deferment for the standards to 2015 (instead of 2010). The additional measures to meet the standards include measures for the whole Flemish Region, on the one hand, and additional measures approved by the city of Antwerp and the Antwerp Port Authority (the 2 zones where according to measurement network the standards were not respected) on the other hand. In 2016 it became clear that, although the air quality in both zones had improved, limit values for 2015 had not been met in several places in Flanders – not solely in those two zones in Antwerp.¹⁷

The Judgment of 10 October 2018 of the President of the Dutch-speaking Court of First Instance of Brussels in the case of *Greenpeace Belgium v Flemish Region* ordered the Flemish Region to reassess the existing air quality plan for the Antwerp agglomeration, to expand its scope to the entire territory of the Flemish Region and to formulate measures taking into account all the data obtained, not solely those of the fixed measurements. The government must do so within a period of one year, subject to a penalty payment of 1.000 EUR per day of delay, with a maximum of 5.000.000 EUR.¹⁸ The European Commission has, as mentioned before, started an infringement procedure on 8 November 2018.¹⁹

On 20 July 2018, the Flemish Government approved the *draft Air Policy Plan 2030*.²⁰ That marks one route to significantly improve air quality in Flanders by 2030. This draft plan includes objectives in the short term (as quickly as possible), in the medium term (by 2030) and in the long term (by 2050). In short, it means that the Flemish Government is committed to achieving the emission ceilings and the European air quality objectives. Flanders want also to meet the (stricter) WHO recommended exposure limits, which has a positive impact on health of the population. The final version after public consultation is still to be approved.

The Brussels-Capital Region has a *Regional Air-Climate-Energy Plan (2016)*²¹, which, however, is not intended as such for the implementation of the AQD. The Walloon Region has drafted an *Air-Climate-Energy Plan 2030* that shall be submitted to public consultation.²² The “Air” part has been added to the Walloon Contribution to the draft National Energy Climate Plan in the framework of Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action.

¹⁷ https://www.lne.be/sites/default/files/atoms/files/VR_2017_1301_MED.0004-2BISLuchtkwaliteitsplan.pdf;

Jeroen DE CONINCK & Tinneke HUYGHE, *o.c.*, 128-134.

¹⁸ Sofie VEREYCKEN, *o.c.*

¹⁹ See par. 3 above.

²⁰ https://www.lne.be/sites/default/files/atoms/files/20180720_luchtbeleidsplan.pdf.

²¹ http://document.environnement.brussels/opac_css/elecfile/PLAN_AIR_CLIMAT_ENERGIE_FR_DEF.pdf;

Jeroen DE CONINCK & Tinneke HUYGHE, *o.c.*, 134-136.

²² <https://energie.wallonie.be/fr/pace-2030.html?IDC=6238&IDD=127763>.

11. The main federal and regional regulatory measures that contribute towards compliance of the EU AQS and the Belgian NEC Ceiling²³ under 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 pollutants²⁴ consists of general, sectorial and specific emission standards for industries, product standards for combustibles, product standards for heating equipment and periodic control and maintenance obligations, tax differentiation for combustibles and the use of cars, emission standards for cars, trucks and other mobile machines, tax incentives for electric cars, the possibility to restrict activities in periods of smog, etc.. Recently, *low emission zones* have been introduced in Antwerp and Brussels²⁵ and a new one will start in Ghent in 2020. The Walloon Region has now also its legal framework for introducing such zones²⁶ For plans and projects with possible impact on air quality, SEA and EIA will have to direct particular attention to the possible impacts on AQDs and measures for minimizing that impact²⁷. An important part of those measures consists of implementation or application of EU Environmental Law.

12. On 2 September 2008, the ministers of Environment of the three regions have adopted the protocol that determines the coordination during pollution episodes. The protocol is activated in occurrence of pollution peaks of PM₁₀ or NO₂. The task of IRCEL is "to monitor phases of increasing pollution and to warn the agencies responsible appointed by the Regions". More specifically, IRCEL distributes an information bulletin in case increased concentrations of PM₁₀ and/or NO₂ are forecasted or measured. When the alarm phase is in effect, each Region has to activate the measures as foreseen by the emergency plans for peak concentrations of particulate matter.²⁸ For example, in

23

Member State	SO ₂ reduction compared with 2005		NO _x reduction compared with 2005		NMVOC reduction compared with 2005	
	For any year from 2020 to 2029	For any year from 2030	For any year from 2020 to 2029	For any year from 2030	For any year from 2020 to 2029	For any year from 2030
Belgium	43 %	66 %	41 %	59 %	21 %	35 %

Member State	NH ₃ reduction compared with 2005		PM _{2,5} reduction compared with 2005	
	For any year from 2020 to 2029	For any year from 2030	For any year from 2020 to 2029	For any year from 2030
Belgium	2 %	13 %	20 %	39 %

²⁴ See also *The Environmental Implementation Review 2019, COUNTRY REPORT BELGIUM*, p. 21-22;

http://ec.europa.eu/environment/eir/pdf/report_be_en.pdf

²⁵ The Constitutional Court found the Brussels Capital Region legislation not breaching the rules that distribute the competencies between federal and regional government, nor property rights, the equality principle and the free movement of persons, goods and services: Constitutional Court, nr.37/2019, 28 February 2019, *Goukens v. Brussels Capital Government*. https://lez.brussels/sites/default/files/lez_note_fr_vdef.pdf; Jeroen DE CONINCK & Tinneke HUYGHE, *o.c.*, 138-144.

²⁶ Décret du 17 janvier 2019 relatif à la lutte contre la pollution atmosphérique liée à la circulation des véhicules

²⁷ Erwin DE PUE, Luc LAVRYSEN & Paul STRYCKERS, *Milieuzakboekje 2018*, Kluwer Belgium, p. 611-632.

²⁸ Brussels Capital Region: <https://qualitedelair.brussels/content/seuils-dalerte>

Walloon Region: <https://www.wallonie.be/fr/dossier/pollution-de-lair-que-faire-en-cas-de-pic-de-pollution>

Flemish Region: <https://www.vlaanderen.be/mobiliteit-en-openbare-werken/duurzame-mobiliteit/smogalarm-maximaal-90-km-per-uur-op-autosnelwegen>.

case of intervention level 1 in the Brussels Capital Region²⁹, public transport will be free and speed limits for cars and trucks will be imposed. In case of intervention level 2, there is a ban of road traffic in the whole region. Similar measures as level 1 measures in Brussels can be taken in the Walloon Region. For the Flemish Region, only speed limitations have been foreseen.

13. Regional governments and their administrations are responsible for meeting air quality standards.

14. Requirements for coordinating efforts of different concerned public bodies may be contained in the plans mentioned in par. 10, although it is not clear whether or not they are somehow legally binding for the public bodies concerned. In general there is a lack of coordination in Belgium between the federal and regional authorities in this matter.³⁰

Enforcement of Air Quality Law

15. Every region has its basic enforcement legislation for environmental law that is also applicable on air quality law. It's a combination of administrative and criminal sanctions, a model we find also on the federal level. Supervision is mainly done by environmental inspectorates. Environmental crimes can also be established by the regular federal and local police. The choice of the sanctioning track is generally a prerogative of the public prosecutor³¹.

16. There have been some court cases on air quality law. Apart from the cases already discussed of *Greenpeace Belgium v. Flemish Region*³² and *Goukens v. Government of the Brussels Capital Region*³³, the following cases too deserve some attention.

In the case of *Angenon v. Flemish Region*, a case concerning a demand for suspension and annulment of a land use plan and planning permission for the redevelopment of Ghent Railway Station and related projects (including an underground car park for 2.800 cars and a new road-connection

²⁹ See Executive Order of the Brussels Capital Region of 27 November 2008, Amended by Executive Order of 31 May 2018.

³⁰ See FEDERAL COUNCIL FOR SUSTAINABLE DEVELOPMENT, *Opinion concerning air quality governance in Belgium*, May 2018 ; <https://www.frdo-cfdd.be/sites/default/files/content/download/files/2018a05f.pdf> ; SENATE, *Information Report concerning the necessary cooperation between the federal government, the Communities and the Regions on improvement of air quality, with a view to the promotion of public health*, 2017-2018, doc 6-391/3.

³¹ Luc LAVRYSEN, Carole BILLIET & Jan VAN DEN BERGHE, EUFJE Conference 2015. *Protection of the Environment through Criminal Law: the Implementation and Application of the Eco-crime Directive in the EU Member States. BELGIAN REPORT*, <https://biblio.ugent.be/publication/6957798/file/6957799.pdf>.

³² See paras 2 and 10.

³³ See note 24.

through anature protection area), it was argued that such a plan cannot be approved and such a permit cannot be delivered because that would lead to lasting violation of PM₁₀, NO_x and NO₂ limit values in the vicinity. The Council of State did not accept the argument. The Council held that an urban development permit only grants permission to perform certain construction works and operations and that this, in itself, is not the cause of the emissions. Furthermore, according to the regulations, it is the Flemish Minister for the Environment who must take the necessary measures to ensure that the limit values are not exceeded, to be done via planning and remediation measures at international, Flemish or local level. There is no direct link between the environmental quality standards and permits for concrete projects.³⁴

In a similar case *Melen v. Walloon Region*, the Council of State held that the AQD and the transposing Order of the Walloon Government of 15 July 2010 aim to organize air quality assessment and management by developing integrated action plans by area or by agglomeration. Compliance with the limit values and the target values prescribed by these regulations is assessed in relation to a given area or agglomeration, but not in relation to a specific urban development project. They do not imply a general prohibition on granting any permit that could cause additional air pollution, nor that they would impose a compensation obligation between the additional pollution resulting from a licensed project and the additional pollution that results from an existing project.³⁵

In the case *Craeynest and Others and ClientEarth v. Brussels Capital Region*, the Dutch-speaking Court of First Instance of Brussels held with reference to the jurisprudence of the CJEU that when limit values are exceeded, the Member State has a clear and unconditional obligation to draw up a plan as referred to in art. 23 (1) of Directive 2008/50/EC. The fact that the competent authorities have a certain freedom of policy in determining the content of that plan does not prevent the judge from issuing an order to the competent authority to draw up that plan. After all, if the limit values are exceeded, the government does not have the policy freedom to refrain from drawing up the plan. However, compared to the obligation to draw up an air quality plan, the rules on the placement of sampling points in the "areas where the highest concentrations occur" do not seem to imply unconditional obligations, compliance with which can be easily enforced by the court or the claim of individuals be checked. Those questions have been referred to the Court of Justice for a preliminary ruling.³⁶ Apart from the question already mentioned³⁷, a second question has been put forward: "*Is a limit value within the meaning of Article 13(1) and Article 23(1) of [Directive 2008/50/EC] exceeded in the case where an exceedance of a limit value with an averaging period of one calendar year, as laid down in Annex XI to that directive, has been established on the basis of the measurement results from one single sampling point within the meaning of Article 7 of that directive, or does such an exceedance occur only when this becomes apparent from the average of the measurement results from all sampling points in a particular zone within the meaning of Directive 2008/50?*". In her Opinion, AG Kokott suggests answering that question as follows: "*A limit value under Annex XI to Directive 2008/50 is exceeded within the meaning of Article 13(1) and Article 23(1) of the directive where the measurement result exceeds one single sampling point within the meaning of Article 7 of that directive.*"

³⁴ RvS nr. 183.359, 26 mei 2008, *Angenon c.s.*, TROS 2008, 316, noot BOUCKAERT, J., ROGGEN, J..

³⁵ CdE n° 236.809, 15 decembre 2016, *Melen c.s.*, Amén. 2017, 218; APT 2017, 260; CDPK 2017, 531, 532, 553 en 554.

³⁶ Nederlandstalige Rechtbank van eerste aanleg 15 december 2017, TMR 2018, 228.

³⁷ See para 7.

17. The absence of a clear link between the limit values of the AQD and project development as illustrated in the case law of the Council of State, as well as the experience that Air Quality Plans seem to be unable to bring conformity within the timeframe set forward, are weakening the enforcement of the AQD. That is probably also because those Plans have no precise legal status in Belgian law, so that it is unclear how they could be enforced against the relevant authorities.

Regulation of Vehicle Emissions Systems

18. Based on the Federal Act of 21 June 1985 concerning the technical requirements that every land transport vehicle, its components, and the safety accessories must comply with, two Royal Decrees of 26 February 1981, both regularly updated, are implementing the EU vehicle type approval rules. The Appendix of the second Royal Decree simply lists the Directives that are applicable, without transposing the content in domestic law. The Act of 21 June 1985, as amended, deals with supervision, administrative and criminal sanctions. The latter includes imprisonment of ten days to ten years and a fine of eight thousand euros to fifty-six million euros. The specific infringements mentioned in Article 13 (2) of Regulation (EC) No 715/2007, including the use of defeat devices, are not mentioned *as such*, but covered by the general sanction provision. Furthermore, the general principles of the Penal Code apply, including the possibility of forfeiture of illegal benefits, are applicable.

19. The Consumer Organization *Test Aankoop-Test Achats* introduced a class action for damages before the Court of First Instance in Brussels against VW and D'leteren on 30 June 2016. The action was declared admissible on 18 December 2017 and will be treated as an opt-out case. The Consumer Organization is thus entitled to represent all Belgian VW car owners in which the defeat devices have been fitted. In the period July 2018-June 2019, negotiations may be held to come to an agreement on compensation between the parties. Only if no settlement is reached within that time-frame, the Court will go into the substance of the case.³⁸ Some lawyers have started their own liability cases.³⁹ There is also a criminal investigation ongoing, centralized in Brussels.⁴⁰

On 16 September 2016, a group of Belgian investors, advised and assisted by *Deminor Recovery Services*, issued proceedings against Volkswagen AG with the Court of Braunschweig. The investors are seeking compensation (1,4 billion euro) for losses suffered on their purchases of Volkswagen securities due to the company's failure to timely and correctly inform them about the use of defeat devices in various car models and the final consequences thereof on the company's earnings, outlook and financial situation.

³⁸ <https://www.test-aankoop.be/mobiliteit/auto-s/dossier/dieselgate-wij-zijn-allemaal-bedrogen/onze-acties-en-eisen>.

³⁹ <https://mijnadvocaten.be/aansprakelijkheid/volkswagenfraude-schadevergoeding/>.

⁴⁰ <https://mijnadvocaten.be/aansprakelijkheid/centralisatie-strafdossier-volkswagen/>.

Case Study

She could bring an action before the civil court (Court of First Instance) as Lies Craeynest and Others have done (see above). That action should be brought against the concerned Region as drawing up air quality plans is considered to be a responsibility of the regional environmental minister and his administration (e.g. art. 2.5.2.1.3 VLAREM II as the Flemish Region is concerned). In case the road is managed by the local authority, one should also call that authority into the procedure. The summons of two parties will cost around 200 EUR. Additionally, a court fee of 165 EUR is applicable. In case of appeal, an additional court fee of 400 EUR is due. One should hire a lawyer, whereby it is fair to say that his honorarium will most likely exceed 5000 EUR. If the case is lost, a contribution in the attorney fee of the opposing party or parties is due and is fixed by the Court. A basic sum (per winning party) of € 1.440 is mentioned, but it will be fixed by the Court *in concreto* (minimum € 90 /maximum € 12.000). In case of appeal, one has to double both the lawyer fee and the contribution for the fees of the winning parties.

She could also count on a very active citizen movement on these issues at the moment, with new types of actions: school streets blockades, citizen science, demonstrations. She would not be alone in her fight. There is a very active citizen stand on that issue, with myriads of associations, be they formally organized or not (*filter café filtré*⁴¹, *curieuse neuzen*, *Ademloos*⁴², *Clean Air BXL*⁴³), etc.

⁴¹ <http://www.filter-cafe.org/>

⁴² <http://www.ademloos.be/>

⁴³ <http://www.cleanairbxl.be/>

Appendix (The Environmental Implementation Review 2019)

Figure: PM_{2.5} and NO_x emissions by sector in Belgium

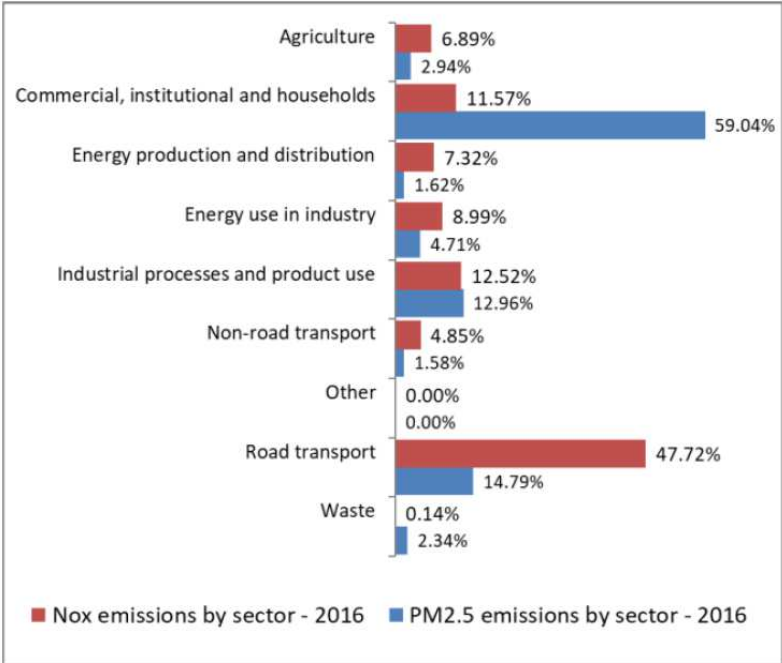
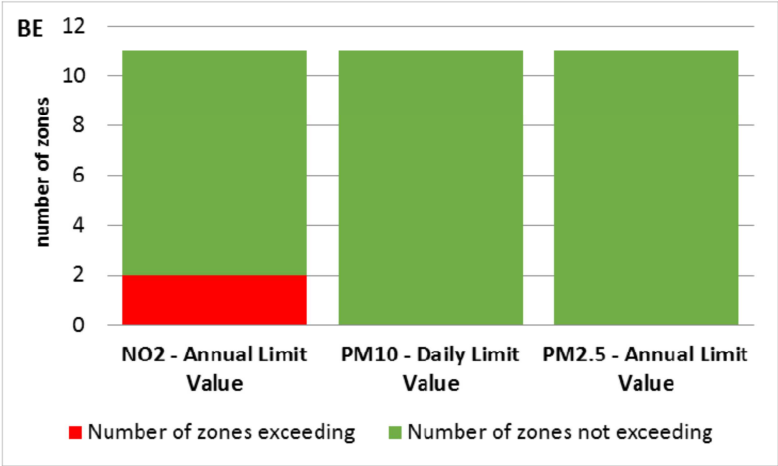


Figure: Air quality zones exceeding EU air quality standards in 2017



Avosetta Questionnaire: Air Quality Law

London 24-25 May 2019

Belgium - Supplementary Answers (N de Sadeleer)

Most of the questions below relate to implementation of the EU Ambient Air Quality Directive (Directive 2008/50/EC [2008] OJ L152/1, 'AQD'), looking beyond direct transposition to actual implementation and the legal and structural challenges in meeting EU air quality standards. Some questions extend beyond the AQD to examine other controversial or emerging aspects of EU law relating to air quality.

Please spend more time answering questions that are particularly relevant to the experience in your Member State.

Please answer these questions in maximum 8 pages (not including the questions), which may require being succinct with some answers. We can flesh out any points further in our discussion when we meet in London.

Please return your answers to Eloise Scotford (eloise.scotford@ucl.ac.uk), along with your short report on national environmental law developments over the last year, by **1 May 2019** in time for preliminary analysis and advance circulation to other attendees.

Air Quality: National Context

- What are the main sources of unlawful levels of air pollution in your Member State?
- How extensive is reported non-compliance with AQD air quality standards in your Member State?

For AQD air quality standards, please refer to AQD, Articles 12-19.

Please refer to data either reported to the Commission or otherwise available in your Member State. It may be easiest to set this information out in a table for different standards for certain pollutants (NO₂, PM₁₀, PM_{2.5}, SO₂ are likely to be the main pollutants for which there may be reported non-compliance with AQD standards).

- If data on compliance with air quality standards is incomplete, please indicate the extent of the non-compliance with requirements of Article 26 AQD (public information requirements).
- Have EU infringement proceedings been brought against your Member State for failure to comply with the AQD?
 - Nitrogen dioxide (NO₂): pending case

Air Quality Standards

- Was there pre-existing national law relating to air quality standards (similar to the AQD), or did the AQD introduce something new in your country?

- How are AQD air quality standards implemented in law in your Member State?

Given that Belgium is a federal State, The EQs are applied by the 3 Regions.

- Does any law in your Member State provide for air quality standards that go beyond those set out in the AQD, imposing any more stringent standards, for example, in relation to PM_{2.5}?

To the best of my knowledge, this is not the case.

Air Quality Monitoring and Modelling

- How are air quality monitoring networks set up in your Member State (briefly)? Do these go beyond the monitoring requirements set out in Chapter II AQD (eg in terms of the number and location of monitoring stations)?

Until 1994, the air quality measurement networks in Belgium were operated by the Institute Federal Institute of Hygiene and Epidemiology (IHE), a federal institution. Since 1994, air quality measurement were transferred to the three Belgian Regions.

The measurement networks are operated:

- In Flanders by the Vlaamse Milieumaatschappij (<http://www.vmm.be>),
- In Wallonia by the Institut Scientifique de Service Public (<http://www.issep.be>) and by the Agence Wallonne de l'Air et du Climat (AWAC) (<http://www.awac.be>)
- in Brussels by Bruxelles Environnement (<http://www.ibgebim.be>).

The Regions have decided to collaborate on a permanent basis, which led to the creation of the Interregional Environment Cell (CELINE). The measurement values gathered by the above mentioned agencies are transferred to CELINE.

As part of a cooperation agreement between the 3 regions, CELINE publishes an annual report on air quality in the three Regions.

- What sort of problems are encountered in monitoring of air quality in your Member State?

Winter smog 2016

On 6 December 2016, the 24-hour sliding average concentrations reached a maximum of

- 64 $\mu\text{g}/\text{m}^3$ in Flanders,
- 62 $\mu\text{g}/\text{m}^3$ in Brussels
- and 54 $\mu\text{g}/\text{m}^3$ in Wallonia.

This episode was due to an accumulation of pollutants emitted by human activity following the presence of a thermal inversion layer at 200-300 m altitude in combination with a light

wind. Following the increase in the wind, the concentrations have increased below the 50 $\mu\text{g}/\text{m}^3$ threshold in the morning of 7 December 2016.

The information threshold was activated a second time from December 18 to 20, 2016. The threshold was first exceeded in Brussels, with a 24-hour average concentration of 52 $\mu\text{g}/\text{m}^3$ in the middle of the day. Later, the information threshold was also exceeded in Flanders as a result of the development of a thermal inversion. The maximum 24-hour concentration reached 62 $\mu\text{g}/\text{m}^3$.

As a result of weather conditions more favourable to dispersion, concentrations decreased on the 20th December and have fallen below the threshold of 50 $\mu\text{g}/\text{m}^3$ on a 24-hour sliding average. As a result, the phase of information has been canceled.

Summer smog 2016

The information threshold of 180 $\mu\text{g}/\text{m}^3$ was exceeded at least once for 5 days between the end of August and mid-September.

The alert threshold of 240 $\mu\text{g}/\text{m}^3$ was not exceeded.

PM10

The **information threshold** is activated when the 24-hour sliding average in PM10 is greater than 50 $\mu\text{g}/\text{m}^3$ and should remain above this threshold for at least the next 24 hours.

The **alert period** is activated when it is expected that the average daily PM10 concentrations will exceed 70 $\mu\text{g}/\text{m}^3$ for two consecutive days.

The **limit value** for the protection of the population from short-term exposure at PM10 is 50 $\mu\text{g}/\text{m}^3$ on average per day. In addition, this threshold may not be exceeded by more than 35 days a year.

In 2016, this limit value was not exceeded anywhere in Belgium.

The maximum number of days on which the daily average PM10 concentration was greater than 50 $\mu\text{g}/\text{m}^3$ in Belgium was, 19 days in 2016 (regarding 4x4km²), the lowest value obtained since the beginning of the calculations in 1997.

PM 2,5

The number of PM2.5 measuring stations has increased significantly, from 5 in 2000 to 32 in 2008 and 72 in 2016.

NOx

In Belgium, the main sources of NOx are road transport, energy production and industry (including refineries), as well as building heating. About half of NOx emissions come from road transport.

- **Annual EU limit value:** The annual EU limit value for the protection of the population is $40 \mu\text{g}/\text{m}^3$.

In Antwerp and Brussels, annual averages above $40 \mu\text{g}/\text{m}^3$ are measured at the sites strongly influenced by traffic.

In 2016, the maximum value of the annual average concentration of NO_2 , over all the national territory, was $37.3 \mu\text{g}/\text{m}^3$.

- **Hourly EU limit value:** The Directive imposes an hourly concentration limit value of $200 \mu\text{g}/\text{m}^3$. This time limit does not apply to can be exceeded more than 18 times (and therefore 18 hours) per year.

Very locally, on busy motorways, it can happen that the $200 \mu\text{g}/\text{m}^3$ are exceeded a few times per year,

Since 2003, the population exposure calculated on the basis of annual average concentrations of NO_2 is decreasing.

Since 1998, the percentage of the Belgian population potentially exposed to average annual concentrations above the European standard fluctuates around 7%.

Ozone

The EU target value for population protection is based on the daily maximum of the eight-hour average ozone concentration. On average over three years, this value may not exceed $120 \mu\text{g}/\text{m}^3$ more than 25 times per year.

Exceedances of the $120 \mu\text{g}/\text{m}^3$ standard are still observed in Belgium.

Conclusions

To conclude with, the air quality has significantly improved in Belgium over the last ten years. However, a part of the population is still exposed to excessive concentrations of the main air pollutants.

- For PM_{10} , the annual European limit value is respected throughout Belgium.
- In 2016, annual average $\text{PM}_{2.5}$ concentrations remained below the target value in force since 2015 (Rapport annuel 2016 de la qualité de l'air en Belgique).
- However, in the large conurbations (Brussels and Antwerp), the annual average concentrations of NO_2 have locally exceeded the EU limit value.
- Concentrations of fine particulate matter (PM_{10} and $\text{PM}_{2.5}$) and ozone remain problematic with regard to the health impact (Rapport annuel 2016 de la qualité de l'air en Belgique).

- As far as you can determine, are there limitations or problems with the modelling techniques used in your Member State to assess air quality (where modelling is permitted as a method for assessment under Chapter II AQD)?

National Air Quality Plans and Governance

- Does your Member State have a national Air Quality Plan under Article 23?

- If so, to which pollutants does the plan relate (eg NO₂ or PM₁₀) and what **key** measures does the plan outline to keep exceedances 'as short as possible'? *Please also indicate if you think there are any **weaknesses** in the plan.*

- If your Member State has such a plan, how is the legal requirement of keeping exceedances 'as short as possible' satisfied? *Please outline any challenges (legal or otherwise) in meeting this requirement in your Member State.*

- Whether or not your Member State has an Air Quality Plan, please outline the **key** national regulatory measures that contribute towards compliance with EU air quality standards in your Member State.

For example, what are the main national legal measures that regulate polluting air emissions from emissions from:

- *households (eg restrictions on solid fuels, planning laws);*
- *transport (eg clean air zones); and*
- *industry (eg reliance in Industrial Emissions Directive or something more)?*

- Has your Member State ever issued a Short-term Action Plan under Article 24? If so, please outline any notable features of the plan or aspects of its implementation (briefly).

Brussels Region

The decree of 27 November 2008 of the Brussels Region defines an emergency plan in the event of a PM₁₀ and/or NO₂ pollution peak. This decree came into force on 1 January 2009.

The Decree is based on three increasing pollution thresholds. Accordingly, a different set of measures have to be activated when a threshold is exceeded.

The decree spells out three increasingly restrictive levels of intervention in order to limit local emissions from traffic (speed limits, alternating plate systems, or even a total ban on traffic) and public building heating.

NO₂ (daily maximum of the hourly concentrations)

PM10

1st threshold

151-200 µg/m³

71-100µg/m³

2nd threshold

201-400µg/m³

101-200µg/m³

3rd threshold

>401µg/m³

>201µg/m³

The action thresholds are reached when the following conditions are fulfilled:

- two stations of the telemetry network detect that the pollution levels are exceeded,
- for one of the two pollutants targeted (PM ou NO₂),
- in the course of two consecutive days during the winter period from November to March.

It must be noted that it is during this period that the most unfavourable situations for the dispersion of pollutants are likely to occur: very low wind speeds, as well as the presence of thermal inversions whose persistence is facilitated by the low level of sunlight during the winter months.

- The Brussels-Capital Region currently has 6 measuring stations for PM10 concentrations.
- NO₂ concentrations in the Brussels Capital Region are measured permanently in the 10 stations of the telemetry network.

Between November 2009 and the end of March 2015, only the measures related to the first action threshold were activated, as the forecasts of pollution levels by PM10 never reached the activation conditions of thresholds 2 and 3.

With respect to PM10, between November 2009 and the end of March 2015, the first action level was reached 9 times and the second level twice. However, the breach of the second threshold did not lead to an activation of the second level measures since the event was caused by a massive formation of secondary aerosols (in particular following fertilizer spraying on agricultural land surrounding the Brussels region), a phenomenon that is completely beyond the scope of the forecasts and therefore does not allow the activation conditions of the plan to be met.

- Which public bodies have legal responsibilities for meeting air quality standards in your Member State?

The three regional ministries for the environment.

- Are there any legal requirements for different public bodies who have control over different air pollution sources to coordinate their efforts in any way to

work towards air quality standards? (For example, different regulators may control highways, airports, local urban planning decisions, large industrial installations, and so on.)

•

As mentioned above, the 3 Regions have hammered out a cooperation agreement in order to submit a single air pollution report to the European Commission (CELINE).

Enforcement of Air Quality Law

- What is the primary mode for enforcing of air quality law in your Member State?
- Have there been court cases concerning the enforcement of air quality law in your Member State? *Please outline major cases or themes in key cases only.*
- Please outline any other major challenges faced in your Member State for enforcing the AQD, or any other applicable air quality law.

A Controversial Source of Air Pollution: Regulation of Vehicle Emissions Systems

Many Member States are currently subject to infringement proceedings by the Commission in relation to vehicle type approval rules. This is currently prescribed under Framework Directive 2007/46/EC establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles [2007] OJ L263/1 and Regulation (EC) No 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 [2007] OJ L171/1.

Amongst other things, this legislation requires Member States to have ‘effective, proportionate and dissuasive’ penalty systems in place to deter car manufacturers from illegal practices, such as installing defeat devices. This legislation was overhauled in 2018 by Regulation (EU) 2018/858 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC [2018] OJ L151/1, which will apply from 1 September 2020.

- How has your Member State implemented these EU vehicle type approval rules? Have there been any controversies in transposing these rules?

In Belgium, there is a national law: « 21 JUIN 1985. - Loi relative aux conditions techniques auxquelles doivent répondre tout véhicule de transport par terre, ses éléments ainsi que les accessoires de sécurité » which provides penalties for the non-conformity of a vehicle.

Approval authorities are competent for all aspects of the approval of a type of vehicle, system, component or separate technical unit or of the individual approval of a vehicle; for the authorization process, for issuing and, if appropriate, withdrawing approval certificates; for acting as the contact point for the approval authorities of other Member States; and for ensuring that the manufacturer meets his obligations regarding the conformity of production.

Approval authorities do not act as private companies and do not advise vehicle manufacturers in preparing vehicles for testing. The approval authorities in Belgium do not act as technical services.

The approval authority has also competence in assessing, designating and notifying technical services, some parts of which may be delegated to an accreditation body signatory to the mutual recognition agreements amongst accreditation bodies. One technical service has been designated for Regulation (EC) No 715/2007. It does not have any laboratory at its disposal. All testing is supervised in the facilities of the manufacturer or in other independent laboratories. These test facilities are always subject to prior appraisal.

As regards Regulation (EC) No 715/2007 conformity of production tests are done in accordance with the control plans of the manufacturer as provided for in the regulations. The control plans include the sampling rate. Vehicles are randomly selected from the production line.

About 55 emission measurements are carried out every year for type approvals under Regulation (EC) No 715/2007. The technical service has nine persons on the staff for that purpose.

Belgian authorities didn't investigate the possible use of defeat devices in vehicles during laboratory test cycles between 2007 and 2015 (Questionnaire to Member States' Authorities, Responses of the Belgian Ministries).

In the aftermath of the dieseldate, a political working group was set up under the auspices of the Prime Minister, as well as an interdepartmental expert group, in order to coordinate actions taken at Belgian level.

The competent authorities of the Walloon Region also undertook to carry out a testing campaign in order to assess the actual emission level of some vehicles present on the UE market. The results of these tests, carried out on 38 Euro 5 vehicles, were published on 2 June 2016.

Belgium has a compulsory accreditation requirement for the technical services. During the accreditation procedures (carried out in Belgium by BELAC) and relevant audits, the impartiality of the technical service is controlled (the ISO/IEC 17020 and ISO/IEC 17025 contain, among other, criteria of independence, impartiality and integrity).

- What legal measures have been taken in your Member State (if any) against car manufacturers which have failed to comply with vehicle type approval rules? *These legal measures might include court cases, including between car buyers and manufacturers.*

Case Study

Martha is living in an urban area in your Member State, and her children have developed asthmatic symptoms (i.e. a diagnosed respiratory illness). She becomes aware that the local air quality exceeds standards laid down in the AQD. Her house is next to a main road, which is a heavily used bus route on which bus operators use diesel vehicles. The town also has a

number of industrial plants, a coal fired power station, and a number of intensive farms. It is unclear to her precisely which pollution source is causing the breaches of air quality standards, or what their respective contributions might be to the local air quality problem.

What sort of legal action could Martha take in your Member State? And against whom? What remedies do the courts possess? What are the financial implications of bringing such a case? Might there be other regulatory avenues available to Martha instead?

CZECH REPUBLIC

Avosetta Questionnaire: Air Quality Law in the Czech Republic

by Ilona Jancarova and Jiri Vodicka

Most of the questions below relate to implementation of the EU Ambient Air Quality Directive (Directive 2008/50/EC [2008] OJ L152/1, 'AQD'), looking beyond direct transposition to actual implementation and the legal and structural challenges in meeting EU air quality standards. Some questions extend beyond the AQD to examine other controversial or emerging aspects of EU law relating to air quality.

Please spend more time answering questions that are particularly relevant to the experience in your Member State.

Please answer these questions in maximum 8 pages (not including the questions), which may require being succinct with some answers. We can flesh out any points further in our discussion when we meet in London.

Please return your answers to Eloise Scotford (eloise.scotford@ucl.ac.uk), along with your short report on national environmental law developments over the last year, by **1 May 2019** in time for preliminary analysis and advance circulation to other attendees.

Air Quality: National Context

1. What are the main sources of unlawful levels of air pollution in your Member State?

Most recent data are from year 2017.¹ Only substances, which reached unlawful levels in the air, are indicated here together with their main sources.

Concerning particulate matter² PM₁₀ and PM_{2,5} main sources are local furnaces/boilers that use solid fuels (briquettes, brown and black coal), non-renewable electricity sources (coal power plants) and high energy intensity industry along with car traffic.

Concerning nitrogen dioxide³, the main sources are motor vehicles.

Concerning ozone⁴, precursors are emitted from anthropogenic sources (transportation, industry) .

2. How extensive is reported non-compliance with AQD air quality standards in your Member State?

For AQD air quality standards, please refer to AQD, Articles 12-19.

¹ All data are available at Czech Hydrometeorological Institute portal:

http://portal.chmi.cz/files/portal/docs/uoco/web_generator/exceed/summary/chmu_2019_CZ.html

² http://portal.chmi.cz/files/portal/docs/uoco/isko/grafroc/17groc/gr17cz/IV1_PM_CZ.html

³ http://portal.chmi.cz/files/portal/docs/uoco/isko/grafroc/17groc/gr17cz/IV3_NOx_CZ.html

⁴ http://portal.chmi.cz/files/portal/docs/uoco/isko/grafroc/17groc/gr17cz/IV4_O3_CZ.html

Please refer to data either reported to the Commission or otherwise available in your Member State. It may be easiest to set this information out in a table for different standards for certain pollutants (NO₂, PM₁₀, PM_{2.5}, SO₂ are likely to be the main pollutants for which there may be reported non-compliance with AQD standards).

24- hours average concentrations of pollutants in the air (ug/m³) in selected monitoring stations in the worst polluted regions

a) Agglomeration Ostrava/Karviná/Frýdek-Místek :

Station	Ostrava-Fifejdy			Fr.Místek		Haviřov	Karviná		Třinec	
Pollutant	SO2	NO2	PM10	NO2	PM10	PM10	SO2	NO2	PM10	PM10
AQS	125	-	50	-	50	50	125	-	50	50
1. 2. 2019	12	51	62	11	17	33	13	20	25	15
2. 2. 2019	7	16	13	12	11	13	9	17	16	9
3. 2. 2019	5	21	34	21	37	39	5	19	52	34
4. 2. 2019	3	22	18	21	18	18	5	21	21	17
5. 2. 2019	5	32	35	36	36	36	9	31	34	45
6. 2. 2019	10	45	48	35	50	58	11	42	55	53
7. 2. 2019	6	21	31	44	49	49	15	39	42	19
8. 2. 2019	5	22	32	19	27	38	13	30	36	32
9. 2. 2019	5	15	25	8	14	33	13	25	24	21
10. 2. 2019	6	12	22	7	17	22	12	16	24	23
11. 2. 2019	4	16	14	12	10	13	7	14	16	13
12. 2. 2019	2	14	15	13	12	12	5	10	15	19
13. 2. 2019	1	18	19	20	20	23	7	25	20	24
14. 2. 2019	2	28	23	29	25	30	6	31	33	22
15. 2. 2019	7	32	38	25	31	38	8	29	39	36
16. 2. 2019	9	25	38	24	30	42	16	26	31	38
17. 2. 2019	7	21	40	21	32	44	10	22	32	35
18. 2. 2019	7	27	48	40	48	59	10	39	48	40
19. 2. 2019	10	26	57	26	55	74	10	34	60	42
20. 2. 2019	8	21	27	21	28	35	9	24	35	34
21. 2. 2019	5	20	26	17	24	31	10	23	29	26
22. 2. 2019	7	19	20	13	16	19	6	14	20	17
23. 2. 2019	16	27	39	21	35	41	12	23	37	33
24. 2. 2019	12	28	49	24	40	55	15	25	52	39
25. 2. 2019	9	38	48	37	52	56	16	39	47	53
26. 2. 2019	7	32	57	31	57	58	9	35	64	49
27. 2. 2019	5	22	39	26	39	49	9	26	42	45
28. 2. 2019	8	25	29	27	27	35	10	23	29	33

b) Zone Moravskoslezsko and Central Morava:

station	Opava		Studénka		Olomouc		Prostějov	Přerov		
	NO2	PM10	SO2	NO2	PM10	NO2	PM10	PM10	SO2	PM10
AQS	-	50	125	-	50	-	50	50	125	50
1. 2. 2019	20	34	10	25	51	37	39	44	9	32
2. 2. 2019	11	12	8	10	12	20	14	14	6	15
3. 2. 2019	13	24	5	15	25	21	22	24	4	22
4. 2. 2019	16	20	3	16	15	27	15	17	2	19
5. 2. 2019	40	53	6	25	38	46	42	45	3	48
6. 2. 2019	35	51	9	37	65	57	68	66	2	81
7. 2. 2019	12	23	8	19	37	53	78	55	3	68
8. 2. 2019	15	26	9	18	40	54	78	70	3	52
9. 2. 2019	10	23	7	11	28	30	42	50	2	42
10. 2. 2019	9	25	8	8	23	25	39	39	3	36
11. 2. 2019	9	12	4	7	16	22	20	15	3	18
12. 2. 2019	5	11	1	4	11	14	14	12	2	13
13. 2. 2019	16	14	4	14	22	39	26	21	1	27
14. 2. 2019	17	18	3	24	31	27	27	24	2	31
15. 2. 2019	26	35	5	18	41	39	47	32	5	41
16. 2. 2019	21	35	9	19	45	44	77	52	7	67
17. 2. 2019	18	36	11	21	46	45	92	63	4	83
18. 2. 2019	23	39	9	24	56	57	100	75	6	100
19. 2. 2019	20	51	9	21	61	46	90	74	4	87
20. 2. 2019	14	24	5	16	29	45	43	33	3	45
21. 2. 2019	14	24	6	15	30	42	50	36	6	39
22. 2. 2019	7	13	4	10	18	12	18	16	1	20
23. 2. 2019	10	24	11	17	34	12	18	19	2	22
24. 2. 2019	27	38	9	20	50	23	44	39	9	51
25. 2. 2019	37	56	10	30	62	49	85	66	7	82
26. 2. 2019	19	38	7	23	53	30	55	46	2	52
27. 2. 2019	23	40	5	15	41	41	41	34	6	42
28. 2. 2019	25	29	8	18	32	36	57	42	6	44

Information about air quality in the Czech Republic

Year: 2018, CHMI

The number of ambient limit value exceedances, red marked exceeded the ambient limit value calculated of both operational data (yet unverified) and verified data

Updated: 2019-04-11 03:45 CEST

The values are from all active stations regardless of whether the number of valid measurement meets the criteria for calculating the aggregated data (annual average).

Completeness of data – completeness of measured data supplied to AQIS database to the day of table update (in percentage).

Purpose: Health protection							
Pollutant	Averaging interval	Ambient limit		Max. permissible number of exceedances		Unit	
SO ₂	1 hour	350		24		µg/m ³	
Sequence	Code	Name	Owner	Data supplier	Number of exceedances	Maximum concentrations	Completeness of data
1	TOFFA	Ostrava-Fifejdy	ČHMÚ	CHMI-brand Ostrava AIM	22	1564.8	100.0
2	TOPRA	Ostrava-Přívovz	ČHMÚ	CHMI-brand Ostrava AIM	17	908.1	100.0
Pollutant	Averaging interval	Ambient limit		Max. permissible number of exceedances		Unit	
SO ₂	24 hours	125		3		µg/m ³	
Sequence	Code	Name	Owner	Data	Number of exceedance	Maximum concentration	Completeness

Site	Code	Name	Owner	Supplier	Measurements	Max. concentration	Completeness of data
1	TOFFA	Ostrava-Fifejdy	ČHMÚ	CHMI-brand Ostrava AIM	2	194.6	100.0
Pollutant	Averaging interval	Ambient limit		Max. permissible number of exceedances		Unit	
NO ₂	1 hour	200		18		µg/m ³	
The limit was not exceeded at the given the period							
Pollutant	Averaging interval	Ambient limit		Max. permissible number of exceedances		Unit	
CO	8 hours	10000		0		µg/m ³	
The limit was not exceeded at the given the period							
Pollutant	Averaging interval	Ambient limit		Max. permissible number of exceedances		Unit	
PM ₁₀	24 hours	50		35		µg/m ³	
Sequence	Code	Name	Owner	Data supplier	Number of exceedances	Maximum concentrations	Completeness of data
1	TVERA	Věřovice	ČHMÚ	CHMI-brand Ostrava AIM	94	271.9	100.0
2	TOPRA	Ostrava-Přívov	ČHMÚ	CHMI-brand Ostrava AIM	87	174.8	100.0
3	TRYCA	Rychvald	ČHMÚ	CHMI-brand Ostrava AIM	73	241.8	100.0
4	TKARA	Karviná	ČHMÚ	CHMI-brand Ostrava AIM	70	229.0	100.0
5	THARA	Haviřov	ČHMÚ	CHMI-brand Ostrava AIM	70	199.8	100.0

6	TCTNA	Český Těšín	ČHMÚ	CHMI-brand Ostrava AIM	69	222.1	100.0
7	TOCB A	Ostrava-Českobratrská (hot spot)	ČHMÚ	CHMI-brand Ostrava AIM	65	218.8	100.0
8	SKLSA	Kladno-Švermov	ČHMÚ	ČHMÚ - Libuš AIM	65	113.0	100.0
9	TOFFA	Ostrava-Fifejdy	ČHMÚ	CHMI-brand Ostrava AIM	64	169.8	100.0
10	ULOM A	Lom	ČHMÚ	ČHMÚ-pobočka Ústí n/Labem-AIM	62	118.7	100.0
11	TTRKA	Třinec-Kanada	SMTř.	CHMI-brand Ostrava AIM	60	213.9	100.0
12	TOZRA	Ostrava-Zábřeh	ČHMÚ	CHMI-brand Ostrava AIM	59	185.5	100.0
13	TFMIA	Frýdek-Místek	ČHMÚ	CHMI-brand Ostrava AIM	55	172.2	100.0
14	TTROA	Třinec-Kosmos	ČHMÚ	CHMI-brand Ostrava AIM	53	218.0	100.0
15	AVRSA	Praha 10-Vršovice	ČHMÚ	ČHMÚ - Libuš AIM	53	111.0	100.0
16	UMOM A	Most	ČHMÚ	ČHMÚ-pobočka Ústí n/Labem-AIM	53	105.7	100.0
17	ZUHR A	Uherské Hradiště	ČHMÚ	CHMI-Brno AIM	52	134.8	100.0
18	ALERA	Letiště Praha	Letiště Pr	ČHMÚ - Libuš AIM	49	126.7	100.0

19	ZVMZA	Valašské Meziříčí	ČHMÚ	CHMI-Brno AIM	48	171.0	100.0
20	TOVKA	Opava-Kateřinky	ČHMÚ	CHMI-brand Ostrava AIM	48	135.2	100.0
21	TSTDA	Studénka	ČHMÚ	CHMI-brand Ostrava AIM	47	156.8	100.0
22	BBNVA	Brno-Úvoz (hot spot)	ČHMÚ	CHMI-Brno AIM	47	115.4	100.0
23	AKALA	Praha 8-Karlín	ČHMÚ	ČHMÚ - Libuš AIM	46	90.1	100.0
24	UDCM A	Děčín	ČHMÚ	ČHMÚ-pobočka Ústí n/Labem-AIM	44	88.3	100.0
25	MBELA	Bělotín	ČHMÚ	CHMI-brand Ostrava AIM	42	121.7	100.0
26	SBERA	Beroun	ČHMÚ	ČHMÚ - Libuš AIM	42	93.4	100.0
27	TPISM	Písečná	ČHMÚ	ČHMÚ - pob.Brno	40	226.8	100.0
28	ALEGA	Praha 2-Legerova (hot spot)	ČHMÚ	ČHMÚ - Libuš AIM	40	107.8	100.0
29	MPRR A	Přerov	ČHMÚ	CHMI-brand Ostrava AIM	39	123.2	100.0
30	EMTP A	Moravská Třebová - Piaristická.	ČHMÚ	ČHMÚ - pob.Hradec Králové	39	105.8	100.0
31	UULM A	Ústí n.L.- město	ČHMÚ	ČHMÚ-pobočka Ústí n/Labem-AIM	39	85.3	100.0
32	TOPO M	Ostrava-Poruba/ČHM	ČHMÚ	ČHMÚ - pob.Brno	38	136.9	100.0

		Ú					
33	ASMIA	Praha 5-Smíchov	ČHMÚ	ČHMÚ - Libuš AIM	38	97.2	100.0
34	UULDA	Ústí n.L.-Všebořická (hot spot)	ČHMÚ	ČHMÚ-pobočka Ústí n/Labem-AIM	38	89.7	100.0
35	AREPA	Praha 1-n. Republiky	ČHMÚ	ČHMÚ - Libuš AIM	38	89.5	100.0
36	MOLJA	Olomouc-Hejčín	ČHMÚ	CHMI-brand Ostrava AIM	36	97.8	100.0
37	USTEA	Štětí	MSTE	ČHMÚ-pobočka Ústí n/Labem-AIM	34	98.4	100.0
38	APRU A	Praha 10-Průmyslová	ČHMÚ	ČHMÚ - Libuš AIM	33	106.5	100.0
39	BBDN A	Brno - Dětská nemocnice	ČHMÚ	CHMI-Brno AIM	32	86.6	100.0
40	PSTAM	Staňkov	ČHMÚ	ČHMÚ-pobočka Ústí n/Labem	32	81.0	100.0
41	BBNYA	Brno-Tuřany	ČHMÚ	CHMI-Brno AIM	31	125.6	100.0
42	MPST A	Prostějov	ČHMÚ	CHMI-brand Ostrava AIM	29	111.5	100.0
43	UCHM A	Chomutov	ČHMÚ	ČHMÚ-pobočka Ústí n/Labem-AIM	29	98.7	100.0
44	TOSGM	Ostravice-golf	ČHMÚ	ČHMÚ - pob.Brno	28	168.4	100.0
45	ZTNVA	Těšnovice	ČHMÚ	CHMI-Brno AIM	28	133.1	100.0
46	AVYNA	Praha 9-	ČHMÚ	ČHMÚ -	28	98.0	100.0

		Vysočany		Libuš AIM			
47	CTABA	Tábor	ČHMÚ	ČHMÚ - pob. Plzeň	28	88.8	100.0
48	BZNO A	Znojmo	ČHMÚ	CHMI- Brno AIM	27	83.3	100.0
49	UTUSA	Tušimice	ČHMÚ	ČHMÚ- pobočka Ústí n/Labem- AIM	26	93.7	100.0
50	ULTTA	Litoměřice	ČHMÚ	ČHMÚ- pobočka Ústí n/Labem- AIM	26	87.7	100.0
51	UTPM A	Teplice	ČHMÚ	ČHMÚ- pobočka Ústí n/Labem- AIM	26	80.3	100.0
52	ZZLNA	Zlín	ČHMÚ	CHMI- Brno AIM	25	118.6	100.0
53	BLOC M	Lovčice	ČHMÚ	ČHMÚ - pob.Brno	25	97.8	100.0
54	SMBO A	Mladá Boleslav	ČHMÚ	ČHMÚ - pob.Hrad ec Králové	24	96.4	100.0
55	HTRTA	Trutnov - Tkalcovská	ČHMÚ	ČHMÚ - pob.Hrad ec Králové	23	77.2	100.0
56	BVYS M	Vyškov	ČHMÚ	ČHMÚ - pob.Brno	22	93.8	100.0
57	ARIEA	Praha 2- Riegrovy sady	ČHMÚ	ČHMÚ - Libuš AIM	22	93.0	100.0
58	ASUC A	Praha 6- Suchdol	ČHMÚ	ČHMÚ - Libuš AIM	22	88.9	100.0
59	ZVSH M	Vsetín - hvězdárna	ČHMÚ	ČHMÚ - pob.Brno	21	135.8	100.0
60	PPMO A	Plzeň - mobil	MPI	ČHMÚ - pob.	21	89.0	100.0

				Plzeň			
61	SBRL M	Brandýs n. Labem	ČHMÚ	ČHMÚ- pobočka Ústí n/Labem	21	78.0	100.0
62	BBNF M	Brno- Kroftova	ČHMÚ	ČHMÚ - pob.Brno	21	74.8	100.0
63	MDST M	Dolní Studénky	ČHMÚ	ČHMÚ - pob.Brno	20	97.0	100.0
64	AKOB A	Praha 8- Kobylisy	ČHMÚ	ČHMÚ - Libuš AIM	19	107.1	100.0
65	SROR A	Rožďalovice -Ruská	ČHMÚ	ČHMÚ - pob.Hrad ec Králové	19	96.0	100.0
66	HHKB A	Hradec Králové- Brněnská	ČHMÚ	ČHMÚ - pob.Hrad ec Králové	19	76.5	100.0
67	SKLMA	Kladno-střed města	ČHMÚ	ČHMÚ - Libuš AIM	17	93.5	100.0
68	ASTOA	Praha 5- Stodůlky	ČHMÚ	ČHMÚ - Libuš AIM	17	93.4	100.0
69	JKOSA	Košetice	ČHMÚ	ČHMÚ - Libuš AIM	17	87.3	100.0
70	UDOK M	Doksany	ČHMÚ	ČHMÚ- pobočka Ústí n/Labem	17	81.0	100.0
71	SKHO A	Kutná Hora- Orebitská	ČHMÚ	ČHMÚ - pob.Hrad ec Králové	17	79.0	95.4
72	LLILA	Liberec Rochlice	ČHMÚ	ČHMÚ- pobočka Ústí n/Labem- AIM	16	107.8	100.0
73	ARER A	Praha 5- Řeporyje	ZÚ Ústí nL	ČHMÚ - Libuš AIM	16	98.1	33.2
74	ABREA	Praha 6- Břevnov	ČHMÚ	ČHMÚ - Libuš AIM	16	90.6	100.0
75	ALIBA	Praha 4-	ČHMÚ	ČHMÚ -	16	81.5	100.0

		Libuš		Libuš AIM			
76	JTREA	Třebíč	ČHMÚ	CHMI- Brno AIM	16	77.8	100.0
77	SPBRA	Příbram- Březové Hory	ČHMÚ	ČHMÚ - Libuš AIM	15	92.0	100.0
78	PPLAA	Plzeň- Slovany	MPI	ČHMÚ - pob. Plzeň	15	80.7	100.0
79	BBNIA	Brno-Líšeň	ČHMÚ	CHMI- Brno AIM	15	79.2	100.0
80	LCLMA	Česká Lípa	ČHMÚ	ČHMÚ- pobočka Ústí n/Labem- AIM	15	78.2	100.0
81	HVEL M	Velichovky	ČHMÚ	ČHMÚ - pob.Brno	15	67.6	100.0
82	UCEC M	Čeradice	ČHMÚ	ČHMÚ- pobočka Ústí n/Labem	14	95.0	100.0
83	SKRPA	Kralupy nad Vltavou- sportoviště	ZÚ Ústí nL	ČHMÚ- pobočka Ústí n/Labem- AIM	13	87.7	50.4
84	PKUJA	Kamenný Újezd	ČHMÚ	ČHMÚ - pob. Plzeň	13	86.5	100.0
85	ESEZ M	Sezemice	ČHMÚ	ČHMÚ - pob.Brno	13	79.9	100.0
86	UULKA	Ústí n.L.- Kočkov	ČHMÚ	ČHMÚ- pobočka Ústí n/Labem- AIM	13	68.3	100.0
87	CVOD M	Vodňany	ČHMÚ	ČHMÚ- pobočka Ústí n/Labem	12	90.0	100.0
88	ACHO A	Praha 4- Chodov	ČHMÚ	ČHMÚ - Libuš AIM	12	89.0	100.0
89	EPAUA	Pardubice	ČHMÚ	ČHMÚ - pob.Hrad	12	83.2	100.0

		Dukla		ec Králové			
90	HJICM	Jičín	ČHMÚ	ČHMÚ - pob.Brno	12	73.2	100.0
91	HRNK M	Rychnov nad Kněžnou	ČHMÚ	ČHMÚ - pob.Brno	12	70.1	100.0
92	HHKT M	Hradec Králové - tř. SNP	ČHMÚ	ČHMÚ - pob.Brno	12	69.4	100.0
93	UKRU A	Krupka	ČHMÚ	ČHMÚ- pobočka Ústí n/Labem- AIM	11	73.1	100.0
94	BMISA	Mikulov- Sedlec	ČHMÚ	CHMI- Brno AIM	10	85.9	100.0
95	PPLVA	Plzeň- Doubravka	ČHMÚ	ČHMÚ - pob. Plzeň	10	71.0	100.0
96	KSOM A	Sokolov	ČHMÚ	ČHMÚ- pobočka Ústí n/Labem- AIM	10	70.4	100.0
97	TBRS M	Bruntál- škola	ČHMÚ,MS K	ČHMÚ - pob.Brno	9	94.1	100.0
98	KCHM A	Cheb	ČHMÚ	ČHMÚ- pobočka Ústí n/Labem- AIM	9	88.6	100.0
99	BKUC M	Kuchařovice	ČHMÚ	ČHMÚ - pob.Brno	9	86.4	96.2
100	JJIHA	Jihlava	ČHMÚ	CHMI- Brno AIM	9	71.9	100.0
101	LFRTM	Frýdlant	ČHMÚ	ČHMÚ- pobočka Ústí n/Labem	8	96.0	100.0
102	MJESA	Jeseník- lázně	ČHMÚ	CHMI- brand Ostrava AIM	8	91.1	100.0

103	PPLRA	Plzeň-Roudná	ZÚ Ústí nL	ČHMÚ - pob. Plzeň	8	86.9	41.9
104	CPRA A	Prachatice	ČHMÚ	ČHMÚ - pob. Plzeň	8	72.1	100.0
105	UVAL M	Valdek	ČHMÚ	ČHMÚ-pobočka Ústí n/Labem	8	65.0	100.0
106	EUOR M	Ústí n.Orl.-letišťe	ČHMÚ	ČHMÚ - pob.Brno	8	62.2	100.0
107	LJNM M	Jablonec-město	ČHMÚ	ČHMÚ-pobočka Ústí n/Labem	7	94.0	100.0
108	CCBD A	České Budějovice	ČHMÚ	ČHMÚ - pob. Plzeň	7	82.2	100.0
109	KKVA M	Karlovy Vary	ČHMÚ	ČHMÚ-pobočka Ústí n/Labem	7	77.0	100.0
110	UUDIA	Ústí n. L.-Prokopa Diviše	ZÚ Ústí nL	ČHMÚ-pobočka Ústí n/Labem-AIM	7	71.8	50.4
111	BBNE M	Brno-Soběšice	ČHMÚ	ČHMÚ - pob.Brno	7	71.3	100.0
112	JKRIM	Křižanov	ČHMÚ	ČHMÚ - pob.Brno	7	69.2	100.0
113	LRAD M	Radimovice	ČHMÚ	ČHMÚ-pobočka Ústí n/Labem	6	93.0	100.0
114	PPLLA	Plzeň-Lochotín	MPI	ČHMÚ - pob. Plzeň	6	71.6	100.0
115	UMED A	Měděnec	ČHMÚ	ČHMÚ-pobočka Ústí n/Labem-AIM	6	67.5	100.0
116	PPLEA	Plzeň-střed	MPI	ČHMÚ - pob.	6	64.9	100.0

				Plzeň			
117	URVH A	Rudolice v Horách	ČHMÚ	ČHMÚ-pobočka Ústí n/Labem-AIM	5	65.2	100.0
118	HHKS A	Hr.Král.-Sukovy sady	ZÚ Ústí nL	ČHMÚ - pob.Hradec Králové	4	74.1	33.4
119	USNZ M	Sněžník	ČHMÚ	ČHMÚ-pobočka Ústí n/Labem	4	56.0	100.0
120	CCBTA	Čes. Budějovice-Třešň.	ZÚ Ústí nL	ČHMÚ - pob. Plzeň	3	80.3	55.2
121	PKLSA	Klatovy soud	ZÚ Ústí nL	ČHMÚ - pob. Plzeň	3	76.5	41.9
122	ESVR M	Svratouch	ČHMÚ	ČHMÚ - pob.Brno	3	59.3	91.5
123	CHVO A	Hojná Voda	ČHMÚ	ČHMÚ - pob. Plzeň	2	83.0	100.0
124	ASRO A	Praha 10-Šrobárova	ZÚÚstí/SZ Ú	ČHMÚ - Libuš AIM	2	66.1	33.4
125	LJIZM	Jizerka	ČHMÚ	ČHMÚ-pobočka Ústí n/Labem	1	54.0	100.0
126	LSOU M	Souš	ČHMÚ	ČHMÚ-pobočka Ústí n/Labem	1	51.0	100.0



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Information about air quality in the Czech Republic

Year: 2018, CHMI

Overview of the target ambient limit values exceedances of O₃ and AOT40 calculated of both operational data (yet unverified) and verified data

Updated: 2019-04-11 03:45 CEST

The values are from all active stations regardless of whether the number of valid measurement meets the criteria for calculating the aggregated data (annual average).

Completeness of data – completeness of measured data supplied to AQIS database to the day of table update (in percentage).

Purpose: Health protection							
Pollutant	Averaging interval	Ambient limit		Max. permissible number of exceedances		Unit	
O ₃	8 hours	120		25 in 3 years average		µg/m ³	
Sequence	Code	Name	Owner	Data supplier	Number of exceedances in year 2018	Maximum concentrations in year 2018	Completeness of data
1	USNZA	Sněžník	ČHMÚ	ČHMÚ-pobočka Ústí n/Labem-AIM	75	172.4	100.0
2	HKRYA	Krkonoše-Rýchory	ČHMÚ	ČHMÚ - pob. Hradec Králové	74	166.6	100.0
3	URVHA	Rudolice v Horách	ČHMÚ	ČHMÚ-pobočka Ústí n/Labem-AIM	72	174.1	100.0
4	UULKA	Ústí n.L.-Kočkov	ČHMÚ	ČHMÚ-pobočka Ústí n/Labem-	72	173.1	100.0

				AIM			
5	TCERA	Červená hora	ČHM Ú	CHMI- brand Ostrava AIM	68	159.1	100.0
6	SKLMA	Kladno- střed města	ČHM Ú	ČHMÚ - Libuš AIM	64	159.8	100.0
7	STCSA	Tobolka- Čertovy schody	VČs	ČHMÚ - Libuš AIM	63	170.6	100.0
8	ASTOA	Praha 5- Stodůlky	ČHM Ú	ČHMÚ - Libuš AIM	63	160.4	100.0
9	PPRMA	Přimda	ČHM Ú	ČHMÚ - pob. Plzeň	62	160.4	100.0
10	HPLOA	Polom	ČHM Ú	ČHMÚ - pob. Hrade c Králové	58	159.9	100.0
11	UTPMA	Teplice	ČHM Ú	ČHMÚ- pobočka Ústí n/Labem- AIM	56	167.0	100.0
12	UTUSA	Tušimice	ČHM Ú	ČHMÚ- pobočka Ústí n/Labem- AIM	56	166.1	100.0
13	SONRA	Ondřejov	ČHM Ú	ČHMÚ - Libuš AIM	56	164.9	100.0
14	ALIBA	Praha 4- Libuš	ČHM Ú	ČHMÚ - Libuš AIM	56	162.6	100.0
15	LFRTA	Frydlant	ČHM Ú	ČHMÚ- pobočka Ústí n/Labem- AIM	55	181.2	100.0
16	UMOM A	Most	ČHM Ú	ČHMÚ- pobočka Ústí n/Labem- AIM	54	165.7	100.0
17	ESVRA	Svratouch	ČHM Ú	ČHMÚ - pob. Hrade c Králové	54	161.9	100.0

18	KPRBA	Přebuz	ČHM Ú	ČHMÚ- pobočka Ústí n/Labem- AIM	53	168.7	100.0
19	ULTTA	Litoměřice	ČHM Ú	ČHMÚ- pobočka Ústí n/Labem- AIM	53	159.7	100.0
20	HHKOK	Hradec Králové- observatoř	ČHM Ú	ČHMÚ - pob.Hrade c Králové	52	174.8	100.0
21	ASUCA	Praha 6- Suchdol	ČHM Ú	ČHMÚ - Libuš AIM	52	161.7	100.0
22	CCHUA	Churáňov	ČHM Ú	ČHMÚ - pob. Plzeň	52	152.9	100.0
23	AKOBA	Praha 8- Kobylisy	ČHM Ú	ČHMÚ - Libuš AIM	50	164.5	100.0
24	UDOKA	Doksany	ČHM Ú	ČHMÚ- pobočka Ústí n/Labem- AIM	50	163.9	100.0
25	BKUCA	Kuchařovic e	ČHM Ú	CHMI-Brno AIM	50	156.5	100.0
26	JKOSA	Košetice	ČHM Ú	ČHMÚ - Libuš AIM	49	163.9	100.0
27	BBNYA	Brno- Tuřany	ČHM Ú	CHMI-Brno AIM	49	162.5	100.0
28	CKOCA	Kocelovice	ČHM Ú	ČHMÚ - pob. Plzeň	49	158.5	100.0
29	ZSNVA	Štítná n.Vláří	ČHM Ú	CHMI-Brno AIM	49	154.5	100.0
30	ARIEA	Praha 2- Riegrovy sady	ČHM Ú	ČHMÚ - Libuš AIM	46	160.8	99.9
31	BMISA	Mikulov- Sedlec	ČHM Ú	CHMI-Brno AIM	43	153.7	100.0
32	SMBOA	Mladá Boleslav	ČHM Ú	ČHMÚ - pob.Hrade c Králové	42	169.1	100.0

33	LLILA	Liberec Rochlice	ČHM Ú	ČHMÚ- pobočka Ústí n/Labem- AIM	41	161.8	100.0
34	LSOUA	Souš	ČHM Ú	ČHMÚ- pobočka Ústí n/Labem- AIM	41	161.1	100.0
35	ZTNVA	Těšnovice	ČHM Ú	CHMI-Brno AIM	40	153.2	100.0
36	TOFFA	Ostrava- Fifejdy	ČHM Ú	CHMI- brand Ostrava AIM	37	169.6	100.0
37	TOVKA	Opava- Kateřinky	ČHM Ú	CHMI- brand Ostrava AIM	37	162.8	100.0
38	CPRAA	Prachatice	ČHM Ú	ČHMÚ - pob. Plzeň	37	149.6	100.0
39	ULOMA	Lom	ČHM Ú	ČHMÚ- pobočka Ústí n/Labem- AIM	36	165.2	100.0
40	UULMA	Ústí n.L.- město	ČHM Ú	ČHMÚ- pobočka Ústí n/Labem- AIM	35	172.2	100.0
41	JJIHA	Jihlava	ČHM Ú	CHMI-Brno AIM	35	156.7	100.0
42	USTEA	Štětí	MSTE	ČHMÚ- pobočka Ústí n/Labem- AIM	35	155.4	100.0
43	JKMYA	Kostelní Myslová	ČHM Ú	CHMI-Brno AIM	35	154.8	100.0
44	PPMOA	Plzeň - mobil	MPI	ČHMÚ - pob. Plzeň	35	149.9	100.0
45	MPRRA	Přerov	ČHM Ú	CHMI- brand Ostrava	34	156.3	100.0

				AIM			
46	KSOMA	Sokolov	ČHM Ú	ČHMÚ- pobočka Ústí n/Labem- AIM	34	154.9	100.0
47	EPAUA	Pardubice Dukla	ČHM Ú	ČHMÚ - pob.Hrade c Králové	33	173.4	100.0
48	TKARA	Karviná	ČHM Ú	CHMI- brand Ostrava AIM	33	172.7	100.0
49	PPLVA	Plzeň- Doubravka	ČHM Ú	ČHMÚ - pob. Plzeň	32	148.7	100.0
50	CTABA	Tábor	ČHM Ú	ČHMÚ - pob. Plzeň	32	147.9	100.0
51	TBKRA	Bílý Kříž	ČHM Ú	CHMI- brand Ostrava AIM	30	160.8	100.0
52	CCBDA	České Budějovice	ČHM Ú	ČHMÚ - pob. Plzeň	30	150.9	100.0
53	PPLAA	Plzeň- Slovany	MPI	ČHMÚ - pob. Plzeň	29	145.6	100.0
54	TSTDA	Studénka	ČHM Ú	CHMI- brand Ostrava AIM	29	139.7	100.0
55	BBDNA	Brno - Dětská nemocnice	ČHM Ú	CHMI-Brno AIM	28	156.6	100.0
56	CHVOA	Hojná Voda	ČHM Ú	ČHMÚ - pob. Plzeň	28	139.8	100.0
57	ZZLNA	Zlín	ČHM Ú	CHMI-Brno AIM	26	149.4	100.0
58	TTROA	Třinec- Kosmos	ČHM Ú	CHMI- brand Ostrava AIM	25	165.0	100.0
59	MJESA	Jeseník- lázně	ČHM Ú	CHMI- brand Ostrava AIM	16	141.5	100.0

60	AVYNA	Praha 9-Vysočany	ČHM Ú	ČHMÚ - Libuš AIM	15	154.4	100.0
61	PPLLA	Plzeň- Lochotín	MPI	ČHMÚ - pob. Plzeň	11	139.4	100.0
Purpose: Protection of vegetation							
Pollutant	Averaging interval	Ambient limit on average over 5 years			Unit		
O ₃	1.5. - 31.7. (AOT40)	18000			µg/m ³ .h		
Sequence	Code	Name	Owner	Data supplier	AOT40 value in year 2018	Completeness of data	
1	URVHA	Rudolice v Horách	ČHM Ú	ČHMÚ-pobočka Ústí n/Labem-AIM	30576.7	100.0	
2	USNZA	Sněžník	ČHM Ú	ČHMÚ-pobočka Ústí n/Labem-AIM	30542.4	100.0	
3	SONRA	Ondřejov	ČHM Ú	ČHMÚ - Libuš AIM	29763.8	100.0	
4	TCERA	Červená hora	ČHM Ú	CHMI-brand Ostrava AIM	28978.0	100.0	
5	HKRYA	Krkonoše- Rýchory	ČHM Ú	ČHMÚ - pob.Hradec Králové	28892.2	100.0	
6	ESVRA	Svratouch	ČHM Ú	ČHMÚ - pob.Hradec Králové	28711.9	100.0	
7	CKOCA	Kocelovice	ČHM Ú	ČHMÚ - pob. Plzeň	28276.6	100.0	
8	LFRTA	Frydlant	ČHM Ú	ČHMÚ-pobočka Ústí n/Labem-AIM	27543.0	100.0	
9	JKOSA	Košetice	ČHM Ú	ČHMÚ - Libuš AIM	27520.2	100.0	
10	BKUCA	Kuchařovic e	ČHM Ú	CHMI-Brno AIM	27256.7	100.0	
11	UDOKA	Doksany	ČHM Ú	ČHMÚ-pobočka Ústí n/Labem-AIM	27237.1	100.0	
12	CCHUA	Churáňov	ČHM Ú	ČHMÚ - pob. Plzeň	26774.4	100.0	
13	KPRBA	Přebuz	ČHM	ČHMÚ-pobočka Ústí	26451.0	100.0	

			Ú	n/Labem-AIM		
14	LSOUA	Souš	ČHM Ú	ČHMÚ-pobočka Ústí n/Labem-AIM	26230.1	100.0
15	UTUSA	Tušimice	ČHM Ú	ČHMÚ-pobočka Ústí n/Labem-AIM	25700.9	100.0
16	BMISA	Mikulov- Sedlec	ČHM Ú	CHMI-Brno AIM	25695.8	100.0
17	HPLOA	Polom	ČHM Ú	ČHMÚ - pob.Hradec Králové	25417.3	100.0
18	PPRMA	Přimda	ČHM Ú	ČHMÚ - pob. Plzeň	24881.1	100.0
19	ZTNVA	Těšnovice	ČHM Ú	CHMI-Brno AIM	23969.6	100.0
20	JKMYA	Kostelní Myslová	ČHM Ú	CHMI-Brno AIM	22805.7	100.0
21	ULOMA	Lom	ČHM Ú	ČHMÚ-pobočka Ústí n/Labem-AIM	21977.4	100.0
22	ZSNVA	Štítná n.Vláří	ČHM Ú	CHMI-Brno AIM	21522.2	100.0
23	CHVOA	Hojná Voda	ČHM Ú	ČHMÚ - pob. Plzeň	19948.1	100.0
24	TSTDA	Studénka	ČHM Ú	CHMI-brand Ostrava AIM	18054.2	100.0

Data available at <http://portal.chmi.cz/> (11.4.2019)

- a. If data on compliance with air quality standards is incomplete, please indicate the extent of the non-compliance with requirements of Article 26 AQD (public information requirements).

All data are available on websites of Czech Hydrometeorological Institute (CHI).⁵ The immediate air quality in individual regions/cities is available for the public on the website of the CHI. If the alert thresholds for SO₂, NO₂, O₃ and PM₁₀ are met, the public is informed by other media (TV, radio). If the alert thresholds are exceeded then control measures to combat smog situation must be adopted according to Act n. 201/2012 Sb., on air protection with the aim to reduce pollution in short term.

3. Have EU infringement proceedings been brought against your Member State for failure to comply with the AQD?

⁵ <http://portal.chmi.cz/?l=en>

- a. If so, what was the outcome of this enforcement action and its impact on air quality law and policy in your Member State? (If enforcement action is ongoing, answer this question as best you can in terms of the effects of this action on your Member State's approach to air quality law and policy.)

Infringement case number 20082186, additional reasoned opinion 2015, concerning PM10 limit values exceedances, still active case⁶

Infringement case number 20162062, formal notice sent 2016, concerning respect of NO2 values – still active case.

Infringement case number 20182262, formal notice sent 2018, concerning ineffective enactment relating to limit values and some definitions, still active case.⁷

All of the infringement cases are still ongoing cases. Therefore it is still unclear what the outcomes might be. Nevertheless, considerable effort is apparent regarding pollution reduction emitted by local heating systems. A public subsidy is offered to the real-estate owners enabling change old fossil fuels heating systems for advanced gas combustion units. For regions, where the air quality standards are exceeded the air quality plans were adopted and mostly challenged at courts by NGOs. Therefore, their legal form (a general measure) was changed by the latest amendment with the aim to exclude the possibility of the public to challenge these air quality plans at courts.

The other way, how the government can contribute to solve the problem with excessive air pollution is the decision-making on developmental projects. In permitting procedures, the state authorities are bound by the air quality standards for the main pollutants so that they are not allowed to permit a new source of pollution contributing significantly to existing excessive level of pollution without adopting compensatory measures.

The Czech Environmental Inspectorate along with Air Protection Authorities are empowered to ensure the enforcement of compliance with emission limitations by individual sources of air pollution.

There are different legal instruments that are interconnected to form effective set of legal rules aimed at air pollution control (see).

Air Quality Standards

4. Was there pre-existing national law relating to air quality standards (similar to the AQD), or did the AQD introduce something new in your country?

The first law in this field was the Air protection Act of 1991 (Act No. 309/1991 Coll.) which empowered the Ministry of Environment to establish the air quality standards in agreement with the Ministry of Public Health so that the level of pollution not exceeding these limits was safe from the public health point of view.

⁶ http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&typeOfSearch=true&active_only=0&noncom=0&r_dossier=&decision_date_from=&decision_date_to=&EM=CZ&DG=ENVI&title=&submit=Search

⁷ http://europa.eu/rapid/press-release_MEMO-18-6247_EN.htm

The first Air Protection Act of 1991 was abolished by the Act n. 86/2002 Coll., on air protection. Specific thresholds and limits were defined in governmental regulation No. 350/2002 Coll. There was a general requirement (Act on the Environment of 1992) that all environmental quality standards must ensure that the public health as well as the environmental components would not be endangered.

Currently, the Air Protection Act No 201/2012 Coll. (APA) is in force, which implements the AQD. Nevertheless, the limit values established by the previous legislation were no less stringent as limit values required by the AQD.

5. How are AQD air quality standards implemented in law in your Member State?

Pursuant to new APA section 9, the Ministry of the Environment (MoE) in cooperation with the competent regional authority is in charge to prepare an Air Quality Plan (which is called “Air Quality Improvement Programme” in Czech) for those zones and agglomerations where the limit values established according to Directive 2008/50/EC are exceeded.

At the national law level, the content of Air Quality Plans is delimited in Annex V of the Air Protection Act. The prescribed form of these plans in Czech national law was until the latest amendment to APA in 2018 a “General Measure” (Allgemeinverfügung) providing the public concerned with the access to administrative courts to repeal the air quality plans. Czech NGOs were very active in this point, which has led to legislative change, consequence of which was the abandonment of the form of a general measure.

AQPs provide a frame for deciding on future projects and activities since the MoE is not entitled to establish duties and directly regulate the process of emission reduction. Measures included in AQPs are not binding over private persons; they become the basis for decision-making by administrative authorities. Pursuant to section 12(1) APA, these authorities have to “base their decisions on AQPs”, which can be interpreted that they are not directly bound by reduction measures established in these plans. AQPs thus serve as instructions how to achieve the objectives. They may include some duties, nevertheless, it is a planning document setting out aims that are to be achieved and that must be taken into account in decision-making and in applying other regulatory tools.

On the other hand, the Czech Air Protection Act established the rule that the Air Protection Authorities (APAs) are bound directly by the limit values for the concentration of the main pollutants in ambient air in their decision-making. This means that they should not approve of any new development projects having impact on the air quality in those zones/agglomerations where the limit values have already been exceeded. The Air Protection Authorities are entitled to depart from this rule only if adequate compensatory measures are proposed in regards to the projected activity. These compensatory measures should ensure that the level of pollution in the given area would not increase with the establishment of a new source of pollution. This legislative provision seems to be much stricter than the rules related to AQPs.

Municipalities and Regions have a duty to implement measures imposed on them by relevant AQP at the municipal and/or regional level so that the non-compliance with the air quality limit values is as short as possible. By the latest amendment to the APA they are required to elaborate the schedule for implementation of these measures.

To sum this up, the Czech APA distinguishes different approaches to achieving limit values in decision-making on activities with possible impact on the air quality expressed by three different terms. In respect to the limit values for the main

pollutants listed in Annex I to the APA , the competent authorities are “bound” by these limit values in their decision-making, while they have just to “consider” the level of pollution compared to the limit values for other polluting substances (arsen, nickel, cadmium, benzo(a)pyren and tropospheric ozone). In respect to air quality plans, the authorities are obligated “to base” their decisions on these plans. This seems not to preclude carrying out a projected activity in excessively polluted area in consistence with Kokott’s opinion mentioned in Case Commission v. Bulgaria, since people in these areas can hardly be prevented from any future economic and social development.

Nevertheless, the abovementioned holds just for decision-making on new installations and does not influence already existing sources of pollution in Czechia. These are subject to the source-oriented regulation, which is based on Directive 2016/2284/EU on the reduction of national emissions of certain atmospheric pollutants aim to reduce emissions of polluting substances, in particular of nitrogen oxides and fine particulate matter. Former emissions reduction programmes are to be transformed to national air pollution control programmes pursuant the new Directive. Even though they are part of source-related regulation, national emissions reduction programmes/air pollution control programmes are contributing effectively to the achievement of the air quality objectives and should, to that end, contribute to the successful implementation of air quality plans established under Article 23 of Directive 2008/50/EC of the European Parliament and of the Council .

In respect to the national legislation applicable to areas with excessive air pollution, the following conclusion may be drawn:

- 1) No increments to existing pollution are allowed.
- 2) A reduction of existing pollution should be gradual and consistent with AQPs, however, other interests must be taken into account and the AQPs should be adopted on the basis of a balance of interests.⁸

6. Does any law in your Member State provide for air quality standards that go beyond those set out in the AQD, imposing any more stringent standards, for example, in relation to PM_{2.5}?

Act n. 201/2012 Sb., imposes alert threshold for PM₁₀, which is not required by EU law.

Air Quality Monitoring and Modelling

7. How are air quality monitoring networks set up in your Member State (briefly)? Do these go beyond the monitoring requirements set out in Chapter II AQD (eg in terms of the number and location of monitoring stations)?

Decree n. 330/2012 Sb., sets minimum number of locations for sampling points. These requirements and substances correspond with AQD.

⁸ JANČÁŘOVÁ, Ilona. Significance of Air Quality Plans - the Czech Experience. In Helle Tegner Anker, Birgitte Egelund Olsen. Sustainable Management of Natural Resources: Legal Instruments and Approaches. Cambridge: Cambridge: Intersentia, 2018. s. 195-210, 16 s. European Environmental Law Forum Series, Volume 5. ISBN 978-1-78068-759-9.

8. What sort of problems are encountered in monitoring of air quality in your Member State?

According to CHI some of the measuring equipment might be too close to roads therefore measurements taken might be negatively influenced by traffic. Some of the measuring equipment might not be in an adequate condition.

9. As far as you can determine, are there limitations or problems with the modelling techniques used in your Member State to assess air quality (where modelling is permitted as a method for assessment under Chapter II AQD)?

Not to my knowledge.

National Air Quality Plans and Governance

10. Does your Member State have a national Air Quality Plan under Article 23?

- a. If so, to which pollutants does the plan relate (eg NO₂ or PM₁₀) and what **key** measures does the plan outline to keep exceedances 'as short as possible'?
*Please also indicate if you think there are any **weaknesses** in the plan.*

The Czech Republic does not have national AQP, since pursuant Art. 23(1) Member States must ensure that air quality plans are established for zones or agglomerations where the levels of pollutants in ambient air exceed any limit value or target value, plus any relevant margin of tolerance in each case. At the national level, the National Emission Reduction Programme/National Air Pollution Control Programme was prepared (pursuant to Directive 2016/2284/EU) that relates to these pollutants⁹: SO₂, NO₂, NO_X, PM₁₀, PM_{2.5}, O₃, CO, benzene, Pb, As, Cd, Ni, B(a)P, NM-VOC, NH₃, black carbon, POPs, Hg.

AQPs exist but for zones and/or agglomerations, where one or more AQS are exceeded. Therefore they relate to those pollutants, concentrations of which are exceeding the AQS. These AQPs are elaborated by the Ministry of Environment (MoE) in cooperation with relevant regional and local authorities within 18 months since the end of the year when the AQS was exceeded in the given zone or agglomeration. The MoE is empowered to approve these AQPs. The content of AQPs is set by the Directive. Information to be included in the air quality plans are delimited in section A of the Annex XV of the Directive. Among those, the AQPs must encompass data on origin of pollution and details of those measures or projects for improvement which existed prior to 11 June 2008, with observed effects of these measures, details of those measures or projects adopted with a view to reducing pollution following the entry into force of the Directive along with timetable for implementation and estimate of the improvement of air quality planned and of the expected time required to attain these objectives. Details of the measures or projects planned or being researched for the long term should be included as well. The required

⁹ https://www.mzp.cz/cz/narodni_program_snizovani_emisi

content of AQPs is delimited in Annex 5 to the Czech Air Act in compliance with the Directive. Specific measures aimed at air quality improvement are derived from the specific needs and based on the analysis of situation in each zone or agglomeration.

- b. If your Member State has such a plan, how is the legal requirement of keeping exceedances 'as short as possible' satisfied? *Please outline any challenges (legal or otherwise) in meeting this requirement in your Member State.*

AQP are set for individual zones/agglomerations. So far, the public was allowed to challenge the AQPs at the administrative court for the non-compliance with the "as short as possible" time period requirement.

11. Whether or not your Member State has an Air Quality Plan, please outline the key national regulatory measures that contribute towards compliance with EU air quality standards in your Member State.

For example, what are the main national legal measures that regulate polluting air emissions from:

- *households (eg restrictions on solid fuels, planning laws);*
- *transport (eg clean air zones); and*
- *industry (eg reliance in Industrial Emissions Directive or something more)?*

Households:

The Czech government subsidizes the change of old furnaces/boilers in local heating systems. Air protection authorities are entitled to check (under strict conditions) whether operators of local heating systems (owners of houses) use fuels compatible with operational requirements and with fuel quality requirements.

Transport:

Municipalities can establish low emission zones in parts of the cities. Municipalities, public authorities, public companies and undertakings can buy subsidized alternative fuel vehicles.

Industry:

Construction of each industrial installation must be permitted. The permit will not be granted if the air quality standards are already exceeded in the given area and no compensatory measures aimed at keeping the pollution at least at existing levels were proposed by the investor. To operate the industrial installation/other source of pollution the permit to operate must be granted either as IPPC permit or as a regular permit to operate sources which are not covered by the IED. Each permit contains emission limits for pollutants which are to be emitted from the installation.

12. Has your Member State ever issued a Short-term Action Plan under Article 24? If so, please outline any notable features of the plan or aspects of its implementation (briefly).

The Czech Republic does not have SAPs in its legal system, since the problems with air pollution concern pollutants which the short-term action plans are not required for by EU law. However, similar and maybe even more effective tool is in place, which is applicable for smog situations and goes beyond SAP. The smog situation is announced when alert thresholds for these pollutants are met: SO₂, NO₂, PM₁₀, O₃. When the smog situation is announced all significant industrial facilities have a duty to adopt special operation reduction regimes which is a part of their operational rules. Municipalities are entitled to establish regulation that can limit the use of vehicles, resp. their entrance into inner city.

13. Which public bodies have legal responsibilities for meeting air quality standards in your Member State?

In general, Ministry of Environment is responsible for meeting air quality standards and for creating AQPs with appropriate measures. At regional and local levels the Air Protection Authorities are empowered to decide on new sources of air pollution and to enforce duties imposed on individuals.

14. Are there any legal requirements for different public bodies who have control over different air pollution sources to coordinate their efforts in any way to work towards air quality standards? (For example, different regulators may control highways, airports, local urban planning decisions, large industrial installations, and so on.)

Pollution issues should be dealt with during permission processes and urban planning. In respect to it, public authorities coordinate their efforts with building authorities. Land use plans are binding upon the decision-making on future use of the land. In these plans, air pollution problems are dealt with and Air Protection Authorities are commenting upon planning proposals. They are entitled to provide their binding opinion to the Building Authority in the permitting procedures of new sources of pollution which are not covered by the Industrial Emissions Directive. The Czech Environmental Inspectorate is entitled to inspect individual sources of pollution and enforce the law by imposing fines and other sanctions.

Enforcement of Air Quality Law

15. What is the primary mode for enforcing of air quality law in your Member State?

The primary mode for enforcing air quality law is via administrative law liability. Person who breaches the law commits an administrative offence. The perpetrator is usually sanctioned by a fine and, at the same time, the corrective measures can be imposed on him. In the worst cases, when previously imposed sanctions are not respected by the perpetrator or if the source of pollution is operated without a permit, the air protection authorities are entitled to prohibit further operation. In case the damage was caused to the property/health, the civil court is authorized to decide on adequate compensation in a civil law proceedings. In case damage was caused to the environment (water, land or specially protected parts of nature), the polluter is liable for environmental damage in the sense of the Environmental Liability Directive.

Criminal charges are not excluded in cases of gross negligence or intentional damage to environmental components. The conditions that must be met to commit this crime are set by the Criminal Code.

16. Have there been court cases concerning the enforcement of air quality law in your Member State? Please outline major cases or themes in key cases only.

There were similar judicial decisions regarding the quality of AQPs. The most recent judgement concerning air quality plan for Brno agglomeration was issued by the Supreme Administrative Court.¹⁰ Complainant (NGO) argued that the plan had not adequately dealt with pollutants such as PM10, PM2,5 and benzo(a)pyrene. Air quality plan had not introduced appropriate measures that would keep exceedance period as short as possible therefore limit values of these pollutants were often breached even after introduction of AQP.

The Administrative Court partially annulled air quality plan created by Ministry of Environment. The court stated that AQP did not fulfil legal requirements posed by law and did not adequately deal with the SEA report.

17. Please outline any other major challenges faced in your Member State for enforcing the AQD, or any other applicable air quality law.

Main issue is transboundary pollution, especially near Polish borders. Czech enforcement authorities cannot effectively regulate sources of pollution that are not based in the Czech Republic. Municipalities cannot effectively reduce air pollution from cars due to congestions and vehicles with removed particle filters. The biggest challenge is connected to enforcement of road worthy vehicles and periodical vehicle checks.

A Controversial Source of Air Pollution: Regulation of Vehicle Emissions Systems

Many Member States are currently subject to infringement proceedings by the Commission in relation to vehicle type approval rules. This is currently prescribed under Framework Directive 2007/46/EC establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles [2007] OJ L263/1 and Regulation (EC) No 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 [2007] OJ L171/1.

Amongst other things, this legislation requires Member States to have 'effective, proportionate and dissuasive' penalty systems in place to deter car manufacturers from illegal practices, such as installing defeat devices. This legislation was overhauled in 2018 by Regulation (EU) 2018/858 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such

¹⁰ This is the third ruling following decisions 4 As 250/2016 a 6 As 288/2016 that partially annulled AQP in the CR.

vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC [2018] OJ L151/1, which will apply from 1 September 2020.

18. How has your Member State implemented these EU vehicle type approval rules? Have there been any controversies in transposing these rules?

The EU rules were transposed via legally binding Acts (e.g. Act n. 111/1994 Sb., Act n. 56/2001 Sb. etc.¹¹) there are also regulatory instruments such as decrees and regulations that mainly deal with technical issues (e.g. process of type approving and other technical requirements). Automotive industry is a pillar of Czech economy therefore the legislation tends not to be so strict. Concerning transposition of EU rules, I am not aware of any controversies connected to type approval procedure or Euro 5 & 6 rules.

19. What legal measures have been taken in your Member State (if any) against car manufacturers which have failed to comply with vehicle type approval rules? *These legal measures might include court cases, including between car buyers and manufacturers.*

Concerning vehicles (and manufacturers) connected to Dieseldate, public authorities did not commence any administrative or criminal proceedings against car manufacturers or distributors. Ministry of transport of the Czech Republic as competent authority concerning type approving received submission by manufacturers that some of their cars might not comply with type approval certification but they offered solution to this situation. This is possible under s. 28(1)(q) of Act No. 56/2001 Coll. Therefore Ministry had no incentive to commence administrative proceedings which might end in pecuniary fine.

There are still some pending court cases between consumers (or their legal representatives) and car manufacturers but the result is unclear, and actions will be most likely dismissed, as Czech legal system is different from US legal system.

Case Study

Martha is living in an urban area in your Member State, and her children have developed asthmatic symptoms (i.e. a diagnosed respiratory illness). She becomes aware that the local air quality exceeds standards laid down in the AQD. Her house is next to a main road, which is a heavily used bus route on which bus operators use diesel vehicles. The town also has a number of industrial plants, a coal fired power station, and a number of intensive farms. It is unclear to her precisely which pollution source is causing the breaches of air quality standards, or what their respective contributions might be to the local air quality problem.

¹¹ For more detailed view please refer to national transposition section in EurLex see: <https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32007L0046&qid=1554293959216>

What sort of legal action could Martha take in your Member State? And against whom? What remedies do the courts possess? What are the financial implications of bringing such a case? Might there be other regulatory avenues available to Martha instead?

The Czech legal order offers different ways to enforce their interest in breathing cleaner air. Public and/or private law remedies may be pursued in order to solve problems with excessive air pollution which differ in relation to legality/illegality of activities carried out in the given area by existing installations or in relation to projected activities.

Presume that a large industrial source of pollution is exceeding the emission limits for PM₁₀ or is operated in breach with conditions set by the permit to operate. In connection with this breach of law, anybody has the right to notify the Czech Environmental Inspectorate or the Air Protection Authority, i.e. to complain on the excessive pollution produced by this installation. The inspection authorities are obligated to inquire into such notification/complaint and if they determine that the installation does not comply with regulatory requirements they are entitled to impose a fine up to 10 000 000 CZK depending on the type of the delict. These authorities are also empowered to impose corrective measures and they even may prohibit or restrict the operation of the installation if the corrective measures were not carried out in time. The authorities must always prohibit the operation of installation which is operated without permits required by the law.

The complainer or the public is generally not entitled to participate in the procedure so that the decision of the public authority is impossible to be appealed by the public - for example in the event that the operator was not sanctioned at all or the penalty imposed was too low or the corrective measures are ineffective. Owners of the land and other persons whose rights were concerned and also NGOs are entitled to lodge a claim and they may participate only in administrative proceedings on the imposition of corrective measures in cases when the ecological damage on soil, water or protected parts of nature¹² was caused by the polluter. In this case, the authorities are obligated to open the procedure on corrective measures aimed just at remedy of damaged parts of the environment.

For common people, the administrative enforcement is less demanding than the judicial one. Private law may be employed independently on administrative law level in case the damage was caused by the polluter to property or health of natural and legal

¹² The liability for ecological damage is regulated by the special law (Act No. 167/2008 Coll.,) which is implementing the EU Directive 2004/35/EC.

persons or in case of nuisance. The owners or tenants may sue the polluter for damages or to file an action for injunction, prohibiting the continuation of the nuisance. The court may order the polluter to stop the nuisance pursuant to Art. 1013 of the Civil Code (Act No. 89/2012 Coll.); however, only if the polluter does not comply with the law or with the permit to operate. If the source of pollution is operated in compliance with the permit and all other regulatory requirements, the Court is not entitled to issue the order to stop the nuisance but decide on damages pursuant to Art. 1013.2 of the Civil Code. In cases mentioned above, the breach of law must be proven and the enforcement activities are directed to specific polluters.¹³

Another legal steps may be taken against the state in case of poor ambient air quality. A question may be raised, whether the state may be held liable for excessive air pollution in the Ostrava-Karviná agglomeration under the Czech national legislation, since Art. 35.1 of the Charter of Basic Human Rights, which is part of constitutional law in the Czech Republic (Act No. 2/1993 Coll.), guaranties the right to the favourable environment to anybody. This constitutional right, nonetheless, is considerably limited by Art. 41 of the Charter saying that the right to the favourable environment (beside others) may be enforced as the constitutional right only by means of regular laws, e.g. in the case of ambient air pollution pursuant to provisions of the Air Protection Act, Construction Code and other laws.

For this particular reason, the actions filed in order to protect constitutional right to favourable environment due to the existence of Art. 41 of the Charter are not possible to be utilized with regard to existing sources and pollution legally arising from them. The action protecting the right to favourable environment has the potential to be successful only if would concern the permission of a new source of air pollution and if compensatory measures required by the Air Protection Act would not be applied.

The right to favourable environment has been demanded by a petitioner at the level of Supreme Administrative Court of the Czech Republic in the legal regime of protection against unlawful interference. In these administrative proceedings, the action of the statutory city of Ostrava was brought against the Government, Ministry of the Environment and Ministry of Transport.¹⁴ The petitioner/complainant demanded a decision that the defendants are prohibited to continue violating the right to favourable environment, the sign of which is inadequate and ineffective protection of air cleanliness caused by the exceedance of ambient air quality standards (AAQS) and emission limits of the pollutants in the regional area of the petitioner set by the directive 2008/50 and by

¹³ JANČÁŘOVÁ, Ilona. Privilegované imise vs. ústavní a veřejnoprávní základy ochrany životního prostředí. In Jančářová I., Hanák, J., Průchová, I.. **Vlastník a podnikatel při ochraně životního prostředí**. Brno: Masarykova univerzita, 2015. p. 15-19, 155-169, 20 pp. Sciencia č. 519. ISBN 978-80-210-7951-9.

¹⁴ Supreme Administrative Court of the CR, Case 6As 1/2014-30

the Air Protection Act No. 201/2012 Coll. and other legislation, as well as by an incorrect implementation of Community law into the national legal system, the reason being that in the regional area of the petitioner there had been no functional and effective system leading to the observance of AAQS. The petitioner further petitioned that the defendants are ordered to “accept and put to practice particular measures creating a functional and effective system that would lead to observance of the limits set by the abovementioned legislation in the area of authority of the petitioner”. The unquestionability of the unlawful consequence has been ruled by the court. The petitioner unfortunately did not manage to prove that the sued administrative bodies behave unlawfully and that there is a cause between the alleged unlawful inactivity and the unlawful consequence. The incorrectness of the EU law implementation had not been specified by the petitioner either. The Supreme Administrative Court stated in this matter that the breach of obligations arising from incorrect or inadequate implementation of the directives can be sanctioned in the proceedings in front of CJ EU based on the action brought by EU bodies. If the petitioner concludes that the breach of the Member State obligation from the directive 2008/50 is an unlawful interference into legal sphere of the petitioner, the protection of which is guaranteed by the administrative courts, there are no sufficient arguments for this conclusion in the matter. It had not been specified by the petitioner which instruments had not been used by the defendants. The Administrative Court therefore concluded that the inobservance of the limits for the air pollution in Ostrava area does not constitute unlawful interference in the sense of Sec. 82 of the Administrative Court Procedure Act.

Another possibility is to demand adoption of such air quality plans from the Government, which would aim at fulfilling the goals set in the 2008/50 directive. Therefore, if the Member State applied for the postponement, the suitability and effectivity of the measures proposed by the Member State in the Air Quality Plan should be guaranteed by the Commission. However, if the limit value for PM₁₀ is exceeded after 1.1.2010 in a Member State that has not applied for a postponement of that deadline, the second subparagraph of Article 23(1) of that directive imposes a clear obligation on that Member State to establish an air quality plan that complies with certain requirements.¹⁵ It follows from the decision of the CJ EU C-404/13 that the natural or legal persons directly concerned by the limit values being exceeded after 1.1.2010 must be in a position to require the competent authorities, if necessary by bringing an action before the courts having jurisdiction, to establish an air quality plan which complies with the second

¹⁵See, by analogy, judgement in Janecek, C-237/07, EU:C:2008:447, paragraph 35. Accessible at <http://eur-lex.europa.eu> .(17.7.2016)

subparagraph of Article 23(1) of Directive 2008/50, where a Member State has failed to secure compliance with the requirements of the second subparagraph of Article 13(1) of Directive 2008/50 and has not applied for a postponement of the deadline as provided for by Article 22 of the directive.¹⁶ As regards the content of the plan, the CJ EU ruled that, while Member States have a degree of discretion in deciding which measures to adopt, those measures must, in any event, ensure that the period during which the limit values are exceeded is as short as possible.¹⁷ If this duty is not observed, the Commission can initiate infringement proceedings on the Member State.

In the Czech Republic, the Government took several steps to reduce air pollution in Ostrava-Karviná agglomeration. First of all, in 2012 the Regional Air Quality Improvement Program of Moravian-Silesian Region from 2009 was updated. Its realization should lead to the enhancement of the air quality, but as implied in the Programme the changes will not be immediate.¹⁸

This Program worked alongside the Regional Program on Emissions Reduction of the Moravian-Silesian Region, which was adopted based on the previous Air Protection Act No. 86/2002 Coll. Its basic objectives are to limit emissions of solid pollutant particles and its precursors (SO₂, NO_x, NH₃, VOC) and to limit emissions of PAH (polycyclic aromatic hydrocarbons such as benzo(a)pyrene). PM₁₀ values were not dealt with individually. Furthermore, the Council of Moravian-Silesian Region published regional regulatory procedure in June 2010 in the legal form of regional regulation. Its main role is to identify regionally significant sources of dust, which will have to adopt specific regulatory measures in the case of increased dust levels during smog situations.^{19,20} The aim of the regulatory measures is an immediate decrease in the levels of emissions of pollutants from the defined sources, even at the cost of lower industrial or other production, which would help to elevate the negative consequences of the continuing

¹⁶ See, by analogy, judgment in Janecek, EU:C:2008:447, paragraph 39. Accessible at <http://eur-lex.europa.eu> (17.7.2016).

¹⁷ That follows from the second subparagraph of Article 23(1) of Directive 2008/50.

¹⁸ In April 2016, new Programme on Air Quality Improvement of Moravian-Silesian Region (CZ08Z) has been adopted along with the Programme on Air Quality Improvement of Ostrava/Karviná/Frýdek-Místek Agglomeration (CZ08A). Available at:

[http://www.mzp.cz/C1257458002F0DC7/cz/kvalita_ovzduzi_moravskoslezsko_2016/\\$FILE/OOO-OOP_PZKO_CZ08Z-20160623.pdf](http://www.mzp.cz/C1257458002F0DC7/cz/kvalita_ovzduzi_moravskoslezsko_2016/$FILE/OOO-OOP_PZKO_CZ08Z-20160623.pdf) (17.7.2016)

and at

[http://www.mzp.cz/C1257458002F0DC7/cz/kvalita_ovzduzi_ostrava_karvina_frydekmostek_2016/\\$FILE/OOO-OOP_PZKO_CZ08A-20160623.pdf](http://www.mzp.cz/C1257458002F0DC7/cz/kvalita_ovzduzi_ostrava_karvina_frydekmostek_2016/$FILE/OOO-OOP_PZKO_CZ08A-20160623.pdf)

¹⁹ <http://iszp.kr-moravskoslezsky.cz/cz/rada-kraje-schvalila-krajsky-regulacni-rad-8925/> (20.4.2016) Jedná se o následující zdroje : ArcelorMittal Ostrava a.s. - závod 10 koksovna; ArcelorMittal Ostrava a.s. - závod 13 ocelárna; EVRAZ VÍTKOVICE STEEL, a.s.; OKK Koksovny, a.s. - Koksovna Svoboda; OKK Koksovny, a.s. - Koksovna Jan Šverma; TŘINECKÉ ŽELEZÁRNY, a. s. - Koksochemická výroba; TŘINECKÉ ŽELEZÁRNY, a. s. - Ocelářenská výroba; ŽDB GROUP a.s. – Ocelárna; ŽDB GROUP a.s. - Topenářská technika Viadrus.

²⁰ According to Air Protection Act (No. 211/2012 Coll., as amended) which is currently in force, these specific regulatory measures are directly part of operational rules of designated sources of pollution.

smog situation.²¹ Nonetheless, not a single one of the abovementioned documents was not fully suitable to replace the action plans as required by the EU law as well as by the Air Protection Act No. 86/2002 Coll.

Action plan for the relevant area has not been adopted, which was again a subject to an action filed against the Regional Authority of the Moravian-Silesian Region.²² The petitioners were fighting against an unlawful intervention of the defendant. The unlawful intervention was considered to lie in the fact that the defendant did not manage, despite the deteriorating air quality, to draw up and issue action plan in accordance with § 7.11 Act No. 86/2002 Coll. Air Protection Act for the areas with degraded state of air (city district of Ostrava Radvanice and Bartovice). The Supreme Administrative Court has ruled based on the judgment of CJ EU Dieter Janecek (C-237/07) and ClientEarth (C-414/13) and stated that in the considered matter it is without doubt that the conditions set by the Air Protection Act No. 86/2002 Coll. are fulfilled and that an adoption of an action plan containing an overview of short-term measures should follow. The Supreme Administrative Court came to a conclusion that the Regional Authority did not comply with this obligation, which means that during the effectivity of the Air Protection Act No. 86/2002 Sb. (i.e. 1.1.2007 – 31.8.2012) it is an unlawful intervention into the rights of the petitioners.²³

From the viewpoint of excessive pollution by PM10 particles this judgment lost its impact, because in the meantime new Air Pollution Act was adopted which did not establish the obligation to issue short term action plans at all.

Following from all the above mentioned arguments, the judicial protection is provided in cases where the petitioner/complainant can specify as precisely as possible what is seen as unlawful intervention and that there is a direct cause between the unlawful intervention (which can also lie in omission) and unlawful consequence in the form of unlawful situation – here extremely polluted air. If it does not follow from the evidence in the proceedings on the protection against unlawful intervention of the administrative body according to § 82 et seq. of Administrative Procedure Code that the unlawful situation (here the quality of air in the relevant area) was caused by the alleged omissive intervention of the defendants, conditions for judicial protection from such intervention are not met, even if the existence of the unlawful situation is unquestionable.²⁴

²¹ <http://iszp.kr-moravskoslezsky.cz/cz/ovzdusi/smogove-situace/regulacni-opatreni--24602/> (20.4.2016).

²² Supreme Administrative Court of the CR, decision 2As 48/2015-60 of 11.6.2015.

²³ Supreme Administrative Court of the CR, decision 2As 48/2015-60 of 11.6.2015

²⁴ Supreme Administrative Court of the CR, decision 6 As 1/2014-30 of 14.11.2014

REFERENCES:

JANČÁŘOVÁ, Ilona. Significance of Air Quality Plans - the Czech Experience. In Helle Tegner Anker, Birgitte Egelund Olsen. **Sustainable Management of Natural Resources: Legal Instruments and Approaches**. Cambridge: Cambridge: Intersentia, 2018. s. 195-210, 16 s. European Environmental Law Forum Series, Volume 5. ISBN 978-1-78068-759-9.

JANČÁŘOVÁ: Ilona **Legal reflections on problems with excessive pm10 concentrations in Ostrava - Karviná agglomeration, Czech Republic**. In Milan Damohorský, Vojtěch Stejskal (ed.) et al.: Environmental Law Yearbook 2017. The Czech Society for Environmental Law. Eva Rozkotová publishing, Beroun 2017. ISBN 978-80-87488-30-0, str.35-56. (Zpráva od Stejskala duben 2018)

JANČÁŘOVÁ, Ilona a Jiří VODIČKA. Kam se poděly krátkodobé akční plány? **Časopis pro právní vědu a praxi**, Brno: Masarykova univerzita, 2018, roč. 26, č. 2, s. 337-355. ISSN 1210-9126.

DENMARK

Avosetta – London My 2019 - Air Quality Law Danish Report

By Peter Pagh

Preliminary observation:

Despite the fact that the first EU directive on the air quality standards go back to 1982, the EU-directives have never been implemented into Danish legislation as a legally binding legislation on air quality standard with sanctions – although a legal base for such implementation was formally adopted in 1982 – now the Environmental Protection Act section 14(2). The explanation is that air quality standards by the Danish EPA and many legal scholars have been (and still is) considered “*environmental demands without an addressee*”. This phrase is even used in one of the environmental law text book from 2018. The reason is that the Danish EPA is the responsible authority and the EPA consider itself as the authority making demands – not subject to demands. The monitoring and reporting obligations under the Directive is placed on Danish Center of Environmental research – an institute under Aarhus University (DCE).

There are no sanctions for none compliance with the limit values or the obligation to draw action plans or the monitoring requirements – and this is still the case in the recent ministerial Statutory Order no. 1472 from 12 December 2017 on air quality. Moreover, under the Environmental Protection Act there is no legal basis regarding the air quality plan adopted to ensure compliance in case limit values on pollutants have been exceeded and there is no direct legal implications when an air quality plan has been adopted and the adoption is not subject to SEA procedure.

Answer to the questionary

1. What are the main sources of unlawful levels of air pollution in your Member State?

Answer: There is no “*unlawful*” level of air pollution under Danish Law – the emission of pollutants to the air is only unlawful under the Environmental Protection Act, if the source (the operator) exceed limit values in an IPPC permit (which only address airpollution on few sources as waste incineration or combusting power plants) – or if an administrative order have been issued by the municipality to the source under section 42 of the Environmental Protection Act. certain power plants, or if emission

2. How extensive is reported non-compliance with AQD air quality standards in your Member State?

For AQD air quality standards, please refer to AQD, Articles 12-19.

Please refer to data either reported to the Commission or otherwise available in your Member State. It may be easiest to set this information out in a table for different standards for certain pollutants (NO₂, PM₁₀, PM_{2.5}, SO₂ are likely to be the main pollutants for which there may be reported non-compliance with AQD standards).

- a. *If data on compliance with air quality standards is incomplete, please indicate the extent of the non-compliance with requirements of Article 26 AQD (public information requirements).*

Answer: Main problems are NO_x and particulates

3. *Have EU infringement proceedings been brought against your Member State for failure to comply with the AQD?*

Answer: Opening letter from the Commission was issued in 2016. NGO/citizens request on access to the opening letter was rejected by the ministry/EPA. Complaints were made to the Ombudsman who didn't find reasons to criticize the ministry/EPA. Based on the information in the media, the concern of the Commission is NO_x. The Danish EPA answered in 2016 and change the location of the monitoring station – and based on information from the media it seems that the discussion between the EPA and the Commission concerns whether the monitoring station can be placed on another location ..

4. *Was there pre-existing national law relating to air quality standards (similar to the AQD), or did the AQD introduce something new in your country?*

Answer: The same as EU

5. *How are AQD air quality standards implemented in law in your Member State?*

Answer: The formal legal base is the Environmental Protection Act section 14 providing the Minister of Environmental with the power to implement EU-environmental quality standards. Based on this authorization, the minister has issued ministerial Statutory Order no. 1472 from 12 December 2017 on air quality

6. *Does any law in your Member State provide for air quality standards that go beyond those set out in the AQD, imposing any more stringent standards, for example, in relation to PM_{2.5}?*

Answer: Not to my knowledge

7. *How are air quality monitoring networks set up in your Member State (briefly)? Do these go beyond the monitoring requirements set out in Chapter II AQD (eg in terms of the number and location of monitoring stations)?*

Answer: The ministerial Statutory Order no. 1472 from 12 December 2017 on air quality copy the text from the Directive and its criteria granting the Danish EPA the authority to use this discretion. One example: according to section 6(3)(1) of the Statutory Order “at rural background locations one sampling point shall be installed every **100 000 km²**” – The territory of Denmark is 43.000 km²! -

8. *What sort of problems are encountered in monitoring of air quality in your Member State?*

Answer: Discretion to place monitoring station seems to be used to escape obligations and this is now one of the issues discussed between the Commission and the Danish EPA

9. As far as you can determine, are there limitations or problems with the modelling techniques used in your Member State to assess air quality (where modelling is permitted as a method for assessment under Chapter II AQD)?

Answer: Not to my knowledge –

10. Does your Member State have a national Air Quality Plan under Article 23?

Answer: The EPA has in 2014 issued a plan regarding reducing NO_x in Copenhagen. The plan has no legal binding status but reflects the intentions of the EPA and measures which could be taken ..

11. Whether or not your Member State has an Air Quality Plan, please outline the key national regulatory measures that contribute towards compliance with EU air quality standards in your Member State.

For example, what are the main national legal measures that regulate polluting air emissions from emissions from:

- *households (eg restrictions on solid fuels, planning laws);*
- *transport (eg clean air zones); and*
- *industry (eg reliance in Industrial Emissions Directive or something more)?*

Answer: See introduction remarks and my answer to q10 – the air quality plan is not legally binding – but intentions and instrument –

12. Has your Member State ever issued a Short-term Action Plan under Article 24? If so, please outline any notable features of the plan or aspects of its implementation (briefly).

Answer: No

13. Which public bodies have legal responsibilities for meeting air quality standards in your Member State?

Answer: The Danish EPA

14. Are there any legal requirements for different public bodies who have control over different air pollution sources to coordinate their efforts in any way to work towards air quality standards? (For example, different regulators may control highways, airports, local urban planning decisions, large industrial installations, and so on.)

Answer: No – see introduction remarks – to this can be added a new instrument: the Planning Act section 15 b: If municipalities adopt local plans for new houses for private home in an area where the limit values are exceeded, the local plan must include an obligation on the developer to ensure that the air quality standards are not exceeded inside the houses.

15. What is the primary mode for enforcing of air quality law in your Member State?

Answer: There is no enforcement of emission causing bad air quality unless the emission exceeds the conditions in the IPPC permit or and administrative order has been issued regarding emission to the air.

15. Have there been court cases concerning the enforcement of air quality law in your Member State? Please outline major cases or themes in key cases only.

Answer: No – there was one case on an underground train station – but in this case it was concluded that the air quality directive does not apply for indoor air.

16. Please outline any other major challenges faced in your Member State for enforcing the AQD, or any other applicable air quality law.

Answer: Environmental NGOs don't like to challenge the EPA in court – probably because such legal action against the Danish EPA might have a negative impact on how the NGO can influence the EPA

17. How has your Member State implemented these EU vehicle type approval rules? Have there been any controversies in transposing these rules?

Answer: I don't know

18. What legal measures have been taken in your Member State (if any) against car manufacturers which have failed to comply with vehicle type approval rules? These legal measures might include court cases, including between car buyers and manufacturers.

Answer: None to my knowledge

Case Study

Martha is living in an urban area in your Member State, and her children have developed asthmatic symptoms (i.e. a diagnosed respiratory illness). She becomes aware that the local air quality exceeds standards laid down in the AQD. Her house is next to a main road, which is a heavily used bus route on which bus operators use diesel vehicles. The town also has a number of industrial plants, a coal fired power station, and a number of intensive farms. It is unclear to her precisely which pollution source is causing the breaches of air quality standards, or what their respective contributions might be to the local air quality problem.

What sort of legal action could Martha take in your Member State? And against whom? What remedies do the courts possess? What are the financial implications of bringing such a case? Might there be other regulatory avenues available to Martha instead?

Answer: As briefly explained above. The best legal and economic advice to Martha will be: - move and find a better place ..!

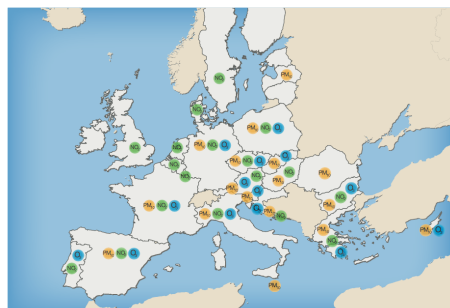
FRANCE

Avosetta Questionnaire: Air Quality Law

London 24-25 May 2019

FRANCE

Carte 11 : dépassements des normes réglementaires de qualité de l'air pour la protection de la santé dans l'UE28 en 2016



Notes : les données de concentrations présentées sont celles de 2016, celles de 2017 n'étant pas encore compilées au niveau européen ; les données proviennent de la base européenne issue des rapports de juillet 2018 et ont été mises à jour au 7 février 2019. Les données relatives à la France sont issues des données nationales de l'ADEME, mises à jour au 7 février 2019. Les données relatives aux autres pays sont issues des données nationales de ces pays. Les données sont exprimées en nombre de dépassements par pays. Les données relatives à la France sont issues de l'ADEME, mises à jour au 7 février 2019. Les données relatives aux autres pays sont issues des données nationales de ces pays. Les données sont exprimées en nombre de dépassements par pays. Les données relatives à la France sont issues de l'ADEME, mises à jour au 7 février 2019. Les données relatives aux autres pays sont issues des données nationales de ces pays. Les données sont exprimées en nombre de dépassements par pays.

Most of the questions below relate to implementation of the EU Ambient Air Quality Directive (Directive 2008/50/EC [2008] OJ L152/1, 'AQD'), looking beyond direct transposition to actual implementation and the legal and structural challenges in meeting EU air quality standards. Some questions extend beyond the AQD to examine other controversial or emerging aspects of EU law relating to air quality.

AIR QUALITY : NATIONAL CONTEXT

According to the last report of the European Environment Agency (2018), in France 35 800 premature deaths were attributable to concentrations of fine particulate matter, 1800 to concentrations of ozone and 9700 to concentrations of nitrogen dioxide (data 2015). In France, it is estimated that 48 000 premature deaths per year are attributable to fine particulate (Data 2018 Santé Publique France, national public health agency). A committee of inquiry of the French Senate (2015) estimated the annual costs of the air pollution around 100 billion euros, of which 20 to 30 billion for health-related harm related to fine particulate.

The last French review on the air quality (2018) underlines the percentage reduction in emissions during the period 2000-2017: 41% for PM10, 48% for PM2,5, 49% for NOX, 77% cadmium and SO2; no change for ammonia emissions.

1. What are the main sources of unlawful levels of air pollution in your MS?

For 2017, exceedances were registered for nitrogen dioxide, particulate matter PM10 and also for concentrations of ozone and benzo(a)pyrene.

According the estimations:

- NO2 emissions are generated by transports (62%), industry (18%), residential (11%)
- PM10 emissions: 31% residential, 27% industry, 27% agriculture, 15% transports.
- PM2,5 emissions: 48% residential, 22% industry, 19% transports, 11% agriculture.

The principal source of particulate emissions is the biomass combustion. According the agency Ademe, residential wood burning is responsible of 29% of PM2,5 emissions.

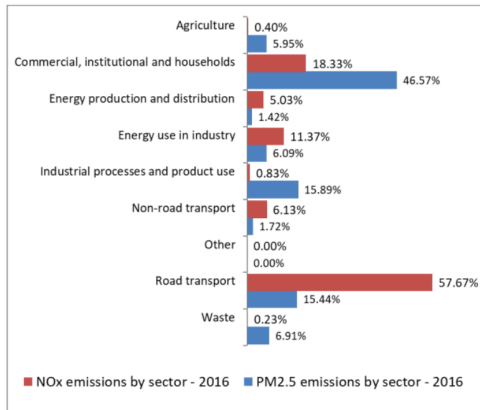
In 2016, France did not respect the NOX emissions ceiling (emissions generated largely by the combustion process).

	Principales sources primaires anthropiques	Tendances concentrations	Respect de la réglementation en 2017	Nombre d'agglomérations en dépassement en 2017
SO ₂		↘	✓	0
NO ₂		↘	✗	12
O ₃		ns	✗	28
PM ₁₀		↘	✗	3
PM _{2,5}		↘	✓	0
CO		↘	✓	0
C ₆ H ₆		↘	✓	0
As		nd	✓	0
Cd		nd	✓	0
Ni		nd	✗	2
Pb		nd	✓	0
B[a]P		nd	✗	2

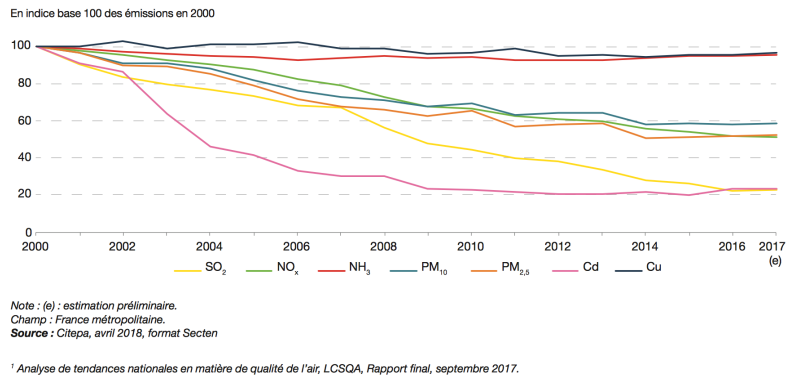
Notes : arsenic (As), cadmium (Cd), nickel (Ni), plomb (Pb), benzo[a]pyrène (B[a]P), benzène (C₆H₆), monoxyde de carbone (CO), particules de diamètre inférieur à 2,5 µm (PM_{2,5}) et ozone (O₃) ; ns : non significatif, nd : non disponible.

Sources : GéoAd'Air, juillet 2018 ; Citepa, mise à jour avril 2018, format Secten ; SDES

Figure 13: PM_{2.5} and NO_x emissions by sector in France⁵²



Graphique 1 : l'évolution des émissions de quelques polluants



<https://www.statistiques.developpement-durable.gouv.fr/sites/default/files/2018-10/datalab-45-bilan-qualite-air-exterieur-france-2017-octobre2018.pdf>

2. How extensive is reported non-compliance with AQD air quality standards in your Member State?

For AQD air quality standards, please refer to AQD, Articles 12-19.

Please refer to data either reported to the Commission or otherwise available in your Member State. It may be easiest to set this information out in a table for different standards for certain pollutants (NO₂, PM₁₀, PM_{2.5}, SO₂ are likely to be the main pollutants for which there may be reported non-compliance with AQD standards).

a. If data on compliance with air quality standards is incomplete, please indicate the extent of the non-compliance with requirements of Article 26 AQD (public information requirements).

For 2017 exceedances related to the annual limit value for nitrogen dioxide were registered in 12 air quality zones (Paris, Marseille and Lyon). Exceedances have also been registered related to particulate matter PM₁₀ in 3 (out of 76) air quality zone (including Paris, Martinique, Guadeloupe). The last French review on air quality (2018) provides an overview of the evolutions of these emissions during the period 2000-2017. Thus, for the NO₂, 157 agglomerations did not exceed the regulated level compared to 5 agglomerations which exceed every year the level (Lyon, Marseille, Montpellier, Aix, Paris, Strasbourg). For the PM₁₀, 146 agglomerations did not exceed the regulated level compared to Paris, Sallanches, Fort de France, Lyon which exceed every year the level.

*Exceedances have also been registered related to ozone (28 agglomerations) in 2017 (Avignon, Beaucaire, Gerardmer, Marseille, Aix, Montpellier, Mulhouse, Nice, Toulon).

Carte 4 : agglomérations présentant des dépassements des normes réglementaires de qualité de l'air pour la protection de la santé et polluants concernés en 2017

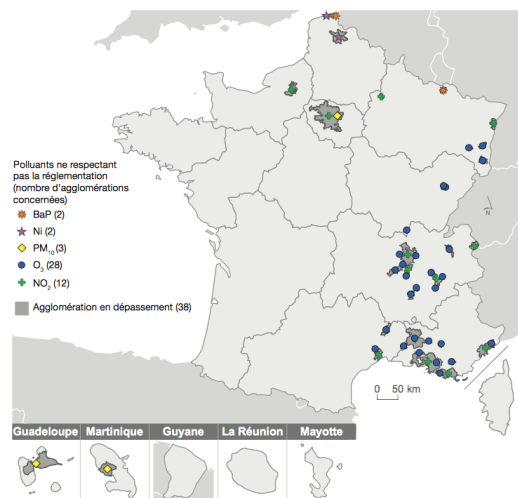
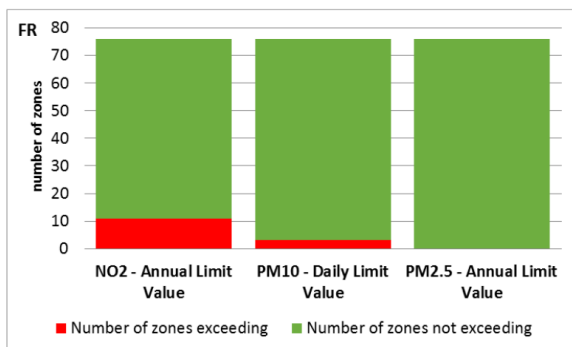


Figure 14: Air quality zones exceeding EU air quality standards in 2017⁵⁹



Source : Géod'Air, juillet 2018. Traitements : SDES, août 2018

3. Have EU infringement proceedings been brought against your Member State for failure to comply with the AQD?

a. If so, what was the outcome of this enforcement action and its impact on air quality law and policy in your Member State? (If enforcement action is ongoing, answer this question as best you can in terms of the effects of this action on your Member State's approach to air quality law and policy.)

Since 2007, the Commission closely follows the implementation of the AQD in France.

Limit value for PM10: 2010 reasoned opinion related 16 agglomerations (PM10) and application to the Court in 2011 (no case). 2013 new procedure for 11 zones (PM10 : Marseille, Toulon, Paris, Douai-Béthune-Valenciennes, Lille, Grenoble, Lyon, la Zone urbaine régionale de Rhône-Alpes, Nice, la Zone urbaine régionale de PACA et la Martinique). 2014 procedure UE pilot and reasoned opinion in 2015 for 10 zones

Limit value for NO2: Reasoned opinion in 2017. In 2018, the Commission decided to refer France to the Court for exceeding NO2 limit values.

Action brought on October 2018 (Case C 636/18). The Commission considers that *“by systematically and persistently exceeding the annual limit value for NO2 from January 2010 in 12 agglomerations and air quality zones and by systematically and persistently exceeding the hourly limit value for NO2 from January 2010 in 2 agglomerations an air quality zone (Paris, Lyon Rhône Alpes)”*. The Commission also considers that the *“French Republic has not adopted, contrary to article 23 of the Directive 2008/50 any appropriate measures in air quality plans in order to ensure that the period during which limits are exceeded can be kept as short as possible”*. It underlines that *the lack of effectiveness of those measures is apparent, from inter alia, the duration of the period during which limit values were exceeded, the level of those exceedance, their development and the detailed analysis of each of the plans adopted by the French authorities for the 12 zones concerned”*.

The 12 areas are Marseille, Toulon, Paris, Auvergne-Clermont-Ferrand, Montpellier, Toulouse Midi-Pyrénées, ZUR Reims Champagne Ardennes, Grenoble Rhône Alpes, Strasbourg, Lyon Rhône Alpes, ZUR Vallée de l'Arve Rhône Alpes and Nice.

The French government has been facing to main strong injunctions: the first from the Commission and the second from the Council of State which in July 2017 called the government *“to take all necessary measures to reduce the concentration of nitrogen dioxide and fine particulate to respect EU directive on pure air in the shortest possible time and to send such measures to the European Commission before the end of March 2018”*. In October 2017, the Minister for the ecological transition invite the regional Prefects to prepare operational and partnership road maps to obtain in short time effective reduction of air pollution in addition to the existing plans for atmosphere protection. In February 2018, the government has presented to the Commission these roads maps with an action plan involving different existing measures as such as taxation convergence diesel/petrol, the reinforcing technical control of vehicles, and the continuation of tax credits. In the report of the working group on the fight against the air pollution for the French Senate, the authors underline the legal and financial uncertainties of such road maps produced in urgency; they conclude that the ambition of public authorities must in the future be determined by health concerns and by the fear of litigation and fines (<http://www.senat.fr/rap/r17-412/r17-4121.pdf>) Unsurprisingly, the Commission has considered that the measures proposed by the French Government were not credible, efficient and timely to reduce air pollution, justifying the referral to the Court.

AIR QUALITY STANDARDS

4. Was there pre-existing national law relating to air quality standards (similar to the AQD), or did the AQD introduce something new in your country?

Historical overview

The French Law related air pollution is not recent. It is rooted in the imperial decree of 1810 on unhealthy, uncomfortable or dangerous establishments which focused on smelly factory fumes. In

1932, the Law “Morizet” aimed unsuccessfully to remove the industrial fumes. The Law 61/842 related to the fight against air pollution and industrial odour covered the radioactive emissions, emissions from cars, and industrial emissions. The pollutant concentrations monitored were, in particular, the Sulphur dioxide and “black fumes” in industrial or urban areas through the establishment of zoning.

The Law on air quality and the rational use of energy 96/1236 underlined the right of everyone to respire a clean and healthy air and introduced the consideration of the quality of indoor air. The Law 2000/788 Grenelle II included in the Atmosphere protection field the prevention of air pollution and the fight against the greenhouse emissions.

Lastly, the Law 2008/757 related to the environmental liability and others adaptations provisions to European Environmental Law transposed the directive 2008/50 (see decree 1250/2010 on air quality. All those provisions are codified in particular in the Environmental Code but not only.

Environmental Code: Book II Physical Environment – Title 2 Air and Atmosphere: L 220 and seq.

Since the beginning of the 1960’s, the government has adopted threshold concentrations to protect human health. It is clearly that under the European environmental Law, the French Law for air protection has been growing and has become more and more complex including different territorial levels and normative tools. The limits values are mentioned in the article R.221-1 of the Environmental Code. PM10, PM 2,5, nitrogen oxide, VOC, ozone, carbon monoxide, benzene, heavy metals and polycyclic aromatic hydrocarbons. The law of modernization of the healthcare system 2016/41 provided a multiannual objective for the reduction of the annual average of hourly concentration of atmospheric particulate is adopted by the ministers for ecological transition and for Health (arrêté 7/12/2016).

5. How are AQD air quality standards implemented in law in your Member State?

In accordance with the approach of multiannual planning, France has developed a series of Actions Plans on different territorial levels (State, Territorial authorities, municipalities) to ensure the fight against air pollution. Over the course of different legislative reforms such as the French reform of the territorial organization and distribution of powers (see new Law 2015), the programming and planning strategy is really complex, unclear marking by a certain inconsistency. All these different plans focus on either the air quality policy, either on nexus between air, climate and energy even on more general topic including air quality aspects. All have to contribute directly or not to the implementation of AQD air quality standards. But their implementation presents several political, legal and financial difficulties. For example: list of the various plans and programming

At national level

- **PREPA** According the directive 2016/2284, the government adopted in may 2017 the national plan on the reduction of atmospheric pollutants emissions on the basis of the Law 2015/992 related to the energy transition and green growth. Order of 11/5/2017 and decree 2017/949 (national objectives with a review every 5 years).

- **PPE** Pluriannual programming of the Energy (decree 2016/1442)

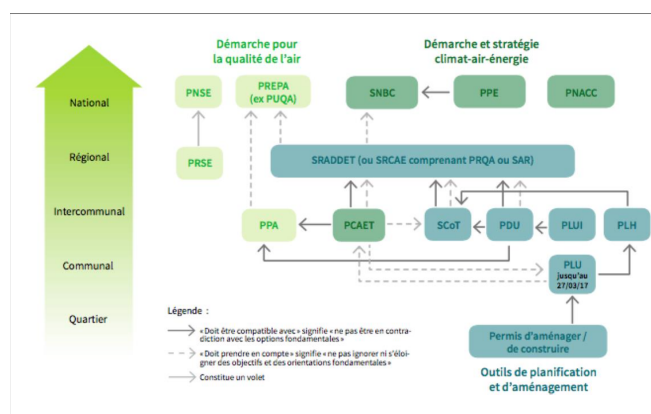
<https://www.ecologie-solidaire.gouv.fr/programmations-pluriannuelles-lenergie-ppe>

- **PNSE** Third National Plan Health and Environment (2014-2019)

http://www.igas.gouv.fr/IMG/pdf/2017-176R_.pdf

At regional and local levels

- **SRADDET**: Regional scheme for planning, sustainable development and equality among the territories (Law 2015 related to the new territorial organization). This scheme will merge



several existing schemes and plans such as the Regional Scheme for land-use, Regional Scheme Climate, air, Energy, Regional Plan for waste). The first SRADDET have to be approved before July 2019.

- PPA Plan for atmospheric protection (Law 96/1236 on air quality and the rational use of energy- all the agglomerations of more 250 000 habitants and the zones where the air limits values are not respected or might be not respected have the obligation to adopt such PPA.
- PCAET: Territorial Plan Climate, Air, Energy for agglomerations of more 20 000 inhabitants
- SCOT : Scheme for “territorial consistency” (cohérence territoriale)
- PDU : Plan for local urban transport
- PLUI : Intercommunal local plan urban planning
- PLU : Local Urban Planning Plan

6. Does any law in your Member State provide for air quality standards that go beyond those set out in the AQD, imposing any more stringent standards, for example, in relation to PM_{2.5}?

The objective for the reduction of PM_{2,5} concentrations (for the indicator average exposition) has been set at 11,2 ug/m³ in 2025 and at 10 ug/m³ in 2030 (arrêté/order 7/12/2016 establishing multiannual objective for the reduction of the annual average of hourly concentration of atmospheric particulate).

AIR QUALITY MONITORING AND MODELLING

7. How are air quality monitoring networks set up in your Member State (briefly)?

The State is responsible of the monitoring of air quality (L 221-1 Environmental Code) and the air quality monitoring is a general interest activity. The Law 96/1236 on air quality and the rational use of energy allowed the devolution of the implementation of such monitoring, in each region, to bodies approved. Without being provided by the Law 1961, the monitoring of air quality was carried out by associative structures. The air pollution monitoring and prediction is an obligation since 1996. The air monitoring Network is composed by 650 measurement stations.

The monitoring system cover all the French territory and the modalities including technical aspects are established by taking into account the importance of people concerned, the level of pollutant concentrations and the weather conditions. The monitoring is realized via fixed stations, measurement campaign, modelling or objective assessment (order 10/4/2017).

Each region is divided in different monitoring area approved by the Minister of ecological transition (updated every 5 years – order 26/12/2016 division of regions into administrative monitoring air quality zone) Each administrative zone is classified into three categories:

- 1) Risk area agglomeration of more than 250 000 inhabitant
- 2) Risk area (out agglomeration of more 250 000 inhabitants) in which the limits values are not respected or might be compromised –
- 3)Regional area which concern the rest of the regional territory.

Each approved association for air pollution monitoring establish a regional program for the monitoring of the air quality and precise for each zone the assessment tools which will be used. Such programmes are approved by the Minister of ecological transition (updated every 5 years: new programmes 2017-2021). The pollutants concerned by the monitoring are PM10, PM 2,5, lead, ozone, carbon monoxide, benzene, arsenic, cadmium, nickel, benzo(a)pyrene, sulphur dioxide, nitrogen oxide.

All approved association for the air pollution monitoring cooperate via a platform for prediction and cartography of air pollution at the national level "Prev'Air" 2003 including a specific tool "Prev'air urgency" (order 19/4/2017)

The measuring equipment for air quality and release of substances are certified by the Ministry (measurement methodologies, criteria for the location of the equipment, monitoring techniques). The order of 4/4/2017 requires the respect of quality processes under the control of the central laboratory for air quality monitoring.



Figure 1 : Carte du réseau de surveillance de la qualité de l'air [ATMO France]

8. What sort of problems are encountered in monitoring of air quality in your Member State?

Problems might include: inconsistent results given by different schemes for monitoring air quality, improper siting of measurement equipment, unreliable equipment used, no monitoring established in key areas, unconfirmed results etc.

I guess you are also referring to the case C 723/17 (Lies Craeynest) related the rule on the location of sampling points in order to ensure compliance with the limits value required by the directive 2008/50. The advocate general has delivered his opinion in February 2019. In this case, the Court of First Instance of Brussels raises the question of what standard of review must be applied by a national Court in respect of the siting of sampling points to meet the Directive 2008/50 requirements. As underlines by the Advocate general, the directive does not expressly specify the scientific methods for identifying the areas where the highest concentrations occur and the MS will use different type of measurements, models and informations in order to determine the location of the sampling points according their best available knowledge. Obviously, *"if the sampling points were not sited in the areas where the highest concentrations actually occur, the effectiveness of Directive 2008/50 could be seriously impaired"*. The Advocate insists on the use of the method which is subject to *"the least reasonable scientific doubt"* and considers that *"may not restrict the national Courts to identifying manifest errors on account of the importance of the rules on ambient air quality for human life and health"*.

So far as I know in France concerning such problematic, the Council of State received a request from applicants which required the establishment of ozone monitoring station across the entire national territory according to the directive 92/72 related to ozone pollution. For the Court, the directive does not require the establishment of specific number of measurement stations. It considers that the applicants do not demonstrate the non-respect of the principle of precautionary by the government and *"in view of the different situations on the territory"*, it concluded that the applicants could not consider that the principle of equal treatment among users was not respected (CE, 14/6/1999, n°183809 Fédération nationale des associations d'usagers des transports).

Given the current high degree of air pollution and the awareness of the seriousness of the situation, it is likely that the Council of State will interpret differently the obligations required by the Directive 2008/50 (see. question 16)

9. As far as you can determine, are there limitations or problems with the modelling techniques used in your Member State to assess air quality (where modelling is permitted as a method for assessment under Chapter II AQD)?

In parallel, we observe alternative projects to involve the citizen in air pollution monitoring processes in MS, including France: Rennes project Ambassad’Air 2017 (sensor Air Beam for fine particulate- <https://www.airbreizh.asso.fr/le-projet-ambassadair/>), Grenoble Mobicitair, Dignes les Bains.

NATIONAL AIR QUALITY PLANS AND GOVERNANCE

10. Does your Member State have a national Air Quality Plan under Article 23?

a. If so, to which pollutants does the plan relate (eg NO₂ or PM₁₀) and what **key** measures does the plan outline to keep exceedances ‘as short as possible’? *Please also indicate if you think there are any **weaknesses** in the plan.*

b. If your Member State has such a plan, how is the legal requirement of keeping exceedances ‘as short as possible’ satisfied? *Please outline any challenges (legal or otherwise) in meeting this requirement in your Member State.*

Atmosphere protection Plans (decret 2001/449)

These plans constitute a legally binding administrative document¹ for the territorial authorities concerned (agglomerations of more 250 000 habitants and the zones where the air limits values are not respected or might be not respected). They must be “compatible” with the SRADDET and are subject to “enquête publique” and to a case by case examination of the environmental authority to determine if they need to be subject to an environmental assessment according the EU Law. For the determination of the zoning, the Prefect and the local authorities competent have to take into account the importance and the location of the population, the levels of polluting substances concentrations and the predictable evolution of such emissions and the meteorological conditions. They also must take into account the emissions levels of the pollutants and the nature of the main sources of releases, including if they come outside of zone. The Environmental Code specifies that the establishment of a PPA is not necessary when the exceedance of a limit value, target value or specific norm is due to natural sources or from re-suspension of particulates following winter-gritting or salting of roads (R.222.13-1). It is also noted that the establishment of the PPA may be not necessary in the exceeded zones if it is demonstrated that the reduction of the concentrations levels is more efficient by the adoption of measures in another framework. If such alternatives measures are decided, the Prefect have to ensure their annual monitoring.

The PPAS contains various components such as the diagnostic, the zoning, emissions reduction objectives the action plan, monitoring alert and assessment procedures. They have to determine different objectives of emissions reduction according a detailed timetable. They also define the modalities of the alert procedure and the emergency measures, including the information provided to the public.

According the last data, 38 PPA have been adopted and updated recently and covers 47% of the French population. Examples : PPA Strasbourg 2014 – PPA Montpellier 2014 - PPA Ile de France 2018 – PPA Vallée de l’Arve (second PPA 2019)- According to the Ministry of ecological transition, the second generation of PPA “should “ contribute to achieve the air limits values.

¹ The control of the administrative Judge is a limited control, regarding the large margin of discretion of the public authorities in this case (CE, 10/6/2015 Assoc. Les Amis de la Terre) who have to respect only an obligation of means.

(Case C 636/18). The Commission considers that “by systematically and persistently exceeding the annual limit value for NO₂ from January 2010 in 12 agglomerations and air quality zones and by systematically and persistently exceeding the hourly limit value for NO₂ from January 2010 in 2 agglomerations an air quality zone (Paris, Lyon Rhône Alpes)”. The Commission also considers that the “French Republic has not adopted, contrary to article 23 of the Directive 2008/50 any appropriate measures in air quality plans in order to ensure that the period during which limits are exceeded can be kept as short as possible

11. Whether or not your Member State has an Air Quality Plan, please outline the key national regulatory measures that contribute towards compliance with EU air quality standards in your Member State.

For example, what are the main national legal measures that regulate polluting air emissions from emissions from:

- households (eg restrictions on solid fuels, planning laws);
- transport (eg clean air zones); and
- industry (eg reliance in Industrial Emissions Directive or something more)?

PREPA. The national interministerial plan on the reduction of atmospheric pollutants emissions (PREPA

2017) has 7 parts related to the principal sectors responsible of the atmospheric emissions: transports, residential, industry and transports and to others transversal questions such as the participation of the local actors, the improvement of knowledge and innovation, and the funding.

It requires the strengthening of the regulatory requirements for /

- the industry: aid for converting most polluting vehicles,
 - the transports: taxation convergence diesel/petrol, area of limited traffic access, study on the establishment of a low emissions traffic zone for ships in the Mediterranean
- (http://www.dirm.mediterranee.developpement-durable.gouv.fr/IMG/pdf/restitution_ineris_dp-1.pdf)

- Households: aids for thermal renovation, for the renewal of heating equipment, reduction of the sulphur content of domestic heating oil

- Agriculture: reduction of the ammonia volatilization from mineral fertilisers and livestock manure, limitation of the burning residues, measurement campaign of phytosanitary products in the atmosphere.



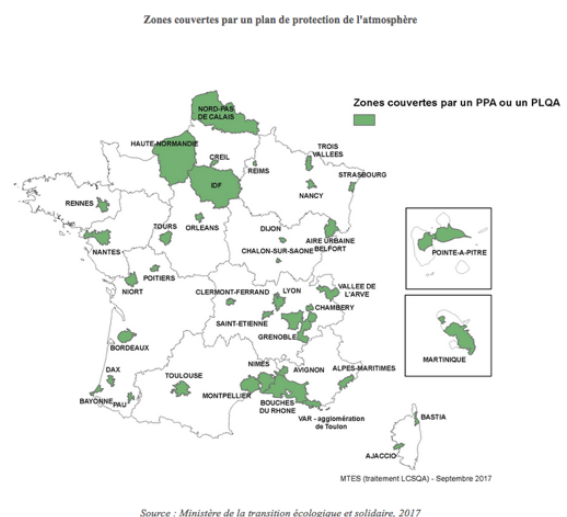
POLLUANT	À partir de 2020	À partir de 2030
Dioxyde de soufre (SO ₂)	-55 %	-77 %
Oxydes d'azote (NO _x)	-50 %	-69 %
Composés organiques volatils (COVNM)	-43 %	-52 %
Ammoniac (NH ₃)	-4 %	-13 %
Particules fines (PM _{2,5})	-27 %	-57 %

PPA Atmosphere Protection Plans (decree 2001/449)

The PPAs contains different types of regulatory measures (specific or general) such as measures in the context of the implementation of IPPC/EIE regulation or measures related to the health regulation or traffic organization (speed reduction...). They also contain voluntary measures.

Industry: energy efficiency measures, more stricter emissions limits values for combustion installation below 20 MW : eg PPA Lyon)

Transports : the renewal of the car fleet (in particular of the public authorities to set the example), the promotion of public transport (including the rail service : see the PPA Vallée de l’Arve : for example, the French government is opposed to the doubling of the Mont-Blanc tunnel)



Source : Ministère de la transition écologique et solidaire, 2017

PCAET Climate, Air, Energy territorial Plan

The establishment of Climate Energy Territorial Plans is legally binding since the Grenelle II Law (2010). The local authorities (region, department, and territorial entities that levy their own taxes) of more 50 000 habitants have to adopt such Plans before the 31/12/2012.

These plans have been generalized by the Law 2015/992 related to the ecological transition for the green growth and have to include the air pollution aspects. According L 229-26 of the Environmental Code, the PCAET contain an action programmes to prevent and reduce the atmospheric pollutants emissions. They need to be compatible with the SRADDET and the objectives of the PPA and have to be updated every 6 years.

Example of the transports and the Traffic management

-Restriction of vehicles movement



Since September 2015, the traffic of buses and trucks registered before 2001 is not prohibited in Paris every day (8 am to 20 pm) according the order 13/7/2015 related to the experimentation of a restricted traffic zone in Paris for certain category of vehicles. It is the same decision for the traffic of private vehicles (diesel, registered before 2001) and light duty vehicles (registered before 2002) since July 2017. Since January 2017, the Crit'air certificat sticker for all vehicles in Paris is obligatory.

Clearly, such measures are not a panacea (equity, effective control and sanctions) and need to be integrated in a more ambitious framework related to a new way of thinking and moving in the cities.

- Taxation and price of Diesel/petrol

Convergence of the price of diesel and petrol (private vehicles). Taxes (TVA+ energetic product consumption tax TICPE, CCE carbon tax) account for 60 % of the pump price. In the beginning of 2019, confronted the yellow jackets movement, the government decided to not increase the carbon tax on fuels; despite this, the fuels price starts to increase.



Few days before the European Elections, the President Macron recalled his commitment to promote a common kerosene tax at the EU Level.

During the high air pollution episodes, different measures must be implemented (new order 7/4/1016 related to the prefect procedures). Since 2014, this system² has thus been strengthened and required the implementation related to the different human activities responsible of atmospheric emissions. The order adopted by the Prefects state the precise modalities in order to ensure the reduction of the exceedances in a short time. See ag, the last "Instruction" of the Government adopted the 5/1/2017 related the management of such situation (including a specific guidance document).

² The alert procedure system has been institutionalized in France in 1991 with the establishment of alert zone. It firstly concerned the fixes sources of air pollution. Since the Law 1996 on air quality, this alert procedure is clearly legally binding, including the air pollution from transports.

12. Has your Member State ever issued a Short-term Action Plan under Article 24? If so, please outline any notable features of the plan or aspects of its implementation (briefly).

See Council of State 12 July 2017 Amis de la Terre France (question 16)

13. Which public bodies have legal responsibilities for meeting air quality standards in your Member State?

National level

The State (Ministry of ecological transition) establishes and implements the climate change and air pollution policy. It conducts the European and international negotiations and ensures their implementation in conjunction with the Ministry of foreign and European affairs. The Ministry of ecological transition also ensure the coordination of the measures related to air quality protection. The Ministry of Housing, in liaison with the Ministry of ecological transition, conducts the energy efficiency policy in the field of the construction and renovation of housing

The agency ADEME undertakes different actions in the field of information, research projects, funding in particular in the field of air pollution. The central laboratory for air quality monitoring created in 1991 brings scientific and technological support (as the national technical framework) for the different approved association for air pollution monitoring.

At the territorial level

The State's decentralised departments, under the region Prefect, ensure the implementation of different national policies (environmental, transports, industry, energy..), in particular the Regional Direction of environment, spatial development and housing.

At regional level

According to the Law 2014/58 related to the modernization of the territorial public action, the Region has to ensure a leading role in the organization of the common action of territorial authorities in different fields such as climate, air quality, energy, biodiversity (...). This explains why the French government decided in October 2017 to invite the Prefects to prepare with the different territorial authorities and stakeholders roadmaps to answer to the judicial injunction of the Council of State (july 2017) and to the European Commission.

According to L 221-1 of the Environmental Code, the State ensure with territorial authorities the monitoring of air quality and its health and environmental impacts. The Grenelle Law 2010/788 regionalize the organization of the approved association for air pollution monitoring.

The municipalities are responsible for the traffic and parking in their area of competence. They must take into account the air quality requirement into their planning documents (local urbanism plan, intercommunal local urbanism plan....) (see above Key measures for air quality protection).

14. Are there any legal requirements for different public bodies who have control over different air pollution sources to coordinate their efforts in any way to work towards air quality standards? (For example, different regulators may control highways, airports, local urban planning decisions, large industrial installations, and so on.)

The municipalities are responsible for the traffic and parking in their area of competence. For traffic on national roads and motorways, the Prefect is competent; for traffic on departmental road, the president of the department is competent. The Prime Minister is also competent to adopt general traffic rules across all the territory (see eg. the decision of the Prime Minister to reduce the speed on departmental roads (speed limit 80 km instead of 90 km, decree july 2018). This decision was subject to important criticisms in particular from the Yellow Jackets movement (launched in November 2018). After the national debate launched by the President Macron in response to the Yellow Jackets movement, the Prime minister is willing to accept that the departments may to relax this decision in certain circumstances in rural or peri-urban areas

ENFORCEMENT OF AIR QUALITY LAW

15. What is the primary mode for enforcing of air quality law in your Member State?

- No particularities compared other field of environmental law

16. Have there been court cases concerning the enforcement of air quality law in your Member State? Please outline major cases or themes in key cases only.

Council of State 12 July 2017 Amis de la Terre France³. The Court called the government “to take all necessary measures to reduce the concentration of nitrogen dioxide and fine particulate to respect EU directive on pure air in the shortest possible time and to send such measures to the European Commission before the end of March 2018”. On the basis on the interpretation of the European Court of Justice (case law ClientEarth C 404/13), the Council of State considered that the authorities did not respect the obligations related to article 23 of the directive 2008/50 in 16 administrative zones of air quality monitoring for nitrogen dioxide (ZUR Rhône-Alpes, Paris Ile-de-France, Marseille Provence-Alpes-Côte-d'Azur, Toulon Provence-Alpes-Côte-d'Azur, Nice Provence-Alpes-Côte-d'Azur, Rouen Haute-Normandie, Saint-Etienne Rhône-Alpes, Grenoble Rhône-Alpes, Lyon Rhône-Alpes, Strasbourg Alsace, Montpellier Languedoc-Roussillon, Rennes Bretagne, ZUR Champagne-Ardenne, Nancy Lorraine, Metz Lorraine et Toulouse Midi-Pyrénées) and in 3 zones for PM10 (ZUR Rhône-Alpes, Paris Ile-de-France et ZUR Martinique). It concluded that the public authority disregarded the provisions of the directive by refusing the establishment of plans for these zones concerned by these exceedances. The follow up of this case law: in October, the NGO Amis de la Terre with numerous others NGOs and doctors had decided to take the State to Court for failure to give effect to the judgement of the Council of State of July 2017 and claimed a penalty payment of 100 000 euros for each day's delay.

17. Please outline any other major challenges faced in your Member State for enforcing the AQD, or any other applicable air quality law.

See above

A CONTROVERSIAL SOURCE OF AIR POLLUTION: REGULATION OF VEHICLE EMISSIONS SYSTEMS

Many Member States are currently subject to infringement proceedings by the Commission in relation to vehicle type approval rules. This is currently prescribed under Framework Directive 2007/46/EC establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles [2007] OJ L263/1 and Regulation (EC) No 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 [2007] OJ L171/1. Amongst other things, this legislation requires Member States to have ‘effective, proportionate and dissuasive’ penalty systems in place to deter car manufacturers from illegal practices, such as installing defeat devices. This legislation was overhauled in 2018 by Regulation (EU) 2018/858 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC [2018] OJ L151/1, which will apply from 1 September 2020.

³ In 2015, les Amis de la Terre had tried to obtain the annulment of a judgement of the administrative Court of appeal of Paris related the implementation of the atmosphere protection plan of the Region Ile de France. In fine, the Council of State has considered such as the administrative Court of appeal of Paris, that the Prefects in charge of the implementation of the plan were submitted to an obligation pertaining to means and not to an obligation of result.

18. How has your Member State implemented these EU vehicle type approval rules? Have there been any controversies in transposing these rules?

Since September 2014, the new procedural requirements for approval of vehicles have to respect the Euro 6 standard. In France, the European type approval is issued by the National Centre of type approval of vehicles.

The bonus/penalty French schema for purchasing private new cars is indexed to the CO2 emissions. With the entry into force of the new type approval of vehicles system, the carbon emissions values of the vehicles are growing and the Ministry of finance take into account the change in the calculation of the penalty (no penalty under 116 g/km, see Finance Law 2018/1317 (art 91).

In July 2018, the French government has announced the establishment of the national service responsible of the market surveillance of vehicles and spare parts and the strengthening of periodical technical control of vehicles in the framework of the future Law on sustainable mobility modes.

In France, until the Dieseltgate scandal, UTAC, a private entity (representative of trade-unions from the automotive sector), was responsible for the conformity control tests; suspected of collusion, Utac is now under the control of the FCDE (Fund of consolidation and development of the compagnies II, public private investment fund established in 2009) via an assignment contract (70% of the capital of Utac - decision 5/1/2018 of the French competition authority).

19. What legal measures have been taken in your Member State (if any) against car manufacturers which have failed to comply with vehicle type approval rules? *These legal measures might include court cases, including between car buyers and manufacturers.*

In 2017, Volkswagen broke a sale record with 10 million of cars sold. May we conclude that the Dieseltgate scandal does not modify the purchasing criteria of consumers? Of course, others car manufacturers are concerned by this fraud. However, there has been a collapse in diesel cars sales in Europe (in France “the diesel country”, less than 40% of cars registration concern diesel cars in 2018 compared to 75% in 2012)

The French government established in 2015 a kind of committee of enquiry (Commission Royal) involving, in particular, independent experts and NGOs (environmental and consumers). This Committee was responsible for assessing the real-time emissions of different cars. The results of the investigation showed different problems related to models of vehicles in particular from French manufacturers (Renault). In the report of this committee, different proposals were listed to improve the control of vehicles in a transparent and independent manner. (<https://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/164000480.pdf>).

In February 2017, the body responsible for combating fraud has referred to the Parquet of Paris for aggravated deception against Renault and PSA. The Parisian prosecutor opened two judicial investigations (2016, 2017). The German manufacturer Volkswagen has been invited by the judge for questioning as witness (témoin assisté) but did not to answer. Three French investigative judges have complained about the lack of cooperation from the prosecutor of Braunschweig responsible for investigating complaints against Volkswagen

The French government did not launch a binding recall procedure for cars requiring the updating of the emissions systems by the manufacturers. In fact, there were very few updates which have been done only a voluntary basis.

Case Study

Martha is living in an urban area in your Member State, and her children have developed asthmatic symptoms (i.e. a diagnosed respiratory illness). She becomes aware that the local air quality exceeds standards laid down in the AQD. Her house is next to a main road, which is a heavily used bus route on which bus operators use diesel vehicles. The town also has a number of industrial plants, a coal fired power station, and a number of intensive farms. It is unclear to her precisely which pollution source is causing the breaches of air quality standards, or what their respective contributions might be to the local air quality problem.

What sort of legal action could Martha take in your Member State? And against whom? What remedies do the courts possess? What are the financial implications of bringing such a case? Might there be other regulatory avenues available to Martha instead?

Since the last two years, we observe an increase in disputes related the air quality protection before the administrative judges (State' responsibility for failure) and also the public prosecutor's office (offense of deliberately endangering another person). To answer to your case-study, we could give the examples of the current pending case in France and the difficulties experienced.

State' responsibility for failure

2019 : Several inhabitants of the Vallée de l'Arve decided to go to the Administrative Tribunal by invoking the responsibility of the State for failure.

According the different informations available, 16 cases now awaiting the Administrative tribunal of Grenoble decisions and in different cities.

April 2019: a former regional councilor of the region Nord Pas de Calais, Sandrine Rousseau decided to go before the administrative tribunal of Lille by invoking the responsibility of the State for failure in its action to ensure air quality protection.

June 2017 Case of Clothide Nonnez, air pollution victim who decided to go before the Administrative Tribunal of Paris (decision awaiting)

Offense of deliberately endangering another person

2014, complaints of two NGO against X for causing danger to life before the public prosecutor of Paris
Last year, 540 inhabitants of the Vallée de l'Arve filed a complaint against X for causing danger to life in order to oblige the public authorities to take efficient measures to reduce the air pollution in their area.
In April 2019, their case was closed by the Court

The main conditions and difficulties experienced

- The demonstration of the failure of the public or private authorities (various nature of the responsibility : fault or not, neglect)
- The demonstration of the inadequacy of the measures taken by the public authorities or the late adoption of efficient and effective measures
- The demonstration of the causality link or consistent evidence between the action or inaction of the public authority and the health and environmental damages, including the prejudice of anxiety (to set sick in a short, medium to long term)

Clearly a linkage between these cases and the Case of Asbestos could be made and the judgements delivered by the administrative and judicial Courts constitute a source of inspiration for the victims and their advocates. In the case C 723/17 (Lies Craeynest), the advocate general (such as the Commission) underlines that the "*directive 2008/50 is based on the assumption that exceedance of the limit values lead to a large number premature deaths*". The public authorities and private compagnies could not explain that they did not known or that the causes of the damages are multifactorial.

As outlined by the Advocate J Kokott, "Measures which may impair the effective application of Directive 2008/50 are thus comparable in their significance, with the serious interference with fundamental rights on the basis of which the Court made the rules on the retention of call data subject to strict review".

The current rising number of disputes demonstrates the determination of NGO and citizens to mobilize the Law to force public authorities to respect their environmental commitments such as air quality or climate change. See the ongoing legal proceeding as the action brought by Carvalho and al against EP and Council, case T 330/18 or in France with the NGO's action for failure to act against the government before the Administrative Tribunal of Paris in March 2019. <https://laffaireducycle.net/actualites/>

GERMANY

Avosetta Questionnaire: Air Quality Law / Answers for Germany (Bernhard Wegener)

1. What are the main sources of unlawful levels of air pollution in your Member State?

Unlawful levels of air pollution in Germany mainly relate to fine particulate matter (PM_{2.5}) and NO₂

- **PM_{2.5}:**
The main sources of unlawful levels of air pollution can be traced back to the following areas:
45% agriculture, 20 % traffic, 13% industry, 13 % electricity production, 8 % private households e.g. fireplaces.¹
- **NO₂:**
Traffic (combustion engines) and fossil energy. In agglomerations, however, the main source is mostly traffic (combustion engines).

2. How extensive is reported non-compliance with AQD air quality standards in your Member State?

Main source of air quality reports is the *Umweltbundesamt - UBA* (national environmental agency). On its official website, yearly reports can be accessed quite easily. The reports are also being published by the UBA's own digital magazine/newsletter *UMID* and usually consist of seven pages.²

The reports show the following non-compliance with the AQD air quality standards:

	Limits as per AQD	Germany 2017 (2018 data not yet available)
NO₂	40 µg/m ³ over the year	approx. <u>46% of the close-to-traffic monitoring systems</u> exceeded the limit values in 2017, some even by 100%. <u>41 % of all monitoring systems</u> exceeded limit values
PM₁₀	40 µg/m ³ over the year	Only <u>one measuring station</u> exceeded the PM ₁₀ limit value
O₃	Maximum daily 8-hour mean within a calendar	17 % of the measuring stations exceeded the O ₃ target value

¹ <https://www.zeit.de/wissen/gesundheit/2017-02/luftverschmutzung-feinstaub-stuttgart-gesundheit>
<https://www.nature.com/articles/nature15371#extended-data>

² report for 2017 see https://www.umweltbundesamt.de/sites/default/files/medien/360/publikationen/luftgu_alitaet_2017.pdf
report for 2016 see https://www.umweltbundesamt.de/sites/default/files/medien/360/publikationen/umid_01_2017_01.pdf

	year: 120 µg/m ³	
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The abovementioned UBA report does not include PM_{2.5} and others. According to this nation-wide report, reaching the limit values on the remaining matters posed no noticeable problems in 2017.

In addition, the federal states publish their own air quality reports³ on a yearly basis. Naturally, their findings may deviate in certain aspects from the nation-wide reports due to regional effects.

3. Have EU infringement proceedings been brought against your Member State for failure to comply with the AQD?

On 11th October 2018, the Commission took action against Germany (and parallel against Britain and France) for infringing upon the AQG before the European Court of Justice (C-635/18). The Commission alleges that Germany – inter alia – breached its obligations under Art. 13 AQD by systematically and continuously exceeding the annual limit value for nitrogen dioxide (NO₂) in 26 zones of air quality assessment and management (Berlin, Stuttgart, Tübingen, Freiburg, Karlsruhe Mannheim/Heidelberg, Munich, Nuremberg/Fürth/Erlangen, Central and Northern Hesse, Rhine-Main, Kassel, Hamburg, Grevenbroich, Cologne, Düsseldorf, Essen, Duisburg, Oberhausen, Mülheim, Hagen, Dortmund, Wuppertal, Aachen, Mainz, Worms/Frankenthal/Ludwigshafen, Koblenz/Neuwied and the hourly limit value for NO₂ in two of those zones (Stuttgart, Rhine-Main) and failed to fulfil its obligations under the second and third subparagraphs of Article 23(1) of, in conjunction with Section A of Annex XV AQD and in particular the obligation to keep the exceedance period as short as possible in the 26 zones in question. The inappropriateness of the measures results from, inter alia, the duration, trend and severity of the exceedances of the limit values and the examination of the air quality plans established for the zones in question.

- a. If so, what was the outcome of this enforcement action and its impact on air quality law and policy in your Member State? (If enforcement action is ongoing, answer this question as best you can in terms of the effects of this action on your Member State's approach to air quality law and policy.)

The infringement proceedings are still pending before the ECJ. In the media, EU-law and EU-Institutions are widely (with a positive or negative connotation) regarded as the guardians against all meanwhile attempts of the German federal or regional authorities to weaken or alter the air quality standards in order to avoid the introduction of driving restrictions for diesel cars.

³ See e.g. for *Lower Saxony* (2017) <https://www.umwelt.niedersachsen.de/themen/luft/LUEN/berichte/jahresberichte/bewertung-der-luftqualitaet-2017-9127.html>

However, this “guardian-character” of the EU-Commission took a blow when it opted not to block a newly introduced change of the “Bundesimmissionsschutzgesetz” that declares driving prohibitions as “generally none-proportional” when the air quality standards are “almost” met. (50 microgram instead of the 40 microgram NO₂ foreseen in the AQD). So far, however, the German administrative courts seem to be unconvincing about the EU-conformity (and the general applicability) of this rather dubious attempt to weaken the European standards.

Air Quality Standards

4. Was there pre-existing national law relating to air quality standards (similar to the AQD), or did the AQD introduce something new in your country?

The whole air quality approach of the EU was rather new for Germany. German legislation mainly focused on an emission-standard-setting-approach. Previously existing air-quality-standards lacked the quality and the enforceability that characterizes the “new” EU-air-quality-approach.

5. How are AQD air quality standards implemented in law in your Member State?

The AQD has been implemented into national law by transforming the *Bundes-Immissionsschutzgesetz* (Specifically, §§ 47, 48a I *BImSchG*) and the 39. *BImSchV* (Verordnung über Luftqualitätsstandards und Emissionshöchstmengen)

The exact standards are set by the 39. *BImSchV* and thereby by the government, not by Parliament.

6. Does any law in your Member State provide for air quality standards that go beyond those set out in the AQD, imposing any more stringent standards, for example, in relation to PM_{2.5}?

No, here (as in most other areas of environmental law) the German legislator and the government are following a rather strict concept of “1:1”-implementation of EU-standards that tries to avoid any setting of more stringent standards.

Air Quality Monitoring and Modelling

7. How are air quality monitoring networks set up in your Member State (briefly)? Do these go beyond the monitoring requirements set out in Chapter II AQD (eg in terms of the number and location of monitoring stations)?

These matters are governed by sections 11 to 20 of the 39. *BImSchV* (Verordnung über Luftqualitätsstandards und Emissionshöchstmengen). These rules refer to the

respective appendixes which elaborate further on the amount and location of monitoring stations.

These rules are mainly a verbatim adoption of the AQD. Higher monitoring standards than the AQD prescribes, are not set. However, there has been some discussion about whether Germany might be “too eagerly” executing the AQD for example by establishing the measuring stations too close to too “problematic” pollution hot spots (see below).

In accordance with Article 4 AQD, zones and agglomerations are to be defined, see sec. 11 and 13 39. BImSchV. The air quality in these zones and agglomerations is to be assessed, sec. 12 39. BImSchV.

Sec. 13 describes the requirements for air quality assessment in the different areas:

- In areas in which the lower limit values have not been exceeded, monitoring can be achieved by use of modelling techniques or similar.
- In areas in which only the upper limit values have been complied with, a combination of modelling techniques and fixed measurements is prescribed. In areas in which the upper limit values have been exceeded, fixed measurements are required.
- Modelling is allowed as an additional means of measuring air quality.

8. What sort of problems are encountered in monitoring of air quality in your Member State?

Over the last months, there has been an active public debate about monitoring in Germany.

Subject matter of the debate was mainly the positioning of the monitoring devices. The German Minister for Transportation, Andreas Scheuer (CSU), criticized the decision where monitoring devices are to be located in Germany.

The Minister argued that in other EU member states, monitoring would be performed in areas with very little traffic load whereas in Munich e.g. the devices were located in one of the most-frequented streets. It has been argued, that in Germany (too) many devices were located too close to traffic-heavy roads so that they could not deliver reliable data on the actual pollution.⁴

Apparently, there are differences to other EU member states in this regard.⁵ In the course of the debate, politicians called for better cooperation between the member states.⁶

Another, very recent, problem is vandalism. In Stuttgart, as city that has severe problems with air quality, a monitoring device has been set on fire in April 2019.⁷

⁴ <https://www.welt.de/wirtschaft/article176882501/Dieselfahrverbote-Streit-ueber-die-Genauigkeit-der-Luftqualitaets-Messstellen.html>

⁵ <https://www.welt.de/wirtschaft/article187929894/Feinstaub-Grenzwerte-Kritik-an-Messstationen-in-Deutschland-waechst.html>

⁶ <https://www.welt.de/wirtschaft/article187929894/Feinstaub-Grenzwerte-Kritik-an-Messstationen-in-Deutschland-waechst.html>

9. As far as you can determine, are there limitations or problems with the modelling techniques used in your Member State to assess air quality (where modelling is permitted as a method for assessment under Chapter II AQD)?

Not to my knowledge.

National Air Quality Plans and Governance

10. Does your Member State have a national Air Quality Plan under Article 23?

All over Germany, 161 Air Quality Plans under Article 23 are either in force (141 of the 161) or being developed (20 of the 161).⁸

- a. If so, to which pollutants does the plan relate (eg NO₂ or PM₁₀) and what **key** measures does the plan outline to keep exceedances ‘as short as possible’?
*Please also indicate if you think there are any **weaknesses** in the plan.*

Of 161 Air Quality Plans, 17 relate to NO₂, one relates to Benzol, four relate to PM_x and the remaining 139 plans relate to both NO₂ and PM_x.⁹

Key (at least the most controversial) measures of many of the plans are the establishment of environmental zones (“Umweltzonen”) mainly in the inner cities in which certain older types of cars are no longer allowed to drive. The discussion mainly focusses on the extension of these limitations to further categories of newer (diesel) cars (Typ Euro 4, 5 and 6). With the “Diesel-scandal” the discussion shifted from the PM-issue (which seems to be somewhat solved by the existing set-up) to the NO_x-issue. Although Euro 5 (and sometimes even Euro 6)-cars are found to emit more NO_x than the older Euro 4-cars, the newly introduced limitations focused on the older car-models. In a very recent judgement the Administrative Court of Stuttgart ordered the authorities to ban not only Euro 4 but also Euro 5-cars from entering the inner-city (Decision of 26.04.2019, 17 K 1582/19, www.vgstuttgart.de/pb/,Lde/Fortschreibung+des+Luftreinhalteplans+Stuttgart_+Erneute+Androhung+eines+Zwangsgeldes/?LISTPAGE=5597587).

A relatively new trend is the introduction of driving restrictions that no longer limited the use of diesel cars in whole zones (= inner cities), but that are limited to single streets or other smaller parts of the city. The limitations thereby react to single hot-spot measurements and avoid more general driving restrictions. The development (as to be regarded in Hamburg and

⁷ <https://www.swr.de/swraktuell/baden-wuerttemberg/stuttgart/Luftreinhaltung-in-Stuttgart-Messstelle-am-Neckartor-beschaedigt,messstelle-am-neckartor-beschaedigt-100.html>

⁸ <http://gis.uba.de/website/umweltzonen/lrp.php>

⁹ <http://gis.uba.de/website/umweltzonen/lrp.php>

Berlin) has the potential to ridicule the whole air-quality-management approach.

- b. If your Member State has such a plan, how is the legal requirement of keeping exceedances 'as short as possible' satisfied? Please outline any challenges (legal or otherwise) in meeting this requirement in your Member State.

There was a debate regarding the question whether Art. 23 AQD gives room from discretion. However, the European Court of Justice did not follow this argumentation.¹⁰

Another issue is whether economical aspects can be taken into consideration when assessing the maximum length of exceedance. Generally, economical aspects *can* be valid arguments. They can, however, not go as far as to delay the implementation of the Directive.¹¹

11. Whether or not your Member State has an Air Quality Plan, please outline the **key** national regulatory measures that contribute towards compliance with EU air quality standards in your Member State.

For example, what are the main national legal measures that regulate polluting air emissions from emissions from:

- *households (eg restrictions on solid fuels, planning laws);*
- *transport (eg clean air zones); and*
- *industry (eg reliance in Industrial Emissions Directive or something more)?*

See above.

12. Has your Member State ever issued a Short-term Action Plan under Article 24? If so, please outline any notable features of the plan or aspects of its implementation (briefly).

Yes, several short-term action plans (German: *Aktionsplan*) are currently in force or in the process of planning.¹²

Notable features are:

Banning heavy traffic from affected areas/streets, designating affected areas as *Umweltzonen* ¹³

¹⁰ Hofmann, NVwZ 2018, 928, 930, Luftreinhaltplanung und ihre Umsetzung. Das schwierige Verhältnis des deutschen Immissionsschutzrechts zum europäischen Luftqualitätsrecht.

¹¹ Hofmann, NVwZ 2018, 928, 930.

¹² <http://gis.uba.de/website/umweltzonen/lrp.php>

¹³ See <https://www.umweltbundesamt.de/themen/luft/regelungen-strategien/nationale-luftreinhaltung#textpart-5>

13. Which public bodies have legal responsibilities for meeting air quality standards in your Member State?

It is the task of the *Länder* (regional states) to ensure that the AQD-derived air quality law is complied with since it their duty to execute national law. The *Länder* can – depending on their own legal framework – either delegate the tasks to the municipalities¹⁴ or discharge them by themselves.

14. Are there any legal requirements for different public bodies who have control over different air pollution sources to coordinate their efforts in any way to work towards air quality standards? (For example, different regulators may control highways, airports, local urban planning decisions, large industrial installations, and so on.)

- There are limited requirements for authorities controlling inner-city air quality to coordinate their efforts with the „Straßenbau- und Straßenverkehrsbehörden“ streetbuilding- and street-traffic-authorities (§ 47 IV 2 BImSchG).¹⁵
- Moreover, according to § 47 VI 2 BImSchG city-planning-authorities must take the air-quality-action-plans into account¹⁶

Enforcement of Air Quality Law

15. What is the primary mode for enforcing of air quality law in your Member State?

???

16. Have there been court cases concerning the enforcement of air quality law in your Member State? *Please outline major cases or themes in key cases only.*

Yes, courts have issued numerous judgements in this regard. Several regional courts ruled on the question where driving bans are – in general – a legitimate measure to ensure AQD-conforming air quality. Ultimately, in February 2018 the *Bundesverwaltungsgericht* (German Federal Administrative Court) ruled that driving bans can be an admissible means when other measures are not sufficient to ensure adequate air quality.¹⁷

However, the decisions of a number of administrative courts that ordered the authorities to establish driving restrictions in inner-cities met with a rather unusual resistance and deliberate negligence. The Courts have therefor sometimes fined the authorities to pay financial sanctions in order to enforce the court rulings. These rulings had only limited effects.

¹⁴ See e.g. in Saxony, § 10 IV *Sächsische Immissionsschutz-Zuständigkeitsverordnung* (26.06.2008).

¹⁵ *Hofmann*, NVwZ 2018, 928, 932.

¹⁶ *Hofmann*, NVwZ 2018, 928, 932.

¹⁷ Federal Administrative Court (BVerwG), 27.2.2018 – 7 C 30/17.

In a rather spectacular case (C-752/18), the Highest Bavarian Administrative Court therefore asks the ECJ for a preliminary ruling about the question, whether the court is entitled or even obliged to send administrators to jail when and because they do not follow earlier court orders to establish driving restrictions for diesel-cars in inner cities. (see also: Wegener, Bernhard: Zwangshaft für Markus Söder? Von der Ungemütlichkeit an den Grenzen des Rechtsstaats, VerfBlog, 2018/12/13, [https://verfassungsblog.de/zwangshaft-fuer-markus-soeder-von-der-ungemueticlichkeit-an-den-grenzen-des-rechtsstaats/.](https://verfassungsblog.de/zwangshaft-fuer-markus-soeder-von-der-ungemueticlichkeit-an-den-grenzen-des-rechtsstaats/))

17. Please outline any other major challenges faced in your Member State for enforcing the AQD, or any other applicable air quality law.

A Controversial Source of Air Pollution: Regulation of Vehicle Emissions Systems

18. How has your Member State implemented these EU vehicle type approval rules? Have there been any controversies in transposing these rules?

Yes, there has been an implementation into national law. However, (criminal law) sanctions have not been implemented by the German legislator who stated that the current law would already cover possible violations (see § 263 German criminal code – *fraud* and § 267 - *falsification of documents*).¹⁸

This view has been contested by legal scholars who call for an express implementation of sanctions.¹⁹ In this regard, the European Commission opened infringement proceedings against Germany in 2016.

19. What legal measures have been taken in your Member State (if any) against car manufacturers which have failed to comply with vehicle type approval rules? These legal measures might include court cases, including between car buyers and manufacturers.

Despite not being linked to the AQD *directly*, it is worth mentioning that – as of now²⁰ – the courts are handling some 50,000 cases related to diesel gate. Roughly 14,000 cases have been decided already.²¹

In this regard, one way of argumentation is that the general vehicle approval expired due to the implementation of illegal defeat devices. This question will likely be decided by the *Bundesgerichtshof* (Federal Court of Justice) in the future.

¹⁸ Führ, NVwZ 2017, 272.

¹⁹ Führ, NVwZ 2017, 272.

²⁰ date of the source cited: 19 Feb. 2019.

²¹ https://www.deutschlandfunk.de/rechtsstreit-mit-volkswagen-erste-diesel-klage-vor-dem-bgh.1766.de.html?dram:article_id=441461

The main way to the enforcement or the sanctioning of the illegal practices of the car-manufacturers could thereby be via the laws of consumer protection and liability. The court-practice in this regard is actually developing.

Case Study

Martha is living in an urban area in your Member State, and her children have developed asthmatic symptoms (i.e. a diagnosed respiratory illness). She becomes aware that the local air quality exceeds standards laid down in the AQD. Her house is next to a main road, which is a heavily used bus route on which bus operators use diesel vehicles. The town also has a number of industrial plants, a coal fired power station, and a number of intensive farms. It is unclear to her precisely which pollution source is causing the breaches of air quality standards, or what their respective contributions might be to the local air quality problem.

What sort of legal action could Martha take in your Member State? And against whom? What remedies do the courts possess? What are the financial implications of bringing such a case? Might there be other regulatory avenues available to Martha instead?

After having approached the responsible agency, e.g. the municipality Martha lives in, without success, she could take action and file a law suit with the Administrative Court. This suit would be directed at compelling the responsible agency to issue a short-term air quality action plan that must be designed in such a way as to ensure the application of the standards set in the AQD.

Under Sec. 47 § 2 BImSchG, the responsible administrative body is obliged to issue a short-term action plan as per Art. 24 of the AQD.

Even though it cannot be read from the explicit wording, this entails the right by an individual to an action plan if the air quality limits are violated. Initially, German courts were reluctant to acknowledge an individual right in this regard.²² This can be traced back to an incompatibility of the German system of legal protection with the EU-law-origin right have action plans issued.²³ The Federal Administrative Court referred the question to the European Court of Justice on 29.3.2007. In 2008, the European Court of Justice decided that – in fact – individuals can claim action plans from their national authorities even if the respective national law provisions don't provide for this opportunity.²⁴ The national law provisions are to be interpreted accordingly.

Should the court deem the requirements for a short-term action plan fulfilled, he will compel the respective agency to issue such a plan.

Naturally, the financial implications depend on the amount in dispute (which can be hard to determine in a case like this). Given that the amount in dispute was set to 10,000 €, the

²² see – inter alia – Administrative Court of Munich, 26.07.2005 - M 1 K 05.1110 and Federal Administrative Court, 28.02.2007 - 2 BvR 2494/06.

²³ Grabitz/Hilf/Nettesheim/Nettesheim, 65. EL 2018, AEUV Art. 192 Rn. 166.

²⁴ European Court of Justice, 25. 7. 2008 - C-237/07 Janecek/Freistaat Bayern.

court fees would amount to 723 €. Should Martha win the case fully, these costs would have to be borne by the agency that Martha took to court.

Alternatively, Martha could try to approach environment NGOs. These NGOs, too, can try to compel the authorities to issue an actional plan under Sec. 47 BImSchG.²⁵

Also, Martha could raise a complaint with the supervising authority that controls the responsible agency. The supervising authority could then compel the respective agency to take certain action – provided that they deem the requirements for that action fulfilled.

²⁵ see in this regard: sec. 3 UmwRBehG and sec. 1 § 1 Nr. 4 UmwRG (*German statutes regarding relief in environmental subject matters*).

GREECE

Answers to the Avosetta Questionnaire: Air Quality Law
London 24-25 May 2019
COUNTRY REPORT: GREECE
VICKY KARAGEORGOU, PANTEION UNIVERSITY OF SOCIAL AND
POLITICAL SCIENCES

Air Quality: National Context

1. What are the main sources of unlawful levels of air pollution in your Member State?

The main sources of unlawful levels of pollution in Greece are the following: a) the energy production and generation¹ b) the energy consumption primarily in industry and secondarily in the households and the commercial sector d) road transport e) non-road transport and f) agriculture which is the main sector that produces ammonia emissions.² It is worth mentioning that the economic crisis contributed to the deterioration of air quality in big cities (Athens, Thessaloniki), as due to the imposition of a huge tax increase in the price of oil heating, poor households found other means for heating, such as burning woods and lignite in fireplaces and stoves. As a result of the increased use of firewood or other means (biomass waste), major cities, such as Athens and Thessaloniki were densely clouded with air pollutants, primarily particulate matter (PM10 and PM2.5), where significant exceedances were observed. For example, in wintertime particle pollution was increased in Thessaloniki by around 30% in 2013.³ Furthermore, exceedances especially of particulate matter (PM10 and PM 2.5) that are observed in the summer season in the Attica Region and the urban area of Athens can be attributed, to a significant extent, to the forest fires that happen almost every summer.⁴

¹ This is due to the fact that the Greek Electric Power System is heavily based on the exploitation of domestic lignite reserves and natural gas imports, along with oil imports for the operation of the autonomous power stations of the non-interconnected island system. See Clean Alternatives to Ptolemaida V, Economic and Ethical Considerations, WWF 2015, p. 11 et.seq. The total electricity generation in the Greek interconnected system for the whole year 2016 amounted to almost 41.6 TWh. Lignite accounted for 23.55% of the installed capacity in the interconnected system, natural gas for 28.4%, hydro-power for 19.10% and RES for 29.33%. An increase of the energy produced by RES is observed in the last years. For further details see *International Energy Agency, Greece Review 2017*, p. 19 et.seq. The recently adopted National Action Plan on Energy and Climate Change sets the roadmap to the gradual reduction of the lignite share in the electricity system and the extensive use of energy produced by fossil fuels. See *Ministry for Environment and Energy, National Action Plan on Energy and Climate Change, January 2019*, p. 121 et.seq, available at : https://ec.europa.eu/energy/sites/ener/files/documents/greece_draftnecp.pdf

² *National Center for the Environment and Sustainable Development, Greek State of the Environment Report, 2018*, p. 25-26.

³ A. Saffari et al, Increased Biomass Burning Due to the Economic Crisis in Greece and Its Adverse Impact on Wintertime Air Quality in Thessaloniki, *Environmental Science and Technology* 2013, p. 13313 et.seq. For the situation in Athens see M. Gratsea et al, The combined effect of reduced fossil fuel consumption and increasing biomass consumption on Athens' air quality, as inferred from long term CO measurements, *Science of the Total Environment* 2017, p. 115-123.

⁴ In the last summer, the worst in a decade wildfire happened in the small resort of Mati, 18 km east from Athens that resulted in the loss of 102 human lives and the destroy of thousand of

2. How extensive is reported non-compliance with AQD air quality standards in your Member State?

Greece has not reported data on compliance with the environmental air quality objectives for the 2016⁵ and 2017. In accordance with the Environmental Implementation Review 2019, in 2017 exceedances related to the annual limit value for nitrogen dioxide (NO₂) were registered in 1 out of 4 air quality zones (Athens) and in 1 out of 4 zones for fine particulate matter (PM_{2.5}). Exceedances were also registered related to particulate matter (PM₁₀) in 3 (out of 4) air quality zones.⁶ Furthermore, in accordance with the annual reports of the Ministry for Environment and Energy concerning atmospheric pollution for the years 2015 and 2016 multiple exceedances of particulate matter (PM₁₀), nitrogen dioxide (NO₂) and ozone were observed especially in Athens.⁷

Furthermore, the table⁸ shows the percentage of the exposure of the urban population to concentrations above EU standards for four air pollutants.

	2012	2013	2014	2015	2016
PM 2.5 annual mean	0,0	0,0	-no data	0,0	0,0
NO ₂ annual mean	3,2	3,0	2,4	3,2	2,4
PM ₁₀ percentile 90,41	48,2	52,0	2,3	4,2	28,6
O ₃ percentile 93.15	97,0	95,3	47,9	96,9	72,5

2a. On the website of the Ministry for Environment and Energy is available information about the air quality situation, the max. and average pollutant values for the present day and the previous one and the forecasting of air pollution levels for 24 and 48 hours. In case of the exceedances of information thresholds or alert thresholds for ozone or particulate matter (PM 10), the Ministry publishes daily information through internet and certain recommendations for the vulnerable groups of the society. Moreover, relevant

hectares forest land. For further information see *Greek wildfires: Dozens dead in Attica Region*, BBC 24 July 2018.

⁵ European Court of Editors, Special Report 23/2018 " Air Pollution: Our Health insufficiently protected", p. 22 footnote 36 referring to Greece's failure to submit data for 2016.

⁶ *European Commission*, The Environmental Implementation Review 2019-Greece, p. 14.

⁷ Ministry for Environment and Energy, Annual Report of Atmospheric Pollution for the year 2015, September 2016, Annex II; Ministry for Environment and Energy, Annual Report of Atmospheric Pollution in Greece, June 2017, Chapter 6.

⁸European Environmental Agency, available at: <https://www.eea.europa.eu/themes/air/country-fact-sheets/greece>. The exposure of the population to concentrations above the EU standards in the years 2012 and 2013 underline the impact of the economic crisis on the quality of people's life.

information is also transmitted through radio and television messages. Exceedances of certain air pollutants above EU Standards are included in the relevant Annual National Reports about the air quality. *Due to the deficiencies of the air quality monitoring network, data concerning air quality in Greece are not comprehensive and sufficient, a fact that also exerts influence on the fulfillment of the public information requirements.*⁹ This is mainly relevant for certain big cities except for Athens and Thessaloniki, where no sufficient measuring stations were installed.¹⁰ Furthermore, another inter-related issue concerns the public access to information concerning the air pollution caused by certain industries (cement industry) through the use of alternative fuels.¹¹

3. Have EU infringement proceedings been brought against your Member State for failure to comply with the AQD?

Commission send two Reasoned Opinions to the Greek Government requesting to take the necessary measures, in order to meet the standards of the AQD concerning the acceptable limit values of particulate matter (PM10). These cases have not been referred to the CJEU. Currently, an infringement procedure is pending against Greece, as the Commission send a letter of formal notice for the failure to ensure compliance with the annual limit value for NO₂ in Athens for the period 2010-2014 and to establish an Air Quality Plan identifying the necessary measures that would keep the exceedance period as short as possible as well for its failure to put in place adequate sampling points in the designated zones of Thessaloniki, in order to ensure proper monitoring of NO₂ concentration.¹²

Air Quality Standards

4. Was there pre-existing national law relating to air quality standards (similar to the AQD), or did the AQD introduce something new in your country?

⁹ WWF Hellas, Environmental Legislation in Greece, 14th Policy Review, 2018, p. 115

¹⁰ It is worth noting that certain regions (Region of Central Macedonia or the Region of Thessaly), which have the responsibility of the operation of the measuring stations, publish daily reports about the air quality and in the case of exceedances of the limit values, they also provide recommendations to the citizens.

¹¹The citizens of Volos (a city in central Greece) asked to have access to information concerning the levels of air pollution and the exceedances of emission limit values for certain air pollutants that can be attributed to the use of alternative fuels in a cement industry, which operates in the industrial zone of the city. In response to the relevant application of the citizens, the Alternate Minister for Environment and Energy recognized their right to have access to relevant information that has to be published also on-line. See Press Release, Alternate Minister for Energy and the Environment, "The systems for measuring emissions in the industries should be open to every citizen" , available at : <https://energypress.gr/news/famellos-ta-systimata-metrisis-rypon-stis-viomihanies-anoikta-se-kathe-politi>.

¹² European Commission, January Infringement Package: Key Decisions, Brussels 24 January 2019, available at : http://europa.eu/rapid/press-release_MEMO-19-462_en.htm.

As is the case with the majority of the legislative pieces dealing with environmental protection issues, where the respective EU legislation was the driving force for their introduction, the same applies for the relevant legislative framework concerning the air quality. In particular, the previous air quality framework directive in conjunction with the single Directives and then the AQD were the driving forces for the introduction of the respective legislative framework setting air quality objectives for the major air pollutants.¹³

5. How are AQD air quality standards implemented in law in your Member State?

The major legislative instrument by which AQD air quality standards are implemented is the Joint Ministerial Decision 14122/549/2011 (Official Government Gazette Issue B 488/30.3.2011), as amended by the Joint Ministerial Decision 74505/607/2017 (Official Government Gazette Issue B1311/ 13.04.2017). Furthermore, the Joint Ministerial Decision 70601/2013 on Short term Action Plans for Environmental Pollution sets the threshold levels of PM₁₀ that require the information of the public and especially of specific sensitive population groups, the threshold levels which require that short-term measures for the reduction of emissions caused by combustion burners and industrial installations should be taken and the threshold levels that justify the introduction of short-term traffic regulations. It is also provided that the Minister for Environment and Energy has competence to adopt Short-term action Plans for the region of Attica, while the Regional Governors have competence to adopt respective Short-terms Plans for concrete areas and zones in the respective regions. Finally, it is foreseen that Environmental Inspectorate established within the Ministry for Environment and Energy and the Directorates of Environmental Protection established in the Seven Decentralized Administrations have the competence to impose administrative fines in the cases of the non-compliance with the measures set in the Short-Term Action Plans.

The afore-mentioned JMD on Short-Term Action Plans seems to be incompatible with the AQD, as it provides for the establishment of Short-term Action Plans in the case that the threshold levels with respect to certain air pollutants are exceeded, while Article 24 of the AQD provides that the relevant Plans should be set in the case that there is a risk that the level of pollutants will exceed one or more alert thresholds. It is obvious that in case of exceedances of the threshold levels in certain zones, Air Quality Plans instead of Short-term Action Plans should have been established in accordance with Article 23 of AQD. Furthermore, the JMD was criticized for the reason that it has set higher threshold levels in relation to those set in AQD as a precondition for taking concrete measures.¹⁴

6. Does any law in your Member State provide for air quality standards that go beyond those set out in the AQD, imposing any more stringent standards, for example, in relation to PM_{2.5}?

¹³ The first significant piece of legislation setting emission limits for certain highly polluting industries was the Presidential Decree 1180/81 (Official Government Gazette Issue A 293/6.10.1981).

¹⁴ WWF Hellas, Environmental Legislation in Greece, 10th Policy Review, 2014, p. 34

To my knowledge, no national standards which are more stringent than those set in the AQD, are set in relation to concrete air pollutants.

Air Quality Monitoring and Modelling

7. How are air quality monitoring networks set up in your Member State (briefly)? Do these go beyond the monitoring requirements set out in Chapter II AQD (eg in terms of the number and location of monitoring stations)?

In 2001 the Ministry for Environment and Energy established the national air quality monitoring network. The network encompasses 33 automatic measuring stations in 8 major cities, including, among others, Athens (18 stations), Thessaloniki (8 stations), Volos and Heraklion, which are set in areas characterised as urban, residential, commercial and semi-industrial plus 1 background station located in a rural area (Aliartos). The Directorate of Air Quality of the Ministry for Environment and Energy is responsible for the operation of the measuring stations in Attica Region and for the comprehensive planning and reporting to the International Organizations. The Directorates for environmental protection established within the respective Regions are responsible for the measuring stations established in their territory, the data gathering and the fulfilment of the relevant requirements concerning their operation at the regional level. The establishment of the air quality monitoring network does not go beyond the relevant requirements set in Chapter II of the AQD.¹⁵

8. What sort of problems are encountered in monitoring of air quality in your Member State?

The major problems which are observed concerning the air quality monitoring network are the following :a) the network is undersized, as measuring stations are set only in certain big cities besides Athens and Thessaloniki, so that there is a need for more extensive substantial coverage¹⁶ b) the measuring stations do not measure all air pollutants on a permanent basis, as for example ozone is not monitored at regional level¹⁷ c) there are no measurement stations in areas which are representative of general population exposure, as required by the Directive (Section B.1. of Annex III) and d) data from measuring stations cannot be easily made available in real time.

9. As far as you can determine, are there limitations or problems with the modelling techniques used in your Member State to assess air quality (where modelling is permitted as a method for assessment under Chapter II AQD)?

I have not found so far any official data about the use of modelling techniques for assessing air quality in Greece. I have only found some scientific papers using modeling techniques to assess the relevant data from the measurement stations especially in the areas of Athens and Thessaloniki.

National Air Quality Plans and Governance

¹⁵ Information is available at : <http://www.ypeka.gr/Default.aspx?tabid=492&language=el-GR>.

¹⁶ See European Environmental Agency, Air Quality Monitoring Situation-State and Trends, 2016, (Chapter 4). See also WWF Hellas, Environmental Legislation in Greece, *supra*, note 9, p. 115.

¹⁷ *Ibidem*.

10. Does your Member State have a national Air Quality Plan under Article 23?

Greece has not established a National Air Quality Plan so far.

E n11. Whether or not your Member State has an Air Quality Plan, please outline the key national regulatory measures that contribute towards compliance with EU air quality standards in your Member State.

a) Industrial Emissions :Emissions from industrial installations are mainly regulated by the Joint Ministerial Decision 36060/155/E.103/2013, by which Industrial Emissions Directive is transposed. Approximately 370 installations fall within the scope of the Directive¹⁸. It is worth noting though that the emission limit values based on the BAT standards set for large combustion plants are not observed by the lignite power plants almost on a permanent basis.¹⁹ A positive step is the participation of the region of Western Macedonia, in which several lignite power stations operate, in the "Coal Regions in Transition Initiative".²⁰ To this end, the National Fund for fair transition was established that is going to be financed by a part of the revenues from the auctioning of CO2 emission rights and will finance projects and actions that can facilitate the transition of coal power regions to more sustainable production models.²¹

Furthermore, due to the inadequate staffing of the Environmental Inspectorate of the Ministry for Environment and Energy and that of the competent regional authorities, the regular monitoring of the IED installations with respect to their compliance with the emission limits values set in the relevant environmental permits cannot be sufficiently ensured. In addition, due to the simplification of the environmental authorization procedures, the vast majority of industrial installations of medium and low disturbance, which are simultaneously classified in the Category B in accordance with the EIA Legislation (Law 4014/2011), are subject only to a simplified notification procedure (submission of a "Declaration of Subjection to the Standard Environmental Commitments" to the competent authority). Subsequently, it cannot be sufficiently ensured that these installations comply with the "Standard Environmental Commitments" which are set in a Ministerial

¹⁸ The majority of IED installations (39%) are reported as 'other activities' (intensive rearing of poultry or pigs (IED activity 6.6), food and drink industries (IED activity 6.4), and surface treatment), while non-hazardous waste management is about 18% and minerals 16%. See European Commission, *supra*, note 6, p. 16.

¹⁹ In accordance with a recent study, only one out of 11 lignite -fired power stations complies with the limit values for three major air pollutants (SO₂,NO_x and PM) set out in accordance with BATs, while all other plants are above the emission limit values with respect to all or some of the pollutants, and by huge factors in some cases. See *WWF Hellas*, BREF Compliance for Greek Lignite Plants-A Cost benefit Analysis, September 2018, p. 6-7.

²⁰ Further information is available at : <https://ec.europa.eu/energy/en/topics/oil-gas-and-coal/coal-regions-in-transition>

²¹ The National Fund for fair Transition is a specific account which was established by Article 3 of Law 4585/2018 (Article 3 that modified Article 24 of Law 3468/2006). Moreover, the Ministerial Decision 67/2019 which determines the distribution of the revenues from the auctioning of emission rights for the year 2018, provides financing of about 30 million euros for certain actions and projects in the so-called regions under transition.

Decision and relate also to emission values for each concrete group of installations.

b) Residential Sector: There are no specific measures set in the legislation that aim to reduce the emissions produced by households with the aim to meet the air quality objectives. In any case, certain measures within the framework of climate change and energy policies contribute to the reduction of emissions produced by households that have an increased share in energy consumption (24% of the total energy consumption). In particular, certain Initiatives (tax incentives) for the use of natural gas for heating in the big cities ("connected to the network") and the production of renewable energy sources (installation of photovoltaic systems in roofs) are introduced. In spite of these efforts, combustion of fuel oil is still being used to a significant extent for central heating, contributing thereby to air pollution especially in winter months.²² Moreover, the Programme "Saving at Home" provides interest free loans and subsidies to citizens and small sized enterprises for the installation of RES and energy saving measures with the aim to increase the energy performance and efficiency of the residential buildings.²³

c) Transport²⁴: Certain legislative measures concerning the fuel mix and service stations are introduced within the framework of the transposition of the relevant EU Directives.²⁵ Furthermore, financial incentives were provided for the scrapping of old cars and their replacement with alternative technology vehicles (hybrid vehicles) for concrete time frames in the last fifteen years. *Due to the precarious economic situation, no relevant incentives for the promotion of hybrid and electric cars have been provided in the last eight years.*²⁶ Furthermore, the relevant provision of Article 8.3 of Law 3855/2010 that required a quota of clean vehicles and the replacement of old medium and heavy vehicles and also set energy efficiency as a selection criterion for the

²² *Ath. Valavanidis et al*, Atmospheric Pollution in Urban Areas of Greece and Economic Crisis-Trends in Air Quality and atmospheric pollution data, research and adverse health effects, p. 5, available at :www.uoa.gr, 20th November 2015.

²³ In accordance with the State of the Environment Report (*supra*, note 2, p. 25), significant emission reductions have been achieved in the residential sector.

²⁴ Intense air pollution problems, which were caused by the increased use of private cars and the public buses which were equipped with old technologies, were emerged in the late eighties in the big cities and especially in Athens (the so called "cloud" (nephos)). A number of measures were taken which concerned mainly the traffic regulation system in the center of Athens (alternate days of license plate system), the financial incentives for the replacement of old cars and vehicles equipped with old technologies and the use of better fuels. *Ath. Valavanidis et al, supra*, note 22, p. 2.

²⁵ Certain legislative instruments which were adopted within the framework of the transposition of the respective EU legislation, are the following: a) the Joint Ministerial Decision 128/2016 for the reduction in the sulphur content of certain liquid fuels b) the Joint Ministerial Decision 178626/2016 for the modernization and the control of the systems for the petrol vapour recovery during refuelling of motor vehicles at service stations in compliance with the Directive 2014/99 and c) Law 4439/2016 by which Directive 2014/94 on the deployment of alternative fuels infrastructure was transposed.

²⁶ Legislative Act of 16.9.2009, "Measures to address Air Pollution" (Official Government Gazete Issue A181/16.09.2009) that was repealed by another legislative act. Furthermore, incentives for the replacement of old private cars were foreseen in the JMD DEFK 5006718EΞ2001/11.2.2011 mainly through the exemption of the new cars from the registration fee at a rate that depended on their engine capacity and their taxable value.

procurement of vehicles in the public sector was abolished in 2015 (Article 47 of Law 4243/2015). In any case, *a significantly reduced registration fee is foreseen for hybrid cars, while electric cars are totally exempted from the fee*. Moreover, the linkage of the tax amount with the each vehicles' s pollutant capacity with respect to CO₂ is applied only to vehicles which are registered since 2010.²⁷ Finally, a series of measures were implemented especially in Athens, with the aim to upgrade the public transportation system, such as the extension of the Athens Metro and the suburban railway in the wider Athens area, the facilitation of the connection and the functionality of the existing network and the smart ticket.²⁸

d) Agriculture: Emissions from Agriculture that accounted for 8.68% of total emissions in 2015, decreased by approximately 17.89% compared to 1990 levels. Emission reductions in the agricultural sector can be mainly attributed to the reduction of N₂O emissions from agricultural soils due to the reduction in the use of synthetic nitrogen fertilizers. The decrease in the use of synthetic nitrogen fertilizers is *attributed to the increase of organic farming, the high price of fertilizers and the impact of initiatives to promote good practices in the fertilizer use*.²⁹

12. Has your Member State ever issued a Short-term Action Plan under Article 24? If so, please outline any notable features of the plan or aspects of its implementation (briefly).

Few Short-term Action Plans³⁰ under Article 24 of AQD are established so far. The first one concerned a specific zone in the city of Volos in Thessaly (central Greece) which is very close to the industrial installations of the area (and especially cement industry) and was approved by the Regional Governor of Thessaly.³¹ The Action Plan distinguishes between the phase of information obligations, in which competent authorities have the obligation to inform the public and the phase of an emergency event with respect to air pollution in which traffic restrictions and restrictions to the heating installations and to the industrial installations with respect to the level of production have to be imposed. Furthermore, Short-term Action Plans to deal with air pollution in four municipalities (Kozani, Eordaia, Florina and Amyntaio), were approved by the Regional Governor of Western Macedonia. It is worth mentioning that Western Macedonia is the region in which certain highly polluting lignite power stations of the Public Power Corporation operate.³² The relevant Short-

²⁷ Center for Renewable Energy Sources and Saving (CRESES), Energy Efficiency Trends and Policies in Greece, July 2018, p. 40 et.seq.

²⁸ Ibidem. A new metro in Thessaloniki is also under construction.

²⁹ Ministry for Environment and Energy, Climate Change-Emissions Inventory, April 2017, p.76.

³⁰ It is worth noting that a Short-term Action Plan has not been adopted so far in the region of Attica in spite of the fact that especially in the years of 2013-2015 significant exceedances of the thresholds with regard to certain major air pollutants were observed. In certain instances, the Minister of Health issued recommendations concerning the precautionary measures that sensitive groups of population should take.

³¹ Decision 5958/2013 of the Regional Governor of Thessaly, Short-term Action Plan dealing with air pollution in the area of urban complex of Volos-Nea Ionia of the Municipality of Volos (Official Government Gazette Issue B 2489/3.10.2013).

³² Decision 66941/1892/2016 of the Regional Governor of Western Macedonia, "Short-term Action Plans" to cope with air pollution in the Region of Western Macedonia (Official Government Gazette Issue B 1589/6.06.2016). In addition, the Regional Governor of Western

term Action Plans which are quite extensive and set thresholds for certain pollutants and in particular PM10 and PM2,5, distinguish three phases in which measures have to be taken. In the first phase measures concerning public information should be taken, while in the second phase measures for the protection of the public have to be taken. Finally, in the third phase measures for the reduction of unallowable concentrations of particulate matter have to be taken, which encompass, among others, traffic restrictions and significant restrictions to the power stations with respect to the electricity production.

It is obvious that the Short-terms Action Plans were adopted in zones and municipalities in which constant air pollution problems exist, so that in accordance with AQD the adoption of Air Quality Plans would be the proper solution.

13. Which public bodies have legal responsibilities for meeting air quality standards in your Member State?

At the central level, the General Directorate for the Environmental Policy established within the Ministry for Environment and Energy is the competent public authority. Within the General Directorate for Environmental Policy, there is a specific Directorate that deals with the issues concerning Climate Change and the Quality of the Atmosphere. The Directorates for environmental protection established within the Regions are the competent authorities at the regional level for ensuring compliance with the air quality standards.

14. Are there any legal requirements for different public bodies who have control over different air pollution sources to coordinate their efforts in any way to work towards air quality standards?

To my knowledge, there are no legal provisions in place that address different public bodies with responsibilities in the field of air pollution and set out concrete obligations to coordinate their efforts with the aim to meet the air quality objectives.

Air Quality Law Enforcement

15. What is the primary mode for enforcing of air quality law in your Member State?

Article 28 of the Joint Ministerial Decision 14122/549/2011 sets that the competent authorities can impose administrative fines to any natural or legal person (companies) that contributes to air pollution and subsequently to environmental degradation. Moreover, the competent authorities can transmit the relevant files concerning the exceedances of emission limits with respect to certain air pollutants to the Prosecutors, in order to initiate criminal proceedings against any natural and legal person that has contributed to air

Macedonia approved certain short-term measures to deal with high concentration of PM10 in certain municipalities of the region.

pollution in a concrete area. To my knowledge, no administrative fines have been imposed so far especially with respect to contribution to air pollution.³³

16. Have there been court cases concerning the enforcement of air quality law in your Member State?

To my knowledge, there is no specific jurisprudence concerning cases of non-compliance with air pollution law. The issue of setting insufficient emission limit standards based on BATs in several industrial sectors (power stations, cement industry, mining activities) or of using fossil fuels instead of natural gas in the production process is reviewed by the Council of State within the framework of petitions for annulment against the relevant environmental permits. In this context, the Council of State (Decision 1864/2015) ruled that the relevant decision of the Ministry for Environment and Energy that rejected the application of an industry to modify the environmental permit with the aim to change the fuel used in the production process from natural gas to petcoke, was sufficiently justified. The Court came to this conclusion by considering that *the EIA Study on which the application for the modification of the environmental permit was based, did not contain a comparative assessment of the environmental impacts associated with the use of the two different fuels especially with respect to air pollution, but instead the proposal for the use of petcoke was based only on purely economic considerations.*

17. Please outline any other major challenges faced in your Member State for enforcing the AQD, or any other applicable air quality law.

A significant challenge that has to be addressed concerns the insufficient staffing of both the Environmental Inspectorate at the central level and of the regional authorities that have competence on environmental protection issues, including air quality. Subsequently, due to the lack of experienced civil servants and Inspectors, inspections cannot be performed on a regular basis. Moreover, authorities cannot respond within a reasonable time to the complaints which are submitted by citizens and NGOs concerning possible exceedances of emission limit values.

Furthermore, another significant challenge concerns the lack of a strategic approach to deal with air pollution problems. In particular, due to the fact that the air quality monitoring network does not cover the whole territory in a representative manner, no comprehensive or sufficient data exist. Furthermore, even in the cases where sufficient data exist which demonstrate constant air pollution problems, the competent authorities do not set an Air Quality Plan, as required by the AQD, in order to deal with the issue in a systematic manner and in a medium-term perspective. Instead of that, they take short-term measures.

Case Study

The first step that Martha could take, is to receive environmental information about the various sources of air pollution. In this context, it is critical if there

³³ Administrative fines (Article 30 of Law 1650/1986) are mainly imposed in the case that the relevant installations do not comply with the conditions set in the respective environmental permits, which in cases of industrial or other polluting installations encompass also emission limits values with respect to major air pollutants. In this context, the imposition of fines and the determination of their exact amount depends also on the exceedances of the emission limit values.

is a measuring station in the critical area, so that exact information could be given about the concrete air pollutants and the exceedances of the relevant emission limits and target values. The next step is to submit an application to the Directorate for the Environmental Protection of the respective Region, which is the competent authority (Article 3 of the MD 14122/549/2011), with the request to establish an air quality plan for the concrete zone in which she lives and where the exceedances are observed. **In the case that the competent authority rejects the application on the grounds that the establishment of an air quality plan is not necessary, Martha can submit a petition for annulment before the Council of State (Fifth Section) against the decision within 60 days since she became aware of it. It is obvious that she can demonstrate her legal interest to take action by claiming that she lives in the area and is a mother of two children that have developed asthmatic symptoms, so that she also acts on their behalf.** In the case that the competent authority does not answer the application within 90 days, *Martha can submit a petition for annulment against the tacit refusal of the application by the competent authority. Moreover, it could be argued that as the Air Quality Directive, as interpreted by the CJEU, sets an obligation for the competent authority to set an air quality Plan in the case of exceedances of emission limits set in AQD³⁴, Martha could ask the Court to annul the omission of the competent authority to act (article 45 .4 of the Presidential Decree 18/1989). Furthermore, due to the negative nature of the relevant acts or omissions of the competent authority, Martha cannot ask the Court to issue an injunction to the administration to take the necessary measures to deal with air pollution.* The Court can annul the rejection of the relevant application by the competent authority or its omission to take the necessary measures to tackle air pollution in the concrete area. In response to the Court Decision, the administration has to take the necessary measures. (If the administration does not respond, Martha can apply to a specific judicial body responsible for the compliance with the judicial decisions). The financial cost of the judicial proceedings can be at least 3.500 euro. The duration of the judicial proceedings is estimated to 3 years approximately, so that judicial protection can be ineffective with regard to the problem solution. There is also the possibility that the Court rejects the petition for annulment.

Martha can also ask to receive a copy of the environmental permit of the coal fired power station. In the case that she becomes aware that the power plant does not meet the emission limit values set out in the relevant environmental permit or in the operation license, she can ask the competent authority (General Directorate for Environmental Policy of the Ministry) or the Environmental Inspectorate to make an inspection and to take the necessary measures (fines, temporal revocation of the license), in order to ensure the compliance of the operator with the relevant standards within a set deadline. In the case that the competent authority rejects the application or does not respond within 90 days, she can go to the Court (Council of State) to seek the

³⁴ It has to be demonstrated that the administration does not enjoy any margin of discretion in issuing the relevant act.

review of the rejection or the tacit refusal. The same route can be followed concerning the permits of the other industrial installations.

Another route that does not involve any financial costs and can be often effective is that Martha submits a petition to the Greek Ombudsman where she can complain with respect to the fact that the competent authorities have not taken the necessary measures to combat air pollution in the critical area. The submission of the petition presupposes that the petitioner had already submitted applications to the competent authorities to take the necessary measures and that the competent authorities either rejected the applications or did not respond effectively.

Finally, it is worth mentioning that the private law can offer some remedies to Martha. *In particular, she can go to the civil court to apply for interim measures against the owners of the neighboring installations that exceed emission limit values. If the Court accepts the application, it issues an order to the operators to take concrete measures to limit the emissions at an acceptable level for a concrete time limit. It is critical that even a tenant can apply for interim measures. Furthermore, if Martha is property owner, she can bring judicial proceedings against the operators of the installations that exceed the emission limits on the basis of the provisions of the Civil Code concerning neighboring law (Articles 1003-1032), requesting that they take the necessary measures in order to remove the infringement of her right to property (and that of her children) and to avoid any infringements in the future. She can also ask for monetary compensation on behalf of her children.*

HUNGARY

Avosetta Questionnaire: Air Quality Law - Hungary
London 24-25 May 2019

by
István Garaguly (legal expert of the Office of the Commissioner of Fundamental Rights)
and Gyula Bándi

1. The main sources of unlawful levels of air pollution in Hungary are:

PM10: As it is officially measured¹ by the Ministry of Agriculture (responsible for the environment as well) based on the analysis of data in 2016 of the National Air-pollution Monitoring Network the responsible sectors for air-pollution are (and this is mostly the case today):

67 % residential heating,

5% traffic, transports

7% industry

15% agriculture

2% waste management

2% energy

1% other non-industrial burning

It is stated by the government, that the 30 % of PM10 pollution comes transboundary

PM2,5

85,5 % residential heating

7% traffic

5% industry

3,5% others (waste management, energy, agriculture, other non-industrial burning)

NOx

40% traffic

20% households, business, services

10% industrial energy use

10% agriculture

Among the other pollutants (such as SOx, CO, O3, As, Cd, Pb, Ni, BaP) generally, nation-wide only BaP (PM10 benz-(a)piren) is significant in every air-quality zones or agglomerations.

In some agglomerations and zones though the level of the abovementioned pollutants is between the limit value and the upper assessment threshold (D), or above the limit value and the margin of tolerance or the target value (B) as follows²:

CO: Budapest & agglomeration, Sajó völgye, Dunaújváros, Ajka (D)

As: Komárom-Tatabánya-Esztergom (D), Dunaújváros (B)

Cd: Dunaújváros (B)

Ni: Dunaújváros (D)

Pb: Dunaújváros (B)

¹ https://pm10.kormany.hu/download/6/80/22000/PM10%20besz%C3%A1mol%C3%B3%202017_web.pdf

² source: a légszennyezetségi agglomerációk és zónák kijelöléséről szóló 4/2002. (X. 7.) KvVM rendelet

2. How extensive is reported non-compliance with AQD air quality standards in your Member State?

The current status of the air quality regulations in Hungary is mostly in compliance with the air quality standards, in some cases (SO_x, NO_x) the limit values are more strict than the ones in the appendix XI. of the AQD.

Meanwhile the available annual reports³ of air quality are revealing us some non-compliant results of analysis of the National Air-quality Monitoring Network (NAMN) data for certain pollutants. For eg. in case of BaP the annual level was above the limit value in the case of 10 automated monitoring stations of the 27 altogether.

The report upon the 2017. aggregated annual records of the NAMN shows us, that from the 52 automated monitoring stations 8 stations recorded polluted air (mostly with NO₂ and NO_x or PM₁₀, PM_{2,5}.air) in Budapest, Debrecen, Győr, Kazincbarcika, Sajószentpéteri and Miskolc.⁴

Since the sectorial air quality data shows us, the main sources on the high level PM₁₀ and PM_{2,5} air-pollution are emitted from the low chimney sources (as residential heating and traffic takes the 70-90% of the aggregated national level). It means that to cope with the local problem (e.g. roads with high traffic and regular daily jams) a more detailed and planned monitoring would be necessary to be able to realize and face with the real air-quality level at a certain area, and to find proper solutions to solve those problems, which can threaten the health of the people.

In some reports of the ombudsman⁵ we called the authorities to execute such local, more problem-focused monitoring-plans with manual monitoring stations, also to reinstall the not working automated monitoring stations, or to build new automated stations. Because of different financial, institutional, certain legal reasons the reactions of authorities on the initiative of the ombudsman were mixed.

The report AJB-3360/2012 for example upon of the lack of monitoring and thus missing air quality data in Szentgotthárd and its suburbs in South-west Hungary had resulted as a conclusion, that a new automated monitoring station has been installed in this area, in cooperation with the neighboring Austria.

In case of the report AJB-2031/2014. upon the lack of air quality data and air-quality plan for Békéscsaba (South-east of Hungary) because of some institutional and financial reasons future promises remained from the authorities responsible for air quality.

3. Have EU infringement proceedings been brought against your Member State for failure to comply with the AQD?

Yes, because in 3 air quality zones, Budapest, Pecs and Sajó valley, the daily limit values of PM₁₀ have been persistently exceeded, in 2016 on up to 76 days. It is still ongoing in front of the CJEU.

4. Was there pre-existing national law relating to air quality standards (similar to the AQD), or did the AQD introduce something new in your country?

³ [http://www.levegominoseg.hu/\(X\(1\)S\(j3g2ogposjfnb33ts4q3v0c\)\)/ertekelesok](http://www.levegominoseg.hu/(X(1)S(j3g2ogposjfnb33ts4q3v0c))/ertekelesok)

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[http://www.levegominoseg.hu/\(X\(1\)S\(j3g2ogposjfnb33ts4q3v0c\)\)/Media/Default/Ertekeles/docs/2017_auto_mata_ertekeles.pdf](http://www.levegominoseg.hu/(X(1)S(j3g2ogposjfnb33ts4q3v0c))/Media/Default/Ertekeles/docs/2017_auto_mata_ertekeles.pdf)

⁵ AJB-7524/2012., AJB-2031/2014., AJB-695/2016, AJB-8603/2016, AJB-1023/2018.

The framework for air pollution regulation is provided by the environmental act of 1995, setting the outline of the regulation. According to the act all the atmosphere, its processes and compounds and also climate issues belong to the scope of legislation. The most important requirement is the general protection of air from any artificial impact, which directly or indirectly may load the environment with any radiation, liquid, aeriform or solid materials in a way that may endanger the quality of the air or damage human health. Odour pollution is prohibited as well. Also, the most important general requirement related to any operations or activities is to minimize the emission or air pollutants as far as possible in case of planning, realization, operation of the installations or production and use of products.

Later the EU air pollution framework of 1996 has been introduced in Hungary in 2001, and it is still in force, with a renewed system of 2010. Similar to the EU law, the followings do not belong to the scope of air pollution legislation:

- ionizing and non-ionizing radiation;
- the air of workplaces; and
- the air of closed spaces.

The basic requirements are that:

- air pollution is prohibited;
- loading the air in a way which causes air pollution is not allowed either; and
- odour pollution is prohibited as well.

The outline of the whole system in it logical order is the following:

(a) The starting point is the specification of the ambient air quality, which shall serve as the basis of ambient air standards and as a next step of emission standards, at least in case of point sources. The pollution of the air actually means the situation of pollution over the air quality standards. These ambient air standards are defined in a way to avoid harmful effects on human health or on ecological systems, based upon scientific information.

(b) The air quality levels and ambient air standards are monitored by the National Ambient Air Monitoring System. There are lower and higher monitoring limit values, having a consequence on the methodology of ambient air monitoring. In case of lower levels, modelling or estimation is enough, while in case of the upper limits, a combination of measuring and modelling is needed.

(c) Based upon the air quality levels, and also on the basis of monitoring limit values, ambient air agglomerations or zones shall be defined. These zones shall be reconsidered at least once in every five years, also their limits may be amended.

(d) If the air pollution in a yearly basis is over the ambient air standards, air quality action plans shall be made by the environmental authorities. These plans shall be integrated action plans if there are more air pollutants over the standard.

(e) In case of developing the above-mentioned action plans by the authorities, the operators of air emitting sources shall also be obliged to design their own action plans. If these plans are missing or not implemented, the activity, that is the operation may be suspended, limited or even prohibited.

(f) The system related to the regulation of individual emissions is based upon the above defined structure, the core element of which is the authorization of emissions, which embodies also the specification of emission standards. A direct consequence of reaching the given ambient air limits is that a new installation may not be authorized in the given areas, except the operator constructs the necessary improvements to stay within the limits. We have to underline also that the whole system is based upon the requirements of BAT, also taking into consideration the permissible level of ambient air quality. These authorizations may of course be limited, suspended, withdrawn or different additional obligation may also be defined, if necessary. Authorization is the essential tool for point sources, but in case of diffused sources this may not necessarily be used. If emission standards may not be defined for diffused sources,

specific requirements shall be tailored for air quality protection or conditions for using different materials. Also setting up of protection zones may be required in case of new polluting sources.

5. How are AQD air quality standards implemented in law in your Member State?

306/2010. Governmental decree about the prevention of air⁶

4/2011. ministerial order⁷ about the immission limit values of air, and emission value limits of the local based sources

6/2011. ministerial order⁸ about the examination, of the monitoring and the evaluation of the immission limit values of air, and emission value limits of the local based sources

6. Does any law in your Member State provide for air quality standards that go beyond those set out in the AQD, imposing any more stringent standards, for example, in relation to PM2.5?

Yes, in case of some pollutants such as SO_x (AQD 350 µg/m³, 4/2011. MD 250 µg/m³) or NO_x (AQD 200 µg/m³, 4/2011. MD 100 µg/m³) the one hour limit values are more strict than the ones regulated in the appendix XI. of the AQD.

7. How are air quality monitoring networks set up in your Member State (briefly)? Do these go beyond the monitoring requirements set out in Chapter II AQD (eg in terms of the number and location of monitoring stations)?

The core of the monitoring system is the full time 24 hours automated monitoring system with 52 monitoring stations in the different air-quality zones and agglomerations.⁹ Beside there are numerous other air-quality monitoring points, where the environmental authorities are checking the limit values with temporary manual monitoring instruments.¹⁰

Until the 24th of December 2016. the environmental authorities had the right to appoint and declare air quality monitoring station-points, where automated or mobile temporary monitoring can be operated.

From November the 16th of 2015. though the Air-Quality Referential Center (AQRC - the National Meteorological Service) recommends the appointment of new air quality monitoring station-points, and the minister responsible for environment is the one, who should accept the recommendation.

It can be observed, that for one year (from 16.11. 2015-24.12.2016) also the environmental authorities and the Air-Quality Referential Center had the same right to appoint new places for monitoring.

In this one year we issued a report of the ombudsman AJB-2031/2014. upon the lack of air quality data and air-quality plans in Békéscsaba (South-east of Hungary), as we already mentioned before, so meanwhile two different authorities could appoint a new air quality monitoring station-point.

⁶ a levegő védelméről szóló 306/2010. (XII. 23.) Korm. rendelet

⁷ a levegőterheltségi szint határértékeiről és a helyhez kötött légszennyező pontforrások kibocsátási határértékeiről szóló 4/2011. (I. 14.) VM rendelet

⁸ a levegőterheltségi szint és a helyhez kötött légszennyező források kibocsátásának vizsgálatával, ellenőrzésével, értékelésével kapcsolatos szabályokról szóló 6/2011. (I. 14.) VM rendelet

⁹ <http://www.levegominoseg.hu/automata-merohalozat>

¹⁰ <http://www.levegominoseg.hu/manualis-merohalozat>

In their response the local environmental authorities accepted the ombudsman's initiation to appoint at least one more new air-quality monitoring station point in Békéscsaba, which was missing contrary to monitoring requirements of the air quality law, as the report has emphasized it.

Meanwhile the other, central governmental authority, the AQRC doubted and refused the ombudsman's initiation to appoint a new monitoring station-point in Békéscsaba, so we received two completely incompatible answers, occurred the temporary contradiction of legal regulations.

According to the results of our investigations in this case and also others, in the early 2000 years the monitoring network was more detailed, more focused on the problems, and also on the possible exposed sensitive groups (children, elderly, ill people). As we observe in our investigations later, in recent years the tendencies changed, and air quality monitoring policies do not to go beyond the legal requirements, but carefully aim to realize these legal requirements.

8. What sort of problems are encountered in monitoring of air quality in your Member State?

As we mentioned above, since the sectorial air quality data shows us, that the main sources on the high level PM10 and PM2,5 air-pollution are from the low chimney sources (as residential heating and traffic takes the 70-90% of the aggregated national level), more detailed and planned monitoring would be necessary to be able to realize the real air-quality level of Hungary, mostly in residential areas of towns and villages.

The data of the automated monitoring network are transparent ¹¹, though in some cases the automated monitoring stations are out of order, and the data are missing for long term, as we investigated it in the case of Dorog, where a hazardous waste-incinerator operates (AJB-7524/2012).

The data of the manual monitoring network are very adverse, not representing the real air quality problems, mostly referring only on NOx, and no more.¹²

9. As far as you can determine, are there limitations or problems with the modelling techniques used in your Member State to assess air quality (where modelling is permitted as a method for assessment under Chapter II AQD)?

Our investigations had not examined cases that are connected to this question.

10. Does your Member State have a national Air Quality Plan under Article 23?

Hungary has a national air-quality action plan relating to the level of PM10.¹³ According to the annual reports since 2012 we cannot state though, that it does not outline to keep exceedances 'as short as possible'.

Though we can refer about a recent success. The PM10 action plan in its 1. appendix under the point D.1. contains the goal to strictly forbid the yard-waste burning, which is now allowed and regulated by local governmental decrees. In our report AJB-1023/2018 the ombudsman initiated at the minister of agriculture responsible for environment to prepare an amendment of the statute 1995. LIII about the general rules of the preservation of environment,

¹¹ <http://www.levegominoseg.hu/automata-merohalozat>

¹² <http://www.levegominoseg.hu/manualis-merohalozat>

¹³ a kisméretű szálló por (PM10) csökkentés ágazatközi intézkedési programjáról szóló 1330/2011. (X. 12.) Korm. határozat

that drives out the bad regulation, and is to realize legally the aimed goal strictly forbidding of residential yard-waste burning. The initiated amendment is now under preparation, as it has been stated by the minister of justice and the minister of agriculture as well in their response to our report.

Next to the above-mentioned planning requirements, we shall also talk about two specific plans:

(1) First is the ozone reducing program for zones and agglomerations, within which the ozone concentration is over the target value close to the ground.

(2) The other option is the smog-alert planning. The essence of it is to develop extraordinary air protection measures if the ambient air quality is over the information levels or alert thresholds due to the emission of air pollutants from different sources under adverse meteorological conditions. The public shall always be informed about such situations. The smog-alert plans related to such measures shall be developed in those settlements, where there is a clear chance for the emergence of such a situation. These smog-alert action plans are made to avoid these kinds of situations and also to minimize the consequences in a limited time. There are two types of thresholds: the information level, which means that the pollution might be dangerous for the people, consequently they need to be informed; and the alert level, which requires immediate response measures – limitation in industrial activities, heating, traffic – due to the direct health hazards. Such plans shall be designed in bigger towns – over 200,000 inhabitants – or in those cases, where there is a hazard of smog. The local governments shall adopt such plans.

11. Whether or not your Member State has an Air Quality Plan, please outline the key national regulatory measures that contribute towards compliance with EU air quality standards in your Member State.

See our previous answer on question number 8.

12. Has your Member State ever issued a Short-term Action Plan under Article 24? If so, please outline any notable features of the plan or aspects of its implementation (briefly).

Yes, if in a town or village the levels of pollutants will exceed one or more of the alert thresholds specified in Annex XII, the local government should accept a Short-term Action Plan with legal decree. Also see part of Question 10.

The features of these short-term action plans e.g., that according to the type approval of motor vehicles the mayor can forbid the operation and use of the most polluting ones with a lower type approval for the time of the smog-alert situation. According to the long-term air quality plan of the certain town, also can enforce to reduce the emissions of the most polluting industrial sites, mills, factories.

In the ombudsman's AJB-682/2012. initiation to the Supreme Court of Hungary, we initiated the repeal of quite numerous regulations of the short-term action plan of Miskolc, due to its contradictions to higher air quality legal regulations, and that way it was un-executable. The Supreme Court in its judgement repealed the whole local governmental decree and prescribed to prepare and accept a new short-term action plan, according to air quality law.

13. Which public bodies have legal responsibilities for meeting air quality standards in your Member State?

Minister of Agriculture
Air-Quality Referential Center (the National Meteorological Service)
National and local authorities of the preservation of the environment
In connection with traffic of roads, the National Transport Authority
In short-term smog-alert situation the mayors of the town or village

14. Are there any legal requirements for different public bodies who have control over different air pollution sources to coordinate their efforts in any way to work towards air quality standards?

Yes, there are rules in the Act LIII of 1995 about the general rules of the preservation of environment about the cooperation requirement of different level of governmental authorities in paragraphs 10, 42., 45., 46. (1) d), and 65., what require the cooperation of the environmental authorities, the local governments, the minister of the environment and all public bodies, for eg. the National Council of Environmental Protection.

15. What is the primary mode for enforcing of air quality law in your Member State?

The environmental authorities have the duty and the basic right to examine, control and enforce air quality law in Hungary, as well to give permission to new local stated emissions according to the limit values. The air quality permissions the environmental authority can prescribe more strict limit values of emissions, if the immission-data of the site the new emission is to be planned, exceed the limit values of certain pollutants.

The NGOs or individuals has the right to ask the investigation of a complaint with air quality issue.

The County Governmental Authorities have the duty to examine the legislation of the local governments also for eg. with Short-term Action Plan decrees.

The ombudsman for future generation can investigate if the processes of the authorities are not suitable, infringe the law and offends the basic human rights (mostly the right for healthy environment) of the individuals or group of individuals. The investigations are initiated by complains of individuals or can be initiated upon official notice. If the offence of fundamental right is caused by improper legal regulation, the ombudsman can suggest to implement or to amend a proper one. The ombudsman can appeal to the Supreme Court if the regulation of a local government contradicts the law (as we mentioned above in the answer on question number 12.). Also, can initiate the process of the Constitutional Court of Hungary, if the legal regulations contradict the Constitution of Hungary.

16. Have there been court cases concerning the enforcement of air quality law in your Member State?

One case is under process right now, Environmental lawyers from Clean Air Action Group (CAAG), Environmental Management and Law Association (EMLA) and ClientEarth have demanded the Hungarian authorities urgently review the Air Quality Plan for Budapest and its surroundings.¹⁴

Some Criminal Court judgments concerned the enforcement of air quality law in cases of individuals who burned household or hazardous waste.

¹⁴ <https://www.levego.hu/en/news/2018/05/environmental-lawyers-demand-revision-of-budapest-air-quality-plan/>

17. Please outline any other major challenges faced in your Member State for enforcing the AQD, or any other applicable air quality law.

In the AJB-8603/2016. statement of the ombudsman for future generations initiated to the legislator body (the ministry responsible for environment) to prepare legal regulation that prohibits the selling of the lowest quality lignite to individuals for residential heating.

Unfortunately – though the ministry responsible for environment has agreed with the ombudsman’s initiation – because of other interests and reasons the regulation remained something to be wait for in the future.

18. How has your Member State implemented these EU vehicle type approval rules? Have there been any controversies in transposing these rules?

There are several regulations related to products, such as fuels and vehicles, with standards and type-approval requirements, and first of marketing requirements, all along the lines of the relevant EU provisions. I may mention some examples:

- engines used in vehicles which do not circulate on roads, also using the type-approval as a major requirement;
- ozone-depleting substances, having the prohibition as the most general tool and also the authorization as a condition in the exceptional cases;
- environmental quality conditions of fuels of vehicles; and
- the requirements of road traffic vehicles, mostly covering the major emission and the temporary environmental control, etc.

The above EU requirement was implemented by the 72/2013. (XII. 2.) order of the Minister of National Development¹⁵ as an amendment of the 6/1990. (IV. 12.) ministerial order about the technical conditions of motor vehicles to be issued and kept in traffic. It came into effect from 10th of December 2013.

We are not informed about controversies transposing these rules.

19. What legal measures have been taken in your Member State (if any) against car manufacturers which have failed to comply with vehicle type approval rules?

Up till now, no such legal measures have been taken in Hungary.

Case Study

1. Marta could take a legal action against the public transport company and claim at the local environmental authority the case, because it can initiate certain traffic-organizational changes at the National Transport Authority, though the regulations of this question is a bit uncertain in the air quality law.

If she is not satisfied with the action of the authorities, in case there is a decision of the first level authority, she can appeal to the second level authority, then could turn to the Court. With the help of EMLA¹⁶ she has the chance to take this action without financial difficulties.

¹⁵ 72/2013. (XII. 2.) NFM rendelet a közúti járművek forgalomba helyezésének és forgalomban tartásának műszaki feltételeiről szóló 6/1990. (IV. 12.) KöHÉM rendelet módosításáról

¹⁶ <https://emla.hu/en>

Among others the Janecek-case refers to the right of an interested person to enforce the legal obligation of the public bodies to prepare and adopt a plan. This type of option is hardly available in Hungary, or at least in a very indirect and doubtful way.

The possibilities of the environmental act (Act LIII of 1995), open for NGOs, there is a missing link: in subparagraph (a) of Article 99(1) the association may require the authority to take action, and in subparagraph (b) the same association may go to court against the operator. Something is clearly missing, and the clear message of the provision is that if the given public organ does not make any steps, we have to do it ourselves.

When presenting the administrative procedure and the silence of administration, it became clear that the whole is connected with the beginning of an administrative procedure either by the client or officially, within which procedure the authority does not take the next step in time, does not finish in time. If the authority in a given case simply answers that the request is not addressing an authority proceeding, it is not taken as a refusal, but only as an information on the lack of competence of any other conditions of action on behalf of the authority.

According to the Ákr. t. Article 7(1), the administrative procedure regulations are made for the authority proceedings and control operations on behalf of the authority. In paragraph (2) of the same, the definition of such proceeding is given: all actions where the administrative authority defines any right or obligation concerning a client, verifies any data, fact or entitlement, maintains official records and registers or conducts a regulatory inspection. If these conditions are not met, the act on administrative procedure does not apply. The no-action or omission as alternative is not really included.

This is the weakest point in the Hungarian legal system in connection with public participation. The general right for complaint, etc. also does not answer the needs as there are no decisions and at the end, the claimant shall only be informed. Information or notice may not be appealed. If it is a question of normative decision-making – order, decree, normative decision (as opposed to a decision in an individual case) – the legality/constitutionality may be challenged by a limited number of applicants, but the missing norm may not.

2. In principle, she might initiate a nuisance or a trespass case in a civil court, as there mean the broadest option, within which the mere fact that the standards are met, is not enough. Unfortunately, these usually take a long time to decide and also the outcome is far from being certain.

Both belong to the wider context of property, protecting the peaceful enjoyment of property rights. Such protection by definition may cover environmental aspects or interests. The two instruments – neighbours' rights and possession protection – have many similarities, probably their direction makes the real difference:

- in case of nuisance or neighbours' rights the owner shall respect others' interest and shall avoid unnecessary disturbances; and
- in case of trespass or possession rights, the possessor shall be protected against similar disturbances.

Neighbours' rights are defined in Article 5:23. § of the Civil Code (Act V of 2013 on Civil Code), and the wording is broad enough to be interpreted in a wider sense:

- covering not only the direct neighbours, but all those, who might be affected;

- covering not only owners, but any lawful users; and
- the necessity of likely disturbance shall always be compared with the given neighbourhood, so there are no prefixed rules.

An additional characteristic of the jurisprudence is that the public law permit or authorization is not enough to escape from liability, as the authorized operations may also infringe private rights. All these features of the rights open up a wide margin of discretion for the judge in balancing the interests and rights of the parties. There are several judgments, which may be mentioned. The court emphasized in one other judgment that the operator, having a permit, may not disturb the neighbours, may not deprive them of the peaceful enjoyment and use of their property, and also the operator shall take care of the precautionary measures or use the MESs to minimize the environmental burden.

The protection of possession rights is regulated in Article 5:5 of the Civil Code and covers – as it has already been mentioned – the unlawful disturbance of possession. No wonder that all the above-described characteristics are also valid here. In theory, in case of possession rights, the possessor might use the chance to protect his/her rights with his/her hands, but it is not a practical option in case of environmental hazards.

In both cases the liability for the infringement of the rights is based upon strict liability standard.

3. The new Hungarian Act on Civil Procedure in its Part 8 covers the collective litigation, and within this, in Chapter XLII stipulates the public interest litigation rules. Public interest litigation is only possible if an act prescribes. Chapter XLIII contains the rules on joint litigation, which means here that a minimum ten plaintiffs may join to protect a so-called representative right, where the basic fact of the litigation are practically identical and if the judge agrees with the proposal. According to Article 583 paragraph (2), there are three possible fields of the joint litigation, one among them is connected with human health or material damages, due to an unforeseen environmental burden. It is still under construction, but there is a chance to along these lines in the future.

4. In case, there is no action or decision of the authority, or the legal regulations are not coherent or contradictory, she can ask the commission of the ombudsman for future generations, the ombudsman can initiate a legal regulation to ban the traffic of the vehicles with diesel-fuel in certain parts of cities, where the air quality is polluted caused by traffic and transport. The process of the ombudsman is financed by the State of Hungary.

IRELAND

Avosetta Questionnaire: Air Quality Law

London, 24-25 May 2019

Report for Ireland

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Opening Remarks

While working to prepare this report, I was struck immediately by the fact that there is currently very limited analysis of air pollution law and policy in Ireland in the academic literature. The standout exception is, of course, Yvonne Scannell's excellent work.² Given the obvious importance of air pollution law and policy, and the significant impacts of air pollution on public health, it is surprising to find that this area of law is not the subject of greater attention from legal scholars and practitioners. I expect that this state of affairs is likely to change relatively quickly, however, in light of growing public awareness of air pollution and its impacts, and the strong linkages between air pollution and climate change. The transition to a low carbon economy will bring positive impacts on air quality.

Section 15 of the [Climate Action and Low Carbon Development Act 2015](#) requires that 'relevant bodies'³ (including Government Departments, local authorities and the Environmental Protection Agency), must have regard to certain matters when performing their functions. The matters to which regard must be had include: the

¹ I acknowledge the valuable assistance I received from Prof Yvonne Scannell; Ciara McMahon, Environmental Protection Agency (EPA); Prof John Wenger, Centre for Research into Atmospheric Chemistry (CRAC), University College Cork; and Aisling Kelly, Senior Prosecutor, Office of the Director of Public Prosecutions. **The views expressed here are those of the author alone.**

² Y Scannell, *Environmental Law and Land Use Law* (Dublin: Round Hall, 2006) ch 6.

³ Defined in [section 15\(5\)](#) of the 2015 Act.

most recent approved National Mitigation Plan, National Adaptation Framework and sectoral adaptation plans; the furtherance of the national transition objective⁴; and the objective of mitigating greenhouse gas emissions and adapting to the effects of climate change in the State.

The main sources of material available to me in preparing this report are publications by the Environmental Protection Agency and the Department of Communications, Climate Action and Environment concerning air quality, air pollution and related matters.

Air Quality: National Context

1. What are the main sources of unlawful levels of air pollution in your Member State?

The Environmental Protection Agency (EPA) reports that, based on the available monitoring data, there has only been one *measured* exceedance of EU air quality standards in Ireland to date. This occurred in 2009 when levels of nitrogen dioxide (NO₂) measured at a Dublin city centre monitoring station were above the 2010 nitrogen dioxide annual limit value which came into force on 1 January 2010.⁵ Emissions from traffic are the main cause of high nitrogen dioxide levels in Dublin.

The most recent EPA annual air quality report, published in 2018, indicates that no levels above the EU limit values were recorded at monitoring sites in Ireland in 2017.⁶ The report concluded that: 'Overall, air quality in Ireland compared favorably with other EU Member States and all the parameters were below the EU limit and target values'.⁷

⁴ Defined in section 3(1) of the 2015 Act as 'the transition to a low carbon, climate resilient and environmentally sustainable economy by the end of the year 2050'.

⁵ <http://www.epa.ie/air/quality/plans/>.

⁶ *Air Quality in Ireland 2017: Indicators of Air Quality* (EPA, 2018) p3. The levels of sulphur dioxide, nitrogen dioxide, carbon monoxide, ozone, particulate matter (PM₁₀ and PM_{2.5}), heavy metals, benzene and polycyclic aromatic hydrocarbons (PAH) were measured and compared to the limit values set out in EU and Irish ambient air quality legislation.

⁷ *Air Quality in Ireland 2017: Indicators of Air Quality* (EPA, 2018) p3.

However, the stricter World Health Organization (WHO) air quality guideline values were exceeded at a number of monitoring sites for fine particulate matter (PM_{2.5}), ozone (O₃), and nitrogen dioxide (NO₂) in 2017.⁸ The European Environment Agency reference level for polycyclic aromatic hydrocarbon (PAH) was exceeded at four monitoring sites.⁹

The data for 2017 confirms that air quality in Ireland is consistently above the WHO guideline value for fine particulate matter (PM_{2.5}) and that we are rapidly approaching the EU limit value for nitrogen dioxide (NO₂) in urban areas.¹⁰

Data for 2017 compiled by the EPA indicates that particulate matter from solid fuel burning (e.g. coal, peat and wood)¹¹ and nitrogen dioxide from transport emissions (diesel and petrol) in urban areas are the two most significant threats to air quality in Ireland.

This EPA assessment for 2017 is based on data obtained from the 29 monitoring stations that formed the National Ambient Air Quality Monitoring Network at that point in time. More specifically, in 2017 NO₂ was monitored at 14 sites, PM₁₀ at 15 sites, PM_{2.5} at nine sites, PAHs at 4 sites and O₃ was monitored at 12 sites.

Data published by the EPA in May 2019, as required under the National Emission Ceilings (NEC) Directive¹², indicates that ammonia (NH₃) emissions increased by 2%

⁸ *Air Quality in Ireland 2017: Indicators of Air Quality* (EPA, 2018) p3.

⁹ *Air Quality in Ireland 2017: Indicators of Air Quality* (EPA, 2018) p3.

¹⁰ *Air Quality in Ireland 2017: Indicators of Air Quality* (EPA, 2018) p3.

¹¹ See further: J Wenger, 'Impact of Residential Solid Fuel Burning on Air Quality and Health' paper delivered at EPA / Health Service Executive [Conference on Human Health and the Environment](#) October 2018 and the EPA funded [SAPPHIRE](#) research project (2014-2017) based at the Centre for Research into Atmospheric Chemistry (CRAC) at University College Cork. See also: "Green" home heating fuels causing "extreme levels of air pollution" *Irish Times* 14 September 2018.

¹² Directive 2016/2284/EC on the reduction of national emissions of certain atmospheric pollutants [2016] OJ L 344/1. This directive was transposed into Irish law under the European Union (National Emission Ceilings) Regulations 2018 (SI No 232 of 2018).

in 2017, following a 5% increase in 2016.¹³ National ceilings for ammonia under the NEC Directive were breached in 2016 and 2017. This trend in increasing ammonia emissions is expected to continue to 2030. Agriculture is the primary source of increasing ammonia emissions in Ireland. This EPA data set also confirms that Ireland exceeded its emission ceilings under the NEC Directive for nitrogen oxides (NO_x) and non-methane volatile organic compounds (NMVOCs) for all years since 2010.

Illegal (agricultural) burning is a further source of air pollution – and other environmental impacts, including loss of wildlife and biodiversity – although the scale of this problem is difficult to determine due to lack of data.¹⁴

Finally, it is worth noting by way of context that due to Ireland's geographical position, and the prevailing westerly winds, we are not affected by transboundary air pollution to the same extent as other European Union (EU) Member States.

2. How extensive is reported non-compliance with AQD air quality standards in your Member State?

See answer to Question 1 above. Only one *measured* exceedance of EU air quality standards to date, according to EPA data, and that exceedance was in 2009. The most recent EPA annual air quality report, published in 2018, indicates that no levels above the EU limit values were recorded at monitoring sites in Ireland in 2017.

There is, of course, a risk that air pollution may be underestimated in some areas due to lack of monitoring capacity and / or inappropriate siting of monitoring stations.¹⁵ While it is impossible to draw any firm conclusions in the absence of reliable data, it is striking that Dublin and Cork, in particular, seem to be so lightly affected by nitrogen dioxide – particularly given the situation prevailing in cities of similar size in the United

¹³ *Ireland's Transboundary Gas Emissions 1990-2030* (EPA, May 2019).

¹⁴ Department of Communications, Climate Action & Environment and European Commission, *Conclusions on the Clean Air Dialogue with Ireland* (13 March 2017) <https://www.dccae.gov.ie/documents/CAD%20conclusions%20%20Final.pdf>

¹⁵ European Commission, *Environmental Implementation Review 2019: Country Report Ireland* (April 2019) p15.

Kingdom. It seems highly unlikely that this sharp disparity can be accounted for by reference to the positive impact in Ireland of the prevailing westerly winds.

Ireland participated in a Clean Air Dialogue with the EU Commission, in Dublin, from 1-2 March 2017. The conclusions that emerged from that valuable exercise included the need for regular review of the monitoring network 'to ensure that the sampling sites remain valid over time ... are spatially representative, and provide estimates of both the highest concentrations, as well as more general concentrations to which the population is exposed for significant periods.'¹⁶ It is notable in this regard that the EPA is currently rolling out a new Ambient Air Quality Monitoring Programme¹⁷, funded by the Department of Communications, Climate Action and Environment, to increase monitoring capacity substantially and to develop modelling and forecasting capability. As part of this programme, the EPA is working with local authorities to carry out studies of nitrogen dioxide in cities using indicative techniques (nitrogen dioxide diffusion tube surveys and urban dispersion modelling). These studies should support the EPA in identifying the current areas of maximum concentrations in cities in order to choose the optimum locations for new monitoring stations.

3. Have EU infringement proceedings been brought against your Member State for failure to comply with the AQD?

No.

¹⁶ Department of Communications, Climate Action & Environment and European Commission, *Conclusions on the Clean Air Dialogue with Ireland* (13 March 2017) <https://www.dccae.gov.ie/documents/CAD%20conclusions%20%20Final.pdf>.

¹⁷ *National Ambient Air Quality Monitoring Programme 2017 – 2022* (EPA, November 2017).

Air Quality Standards

4. Was there pre-existing national law relating to air quality standards (similar to the AQD), or did the AQD introduce something new in your country?

Yes – the [Air Pollution Act 1987](#) (the 1987 Act) (as amended) and regulations made thereunder. The First Schedule to the 1987 Act sets out the pollutants to which it applies. The Planning and Development Act 2000 (as amended) and the Environmental Protection Agency Act 1992 (as amended) are also relevant in this context.

The 1987 Act aimed to provide a comprehensive framework for dealing with existing and emerging air pollution issues. In summary, it provides for a licensing regime administered by the local authorities and vests local authorities with significant powers to control air pollution generally and for specified activities, as well as a wide range of enforcement powers. Following the introduction of Integrated Pollution Control (IPC) under the Environmental Protection Agency Act 1992, the EPA became the licensing and enforcement authority for activities that came within the scope of the IPC system.

The 1987 Act provides for the making of ‘air quality management plans’ by local authorities. It empowers the Minister for Communications, Climate Action and Environment to specify air quality standards and provides for monitoring by the local authorities of air quality and the nature and extent of emissions.

The main impact of the AQD in Ireland as regards air quality standards was to introduce new obligations relating to fine particulate matter (PM_{2.5}).

5. How are AQD air quality standards implemented in law in your Member State?

Directive 2008/50/EC (the EU Ambient Air Quality Directive – AQD) was transposed into Irish law by means of the [Air Quality Standards Regulations 2011](#) (SI No 180 of 2011).¹⁸

The EPA is the designated competent authority for the implementation of Irish and EU ambient air quality legislation. The local authorities assist the EPA in monitoring air quality via the national Ambient Air Quality Monitoring Network, as well as other partners including Universities (University College Cork, National University of Ireland Galway and Cork Institute of Technology), *Met Éireann* / Irish Meteorological Service and *Teagasc* / Agriculture and Food Development Authority. The EPA manages and co-ordinates this network and is responsible for communicating air quality data to the EU Commission and the public. The EPA is the National Reference Laboratory under Directive 2008/50/EC.

Roll out of the new Ambient Air Quality Monitoring Programme (AAMP) commenced in late 2017.¹⁹ Its delivery is planned to take place over five years. A framework structure is envisaged to oversee implementation and management of the AAMP.²⁰ It is anticipated that the EPA, as the national competent authority, and the Department of Communications, Climate Action and the Environment, as the relevant Government Department, will develop this framework in consultation with the [County and City Management Association](#) (CCMA) – the representative body of the local government management network.

¹⁸ See also the Air Quality Standards (Amendment) and Arsenic, Cadmium, Mercury, Nickel and Polycyclic Aromatic Hydrocarbons in Ambient Air (Amendment) Regulations 2016 (SI No 659 of 2016). For a helpful overview of the relevant legislation and the applicable standards / limit values see: <http://epa.ie/air/quality/standards/>

¹⁹ *National Ambient Air Quality Monitoring Programme 2017 – 2022* (EPA, November 2017).

²⁰ *National Ambient Air Quality Monitoring Programme 2017 – 2022* (EPA, November 2017) p17.

6. Does any law in your Member State provide for air quality standards that go beyond those set out in the AQD, imposing any more stringent standards, for example, in relation to PM_{2.5}?

No. Although it is notable that the EPA also assesses air quality against the stricter WHO air quality guideline values. The EPA has called for the WHO standards to be adopted as legally binding and enforceable standards across the EU and in Ireland, especially for particulates and ozone.²¹

See further the answer to Question 1 above.

Air Quality Monitoring and Modelling

7. How are air quality monitoring networks set up in your Member State (briefly)? Do these go beyond the monitoring requirements set out in Chapter II AQD (eg in terms of the number and location of monitoring stations)?

Following a review of existing arrangements undertaken by the EPA, a new five-year national Ambient Air Quality Monitoring Programme (AAMP) was launched in 2017 and is currently being rolled out.²² The AAMP is geared towards a significant expansion of the national monitoring network in order to strengthen air quality monitoring capacity. An increase from 31 to 68 fixed national monitoring stations is anticipated.²³ More specifically, it will improve spatial coverage across rural and urban centres. The aim is to provide more comprehensive, accessible, local air quality information to the public, including the availability of enhanced [real-time data](#) via the [EPA website](#) and Twitter account ([@EPAirQuality](#)) as new equipment is commissioned. This will be supplemented by greater local authority capacity to carry out 'local' air monitoring. Citizen engagement and citizen science initiatives are an

²¹ 'Burning solid fuel is the biggest threat to air quality in Ireland' EPA Press Release, 6 November 2017

<http://www.epa.ie/newsandevents/news/pressreleases2017/name,63174,en.html>

²² *National Ambient Air Quality Monitoring Programme 2017 – 2022* (EPA, November 2017).

²³ *National Clean Air Policy* presentation to Engineering Ireland, Breakfast Briefing on Air Quality by M Young, Senior Advisor (Environment), Department of Communications, Climate Action and Environment, 24 October 2018.

important element of the AAMP ‘to encourage greater understanding and involvement of the public in air quality issues’.²⁴

In Ireland, the traditional focus has been on air quality measurements to assess air quality. The EPA is now developing capacity for general ambient air quality monitoring at urban and regional scales and ambient air quality forecasting and modelling.²⁵

8. What sort of problems are encountered in monitoring of air quality in your Member State?

See answer to Question 7 above. Historically, the main problem was lack of investment (very few staff, limited funding for equipment / instrumentation and outdated equipment / instrumentation). As explained in Question 7 above, the EPA is currently rolling out a new *Ambient Air Quality Monitoring Programme 2017-2022*. The monitoring situation is therefore improving gradually. Current problems include: identifying suitable monitoring sites to meet the requirements of the AQD; outdated monitoring locations; meeting public demand for air quality data (more real-time reporting in an easily accessible format and more focus on public health information); maintaining a growing stock of equipment (keeping equipment and data links up and running is an ongoing challenge); and capacity of partners, especially local authorities, to provide resources for monitoring.

There is a recognized need to upscale air quality monitoring, forecasting and modelling significantly.

²⁴ *National Ambient Air Quality Monitoring Programme 2017 – 2022* (EPA, November 2017) p7.

²⁵ *National Ambient Air Quality Monitoring Programme 2017 – 2022* (EPA, November 2017) pp7-10 and A Donnelly, B Misstear and B Broderick, *Air Quality Modelling for Ireland* (EPA, 2019) (Report No 270).

9. As far as you can determine, are there limitations or problems with the modelling techniques used in your Member State to assess air quality (where modelling is permitted as a method for assessment under Chapter II AQD)?

See the answers to Questions 7 and 8 above.

National Air Quality Plans and Governance

10. Does your Member State have a national Air Quality Plan under Article 23?

No. A *National Clean Air Strategy* remains to be adopted following a public consultation to inform the development of such a strategy in 2017. The Department of Communications, Climate Action & Environment published a detailed consultation document at the time of the [public consultation](#).²⁶ It is anticipated that the strategy 'will provide a framework for a set of cross-Government policies and actions to reduce harmful emissions and improve air quality and public health to meet current and future EU and international obligations.'

It is notable that the Department of Communications, Climate Action and Environment is in the process of developing a *National Air Pollution Control Programme* (NAPCP), as required under the National Emission Ceilings Directive (Directive 2016/2284). The NAPCP is intended to outline the pathway Ireland will follow to achieve compliance with the NEC 2020 and 2030 targets, projections of relevant pollutants and policy options. A [public consultation](#) is currently underway.

²⁶ Department of Communications, Climate Action and Environment, *Cleaning Our Air: Public Consultation to Inform the Development of a National Clean Air Strategy* (2017).

11. Whether or not your Member State has an Air Quality Plan, please outline the key national regulatory measures that contribute towards compliance with EU air quality standards in your Member State.

Planning law in the form of the Planning and Development Act 2000 (as amended);

Air Pollution Act 1987 (as amended);

Environmental Protection Agency Act 1992 (as amended); the EPA regulates industrial emissions and emissions from intensive agriculture under the Industrial Emissions Directive (IED). It also licenses the larger waste facilities.

The Office of Environmental Enforcement (OEE), one of five offices within the EPA, oversees compliance with licences granted under *inter alia* the Environmental Protection Agency Act 1992 (as amended) and the Waste Management Act 1996 (as amended).

The Office of Environmental Enforcement has a wide range of enforcement tools available to it. One particularly innovative mechanism designed to drive compliance is the [National Priority Sites for Enforcement List](#) which is used to target enforcement efforts at the poorest performing sites.

The EPA / OEE may decide to prosecute for breach of condition(s) of licences specifically relating to air quality in a technical sense or in odour prosecutions, where the emission limit values may not have been breached, but air quality is being impacted to the detriment of the people sharing an installation's boundaries.

The 'smoky' coal regulations

The Low Smoke Zone (or the 'smoky' coal ban) is an example of a product standard for residential emissions. It was first introduced to tackle very severe 'winter smogs' experienced in Dublin during the 1980s due to the widespread use of coal for home heating. The ban was subsequently extended to Low Smoke Zones (LSZs) – mainly the cities and larger towns.

Regulations made under the Air Pollution Act 1987 (as amended)²⁷ regulate the marketing, sale, distribution and use of bituminous ('smoky') coal and other specified fuels. There is a ban on the burning of 'smoky' coal and other prohibited fuels in LSZs.

In 2017, it was announced that this ban was to be extended nationwide (this had been promised in 2015).²⁸ The anticipated extension of the 'smoky' coal ban has not come to pass to date, however, due to sustained opposition and the threat of litigation from the coal importers (See: 'Government delays plans for smoky coal ban following legal threats from industry' *Irish Times* 5 April 2019).²⁹ A request for access to the correspondence between the coal industry and the Department of Communications, Climate Action and Environment under the Access to Information on the Environment Regulations 2007-2018 was refused on 17 April 2019. The refusal was based on the exceptions protecting the confidentiality of the proceedings of public authorities, commercial and industrial confidentiality and the internal communications of public authorities.

The 'smoky' coal regulations are enforced primarily by local authorities, supported by a national implementation group – the Local Authority Implementation Group. The Environment (Miscellaneous Provisions) Act 2015 introduced fixed payment notices – or 'on the spot' fines for certain breaches of the regulations.

²⁷ An unofficial consolidated version of the regulations is available here: [https://www.dccae.gov.ie/documents/Departmental%20Consolidated%20Regs%20%20\(Oct%202017\).pdf](https://www.dccae.gov.ie/documents/Departmental%20Consolidated%20Regs%20%20(Oct%202017).pdf)

²⁸ 'Minister Naughten announces nationwide ban on smoky coal' 6 December 2017 <https://www.dccae.gov.ie/en-ie/news-and-media/press-releases/Pages/Minister-Naughten-announces-nationwide-ban-on-smoky-coal.aspx>. See also 'Schedule finalised for total ban on smoky coal' *Irish Times* 5 December 2017 <https://www.irishtimes.com/news/environment/schedule-finalised-for-total-ban-on-smoky-coal-1.3316361>

²⁹ <https://www.irishtimes.com/news/environment/government-delays-plans-for-smoky-coal-ban-following-legal-threats-from-industry-1.3849945>

12. Has your Member State ever issued a Short-term Action Plan under Article 24? If so, please outline any notable features of the plan or aspects of its implementation (briefly).

No. It is notable, however, that under Article 22 of the Air Quality Standards Regulations 2011 (which transpose Article 23 of the AQD concerning Air Quality Plans), the four Dublin local authorities prepared a regional Air Quality Management Plan covering the period 2009-2012. This plan aimed to improve levels of NO₂ in the Dublin region and comply with the limit value. Traffic emissions are the main cause of high nitrogen dioxide levels in Dublin and the plan is concerned with measures to reduce these emissions. See further: <http://www.epa.ie/air/quality/plans/>

13. Which public bodies have legal responsibilities for meeting air quality standards in your Member State?

Department of Agriculture, Food and the Marine;
Department of Communications, Climate Action and Environment;
Department of Culture, Heritage and the Gaeltacht;
Environmental Protection Agency;
Local authorities.

14. Are there any legal requirements for different public bodies who have control over different air pollution sources to coordinate their efforts in any way to work towards air quality standards? (For example, different regulators may control highways, airports, local urban planning decisions, large industrial installations, and so on.)

Under the Planning and Development Act 2000 (as amended) local authorities are obliged to cooperate with each other in land use planning matters (e.g. making development plans, granting planning permissions that could affect the area of another local authority etc.).

The Environmental Protection Agency works closely with the local authorities and the relevant Government Departments.

It is anticipated that the forthcoming *National Clear Air Strategy* will provide the strategic policy framework necessary to identify and promote more integrated measures across all Government sectors and policy areas. The strategy will cover a wide range of policies relevant to *inter alia* transport, energy, home heating and agriculture.

Enforcement of Air Quality Law

15. What is the primary mode for enforcing of air quality law in your Member State?

Enforcement action by local authorities and the Environmental Protection Agency, including prosecution, where appropriate.

16. Have there been court cases concerning the enforcement of air quality law in your Member State?

Prosecutions by local authorities and the Environmental Protection Agency for alleged offences under air quality and environmental protection legislation are the main avenue by which the courts may become involved in enforcement of air quality law.

17. Please outline any other major challenges faced in your Member State for enforcing the AQD, or any other applicable air quality law.

See Questions 7 and 8 concerning air quality monitoring.

Enforcement of the smoky coal ban is particularly challenging as regards source attribution and apportionment. There is a lack of consistency in enforcement efforts across local authorities. Very limited resources are being allocated to air quality issues by local authorities.³⁰

³⁰ Environmental Protection Agency, *Focus on Local Authority Environmental Enforcement 2014-2016 Performance Report* (2017) pp24-26 http://epa.ie/pubs/reports/enforcement/performanceframework/Focus_on_Local_Authority_Environmental_Enforcement_2014-2016_Performance_Report.pdf

A Controversial Source of Air Pollution: Regulation of Vehicle Emissions Systems

Many Member States are currently subject to infringement proceedings by the Commission in relation to vehicle type approval rules. This is currently prescribed under **Framework Directive 2007/46/EC** establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles [2007] OJ L263/1 and **Regulation (EC) No 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 [2007] OJ L171/1.

Amongst other things, this legislation requires Member States to have 'effective, proportionate and dissuasive' penalty systems in place to deter car manufacturers from illegal practices, such as installing defeat devices. This legislation was overhauled in **2018 by Regulation (EU) 2018/858** on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC [2018] OJ L151/1, which will apply from 1 September 2020.

18. How has your Member State implemented these EU vehicle type approval rules? Have there been any controversies in transposing these rules?

Ireland transposed Directive 2007/46/EC by means of the [European Communities \(Road Vehicles: Entry into Service\) Regulations](#) (SI No 157 of 2009) most recently amended by [SI 279 of 2017](#) and the [European Communities \(Road Vehicle\) Type-Approval Regulations 2009](#) (SI No 158 of 2009) most recently amended by [SI No 280 of 2017](#). These regulations include provisions governing enforcement and penalties.

The Road Safety Authority has produced Information Notes on the *Introduction of Euro 5 and Euro 6 Emissions Regulations for Light Passenger and Commercial Vehicles* (September 2015) and *Euro IV, Euro V and VI Emissions Regulations for Heavy Duty Vehicles* (September 2016).³¹

³¹ *The Introduction of Euro 5 and Euro 6 Emissions Regulations for Light Passenger and Commercial Vehicles: Information Note and Euro IV, Euro V and VI Emissions Regulations for Heavy Duty Vehicles: Information Note.*

19. What legal measures have been taken in your Member State (if any) against car manufacturers which have failed to comply with vehicle type approval rules? These legal measures might include court cases, including between car buyers and manufacturers.

The owner of one of the estimated 117,000 Irish cars impacted by the Volkswagen emissions scandal brought an action for damages in the District Court (the lowest level of court in the Irish courts system) in Castlebar, Co Mayo.³² This case attracted international media attention when the District Court judge made an interim discovery order requiring VW to release certain internal documents.

Case Study

Martha is living in an urban area in your Member State, and her children have developed asthmatic symptoms (i.e. a diagnosed respiratory illness). She becomes aware that the local air quality exceeds standards laid down in the AQD. Her house is next to a main road, which is a heavily used bus route on which bus operators use diesel vehicles. The town also has a number of industrial plants, a coal fired power station, and a number of intensive farms. It is unclear to her precisely which pollution source is causing the breaches of air quality standards, or what their respective contributions might be to the local air quality problem.

What sort of legal action could Martha take in your Member State? And against whom? What remedies do the courts possess? What are the financial implications of bringing such a case? Might there be other regulatory avenues available to Martha instead?

In principle, a range of remedies under both public and private law are available to Martha. However, she will very likely face significant difficulties in bringing any legal action due to the fact that it is not clear what particular source(s) caused and / or contributed to the air pollution in this particular case. Martha may be able to compile

³² 'Court hears claim for damages against Volkswagen' *RTÉ News* 27 May 2016 <https://www.rte.ie/news/2016/0527/791454-volkswagen-court-castlebar/> ; 'VW likely to face international implications over District Court case' *Irish Times* 3 September 2016; 'Volkswagen emissions scandal: Next stop Castlebar' *Irish Times* 6 September 2016; 'The People v Volkswagen' *Irish Times* 10 September 2016 and 'Dieselgate Case: Volkswagen versus the Irish nurse' *Handelsblatt Today* 9 May 2016 <https://www.handelsblatt.com/today/companies/dieselgate-case-volkswagen-vs-the-irish-nurse/23540608.html?ticket=ST-817592-jPF3rKByglaZJcJdmbtB-ap4>.

data / evidence from the relevant public authorities who monitor and enforce air quality law (i.e. the local authority and the EPA).

Public law remedies

Martha may complain to the relevant local authority – which is the enforcement body for planning and development law and air pollution law (under the Air Pollution Act 1987, as amended) – in the hope that the local authority will investigate the matter and, if appropriate, bring enforcement proceedings against any party operating in breach of planning law and / or air pollution law. Local authorities have a wide range of enforcement powers, both civil and criminal.

In the case of an activity that is regulated by the Environmental Protection Agency, (e.g. larger industrial plants, coal fired power stations and intensive farms, as per the facts of the Case Study), Martha may complain to the EPA. The EPA has a wide range of enforcement powers under the Environmental Protection Agency Act 1992 (as amended), both civil and criminal.

Under section 28(1) of the Air Pollution Act 1987 (as amended), a local authority or ‘any other person’ (e.g. Martha), is entitled to apply to the High Court seeking an order prohibiting or restricting an emission from any premises. ‘Emission’ in the 1987 Act is defined as ‘an emission of a pollutant into the atmosphere’. The High Court may grant such an order where it is satisfied that the continuance of the emission would give rise to ‘a serious risk of air pollution’ or is an emission from an industrial plant in contravention of an air pollution licence or is an emission from an industrial plant which requires an air pollution licence but is operating without such a licence.

Any High Court order under section 28(1) may contain such provisions as the High Court considers appropriate including, in particular, requiring specific measures to be taken to eliminate or reduce the risk of air pollution (section 28(2)). Section 28A(1)(a) of the 1987 Act (as amended) entitles ‘any person’ to apply to the ‘appropriate court’ for an order requiring the occupier of any premises from which there is an emission to take certain specified measures.

Section 28B of the Air Pollution Act 1987 (as amended) provides for civil liability for air pollution. When an emission causes injury, loss or damage to a person or their property, that person may recover damages in any court of competent jurisdiction in respect of such injury, loss or damage from the occupier of the premises from which the emission originated or, if the omission was caused by an act or omission of any person that, in the opinion of the court amounts to a contravention of the Act, from that person. This remedy is in addition to any other common law or statutory remedy that may be available.

Section 99H of the Environmental Protection Agency Act 1992 (as amended) provides that on application by 'any person' to the High Court or the Circuit Court, the court may, where it is satisfied that an activity is being carried on in contravention of the requirements of the 1992 Act (as amended), by order, require the person in charge of the activity to do, refrain from or cease doing any specified act and make such other provision as it considers appropriate.

Under section 160 of the Planning and Development Act 2000 (as amended) an application can be made to the High Court or the Circuit Court for certain orders where unauthorised development has been, is being, or is likely to be carried out or continued. Section 160 may be invoked by the local planning authority or by 'any other person' (e.g. Martha).

It may also be worth exploring any possibilities that may arise under the Environmental Liability Directive (Directive 2004/35/EC). The definition of 'land damage' includes a reference to 'any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms.' The European Communities (Environmental Liability) Regulations 2008 (SI No 547 of 2008) as amended purport to transpose the Environmental Liability Directive into Irish Law. The EPA is the designated competent authority for the Environmental Liability Directive.

There are potentially other public law remedies – currently underexplored in the context of air pollution law in Ireland – that may be available to Martha. These may include, for example, a public law challenge against the State and the relevant local

authority for failing to make an air quality plan or an effective air quality plan under Article 23 of the AQD.

In [*Friends of the Irish Environment v Fingal County Council*](#) [2017] IEHC 695 the High Court of Ireland recognised an unenumerated constitutional right to ‘an environment that is consistent with the human dignity and well-being of citizens at large’ (para 264). The High Court also determined that this right is ‘an essential precondition for the fulfilment of all human rights’ (para 264). It will be interesting to see how this new constitutional right is deployed in environmental litigation into the future, including litigation alleging personal injury due to unlawful levels of air pollution.

Martha may plead in any public law litigation against the State that it has failed to protect and vindicate her constitutional right to ‘an environment that is consistent with the human dignity and well-being of citizens at large’.

Private law remedies

As regards private law remedies, there is the law of private nuisance. Private nuisance is primarily a tort to the land. Under Irish law, the tort of private nuisance consists of interference, without lawful justification, with a person’s use and enjoyment of their property. The leading Irish Supreme Court authority on private nuisance is [*Hanrahan v Merck Sharp and Dohme Ltd*](#) [1988] ILRM 629; [1988] IESC 1. The basis of liability for private nuisance was set out by Henchy J as follows:

To provide a basis for the award of damages for [private nuisance], the plaintiffs have to show that they have been interfered with, over a substantial period of time, in the use and enjoyment of their farm, as a result of the way the defendants conducted their operations in the factory. The plaintiffs do not have to prove want of reasonable care on the part of the defendants. *It is sufficient to show as a matter of probability that what they complain of was suffered by them as occupiers of their farm in consequence of the way the defendants ran their factory* (at 633, emphasis added).

So, in principle, if Martha could establish that her children's health issues are caused by a particular source (or sources) of air pollution (e.g. industrial plant, coal fired power station, intensive farm, as per the facts of the Case Study), she may be able to sue the creator(s) of the nuisance for damages and / or an injunction.

Under Irish law, occupation of the land is the basis for *locus standi* to sue in private nuisance, so the children would have *locus standi* (Martha could bring an action on their behalf while they are minors). Also, under Irish law the possibility of recovering damages for personal injury in an action for private nuisance has not been ruled out by the courts. But again, proving causation against a particular defendant (or defendants) will be a key challenge here.

An action in negligence may also be an option although, again, proving causation will be challenging. Plus it would be necessary to prove 'fault' (i.e. negligence) whereas private nuisance is a strict liability tort in Irish law. In the case of both private nuisance and negligence, the damage in question must have been reasonably foreseeable.

Source apportionment

As explained in the answers to the questionnaire above, the EPA is currently rolling out a new air quality monitoring programme. One element of this programme involves developing source apportionment capacity and capability with a view to providing a more detailed understanding of the origins of poor air quality. This development may facilitate more effective enforcement of air quality law into the future.

ITALY

Avosetta Questionnaire: Air Quality Law

Report: Italy*

London 24-25 May 2019

Most of the questions relate to implementation of the EU Ambient Air Quality Directive (Directive 2008/50/EC [2008] OJ L152/1, 'AQD'), looking beyond direct transposition to actual implementation and the legal and structural challenges in meeting EU air quality standards. Some questions extend beyond the AQD to examine other controversial or emerging aspects of EU law relating to air quality.

Please spend more time answering questions that are particularly relevant to the experience in your Member State.

Please answer these questions in maximum 8 pages (not including the questions), which may require being succinct with some answers. We can flesh out any points further in our discussion when we meet in London.

Please return your answers to Eloise Scotford (eloise.scotford@ucl.ac.uk), along with your short report on national environmental law developments over the last year, by 1 May 2019 in time for preliminary analysis and advance circulation to other attendees.

Air Quality: National Context

1. What are the main sources of unlawful levels of air pollution in your Member State?

According to the 2018 Annual Report of the European Environment Agency (EEA), examining 2015 data, more than 422,000 people die in Europe every year due to atmospheric pollution. Italy has a very high number those deaths: more than 60,000 in 2015 only.

The most widespread polluting substances are PM 2,5 and NOx deriving from car emissions in urban areas. According to "*Mal'aria 2019*", the annual report on atmospheric pollution in Italy issued by *Legambiente*, the most important Italian environmental NGO, daily allowed thresholds of PM 2,5 and ozone were overcome in 55 major Italian towns in 2018. In particular, such thresholds were overcome in almost all the towns of the Po Valley, in the North of Italy. In other Italian Regions, the most polluted towns are Genoa in Liguria, Terni in Umbria, Frosinone in Lazio, and Avellino in Campania.

The main reasons for the atmospheric pollution of the abovementioned towns are well known, as they relate to car emissions, house heating, industrial activities, and pesticides used in agriculture. However, the absence of adequate and effective legal and administrative instruments to regulate such polluting activities (with the exception of occasional emergency bans on private transport circulation in metropolitan areas) prevents the possibility to avoid

* Report prepared by Massimiliano Montini and Emanuela Orlando with the assistance of Patrizia Vigni and Viola Santarneckchi

both the overcome of thresholds as well as the rapid restoration of acceptable thresholds of polluting substances in the atmosphere.

2. How extensive is reported non-compliance with AQD air quality standards in your Member State?

For AQD air quality standards, please refer to AQD, Articles 12-19.

Please refer to data either reported to the Commission or otherwise available in your Member State. It may be easiest to set this information out in a table for different standards for certain pollutants (NO₂, PM₁₀, PM_{2.5}, SO₂ are likely to be the main pollutants for which there may be reported non-compliance with AQD standards).

The AQD has been implemented in Italy by means of Legislative Decree n. 155 of 13 August 2010 (hereinafter, Decree 155/2010) (see below for more details).

The most relevant sources of information on air quality in Italy are the following ones:

- 1) The yearly Italian Report on Urban Air Quality (*Rapporto sulla qualità dell'ambiente urbano*), issued by ISPRA ((Italian Institute for Environmental Protection and Research)
- 2) The yearly Italian “Report on Fair and Equitable Fairness” (*Rapporto sul benessere sostenibile*), issued yearly by ISTAT (Italian National Institute of Statistics);
- 3) The European Environment Agency (EEA) Report on Air Quality in Europe.

1. Italian Report on Air Quality 2017 (*Rapporto sulla qualità dell'ambiente urbano*)

This report is drafted by ISPRA—the EIONET National Focal Point for Italy with respect to air quality, and the entity responsible for collecting information and data on air quality from the different Italian regions and transmitting them to the European Commission.

The Air Quality Report 2017 records the air quality registered in 119 Italian municipalities in 2016 and part of 2017. The most critical values relate to PM₁₀, PM_{2.5} and NO₂

With respect to PM₁₀, the Report highlights in 2016 the failure to comply with the maximum daily limit value in 33 urban areas (out of 102 examined). In 2017, this threshold was exceeded in 18 urban area for more than 35 days.

With respect to PM_{2.5} the Report highlights failure to comply with the limit threshold in 7 urban areas (out of the 80 areas examined). These urban areas are located in Northern Italy, except Terni. The highest level of PM_{2.5} was recorded in Padova (30 µg/m³).

With respect to appropriate measures to contain pollution, ISPRA underlines the importance of implementing local policies (in addition to the necessary and long-term measures at national and regional level) that are aimed at improving air quality aimed at specific sources, and of integrating those policies into the regional plans.

2. Italian Report on Fair and Equitable Wellbeing (*Rapporto sul benessere sostenibile*) (2017)

This Report, drafted by ISTAT, seeks to provide an assessment on the ‘fair and equitable well-being’. This is measured through a multidimensional approach which aims at integrating the classic economic indicators (such as in particular GDP) with the dimensions of sustainability and equality. Air quality forms part of the sustainability and environment indicators. In that respect, the 2017 Report provides relevant information concerning (non)-compliance with the air quality standards set at EU level, particularly with respect to PM₁₀ and NO concentrations. Specifically, according to the ISTAT Report:

In 2016, an excess level of PM₁₀ concentrations, compared to the daily permitted level, was registered for more than 35 days by 27% of the air quality monitoring stations situated in 116 Italian towns. Moreover, 71% of the monitoring stations exceeded the daily limits up to 35 times, and only 10% of the monitoring stations registered concentration levels in line with the WHO standards.

The Report notices that this is a slight improvement from previous years (in 2015, 44% of the monitoring stations registered excesses of PM₁₀ concentration); yet, it highlights the high disparity concerning the level of PM₁₀ concentrations among Italian regions. In particular, in 2016, the regions with most critical level of PM₁₀ and NO₂ related pollution were Veneto (with 90% of monitoring stations registering excess levels of PM₁₀ for more 35 days, and 10% above the NO₂ annual average); Lombardy (with 79% of monitoring stations registering excess of PM₁₀ and 32% for NO₂); Piedmont (with 69% of air monitoring stations registering excess of PM₁₀ and 25% for NO₂); Trento (with excess levels of NO₂ recorded in 50% of the monitoring stations); Liguria (with excess concentrations of NO₂ registered in 31% monitoring stations); Emilia-Romagna (with 27% of the stations registering excess levels of PM₁₀ and 13% for the NO₂); Umbria recording excess PM₁₀ levels in 63% of monitoring stations); Lazio (with 15% of monitoring stations recording excess levels of PM₁₀ e 45% for NO₂); and Campania (with 27% of monitoring stations registering failure to comply with limits of PM₁₀ and 40% for NO₂).

3. EEA Air quality report in Europe (2018):

The EEA Report provides relevant information on air quality in various member states, including with respect to the adverse impact of air pollution on the population. With respect to Italy, the EEA Report 2018 refers to data published in the 2016 Report, and highlights the impressive number of early deaths due to air pollution occurred among the Italian population in 2015. Figures amounted to 60.600 for excessive exposure to PM_{2.5}; 20.500 for excessive exposure to NO₂ and 3.200 for exposure to excessive levels of ozone concentration. Moreover, in 2015 the Po Valley was among the EU regions with the highest degree of eutrophication, due to an excess of nutrients in soil or waters accentuated by air pollution.

3. Have EU infringement proceedings been brought against your Member State for failure to comply with the AQD?

- a. If so, what was the outcome of this enforcement action and its impact on air quality law and policy in your Member State? (If enforcement action is ongoing, answer this question as best you can in terms of the effects of**

this action on your Member State's approach to air quality law and policy.)

The European Commission started several infringement procedures against Italy. The most recent ones are the following two cases:

a) Procedure 20142147, then case C-644/18 (Commission vs. Italy)

(17/05/2018 Referral to Court Art. 258 TFEU; 27/04/2017 Reasoned opinion Art. 258 TFEU; 16/06/2016 Additional formal notice Art. 258 TFEU; 10/07/2014 Formal notice Art. 258 TFEU).

Italy was referred by the Commission to the Court of Justice over persistently high levels of particulate matter (PM10). The PM10 pollution in Italy is predominantly caused by emissions from energy and household heating, transport, industry and agriculture.

More than 66 000 people die prematurely in Italy each year as a result of particulate matter pollution, making it the most affected of all Member States in terms of PM-related mortality, according to estimates by the European Environment Agency (EEA).

This case regards exceedances occurred in 30 air quality zones across Italy, where the daily limit values for the airborne particles (PM10) have been exceeded for a relevant number of days each year, since the limit values came into force on 1 January 2005. The 30 affected zones are located in the Regions of: Lombardia, Veneto, Piemonte, Toscana, Emilia-Romagna, Friuli-Venezia Giulia, Umbria, Campania, Marche, Molise, Puglia, Lazio and Sicilia. In addition, this case also refers to exceedances of the annual limit value in 9 zones: Venezia-Treviso, Vicenza, Milano, Brescia, two zones of Po valley, namely Torino and Valle del Sacco (Lazio).

So far, no measures seem to have been adopted by Italian authorities to modify existing conditions.

b) Procedure 20152043

(07/03/2019 Referral to Court Art. 258 TFEU; 15/02/2017 Reasoned opinion Art. 258 TFEU; 28/05/2015 Formal notice Art. 258 TFEU; 17/05/2018 Referral to Court Art. 258 TFEU)

This case concerns air pollution from nitrogen dioxide (NO₂) and a failure to protect citizens against the effects of such pollution. The Commission is calling on Italy to respect air quality limit values and take appropriate measures to cut pollution levels in ten agglomerations covering around 7 million people. The limit values for NO₂ set out under EU legislation on ambient air quality (Directive 2008/50/EC) had to be met since 2010.

This referral follows similar action against France, Germany, and the United Kingdom in May 2018, for similar failures to respect limit values for NO₂, and for failing to take appropriate measures to keep exceedance periods as short as possible.

So far, no measures seem to have been adopted by Italian authorities to modify existing conditions.

Air Quality Standards

4. Was there pre-existing national law relating to air quality standards (similar to the AQD), or did the AQD introduce something new in your country?

In Italy, the previous legislation which was in force until the approval and entry into force of Decree 155/2010 (implementing AQD), was Legislative Decree 351/99. The current Italian legislation is largely based on the corresponding AQD, without any notable gold-plating. The same may be said of the previous Italian legislation, namely legislation Decree 351/99 (adopted as a means of implementation of EC Directive 96/62/EC on ambient air quality), as supplemented by Ministerial Decree (DM) 60/02 (adopted as a means of implementation of EC Directive 99/30/EC on ambient air quality).

On such a basis, it may be affirmed that neither the current Italian legislation contains, nor the previous one contained innovative elements of differentiation with respect to the corresponding EU legislation.

5. How are AQD air quality standards implemented in law in your Member State?

The AQD has been implemented in Italy by means of Legislative Decree n. 155 of 13 August 2010 (hereinafter, Decree 155/2010). The said Decree 155/2010 determines the air quality standards at national level.

Decree 155/2010 empowers the Italian Regions (and the autonomous Provinces of Trento and Bolzano) to fulfill the planning, management and monitoring competences established by the AQD and implemented into Italian Legislation by said Decree.

The Regions (and autonomous Provinces) have the duty to establish zones and agglomerations throughout their national territory, pursuant to art. 3-5 of Decree 155/2010. Air quality must be assessed in the said zones and agglomerations pursuant to art. 5 and plans and related measures must be elaborated to fulfill the EU legal requirements.

6. Does any law in your Member State provide for air quality standards that go beyond those set out in the AQD, imposing any more stringent standards, for example, in relation to PM_{2.5}?

In Italy, no air quality standards that go beyond those set out in the AQD are foreseen.

Air Quality Monitoring and Modelling

7. How are air quality monitoring networks set up in your Member State (briefly)? Do these go beyond the monitoring requirements set out in Chapter II AQD (e.g. in terms of the number and location of monitoring stations)?

The air quality standards are monitored and assessed by the Italian Regions (and the autonomous Provinces of Trento and Bolzano) pursuant to the provisions of Art. 5 of Decree 155/2010. The monitoring networks are set up on the basis of the criteria contained in Annex III and Appendices II and III of Decree 155/2010.

There is no evidence that the Italian criteria go beyond those set out in chapter II AQD in terms of number and location of monitoring stations as well as of monitoring criteria.

The data collected through the air quality monitoring network set up in Italy are elaborated through the network named SINAnet (Italian Environmental Informative System), that is located within the Technical Authority ISPRA. The SINAnet network acts as Italian national Focal Point of the European Environment Information and Observation Network EIONet.

8. What sort of problems are encountered in monitoring of air quality in your Member State?

Problems might include inconsistent results given by different schemes for monitoring air quality, improper siting of measurement equipment, unreliable equipment used, no monitoring established in key areas, unconfirmed results etc.

No specific problems in monitoring of air quality in Italy have been detected on the basis of the official Reports published and the other information available.

9. As far as you can determine, are there limitations or problems with the modelling techniques used in your Member State to assess air quality (where modelling is permitted as a method for assessment under Chapter II AQD)?

The data collected through the air quality monitoring network set up in Italy are elaborated through the network named SINAnet (Italian Environmental Informative System), that is located within the Technical Authority ISPRA. The SINAnet network acts as Italian national Focal Point of the European Environment Information and Observation Network EIONet.

The modeling techniques which are allowed in Italy are set out in Appendix III of Decree 155/2010 and recall those established in the AQD. The competence to determine and implement the modeling techniques in Italy lies with the Technical Support Institute ISPRA. To my knowledge, no specific problems or limitations with modeling techniques used in Italy have been reported.

National Air Quality Plans and Governance

10. Does your Member State have a national Air Quality Plan under Article 23?

- a. **If so, to which pollutants does the plan relate (e.g. NO₂ or PM₁₀) and what key measures does the plan outline to keep exceedances ‘as short as possible’? Please also indicate if you think there are any weaknesses in the plan.**
- b. **If your Member State has such a plan, how is the legal requirement of keeping exceedances ‘as short as possible’ satisfied? Please outline any challenges (legal or otherwise) in meeting this requirement in your Member State.**

The air quality plans foreseen in article 23 AQD are regulated in Italian legislation by art. 9 of Decree 155/2010. Pursuant to such a provision, Italian Regions (and the autonomous Provinces of Trento and Bolzano) have the duty to establish air quality plans for the zones and agglomerations where the levels of pollutants in ambient air exceed any limit value or target value foreseen by the legislation. Therefore, there is not a single national air quality plan in Italy, but rather several Regional plans for the areas where exceedances of the any limit value or target value have been detected. The Regional plans must be communicated to the Ministry for the Environment and to the Technical Support Institute ISPRA, which keep a nationwide data base of all plans and related measures for air quality protection and improvement.

Air Quality Plan for the Tuscany Region (2018)

An example of such regional plan is the Air Quality Plan for Tuscany Region. The most recent version was approved on 18th July 2018. The act has a regulatory value at the regional level and sets out the regional strategy aimed at improving air quality. Its timeframe extends to 2020, although some of its provisions and commitments will likely have a much longer temporal impact.

The primary goal of the Plan is to bring down to zero the percentage of population exposed to excess air pollution levels by 2020. In Tuscany, excess values of air pollution are concentrated in certain areas previously identified in a Regional Decree (DGR 1182/2015) and concerns exclusively the daily average (or mean?) of PM10 and the annual mean of NO₂. Further goals include the maintenance of a good air quality in the areas where the polluting particles are consistently below the thresholds; updating the general knowledge about air quality as well as raising environmental awareness and promoting public information.

With specific respect to the main goal of keeping exceedance of PM10 and NO₂ as short as possible, the specific actions envisaged in the Plan covers various sectors such as: **transport and mobility** (these includes measures such as mitigation NO_x emission in the new Florence Airport; imposing prohibitions of keep car engines on in front of schools; finalize the tram transport system in Florence and extend it to outside areas; promote system supporting pedestrians and the use of bicycles; promote train links); **urbanism** (prohibition of biomass for heating in new buildings as well promoting sustainable buildings); **agriculture; waste** (such as, reach a level of recyclable waste of at least 70%; extends and promote compost); **industry** (providing technical and administrative guidance for air emission permits; promoting voluntary agreements for the reduction of emissions in the field of paper mills and leather); and **energy**. The Plan also provides some urgent and contingent measures, such as the reduction of highway limits in the trait between Florence and Pistoia; increasing street cleaning in the most critical periods; prohibiting open air fires and enforce such prohibitions.

11. Whether or not your Member State has an Air Quality Plan, please outline the key national regulatory measures that contribute towards compliance with EU air quality standards in your Member State.

For example, what are the main national legal measures that regulate polluting air emissions from emissions from:

- *households (eg restrictions on solid fuels, planning laws);*

- *transport (eg clean air zones); and*
- *industry (eg reliance in Industrial Emissions Directive or something more)?*

In Italy, the most relevant national measures regulating air pollution emissions are relating to the transport and industrial sectors. However, most Italian legislation tends to correspond almost literally to the pertinent EU legislation. No gold-plating of EU rules and standards is normally done by the Italian legislature.

Therefore, with respect to **air emissions from transport**, the Italian legal framework is essentially represented by a series of legislative instruments implementing relevant EU legislation.

With respect to **air emissions from industrial plants and activities**, the primary legal framework is represented by the relevant provisions in Part III of Legislative Decree 152/2006 (Testo Unico Ambientale – this essentially a sort of Environment Act which brings together environmental protection provisions addressing different areas).

Part V, which includes 32 articles and 10 annexes, is divided into 3 main sections (“titoli”):

- Section I – on the prevention and limitation of air emissions from plants (artts. 267-281)
- Section II – Thermal Plants (artt. 282-290)
- Section III – Fuels (art 291-298)

The decree sets the emissions limit values, the methods for sampling and analysis of emissions and the criteria for assessing compliance with the emissions limit values. It does not cover waste combustion plants as these are regulated by a separate legislative instrument (i.e. legislative Decree No 133 of 2005, implementing Directive 76/2000/EC).

Under Decree 152/2006, both Regions and autonomous provinces can set their own maximum emission limit values provided they are within the parameters set by the decree in Annex I to Part V. Emission limit values for large combustion plants and for Volatile Organic Compounds (VOCs) are instead provided in Annex II and III respectively. Annex III concerning VOCs generally reproduces, without any major amendments, the relevant European legislation, already transposed in the Italian legal system by Ministerial Decree 44/2005. With specific respect to Large Industrial plants, the decree provides that every year the responsible operators must notify to the Environment Agency (ARPAT) the data concerning the overall SO₂ and NO emissions related to the previous year, together with data concerning the annual quantity of energy produced by biomasses, and other fuels.

Furthermore, the operation of all industrial plants producing air emissions are subjected to an emission permit by the competent authority (art 269). There is an exception for plants falling within the scope of application of Legislative Decree 59/2005 (implementing the *Integrate Pollution Prevention and Control Directive* (IPPC)), whereby for those installations the emission authorization is replaced by the ‘Integrated Environmental Authorization’.

12. Has your Member State ever issued a Short-term Action Plan under Article 24? If so, please outline any notable features of the plan or aspects of its implementation (briefly).

No evidence of short-term Action Plan under Article 24 AQD (corresponding to art. 10 of Decree 155/2010) have been detected in Italy.

13. Which public bodies have legal responsibilities for meeting air quality standards in your Member State?

In Italy, the general competence in the environmental field lies with the central (State) level. The main reference institution in the field of air quality at national level is the Ministry for the Environment, that has a general coordination competence, pursuant to art. 20 of decree 155/2010.

The Ministry is supported by ISPRA (Italian Institute for Environmental Protection and Research), a technical support institute.

The Italian Regions (and the autonomous Provinces of Trento and Bolzano) have the competence to draft and adopt air quality plans, pursuant to art. 9 and 10 decree 155/2010.

In addition, the Mayors have a general competence to adopt “urgent deliberations” in case of air quality emergencies occurring within their territories.

14. Are there any legal requirements for different public bodies who have control over different air pollution sources to coordinate their efforts in any way to work towards air quality standards? (For example, different regulators may control highways, airports, local urban planning decisions, large industrial installations, and so on.)

At national level, pursuant to art. 20 of decree 155/2010, a coordination of the national activities in the air quality field is ensured by a “Permanent Coordination Team”, chaired by and hosted at the Ministry for the Environment, which includes representatives from the Ministry for Public Health, as well as from the Italian Regions (and the autonomous Provinces of Trento and Bolzano), the Union of Italian Provinces (UPI), ISPRA (National Institute for Environmental Protection and Research – a Technical Support Institute of the Ministry for the Environment), ENEA (National Agency for New Technologies, Energy and Sustainable Development), and the National Research Council (CNR).

Enforcement of Air Quality Law

15. What is the primary mode for enforcing of air quality law in your Member State?

In Italy the competence for enforcing air quality law provisions lies with the Regions, which acts pursuant to the plans adopted under art. 9 of Decree 155/2010.

16. Have there been court cases concerning the enforcement of air quality law in your Member State? Please outline major cases or themes in key cases only.

Omissis

17. Please outline any other major challenges faced in your Member State for enforcing the AQD, or any other applicable air quality law.

Omissis

A Controversial Source of Air Pollution: Regulation of Vehicle Emissions Systems

Many Member States are currently subject to infringement proceedings by the Commission in relation to vehicle type approval rules. This is currently prescribed under Framework Directive 2007/46/EC establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles [2007] OJ L263/1 and Regulation (EC) No 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 [2007] OJ L171/1.

Amongst other things, this legislation requires Member States to have ‘effective, proportionate and dissuasive’ penalty systems in place to deter car manufacturers from illegal practices, such as installing defeat devices. This legislation was overhauled in 2018 by Regulation (EU) 2018/858 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC [2018] OJ L151/1, which will apply from 1 September 2020.

18. How has your Member State implemented these EU vehicle type approval rules? Have there been any controversies in transposing these rules?

Italy implemented Directive 2007/46/EC establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles by means of the Ministerial Decree of 28 April 2008. The Decree identifies organs at State and regional level that are entitled to grant the certification of compliance with the requirements established in the Directive.

On 17 May 2017 the European Commission started an infringement procedure against Italy claiming that Italy had not adopted suitable measures with respect to Fiat Chrysler Automobiles (FCA), an Italian vehicle plant, in order to oblige it to comply with the Directive’s requirements aimed at reducing CO₂ emissions. The infringement procedure relates to the use by the FCA of a defeat device leading to higher NO_x emissions outside of the test cycle. The Commission was particularly concerned about the about insufficient action taken by Italy regarding the emission control strategies employed by FCA. Accordingly, in its letter of formal notice, it asked Italy to clarify whether it has failed to meet its obligation to adopt corrective measures with regard to the approval of FCA type of vehicles and impose penalties on the car manufacturer.

Two years later, however, there seem not to have been further significant developments. Indeed, a recent EP Resolution on recent developments in the ‘Dieselgate’ scandal, dated 25th March 2019, highlights that “whereas on 17 May 2017 the Commission started another

infringement procedure concerning the emission control strategies employed by the Fiat Chrysler Automobiles (FCA) Group and the failure of Italy to meet its obligations to adopt corrective measures and impose sanctions on this manufacturer; ... despite the fact that these procedures, which are still ongoing against Germany, Italy, Luxembourg and the United Kingdom, were launched more than two years ago, the Commission has still not pushed them beyond the stage of seeking further information from the Member States through additional letters of formal notice; ... some Member States appear not to be cooperating sincerely with the Commission in this regard”.

19. What legal measures have been taken in your Member State (if any) against car manufacturers which have failed to comply with vehicle type approval rules? *These legal measures might include court cases, including between car buyers and manufacturers.*

Art. 5 of the Ministerial Decree of 28 April 2008, which implements Directive 2007/46/EC, foresees the responsibility of manufacturers of both vehicles and single components for compliance with the procedures and requirements established in the Decree and the corresponding Directive. Such responsibility applies also on the manufacturer that modify components or systems already approved.

According to the Decree, the certification of compliance can be suspended or withdrawn in the case of manufacturers’ non-compliance with legal requirements (article 30). Moreover, administrative pecuniary sanctions are established in Art. 77 of the Italian Traffic Code with respect to both manufacturers or traders of vehicles which do not possess the certification of compliance with the approved type (sanctions vary from 163 to 658 euro) and for individuals travelling with non-certified vehicles with respect to non-compliance with security requirements (such as brake systems, security belt and tires).

Case Study

Martha is living in an urban area in your Member State, and her children have developed asthmatic symptoms (i.e. a diagnosed respiratory illness). She becomes aware that the local air quality exceeds standards laid down in the AQD. Her house is next to a main road, which is a heavily used bus route on which bus operators use diesel vehicles. The town also has a number of industrial plants, a coal fired power station, and a number of intensive farms. It is unclear to her precisely which pollution source is causing the breaches of air quality standards, or what their respective contributions might be to the local air quality problem.

What sort of legal action could Martha take in your Member State? And against whom? What remedies do the courts possess? What are the financial implications of bringing such a case? Might there be other regulatory avenues available to Martha instead?

This is a case of diffuse air pollution. It is not easy to establish a direct causal link between the various sources of pollution and the respiratory illness suffered by Martha and her children. It seems that Martha could act in different ways, under Italian law.

For instance, she could ask compensation under civil law, for damages suffered as a consequence of the different sources of air pollution. However, in principle it will be difficult to get compensation for damages suffered as a consequence of “lawful” sources of pollution, for instance for air emissions duly authorized (e.g. industrial emissions) or in compliance with the legal requirements (e.g. use of diesel vehicles).

In the alternative, Martha could seek administrative remedies, in case it may be proven that the provisions of the law or the requirements set out in the relevant authorizations have not been complied with.

In a different alternative, Martha could seek criminal law remedies, by sending a complaint to the public prosecutor’s office, in order to ask the public prosecutor to verify whether a violation of criminal law provisions has been caused by the pertinent industrial activities and/or vehicles users. In this case, however, the public prosecutor will enjoy a broad discretionary power in determining whether a violation of relevant criminal law norms has occurred. Recent practice occurred in Italy seems to show that recourse to the public prosecutor’s office may prove to be more effective than civil and administrative law remedies, to try and address complex cases of air pollution, such as the one presented in this case. See for instance the recent “Ilva case”, which started with a criminal prosecution (before a national criminal court) and continued before the European Court of Human Rights, with Italy found in violation of its duties under the European Convention on Human Rights. In particular, in a decision rendered on 24 January 2019, the European Court of Human Rights held, unanimously, that there had been a violation of Article 8 (right to respect for private and family life) and a violation of Article 13 (right to an effective remedy) of the European Convention on Human Rights.

LATVIA

Latvia

Author: PhD, Žaneta Mikosa

I Air Quality: National Context

1. What are the main sources of unlawful levels of air pollution in your Member State?

Air pollution in excess of limit values stated in the AQD is being repeatedly registered in one area of Latvia: Riga, its capital.¹

The main sources are largely two: **traffic** (~ 90% car transport and dominance of diesel fuel)² and **domestic heating systems** allocated in and around the center of Riga.

According to the central monitoring information system, air pollution in other cities and regions of Latvia do not exceed levels that would require action plan (according to Art.23(1) of the AQD). It does not however mean that there are no problems with air quality. For example, as one may see from the Constitutional Court case discussed below (No 2018-19-03), air quality in and around port areas is problematic and requires actions for reducing pollution.

2. How extensive is reported non-compliance with AQD air quality standards in your Member State?

According to the reports, the main problem of air quality relates to exceedance of two pollutants: *NO₂*, *PM₁₀* (as well as *PM_{2.5}*)

I Non-compliance with respect to NO₂

Exemption (time extension) has been applied with respect to *NO₂*³ under certain conditions.⁴ Accordingly, Latvia had to ensure the annual limit value with the maximum margin of tolerance – 60 µg/m³ until 2015. From 2016 it has to ensure compliance with AQD Annex XI limits - 40 µg/m³.

The frequency of exceeding air pollution thresholds demonstrated by Table 1 includes data with respect to *NO₂* emissions in Latvia (except Riga) during 2013 – 2017.

Table 1⁵

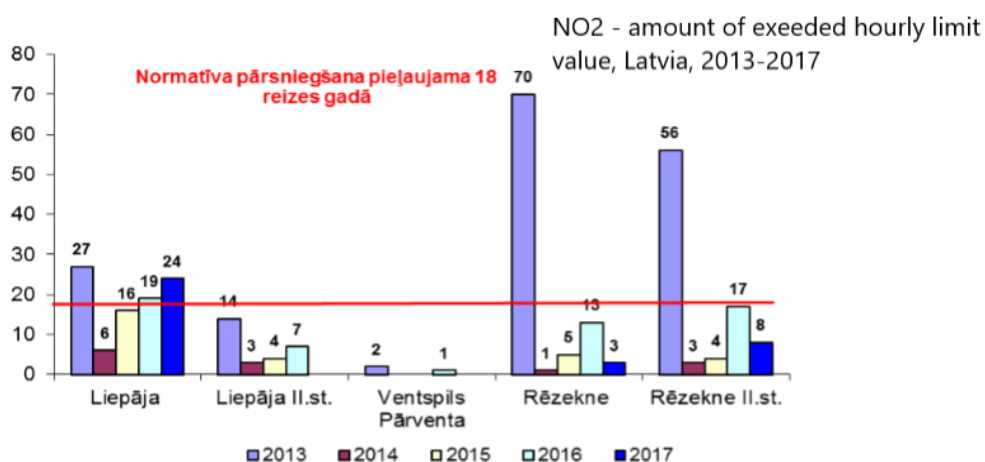
¹ More detailed information available in: <http://www.sus.lv/lv/registrs/pilsetas-parvaldiba/rigas-pilsetas-gaisa-kvalitates-uzlabosanas-ricibas-programma-2016-2020> (in Latvian only)

² Interesting (and unfortunate) to note that pollution from traffic (cars) as the main problem (and source) of air pollution (persistently high levels of *PM₁₀* in ambient air) in Riga is quite similarly pointed out as the main problem today as it was noted by scholars during the 1990s. Strautmanis J. *Ekoloģisko tiesību pamati*. [Basics of ecological rights.] Rīga, Zvaigzne ABC, 1997, pp. 216. It is so even if quite some actions aimed at improving situation have taken place. See: The first Action plan for the improvement of air quality in Riga city (approved 6 July 2004), pp. 23-26. Available: <https://mvd.riga.lv/uploads/videgaiss/gaisaricprogriga.pdf>

³ The notifications of time extensions submitted by Latvia and COM decisions see in: http://ec.europa.eu/environment/air/quality/time_extensions.htm

⁴ COM Decision of 25.06.2012. C(2012) 4104. It states the following conditions: in years 2010 to 2014 inclusive, Latvia shall provide to the Commission “data indicating that the concentration levels in Riga (zone LV0001) are below the annual limit value for *NO₂* plus the maximum margin of tolerance specified in Annex XI to Directive 2008/50/EC.” And by 30 September 2016 at the latest, provide the Commission with information confirming that compliance with the annual limit value for *NO₂* set out in Annex XI to Directive 2008/50/EC has been achieved.”

⁵ Overview of air quality in Latvia, 2017, p. 19. (The latest overview available at the moment). Available: https://www.meteo.lv/fs/CKFinderJava/userfiles/files/Vide/Gaiss/Gaisa_kvalitate/Parskati/parskats_par_gaisa_kvalitati_Latvija_2017_g.pdf



Information on emission of NO₂ in Riga city is available in charts only for the periods before 2013. According to the recent draft for the State Action plan on *Reducing Emissions of Air Pollutants (2019-2030)*, the annual limit values of NO₂ (with respect to health protection) have been exceeded during 2013-2015 in two Riga (transport) monitoring stations. Even though there was no monitoring on this parameter during 2016 and 2017, the intensity of traffic allows to make presumption that the emissions continue to exceed limit values.⁶

II Non-compliance with respect to PM₁₀

The request for exemption from the obligation to apply the daily and annual limit values for PM₁₀ in the air quality zone LV0001 (Riga) has been objected by the Commission in 2009.⁷

Up to date, the exceedance of limit values of this pollutant (and PM_{2.5}) seems to be the main problem with air quality in Latvia that has been improved during the last years (2017 has been noted as indicating improvements).⁸ In any case, pollution with PM still create problems, as firstly, the preliminary data of 2018 indicates that the limit values have been exceeded again; secondly, emissions are still well above the WHO recommended level.⁹ The data on emissions of PM₁₀ are demonstrated by tables below. In Tables 2 and 3 are reflected data on PM₁₀ in the main cities:

Table 2 indicates number of exceedances of PM₁₀ threshold during each month of 2012 as well as total number of exceedances in 6 sampling points during 2012. The red line indicates the maximum times per year the threshold can be exceeded (35). Accordingly, in one of monitoring stations in Riga excessive pollution was registered far more often.

⁶ Draft for Action Plan on Reducing Emissions of Air Pollutants 2019-2030. (Launched for public consultations in April 2019). Available: http://www.varam.gov.lv/lat/likumdosana/normativo_aktu_projekti/normativo_aktu_projekti_vides_aizsardzibas_joma/?doc=27258

⁷ Commission decision of 28.9.2009. on the notification by Latvia of an exemption from the obligation to apply the limit values for PM₁₀. C(2009) 7084 final.

⁸ This is according to official data (based on mainly one transport monitoring station), but there is no certainty on reliability of data about air pollution, as the main monitoring station in the center of Riga (on Valdemara str.) that indicated high level of air pollution with PM₁₀ has been out of order since 2016 and has since been dismantled. The one working at this moment (the only one for transport monitoring) has often technical difficulties with measuring level of one or another pollutant.

⁹ Draft for Action Plan on Reducing Emissions of Air Pollutants 2019-2030, p.11.

Table-2¹⁰

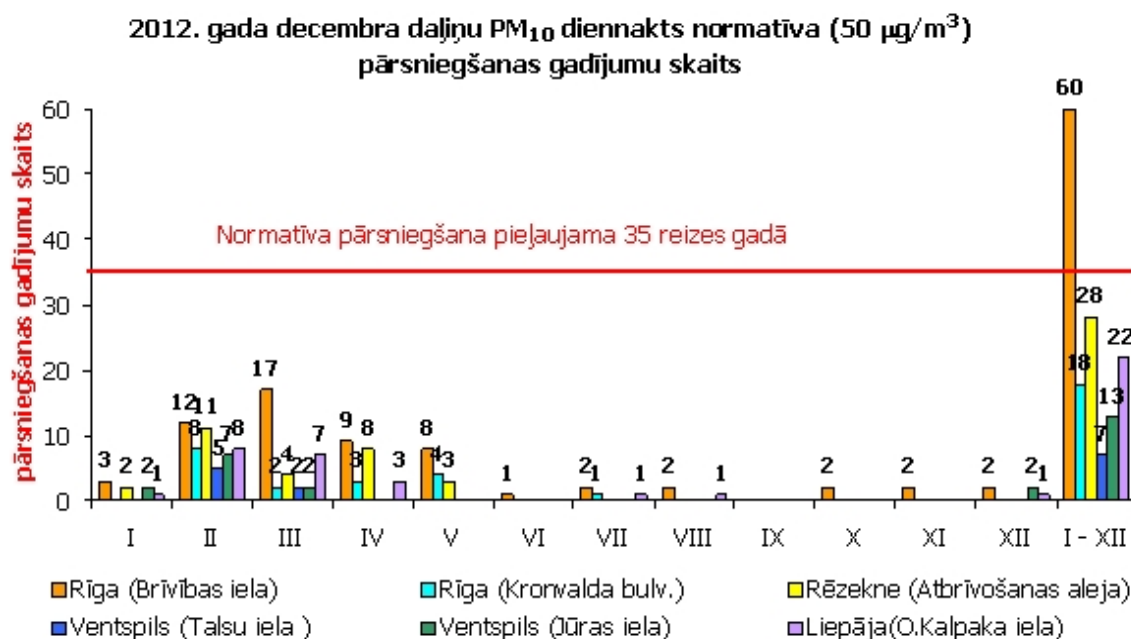
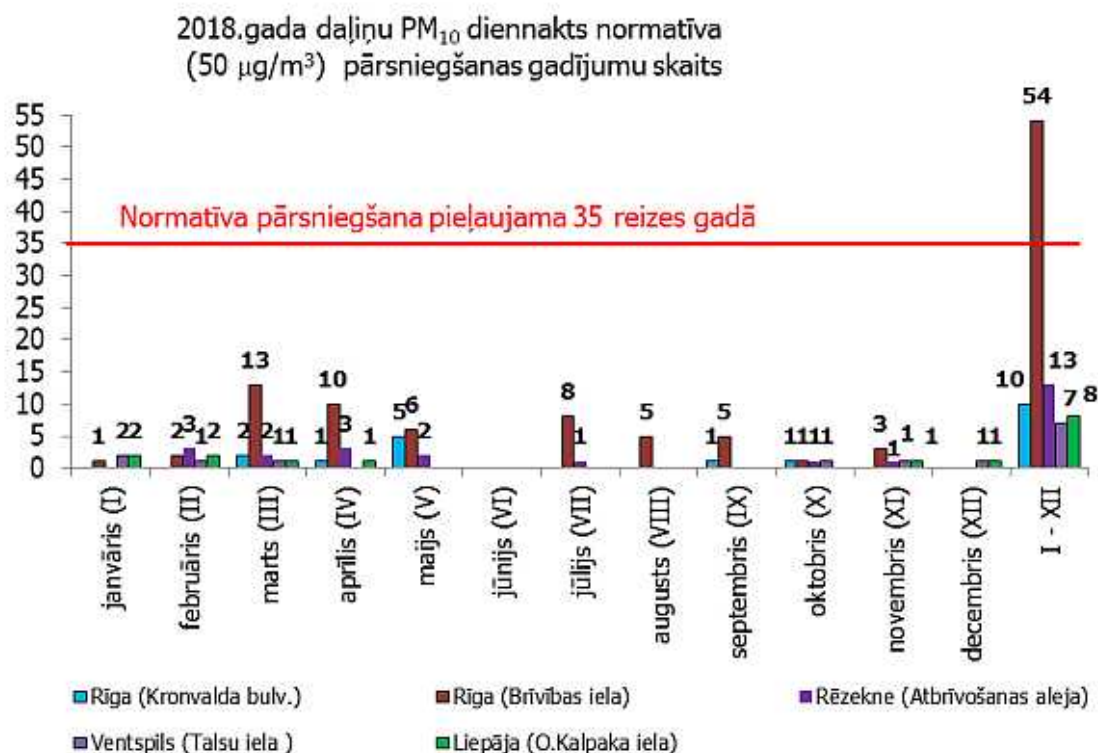


Table 3 - indicates number of times the threshold of *PM*₁₀ pollution has been exceeded during 2018. Again, excessive pollution has been registered far too often in the same monitoring station as in 2012.¹¹



It is worth noting that limit values of EU standard are exceeded “only” in Riga, however, limit values of *PM*₁₀ (of annual target value) recommended by the WHO were exceeded

¹⁰ Amount of exceedances of limit value of *PM*₁₀ in 2012. Available: <https://www.meteo.lv/lapas/decembris-2012?&id=1721&nid=619>

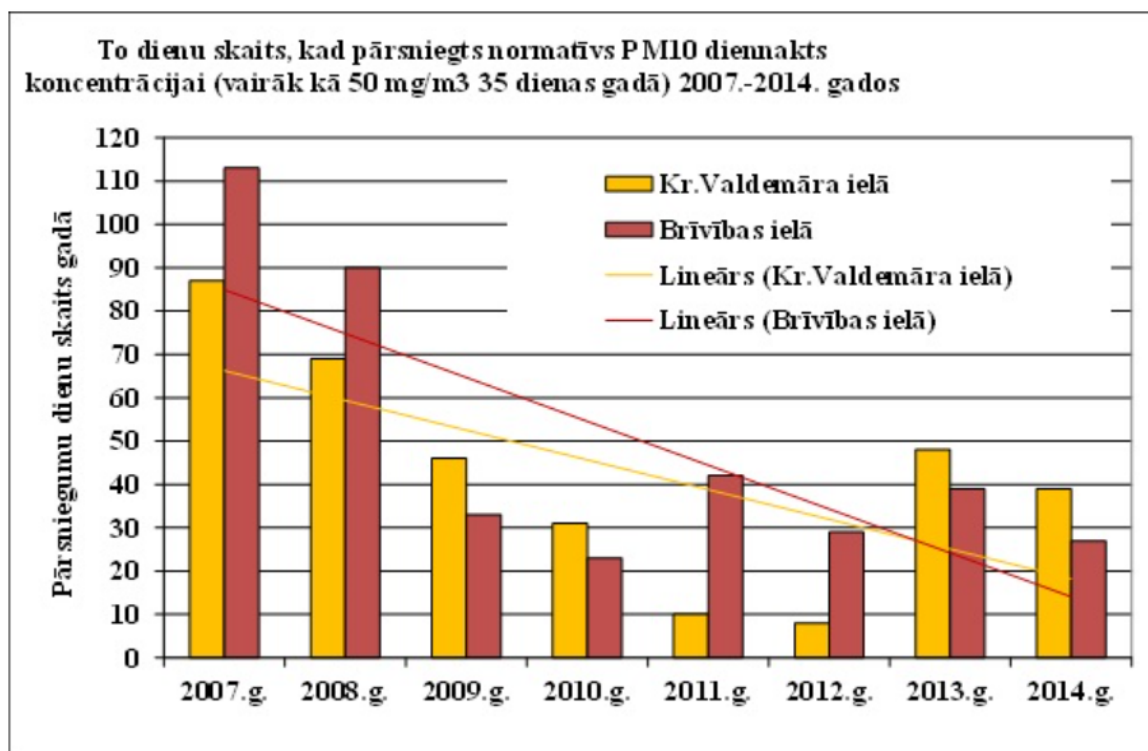
¹¹ Amount of exceedance of limit value of *PM*₁₀ in 2018. Available: <https://www.meteo.lv/lapas/noverojumi/gaisa-kvalitate/ikmensa-informacija-par-gaisa-kvalitati-latvijas-pilsetas/decembris-2018?&id=2373&nid=619>

additionally in two other cities (Liepāja and Rēzekne) in 2012. In 2018 the situation had improved with respect to in the latter two cities.

The chart of the table 3 indicates that the exceeded level is observed in one “traffic-orientated” sampling point located in Riga (on the one of the main streets in the city center). In fact, it is the only one station left for monitoring transport pollution in the center of Riga where the haviest traffic is observed. The second one (on Kr.Valdemara str.) has been dismantled after a car crashed into it.¹² The general air quality is monitored by three urban background sampling points in Riga, in addition.¹³

Table 4 reflects the number of days when pollution of PM₁₀ has exceeded 50 µg/m³ (vertical axis) during 2007-2014 (when still both monitoring stations in Riga functioned).¹⁴

Table-4



3. Have EU infringement proceedings been brought against your Member State for failure to comply with the AQD?
 - a. If so, what was the outcome of this enforcement action and its impact on air quality law and policy in your Member State? (If enforcement action is ongoing, answer this question as on your Member State’s approach to air quality law and policy.)

The exceedances of limit values with respect to PM₁₀ was significant enough to start an infringement proceeding by the Commission in 2010 (Formal notice 28/01/2010, additional FN 30/09/2010). It proceeded with two Reasoned opinions: 16/02/2011 and 10/07/2014. The latter was adopted after the third Formal notice letter of 24/01/2013 “as part of a fresh approach to the

¹² It is worth noting that the one dismantled was the one that indicated the highest level of PM pollution since monitoring started. So, one may question whether the station should not be restored instead of dismantling to control the pollution in the place where it is the highest one.

¹³ Managed by the Center responsible for monitoring data, located in Riga on streets: Raiņa bulv., Kronvalda bulv. and Maskavas str.

¹⁴ See comment under Q7. Chart is copied from the municipality of Riga webpage detailing information on the air quality. Available: <https://mvd.riga.lv/nozares/vides-parvalde/gaisa-kvalitate/>

problem” as stated by the Commission.¹⁵ In Formal notice of 2013, COM enlarged the scope of the legal action to take into account the results of already finalized infringement procedures with respect to non-compliance of Italy, Portugal, Slovenia and Sweden with the AQD. As noted by the Commission, the Court rulings with respect to these countries “only covered the failure to comply with air quality limit values *in the past*, providing little incentive for Member States to *act on future exceedances*.”¹⁶

In case of Latvia, in 2009 Latvia sent to the Commission the request for exemption to apply the limit values for PM₁₀ based on Article 22(2) of Directive 2008/50/EC (AQD), as noted above. However, the objections were raised by the COM and thus exemption has not been applied. Soon after Latvia got the first Formal notice letter related to the problems of compliance with PM₁₀ limit values as required by the AQD.

The infringement proceeding is still open.

It is worth noting that for quite a long time the responsible public authority (municipality of Riga in this case) failed to adopt the necessary measures (including the action plan) for solving problems with exceeded level of limit values (on PM) in accordance with the AQD. This served as one of the main reasons to refuse exemption requested by Latvia, as Latvia was not able to prove that “all appropriate abatement measures have been taken at national, regional and local level to achieve compliance by the deadlines in Directive 1999/30/EC..” and there is no “an air quality plan established demonstrating that conformity with the limit values will be achieved before the new deadline”, as required by Article 22 of the AQD.¹⁷

In this sense, the infringement procedure and a number of consultations with the Commission that took place during the meetings with the representatives of the state (Ministry of Environmental Protection and Regional Development) together with the representatives of the municipality helped to proceed with needed actions aimed at solving problems with exceeded level of air pollution. Thus, there has been quite a number of actions taken (including legislative) as response to the infringement proceeding, including adoption of the action plan in 2015 (Riga Action plan 2016-2020) that takes into account the requirements of the AQD.¹⁸

II Air Quality Standards

4. Was there pre-existing national law relating to air quality standards (similar to the AQD), or did the AQD introduce something new in your country?

Largely all legislation on air quality is based on EU requirements adopted *prior* Latvia joined the EU in 2004.¹⁹ The Law on Pollution adopted in 2001 is setting the system for air protection. It was adjusted to the requirements of the AQD through amendments as well as adoption of Government regulation No 1290/2009 “Rules on the air quality.”²⁰ Introducing air quality standards, annual and daily mean concentration etc. as the country needs to establish and monitor

¹⁵ COM Press release of 24/01/2013. Available: http://europa.eu/rapid/press-release_IP-13-47_EN.htm

¹⁶ Ibid.

¹⁷ Commission decision of 28.9.2009. on the notification by Latvia of an exemption from the obligation to apply the limit values for PM₁₀. C(2009) 7084 final.

¹⁸ Action Plan (approved by Riga municipality). Available: <http://www.sus.lv/lv/registrs/pilsetas-parvaldiba/rigas-pilsetas-gaisa-kvalitates-uzlabosanas-ricibas-programma-2016-2020> (in Latvian only)

¹⁹ It does not mean that there was no legislation prior, but it was based on different approach and principles (Law on ambient air protection, 1959).

²⁰ There are a number of Government regulation adopted in area of air protection, the list is available: http://www.varam.gov.lv/lat/likumdosana/normativie_akti/?doc=3139

according to the AQD was rather new approach for establishing the system for air quality control with respect to, for example, monitoring of PM emissions etc.

5. How are AQD air quality standards implemented in law in your Member State?

It is primarily based on three approaches: firstly, through defined standards (limit values etc.) set for controlling emissions on pollutants defined and established (though developing) monitoring system. The standards of air quality are determined in the Government regulation No 1290/2009 “Rules on the air quality” that defines *inter alia* permissible level of 12 air pollutants in the environment and characteristic values, monitoring and other requirements that needs to be observed in establishing monitoring systems at both state level and individual polluters that are obliged to monitor and report. Secondly, through the permitting system of polluting activities where requirements on air quality and limits on emissions are individualized and detailed.²¹ Thirdly, through planning law and competences and duties of local government to take into account the air quality while planning development of its territory or authorizing construction.

6. Does any law in your Member State provide for air quality standards that go beyond those set out in the AQD, imposing any more stringent standards, for example, in relation to PM_{2.5}?

The legislation sets the minimum requirements following the AQD standards, however, when reporting, monitoring and developing the plans (for air quality) the emissions are analyzed in light of both AQD requirements and the World Health Organization Air Quality Guidelines²² (The latter are more stringent, for example, for PM_{2.5} (annual mean concentration = 10µg/m³) and PM₁₀ (annual mean concentration = 20µg/m³).²³

According to the Draft Action plan on *Reducing Emissions of Air Pollutants 2019-2030* in Latvia, the objective set for PM_{2.5} average concentration value is aimed at the level of 14,4µg/m³ of the daily limit value to be achieved by 2020.

The calculations of the annual average concentration within three–calendar years (2015-2017) indicates that the daily value of PM_{2.5} measurement is 12,98 µg/m.³ It means that the national exposure reduction target is achieved, however, annual mean concentration will be above WHO recommended level.

Air Quality Monitoring and Modelling

7. How are air quality monitoring networks set up in your Member State (briefly)? Do these go beyond the monitoring requirements set out in Chapter II AQD (eg in terms of the number and location of monitoring stations)?

Monitoring network is set up following the minimum sampling points needed without going beyond the monitoring requirements set out in Chapter II AQD.²⁴ Or it could be even questioned whether there are indeed enough monitoring stations in Riga and allocated in accordance with criteria determined in the AQD.²⁵

²¹ With respect to permitting system there are several other Government regulations, including Regulation No 182/2013 on the development of emissions limit projects for point source pollution.

²² See e.g. Draft for Action Plan on Reducing Emissions of Air Pollutants 2019-2030, p.11, noting the WHO recommended level for PM_{2.5} (stating that it has been exceeded in all cities of Latvia).

²³ <https://www.who.int/airpollution/publications/aqg2005/en/>

²⁴ Information on monitoring stations available on the web page of the competent authority gathering and assessing the relevant information: <https://www.meteo.lv/gaisa-kvalitates-stacijju-karte/?nid=470>

²⁵ See Table 5 above.

8. What sort of problems are encountered in monitoring of air quality in your Member State?

There are different problems encountered with the monitoring of air quality. However, as the latest Report reflecting on them is available only from 2014,²⁶ there are difficulties to provide up to date information as some shortcomings have been addressed during recent years and some additional problems have emerged.

One of problems is connected with a need for the assessment of the state monitoring plan and location of sampling points, to establish the appropriate network of state monitoring system including assessing whether to add measurement equipment in other cities (in addition to the few cities covered), as one may read from the Draft Action plan on Reducing Emissions of Air Pollutants (2019-2030).²⁷

9. Are there limitations or problems with the modelling techniques used in your Member State to assess air quality (where modelling is permitted as a method for assessment under Chapter II AQD)?

There are problems with the capacity and appropriate knowledge for the modeling and necessary data is not always available.

Although the assessment and calculations for modeling of distribution patterns of ambient-air pollution are claimed to be carried out in accordance with the requirements of AQD (and national legislation) using a distribution modelling technique (ADMS Urban 4.0.), they are in fact based on many presumptions with respect to traffic flows and type of transport, as well as location of individual heating systems.²⁸ Accordingly, the further improvements are possible only if lack of needed data is eliminated improving traffic records, availability of information on individual heating systems and avoidance of inaccurate data submitted by operators through statistic reports.²⁹

National Air Quality Plans and Governance

10. Does your Member State have a national Air Quality Plan under Article 23?

The elaboration of a plan (required by Art.23) has been delegated to local governments (municipalities). It has to be developed in cooperation with the Ministry of Environmental Protection and Regional Development. To date, only one plan has been elaborated and approved: Action Plan for the improvement of the air quality in Riga, the recent one for 2016-2020.³⁰

- a. If so, to which pollutants does the plan relate (eg NO₂ or PM₁₀) and what key measures does the plan outline to keep exceedances 'as short as possible'?

The plan covers four pollutants: NO₂, PM₁₀, benzene and benzopyrene and actions intended for reducing pollution levels.

There are different actions planned that have been categorized in the following groups:

²⁶ Report on the review of the state monitoring system according Article 14 of the Government regulation No 290/2009 "Rules on the air quality." The Report available: [https://www.meteo.lv/fs/CKFinderJava/userfiles/files/Vide/Gaiss/Gaisa_kvalitate/Parskati/Atskaite_par_Valsts_monitoringa_tikla_izvietojumu_\(2\).pdf](https://www.meteo.lv/fs/CKFinderJava/userfiles/files/Vide/Gaiss/Gaisa_kvalitate/Parskati/Atskaite_par_Valsts_monitoringa_tikla_izvietojumu_(2).pdf)

²⁷ Draft Action Plan on Reducing Emissions of Air Pollutants 2019-2030, p.59 (action 8.1.).

²⁸ Riga Action Plan 2016-2020, p.110.

²⁹ Riga Action Plan 2016-2020, p. 4.

³⁰ "Rīgas pilsētas gaisa kvalitātes uzlabošanas rīcības programma 2016. – 2020. gadam." [Riga Action Programme for air quality improvement 2016-2020.] Elaborated by consultant company: Estonian, Latvian & Lithuanian Environment in cooperation with the Cambridge Environmental Research Consultants Limited, 2016. Approved by the decision of Riga Council No 4641, 20.12.2016. Available: <http://www.sus.lv/lv/registrs/pilsetas-parvaldiba/rigas-pilsetas-gaisa-kvalitates-uzlabosanas-ricibas-programma-2016-2020> (in Latvian only)

- (i) Transport and traffic infrastructure; (ii) Public transport; (iii) Cycling infrastructure; (iv) Heating and energy efficiency measures; (v) Industry, incl. centralized heating companies; (vi) Ports, ship logistics and parking at berths; (vii) improvement of air quality management system.

The Action plan (programme) includes details on both: actions planned to be completed by 2020 and identified actions for further planning and perspective after 2020.

Key actions:³¹

I Traffic related:

- Infrastructure: building new infrastructure objects to better connect the districts and port and to bypass the center of Riga (now many trucks going to Riga port have to cross the center and some areas with poor air quality already present). It is planned to forbid freight transport (trucks) to go through the most traffic-intensive roads in the center and diminish transit (up to 80%) through some of the districts with high level of traffic related pollution (such as *Sarkandaugava*). However, it could be possible only when alternative routes for reaching the port are provided. By 2019 this has not materialized as most transport infrastructure developments aimed at solving this are to be completed or are at the initial stage.

- Public transport:

- (i) modernization of public transport by firstly replacing buses of EURO 1, EURO 2, partly EURO 3 to new models complying with EURO 6 emission standards.
- (ii) Speed limits (to reduce at least by 5 km/h aimed at reduction of NO₂ pollution).³²
- (iii) Improvements in the municipality owned parking system (developing park&ride places outside center to facilitate using public transport in the center) .

II Domestic heating systems: planning to switch more households to district heating systems. (action seems theoretical as no practical measures have been identified).

III Industry:

- (i) improvements of centralized heating system infrastructure to ensure minimization of heat loss by 335 000 MWh in 2020.
- (ii) Building infrastructure to reallocate port industry (operators discharging dry bulk cargo) from area of Riga port located close to the city center to the area closer to the sea.

b. If your Member State has such a plan, how is the legal requirement of keeping exceedances ‘as short as possible’ satisfied?

The main challenges seem to be related to ensuring that the plan is respected in further planning of the developments as well as investment programmes by both municipality as the main responsible body for its implementation, and the state obliged to ensure the air quality. Moreover, it is indicated that there are expected increases of emissions, for example, of NO₂ due to expected developments. Accordingly, additional actions are needed to avoid from exceedance of pollution that is already above norms of limit values.

Secondly, there is lack of mechanisms to ensure effective implementation of actions identified for reducing air pollution, for example, there are no legal mechanisms allowing to persuade existing individual households to switch from individual heating system to centralized, to improve efficiency of existing systems or to use another type of fuel for heating to reduce emissions in a particular area. There are some plans to facilitate “the right direction” in order to reduce pollution,

³¹ Based on Riga Action Plan 2016-2020, table 7.1. (actions envisaged till 2020) and Annex I.

³² At the same time, taking into account traffic growth trends (due to, for example, changing habits of population, i.e., moving to live outside Riga, but to work/study in Riga etc.), the predictions indicates that NO₂ pollution will rise (by 98,3 t/year).

for example, to “identify possible support mechanisms for replacement of old heating systems (wood-fired stoves) to others that comply with EU Regulation No 2015/1185.”³³

11. Whether or not your Member State has an Air Quality Plan, please outline the key national regulatory measures that contribute towards compliance with EU air quality standards in your Member State.

For example, what are the main national legal measures that regulate polluting air emissions from emissions from:

- *households (eg restrictions on solid fuels, planning laws);*

Measures are taken mainly with respect to Riga city, for example, in 2015, Riga Council has adopted binding municipality regulation on territory zoning related to air pollution and determines conditions for choosing a type of heating supply in Riga.³⁴ This regulation must be taken into account when deciding on permits for building or installing any incinerator.

Riga Action plan 2016-2020 requires to include in Riga Building regulation conditions with respect to different activities dependent on location of activity in respective air pollution zone of the city, as well as specific requirements with respect to activities that might produce significant air pollution.³⁵

- *transport (eg clean air zones); and*

There are no “clean air zones” introduced yet, however, recommended by Riga Action plan 2016-2020 to be considered for the center of Riga. In the Action plan, it is suggested: “to carry out a feasibility study for introducing low emission zones in the center of Riga.”

The new approach for taxation of vehicles (vehicle use tax) that was introduced this year (2019) might help to reduce CO₂ emissions as there is a financial incentive to choose cars with lower CO₂ emission (the higher level of CO₂ the higher the tax). However, that could facilitate the preference to diesel cars and in fact add to the main problem of air quality in Riga (exceedance of NO₂ and PM).

With respect to other means of transport, there are plans for electrification of railway to replace diesel-powered trains to electric ones (pending project).

According to several planning documents, different recommendations have been made to concentrate more to the development of electric public transport (trams, trolleybus). However, the reality indicates opposite or at least insignificant trend moving to that direction. Furthermore, many public procurements (aimed at buying new trams, more environmentally friendly buses) have been surrounded by corruption scandals and now stuck pending investigations.

- *industry (eg reliance in Industrial Emissions Directive or something more)?*

There is a system of integrated pollution control based on the IED, however, it captures other polluting activities as well. These activities are categorized under A, B and C categories. Activities that qualify as “A” category have to comply with BAT and other IED requirements that are included in A permit issued for respective operator (these are IED activities). B category activities must receive a B permit where requirements on emissions (including on air pollutants) are detailed – these are activities beyond IED. Operator of C category activity has to submit announcement about a plan to carry out such activity – these are activities that do not have to receive a permit with individual conditions but as they might affect the environment, they have to

³³ Riga Action Plan, point G.6 in Annex I.

³⁴ Rīgas domes 2015. gada 22. septembra saistošie noteikumi Nr. 167 „Par gaisa piesārņojuma teritoriālo zonējumu un siltumapgādes veida izvēli.”

³⁵ Riga Action Plan, point G.3 in Annex I.

inform competent authority as well as observe general rules or “technical rules” adopted with respect to these activities.³⁶

12. Has your Member State ever issued a Short-term Action Plan under Article 24? If so, please outline any notable features of the plan or aspects of its implementation (briefly).

No.

13. Which public bodies have legal responsibilities for meeting air quality standards in your Member State?

According to the Ministry of Environmental Protection and Regional Development (MEPRD) these are local governments in cooperation with the Ministry (according to local governments, it is *vice versa*). At the end of the day, it is shared competence of both. The municipalities have legal responsibilities to take into account data on air pollution when planning the development of its territory,³⁷ as well as to elaborate and implement Air quality plans where they are required according to the law. Moreover, they must report to the MEPRD by the 1st of March of each year on actions taken in the previous year in accordance with the Action Plan (where it has been adopted). According to the Government Regulation (No 1290/2009, Art.27), if the Action plan includes measures (actions) that are beyond the competence of a local government, they are coordinated by the MEPRD or its institution.

The Constitutional Court is currently reviewing a case that highlights the topic of competences and responsibilities of the state (Ministry and its institutions) and a municipality with respect to the rights and duties to set specific requirements aimed at limiting air pollution in a territory of port. The dispute was initiated by a port operator that was required to install a pollution reducing equipment (vapors emission control system) as well as monitoring system if it carries out determined types of activities (e.g., loading/unloading oil products or chemicals (with certain vapor pressure) etc.)). These requirements were introduced by the municipality of Ventspils amending its binding regulation on *Ventspils freeport rules*. The operator claims that his right to property protected by the Constitution has been breached as a local government is not the competent body to determine such types of conditions.³⁸ In fact, there are long lasting problems in connection with air pollution (as well as odor) resulting from the polluting activities carried out in the port of Ventspils (located close to populated areas in Ventspils city).

Notwithstanding to numerous complaints from inhabitants living close to ports (mainly with respect to Riga and Ventspils port), there was no legislative initiative from the environmental authorities of the state to determine in law more stringent measures with respect to polluting activities taking place in ports up to 2018. In light of on-going disputes and lack of action from the legislator, a local government adopted specific requirements that operators of certain polluting

³⁶ Activities of category “A” are listed in the Law on Pollution (Annex I), B and C categories are listed in the Cabinet of Ministers Regulation No 1082/2009.

³⁷ The Regulation of the Cabinet of Ministers of 30 April 2013, No 240 and other planning legislation determining the competence and duties of a local government, for example, there are detailed requirements on “protection from noise and pollution” (Chapter 7.9. of Regulation No 240/2013), including the obligations to plan pedestrian and cycling roads in a way that the best protects users of them from traffic pollution (99 and 110 point). It has competence “taking into account the specific character and risk degree of each particular object or area” and “on the basis of the research, to set such restrictions in the building regulations of the spatial plan or local plan which are stricter than those determined by other laws and regulations in the field of environmental protection or health” (218 point).

³⁸ Constitutional Court case No 2018-19-03. The local government (Ventspils municipality) issued these amendments in 2012 requiring the installation of particular systems from June 2018. On February 2018, similar (or mostly identical) rules were adopted by the legislator amending the Law on Pollution requiring to install particular equipment and to ensure monitoring requirements from 2021 (except were municipalities have already required to introduce them earlier). Thus, indirectly acknowledging the competence of municipalities to set such requirements (though with respect to the territories of ports.)

activities have to observe in Ventspils port that are now challenged before the Constitutional Court.³⁹

14. Are there any legal requirements for different public bodies who have control over different air pollution sources to coordinate their efforts in any way to work towards air quality standards? (For example, different regulators may control highways, airports, local urban planning decisions, large industrial installations, and so on.)

Usually all public bodies that are involved in adopting and enforcing measures in connection with air quality standards are identified as “responsible body” or “need to be involved” for each action/measure identified in national and local planning documents, i.e. when planned action/measure is identified, there is also “the main responsible” body and others with whom the first one has to cooperate. However, with respect to controlling authorities, for example, the State Environmental Service (Inspectorate) responsible for controlling emissions from polluting activities, there is no law-based obligation to coordinate their efforts with other regulators (e.g., with one controlling emissions from cars) towards air quality standards.

Enforcement of Air Quality Law

15. What is the primary mode for enforcing of air quality law in your Member State?

Two main legal mechanisms that could lead to the enforcement actions:

- integration of the specific requirements within the planning documents of local governments that accordingly need to be respected while authorizing one development or another, (see example in response to Q 13); and
- integration of specific requirements in environmental permits of polluting activities.

The enforcement is mainly based on the general administrative enforcement for permitted activities, administrative fines and criminal sanctions (rear). In addition, private enforcement by the public, including environmental NGOs might be initiated against an acts or omissions of public authorities alleged to be breaching environmental law. But no such cases till so far in the area of air quality.

16. Have there been court cases concerning the enforcement of air quality law in your Member State? *Please outline major cases*

There have been very few cases so far.

It seems that the general public is only starting to recognize the harmful effect of air pollution as well as the situation on air quality. Better understandable and accessible information has been made available to the public only recently and before that it was widely presumed that air quality is much better than it turned out to be.

At the same time, no cases have been initiated by members of the public (or environmental NGOs) yet, but ideas on such action are emerging, especially with respect to air quality of Riga. Additionally, recent problems on the lack of complete monitoring data as has been claimed by the society initiative “The city for people,”⁴⁰ triggered a public movement to join the European wide system of individual monitoring (sampling) points that are reporting data to online open data system.⁴¹

³⁹ The local government basis additional requirements on the Law of Ports. According to this law a local government may determine “requirements for environmental protection.” (Art.6). The complainant claims that this law allows to determine only such type of requirements as stems from existing legislation on pollution.

⁴⁰ Publication on project “Out air.” Available in latvian: <https://pilsetacilvekiem.lv/projekts-musu-gaiss/> They invite everyone to join the system on the public monitoring of the air quality: <https://pilsetacilvekiem.lv/gaiss/>

⁴¹ Through open data portal LUFTDATA launched in Germany: <https://luftdaten.info/>

Up to now, there have been only court cases initiated by the operators objecting to the mitigation actions they were required to perform in relation to pollution emitting activities. Two are worth noting:

1) Case before the administrative court (No SKA-53/2017).⁴²

The operator challenged requirements of the environmental authority included in the renewed B category permit for the polluting activity (metal slag recycling). One of the disputed requirements obliged the operator to carry out instrumental monitoring for air pollution from his activities (involving accredited laboratory) more often than in the permit before. Previously it was once every two years. The operator challenged this requirement among others by claiming it was disproportional.

The court admitted that in principle the environmental authority was entitled to determine such type of requirements as well to change intensity of monitoring but they have to be in compliance with the principle of proportionality and be based on the efficiency considerations.

The court agreed with the environmental authority on legitimate aim of such requirements pointing out that the measurements are needed to control emissions limit values and to interpret and compare monitoring data with the requirements of permit and legislation on environmental air quality standards.

The court ruled in favour of environmental authority and rejected the complaint of the operator. In its assessment on the consistency with the efficiency considerations and proportionality, referring *inter alia* to EU Regulation No. 166/2006 concerning the establishment of a European Pollutant Release and Transfer Register and obligations to make available information to the public and related national legislation requiring collect and submit data once a year.

2) The above mentioned Constitutional Court case No 2018-19-03 (pending case)⁴³

Dispute on the competence of a local government to set more stringent requirements than embedded in the B permit for particular operators working with oil and petroleum products in the area of port. The requirements of a local government were triggered by high level of overall emissions in this area located close to populated areas. Thus, the local government issued the binding regulation with respect to the actions in territory of port. It required port operators *inter alia* to install a specific emission control systems in order to ensure that “volatile organic compounds emissions from cargo vapors emission control system does not exceed 10g/Nm³”. The regulation also determines actions to be taken if emissions exceed the limits.

17. Please outline any other major challenges faced in your Member State for enforcing the AQD, or any other applicable air quality law.

Firstly, lack of clarity on which decisions are within the responsibility of which public authority as well as lack of coordination of different authorities might seriously affect effective implementation of actions needed to ensure appropriate air quality. Secondly, many measures or actions envisaged are closely connected with change of daily habits of the society (e.g., very dominant car preference instead of bicycle and public transport). Some of envisaged actions require significant investments (like plans to build completely new infrastructure for *inter alia* reallocating the port outside Riga center and to build bypass roads around the center). In addition, some of measures are unpopular (like to introduce a congestion charge for entering the city center) as well as difficult to be enforced (e.g., due to existing infrastructure system through center there are some practical limitations to develop a wider bicycle infrastructure and leave some streets of the center to pedestrian ones). Finally, the political priorities play crucial role and air quality has not been among priorities of municipality of Riga, i.e., the city where air pollution is the highest as noted under the first questions above.

⁴² The Administrative Supreme Court judgment of 24 April 2017, case No SKA-53/2017 upholding the Appeal court judgment of 21 April 2015.

⁴³ See under Q 13.

18. How has your Member State implemented these EU vehicle type approval rules? Have there been any controversies in transposing these rules?

This question is under the competence of the Ministry of Transport and unfortunately will not be answered as information is incomplete.

19. What legal measures have been taken in your Member State (if any) against car manufacturers which have failed to comply with vehicle type approval rules? *These legal measures might include court cases, including between car buyers and manufacturers.*

No action taken.

Case Study

There could be several avenues (in accordance with administrative, constitutional and civil law procedures):

1. Request an action from the state (two different possibilities – through administrative level and Administrative court and through the Constitutional court):

- 1.1. Administrative: According to Article 9(4) of the Environmental Protection Law (EPL) a private person may submit a complaint and request action of the competent authority in case of violation of environmental law (including exceeded emission standards) or a threat to the environment (including to human health). This may result in a court action based on Article 9(3) of the EPL in case the competent authority does not take appropriate actions to prevent infringement of the law or a threat to the environment.⁴⁴ However, in light of the given conditions of the case and taking into account the competence of the environmental authority it may act (control and check compliance with the law) only with respect to industrial installations and intensive farms (e.g., checking their compliance with their permits). Thus, this type of action is capable of reaching only individualized breaches of permit conditions or law. It will not capture problems from cumulative effect of different activities resulting in exceeded air pollution.

Nevertheless, if the court would find illegal failure to act by the competent authority that might result in the court judgment admitting an infringement of an applicant's right and legal interest (such as right to a healthy environment or right to health) and then the applicant can claim compensation from the state.⁴⁵ However, it could be only in a case of omission, when a public authority had legal obligation to act or court had admitted illegal action.⁴⁶

⁴⁴ There are quite a number of cases adjudicated based on this Article, some could be mentioned here, as particularly relevant in case the competent authority does not act to prevent infringement (or acting insufficiently): The Administrative Supreme Court (ASC) judgment of 1 July 2011, Case No SKA-215/2011, recognizing the right of environmental group to request the action from the competent authority (State Environmental Service) to ensure that the breach of environmental law is prevented (referring *inter alia* to Article 9(3) of the Aarhus Convention); Another is the ASC decision of 22 Dec. 2015, Case No SKA-1600/2015, discussing competences of a local government *versus* the State Environmental Service while assessing who has the duty to act in accordance with Art. 9(4) and Art. 30 of the EPL for controlling polluting activities with respect to noise and dust pollution (para 8). It is worth noting that Article 9(3) of the EPL claims are so called "environmental exception clause" or in essence an *actio popularis* rule.

⁴⁵ According to Article 92 of the Constitution stating: "Everyone, where his or her rights are violated without basis, has a right to commensurate compensation." E.g. ASC judgment of 10 July 2018, Case No SKA-127/2018, para 4, or the Administrative District Court judgment A42-00048-18/17, recognizing the applicants right to right to compensation, if *causation could be proved*.

⁴⁶ The concept of omission might include also situations where there is "the environmental pollution at such level that might significantly affect private person's right to a health, life, privacy or property and that wouldn't be justified to require that he/she accepts the situation in public interests, but the law does not govern such situations. The, according to the Administrative Supreme Court "the state has constitutional duty to act for reducing such pollution (and thus, a private person subjective public right to require action)." ASC decision of 12 July 2013, Case SKA-759/2013.

- 1.2. To address these illegal pollution problems wider, one may presume that an Action plan on Air quality would have been needed (required by law). Then there could be an additional option to submit complaint to the administrative court about illegal inaction (omission) with respect to adoption of the Action plan based on *Janecek* doctrine. This complaint then shall be submitted against a local government. (No cases till so far to confirm this option).
- 1.3. “Constitutional Court avenue.” One may try to submit a constitutional complaint if all other options are exhausted and no action taken to improve air quality. A private person may claim failure to act if exceeded level is at the level breaching the law. In this case, a private person may try “the constitutional court avenue” submitting a complaint based on a breach of a right to a healthy environment (Article 115 of the Constitution that include a right to environmental information and participation, as well as substantive rights)⁴⁷ or/and a right to a health (Article 111).

In addition, Ombudsman “avenue”:

Another avenue would be through the Ombudsman. In this case, if no action from the competent authority, it might lead to the “constitutional court avenue,” submitted by the Ombudsman, as a relatively similar case suggests. One may reference here the case against illegal exceedance of noise level (from motor racing) that was included in the regulation of the Cabinet of Ministers and challenged by the Ombudsman in the interests of a local inhabitant. This case was triggered by a local inhabitant complaint to the Ombudsman when she did not succeed in fight with a local government to ensure reduction of level of noise from motor racing trucks located in the city (Kandava) near to populated area.⁴⁸ Based on this case, the private person has won a case against the municipality before the Administrative Court and got compensation – personal injury reimbursement, though much smaller amount then requested (500 EUR v 19 000 EUR).⁴⁹

2. Another avenue could be through ordinary court - a submission of a complaint against private persons – polluters to claim damages that the family suffer due to the environmental pollution. But this seems to be very difficult option given particular circumstances of complex pollution. In this case, one would need to prove fault of the polluter(s) (exceedance of emissions stated in permit might suffice), as well as a causal link between pollution and the health problems. At the same time, if there has been the case in favor of the applicant before the Administrative court through option described under 1.1., and any operator has been found illegally polluting the air (exceeding emission limits), then this option might be the next step, i.e., to claim a compensation of the “traditional” damage from the polluter through the ordinary court. (Under the option 1.1. such claim is not covered.)

Financial implications:

- (iii) Under the options 1, the submission at the administrative level is free of charge; submission to the court: I instance - 30 EUR, an appeal - 60 EUR; cassation - 70 EUR. As there is no obligation to be represented by a lawyer, there are no additional expenses by default. There is no court fee or state tax for constitutional litigations.
- (iv) Under the option 2, the court fee (tax) varies dependent on an amount of a claim, e.g., claims up to 2134 EUR, — 15 % of the amount but not less than 70 EUR.

⁴⁷ See for example, the recent Constitutional Court case on the protection of illegal exceedance of noise level that applicant was entitled to be protected from. Constitutional Court Case No 2017-02-03, judgement of 19 Dec.2017.

⁴⁸ Constitutional Court Case No 2017-02-03, judgement of 19 Dec.2017.

⁴⁹ Administrative District Court judgment of 17 April 2018, Case No A42-00048-18/17 (but appealed).

NORWAY

NORWAY
Avosetta Questionnaire: Air Quality Law

London 24-25 May 2019

Air Quality: National Context

1. What are the main sources of unlawful levels of air pollution in your Member State?

Reply: Main sources are road traffic, fireplaces (heating based on burning wood), industry, ships at port and ferries

2. How extensive is reported non-compliance with AQD air quality standards in your Member State?

For AQD air quality standards, please refer to AQD, Articles 12-19.

Please refer to data either reported to the Commission or otherwise available in your Member State. It may be easiest to set this information out in a table for different standards for certain pollutants (NO₂, PM₁₀, PM_{2.5}, SO₂ are likely to be the main pollutants for which there may be reported non-compliance with AQD standards).

- a. If data on compliance with air quality standards is incomplete, please indicate the extent of the non-compliance with requirements of Article 26 AQD (public information requirements).

Reply: It is hard to find data on reporting and compliance. Data focus on a few main cities and areas of heavy traffic and industry. There are approximately ten areas that are subject to significant problems. Most of these have become better in recent years, in particular after the EFTA Surveillance Authority brought a case concerning non-compliance against Norway in 2014 (see question 3).

The judgement was followed up, inter alia, by the Office of the Auditor General, which issued a major report in 2016, criticizing environmental authorities for not following up properly after the judgement and providing recommendations for how to proceed.

Significant efforts are still under way in order to improve measurements and reporting. New web interfaces are about to be established that might improve communication of air quality status and development to the public. One significant challenge is that a very significant part of the responsibility to achieve compliance is delegated to municipalities and that their follow-up measures as well as reporting on compliance differ significantly.

3. Have EU infringement proceedings been brought against your Member State for failure to comply with the AQD?

- a. If so, what was the outcome of this enforcement action and its impact on air quality law and policy in your Member State? (If enforcement action is ongoing, answer this question as best you can in terms of the effects of this action on your Member State's approach to air quality law and policy.)

Reply: The EFTA Surveillance Authority brought a case against Norway in 2014. Norway conceded extensive non-compliance, and the EFTA Court found against Norway in case E-7/15, see <https://eftacourt.int/cases/e-07-15/>

The case has had very significant effects as a support to public authorities' efforts to implement new policy measures.

Air Quality Standards

4. Was there pre-existing national law relating to air quality standards (similar to the AQD), or did the AQD introduce something new in your country?

Reply: Norway had no corresponding rules on air quality prior to the AQD.

5. How are AQD air quality standards implemented in law in your Member State?

Reply: As Chapter 7 of the Pollution Control Regulation ("forurensningsforskriften", adopted 1 June 2004, number 931)

6. Does any law in your Member State provide for air quality standards that go beyond those set out in the AQD, imposing any more stringent standards, for example, in relation to PM_{2.5}?

Reply: Yes, Norwegian mandatory standards were made more stringent in 2016 for PM₁₀: 25 µg/m³ (EU: 40) average over calendar year and PM_{2.5}: 15 µg/m³ (EU: 25) average over calendar year

Air Quality Monitoring and Modelling

7. How are air quality monitoring networks set up in your Member State (briefly)? Do these go beyond the monitoring requirements set out in Chapter II AQD (eg in terms of the number and location of monitoring stations)?

Reply: A major report on the characteristics of the existing monitoring stations (52) and their compliance with the AQD was published in 2015 (Miljødirektoratet and NILU, Norges målenettverk for luftkvalitet. Gjennomgang av stasjonsplasseringer i forhold til krav i EUs luftkvalitetsdirektiver, report no. M-358, 2015, 203 pages). A number of stations were reclassified and adjusted.

8. What sort of problems are encountered in monitoring of air quality in your Member State?

Problems might include: inconsistent results given by different schemes for monitoring air quality, improper siting of measurement equipment, unreliable equipment used, no monitoring established in key areas, unconfirmed results etc.

Reply: One significant challenge is the extent of differences between the seasons. Another challenge might be the fairly limited number of monitoring stations relative to the size of the country.

9. As far as you can determine, are there limitations or problems with the modelling techniques used in your Member State to assess air quality (where modelling is permitted as a method for assessment under Chapter II AQD)?

Reply: Work on modelling seems to have come relatively short in Norway. Start-up was in 2017, and a web site which provide guidance and best practices examples has been established: <http://www.luftkvalitet.info/ModLUFT/ModLUFT.aspx>

National Air Quality Plans and Governance

10. Does your Member State have a national Air Quality Plan under Article 23?

- a. If so, to which pollutants does the plan relate (eg NO₂ or PM₁₀) and what **key** measures does the plan outline to keep exceedances 'as short as possible'? *Please also indicate if you think there are any **weaknesses** in the plan.*
- b. If your Member State has such a plan, how is the legal requirement of keeping exceedances 'as short as possible' satisfied? *Please outline any challenges (legal or otherwise) in meeting this requirement in your Member State.*

Reply: The Norwegian approach has been that national authorities establish guidelines to be followed up through local plans.

11. Whether or not your Member State has an Air Quality Plan, please outline the **key** national regulatory measures that contribute towards compliance with EU air quality standards in your Member State.

For example, what are the main national legal measures that regulate polluting air emissions from emissions from:

- *households (eg restrictions on solid fuels, planning laws);*
- *transport (eg clean air zones); and*
- *industry (eg reliance in Industrial Emissions Directive or something more)?*

Reply: To a significant extent, Norway has relied on economic incentives to promote behavioral change, in particular exemptions from road tolls and other taxes for electric cars, subsidies for installing modern fireplaces. There have also been some regulatory measures, including lowering of speed limits during periods with high pollution, restrictions on the use of studded tires during winter, and a duty to use

electrical power for ships when in port. Industrial emissions are essentially controlled through individual permits under the Pollution Control Act.

12. Has your Member State ever issued a Short-term Action Plan under Article 24? If so, please outline any notable features of the plan or aspects of its implementation (briefly).

Reply: Not to my knowledge.

13. Which public bodies have legal responsibilities for meeting air quality standards in your Member State?

Reply: The Ministry of Climate and the Environment (lead ministry), as well as the Ministry of Transport, the Ministry of Health and Care Services, and the Ministry of Local Government and Modernisation. A very significant share of responsibilities have been delegated to municipalities.

14. Are there any legal requirements for different public bodies who have control over different air pollution sources to coordinate their efforts in any way to work towards air quality standards? (For example, different regulators may control highways, airports, local urban planning decisions, large industrial installations, and so on.)

Reply: There are no explicit legal requirements beyond general governance rules and policies.

Enforcement of Air Quality Law

15. What is the primary mode for enforcing of air quality law in your Member State?

Reply: The primary modes are through instructions from central authorities followed up through local longer term plans and (rarely) specific short-term measures.

16. Have there been court cases concerning the enforcement of air quality law in your Member State? *Please outline major cases or themes in key cases only.*

Reply: There have been no significant cases before national courts to my knowledge.

17. Please outline any other major challenges faced in your Member State for enforcing the AQD, or any other applicable air quality law.

Reply: Access to judicial and legal remedies is very weak in such cases in Norway. There are very limited traditions for use of such remedies to force public authorities to take action. This is one reason why the case before the EFTA Court became a very significant event in the Norwegian context.

A Controversial Source of Air Pollution: Regulation of Vehicle Emissions Systems

Many Member States are currently subject to infringement proceedings by the Commission in relation to vehicle type approval rules. This is currently prescribed under Framework Directive 2007/46/EC establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles [2007] OJ L263/1 and Regulation (EC) No 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 [2007] OJ L171/1.

Amongst other things, this legislation requires Member States to have ‘effective, proportionate and dissuasive’ penalty systems in place to deter car manufacturers from illegal practices, such as installing defeat devices. This legislation was overhauled in 2018 by Regulation (EU) 2018/858 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC [2018] OJ L151/1, which will apply from 1 September 2020.

18. How has your Member State implemented these EU vehicle type approval rules? Have there been any controversies in transposing these rules?

Reply: They have been accepted under the EEA Agreement, and are implemented as technical standards and not through regulations.

19. What legal measures have been taken in your Member State (if any) against car manufacturers which have failed to comply with vehicle type approval rules? *These legal measures might include court cases, including between car buyers and manufacturers.*

Reply: None, to my knowledge.

Case Study

Martha is living in an urban area in your Member State, and her children have developed asthmatic symptoms (i.e. a diagnosed respiratory illness). She becomes aware that the local air quality exceeds standards laid down in the AQD. Her house is next to a main road, which is a heavily used bus route on which bus operators use diesel vehicles. The town also has a number of industrial plants, a coal fired power station, and a number of intensive farms. It is unclear to her precisely which pollution source is causing the breaches of air quality standards, or what their respective contributions might be to the local air quality problem.

What sort of legal action could Martha take in your Member State? And against whom? What remedies do the courts possess? What are the financial implications of bringing such a case? Might there be other regulatory avenues available to Martha instead?

Reply: Martha could bring a civil case against the private or public actor that is causing harm to her as a “neighbor”. However, the threshold for succeeding in such cases before

Norwegian courts has generally been very high, and there has been no successful cases concerning air quality.

POLAND

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Air Quality Law - Polish Report
London 24-25 May 2019

I. Air Quality: National Context

1. What are the main sources of air pollution in your Member State?

- Commercial and residential sector (low emission related to the combustion of solid fuels for heating and household needs, including the combustion of poor quality fuel in household furnaces, obsolete installations). PM emissions from this source category have the largest share in national emissions (45% PM₁₀, 48% PM_{2.5});
- Transport sector

1.1. In terms of environmental legislation concerning air protection, three basic groups of air pollution sources subject to legal regulation are distinguished in literature¹:

- “Spatially clustered sources” (installations and equipment);
- “Spatially dispersed sources” (roads, railway lines, airports and ports);
- Substances and products.

1.2. In turn, in strategic documents, in particular in the National Program for Air Protection and regional air protection programs (at the voivodship level), categories/ groups of air pollution sources are distinguished slightly different.

1.2.1. In the **National Program for Air Protection until 2020 (with prospects up to 2030)** adopted in 2015, three main sources of air pollution are distinguished²:

- Commercial and residential sector;
- Transport sector;
- Energy and industry sector.

The National Program for Air Protection (“NPAP”) proves that **the main source of poor air quality in many zones is the commercial and residential sector**³. The reasons for exceeding PM₁₀ and PM_{2.5} concentrations and B(a)P level are mainly low emissions related to housing heating (the commercial and residential sector), to a lesser extent related to vehicle traffic (the transport sector)⁴. The share of the industry sector was rated as low⁵. A reduction in the share

¹ M. Górski, Emissions from point sources from industrial polluters in: European Judicial Review No. 7/2017, p.29.

² National Program for Air Protection until 2020 (with prospects up to 2030) Ministry of Environment, Air Protection Department. Warsaw 2015. <https://www.gov.pl/web/srodowisko> (viewed on 5 May 2019).

³ Ibidem, p. 19 (a share of approx.90%).

⁴ Ibidem, pp. 21-22 (as of 2013).

⁵ Ibidem, p. 19 (a share of 5%)

of the industry sector results from the applied technical and technological solutions (BAT technologies) and legal measures (integrated permits)⁶.

1.2.2. In regional programs for air protection adopted at the voivodship level, the same categories of sources of air pollution are distinguished.

For example, in the program for air protection for Małopolskie voivodship⁷ of 2017, the following pollution sources are identified:

- impact from outside the voivodship,
- sources of emissions from Małopolska region with further division into surface (commercial and residential) sources, linear (the transport sector) and point sources (energy and industry sectors)⁸.

The analyses and assessments presented in the air protection program for Małopolskie voivodship demonstrate that:

- **Surface sources** from the commercial and residential sector originating from housing are the main cause of exceeding particulate matter and benzo(a)pyrene levels⁹;
- **Linear sources** (the transport sector) contribute significantly to high annual average concentrations of nitrogen dioxide (on average more than 65% share in concentrations); they are also the cause, though not the main one, of exceeding PM₁₀ concentrations; however, they are not the cause of high concentration of benzo(a)pyrene in ambient air of Małopolska¹⁰.
- **Point sources** (industry in Małopolskie voivodship) as well as **other emission sources** such as emissions from agriculture and breeding, and non-organized emissions contribute to a limited extent to exceeding limit values of concentrations of PM_{2.5}, PM₁₀, benzo(a)pyrene and nitrogen dioxide¹¹.

2. How extensive is reported non-compliance with AQD air quality standards in your Member State?
For AQD air quality standards, please refer to AQD, Articles 12-19.
Please refer to data either reported to the Commission or otherwise available in your Member State. It may be easiest to set this information out in a table for different standards for certain pollutants (NO₂, PM₁₀, PM_{2.5}, SO₂ are likely to be the main pollutants for which there may be reported non-compliance with AQD standards).

- a. **If data on compliance with air quality standards is incomplete, please indicate the extent of the non-compliance with requirements of Article 26 AQD (public information requirements).**

⁶ Ibidem, p. 19

⁷ Resolution No. XXXII/451/17 of the Małopolskie Regional Assembly of 23 January 2017 on the amendment to the resolution No. XXXIX/612/09 of the Małopolskie Regional Assembly of 21 December 2009 regarding the "Air protection program for Małopolskie voivodship" amended by resolution No. VI/70/11 of 28 February 2011 and Resolution No. XLII/662/13 of 30 September 2013.

⁸ Ibidem, p.29-39.

⁹ Ibidem, p.35.

¹⁰ Ibidem, p.37.

¹¹ Ibidem, p.38.

2.1. The task of conducting research and assessments of the condition of the environment, including air quality monitoring, is carried out by Inspekcja Ochrony Środowiska (Inspectorate of Environmental Protection).

This task is performed as part of the State Environment Monitoring (SEM), the program developed by the Chief Inspector of Environmental Protection and approved by the Minister of Environment.

Based on the national SEM program, voivodship SEM programs are developed and are subject to approval by the Chief Inspector of Environmental Protection.

Currently, the "Program of State Environment Monitoring for 2016-2020" is being implemented¹².

Air quality monitoring includes tasks related to the examination and assessment of air pollution, including measurement and assessment of air quality in zones¹³.

In 2005 the deadline for reaching the limit values for particulate matter PM_{10} has passed. Furthermore, in 2015 the deadline for reaching the permissible levels for $PM_{2.5}$ has expired¹⁴.

2.2. The report: "Air Quality in Poland in 2017 in the light of the results of measurements carried out as part of the SEM program"¹⁵ demonstrates the following:

Air pollution in agglomerations and cities with more than 100,000 residents in 2017¹⁶:

- "Measurements of B(a)P concentrations in Poland have for many years shown the occurrence of exceedances of normative concentrations of this pollutant, sometimes very significant, in a large number of stations and in different regions of the country."
- In 2017 the limit value of PM_{10} and $PM_{2.5}$ concentrations was exceeded.

Air pollution by ozone at national level¹⁷:

- In 2017 the target level of ozone was exceeded (at three measuring stations in cities, one suburban station and three out of 100 suburban stations);
- in 2017 the long-term target level was exceeded (as registered at 78 out of 95 stations);
- in 2017 the alarm level was not exceeded.

Air pollution with PM_{10} at national level¹⁸:

¹² Air quality data is available on the website:

http://powietrze.gios.gov.pl/pjp/content/measuring_air_assessment_rating_info

¹³ <http://powietrze.gios.gov.pl/pjp/home> (viewed on 5 May 2019).

¹⁴ Regulation of the Minister of Environment of 24 August 2012 on the levels of certain substances in the air (Dz. U. /Polish Journal of Laws/ of 2012 item 1031).

¹⁵ Jacek Iwanek et al." Report. Air quality in Poland in 2017 in the light of the results of measurements conducted as part of the State Environmental Monitoring", Warsaw 2018, <http://powietrze.gios.gov.pl/pjp/maps/air/quality/type/R>

¹⁶ Ibidem, p.157-158.

¹⁷ Ibidem, p.159.

¹⁸ Ibidem p. 159-160.

- As in previous years, high concentrations of **PM₁₀** were noted in many cities in Poland. In 31 out of 209 urban and suburban stations, the **average annual concentration of PM₁₀ exceeded the limit value**;
- "In 2017, as in previous years, **daily limit value of concentration was exceeded in many urban and suburban stations**. Such exceedances in 2017 occurred at 68% of urban and suburban stations, including 79% of transport stations. The largest number of stations at which exceedances were recorded are located in cities of central and southern Poland, and the least in the north of the country. In cities of Zachodniopomorskie, Warmińsko-Mazurskie and Podlaskie voivodships no exceedance of daily limit value of **PM₁₀** was recorded. Also no exceedances occurred at suburban stations in Poland";
- The largest number of days with exceedances of the daily limit value of **PM₁₀**, i.e. 130 days, were registered at two stations in Małopolskie voivodship. "Over 100 days with exceedances were registered at eight stations in three voivodships (the largest in Małopolskie voivodship)";
- "In 2017 **79 cases of exceeding the alarm level of PM₁₀ concentrations** (300 µg/ m³ for 24-hour concentrations) occurred. These exceedances (up to 860 µg/m³ in Rybnik) were registered at 35 stations in four voivodships (Śląskie, Małopolskie, Łódzkie and Dolnośląskie)";
- "In 2017, there were **369 cases of exceeding the information level** (200 µg/ m³ for 24-hour concentrations of **PM₁₀**). These exceedances occurred at 105 measuring stations, in 12 voivodships";

*Air pollution with **PM_{2,5}** at national level¹⁹:*

- "In 2017, at 29 out of 93 measuring stations (31%) located in nine voivodships, the **average annual concentration of PM_{2,5} exceeded the limit value** (...). Exceedances occurred at 31% of urban background stations, at one of seven suburban background stations and at five out of eight transport stations (63%)";
- "The highest average annual concentrations of **PM_{2,5}** occurred at transport stations in Kraków and Katowice. At these stations, the average annual concentration of particulate matter exceeded the permissible level by more than 50%";
- "The highest concentrations of **PM_{2,5}** are recorded in the cold season, similarly as in the case of **PM₁₀**" (January-February).

3. Have EU infringement proceedings been brought against your Member State for failure to comply with the AQD? – yes;
 - a. If so, what was the outcome of this enforcement action and its impact on air quality law and policy in your Member State? (If enforcement action is ongoing, answer this question as best

¹⁹ Ibidem p. 161.

you can in terms of the effects of this action on your Member State's approach to air quality law and policy.)

3.1. In the judgment in Case C-336/16, the Court of Justice ruled that:

- By exceeding in the years 2007 to 2015 inclusive daily limit values for **PM₁₀** concentration in 35 air quality assessment and management zones, and annual limit values for **PM₁₀** concentration in **nine air quality assessment and management zones**;
- By not taking appropriate actions in air protection programs aimed at ensuring that the period of occurrence of exceeding the limit values for particulate matter **PM₁₀** concentration in air is as short as possible;
- By exceeding the daily limit value for concentration of **PM₁₀** in air increased by the margin of tolerance in the period from 1 January 2010 to 10 June 2011 in three zones, as well as in the period from 1 January to 10 June 2011 in one zone, and
- By failing to correctly transpose the second subparagraph of Article 23 (1) of the CAFE Directive

the Republic of Poland failed to fulfil its obligations of that Member State under Article 13 (1) of Directive 2008/50 in conjunction with Annex XI thereto, the second subparagraph of Article 23 (1) of this Directive, as well as Article 22 (3) of the above-referenced Directive in conjunction with Annex XI to it.

The judgment of the Court of Justice confirms that Poland **has not taken effective measures thanks to which periods of occurrence of the above-mentioned exceedances would be as short as possible (*as far as possible*)**. It also results from the established deadlines for the cessation of exceedances indicated in the programs for air protection. Depending on the zone in question, it was the period between 2020 and 2024. The Court of Justice rejected in this respect the argumentation raised by Poland, including difficulties of a social, economic and budgetary nature, as justification for setting such long deadlines for the cessation of exceeding the limit values for the concentration of **PM₁₀** in ambient air.

The judgment of the Court of Justice **confirms that the problem concerns both the incorrect implementation of the directive and the sphere of actual implementation of the obligations imposed by the directive**, as the pleas in law are aimed at proving a systematic and persistent failure to comply with the provisions of Article 13 (1) of the CAFE Directive in conjunction with Annex XI thereto (general and continuous nature of the alleged violation of the Directive) by continuously exceeding (not keeping) the limit values for certain substances in a significant number of zones (persistent structural failure).

3.2. Enforcement of the Court's ruling - legislative changes to implement the judgment of the Court of Justice of the European Union and the policy in the air protection sector.

3.2.1. The Court's judgment justifies a thorough revision of the procedure for the development and implementation (ensuring the implementation of objectives) of programs for air protection, so that the periods of occurrence of exceedance of certain substances in

ambient air in each zone are as short as possible. Furthermore, appropriate organizational and financial solutions ensuring effective actions in the area of air protection are required.

Currently, an amendment to the Act - Environmental Protection Law (EPL) and the Regulation of the Minister of Environment on programs for air protection and short-term action plans is under way. The planned amendment includes, inter alia,²⁰:

- Adding in the EPL Act an explicit definition stating that "programs for air protection (PAP) determine appropriate actions, so that the period in which the limit and target values are not kept, is as short as possible" (underlined by BI MB);
- Clarifying the provisions of the EPL Act to enable control over the timely formulation and implementation of tasks resulting from the programs and short-term action plans (STAP), as well as financial sanctions for failure to perform these tasks"; and
- Related tasks of government and self-government administration in the scope of reporting, monitoring and verification of the level of implementation of corrective actions provided for in the programs for air protection and short-term action plans;
- Change of the statutory delegation to the amendment of the regulation of the Minister of Environment of 18 September 2012 *on programs for air protection and short-term action plans*, in order to increase the effectiveness of corrective actions defined in the programs, in accordance with the requirement to achieve the environmental effect in time "as short as possible", e.g. by "supplementing the scope of PAP with short-term actions with a deadline of not more than two years (...) from the day of adopting the program" or "introducing indicators for monitoring the progress of implementation of remedial actions and environmental effects achieved (...)"²¹.

On the Sejm website a parliamentary another draft amendment to the Act - Environmental Protection Law that provides for organizational, legal and financial solutions for improving air quality throughout Poland is also made available.²² This draft introduces:

- Providing public funding of expenditure on improving air quality at the level of 0.5% of GDP per year;
- Making mandatory certain tasks specified in the National Program for Air Protection (replacing heat sources with ecological ones, increasing energy efficiency, using renewable energy (RES), especially in the field of citizen-produced energy, environmental and health education);

²⁰ The Public Information Bulletin of the Council of Ministers. The draft amendment to the Act - Environmental Protection Law <https://bip.kprm.gov.pl/kpr/bip-rady-ministrow/prace-legislacyjne-rm-i/prace-legislacyjne-rady/wykaz-prac-legislacyjnych/rejestr45489205.dok.html?czas=1550476800>

²¹ Ibidem.

²² Rationale for the draft act <https://www.sejm.gov.pl/Sejm8.nsf/PrzbiegProc.xsp?nr=2986>

- Providing public financial support not only to investment outlays but also the current costs of more expensive, ecological heating. It aims to compensate for possible higher costs of ecological heating;
- Introduction of statutory regulation regarding the quality of fuels applicable in the commercial sector and the required quality of heating equipment; implementation of effective tools for control and penalties for non-compliance with the above restrictions and prohibitions;
- Lowering the upper limit of the information level and the alarm level.

3.2.2. During the proceedings relating to Poland's violation of the CAFE Directive, political and legislative actions aimed at combating smog were implemented, which resulted in new legal solutions or solutions in the field of environmental policy.

3.2.2.1. Anti-smog resolutions

In 2016, the Act - Environmental Protection Law was amended, its Article 96 which contains the basis for taking up action at a regional level (adopting the so-called anti-smog resolution) to prevent negative impacts on human health or the environment.

- By way of an “anti-smog” resolution, a regional assembly can introduce restrictions or prohibitions in respect of operation of fuel combustion systems (with the exception of systems whose operation is regulated by way of licenses or applications).
- Local government authorities can specify, by way of a resolution, which fuels and in what type of installations may be used in a given area.
- An “anti-smog” resolution **defines**: 1) boundaries of the area where restrictions or bans are introduced; 2) types of entities or systems in respect of which restrictions or bans are imposed; 3) types or quality of fuels permitted for use or banned, or technical parameters, technical solutions or emission parameters for fuel combustion systems admitted for use in this area²³.
- In addition, an “anti-smog” resolution **can also specify**: 1) the manner or purpose of using fuels, which is subject to the restrictions set out in the resolution; 2) the period in which restrictions or prohibitions are in force during the year; 3) obligations of entities subject to the resolution to the extent necessary to control the implementation of the resolution.
- Violation of the restrictions set out in such a resolution constitutes an offense subject to a fine of up to PLN 5,000 (Article 334 of the EPL Act in conjunction with Article 24 § 1 of the Code of Petty Offenses).

To date, several “anti-smog” resolutions have been adopted in several voivodships. Three “anti-smog” resolutions were adopted in Małopolskie voivodeship.

²³ Art. 96 of the Environmental Protection Law.

- The first “anti-smog” resolution (also the first in Poland) was adopted by the Małopolskie Regional Assembly in 2016 and concerns the city of Kraków. A total ban on the use of solid fuels in heating systems (boilers, furnaces, fireplaces) from 1 September 2019 was introduced in the city of Kraków.
- Until the entry into force of this ban, transitional solutions were introduced in the next resolution of the Malopolskie Regional Assembly of 2017, in which quality requirements for solid fuels were introduced for the city of Kraków, to be applied until the total ban on the use of solid fuels in Kraków becomes effective.
- The third anti-smog resolution concerns the area of Małopolskie voivodship with the exclusion of Kraków and introduces restrictions in the scope of heating systems (possible use of stoves and fireplaces that meet certain requirements) and in terms of fuel quality.

3.2.2.2. *"Clean Air" Program adopted by the Council of Ministers on 25 April 2017.*

The program contains recommendations and indicates activities to be carried out by the government administration to improve air quality. They include planned legal and factual actions and mechanisms for financing activities in the area of air protection.

3.2.2.3. *Regulation of the Minister of Development and Finance of 1 August 2017 on the requirements for solid fuel boilers*

The Regulation implements one of the recommendations of the abovementioned Clean Air Program. It describes the requirements for solid fuel boilers for use in households and small and medium-sized enterprises placed on the market and put into service²⁴.

3.2.2.4. *Act of 5 July 2018 on the amendment to the Act on the Fuel Quality Monitoring and Control System and the Act on the National Tax Administration and the implementing regulations issued on its basis.*

The objective of the amendment together with implementing regulations is to **eliminate from the market the most harmful solid fuels used by individual consumers**.²⁵ The Act sets out or clearly determines:

- quality requirements for solid fuels (bituminous coal and fuels made from bituminous coal containing a certain % of it);
- rules for controlling the quality of solid fuels placed on the market or placed under a customs approval procedure for release to trading, if these fuels are intended for use in households and combustion installations with a rated thermal input below 1 MW;
- catalogue of solid fuels, the placing of which on the commercial and residential market will be prohibited (e.g. coal slurries, floatation concentrates).

²⁴ Rationale for the draft regulation of the Minister of Enterprise and Technology amending the regulation on the requirements for solid fuel boilers

<https://legislacja.rcl.gov.pl/docs//527/12310750/12503352/12503353/dokument351153.pdf>, p. 5 (viewed on 3 May 2019).

²⁵ More on the justification for the draft law <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=2147> (viewed on May 5, 2019).

3.2.2.5 *The Act of 11 January 2018 on Electromobility and Alternative Fuels*

The Act contains comprehensive solutions in the field of **alternative fuels for transport and supports low-emission transport**, including by defining the rules for the development and operation of **infrastructure for the use of key alternative fuels in transport**, including infrastructure used in mass and public transport²⁶.

The Act transposes into the Polish legal system the Directive of the European Parliament and of the Council 2014/94/EU of 22 October 2014 on the development of infrastructure for alternative fuels.

The Act introduces the legal basis for municipal councils to introduce **clean transport zones**, which may contribute to reducing emissions from transport, especially in city centres.

II. Air Quality Standards

4. Was there pre-existing national law relating to air quality standards (similar to the AQD), or did the AQD introduce something new in your country?

Prior to the implementation of Directive 2008/50 (which was implemented with a delay in 2012), the existing provisions of the Environmental Protection Law were in line with EU regulations in force prior to the CAFE Directive.

5. How are AQD air quality standards implemented in law in your Member State?

5.1. The provisions of Directive 2008/50 have been incorporated into the Polish legal system by the Act of 13 April 2012 which entered into force on 28 May 2012²⁷ and which amended the Act - Environmental Protection Law and some other acts²⁸.

The adaptation of Polish regulations to the provisions of the Directive occurred primarily through: amending the Act - Environmental Protection Law and introducing statutory authorizations for the issuance of executive acts²⁹ and changes to existing statutory authorizations for the issuance of executive regulations³⁰.

²⁶ Rationale for the draft of the Act.

²⁷ According to Article 33(1) of the CAFE Directive, Poland was obliged to implement the provisions of the directive by 11 June 2010. In the absence of incorporation of the provisions of the Directive into the Polish legal system, the European Commission asked the Court of Justice of the European Union to impose on Poland financial sanctions of EUR 71,521/day (press release available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1434&language=PL>) – a complaint registered under the number C-48/12 and order of the President of the Court of Justice of 8 January 2013 on the withdrawal of the case from the Court's register as a result of its withdrawal by the European Commission.

²⁸ Dz. U. (Polish Journal of Laws) of 2012 item 460; hereinafter also as the "amending act" or the "implementing act".

²⁹ The Act - Environmental Protection Law introduced authorizations for the issuance of regulations in the scope of: 1) determining the average exposure indicator (Article 86a paragraph 1 of the Act - see the Regulation of the Minister of Environment of 13 September 2012 issued on this basis and relating to the method of calculating average exposure indicators and the way of assessing compliance with the exposure concentration limit; and 2) national exposure reduction target (Article 86c of the Act - Environmental Protection Law - see the Regulation of the Minister of Environment dated 14 August 2012, issued on this basis and relating to the national exposure reduction target).

³⁰ The Act - Environmental Protection Law changed the authorizations for the issuance of regulations regarding: a) levels of certain substances in ambient air; b) zones in which air quality is assessed; c) assessment of the levels of substances in the air; d) detailed requirements to be met by air protection programs and short-term action; and e) the scope and manner of conveying information on air pollution; also see Table of Convergence to the justification to the draft act amending the Act - Environmental Protection Law and some other acts, available at <http://www.sejm.gov.pl/Sejm7.nsf/druk.xsp?nr=175>

The amending act has implemented the provisions of the Directive in principle ³¹ through:

1. Amendment of the existing regulations in the scope of measurements and assessment of air quality (amended Articles 87-90 of the EPL Act);
2. Amendments in regulations regarding the preparation, execution and implementation of air protection programs and short-term action plans (amended Articles: 91, 91c and 92 of the EPL Act);
3. Amendments in regulations regarding cooperation with other Member States in case of risk of exceeding the levels as a result of pollution in another country (amended Article 92 of the EPL Act);
4. Amendments in regulations regarding notification, conveying information and informing the public (amended Article 92b-94 of the EPL Act);
5. Introduction of regulations in the scope of supervision over the execution and implementation of air protection plans (Article 96a of the EPL Act); and
6. Introduction of regulations on administrative fines for negligence in the preparation and implementation of air protection programs and short-term action plans (Articles 315- 315b of the EPL Act).

5.2. The legislator, implementing the provisions of Directive 2008/50 into the Polish legal system - in addition to the reservations indicated above, which affect the effectiveness of the regulations - did so basically correctly, making literal transfer of the provisions of the directive to Polish law.

6. Does any law in your Member State provide for air quality standards that go beyond those set out in the AQD, imposing any more stringent standards, for example, in relation to PM_{2.5}?

Transposition of the CAFE directive provisions, except one aspect, **does not go beyond the minimum requirements provided for by EU law.**

With reference to the concept of “average exposure indicator”³² the Polish legislator, making its implementation in order to increase the effectiveness of efforts to achieve the exposure concentration obligation for PM_{2.5} at the level of 20 mg/m³ (air quality standard)³³, opted for introducing two concepts, i.e. "national average exposure indicator"³⁴ and "average exposure indicator for a city over 100,000 inhabitants and agglomerations"³⁵.

Thus, in Polish law, annual calculations of average exposure indicators will not only be made in urban background areas on the entire territory of a Member State, but for cities over 100,000

³¹ See M. Baran, Directive 2008/50/EC on ambient air quality and cleaner air for Europe and its implementation in Polish law, the European Judicial Review 2017 No. 5, pp. 15-27 together with the literature indicated there.

³² See Art. 2 point 20 of directive, according to which it means “average level of substances in the air determined on the basis of measurements carried out in urban background areas throughout the territory of a Member State, reflecting the exposure of the population to pollution. It is used to calculate the national exposure reduction target and the exposure concentration obligation”.

³³ This is the justification for the draft act amending the Act - Environmental Protection Law and some other acts.

³⁴ See Art. 3 point 8c of the Act - Environmental Protection Law.

³⁵ See Art. 3 point 46.

inhabitants and agglomerations, which is supposed to increase the possibility of reaching the national reduction target by 2020³⁶.

Air Quality Monitoring and Modeling

7. How are air quality monitoring networks set up in your Member State (briefly)? Do these go beyond the monitoring requirements set out in Chapter II AQD (e.g. in terms of the number and location of monitoring stations)?

Assessments of air quality and observation of changes is carried out within the framework of the State Environmental Monitoring in:

- 1) agglomerations with a population of more than 250,000;
- 2) cities with a population of more than 100,000;
- 3) in other areas of a voivodship that are not part of cities with more than 100,000 inhabitants and agglomerations (Article 87 of the EPL Act).

With regard to the key issue for air quality management, which is the division of the country's territory into zones and agglomerations, for which the state of air quality is assessed and which are subject to management, **the Polish legislator decided to significantly reduce the total number of zones into which Poland has been divided:** from 170 (in 2008) to 46, comprising 12 agglomerations of over 250,000 residents, 18 cities with over 100 000 inhabitants and 16 voivodship areas excluding the zones in cities and agglomerations³⁷.

The justification for such a significant change was the fact that the results of air quality assessment to date (in 2007 made in 362 zones, and from 2008 in 170 zones) pointed to significant problems with air quality management due to significant fragmentation of measurements and small area of the zones in which they were made, basically boiling down to the development and implementation of air protection programs at the provincial and local levels³⁸.

The effect of state environmental monitoring carried out by the Chief Inspector of Environmental Protection is classification of zones separately for each substance, the level of which, respectively:

- 1) exceeds the limit value plus a margin of tolerance;
- 2) lies between the limit value and the limit value plus a margin of tolerance;
- 3) does not exceed the limit value;
- 4) exceeds the targeted level;
- 5) does not exceed the targeted level;

³⁶ This is the justification for the draft act amending the Act - Environmental Protection Law and some other acts.

³⁷ See Art. 87 (2) of the EPL Act and Resolution of the Minister of Environment of 2 August 2012 on the zones in which air quality is assessed.

³⁸ Ibidem.

- 6) exceeds the level of the long-term goal;
- 7) does not exceed the level of the long-term goal (Article 88 of the EPL Act).

8. What sort of problems are encountered in monitoring of air quality in your Member State?

Problems might include: inconsistent results given by different schemes for monitoring air quality, improper siting of measurement equipment, unreliable equipment used, no monitoring established in key areas, unconfirmed results etc.

Until 2018, monitoring of air quality was carried out as part of the state environmental monitoring and was carried out by means of continuous measurements and indicative measurements as well as the application of reference measurement methods in accordance with the requirements of Directive 2008/50.

The principles of air quality assessment in zones were set out in the 2012 regulation.

We do not know if major problems arose; although mathematical modelling techniques for the assessment and analysis of air quality were not used.

Only the amendment of regulations made by the Act of 14 December 2017 amending the Act on the Inspectorate of Environmental Protection and the Act - Environmental Protection Law, which came into force on 2 January 2018, introduced mathematical modelling and the application of mathematical modelling of transport and transformation of substances in the air, and analysis of the results of this modelling for the needs of air quality assessment.

Along with the change in the legislation that introduced mathematic modelling for the purpose of assessing air quality, a new regulation of the Minister of Environment was issued on 8 June 2018 on assessment of levels of substances in the air.³⁹

9. As far as you can determine, are there limitations or problems with the modelling techniques used in your Member State to assess air quality (where modelling is permitted as a method for assessment under Chapter II AQD)?

Under new regulations, mathematical modelling of transport, transformation of substances in the air and analysis of results of this modelling are carried out for the first time in 2019 and they concern an assessment of the levels of substances in the air in 2018 (Article 4 paragraph 1 of the Act of 14 December 2017).

"New regulations implementing the national modelling system for transport and transformation of substances in the air include not only an assessment of air quality in zones, but also an operational forecast of air pollution, cross-border impacts, reporting on the share of natural pollutants and, if necessary, implementation of the national program for air protection"⁴⁰.

The execution of these works was entrusted to the Institute of Environmental Protection - National Research Institute.

³⁹ Dz. U. of 2018 item 1119.

⁴⁰ Rationale for the draft act amending the act on the Inspectorate of Environmental Protection and the Act - Environmental Protection Law <http://orka.sejm.gov.pl/Druki8ka.nsf/0/3B55E6EAF82EC26EC12581E8004AECA4/%24File/2066.pdf> (viewed on 5 May 2019).

"Entrusting tasks in the field of modelling to one institution enables support of the national air quality policy in a consistent manner for all pollutants, homogeneous on national scale in terms of applied methods and does not introduce internal contradictions due to different calculation methods potentially used by different contractors"⁴¹.

National Air Quality Plans and Governance

10. Does your Member State have a national Air Quality Plan under Article 23? - yes

- a. If so, to which pollutants does the plan relate (e.g. NO₂ or PM₁₀) and what **key** measures does the plan outline to keep the exceeding 'as short as possible'? *Please also indicate if you think there are any **weaknesses** in the plan.*

There are two types of air protection programs in the Polish legal system:

- The national program for air protection (Article 91 of the EPL Act), and
- Voivodship (regional) air protection programs (Article 91 of the EPL Act).

10.1. In 2015, the National Program for Air Protection until 2020 (with prospects up to 2030) - hereinafter NPAP – was adopted.

It should be noted that the national program is developed "in case when exceeding the limit values or the targeted values of substances in ambient air occurs in a large area of the country, and the measures taken by local government bodies do not affect the limitation of emissions of certain pollutants into the air"⁴². It is a strategic document "setting goals and directions of actions that should be included in air protection programs"⁴³. **The national program is a non-regulatory act.**

10.2. Compliance with the obligation to develop and implement plans under Article 23 and 24 of Directive 2008/50, is implemented in the Polish legal system by:

- Voivodship (regional) programs for air protection. Such programs are developed and adopted for zones in which the limit or the targeted values for the substances subject to air quality assessment have been exceeded. **Such programs are adopted by way of a resolution of voivodeship regional assemblies within 18 months from the date of receipt of results of an assessment of the levels of substances in the air and the classification of zones. Such a resolution has the status of a local law act.**
- Short-term action plans, if there is a risk of exceeding the alarm, the limit or the targeted level of the substances in the air in a given zone.

10.2.1. To which pollutants does the plan relate

⁴¹ Ibidem.

⁴² Article 91c of the Act - Environmental Protection Law.

⁴³ Ibidem.

Programs are developed and adopted for zones in which the limit or the targeted level for the substances subject to air quality assessment have been exceeded. The results of monitoring and detected exceedances determine the pollutants covered by the plan.

For example, the air protection program in Małopolskie voivodship relates to PM₁₀ and PM_{2.5}, benzo(a) pyrene, nitrogen dioxide and carbon dioxide.

10.2.2. Measures to keep exceedances 'as short as possible':

- Obligation to update the program for air protection after a period of three years from its entry into force, if in the areas covered by the program air quality standards continue to be exceeded;
- Financial penalties for failure to meet the deadlines for the implementation of tasks set out in air protection programs and short-term action plans, that may be imposed on the authority responsible for their implementation (in the amount of PLN 50,000 to PLN 500,000).

10.2.3. Weaknesses in the plans

As confirmed by the results of the audit carried out by the Supreme Audit Office⁴⁴, the responsible authorities (voivodship self-government) comply with the basic obligation, i.e. they develop and adopt programs for air protection; however, a detailed analysis of their content shows the following weaknesses:

- “The adopted programs are characterized by different structures, also in the matter of estimating parameters important for air protection and, as a consequence, varying usefulness in the process of management improving air quality - it is due, among other factors, to too general regulations in respect of the principles for developing air protection programs,
- The adopted periods of validity of individual air protection programs (7-14 years) - in the light of the judgment of the EU Court of Justice in case C-336/16 - confirm the thesis about incorrect transposition of some of the requirements of the CAFE Directive,
- In air protection programs the final year by which the target levels for benzo(a) pyrene will be achieved is not assumed,
- Data on the achieved environmental effects for individual voivodships clearly indicate that the current pace of implementation of remedial actions (regarding low emissions) is far insufficient to achieve the required air quality in the time perspective assumed in currently applicable programs for air protection⁴⁵.

- b. *If your Member State has such a plan, how is the legal requirement of keeping exceedances ‘as short as possible’ satisfied? Please outline any challenges (legal or otherwise) in meeting this requirement in your Member State.*

⁴⁴ See: Protection of air against pollution, years 2014-2017 (the first half year), The Supreme Audit Office Warsaw, September 2018: <https://www.nik.gov.pl/plik/id,17789,vp,20393.pdf> (viewed on 2 May 2019).

⁴⁵ Ibidem, p 18-19.

In the audit carried out by the Supreme Audit Office⁴⁶, in addition to the criticisms mentioned above concerning the quality of the programs for air protection applicable in individual voivodships, also general comments are made in respect of the activities of other bodies that carry out tasks in the air quality management system, whose activities translate into the fulfilment of the obligations under Article 23 of the directive, i.e. *"that the period in which they are not met [quality standards] was as short as possible"*.

The Supreme Audit Office formulated the following basic objections to **the activities of the Minister of Environment**

- "lack of proactive, adequate to the scale of the problem actions to shape air protection policy in the country and ensure proper functioning of certain elements of the air protection system; in particular:
- Lack of cost-benefit analysis - lack of full and detailed data on the actual and required costs of corrective actions and external costs of poor air quality,
- Lack of ensuring a uniform methodology for the development of air protection programs and failure to establish the obligation to specify in the air protection programs indicators enabling the assessment of the degree of implementation of remedial actions (including ecological effects),
- Insufficient efforts to ensure consistency and continuity of funding sources for the elimination of low emissions (e.g. liquidation of the "KAWKA" Program),
- Mitigation (in comparison to the content of the provisions of the National Program for Air Protection) of the position regarding the qualitative parameters of solid fuels proposed by the Minister of Energy⁴⁷.

As regards the activities and tasks of the Minister of Energy, the Supreme Audit Office points to "failure to take sufficient actions adequate to the scale of the problem by:

- Adopting regulations in the scope of quality parameters of solid fuels with a long delay in relation to the needs; moreover, the solutions adopted therein protect the interests of the coal lobby to a much greater extent than the endeavours to protect the citizens and the environment from the negative impact of air pollution,
- Lack of elaboration within the prescribed period (by the end of 2017) - together with other departments - of the assumptions for a comprehensive public policy aimed at protecting vulnerable social groups against energy poverty,
- Development and implementation of the so-called anti-smog tariff for electricity, which will possibly fail to guarantee lower heating costs when using heating devices for more than 8 hours per day⁴⁸.

⁴⁶ Ibidem.

⁴⁷ Ibidem p. 8.

⁴⁸ See: Protection of air against pollution, years 2014-2017 (the first half year), The Supreme Audit Office Warsaw, September 2018: <https://www.nik.gov.pl/plik/id,17789,vp,20393.pdf> (viewed on 2 May 2019).

As regards the activities and tasks of community self- governments, the Supreme Audit Office pointed to the following weaknesses of the actions taken:

- "Lack of detailed inventory of surface emission sources,
- Lack of adequate measures - except for a few exceptions - consisting in replacement/ liquidation of old high-emission sources of heat for solid fuel in the commercial and residential sector,
- Lack of adequate shield programs - except for a few exceptions - providing for subsidies for higher heating costs after replacing solid fuel boilers,
- The scale and pace of corrective actions in communities - apart from a few exceptions - was far from sufficient to achieve required air quality in the time perspective assumed in air protection programs,
- Insufficient own resources of communities in relation to the needs - lack of coherent and permanent financial mechanisms from external sources,
- Too small scale of control in respect of compliance with the ban on waste incineration in households"⁴⁹.

11. Whether or not your Member State has an Air Quality Plan, please outline the **key national regulatory measures that contribute towards compliance with EU air quality standards in your Member State.**

For example, what are the main national legal measures that regulate polluting air emissions from emissions from:

- *households (e.g. restrictions on solid fuels, planning laws);*
- *transport (e.g. clean air zones); and*
- *industry (e.g. reliance in Industrial Emissions Directive or something more)?*

Air protection is implemented basically by two types of regulations:

- Firstly, determining environmental quality standards and controlling their achievement, as well as taking measures to meet them or to restore them - described in detail above, and
- Secondly, reducing emissions (anti-pollution measures) (e.g. emission standards, product standards, emission permits).

The main national legal measures that regulate polluting air emissions from:

Households:

- Legal measures: anti-smog resolutions that introduce restrictions on the use of solid fuel systems; restrictions on solid fuels; requirements for solid fuel boilers used in households; planning laws (see above);
- Other organizational activities described in the program for air protection for Małopolskie voivodship: e.g. extension and modernization of heating networks, use of renewable energy sources, thermo-modernization of buildings.

⁴⁹ Ibidem, p.14.

Transport:

- Legal measures: clean air zones;
- Other organizational activities described in the program for air protection for Małopolskie voivodship: extension of limited paid parking zones; improving the organization of car traffic in cities; development of public transport and implementation of energy-saving and low-emission solutions in public transport; development of cycling transport; strengthening the control at vehicle diagnostic stations.

Industry:

- anti-pollution instruments: emission standards, emission permits, the obligation to measure emissions; financial and legal means of environmental protection (fees and administrative **fin**es) and compensatory proceedings⁵⁰.

12. Has your Member State ever issued a Short-term Action Plan Article 24? If so, please outline any notable features of the plan or aspects of its implementation (briefly).

A short-term action plan is an integral part of the program for air protection.

On the example of the program for air protection for Małopolskie voivodship, short-term activities **include information activities and a list of protective, operational and organizational actions** undertaken within the framework of identified hazard levels - I, II and III ⁵¹.

- Information activities: warnings about the risk of occurrence of hazard levels I, II or III (refers to exceeding the concentration levels of PM10, ozone or sulphur dioxide).
- Protective measures (example for hazard level III): avoiding being in open air, avoiding ventilation of rooms).
- Operational activity (example for hazard level III): intensive home furnace checks, transfer of onerous traffic to alternative road sections, ban on entry of lorries to city centres, temporary stoppage of technological processes.
- Organizational activities (example for hazard level III): recommendations for using public transport, increased vehicle inspections in terms of exhaust quality, temporary suspension of onerous construction works.

13. Which public bodies have legal responsibilities for meeting air quality standards in your Member State?

⁵⁰ In the area where air quality standards have been exceeded, issuing a permit for release into air of a substance in respect of which the air quality standard has been exceeded, from a newly built or significantly altered installation is possible, if adequate reduction of the quantity of this substance released into air is ensured from other installations located in the area of the commune in which the construction of a new installation or a significant modification of an existing installation is planned (Article 225 of the EPL Act). **Issuance of a permit in this case requires compensatory proceedings.** The total reduction of the quantity of the substance should be at least 30% greater than the quantity of the substance allowed to be released into air from a newly constructed installation or from an installation significantly altered.

⁵¹ Protection program s.65-78.

The tasks and the competences in respect of ensuring compliance, achieving and maintaining air quality standards are distributed among government administration bodies (and local self-government bodies, both at the central, regional and local levels).

The bodies responsible for air quality management⁵² are as follows:

- Minister of Environment (undertaking active and adequate to the scale of the problem measures to shape the policy of air protection in the country and to ensure the proper functioning of some elements of the air protection system; ensuring uniform methodology for drawing up air protection programs and establishing the obligation to specify in air protection programs indicators enabling the assessment of the degree of implementation of remedial actions undertaken (ecological effect), ensuring consistency and continuity of financing sources for the elimination of low emissions);
- Minister of Energy (quality parameters of solid fuels, implementation of public policy aimed at protecting vulnerable groups against energy poverty);
- Minister for Entrepreneurship and Technology (requirements for solid fuel boilers);
- Inspectorate of Environmental Protection (performing measurements and assessing air quality - state monitoring of the environment, control over the execution and implementation of air protection programs and short-term action plans);
- Voivodes (supervision over the execution and implementation of air protection programs and short-term action plans),
- Boards of Voivodships (preparation of air protection programs and short-term action plans),
- Staroste (issuing opinions on draft air protection programs and short-term action plans and their implementation);
- Commune Heads (mayors, presidents of cities) (giving opinions on draft air protection programs and short-term action plans and their implementation).

14. Are there any other legal requirements for different public bodies who have control over different air pollution sources to coordinate their efforts in any way to work towards air quality standards? (For example, different regulators may control highways, airports, local urban planning decisions, large industrial installations, and so on.

The authority competent to issue an emission permit is obliged to refuse to issue a permit, if:

- 1) operation of a given installation would cause exceeding environmental quality standards (including air quality);
- 2) issuing a permit would be contrary, inter alia, to air protection programs.

Enforcement of Air Quality Law

⁵² For more information see Protection of air against pollution Years 2014-2017 (first half of year), Supreme Audit Office Warsaw, September 2018, p. 10; <https://www.nik.gov.pl/plik/id,17789,vp,20393.pdf> (viewed: 5/05/2019).

15. What is the primary mode for enforcing of air quality law in your Member State?

The primary mode for enforcing air quality law are regulations concerning legal liability in environmental protection.

15.1 In respect of administrative and legal liability:

- Imposing administrative penalty payments in the event of a breach by the operator of an installation of the terms of the emission permit;
- Commitment of the entity, which uses the environment and has a negative impact on the environment, to reduce the impact on the environment and threats to it;
- Ordering a natural person whose activity has a negative impact on the environment, performance of activities at a given time aimed at limiting the negative impact on the environment and threats to it;
- Suspending activities carried out by an entity using the environment or a natural person causing deterioration of the state of the environment to a significant scope or hazardous to the life or health of people;
- Stopping the use of an installation operated without the required integrated permit;
- Penalties for deficiencies in the development and implementation of air protection programs and short-term action plans.

Article 315a. 1. If the EPA “In the case: 1) when the inspected body does not follow the post-inspection recommendations referred to in Article 96a (3), in respect of observing the deadline for adopting air protection programs and short-term action plans, 2) failure to meet the statutory deadline for adopting air protection programs and short-term action plans, 3) failure to meet deadlines for tasks set out in air protection programs and short-term action plans - the responsible authority is subject to a fine in the amount of PLN 50,000 to PLN 500,000”.

15.2. In respect of criminal liability, first of all, imposing fines for:

- Failure to comply with the restrictions, orders or prohibitions set out in a short-term action plan;
- Failure to comply with the restrictions, orders or prohibitions laid down in a resolution of the regional assembly adopted on the basis of Article 96, is subject to a fine.

15.3. In respect of civil law liability

- Action for the protection of personal rights;
- Liability for damage; however, it could be difficult to prove causal link between damage and activity of the polluter.

16. Have there been court cases concerning the enforcement of air quality law in your Member State? Please outline major cases or themes in key cases only.

Enforcement of air quality requirements by means of protection of personal interests (rights) provided for in the Civil Code.

Article 23 of the Civil Code "The personal interests of a human being, in particular health, freedom, dignity, freedom of conscience, name or pseudonym, image, privacy of correspondence, inviolability of home, and scientific, artistic, inventive or improvement achievements are protected by civil law, independently of protection under other regulations."

Article 24 §1. Any person whose personal interests are threatened by another person's actions may demand that the actions be ceased unless they are not unlawful (...). On the terms provided for in this Code, he/she may also demand monetary compensation or that an appropriate amount of money is paid to a specific public cause.

§ 2. If, as a result of infringement of a personal interest, financial damage is caused, the aggrieved party may demand that the damage be remedied in accordance with general principles.

§ 3. (...)

Article 417. § 1. "The State Treasury or a territorial self-government unit, or other legal person exercising that power by virtue of law shall be liable for damage caused by unlawful act or omission in the exercise of public authority."

Art. 448. In the event of infringement of one's personal interests the court may award to the person whose interests have been infringed an appropriate amount as monetary compensation for the harm suffered or may, at his/her demand, award an appropriate amount of money to be paid for a social cause chosen by him/her, irrespective of other means necessary to remove the effects of the infringement (...).

1) A suit of a resident of Warsaw against the State Treasury in connection with poor air quality

The Court stated that the state of air pollution in recent years and the lack of unambiguous and effective actions by public authorities infringe the personal interests (rights) of the plaintiff, in particular:

- the right to use air that meets at least the standards set out in EU legislation, and restricts:
- the right to freedom by limiting outdoor physical activity at any time,
- the right to leave the house at any time and the possibility of airing the rooms,
- the right to privacy and respect for the place of residence, by exposing to breathing contaminated air for a long time and, consequently, disturbing peaceful residence.

Finding the violation of personal rights of the plaintiff, the court ordered the State Treasury to pay the requested amount of 5.000 PLN for the indicated association.

2) A suit filed by a resident of Rybnik against the State Treasury.

The Plaintiff requested from the Defendant an award of PLN 50,000 as compensation for the infringement of personal interests (rights).

The Plaintiff justified his claim with the fact that in Rybnik, his place of residence, there is significant air pollution (pollution of air with such substances as suspended particulate matter PM 10, benzo(a)pyrene exceeds several times the limit value).

He argued that this state of affairs, contrary to the law, is a source of infringement of his personal interests, in particular: the right to health, the right to protection of private life and housing, the right to free movement and the right to live in a clean environment.

The District Court dismissed the claim in its entirety.

- The Court ruled that the Plaintiff did not give evidence of any infringement of his personal interests in terms of health - he did not prove that the pollution affected his health.
- The Court also stated that the right to live in a clean environment was not an independent personal interest subject to protection under Article 24 of the Civil Code. Although the Court confirmed that there was frequent and significant exceedance of air pollution standards in Rybnik, which was a serious and onerous problem for residents, the Court found no grounds to accept the claim in respect of the demand for compensation.

The Plaintiff appealed against this ruling.

The Ombudsman joined the proceedings, and considered the allegations of the appeal fully legitimate⁵³.

The Ombudsman in the procedural letter demonstrates, first of all, that regular and long-term exceedance of quality requirements for ambient air in Rybnik leads to an infringement of the Plaintiff's right to privacy, family life and housing, as well as the right to freedom of movement. Contrary to the position of the Court of First Instance, this interference - in the opinion of the Ombudsman - does not fall within the generally accepted level, but goes far beyond.

"While an average person would be able to accept the fact that occasionally - due to air pollution - he/she must limit his/her activity, the situation in which the interference with his/her personal interests is (at least in autumn and winter) permanent and - what needs to be emphasized - significant, would not be accepted by an average person."

Secondly, the Ombudsman argues that, contrary to the Court's standpoint, the right to (use) the environment meets all the conditions that determine its recognition as a personal interest within the meaning of Article 23 of the Civil Code.

The Ombudsman emphasizes among others the fact that "the possibility of using unpolluted environment for personal purposes is undoubtedly an intangible asset (...) and it is related to the personality of a human being". The Ombudsman derives the right to use the environment from the provisions of the Constitution, which, although it does not form such a law, imposes an obligation on public authorities to protect the environment and to ensure ecological safety and health protection.

⁵³ The following information comes from the procedural letter of the Ombudsman <https://www.rpo.gov.pl/>

Thirdly, it is alleged that “granting protection based on Article 24 of the Civil Code requires declaring unlawfulness of the act (omission) of the entity that is guilty of an infringement of personal interests: and that "at the same time the Act constructs the presumption of unlawfulness of the infringement. As a result, demonstration of the lack of unlawfulness is a defensive measure for the defendant." The Ombudsman stresses that the Defendant not only failed to demonstrate the lack of unlawfulness of its omission, but that the Defendant's unlawfulness in the light of the referred-to judgment of the Court of Justice of the European Union in Case C-336/16 does not raise any doubts.

The case is still pending.

17. Please outline any other major challenges faced in your Member State for enforcing the AQD, or any other applicable air quality law.

In Polish law, it is not possible for individual entities or ecological organizations to bring a suit to the administrative court against air protection programs. ClientEarth has requested the European Commission to intervene in the matter of system restrictions on access to courts in Poland in respect of air protection⁵⁴.

A Controversial Source of Air Pollution: Regulation of Vehicle Emissions Systems

Many Member States are currently subject to infringement proceedings by the Commission in relation to vehicle type approval rules. This is currently prescribed under Framework Directive 2007/46/EC establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles [2007] OJ L263/1 and Regulation (EC) No 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 [2007] OJ L171/1.

Amongst other things, this legislation requires Member States to have ‘effective, proportionate and dissuasive’ penalty systems in place to deter car manufacturers from illegal practices, such as installing defeat devices. This legislation was overhauled in 2018 by Regulation (EU) 2018/858 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC [2018] OJ L151/1, which will apply from 1 September 2020.

18. How has your Member State implemented these EU vehicle type approval rules? In Poland, Directive 2007/46 is implemented by the provisions of the Act - Road Traffic Law⁵⁵. Provisions regarding technical conditions of vehicles and the scope of their obligatory equipment are standards defining the vehicle's administrative parameters and the scope of its equipment, the fulfilment of which is necessary for the vehicle to be authorised to be used in road traffic. Issues relating to the technical conditions of vehicles

⁵⁴ <https://www.pl.clientearth.org/ke-musi-zareagowac-ws-dostepu-do-sadow-w-zakresie-ochrony-powietrza-w-polsce/> (viewed on 5 May 2019).

⁵⁵ Consolidated text Dz. U. of 2018 item 1990.

are regulated in detail by the provisions of implementing regulations. **Have there been any controversies in transposing these rules?** (we do not know).

19. **What legal measures have been taken in your Member State (if any) against car manufacturers which have failed to comply with vehicle type approval rules? *These legal measures might include court cases, including between car buyers and manufacturers***

As far as we know there were no legal disputes in Poland against car manufacturers in connection with a breach of the provisions of Directive 2007/46 in respect of certificates of conformity and vehicle approval (in connection with the "*Volkswagen scandal*").

Case Study

Martha is living in an urban area in your Member State, and her children have developed asthmatic symptoms (i.e. a diagnosed respiratory illness). She becomes aware that the local air quality exceeds standards laid down in the AQD. Her house is next to a main road, which is a heavily used bus route on which bus operators use diesel vehicles. The town also has a number of industrial plants, a coal fired power station, and a number of intensive farms. It is unclear to her precisely which pollution source is causing the breaches of air quality standards, or what their respective contributions might be to the local air quality problem.

What sort of legal action could Martha take in your Member State? And against whom? What remedies do the courts possess? What are the financial implications of bringing such a case? Might there be other regulatory avenues available to Martha instead?

- Martha can use civil law suits against the State Treasury for protection of her personal rights (see point 16)
- Martha can use civil law suit against "polluter" and demand compensation or preventive measures. But she will have to prove damage and causal between damage/risk of damage and polluter activity; in case of diffuse air pollution it could be hard; Responsibility for damages caused by the impact on the environment does not exclude the fact that the activity causing the damage is carried out on the basis of the decision and within its limits.
- Martha can seek administrative law remedies by sending a complaint to competent public authority. The competent authority can initiate a proceedings from the office and can use administrative sanction (e.g. suspend activity of the polluter, stop the use of an installation; limit the negative impact on environment) if the prerequisites for their use are met.

PORTUGAL

Avosetta Questionnaire: Air Quality Law - PORTUGAL

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London 24-25 May 2019

Most of the questions below relate to implementation of the EU Ambient Air Quality Directive (Directive 2008/50/EC [2008] OJ L152/1, 'AQD'), looking beyond direct transposition to actual implementation and the legal and structural challenges in meeting EU air quality standards. Some questions extend beyond the AQD to examine other controversial or emerging aspects of EU law relating to air quality.

Air Quality: National Context

1. What are the main sources of unlawful levels of air pollution in your Member State?

The main sources of primary air pollutants are:

for SO₂: energy production (64%) and industry (26%)

for PM_{2,5}: industry (33%) and domestic heating (26%)

for PM₁₀: industry (47%) and domestic heating (36%)

for NO₂: road traffic (41%) and energy production (35%)

NO₂ and O₃ are the two biggest concerns with values exceeding the limits established and with no prospects for improvement.

From the nineties, a large effort has been made to reduce emissions¹.

Tabela 1: Variação das emissões de poluentes atmosféricos em Portugal

Poluente	Δ1990-2012	Δ2005-2012
NO _x	-31%	-37%
COVNM	-43%	-19%
SO ₂	-86%	-75%
NH ₃	-25%	-6%
PM _{2,5}	-24%	-19%
PM ₁₀	-16%	-26%

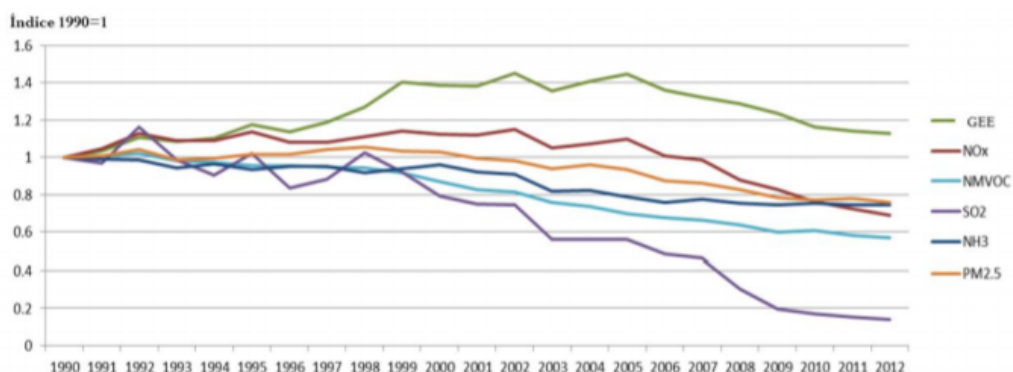


Figura 2: Evolução histórica das emissões de GEE e poluentes atmosféricas (Adaptado de IIR, 2014) Por forma a minimizar os efeitos adversos da poluição atmosférica nos ecossistemas e saúde humana, têm vindo a ser debatidos, a nível comunitário e internacional, objetivos mais ambiciosos, em termos de redução de poluentes atmosféricos.

¹ National Strategy for air quality 2020, adopted in 2015

https://www.apambiente.pt/zdata/DAR/Ar/ENAR_03_Projecoes_vf.pdf

Tabela 2: Tetos de emissão definidos para Portugal no Protocolo de Gotemburgo

Poluente	2005	%redução face a 2005	Objetivo em 2020 (Gg)
SO ₂	177	63%	65
NO _x	256	36%	164
NH ₃	50	7%	47
COVNM	207	18%	170
PM _{2,5}	65	15%	55

The aggregated data don't show the real panorama of the country as there are significant regional variations².

Tabela 1: Variações de emissões de poluentes atmosféricos (NO_x, PM10) entre os anos de 2009 e 2015 para as regiões NUT II de Portugal continental.

Poluentes	NO _x			SO _x			PM10		
	Anos/Variação	2009	2015	Δ	2009	2015	Δ	2009	2015
Regiões	(t/km ²)	(t/km ²)	%	(t/km ²)	(t/km ²)	%	(t/km ²)	(t/km ²)	%
Algarve	1,974	1,306	-33,8	0,117	0,058	-103,4	0,567	0,393	-30,8
Centro	2,785	1,836	-34,1	0,463	0,472	1,9	1,391	0,858	-38,3
Norte	2,841	2,068	-27,2	0,705	0,262	-169,3	1,085	0,757	-30,2
Lisboa	6,664	4,758	-28,6	2,473	1,331	-85,8	2,578	1,138	-55,9
Alentejo	0,408	0,376	-7,8	0,028	0,014	-86,7	0,197	0,130	-33,7
Portugal continental			-26,3			-88,7			-37,8

Tabela 2: Variações de emissões de poluentes atmosféricos (CH₄, CO₂, NH₃, PM2.5) entre os anos de 2009 e 2015 para as regiões NUT II de Portugal continental.

Poluentes	CH ₄			CO ₂			NH ₃			PM2.5 *
	Anos/Variação	2009	2015	Δ	2009	2015	Δ	2009	2015	Δ
Regiões	(t/km ²)	(t/km ²)	%	(t/km ²)	(t/km ²)	%	(t/km ²)	(t/km ²)	%	(t/km ²)
Algarve	3,648	3,203	-13,9	317,648	260,254	-22,1	0,307	0,239	-28,5	0,276
Centro	4,172	3,744	-11,4	403,777	415,274	2,8	0,501	0,619	19,0	0,694
Norte	6,890	5,243	-31,4	621,638	505,331	-23,0	0,543	0,486	-11,6	0,570
Lisboa	10,347	8,922	-16,0	1934,885	1922,466	-0,6	0,740	0,806	8,1	0,961
Alentejo	1,523	2,755	44,7	56,520	51,548	-9,6	0,565	0,402	-40,7	0,072
Portugal continental			-5,6			-10,5			-10,7	

* dados disponíveis apenas para o ano de 2015.

Similarly, the number of deaths associated with respiratory diseases or diseases of the circulatory system, also differs greatly from one region to another:

² The following tables and graphics are available in the **Report on air pollution** presented in 2017 by the National Health Institute (http://repositorio.insa.pt/bitstream/10400.18/4865/1/Boletim_Epidemiologico_Observacoes_N19_2017_artigo4.pdf).

Gráfico 1: Evolução do número de mortes por doenças respiratórias do ano de 2009 a 2015, nas diferentes regiões de Portugal continental.

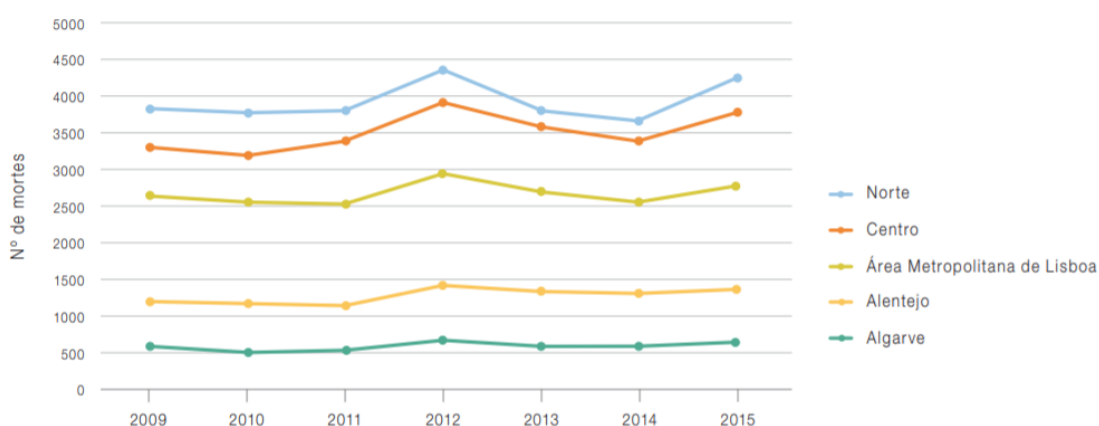
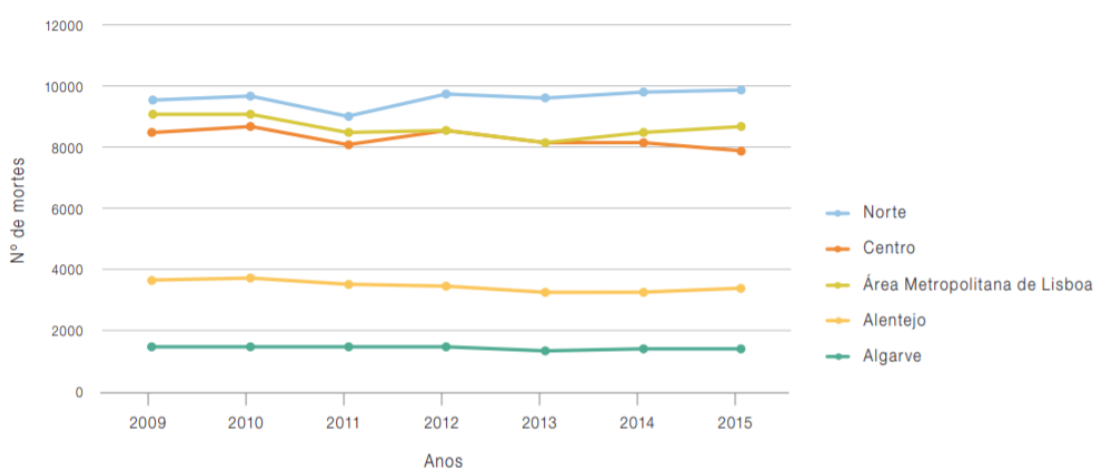


Gráfico 2: Evolução do número de mortes por doenças do sistema circulatório do ano de 2009 a 2015, nas diferentes regiões de Portugal continental.



2. How extensive is reported non-compliance with AQD air quality standards in your Member State?

For AQD air quality standards, please refer to AQD, Articles 12-19.

Please refer to data either reported to the Commission or otherwise available in your Member State. It may be easiest to set this information out in a table for different standards for certain pollutants (NO₂, PM₁₀, PM_{2.5}, SO₂ are likely to be the main pollutants for which there may be reported non-compliance with AQD standards).

First of all, it is important to explain that for public authorities in Portugal air pollution is not one of the main environmental concerns. This statement is confirmed by the Portuguese answers to the question “in your opinion, which of the following are or would be more effective ways of tackling problems of air quality?” in the Special Eurobarometer Attitudes of European citizens towards the environment (2017). Differently from the other countries, 46% of Portuguese respondents think that: “ensuring better enforcement of existing air quality legislation”³ is the most effective way to tackle air problems.

³ See Special Eurobarometer 468 on *Attitudes of European citizens towards the environment*, published in November 2017 (<http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/SPECIAL/surveyKy/2156>) in Annex I.

Until very recently the information on air quality followed the same approach as information on any other environmental sector. The perspective on active dissemination of information was no different from nature conservation, water or waste.

According to annex XVII of the National Air Quality Law⁴ The main sources of information are the Portuguese Environmental Agency (PEA) and the Regional Coordination and Development Commissions⁵ through their websites. The information available for the public was a description of the general laws and regulations in force and air quality reports produced for the EU and UN bodies, both on air and on any other environmental sector. There is a database on air quality, “Qualar”. But the access to Qualar used to be quite “unfriendly” for lay users (this concept is explained in more detail below). The measurements were presented as raw data, without indicating whether there was an exceedance of certain parameters or not. Some information, such as reports, was even presented in English language. Large parts of the information are reports produced by the European Union institutions and organs.

No information on exceedance of air quality standards using other channels of communication is usually provided. The only exception is the exceedance of ozone thresholds which has indeed lead to some alerts, using mass media of communication such as TV, radio or press.

In 2019, the panorama changed quite radically. One month ago, a Resolution of the Council of Ministers of the 10th April 2019 declared the 12th April as the national air quality day. On the same day, a new website <https://por1bom-ar.apambiente.pt/> (literally “for a good air”) was launched by the Portuguese Environmental Agency. This was the result of a 3-year project supported by the Cohesion Fund⁶ for the “modernization of the air quality information system (QualAr) and reinforcement of background pollution monitoring”. The new QualAr information system was specially designed to provide lay users friendly access to information. The colourfull and brand-new website is divided in three tabs: “know the air you breathe”, “chose the air you breathe” and “protect yourself”.

In the first tab, a brief plain language explanation of the different atmospheric pollutants, their main sources in Portugal and the main effects on human health and ecosystems (sometimes too short and too optimistic information) can be found.

In the second tab, there is a list of behaviors that can be adopted by citizens (mostly related to soft mobility or collective transports) to reduce emissions both at the individual and the household level.

In the third tab, another list of self-protection measures (mostly related to the prevention of physical activity in the open air in polluted areas or during episodes of excess pollution).

In the future, other information will also be available. For the moment, several parts are “**under construction**”: validated data, the historic index of air quality, the management units, the statistical data, etc..

Now, the access to historic data is only possible using the old “lay user” unfriendly version of the “Qualar” database. For environmental engineers and air quality experts, the old system was more interesting as it provided direct access to a broader range of usable data in an editable format (a spreadsheet).

The old system, that is still available. allows searching according to three criteria: aggregated data of all polluting emissions in a certain station belonging to a network of measuring stations (chosen country wide among 7 networks), during a certain year (between

⁴ Decree Law 102/2010 of 23 September, amended in 2015 by Decree Law 43/2015 of 27 March.

⁵ There are five regions in continental Portugal plus two similar entities in the autonomous insular regions.

⁶ The project cost was 553.007,90 € (<https://qualar.apambiente.pt/node/acerca-do-projeto>).

2003 and 2017); aggregated data on all measuring stations for one single emission polluting (from a list of 8⁷) in a certain year (between 1992 and 2017); and data on one single polluting emission (chosen from a list of more than 100) in one single measuring station (out of 100) in one year (between 1992 and 2011).

The result is an excel sheet with a bunch of numbers (raw data), very hard to interpret for non-specialists and understand its meaning and relevance.

In the new 2019 version of the “Qualar” database is possible to find three types of information:

- static textual information (explanation on the measurement network, brief information on what “air quality previsions” mean, a simple explanation of the calculation method)
- very graphic information (drawings and flowcharts on the main sources of air pollution⁸)
- georeferenced information (displayed as colors in a map) is available for historic of previsions, and for non-validated (provisional) daily air quality indexes⁹.

This recent change seems to be an evolution in the right direction.

a. If data on compliance with air quality standards is incomplete, please indicate the extent of the non-compliance with requirements of Article 26 AQD (public information requirements).

Article 26 is fully transposed to article 34 of the Portuguese Air Quality Law¹⁰, which has been amended in 2015 to include the duty to make “the results of investigations into the feasibility and content of specific short-term action plans and the information available on the implementation of such plans to the entities indicated in paragraph 1” (namely, public and NGOs). However, in practice, day to day application of the duty to inform about compliance falls far short of the law. The main non-compliance is related with the omission to issue alerts for several exceedances referred in the reports.

Until now, the requirement to inform the public and NGOs “adequately and in good time” was also not fulfilled, as the information was not updated (in several websites only information for 2015 is available), and focused more on the efforts being made (description of norms, regulations, and monitoring networks), rather than on the results being attained (compliance or non-compliance with standards and issuing alerts)¹¹.

3. Have EU infringement proceedings been brought against your Member State for failure to comply with the AQD?

On the 15 November 2012 in an infringement proceeding (case C-34/11) under article 258 TFEU the Court declared that between 2005 and 2007 Portugal did not fulfil the obligations to ensure the air quality, under the previous air directive. Yet, the conclusion of the action against Portugal did not reflect the real extent, duration and prospects of the failure. In fact, Portugal was exclusively censored for failing to keep the daily concentrations of PM10 in ambient air

⁷ Nitrogen dioxide, sulfur dioxide, nitrogen monoxide, carbon monoxide, nitrogen oxide, ozone, particles 10 and 2.5.

⁸ See Annex II.

⁹ See Annex III.

¹⁰ Decree Law 102/2010 of 23 September, amended in 2015 by Decree Law 43/2015 of 27 March.

¹¹ <http://www.ccdr-n.pt/servicos/ambiente/qualidade-ar>, http://www.ccdr-pt/index.php?option=com_content&view=category&id=277&Itemid=184, <http://www.ccdr-lvt.pt/content/index.php?action=detailfo&rec=654>, <https://www.ccdr-a.gov.pt/index.php/ab/qualidade-do-ar>, <https://www.ccdr-alg.pt/site/info/emissoes-atmosfericas>, <http://rea.azores.gov.pt/reaa/10/qualidade-do-ar-e-controlo-da-poluicao-atmosf/280/indice-de-qualidade-do-ar>, <https://www.madeira.gov.pt/drota/Estrutura/Ambiente>.

below the limit values set in the EU directives in the years 2005, 2006 and 2007 in 4 zones and agglomerations (Braga, Porto Litoral, Área Metropolitana de Lisboa Norte and Área Metropolitana de Lisboa Sul).

Reading carefully the arguments balanced by the Court, it is easy to understand that the Commission aimed at a much wider “condemnation” in terms of geographic scope, types of limit values set for PM10 exceeded, time span and, most of all, the *nature* of the incompliance. In fact, based exclusively on official documents and reports produced by the Portuguese authorities, it is possible to find that there were also exceedances of additional limit values other than the daily concentration, that there were other zones and agglomerations (well-known industrial areas such as Vale do Ave, Vale do Sousa, Zona de Influência de Estarreja, Aveiro/Ílhavo and Setúbal) where the values were exceeded, and that the exceedance is also present in the report relating to 2009, submitted by the Portuguese Republic on 30 September 2010. More serious of all, is the fact that the concentration of PM10 being exceeded seems to be an ongoing trend, and therefore the particulate pollution matter pollution is a “systemic problem” in Portugal.

This was what the Commission asked the Court to declare, in a very realistic and pragmatic approach. The reasoning was quite straight forward: MS report their emission with one-year delay. But they have the updated data and should present them in Court for their defence. In the words of the Commission, “it is incumbent upon the Portuguese Republic to prove that the breach of obligations no longer exists by adducing new data capable of showing that it has ceased. Inasmuch as the Portuguese Republic does not adduce this data, it should be concluded that the breach of obligations is current”. Besides, “a judgment making a finding in relation to a past situation (...) would generally have no practical effect”. The Commission’s intention was that “infringement proceedings therefore does not relate to past years, but rather relates to a current failure to fulfil obligations”.

Adopting a very formalistic (but expectable) approach, the Court accepted the Member State's formal arguments and ruled that “It is therefore necessary for the essential points of law and fact on which a case is based to be indicated coherently and intelligibly in the application itself and for the form of order sought to be set out unambiguously so that the Court does not rule *ultra petita* (...)”.

This is the reason why, almost 6 years later, the judicial criticism directed to Portugal was limited to a very limited failure to comply, corresponding to the precise facts alleged in the reasoned opinion of the Commission.

a. If so, what was the outcome of this enforcement action and its impact on air quality law and policy in your Member State? (If enforcement action is ongoing, answer this question as best you can in terms of the effects of this action on your Member State’s approach to air quality law and policy.)

After the ECJ ruling there were no noticeable changes.

In 2008, before the infringement procedure (the notification by the Commission happened only in 2009) Portugal had already adopted Plans for the improvement of the air quality for the regions where the emission thresholds had been exceeded¹². Based on the adoption of these Plans Portugal requested an exemption under Article 22 of Directive 2008/50 and asked for the deadline prescribed for attaining the set limit values, to be postponed. The Commission rejected this application. This rejection was mentioned but not discussed in Court.

In 2016, the National Strategy on Air quality, still admits that one of the most critical and priority aspects of air quality in Portugal is the non-compliance with air quality objectives, as well as knowledge and information gaps. In a straight forward manner, it states that “despite

¹² For Lisbon region, it was the Decree 715/2008 of 6 August and the Despach 20763/2009 of 16 September.

significant improvements in recent decades, air pollution in Europe and Portugal continues to be detrimental to health and the environment. In particular, pollution by PM, O₃ and NO₂ poses serious risks to the health of Portuguese citizens, affecting the quality of life and reducing the average life expectancy, and, in relation to NO₂, the persistence of high concentration values occurs essentially in some urban areas of Portugal”¹³.

In 2019, a new Plan for the improvement of the air quality in Lisbon was adopted¹⁴, demonstrating that the atmospheric crisis is still unresolved. The reasons for adopting this Plan are clearly stated: “the evaluation of the monitoring results obtained by the air quality stations of the network of Lisbon and Tagus Valley Regional Coordination and Development Commission (CCDR LVT) for the years 2011 to 2014 revealed that there were occasional exceedances of the limit values established for particulate pollutants PM₁₀ and nitrogen dioxide (NO₂) in the agglomerations of the North Metropolitan Area (AML Norte) and the Metropolitan Area of Lisbon South (AML Sul), (...).”

“In the period from 2011 to 2014, there were only surpluses to the annual limit value (VLA) of NO₂ in the agglomeration of the North of Lisbon (AML). During this period there were also exceedances of the NO₂ hourly limit (VLH) in this agglomeration at the Avenida da Liberdade traffic station in 2011 and 2014, although this situation did not constitute a legal non-compliance, this limit value only started to be applied on 1 January 2015, given the extension granted by the European Commission to compliance only on that date; Exceeding the annual limit value is the most worrying situation, because in this Lisbon North (AML Norte), Avenida da Liberdade, Entrecampos and Santa Cruz de Benfica, on some cases, there were very high annual average concentrations beyond the limit value. In the Avenida da Liberdade station, this situation occurred systematically and the value reached in 2014 still exceeded the limit value by 25%, despite the trend of decreasing concentrations”

“In the period from 2011 to 2014 occurred in 2011 a situation of exceedance of the PM₁₀ annual limit value, established for the protection of human health, at the traffic station of Avenida da Liberdade; PM₁₀ exceeded the daily limit values (VLD) of PM₁₀ at Lisbon North (AML Norte) Avenida da Liberdade in 2011 and 2012 and Santa Cruz de Benfica in 2011, and 2011 at the Paio Pires in Lisbon South (AML);”

Air Quality Standards

4. Was there pre-existing national law relating to air quality standards (similar to the AQD), or did the AQD introduce something new in your country?

Yes, in the context of the duty to transpose some directives on pollutant emissions (80/779/CEE, 89/427/CEE, 85/203/CEE, 82/884/CEE) there was a law¹⁵ adopted in 1990 where a similar approach was adopted. This law, later regulated by a government order¹⁶, established values of certain pollutants (sulfur dioxide, particulate matter, nitrogen dioxide, carbon monoxide, ozone and lead) concentration in the atmosphere either from industrial origin or of “mobile sources” (traffic). For purposes of air quality management, a network for air quality surveillance was established, and a national inventory of sources of air pollution was created. In accordance with the measurements there was already the possibility to declare “critical areas” and to adopt emission reduction plans, the possibility to impose emission suspensions in the area

¹³ Resolution of the Council of Ministers n.46/2016 of 26 August 2016, page 5 and 17.

¹⁴ Ministerial Dispatch 116-A/2019 of 4 February 2019.

¹⁵ Decree-law 352/90 of the 9th November 1990.

¹⁶ Portaria 286/93 de 12 de Março 1993.

for 72 hours, and the obligation to inform the public. The Law even implemented the polluter pays principle through the application of an air emission tax to be paid by industrial plants.

5. How are AQD air quality standards implemented in law in your Member State?

In what concerns transposition, there is an almost one-to-one correspondence between the articles of the AQD and the articles of the National Law on Air Quality. Limit values, targets, objectives, alert thresholds, plans, everything is in the Portuguese law, corresponds more or less to the same articles of the directive.

In what concerns enforcement, only prosecution of private obligations (namely industrial obligations) if foreseen. It is up to the Regional Coordination and Development Commissions (7 decentralized organisms with regional competence) and to the General Inspection on environment and territorial management (IGAMAOT - centralized organism directly dependent on the Minister of the Environment and Energetic Transition) to check compliance with legal obligations.

In theory, if upon ordinary supervision of activities or after an inspection, a case of non-compliance is detected, the administrative sanctioning tools are immediately applicable. These sanctions apply to environmental offences such as: performing measurements not complying with data quality requirements and objectives; failure to send duly validated results; disclosing or making available information that is obtained by measurements that do not comply with data quality requirements and objectives or regarding data that has not been validated; the non-compliance, by the networks and stations, of the obligation to maintain emission records.

Whenever the seriousness of the offense so warrants, the competent authority, may determine the application of the additional sanctions that may prove appropriate, simultaneously with the fine.

In practice, the reports on monitoring measurements performed by the companies are received but not analyzed by the public authorities and the capacity to perform inspections is limited for shortage of human resources.

6. Does any law in your Member State provide for air quality standards that go beyond those set out in the AQD, imposing any more stringent standards, for example, in relation to PM_{2.5}?

No. It is already difficult enough to meet the European standards.

Air Quality Monitoring and Modelling

7. How are air quality monitoring networks set up in your Member State (briefly)? Do these go beyond the monitoring requirements set out in Chapter II AQD (eg in terms of the number and location of monitoring stations)?

The law follows the criteria established in the European Directive for setting up the networks.

But the monitoring network goes beyond the requirements of the Directive in what concerns the number of monitoring stations. There are some regions in the interior south of the country where measurements were not even required and where stations were installed.

In some regions (north, center) the monitoring stations use obsolete technology (both hardware and software) and the results are not as reliable as it would be desirable.

Malfunction of the equipment is frequent and the human resources necessary to fix a damaged or broken sensor do not allow a quick replacement. Since the hurricane Leslie hit the Center of Portugal in October 2018, the damaged sensors and stations have not been replaced yet.

The location of the monitoring sensors is not the most adequate, leaving out several critical areas, despite the fact that the global number of stations is more than necessary.

8. What sort of problems are encountered in monitoring of air quality in your Member State?

Problems might include: inconsistent results given by different schemes for monitoring air quality, improper siting of measurement equipment, unreliable equipment used, no monitoring established in key areas, unconfirmed results etc.

All these problems are mentioned in Portugal: improper siting of measurement equipment (choice of monitoring in “convenient” areas instead of monitoring in “key” areas), obsolete equipment, unconfirmed results, scarce measurements, and, most important of all, no consequences are drawn from industrial reporting. Data are not thoroughly analyzed or used.

9. As far as you can determine, are there limitations or problems with the modelling techniques used in your Member State to assess air quality (where modelling is permitted as a method for assessment under Chapter II AQD)?

Although the Directive itself admits some uncertainty in the measurements, the modeling methods used in Portugal go much beyond acceptable uncertainty both on assessment and prevision (over 50% uncertainty each). As a consequence, heavy concentrations may not be detected, and emission peaks may neither be anticipated nor prevented.

National Air Quality Plans and Governance

10. Does your Member State have a national Air Quality Plan under Article 23?

Yes, it was produced in 2015, under the name of ‘National Air Strategy 2020’ and was adopted in 2016 by the Resolution of the Council of Ministers 46/2016 of 26 August.

a. If so, to which pollutants does the plan relate (eg NO₂ or PM₁₀) and what **key** measures does the plan outline to keep exceedances ‘as short as possible’? *Please also indicate if you think there are any **weaknesses** in the plan.*

The Plan NAS 2020 covers all pollutants (NO_x, CO, PM, C₆H₆, COV, SO₂, NO_x).

The NAS proposes measures in 4 areas: knowledge and Information, sector initiatives for air emissions, governance, research & development.

- Under “knowledge and Information”, eight measures are listed, all of them revealing the present state of uncertainty on air emissions¹⁷.
- Under “sector initiatives for air emissions” a list of twenty-four energy efficiency and smart mobility measures are proposed¹⁸.
- Under governance, six basic coordination measures as well as implementation of already existing initiatives are proposed¹⁹.
- Under research & development, five forward looking measures²⁰.

A contrario sensu, this long list of 43 measures shows that a lot remains yet to be done for air quality in Portugal.

¹⁷ See Annex IV for concrete examples of measures.

¹⁸ See Annex V for concrete examples of measures.

¹⁹ See Annex VI for concrete examples of measures.

²⁰ See Annex VII for concrete examples of measures.

The main weakness of the plan is the fact that it was intended to do what was already mandatory and until now it seems to be in *standby mode*: it is not referred to by subsequent legal or administrative measures and most of the measures proposed are still to be implemented.

b. If your Member State has such a plan, how is the legal requirement of keeping exceedances 'as short as possible' satisfied? *Please outline any challenges (legal or otherwise) in meeting this requirement in your Member State.*

Slowly, the modernization of the car fleet, the improvement of industrial technologies, and the evolution of domestic heating systems are regaining air quality. These measures are called "sector initiatives for air emissions" in the Plan 'National Air Strategy' 2020.

However, Portugal is more exposed to some forms of atmospheric pollution for geographic and meteorological reasons. Geographically, we are on the route of desert dust coming from the arid regions of the Sahara²¹. Meteorologically, we have frequent periods of intense sun, high temperatures and no wind, contributing to the exceedance of O₃ due to traffic and industrial emissions.

11. Whether or not your Member State has an Air Quality Plan, please outline the **key** national regulatory measures that contribute towards compliance with EU air quality standards in your Member State.

For example, what are the main national legal measures that regulate polluting air emissions from emissions from:

- *households (eg restrictions on solid fuels, planning laws);*

The use of oil for heating is submitted to a very high fuel tax²².

- *transport (eg clean air zones); and*

In the urban areas where air pollution was more critical, "reduced emission areas" were created. At least *in paper*, diesel cars should not be allowed in these areas. In practice, illegal access from diesel cars is tolerated (the police doesn't control, and doesn't punish²³).

Gradually, urban collective road transport is adopting electric buses. Waste collection is also shifting to electric vehicles.

- *industry (eg reliance in Industrial Emissions Directive or something more)?*

Besides the Industrial Emissions Directive, something more is being done, namely concerning GHG emissions. Industry used to be a very inefficient sector in terms of energy consumption. Now, due to raising taxes, the price of industrial fuel is an incentive strong enough to push energy efficiency measures and transitioning to renewables.

Sponsored by the State, projects to support the replacement of fossil fuels with renewables have been adopted for almost 10 years²⁴.

12. Has your Member State ever issued a Short-term Action Plan under Article 24? If so, please outline any notable features of the plan or aspects of its implementation (briefly).

²¹ See Annex VIII.

²² See Annex IX.

²³ <https://shifter.sapo.pt/2018/05/lisboa-carros-poluicao/>.

²⁴ National Plan of action for energy efficiency. Adopted by the Resolution of the Council of Ministers 20/2013 (<https://dre.pt/application/file/260476>). The fund for energy efficiency as adopted even earlier, by the Decree-law n. 50/2010 of the 20 May.

No, there were never Short-term Action Plans adopted, although there are technical guidelines to produce Short-term Action Plans²⁵. Besides, there were a few good reasons for their adoption.

The most recent example was an industrial accident in 2017. In February 2017, a big fire lasting two days in a chemical industry (SAPEC) led to huge releases of SO₂. Some measures were taken (schools were closed) but the intervention of the competent authorities (in addition to firefighters and civil protection services) was limited to issuing statements to calm down the population²⁶ explaining that the winds had dispersed the gases and only one-hour exceedance had been registered in the monitoring stations²⁷.

Surprisingly, no Short-term Action Plan was adopted.

13. Which public bodies have legal responsibilities for meeting air quality standards in your Member State?

For the national territory, it is the Portuguese Environmental Agency (central authority).

For the regional territory, it is the Regional Coordination and Development Commissions²⁸ (regional authorities).

For inspection and checking compliance with legal obligations it is the General Inspection on environment and territorial management (the IGAMAOT)²⁹, as a centralized organism directly dependent on the Minister of the Environment and Energetic Transition).

14. Are there any legal requirements for different public bodies who have control over different air pollution sources to coordinate their efforts in any way to work towards air quality standards? (For example, different regulators may control highways, airports, local urban planning decisions, large industrial installations, and so on.)

According to the Air Quality Law (article 3 n.1) it is the responsibility of the Portuguese Environmental Agency (APA), as a national authority, to ensure, coordinate and harmonize the procedures for the application of the Law in cooperation with other entities involved in the process of management and evaluation of ambient air quality in the national territory.

Nevertheless, the National Air Strategy 2020, highlights the lack of coordination as one of the weak aspects of the Portuguese system of air quality control. This conclusion can be inferred from 3 of the priority actions under “governance”³⁰:

- Promotion of the functioning of the Interministerial Commission for Air and Climate Change (it already exists, but it doesn’t function),
- Create a mechanism to improve the linkage between the different levels of governance (central, regional and local levels don’t talk with each other),
- Promotion of collaboration between entities of the Public Administration of the environment and health sectors, as well as with the municipalities for the implementation of ENAR2020 within the framework of their attributions, competencies and local / sectoral strategies (no intra-sectoral dialogue).

Enforcement of Air Quality Law

15. What is the primary mode for enforcing of air quality law in your Member State?

²⁵ Available here https://www.apambiente.pt/cms/view/page_doc.php?id=711.

²⁶ See summary of events in Annex X (communiqué available here

²⁷ https://www.apambiente.pt/zdata/Instituicao/Imprensa/2017/06_Nota_ComSocial_Incendio_SAPECSetubal.pdf).

²⁸ There are five regions in continental Portugal plus two similar entities in the autonomous insular regions.

²⁹ Statute adopted by the Decree Law n. 153/2015 of the 7 august.

³⁰ See Annex VI.

For private polluters, the primary mode of enforcing is administrative sanctioning. Both fines and other accessory administrative sanctions³¹ can be applied.

To understand the extent of the enforcement needed, it is important to have reports on enforcement actions. There are two types of reports: reports on “self-assessment” (i.e. reports based on industry-reported data) and reports on inspecting activities carried out by the competent authority (IGAMAOT).

There are only three “self-assessment” reports available online, for the years 2007, 2008 and 2009. Below is the data presented in the 2009 report (published in 2010³²) on the default rate (% of failure to comply with applicable legislation air).

Quadro 3

Percentagem de incumprimento dos VLE das medições em contínuo, por setor de actividade e poluente, e número absoluto de excedências ao VLE das medições pontuais

	Medições em Contínuo										Pontuais (ex: 2xano)
	Todos os poluentes	SO2	NOx	Part	CO	COV	Cl	F	H2S	NH3	Todos os poluentes
Agro-Industrial (1)	8%	0%	0%	25%							0
Argilas Expandidas (1)	0%	0%									1
Cal (3)	0%	0%									4
Central Termoeléctrica (9)	2%	1%	2%	6%	0%						0
Centro Integrado Tratamento Resíduos (1)	0%	0%	0%	0%	0%	0%	0%				0
Cerâmica (17)	0%	0%									5
Cimento (7)	0%	0%	0%	0%	0%	0%	0%	0%			0
Cogeração (8)	5%	0%	9%	0%	0%						5
Fabricação de painéis de partículas de madeira (1)	23%		0%	0%	36%	55%					0
Farmacêutico (1)	11%	0%	25%	0%	17%	17%	8%	8%			0
Fibras Sintéticas (1)	0%			0%							1
Incineração Resíduos Não Perigosos (1)	0%	0%	0%	0%	0%	0%	0%	0%			0
Incineração Resíduos Perigosos (1)	0%	0%	0%	0%	0%	0%	0%	0%			0
Incineração Resíduos Urbanos (2)	2%	0%	0%	7%	2%	0%	10%	0%		0%	0
Pasta de Papel (6)	5%	4%	2%	12%	1%				1%		2
Químico (2)	35%	60%	27%	45%	28%	78%	0%	11%			2
Refinaria (2)	6%	0%	10%	9%							7
Vidro (3)	0%	0%	0%	0%							1
	4%	2%	5%	4%	4%	6%	3%	1%	1%	0%	28

As can be seen throughout the available reports, some sectors (lime production, ceramic, co-generation of electricity and heat, wood aggregates, paper pulp, chemicals, and refineries) have the worst environmental performance and present several cases of recurring non-compliance.

However, as explained, no direct consequences are drawn from the reporting duties imposed to the industries.

The second type of reports are on inspections performed and respective results. The only report available online covers two years: 2015 and 2016³³.

The report depicts maps showing the installations where infractions to the industrial emissions law were found³⁴.

The report does not go into the details of the different infractions, and therefore it is difficult to know how many of these infractions relate to air, water, waste or other.

³¹ See full list in Annex XI.

³² Available here https://www.apambiente.pt/_cms/view/page_doc.php?id=247.

³³ Available here https://www.igamaot.gov.pt/wp-content/uploads/Desempenho_bienio.pdf.

³⁴ See Annex XII.

For the public entities, the law on extracontractual civil liability of the State and other collective persons of public law³⁵ determines the civil liability of the public entities when the exercise of the administrative function causes damage (there must be a fault of the public agent or the activity must involve a risk) to the citizens.

To my knowledge there was never a court being asked to declare the State liable for not performing the measurements, controls, and actions necessary to implement and enforce the air quality law.

The panorama of infractions and enforcement needs can also be perceived looking at the reports on complaints to the IGAMAOT. The last report for the year 2018³⁶ refers to 113 complaints presented on air emissions, representing the second most reported non-compliance sector, after waste³⁷.

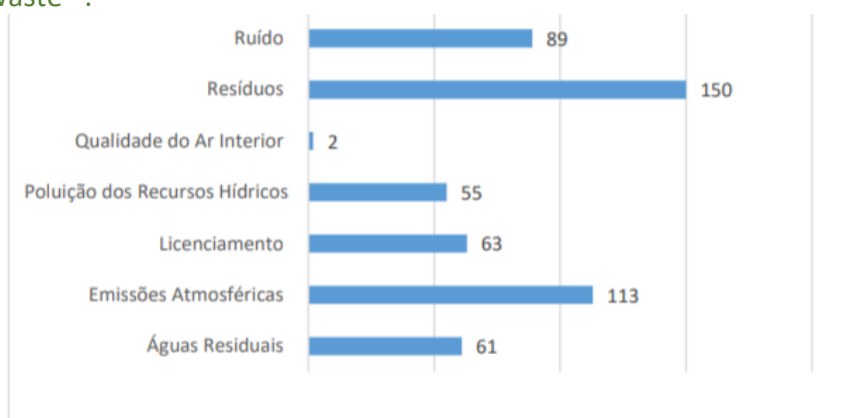


Figura 4 - Situações denunciadas em 2018 distribuídas por vertente ambiental (fonte: SGI, consulta a 15.03.2019)

Even if the absolute number of complaints is raising,

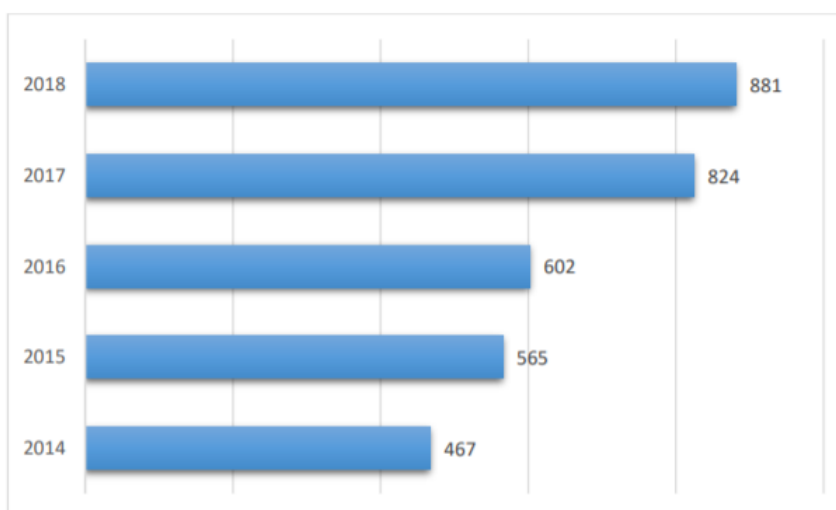


Figura 7 - Comparativo anual do número de situações denunciadas na IGAMAOT

...the number of cases that lead to imposing a fine is nothing compared with the number of cases that were simply filed or the number of complaints. An 89% filing rate leaves without any punishment, for a number of reasons (mostly procedural), the large majority of complaints.

³⁵ Law 67/2007 of 31 December, amended in 2008, by the Law 31/2008 of 17 July.

³⁶ Available here https://www.igamaot.gov.pt/wp-content/uploads/BRD_2018_vf.pdf.

³⁷ For the geographic distribution, see annex XIII.

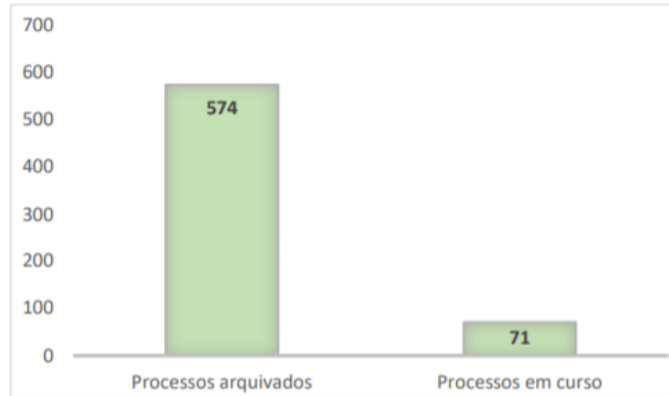


Figura 6 - Estado dos processos de prioridade 1, 2 e 3 no ano de 2018 (fonte: SGI, consulta a 15.03.2019)

16. Have there been court cases concerning the enforcement of air quality law in your Member State? *Please outline major cases or themes in key cases only.*

Not to my knowledge³⁸.

17. Please outline any other major challenges faced in your Member State for enforcing the AQD, or any other applicable air quality law.

A Controversial Source of Air Pollution: Regulation of Vehicle Emissions Systems

Many Member States are currently subject to infringement proceedings by the Commission in relation to vehicle type approval rules. This is currently prescribed under Framework Directive 2007/46/EC establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles [2007] OJ L263/1 and Regulation (EC) No 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 [2007] OJ L171/1.

Amongst other things, this legislation requires Member States to have ‘effective, proportionate and dissuasive’ penalty systems in place to deter car manufacturers from illegal practices, such as installing defeat devices. This legislation was overhauled in 2018 by Regulation (EU) 2018/858 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC [2018] OJ L151/1, which will apply from 1 September 2020.

To my knowledge nothing was done.

18. How has your Member State implemented these EU vehicle type approval rules? Have there been any controversies in transposing these rules?

Not to my knowledge.

³⁸ As explained in previous Avosetta reports, there is no general database of court cases in Portugal. The official database (DGSI.pt) only covers upper courts and even there, not all the decisions are public.

The NGOs more involved with air quality (Zero and Quercus) consulted for this information were not informed as well.

19. What legal measures have been taken in your Member State (if any) against car manufacturers which have failed to comply with vehicle type approval rules? *These legal measures might include court cases, including between car buyers and manufacturers.*

The largest national consumers association DECO, alerted the consumers and issued opinions favorable to the new regulation³⁹ but to my knowledge no legal measures were adopted no judicial initiatives were initiated, and no compensations were required to the manufacturers.

Case Study

Martha is living in an urban area in your Member State, and her children have developed asthmatic symptoms (i.e. a diagnosed respiratory illness). She becomes aware that the local air quality exceeds standards laid down in the AQD. Her house is next to a main road, which is a heavily used bus route on which bus operators use diesel vehicles. The town also has a number of industrial plants, a coal fired power station, and a number of intensive farms. It is unclear to her precisely which pollution source is causing the breaches of air quality standards, or what their respective contributions might be to the local air quality problem.

What sort of legal action could Martha take in your Member State? And against whom? What remedies do the courts possess? What are the financial implications of bringing such a case? Might there be other regulatory avenues available to Martha instead?

Before going to court Martha should first lodge an administrative complaint to one of the competent authorities, namely using the online forms available.

IGAMAOT - <https://www.igamaot.gov.pt/balcao-eletronico/denunciar/>

CCDR - <http://www.ccdr-lvt.pt/pt/reclamacoes---denuncias/7112.htm>

If no action was taken she could file a complaint before the Ombudsman (Provedor de justiça <http://www.provedor-jus.pt/?idc=142>) whose opinions are not binding but have some influence on public authorities.

As the procedure before the Ombudsman does not have any interim effect, she could institute legal proceedings against the industrial plant owners and the administration (before filing the case it would be advisable to request further information on excessive air emissions to substantiate her arguments in court).

The civil proceedings against the owners (in the geographically competent first instance civil court), would aim at changing the permit conditions (public authorities could also be called to participate) based on excessive emissions and eventually obtaining a compensation for damages. In this case the industry owners might claim that the pollution and the asthmatic symptoms are caused by the intense traffic, it might be difficult to demonstrate the opposite.

The court fees can range from 100€ and 1000€ depending on the values at stake, the complexity of the case, the number of allegations and counter-allegations, the court proceedings requested, if it is a court of appeal, etc.

To attain a faster result, she could ask for an immediate suspension of the license (interim measures).

³⁹ Available here <https://www.deco.proteste.pt/auto/automoveis/noticias/emissoes-poluentes-consumidores-podem-poupar-com-os-novos-limites#>.

If she thinks that the excess pollution assumes criminal nature⁴⁰ she could present a complaint to the public prosecutor⁴¹ or file a criminal case directly against the company owners.

The administrative proceedings against the Ministry of the Environment (governmental body which oversees the other two competent authorities) should be filed in the second instance court geographically competent, asking for the appropriate measures to be taken.

Martha could ask namely for:

- a) The annulment or the declaration of nullity or non-existence of administrative acts;
- b) The condemnation to the practice of acts due, in the terms of the law or of contractually assumed bond;
- c) Conviction of non-issuance of administrative acts;
- d) The declaration of unlawfulness of norms issued under provisions of administrative law;
- e) The condemnation to the issuance of norms due under provisions of administrative law;
- f) The recognition of subjective legal situations directly arising from legal-administrative norms or legal acts practiced under provisions of administrative law;
- g) The recognition of qualities or the fulfilment of conditions;
- h) The condemnation to the adoption or abstention of behaviours, by the Public Administration or by individuals;
- i) The Administration's condemnation of the adoption of the conduct necessary to reinstate violated rights or interests, including in *de facto* situations, lacking a title that legitimates them;
- j) The Administration's condemnation of the fulfilment of obligations to provide that directly derive from legal-administrative norms and do not involve the issuance of an actionable administrative act, or that were constituted by legal acts practiced under provisions of administrative law, and that may be subject to payment of an amount, delivery of a thing or provision of a fact;
- k) The condemnation to the reparation of damages caused by legal persons and the holders of its organs or their workers in public functions;
- l) The examination of questions relating to the interpretation, validity or execution of contracts;
- m) restitution of unjust enrichment, including repayment of undue payment;
- n) The notification of the Administration to provide information, allow the consultation of documents or pass certificates;
- o) The summons for the protection of rights, freedoms and guarantees;
- p) The extension of the effects of judgments;
- q) The adoption of appropriate precautionary measures to ensure the effectiveness of decisions to be rendered in a declaratory process.⁴²

This action should assume the form of an *actio popularis*. In that case she would not have to bear any costs related with court fees, although she would always have to pay her lawyer (a few thousand euros). In the end if she is condemned as bad faith litigant, Martha could be condemned to pay the opponents' attorney costs.

⁴⁰ Article 279 n.1 of the Criminal Code "Who, not observing legal provisions, regulations or obligations imposed by the competent authority in accordance with those provisions, causes noise pollution or pollute air, water, soil or in any way degrades the qualities of these environmental components, causing substantial damages, shall be punished by imprisonment for up to 5 years".

⁴¹ The form is available here https://queixaselectronicas.mai.gov.pt/SQE2013/default.aspx#tag=MAIN_CONTENT.

⁴² Article 2 n.2 of the Code of Procedure of the Administrative and Fiscal Courts, on effective judicial protection (approved by the

In an *actio popularis* she would not have to demonstrate the causation link between her daughter's symptoms and the pollution source. It is enough to demonstrate that damage is being caused to the community as a whole.

After exhausting all the instances, she could apply to the European Court of Human rights claiming illegal interference with the right to respect for her private life, her family life and her home (article 8 of the European Convention on Human Rights) and alleging violation of the positive obligation to protect against arbitrary interferences.

Instead of acting directly as plaintiff, she could as an NGO to represent her (for instance <https://zero.org/contactos/>, <https://www.quercus.pt/contactos/gerais> or <http://www.geota.pt/scid/geotaWebPage/defaultCategoryViewOne.asp?categoryId=593>)

Annex I

“in your opinion, which of the following are or would be more effective ways of tackling problems of air quality?”⁴³

		1	2	3	4	5	6	7	8
1									
	1								
	2								
	3								
	4								
	5								
	6								
	7								
	8								
BE		40	34	31	24	29	33	32	26
BG		44	24	21	23	31	35	31	22
CZ		46	22	26	28	24	28	27	21
DK		39	34	29	37	25	25	25	25
DE		41	38	23	24	21	20	25	18
EE		41	21	27	24	15	15	23	15
IE		34	27	34	34	29	25	23	21
EL		53	31	42	32	27	31	28	18
ES		36	29	32	26	27	33	22	18
FR		53	25	31	25	27	26	18	20
HR		36	18	29	23	23	31	22	15
IT		41	25	31	26	30	27	25	25
CY		34	46	36	19	21	41	28	10
LV		45	23	29	23	16	21	22	18
LT		34	21	34	25	30	22	24	16
LU		44	26	26	24	27	30	25	19
HU		45	27	29	30	29	31	22	17
MT		29	28	32	28	34	29	25	20
NL		51	27	27	39	35	27	37	25
AT		42	31	35	38	25	23	25	22
PL		28	23	29	31	27	24	18	17
PT		40	19	25	31	46	32	22	16
RO		32	24	26	21	22	28	24	20
SI		35	21	28	27	26	29	25	22
SK		28	18	27	20	27	30	18	24
FI		48	27	37	39	22	21	22	18
SE		50	36	32	40	27	14	26	31
UK		35	32	23	26	25	24	21	21
		1st MOST FREQUENTLY MENTIONED ITEM							
		2nd MOST FREQUENTLY MENTIONED ITEM							
		3rd MOST FREQUENTLY MENTIONED ITEM							

⁴³ Special Eurobarometer 468 on Attitudes of European citizens towards the environment published in November 2017 (<http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/SPECIAL/surveyKy/2156>).

Annex II

O QUE É A QUALIDADE DO AR?

A qualidade do ar é o termo que se usa, normalmente, para traduzir o grau de poluição no ar que respiramos.

PORQUE NOS DEVEMOS PREOCUPAR COM A QUALIDADE DO AR?

A POLUIÇÃO NO AR TEM UM FORTE IMPACTO NA SAÚDE HUMANA, CONTRIBUI PARA AS ALTERAÇÕES CLIMÁTICAS E DANIFICA ECOSISTEMAS.

Ecosistema

DANOS NA VEGETAÇÃO, PERDA DE BIODIVERSIDADE, ACIDIFICAÇÃO E EUTROFIZAÇÃO DOS ECOSISTEMAS

Clima

ALGUNS DOS POLUENTES SÃO GASES COM EFEITO DE ESTUFA DE CURTA DURAÇÃO (OZONO E METANO), AS PARTÍCULAS ALTERAM O FORÇAMENTO RADIATIVO

Saúde

PODE PROVOCAR DOENÇAS RESPIRATÓRIAS E CARDIOVASCULARES, EM ESPECIAL NOS GRUPOS MAIS SENSÍVEIS (CRIANÇAS, IDOSOS E GRAVÍDAS)

SUBSTÂNCIAS EUTROFIANTES



SUBSTÂNCIAS ACIDIFICANTES



FORÇADORES CLIMÁTICOS



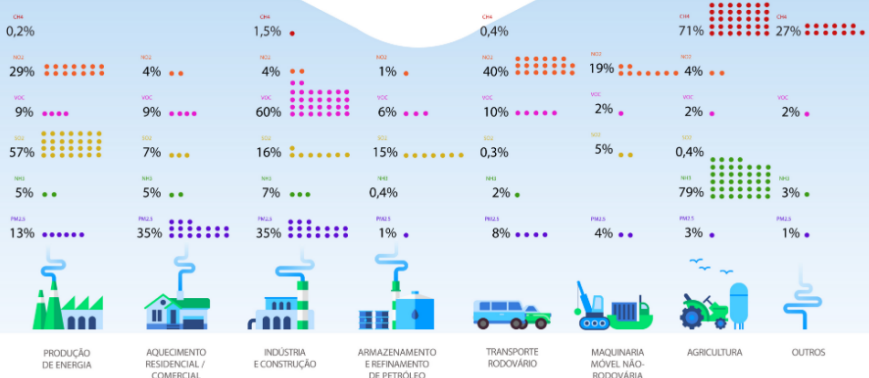
OZONO AO NÍVEL DO SOLO



PARTÍCULAS EM SUSPENSÃO

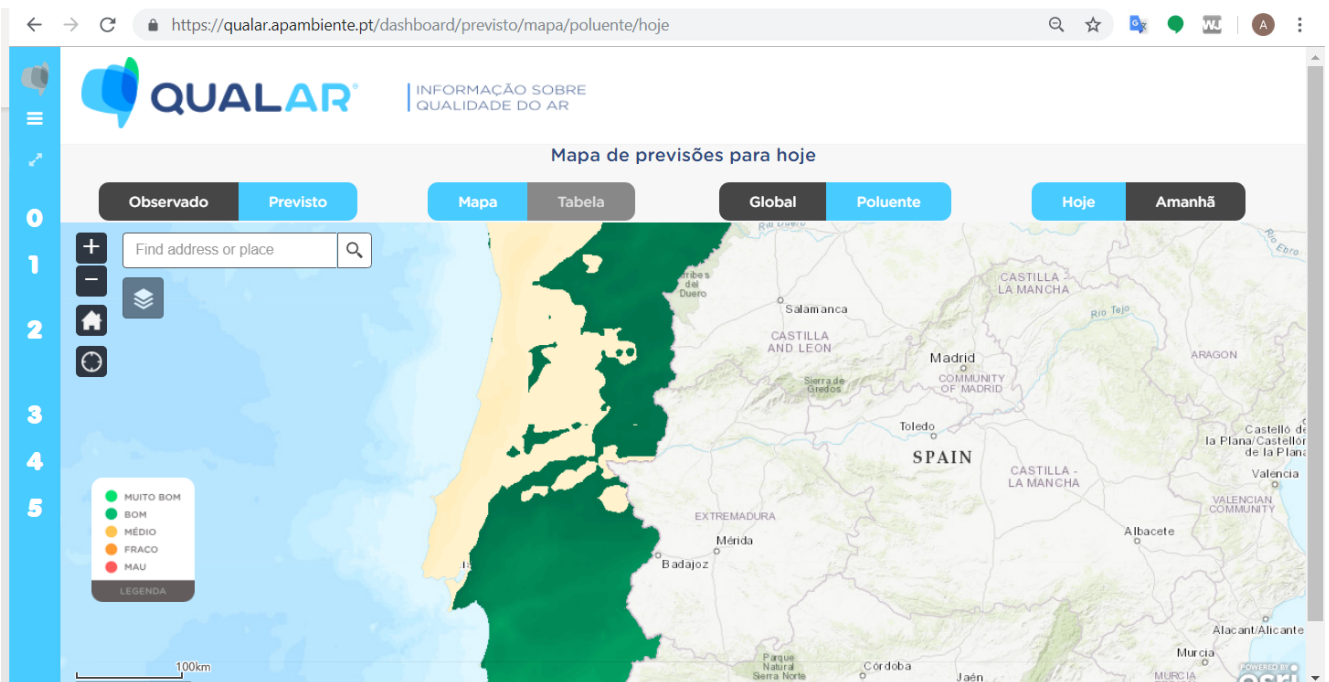
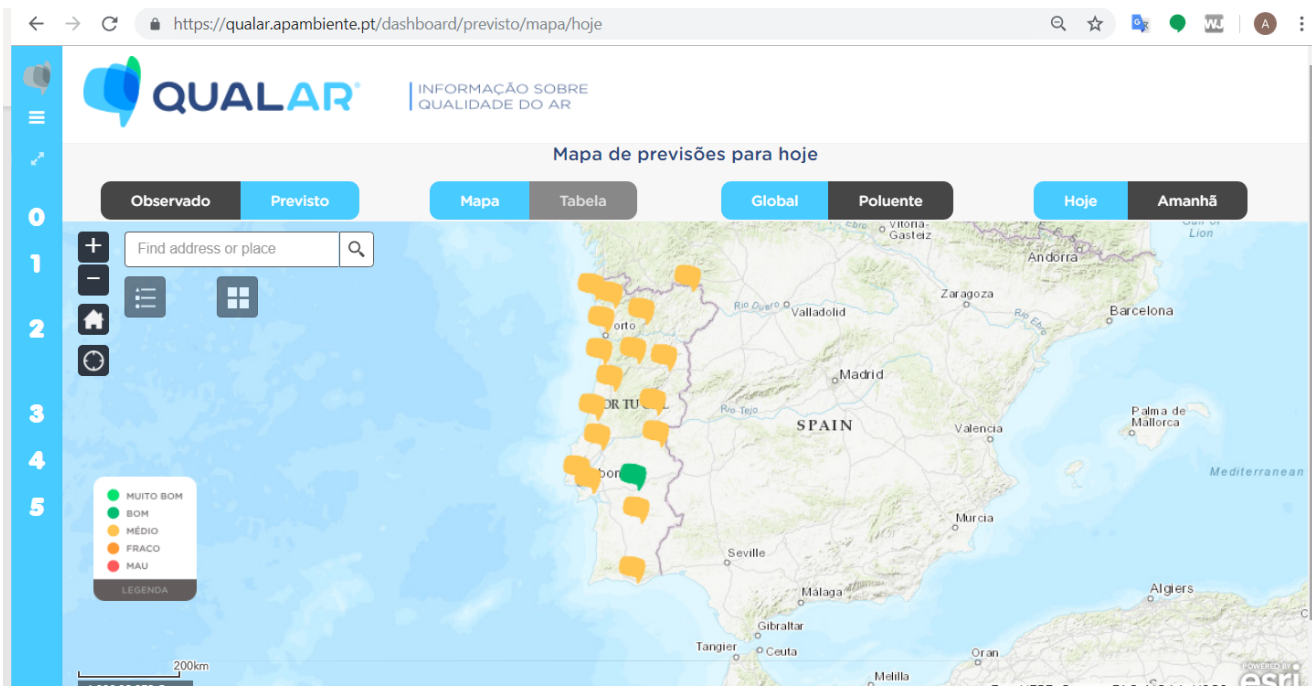


FONTES DE POLUIÇÃO DO AR



Annex III

New version of Qualar database. Map viewing



Annex IV

Measures proposed in the 'National Air Strategy 2020'

A. Knowledge and information

1. Development of methodological guidelines for the preparation of Atmospheric Emissions Inventories at regional / local scale.
2. Implementation of an environmental information system incorporating the results of self-monitoring of emissions of pollutants into the air.
3. Adaptation of air quality information systems (current QualAr) by extending its scope to new data sources and new requirements arising from e-Reporting.
4. Improvement of the air quality forecasting system, namely the inclusion of more pollutants and greater detail of spatial information.
5. To promote the effectiveness of the dissemination of information on air quality through new information.
6. Renovation of monitoring equipment, in line with quality control and assurance requirements.
7. Implementation of Quality Assurance and Control procedures (QA / QC - Quality Assurance / Quality Control) in the air quality monitoring network.
8. The evaluation of the chemical composition of particulate matter (source apportionment), including the quantification of levels of black carbon.

Annex V

Measures proposed in the 'National Air Strategy 2020'

B. Energy efficiency and smart mobility

9. Optimization of the processes of burning and the use of energy or heat (re-enrichment).
 10. Use of cleaner fuels.
 11. Promotion of the use of secondary raw materials in production processes or the design of products.
 12. Integration of operators into the information system on industrial emissions of pollutants into the air.
 13. Creation of Reduced Emission Zones (ZERs) in medium and large cities
 14. Development and implementation of mobility planning tools, such as Mobility and Transport Plans (PMT) by municipalities with more than 50,000 inhabitants or that are district capitals, as referred to in the Mobility Package, as well as the Urban Mobility Action Plans Sustainable.
 15. Promotion of Mobility Plans of companies and generating poles and attractors of School Mobility.
 16. Creation of regulatory instruments to accommodate new forms of mobility, including flexible transport, carsharing and bikesharing, among others.
 17. Promotion of the use of public transport and modal shift - disincentive to individual transport and improvement of public transport in urban areas (optimization of parking management, development of multimodal ticketing policies, extension of complementary transport systems, eg park & ride together with CT interfaces).
 18. Reduction of the average age of heavy passenger fleet of public passenger transport.
- Decarbonization
of the fleet of taxis.
19. Encouraging smooth mobility (in particular with regard to the promotion of bicycle use), through initiatives creating conditions for intermodality with public transport systems.
 20. Promotion of eco-driving and incorporation of eco-driving in the training of drivers.
 21. Promotion of the use of new technologies for a more efficient operation in public road transport passengers and goods.
 22. Promotion of the adoption of electric vehicles in the taxi fleets.
 23. Promotion of the acquisition of electric vehicles by private individuals and fleet holders.
 24. Promotion of the acquisition of electric vehicles in the Public Administration.
 25. Promotion of the electric vehicle in urban micrologistics.
 26. Creation of alternative energy charging points.
 27. Promotion of policies to encourage the reduction of the average age of the fleet of road transport vehicles of goods.
 28. Strengthening the technical capacity of the CITV centers (technical and human resources) to ensure the continuous operation of On-Board Diagnostics (OBD) equipment for pollutant emissions.
 29. Promotion of the implementation of Annex IX of the Göteborg Protocol of CLRTAP, in particular as regards the code of good agricultural practice.
 30. Promoting the replacement of fireplaces by heat recuperators, taking into account the "state of the art" in terms of emission reduction technologies.
 31. Promotion of the acquisition of heat pumps for heating in substituting active old air conditioning equipment.
 32. Promotion of green infrastructures.

Annex VI

Measures proposed in the 'National Air Strategy 2020'

C. Governance

33. Promotion of the functioning of the Interministerial Commission for Air and Climate Change (CIAAC).

34. Create a mechanism to improve the linkage between the different levels of governance (central, regional and local).

35. Promotion of collaboration between entities of the Public Administration of the environment and health sectors, as well as with the municipalities for the implementation of ENAR2020 within the framework of their attributions, competencies and local / sectoral strategies.

36. Operationalization of an organizational model among air management entities.

37. Implementation of Single Environmental Licensing.

38. Implementation of the Control Platform, Audit and Environmental Inspection.

Annex VII

Measures proposed in the 'National Air Strategy 2020'

D. Research & development

39. Creation of the methodology for obtaining information for the assessment of atmospheric emissions associated with maritime transport of passengers and goods, in relevant port areas, of non-road mobile machinery.

40. Development of methodologies that optimize air quality management with the best cost-benefit ratio.

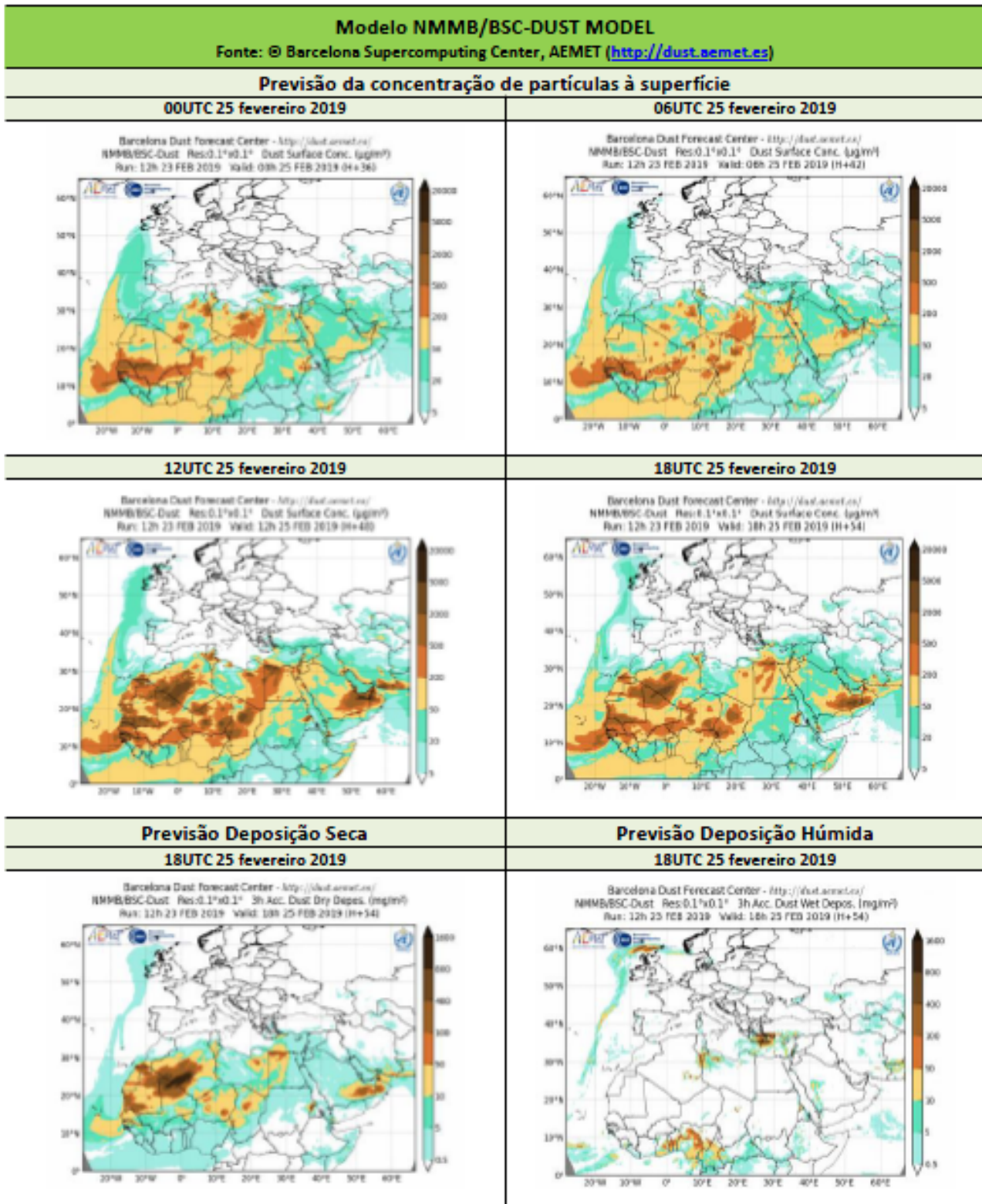
41. Promotion of studies to evaluate the effects of air pollution on health in Portugal.

42. Development of a monitoring system for human health effects associated with exposure to air pollutants in ambient air.

43. Development of tools to assess the effects of atmospheric pollution on ecosystems (critical loads) and identification of mitigating measures.

Annex VIII

Dust from arid regions.

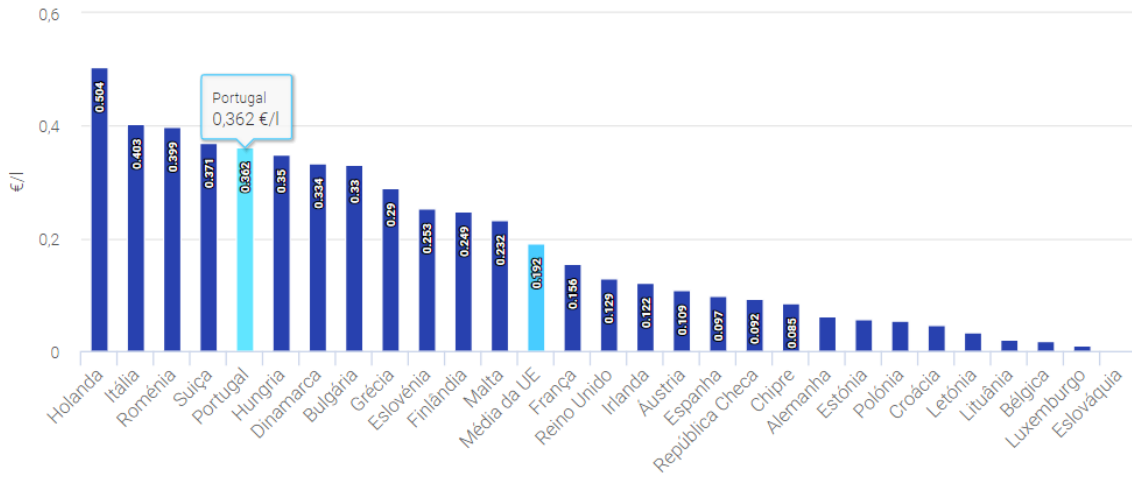


(available in <https://qualar.apambiente.pt/download/documentos.ficheiro.a63ea246d191fb63.505245564953414f5f454e5f323031395f30325f31322e706466.pdf>)

Annex IX Fuel for heating taxes in Europe

Gasóleo de Aquecimento - ISP na UE

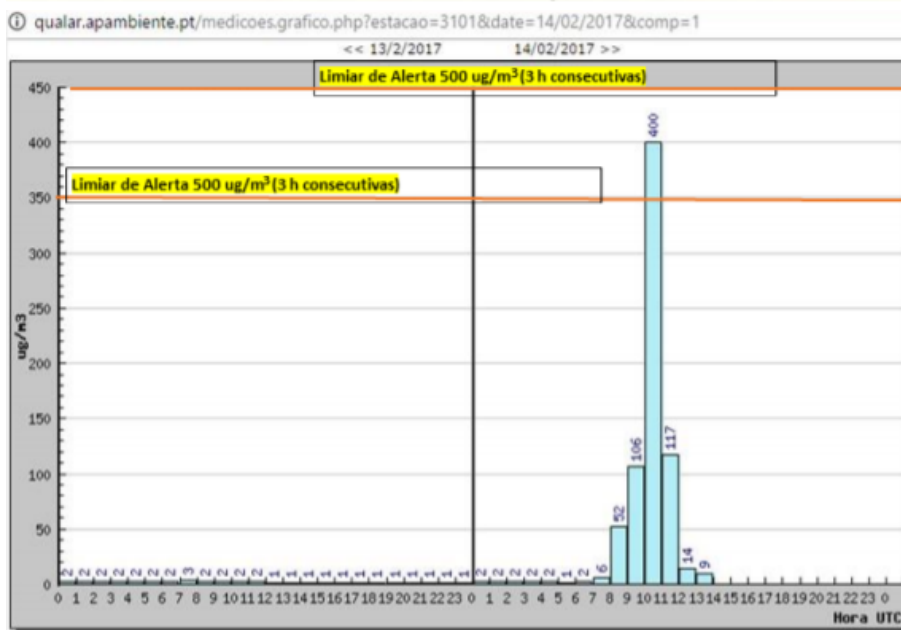
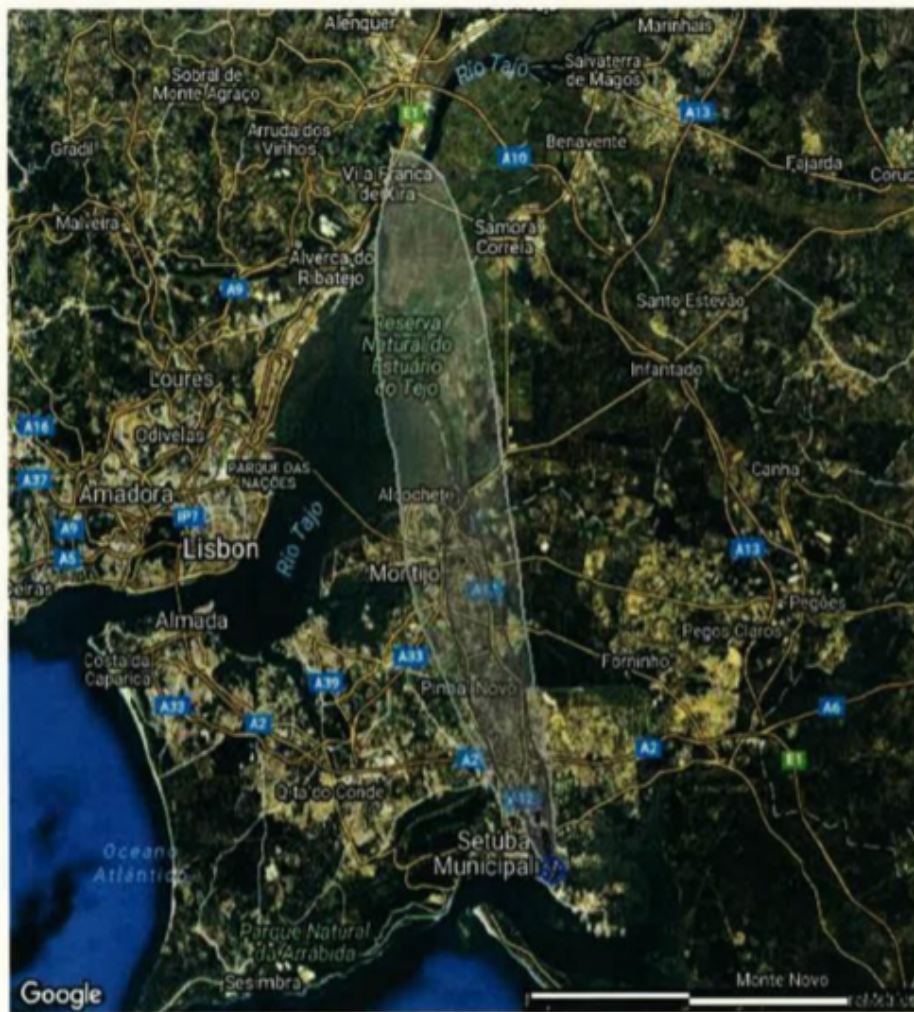
Fonte: Oil Bulletin 29.04.2019



(available in: <https://www.apetro.pt/estatisticas-e-estudos/impostos/isp---imposto-sobre-produtos-petroliferos-ue/1632>)

Annex X

Accidental air pollution plume and exceedance of SO₂ emissions (SAPEC Setúbal, 2017)



https://www.apambiente.pt/zdata/Instituicao/Imprensa/2017/05_Nota_ComSocial_Incendio_SAPECSetubal.pdf

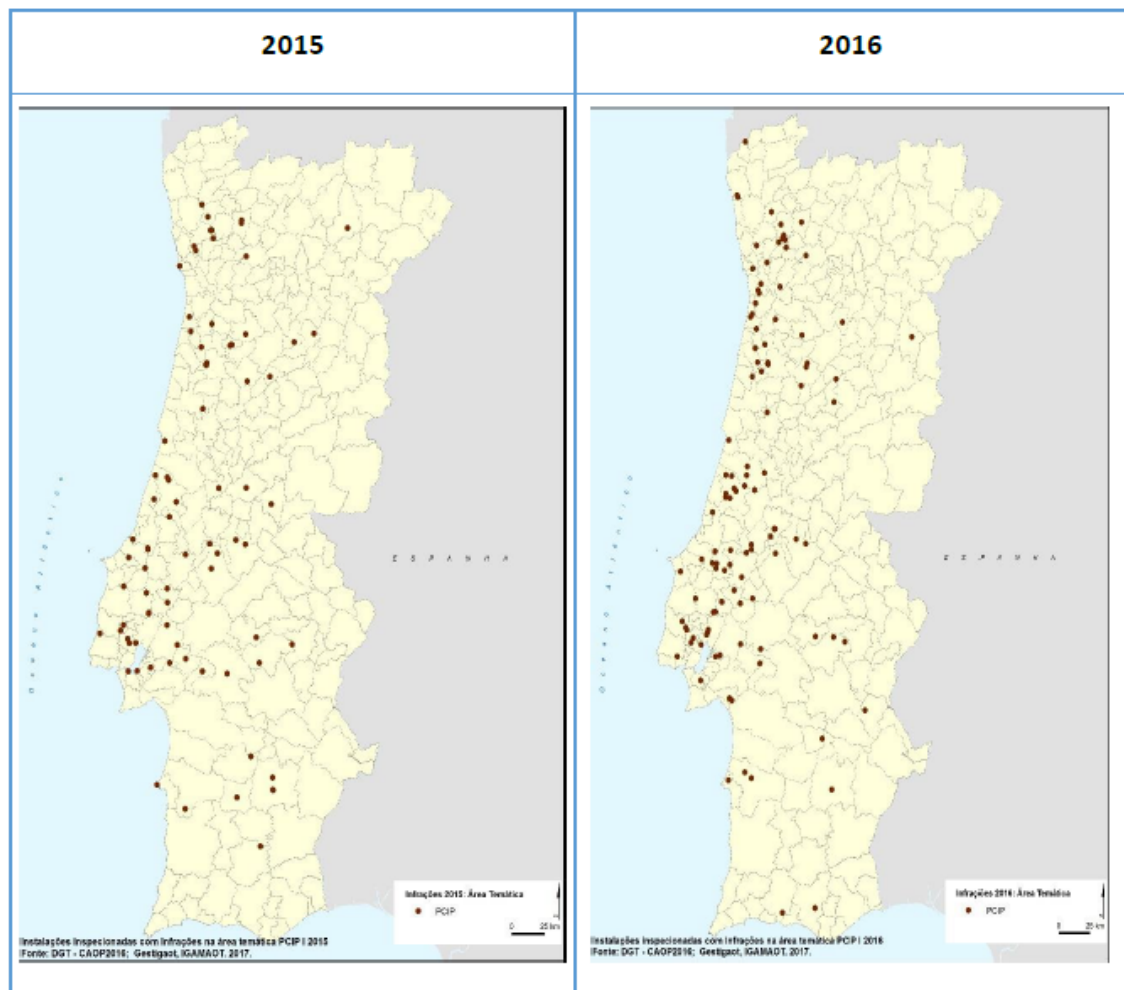
Annex XI

List of accessory administrative sanctions according to the framework law on administrative sanctioning

- a) Seizure and loss in favor of the State of the objects belonging to the defendant, used or produced at the time of the infraction;
- b) Interdiction of the exercise of professions or activities whose exercise depends on public title or authorization or homologation of public authority;
- c) Deprivation of the right to benefits or subsidies granted by national or community public entities or services;
- d) Deprivation of the right to participate in national or international conferences, fairs or markets in order to transact or publicize their products or their activities;
- e) Deprivation of the right to participate in public tenders or tenders for the purpose of contracting or concession of public works, the acquisition of goods and services, the concession of public services and the attribution of licenses or permits;
- f) Closure of an establishment whose operation is subject to authorization or license of administrative authority;
- g) Termination or suspension of licenses, permits or authorizations related to the exercise of their activity;
- h) Loss of tax benefits, credit benefits and credit financing lines that you have used;
- i) Sealing of equipment destined to the work;
- j) Imposition of measures that are adequate to prevent environmental damage, restore the situation prior to the infraction and minimize the effects arising from it;
- l) Publicity of the conviction;
- m) Seizure of animals.

Annex XII

Maps of the facilities fined for failure to comply with the industrial emissions law



(available here https://www.igamaot.gov.pt/wp-content/uploads/Desempenho_bienio.pdf)

Annex XII

Maps of the facilities fined for failure to comply with the industrial emissions law



(available here https://www.igamaot.gov.pt/wp-content/uploads/Desempenho_bienio.pdf)

SPAIN

Avosetta Questionnaire: Air Quality Law

London 24-25 May 2019

Agustín García-Ureta, University of the Basque Country, Bilbao

Most of the questions below relate to implementation of the EU Ambient Air Quality Directive (Directive 2008/50/EC [2008] OJ L152/1, 'AQD'), looking beyond direct transposition to actual implementation and the legal and structural challenges in meeting EU air quality standards. Some questions extend beyond the AQD to examine other controversial or emerging aspects of EU law relating to air quality.

Please return your answers to Eloise Scotford (eloise.scotford@ucl.ac.uk), along with your short report on national environmental law developments over the last year, by **1 May 2019** in time for preliminary analysis and advance circulation to other attendees.

Air Quality: National Context

1. What are the main sources of unlawful levels of air pollution in your Member State?

In Spain the biggest problems are located in the cities, particularly, albeit not only, in Madrid and Barcelona, where traffic causes high NO₂ levels. In fact, according to the Spanish Government (data of 2017, see below at (1)) air-quality data have shown an increase in nitrogen dioxide (NO₂) and particulate matter (PM₁₀). The figures indicate that in seven urban agglomerations NO₂ was above the annual threshold (up from six in 2016). The most affected areas are Barcelona metropolitan area, Madrid, Henares industrial area, Southern Madrid, the metropolitan area surrounding Bilbao, and the city of Granada and its outskirts. Interestingly, air quality seems to have improved in Madrid in the last year owing to the use of public transport. However, air pollution protocols have been activated on several occasions owing to the lack of rain and stable high-pressure conditions over large parts of Spain during several days and even weeks.¹ There is some controversy regarding deaths caused by air pollution. According to a study, air pollution has caused 93.000 premature deaths in Spain over a decade.² This mortality is equivalent to eight times that produced by traffic accidents. By contrast, the

¹ Madrid's protocol sets out (1) *Pre-warning*, if any two stations in the same area exceed, simultaneously, 180 µg/m³ for two consecutive hours, or three stations of the surveillance network exceed, simultaneously, 180 µg/m³ for three consecutive hours; (2) *Warning*, if any two stations in the same area exceed 200µg/m³ simultaneously for two consecutive hours, or three stations of the surveillance network simultaneously exceed 200 µg / m³ for three consecutive hours; (3) *Alert*, if any three stations of the same zone (or two if it is zone 4) exceed, simultaneously, 400µg/m³ for three consecutive hours. By reference to these three situations, the Protocol provides for: (a) *Scenario 1*: 1 day with exceeding the advance notice level (actions include information and recommendation measures; measures to promote public transport and reduction of the speed to 70 km/ h in the M-30 and accesses; (b) *Scenario 2*: 2 consecutive days exceeding the level of pre-warning or 1 day exceeding the warning level (reduction of the speed to 70 km / h in the M-30 and accesses; prohibition to circulate in the M-30 and parking prohibition to any vehicles not hold a zero emission sticker; (c) *Scenario 3*: 3 consecutive days exceeding the level of pre-warning or 2 consecutive days exceeding the level of warning (apart from the already mentioned measures, taxis lacking the zero emission sticker would not be allowed to circulate); (d) *Scenario 4*: 4 consecutive days exceeding the warning threshold (other taxis, save those holding the zero emissions sticker would be banned); *Scenario 5*: 1 day under Alert threshold (similar measures to those under scenario 4). If scenario 4 is exceed, Annex II sets out certain exceptional measures that include restrictions on the use of heating or machines, construction workings or the use of "certain" (unspecified) materials.

² Linares, C., "An approach estimating the short-term effect of NO₂ on daily mortality in Spanish cities"; (2018) *Environment International* available at <https://www.sciencedirect.com/science/journal/01604120>.

European Environment Agency (EEA) has estimated that 30.000 premature deaths occur each year, more than triple the 9.300 deaths per year calculated by the aforementioned study. In the EEA study, the authors use dose-response functions estimated in other countries and extrapolated to Spain. The former study has calculated the dose-response function for each provincial capital, considering factors such as its population pyramids, its temperatures and its socioeconomic characteristics. This would explain the difference between both reports. Among the factors that generate pollution problems are also the emissions derived from heating, those of agriculture and their waste, industrial and power plants, and harbours. According to a 2007 report prepared by the Spanish *Observatory on Sustainability* (an institution that does not longer exist), the economic costs of air pollution were ‘at least’ of 16.839 million euros (1.7% of GDP).

(1) How extensive is reported non-compliance with AQD air quality standards in your Member State?

Every year since 2008 (there is a consolidated version in excel format, 2001-2007 available),³ the Spanish Government publishes a report on air quality.⁴ The report is based on the stations of the Autonomous Communities, those of the cities of Madrid and Zaragoza and also a State network for the assessment of air quality in remote rural areas.⁵

Summary 2005-2016 (excesses are marked in blue)⁶

CONTAMINANTE	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
SO ₂												
NO ₂												
PM10												
PM2,5												
Pb												
C ₆ H ₆												
CO												
O ₃												
As												
Cd												
Ni												
B(aP)												

- Sin superación de los valores legislados
- Superación de los valores legislados
- Sin obligación de evaluación (entrada en vigor: 2008)

The following are the data available for the year 2017 in comparison with previous years.

NO₂: According to the 2017 report, only Madrid exceeded the hourly limit value of NO₂ for the protection of human health, as already happened in the four preceding years. However, the annual limit value of NO₂ was exceeded in seven areas.

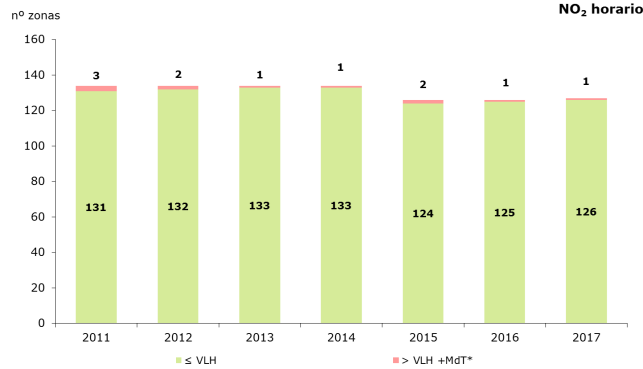
³ Available at https://www.miteco.gob.es/es/calidad-y-evaluacion-ambiental/temas/atmosfera-y-calidad-del-aire/calidad-del-aire/evaluacion-datos/datos/Historico_calidad_aire.aspx.

⁴ Ibid.

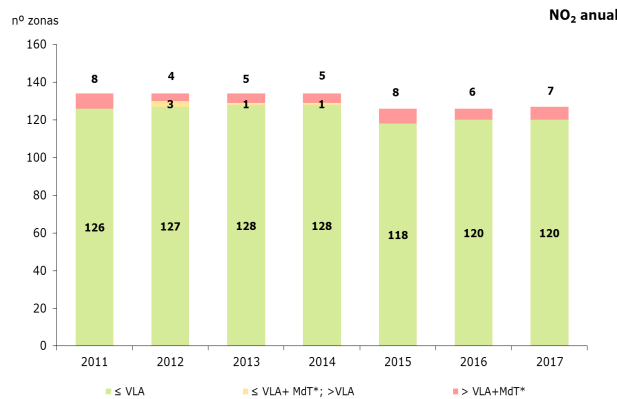
⁵ *Supra* note 3, at 10.

⁶ Source: State Air Quality Plan (Plan II), available at https://www.miteco.gob.es/es/calidad-y-evaluacion-ambiental/temas/atmosfera-y-calidad-del-aire/planaire2017-2019_tcm30-436347.pdf.

NO₂ hourly

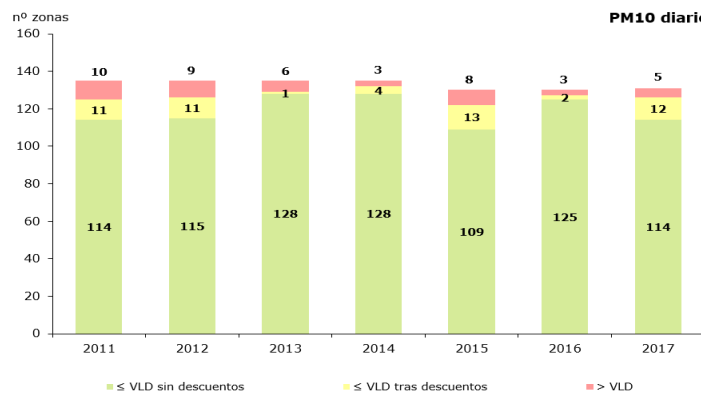


NO₂ annual



PM₁₀: As the 2017 report indicates, Spain has always presented high levels of particles owing to the entry of African air masses (this usually happens during summer). Therefore, a procedure was established to quantify the contributions of natural sources and thus be able to establish the level of particles caused by human activities for the purposes of compliance with the Directive 2008/50/EC in Article 20.⁷

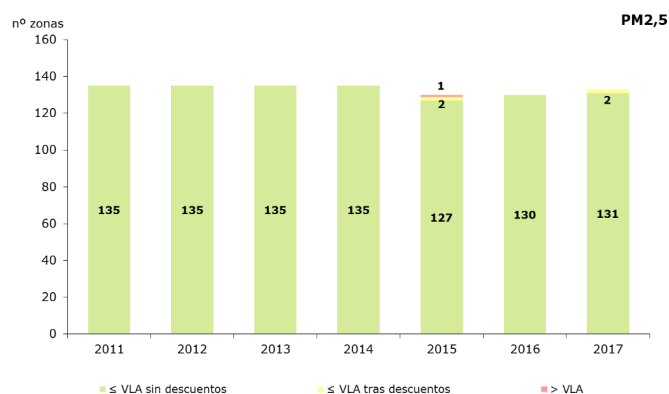
PM₁₀ daily



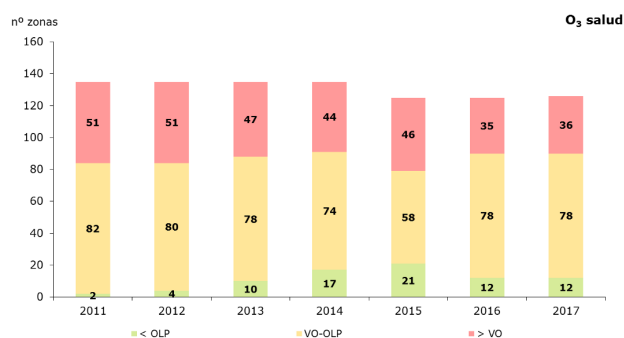
⁷ This provision indicates (at para. 1): ‘Member States shall transmit to the Commission, for a given year, lists of zones and agglomerations where exceedances of limit values for a given pollutant are attributable to natural sources. Member States shall provide information on concentrations and sources and the evidence demonstrating that the exceedances are attributable to natural sources.’

After discounting the episodes of intrusions of African air masses, in 2017 the daily limit value for PM₁₀ was exceeded in five zones.

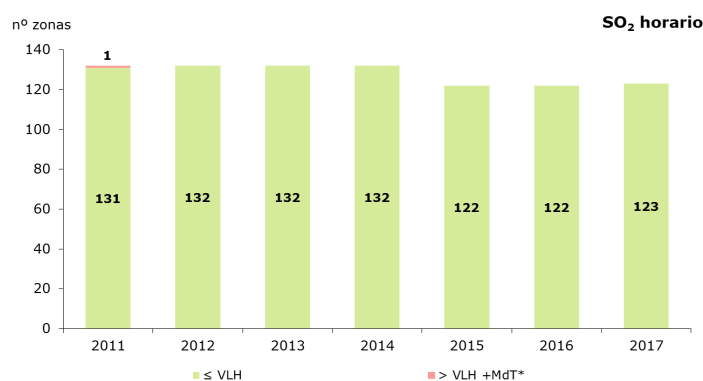
PM_{2,5}: As regards, Pm_{2,5}, only two areas exceeded the annual limit value (Industrial Zone of the Bay of Algeciras and Seville and Metropolitan Area). However, these two areas were excluded once the effect of air masses from Africa were discounted.



O₃: The objective value for ozone (O₃) for health protection was exceeded in 36 areas.



Limit values for CO, lead (Pb), benzene (C₆H₆), arsenic (As), cadmium (Cd), nickel (Ni) were not exceeded.



According to the NGO *Ecologistas en Acción* in its report 'Air Quality in Spain in 2017',⁸ if the values recommended by the World Health Organization are considered (they are more stringent than legal limits) the population that breathed contaminated air increased to 45 million

⁸ Available at: <https://www.ecologistasenaccion.org/wp-content/uploads/2018/06/informe-calidad-aire-2017.pdf>.

(96.6% of the population). This situation represents an increase of 1.3 million in comparison with 2016.

1. Have EU infringement proceedings been brought against your Member State for failure to comply with the AQD?

In 2018 Spain (surprisingly) avoided being referred to the CJEU. The Commission decided not to act over poor air quality in Barcelona and Madrid. Spain promised to adopt measures allowing it to comply with EU air quality rules. It remains to be seen whether a future infringement procedure may be avoided bearing in mind the lack of willingness to tackle this environmental and health problem.

Air Quality Standards

2. Was there pre-existing national law relating to air quality standards (similar to the AQD), or did the AQD introduce something new in your country?

Law 38/1972, on the protection of the atmosphere, foresaw both the setting out of ambient and emission limit values (supplemented by Decree 833/1975, this regulation largely repealed by successive regulations). Both values had to be adopted by the Spanish Government. The law also contemplated the creation of so-called Air Pollution Areas in the case of populations or places where, even if the established emission levels were observed, the concentration of pollutants exceeded ambient values during a certain number of days per year. As the preamble to Law 34/2007 (see below) acknowledges owing to important changes that had taken place since its entry into force, it had become an outdated piece of legislation requiring a new law.

3. How are AQD air quality standards implemented in law in your Member State?

Law 34/2007, of November 15, on air quality and protection of the atmosphere, is the basic (albeit not the only one) piece of air pollution legislation in Spain. Its goal is to achieve optimal levels of air quality to prevent or reduce risks or negative effects on air quality, human health, the environment and other goods of any nature. This legislation is the basic reference for the Autonomous Communities. Royal Decree 102/2011, relating to the improvement of air quality, transposes Directive 2008/50 (and supplements Law 34/2007). This Royal Decree has been amended by subsequent royal decrees setting out data validation and location of measurement points for the assessment of ambient air quality, and incorporate information exchange requirements. One of the amendments created a *National Air Quality Index* allowing citizens to be informed about the quality of the air according to a set of colours (this index regulated by Order Orden TEC/351/2019).

AIR QUALITY	SO₂	NO₂	O₃	PM₁₀	PM_{2,5}
VERY GOOD	0-100 µg/m ³	0-40 µg/m ³	0-80 µg/m ³	0-20 µg/m ³	0-10 µg/m ³
GOOD	101-200 µg/m ³	41-100 µg/m ³	81-120 µg/m ³	21-35 µg/m ³	11-20 µg/m ³
REGULAR	210-350 µg/m ³	101-200 µg/m ³	110-180 µg/m ³	36-50 µg/m ³	21-25 µg/m ³
BAD	351-500 µg/m ³	201-400 µg/m ³	181-240 µg/m ³	51-100 µg/m ³	26-50 µg/m ³
VERY BAD	501-1250 µg/m ³	401-1000 µg/m ³	241-600 µg/m ³	110-1200 µg/m ³	51-800 µg/m ³

The Spanish government is empowered to define and establish air quality objectives and the minimum requirements of air quality assessment. Article 5 of Law 34/2007 sets out three types of activities by reference to the three levels of government in charge of air pollution (State, Autonomous Communities and municipalities). According to Article 5 of Law 34/2007, the Government is empowered to:

- (a) Update, with the participation of the Autonomous Communities, the list of pollutants and the catalogue of potentially polluting activities.
- (b) Define and establish, with the participation of the Autonomous Communities, air quality objectives, alert and information thresholds and emission limit values, without prejudice to emission limit values that may be established by the Autonomous Communities in application of IPPC legislation.
- (c) Define minimum requirements to which the stations, networks, methods and other air quality assessment systems must comply.
- (d) Define the methodologies to estimate natural sources and the procedures to identify their incidence in the registered values of certain pollutants.
- (e) Prepare and approve State-level plans and programs necessary to comply with EU rules regulations and commitments that derived from international agreements on transboundary air pollution.⁹

⁹ Although it is outside the scope of the questionnaire, in December 2010, the Executive Body of the Convention on Long-range Transboundary Air Pollution adopted decision 2010/5 on Spain's continuing and long-standing non-compliance with its emission reduction obligations under the Protocol on Volatile Organic Compounds (VOCs) or their Transboundary Fluxes. In the decision, the Executive Body reiterated its increasing disappointment at the continuing failure of Spain to fulfil its obligations to adopt and implement effective measures to reduce its national annual emissions of VOCs by at least 30 per cent by the year 1999, using 1988 as its base year, as set out in article 2.2 (a) of the Protocol on VOCs. The Implementation Committee noted that

- (f) Prepare and update periodically the Spanish emission inventories. Carry out an evaluation, monitoring and compilation of technical information on background pollution for the fulfilment of the obligations derived from commitments on transboundary pollution.
- (g) Coordinate the Spanish system of information, monitoring and prevention on air pollution.
- (h) Coordinate the adoption of the necessary measures to deal with adverse situations related to the protection of the atmosphere or related to air quality, whose dimension may exceed the territory of an Autonomous Community.

The Autonomous Communities are entitled to evaluate air quality, establish air quality objectives and emission limit values that may be stricter than those established by the State in accordance with article 5.1 (within the framework of IPPC), adopt plans and programs for the improvement of air quality and compliance with quality objectives in their territory, adopt the necessary control and inspection measures to guarantee compliance with the law, and impose penalties for infringements of its provisions.

The powers of the local authorities are more imprecise as they are entitled to exercise powers in terms of air quality and protection of the atmosphere attributed by the basic legislation of the State and the legislation of the Autonomous Communities in this matter. In other words, their powers depend on the specifics set out either by the State or the Autonomous Communities. Nevertheless, they are in charge of traffic regulation within their boundaries (see the measures adopted by Madrid (*supra* note 1)).

4. Does any law in your Member State provide for air quality standards that go beyond those set out in the AQD, imposing any more stringent standards, for example, in relation to PM_{2.5}?

No, to my knowledge.

Air Quality Monitoring and Modelling

5. How are air quality monitoring networks set up in your Member State (briefly)? Do these go beyond the monitoring requirements set out in Chapter II AQD (eg in terms of the number and location of monitoring stations)?

Please see the answer to the following question.

6. What sort of problems are encountered in monitoring of air quality in your Member State?

Problems might include: inconsistent results given by different schemes for monitoring air quality, improper siting of measurement equipment, unreliable equipment used, no monitoring established in key areas, unconfirmed results etc.

There are approximately 800 stations measuring air pollution. However, it has been indicated that it is not possible to make an objective comparison between different Autonomous Communities for various reasons: (1) Data collection by the Autonomous Communities does not present the same soundness; (2) not all measurement stations are equally designed (the NGO *Ecologistas en Acción* highlights that there is lack of stations measuring the concentration of PM_{2.5}) nor all areas or agglomerations are equally defined; (3) the location of many stations

Spain, despite the fact that it had already been in non-compliance for over 10 years, still did not expect to achieve compliance before 2020, by which time it will have been in non-compliance for more than 20 years. See at: <http://www.unece.org/fileadmin/DAM/env/documents/2009/EB/eb/ece.eb.air.2009.3.e.pdf>.

is not adequately representative of the area or agglomeration owing to the trend to relocate the most conflictive stations (i.e., those assessing traffic) in urban background locations; (4) few stations reach the minimum percentages of data established by applicable regulations.

7. As far as you can determine, are there limitations or problems with the modelling techniques used in your Member State to assess air quality (where modelling is permitted as a method for assessment under Chapter II AQD)?

Please see the answer to the previous question.

National Air Quality Plans and Governance

8. Does your Member State have a national Air Quality Plan under Article 23?

The Spanish Government adopted the *National Air Quality Plan (2017-2019)* (Air Plan II). This Plan supersedes Air Plan I (2013-2016). One of the Plan's objectives is to reinforce actions for the control of registered tropospheric ozone values, given the generalized infringement of the objective value for the protection of health in a large part of Spain. As indicated above, this objective has not been achieved. The structure of the Plan is as follows: It first refers to the legal framework and provides an analysis of the current situation by reference to different pollutants. Part 3 is devoted to its (fairly broad) objectives (e.g., to ensure compliance with legislation on air quality in all areas: national, European and international; to implement measures of a general nature that may help to reduce emission levels into the atmosphere of the most relevant pollutants and with the greatest impact on health and ecosystems, especially in the areas most affected by pollution, to promote available information on air quality, to implement measures to ensure compliance with Directive 2016/2284, and to reinforce actions for the control of registered tropospheric ozone values, given the generalized infringement of the objective value for the protection of health in a large part of the country. In the light of those objectives, the Plan sets out different measures:

- (1) Information on air quality (e.g., the elaboration of simple air quality indexes or assessment of air pollution on health).
- (2) Environmental taxation (the only measure is the creation of a study group on this matter)
- (3) Mobility measures (e.g., the creation of charging points for electric vehicles, or the drafting of plan on the use of bicycles).
- (4) Research (e.g., the carrying out of studies in areas exceeding O₃ values to obtain information on the causes and assess possible measures)
- (5) Improvements in agriculture and livestock that allow reducing ammonia emissions (e.g., to elaborate the necessary algorithms for the calculation of the emissions and adjust them to techniques that really are applied by part of the farmers)
- (6) Measures for the residential sector (e.g., to improve the reduction of emissions)
- (7) Measures to reduce emissions in the industrial sector (e.g., to update and develop emission limit values applicable to medium size combustion plants).
- (8) Transportation improvements: road traffic (e.g., to promote alternative and efficient energy vehicles, or the carsharing).
- (9) Transportation improvements: air traffic and airports (to reduce emissions from aeroplanes within Spanish air space; tracking the optimization of taxiing movements of aircraft).
- (10) Transportation improvements: rail traffic (promotion of alternative fuels in rail transport).
- (11) Improvements in ports (e.g., promotion of rail transport to or from ports).

The drafting of the plan was subject to criticism. First, it was prepared during 2017 but it also applies to this very year. Secondly, its limited temporal scope was justified because as of 2019 it was to be replaced by the national air pollution control program within the framework of Directive 2016/2284 on new national emission ceilings. As some environmental NGOs put it, the Plan was simply trying to formally cover the time lapse between the completion of the Air Plan I and the national air pollution control program already mentioned.¹⁰ Third, some of the measures are fairly broad and it is doubtful whether they have had real impact on the combat against air pollution (e.g., the creation of a commission to analyse the role of environmental taxation). *Ecologistas en Acción* (an environmental NGO already mentioned) brought in 2018 a lawsuit before the *Audiencia Nacional* to force the Spanish Government to comply with its legal obligation to draw up a national plan for improving air quality including specific measures to tackle the problem of pollution caused by tropospheric ozone (the judgment has not yet been delivered).

No information has been obtained on the national air pollution control program replacing Air Plan (II).

- a. If so, to which pollutants does the plan relate (eg NO₂ or PM₁₀) and what **key** measures does the plan outline to keep exceedances ‘as short as possible’? *Please also indicate if you think there are any weaknesses in the plan.*
- b. If your Member State has such a plan, how is the legal requirement of keeping exceedances ‘as short as possible’ satisfied? *Please outline any challenges (legal or otherwise) in meeting this requirement in your Member State.*

Royal Decree 102/2011 distinguishes between two different types of air quality plans.

- (a) Air quality improvement plan. To be adopted in certain zones or agglomerations where pollutant levels in the air exceed any limit value or objective value, as well as the margin of tolerance corresponding to each case. This plan is to achieve compliance with limit values or the corresponding target value specified in Annex I of the Royal Decree. This type of plan includes sustainable measures to improve air quality over time.
- (b) Short term air quality plans. To be adopted in certain areas or agglomeration where there is a risk that the level of pollutants exceeds one or more of the alert thresholds specified in its Annex I, the Autonomous Communities and, where appropriate, local authorities, will draw up action plans setting out measures that must be adopted in the short term to reduce the risk of exceeding those thresholds or their duration. Unlike the previous plan, this plan has to include short term measures to avoid surpassing alert thresholds. The following are some of the plans adopted by the Autonomous Communities:
 - (1) Andalucía: Granada and metropolitan area, Córdoba, Málaga and Costa del Sol, Villanueva del Arzobispo (Jaén), Almería, Seville and metropolitan área, El Ejido, Bahía de Algeciras, Cuevas de Almanzora, Carboneras industrial área, Bailén, Huelva industrial área, Cádiz bay, Jerez de la Frontera, Jaén and Torredonjimeno.
 - (2) Aragón: Alcañiz and Zaragoza
 - (3) Asturias: Avilés, Gijón, Trubia.
 - (4) Baleares: Palma de Mallorca

¹⁰ Ecologistas en Acción, ‘Observaciones de Ecologistas en Acción con respecto al Plan Aire II’, available at: <https://spip.ecologistasenaccion.org/IMG/pdf/observaciones-plan-aire-ii.pdf>.

- (5) Basque Country: Alto Deba, Durango metropolitan área, Leona, lower section of Nervion river, Pasaialdeá metropolitan área, Goierri, metropolitan área, Tolosaldea metropolitan area, Urola metropolitan area, Betoño neighbourhood (Vitoria-Gasteiz).
- (6) Canary Islands: Santa Cruz de Tenerife and San Cristóbal de La Laguna
- (7) Cantabria: Los Corrales de Buelna
- (8) Castilla La-Mancha: Puertollano (two plans to tackle SO₂ and PM₁₀).
- (9) Castilla-León: León, Miranda de Ebro and la Robla
- (10) Catalonia: Barcelona and Santa Coloma de Gramenet
- (11) Galicia: A Coruña
- (12) Madrid: Henares corridor, “Urbana Sur” metropolitan área, Torrejón de Ardoz, Alcorcón, Getafe, Alcobendas.
- (13) Valencia: Mijares - Penyagolosa and Castelló, Segura - Vinalopó and Alicante, L'Horta and metropolitan área.

These plans have been criticized for several reasons: (i) They include measures lacking an execution schedule, nor pollution reduction objectives nor quantified indicators to assess their application; (ii) they also lack funding; (iii) the majority of measures lack binding effect, (e.g., to inform, or promote attitudes or activities that cause less pollution); (iv) they also include measures already in execution or that had previously been approved, reflecting a lack of coherence among themselves; or (v) plans include as improvement measures those that do not actually seem to contribute to air quality (e.g., the construction of underground car parks in cities or new bypass roads).¹¹

9. Whether or not your Member State has an Air Quality Plan, please outline the **key** national regulatory measures that contribute towards compliance with EU air quality standards in your Member State.

For example, what are the main national legal measures that regulate polluting air emissions from:

- *households (eg restrictions on solid fuels, planning laws);*
- *transport (eg clean air zones); and*
- *industry (eg reliance in Industrial Emissions Directive or something more)?*

These sectors are now covered either by local regulations (traffic), Royal Decree 314/2006, (Technical building Code), Royal Decree 1027/2007, which approves the Regulation on Thermal Installations in Buildings, or the Law on IPPC (Royal Legislative Decree 1/2016).

10. Has your Member State ever issued a Short-term Action Plan under Article 24? If so, please outline any notable features of the plan or aspects of its implementation (briefly).

Please see the answer to question 8.

11. Which public bodies have legal responsibilities for meeting air quality standards in your Member State?

This question has been answered above.

12. Are there any legal requirements for different public bodies who have control over different air pollution sources to coordinate their efforts in any way to work towards air

¹¹ Ecologistas en Acción, *La calidad del aire en el Estado español durante 2017*, supra note 8, at 41.

quality standards? (For example, different regulators may control highways, airports, local urban planning decisions, large industrial installations, and so on.)

The distribution of powers in respect of air pollution are defined in Article 5 of Law 34/2007, as already stated.

Enforcement of Air Quality Law

13. What is the primary mode for enforcing of air quality law in your Member State?

There are some basic mechanisms, summarised in the ensuing paragraphs:

- (1) Article 7 of Law 34/2017 sets out a list of obligations to be complied with by potentially polluting activities. These obligations include:
 - (a) Fulfil the obligations regarding potentially polluting activities.
 - (b) Respect emission limit values as established in regulations.
 - (c) Adopt without delay and without any requirement, the necessary preventive measures when there is an imminent threat of significant damage due to air pollution from an installation.
 - (d) Adopt without delay and without need of any requirement measures to avoid new damages when air pollution has been caused in the installation causing damage to safety or health.
 - (e) Comply with technical requirements to safeguard human health and the environment.
 - (f) Comply with measures contained in the plans for the protection of the atmosphere.
 - (g) Carry out controls on emissions and, where appropriate, on air quality, in the manner and time frames provided for in applicable regulations.
 - (h) Provide the information requested by public administrations within the scope of their competences.
 - (i) Facilitate the inspection and verification acts carried out by the competent autonomous community, in the terms and with the guarantees established by the legislation in force.
- (2) Potentially polluting activities (included into Annex IV to the Law) are subject to authorisation to be granted by the Autonomous Communities. The activities are divided into three groups (A, B and C). The Spanish Government must update the catalogue every five years (the catalogue is developed by Royal Decree 100/2011, which updates it). Activities under groups A and B are subject to authorisation and also those belonging to these two groups even if they act autonomously but the sum of their production capacity exceeds the threshold for groups A and B. The construction, assembly, operation, transfer, substantial modification, cessation or closure of facilities belonging to group C is to be notified to the Autonomous Community according to their own rules. These authorisations are granted for a specific period of time no exceeding eight years, after which they may be renewed for successive periods. The Autonomous Community cannot authorise the construction, assembly, exploitation, transfer or substantial modification of facilities included into Annex IV if the emissions derived from their operation exceed air quality objectives.
- (3) The Autonomous Communities have to carry out inspections to guarantee the enforcement of the Law. However, the inspections and, in particular, human resources available deeply vary in the Autonomous Communities.¹²

¹² See García-Ureta, A., 'Potestad inspectora y medio ambiente: derecho de la Unión Europea y algunos datos sobre las Comunidades Autónomas' with tables containing data of 2015; available at:

- (4) Law 34/2007 (and also other environmental laws adopted by the Autonomous Communities) foresee the imposition of fines up to 2 million euros and total or partial closure of activities and facilities (in the case of very serious breaches of the Law).

14. Have there been court cases concerning the enforcement of air quality law in your Member State? *Please outline major cases or themes in key cases only.*

- (1) There are no relevant cases before the Spanish Supreme Court.
- (2) The High Courts of different Autonomous Communities have delivered several judgments on the application of diverse provisions of Law 34/2007:
 - (a) High Court of Cantabria, judgment 969/2012 of 21 December of 2012. The Court upheld the measures imposed by the public authorities in the case of a mining activity by declaring that Article 13.5 of the Law, establishes that the Autonomous Community cannot authorize (*inter alia*) the exploitation of activities of groups A and B to Annex IV, if it is demonstrated that the increase of air pollution, as a result of the emissions from their operation, exceeds air quality objectives. Therefore, both the concrete emission from the installation and the rest of factors and circumstances that could affect the quality of air in a certain place, had to be taken into consideration.
 - (b) High Court of Catalonia, judgment 855/2018 of 5 October of 2018. The Court referred to the IPPC authorisation by holding that in the absence of emission limit values it was not for each authorisation to impose those that the public authorities might think appropriate.
 - (c) High Court of Castilla-León, judgment 940/2018 of 19 October of 2018. The plaintiff asked the Court to impose on the Autonomous Community the obligation to elaborate and approve mandatory Air Quality Plans for the following areas: Salamanca, North Duero, South Duero, South Mountain, Tiétar Valley and Alberche, South and East of Castilla-León León, within a year after the publication of the judgment. The Court observed that target values had been exceeded in the years 2012, 2013 and 2014. The Court conclude that it could not be held that the adoption of the regional plans had to take place after the approval of the national plan, since they were independent, albeit interrelated instruments. This judgment is important in so far as Law 29/1998, on access to administrative courts, includes restrictive clauses to sustain a challenge for the failure to act.¹³
 - (d) High Court of Valencia, judgment 783/2018 of 14 December of 2018. The Court considered Article 5(2) of Royal Decree 102/2011, which sets out five different criteria for the specification of emission limit values in authorisations: (1) adequate techniques and measures to prevent pollution and, as far as possible, the best available techniques under IPPC; (2) technical characteristics of the installation, its geographical implantation and the local conditions of the environment; (3) nature of the emissions

http://www.actualidadjuridicaambiental.com/wp-content/uploads/2016/01/2016_02_01_Garcia-Ureta_Potestad-inspectora-y-medio-ambiente.pdf.

¹³ Article 29 reads (my translation): '(1) Where a public authority, by virtue of a general provision that does not require acts of application or by virtue of an act, contract or administrative agreement, is obliged to perform a specific benefit in favour of one or more specific persons, those who are entitled to it can demand from the fulfilment of that obligation. If, within three months from the date of the claim, the Administration has not complied with the request or has not reached an agreement with the interested parties, they may bring an appeal against the failure to act.

(2) Where a public authority does not execute its final acts, individuals affected may request its execution. If this does not occur within one month of such a request, the applicants may file an appeal.'

and their potential transfer from one medium to another, as well as their impact on the people and the potentially environment affected; (4) plans and programs approved in accordance with the provisions of sections 1 and 2 of Article 16 of Law 34/2007; and (5) the emission limit values adopted, where appropriate, by the regulations in force on the date of authorization, or in international treaties signed by Spain or the EU. According to the Court, the five criteria had to be jointly considered.

- (e) High Court of Asturias, judgment 900/2018 of 12 November of 2018. The Court reaffirmed the powers of the Autonomous Communities to adopt more stringent emission limit values than those set out by the Spanish Government.
- (f) On 19 February 2019 it was reported that the administrative court number 6 of Barcelona (this a lower court) has accepted a lawsuit filed by an individual against Barcelona City Council for high air pollution in this capital. The plaintiff requires the City Council to take measures to curb the pollution and, in particular, proposes that a system of entry fee or toll for vehicles be implemented.

15. Please outline any other major challenges faced in your Member State for enforcing the AQD, or any other applicable air quality law.

As indicated above, the first major challenge is the lack of political willingness to tackle this problem in its diverse facets, i.e., traffic congestion,

A Controversial Source of Air Pollution: Regulation of Vehicle Emissions Systems

16. How has your Member State implemented these EU vehicle type approval rules? Have there been any controversies in transposing these rules?

Vehicle approval rules are currently set out in Royal Decree 750/2010 (as amended). The last amend took place in 2018 (by Order ICT/1212/2018, of 12 November, updating Annexes II, III, IV, V, VI, VII, VIII, IX, X, XI y XII of the Royal Decree).

17. What legal measures have been taken in your Member State (if any) against car manufacturers which have failed to comply with vehicle type approval rules? *These legal measures might include court cases, including between car buyers and manufacturers.*

The Spanish Consumer Organisation (OCU) brought (June 2007) a lawsuit against Volkswagen. This a collective legal action representing approximately 7.500 affected users. They demand more than 22 million euros in compensation for damages (around 3.000 euros per person). Overall 9 out of 10 lawsuits against Volkswagen were dismissed in 2016.

- (a) The rationale behind some of the judgments (Valencia, 29-07-2016) was that the vehicle was suitable for circulation, that is, for the purpose for which the vehicle was purchased, and that neither the national nor the EU authority imposed the withdrawal of vehicles.
- (b) In a different judgment (Manacor, 21-11-2016), the judge indicated that it was true that the vehicle lacked one of the characteristics attributed to it. However, it was not proven that this factor motivated the purchase. Therefore, the lack of information on the installation of the software had not necessary relevance to invalidate the consent given for the purchase.
- (c) A further judgment (Quart de Poblet, 10-11-2016) held that it was notorious that Volkswagen was going to give a technical solution to the engine taking charge of all costs derived from the implementation of that solution.
- (d) Similarly, in 2017, a judge (Cantabria, 19-04-17) held that it was not proved that under normal conditions the vehicle was more polluting than any other vehicle on the market. In

addition, the vehicle was legally circulating as well as the administrative authorisation for the sale of such vehicles.

- (e) A more recent judgment (Barcelona, April 2018) held that the plaintiff had not proved the damages he claimed, which were based on the engine components and the loss of sale value of the vehicle on the second-hand market, a damage that was regarded as ‘hypothetical’.
- (f) The only judgment delivered in 2016 upholding the plaintiff (Valladolid, 25-10-2016) held that the right to compensation had to be recognised owing to the breach of the principle of good faith, and the loss of confidence on the part of the consumer. Although these were assets difficult to measure, given their immaterial nature, the judge awarded 5.000 euros in compensation. The judge also held that the case involved the infringement of basic norms regarding the homologation of vehicles, with impact on a public good such as the environment.

As regards the criminal prosecution of the *dieselgate*, the *Audiencia Nacional* decided (end of 2018) to transfer the case to German judicial authorities (Prosecutor’s Office of Braunschweig (in the federal state of Lower Saxony). The Spanish court considered that the German authorities were in a better position to investigate the case. In addition, the Court argued that that the majority of those investigated reside in Germany, as well as the people who allegedly took the criminal decision.

Case Study

Martha is living in an urban area in your Member State, and her children have developed asthmatic symptoms (i.e. a diagnosed respiratory illness). She becomes aware that the local air quality exceeds standards laid down in the AQD. Her house is next to a main road, which is a heavily used bus route on which bus operators use diesel vehicles. The town also has a number of industrial plants, a coal fired power station, and a number of intensive farms. It is unclear to her precisely which pollution source is causing the breaches of air quality standards, or what their respective contributions might be to the local air quality problem.

What sort of legal action could Martha take in your Member State? And against whom? What remedies do the courts possess? What are the financial implications of bringing such a case? Might there be other regulatory avenues available to Martha instead?

According to the case, Martha could sue, under public authorities’ liability rules, the Autonomous Community for not complying with air quality standards, be they set out in EU law (therefore, they would have direct effect) or in national rules. For the attainment of that purpose, the lawsuit should establish the causal link between the excess of air pollution and their health problems.

SWEDEN

Sweden

2019-05-11

AVOSETTA MEETING in London 24-25 May 2019

Professor Jan Darpö, Uppsala Universitet

Air Quality: National Context

1. What are the main sources of unlawful levels of air pollution in your Member State?

- In Sweden, the most important air quality problems relate to particular matters (PM₁₀/PM_{2,5}) and nitrogen dioxide (NO₂). In quite a few urban areas, the levels of those pollutants exceed the air quality standards and the impact on human health is still significant. The main sources are road traffic, long range transportation of particles from other parts of Europe and small scale domestic heating (furnaces in the homes, mostly outside of urban areas). A Nordic peculiarity concerning road traffic is the wide use of studded tires, something that substantially contributes to the high levels of particular matters in the ambient air in urban areas. The long range transportation of pollutants come from all areas of Europe, although winds from the west are dominating in our country. Thus, an important part of the pollution comes from the UK, a phenomenon which is expected to continue even after Brexit. On the other hand, when the winds blow from Eastern Europe, the pollution is also quite significant, as the air quality in those regions is among the poorest in Europe.

2. How extensive is reported non-compliance with AQD air quality standards in your Member State?

For AQD air quality standards, please refer to AQD, Articles 12-19.

Please refer to data either reported to the Commission or otherwise available in your Member State. It may be easiest to set this information out in a table for different standards for certain pollutants (NO₂, PM₁₀, PM_{2.5}, SO₂ are likely to be the main pollutants for which there may be reported non-compliance with AQD standards).

- a. If data on compliance with air quality standards is incomplete, please indicate the extent of the non-compliance with requirements of Article 26 AQD (public information requirements).

- In the calendar year 2017, there was 19 exceedances reported from nine cities in Sweden. Two of these concerned PM₁₀ and the rest NO₂. Ten Air Quality Plans are in place for the cities Stockholm, Göteborg, Umeå, Uppsala, Sundsvall, Luleå, Örnsköldsvik, Linköping, Norrköping and Skellefteå. All of these deal with particular matters and/or nitrogen dioxide. As of today, five Air Quality Plans are concluded due to successful efforts to lower the levels of those pollutants (Göteborg, Helsingborg, Norrköping, Malmö and Jönköping).

The information to the public on air pollution according to Article 26 AQD is accessible on the website of Swedish Environmental Protection Agency (Naturvårdsverket):

www.naturvardsverket.se/luftenisverige

www.naturvardsverket.se/luft

www.naturvardsverket.se/mknluft

Here, one can find information about the air quality control, effects on the human health, exceedances and levels of pollutants in several cities/municipalities. Also the cities/municipalities are required to inform the public on air pollution, which is done on websites of their own. However, many municipalities perform poorly in this respect. Data host for the whole information system is the Swedish Meteorological and Hydrological Institute (SMHI). All information from air quality measuring in the country is reported here in (not very accessible) tables.

www.smhi.se/datavardluft

3. Have EU infringement proceedings been brought against your Member State for failure to comply with the AQD?
 - a. If so, what was the outcome of this enforcement action and its impact on air quality law and policy in your Member State? (If enforcement action is ongoing, answer this question as best you can in terms of the effects of this action on your Member State's approach to air quality law and policy.)

- Oh yes..! Already in 2011 in the case C-479/10, Sweden was found in breach of the AQD for exceedances of PM₁₀ during the years 2005, 2006, 2007 in the zones SW 2 (Zone Middle) and SW 4 (Stockholm), and for the years 2005 and 2006 in SW 5 (Göteborg). In addition to this, there are two ongoing infringement cases and one EU Pilot against our country concerning the AQD.

According to my informants, the Commission has opened infringement cases against 17 Member States including Sweden for exceedance of PM₁₀ in the ambient air in urban areas. Two test cases are already decided against Bulgaria (C-488/15) and Poland (C-336/16). In those, the countries were found in breach of the directive concerning incorrect transposition and systematic and continuous exceedance of the limit values for PM₁₀, postponement of the deadlines set to attain certain the limit values, 'shortest possible' exceedance period, the content of Air Quality Plans and appropriate measures, information needed for an assessment, etc. Actions in the CJEU are also brought against Hungary, Italy and Romania. In the infringement case against Sweden (No 2012/2216), the Commission's complaints in the Letter of Formal Notice 2013-04-26 and the Reasoned Opinion 2015-06-19 concern similar issues. In its replies (2013-06-26, 2015-08-19 and 2016-06-30), Sweden claims that the exceedances are limited to only a few control stations and only some of the daily limit values have been breached with (not the yearly ones) and that the exceedance have not occurred recent years due to appropriate action. Moreover, actions such as raised

congestion fees, environmental taxes and environmental zones (where Euro5 and Euro6 cars only are allowed) are on their way and will surely be appropriate in combating the problems with high levels of PM₁₀ in the urban areas concerned. If this line of argument will convince the Commission remains to be seen.

An EU Pilot was opened against Sweden 2014-02-12 (No 6106/14/ENVI) for omissions in relation to AQS for nitrogen dioxide. This is one of 13 similar cases brought against different Member States, out of which actions already are brought to CJEU against France, Germany and the UK. In the Swedish case, the Commission has focused on the exceedance in zone SW5 (Göteborg). In its replies (2014-04-23 and 2018-11-06), Sweden claims that the exceedance only concerns one control station at a densely trafficked intersection where no person ever resides, that the levels of pollutants are decreasing rapidly and that actions already undertaken, ongoing and planned to bring down the levels of nitrogen dioxide are both appropriate and effective. Further measures such as environmental zones, subsidies for electric cars and a revised Air Quality Plan for Göteborg will also be helpful.

Finally, a LFM was delivered 2019-01-25 against Sweden for inappropriate formal transposition of the AQD in relation to nitrogen dioxide and ozone, for inappropriate content in the Air Quality Plans, inadequate measures concerning transboundary air pollution and for inappropriate methods for measurement and control of those substances (case No 2018/2326). In its reply 2019-03-25, Sweden has pointed to that most of the measures needed must be decided by the Government or SEPA and appropriate action will be taken in the end of the year.

Air Quality Standards

4. Was there pre-existing national law relating to air quality standards (similar to the AQD), or did the AQD introduce something new in your country?

- No such legislation existed. In the beginning of the 1990s, air quality standards were introduced (NFS 1993:10, 1993:11 and 1993:12), but only requiring that SEPA should be informed and monitoring/measuring should be performed in cases of exceedances. Before that, only some recommendations under the Health Protection Act (1982:1080) existed, also issued by the Swedish Environmental Protection Agency (SEPA). Against this background, the AQD surely introduced something new, although the implementation has been undertaken in phases.

5. How are AQD air quality standards implemented in law in your Member State?

- Air Quality Standards are regulated in Chapter 5 of the Environmental Code. This Chapter sets the basis for all kinds of Environmental Quality Standards, be that for ambient air, water or noise. The more detailed rules on AQS are given in the Air Quality Ordinance (2010:477) and different Regulations issued by the SEPA, out of which NFS 2016:9 on the control of air quality is the most important.

6. Does any law in your Member State provide for air quality standards that go beyond those set out in the AQD, imposing any more stringent standards, for example, in relation to PM_{2.5}?

- As shown in the Annex of this report, Sweden has stricter air quality standards for some pollutants such as ozone and sulphur dioxide (SO₂). Most of these stricter requirements concern exceedance periods. However, the most important of the stricter air quality standard according to domestic law is the one on nitrogen dioxide. As can be seen in the Annex, the stricter requirements here concern both the exceedance period (daily exceedance to be compared with monthly only in the AQD) and the limit values (90 micrograms per m³, instead of 200 micrograms per m³ in the AQD).

Air Quality Monitoring and Modelling

7. How are air quality monitoring networks set up in your Member State (briefly)? Do these go beyond the monitoring requirements set out in Chapter II AQD (eg in terms of the number and location of monitoring stations)?

- Sweden prides itself for being one of the originators of the modern legislation on air quality, not least on the international level. Be that as it may, the Swedish system for monitoring air quality follows closely the provisions of the AQD.

8. What sort of problems are encountered in monitoring of air quality in your Member State?

Problems might include: inconsistent results given by different schemes for monitoring air quality, improper siting of measurement equipment, unreliable equipment used, no monitoring established in key areas, unconfirmed results etc.

- The monitoring problems are minor, although the local implementation of the requirements creates weaknesses here and there on municipal level.

9. As far as you can determine, are there limitations or problems with the modelling techniques used in your Member State to assess air quality (where modelling is permitted as a method for assessment under Chapter II AQD)?

- No limitations or problems concerning modelling techniques reported...

National Air Quality Plans and Governance

10. Does your Member State have a national Air Quality Plan under Article 23?

- a. If so, to which pollutants does the plan relate (eg NO₂ or PM₁₀) and what **key** measures does the plan outline to keep exceedances 'as short as possible'?
*Please also indicate if you think there are any **weaknesses** in the plan.*

- b. If your Member State has such a plan, how is the legal requirement of keeping exceedances 'as short as possible' satisfied? *Please outline any challenges (legal or otherwise) in meeting this requirement in your Member State.*

11. Whether or not your Member State has an Air Quality Plan, please outline the **key** national regulatory measures that contribute towards compliance with EU air quality standards in your Member State.

For example, what are the main national legal measures that regulate polluting air emissions from emissions from:

- *households (eg restrictions on solid fuels, planning laws);*
- *transport (eg clean air zones); and*
- *industry (eg reliance in Industrial Emissions Directive or something more)?*

12. Has your Member State ever issued a Short-term Action Plan under Article 24? If so, please outline any notable features of the plan or aspects of its implementation (briefly).

- Nope...

13. Which public bodies have legal responsibilities for meeting air quality standards in your Member State?

- The municipalities, the regional County Administrative Boards, the SEPA and other national authorities such as the Transportation Authority.

14. Are there any legal requirements for different public bodies who have control over different air pollution sources to coordinate their efforts in any way to work towards air quality standards? (For example, different regulators may control highways, airports, local urban planning decisions, large industrial installations, and so on.)

Enforcement of Air Quality Law

15. What is the primary mode for enforcing of air quality law in your Member State?

16. Have there been court cases concerning the enforcement of air quality law in your Member State? *Please outline major cases or themes in key cases only.*

Just one case, where the Swedish Association for Nature Conservation (SSNC) brought action against the city of Stockholm for its omission to deal with the exceedance of the air quality standard in the area of Hornsgatan, a street with a long history of non-compliance with particle (PM10) and Nitrogen Oxide (NO2) standards. In 2011 a first judgement of the Land and Environment Court in

Nacka clarified that the city could not escape responsibility for upholding the standards, and the case was remitted back to the competent authority at municipal level. This national judgement together with the Commission's successful action against Sweden in the CJEU in C-XX, alerted the authorities to action, i.e. a program of spraying affected streets with particle-binding fluids and a ban on studded tires on that street. In Sweden studded tires is the main factor causing high particle concentrations. Today the standards in the Air Quality Directive have been upheld for some years in Stockholm, albeit not the Swedish significantly stricter standards for NO₂, and the case is at present tried a second time in the environmental court.

17. Please outline any other major challenges faced in your Member State for enforcing the AQD, or any other applicable air quality law.

- The main problem in my view is that the Air Quality Plans are merely programmatic and that there are no enforcement mechanisms connected to them. In the plan for Stockholm for example, it is clearly stated that

A Controversial Source of Air Pollution: Regulation of Vehicle Emissions Systems

Many Member States are currently subject to infringement proceedings by the Commission in relation to vehicle type approval rules. This is currently prescribed under Framework Directive 2007/46/EC establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles [2007] OJ L263/1 and Regulation (EC) No 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 [2007] OJ L171/1.

Amongst other things, this legislation requires Member States to have 'effective, proportionate and dissuasive' penalty systems in place to deter car manufacturers from illegal practices, such as installing defeat devices. This legislation was overhauled in 2018 by Regulation (EU) 2018/858 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC [2018] OJ L151/1, which will apply from 1 September 2020.

18. How has your Member State implemented these EU vehicle type approval rules? Have there been any controversies in transposing these rules?

- The implementation of Regulation 2018/858 is on its way, although no actual proposal is made yet and the discussion is only in its cradle. As usual when it comes to car manufacturing in Sweden, any new "administrative burden" will be heavily opposed by the business stakeholders.

19. What legal measures have been taken in your Member State (if any) against car manufacturers which have failed to comply with vehicle type approval rules? *These legal measures might include court cases, including between car buyers and manufacturers.*

- To my knowledge, no such legal means are available except for the ordinary criminal sanctions for fraud. However, the Swedish Transportation Authority undertakes yearly controls of vehicles 5 years old/driven 100,000 km in order to control of if their emissions meet the standards under the notion of "Sustainable Car Control". About civil remedies, there is a rumour that some Swedish consumers are among those who has sued Volkswagen...

Case Study

Martha is living in an urban area in your Member State, and her children have developed asthmatic symptoms (i.e. a diagnosed respiratory illness). She becomes aware that the local air quality exceeds standards laid down in the AQD. Her house is next to a main road, which is a heavily used bus route on which bus operators use diesel vehicles. The town also has a number of industrial plants, a coal fired power station, and a number of intensive farms. It is unclear to her precisely which pollution source is causing the breaches of air quality standards, or what their respective contributions might be to the local air quality problem.

What sort of legal action could Martha take in your Member State? And against whom? What remedies do the courts possess? What are the financial implications of bringing such a case? Might there be other regulatory avenues available to Martha instead?

AQS (bomstyg)
National goal (non-binding)

Tabell 1.1 Jämförelse mellan riktvärden från WHO, gräns- och målvärden från EU samt svenska miljökvalitetsnormer och miljömål. Urvalet av föroreningar utgår från miljökvalitetsnormerna.

Ämne	Medelvärde	MKN Gränsvärde (GV) Målvärde (MV)	EU Gränsvärde (GV) Målvärde (MV)	Miljömål Preciseringar Frisk luft	WHO Riktvärden (från år 2005 alt. 2000)
NO ₂	<i>Timme</i> <i>Hour</i>	90 µg/m ³ GV Får överskridas 175 ggr/år, förutsatt att 200 µg/m ³ /h inte överskrids mer än 18 ggr/år	200 µg/m ³ GV Får inte överskridas mer än 18 ggr/år	60 µg/m ³ Får överskridas 175 ggr/år	200 µg/m ³
	<i>Dygn</i> <i>Day</i>	60 µg/m ³ GV Får överskridas 7 ggr/år			
	<i>År</i> <i>Year</i>	40 µg/m ³ GV	40 µg/m ³ GV	20 µg/m ³	40 µg/m ³
NO _x regional bakgrund	<i>År</i>	30 µg/m ³ GV	30 µg/m ³ GV		
SO ₂	<i>10 min</i>				500 µg/m ³
	<i>Timme</i>	200 µg/m ³ GV Får överskridas 175 ggr/år, förutsatt att 350 µg/m ³ /h inte överskrids mer än 24 ggr/år	350 µg/m ³ GV Får överskridas 24 ggr/år		
	<i>Dygn</i>	100 µg/m ³ GV Får överskridas 7 ggr/år förutsatt att 125 µg/m ³ inte överskrids mer än 3 ggr/år	125 µg/m ³ GV Får överskridas 3 ggr/år		20 µg/m ³
SO ₂ regional bakgrund	<i>Vinterhalvår</i>	20 µg/m ³ GV	20 µg/m ³ GV		
	<i>År</i>	20 µg/m ³ GV	20 µg/m ³ GV		

PM10	Dygn	50 µg/m ³ GV Får överskridas 35 ggr/år	50 µg/m ³ GV Får överskridas 35 ggr/år	30 µg/m ³ Får överskridas 35 ggr/år	50 µg/m ³
	År	40 µg/m ³ GV	40 µg/m ³ GV	15 µg/m ³	20 µg/m ³
PM2,5	Dygn			25 µg/m ³ Får överskridas 3 ggr/år	25 µg/m ³
	År	25 µg/m ³ MV 25 µg/m ³ GV	25 µg/m ³ MV 25 µg/m ³ GV	10 µg/m ³	10 µg/m ³
CO	8h- medelvärde	10 mg/m ³ GV	10 mg/m ³ GV		10 mg/m ³
	Timme				30 mg/m ³
	30 min				60 mg/m ³
	15 min				100 mg/m ³
Bensen	År	5 µg/m ³ GV	5 µg/m ³ GV	1 µg/m ³	
Ozon	8h- medelvärde	120 µg/m ³ MV	120 µg/m ³ MV Får överskridas 25 dagar/år	70 µg/m ³	100 µg/m ³
	Timme			80 µg/m ³	
Pb	År	0,5 µg/m ³ GV	0,5 µg/m ³ GV		0,5 µg/m ³
As	År	6 ng/m ³ MV	6 ng/m ³ MV		
Cd	År	5 ng/m ³ MV	5 ng/m ³ MV		5 ng/m ³
Ni	År	20 ng/m ³ MV	20 ng/m ³ MV		
B(a)P	År	1 ng/m ³ MV	1 ng/m ³ MV	0,1 ng/m ³	

SWITZERLAND

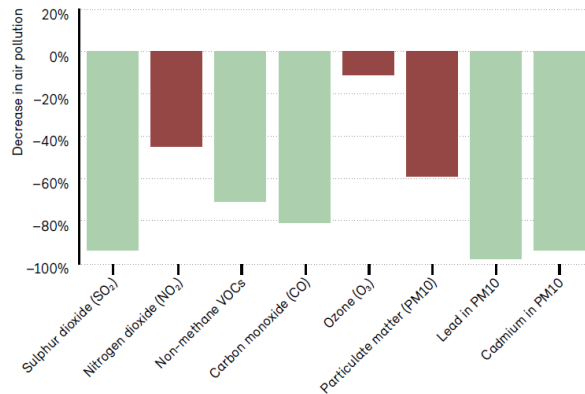
Questionnaire on Air Quality Law – Switzerland

Avosetta Meeting 2019 in London

Markus Kern/Ann-Kathrin Braendle

Air Quality: National Context

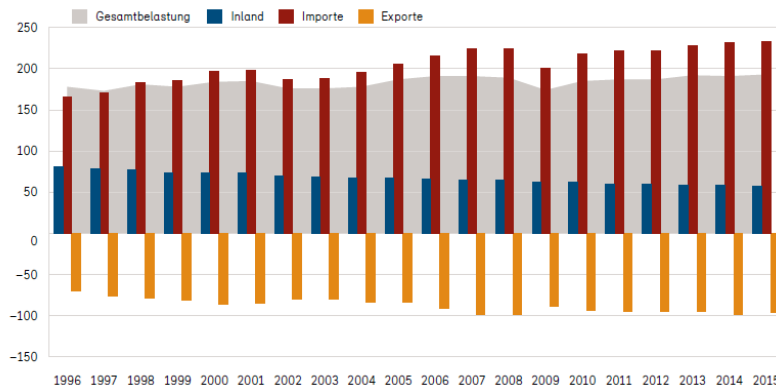
1. Air quality in Switzerland has continued to improve since the 1980s and can be qualified as **fairly good in international comparison with similarly densely populated areas**. Over the last decades most air pollutants were declining, with the result that ambient air quality standards are respected for 9 out of the 13 most important pollutants, for which the Ordinance on Air Pollution Control (OAPC) sets standards. With regard to nitrogen dioxide (NO₂), ground-level ozone (O₃) and particulate matter (PM10) the specified limits continue to be temporarily exceeded. Zinc in dust fallout is a punctual problem in the neighbourhood of a metal-industry plant. In addition to this, ammonia stemming from agriculture continues to be a problem. The main causes of today's air pollution are primarily motorized traffic (NO_x, PM10), wood combustion (PM10), agriculture (NH₃, PM10) and industry (VOC, NO_x, PM10). In 2016, road traffic emissions accounted for a large share of total emissions: Nitrogen oxides (NO_x): 50%; hydrocarbons (HC, VOC): about 12% and particulate matter (PM10): about 20%.



Source: FOEN – NABEL

Air quality improvement from 1988 to 2017

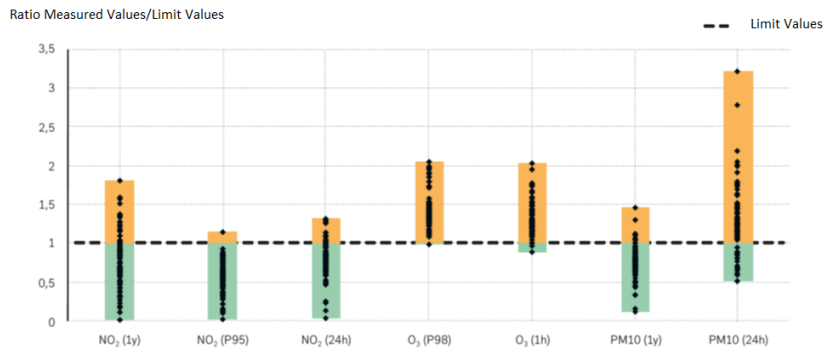
Yet, this picture is both incomplete and too bright. According to a recent study by the Federal Office for the Environment, **73% of the total environmental impacts** of Swiss consumption was caused abroad. With regard to the “air pollution footprint” the situation is even more drastic: In 2015 the inland share of the consumption related footprint reached merely **21%**. At the same time Switzerland – via its exports – also shoulders some burden for other countries, but this burden is much lower



than the one which countries abroad have to carry for Swiss consumption (comparison between the orange and the red bar below). Total air pollution occurring in Switzerland due to consumption results from the sum between the blue and the orange bar.

Consumption Perspective: Absolute Air Pollution Footprint / Source : FOEN 2018

2. The ambient air quality standards set by the OAPC are **exceeded** when it comes to nitrogen dioxide (**NO₂**), ground-level ozone (**O₃**) and particulate matter (**PM10**).



Comparison between the air pollution values as measured and ambient limit values

3. –

Air Quality Standards

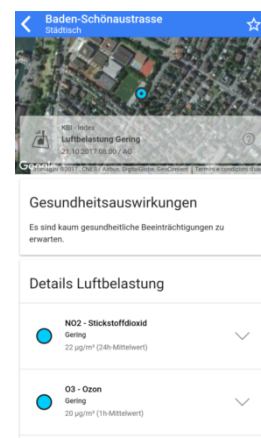
4./5./6. Both emission limits as well as ambient limit values for air pollutants are set in the Ordinance on Air Pollution Control, which establishes a system which is fairly close to the one of the AQD. Even though comparison is not simple due to the difference of the units and standards used, it nevertheless seems that the air quality standards in Switzerland go beyond those in the European Union and are therefore in general more stringent:

Pollutant	Definition (CH)	CH: Ambient air limit value / permitted exceedences	EU : Ambient air limit value / permitted exceedences
Sulphur dioxide (SO ₂)	Annual average	30 µg/m ³	
	95% of half-hour means for one year ≤ 100 µg/m ³	100 µg/m ³	
	24-hour mean	100 µg/m³ / 1	125 µg/m ³ / 3
Nitrogen dioxide (NO ₂)	Annual average	30 µg/m³	40 µg/m ³
	95% of half-hour means for one year ≤ 100 µg/m ³	100 µg/m ³	
	24-hour mean	80 µg/m ³ / 1	
Carbon monoxide (CO)	24-hour mean	8 mg/m ³ / 1	10 mg/m ³ / maximum daily 8 hour mean / 25
	Ozone (O ₃)	95% of half-hour means for one year ≤ 100 µg/m ³	
	1-hour mean	120 µg/m³ / 1	120 µg/m ³ Maximum daily 8 hour mean / 25 (?)
	Suspended particulates (PM10)	Annual average	20 µg/m³
24-hour mean		50 µg/m³ / 1	50 µg/m ³ / 35
Suspended particulates (PM2.5)	Annual average	10 µg/m³	25 µg/m ³ ; 20 µg/m ³ in 2020
Lead (Pb) in PM10	Annual average	500 ng/m ³	
Cadmium (Cd) in PM10	Annual average	1.5 ng/m ³	5 ng/m ³ (?)
Total dust deposition	Annual average	200 mg/m ² day	
Lead (Pb) in dust fallout	Annual average	200 mg/m ² day	
Cadmium in dust fallout	Annual average	2 µg/m ² day	
Zinc (Zn) in dust fallout	Annual average	400 µg/m ² day	
Thallium (Tl) in dust fallout	Annual average	2 µg/m ² day	

Air Quality Monitoring and Modelling

7. In Switzerland air quality is measured in about 80 stations run by the federal government, the cantons and municipalities. First measurements began in the 1960s. In 1979, the National Air Pollution Monitoring Network (NABEL) was established, which identifies the status and evolution of air pollution in the entire country. The measuring network of NABEL with its 16 stations is designed to record the most common types of stress occurring in Switzerland. This should give a fairly representative picture of air pollution in Switzerland, does however not fully reflect local peculiarities. At the same time the measurement network also contributes to international programs and participates in the exchange of data within Europe. Some of the rural stations are part of the European Monitoring and Evaluation Program (EMEP). NABEL provides data within the framework of EUROAIRNET. The station on the Jungfrauoch is part of “Global Atmosphere Watch” conducted by the World Meteorological Organization (WMO).

Data on air quality both current and historic is readily available online. In addition to this, the cantonal offices have also developed a mobile phone app (“airCheck”), which allows access to current data at any point in the country, indicates pollution on an index and gives indications about health-implications of the current status as well as hints with regard to adequate behaviour.



8. I wouldn't know of any particular problem or critique when it comes to monitoring air quality in Switzerland.

9. Again, I wouldn't know of any limitations or problems with the modelling techniques used.

National Air Quality Plans and Governance

10. -

11. Generally speaking, the regulatory system which should ensure the respect of the clean air standards follows a two-step approach:

(i.) The first stage relates to measures at the source and operates with **preventive emission limits**. The law thus explicitly and in a quite detailed manner regulates the requirements that different *types of installations* in different domains (undertakings handling mineral products, chemistry, mineral oil, metals, agriculture and foodstuffs, coating and printing, waste etc., i.e. installations such as cement kilns, refineries, foundries, installations for stock rearing in agriculture, installations for roasting coffee and cocoa etc.) have to comply with [Annex 1 and 2 OAPC]. Additionally, the law also foresees emission limits for combustion installations, any kind of motorized vehicles or machines in agriculture and sets comparatively strict requirements for construction machines. The latter amounts to a technical barrier to trade from the perspective of the applicable international agreement between Switzerland and the European Union, but can be justified under the agreement. These emission standards constitute a regulatory expression of the precautionary principle as it is enshrined in the Environmental Protection Act (EPA). The measures thus aim at “limiting emissions as

much as technology and operating conditions allow”, under the condition that this is “economically acceptable” (art. 11(2) EPA). In addition to these explicit standards, the measures at this first stage may also pertain to **secondary emissions** such as traffic flows caused by a certain installation – e.g. a shopping centre or a sports stadium. In some instances the respective regulation (handled by the local construction authorities) takes the form of a limitation of parking spaces. In recent years however, the so called journey-model (“Fahrtenmodell” or “Fahrleistungsmodell”) found frequent application. Under this mechanism the competent authorities limit the number of authorized journeys with regard to a certain installation by means of a condition to the construction permit. If the authorized quotas are not respected during the actual operation of the installation, the authorities may foresee further restricting measures (imposition of a fee per journey exceeding the ceiling; temporary or even permanent reduction of parking spaces etc.). When it comes to *traffic installations*, precautionary measures to limit emissions often take the form of constructional measures, such as roofing, ventilation systems etc. Depending on the canton, further instruments exist with regard to the transport sector: The Canton of Berne for instance took measures in the field of mobility management (establishment of a coordination unit; measures for the cantonal administration), envisages measures of mobility pricing and aims at ensuring that the vehicles used in public transportation comply with high environmental standards.

(ii.) The second stage comes into play if **excessive immissions** result despite emission limitations. For this purpose the law sets ambient limit values for a whole range of air pollutants (SO₂, NO₂, CO, O₃, PM₁₀, PM_{2.5}, lead in PM₁₀, cadmium in PM₁₀, total dust deposition, lead in dust fallout, cadmium in dust fallout, zinc in dust fallout, thallium in dust fallout). If no explicit limitations exist the authorities may determine the acceptable levels of pollution based on legal criteria. In case these limits are exceeded, authorities either specify **stricter emission limits** (if a single new installation causes the excess) or prepare an **action plan** (if several installations or a traffic installation constitute its cause; cf. question 14). At this stage, economic considerations should play no role, even though the principle of proportionality demands that the effects of a certain measure are in a reasonable relation as compared to the efforts required for its implementation.

In addition to the instruments under the two-step approach, the Confederation has implemented **further instruments** such as quality regulations for fuels or incentive taxes such as the Heavy Vehicle Incentive Charge (LSVA) and the VOC Steering Fee. The general transport policy of shifting traffic from road to rail and the massive investments in public transportation over the last decades (trans-alpine rail-freight infrastructure, offer of public transportation as well in urban as in rural areas etc.) among other goals equally pursue the aim of reducing air pollution.

To sum up, it can be said that the Swiss regulatory regime in this field is still mainly based on *prohibitions and commandments*. At the same time *market-based instruments* such as the Heavy Vehicle Incentive Charge, the VOC Steering Fee or the CO₂-Tax play a certain role in this regulatory context. In addition to this *public subsidies or public investment* also constitute to some extent an influencing factor when it comes to the prevention of air pollution such as in the case of investment into public transportation. Finally, air pollution prevention as a consideration equally plays a certain role in a *broad range of other public policies* such as in spatial planning (aim of densifying settlements and reducing the environmental impact of agglomeration traffic) or even tax law, where the costs of commuting by private car are only deductible under restrictive conditions (if no public transport offer exists, the person is not able to use it due e.g. due to illness or if the use of public transportation requires at least an extra hour per day as compared to commuting by car [Canton of Berne]).

12. This instrument does not exist in Switzerland.

13. Both in the area of environmental law (art. 74 Federal Constitution [Const.]) and in the area of road traffic law (art. 82 Const.), the Confederation has a competing **legislative competence**. The cantons are only authorised to enact regulations in the same area for as long as the Confederation has not exhausted its competence. Since the immission protection of the EPA only provides for long-term measures in the field of air pollution control, the cantons have the competence to take measures themselves, if the immission limit values are exceeded in the short term. However, they are bound by the provisions of the EPA and they may not set new immission limit values, alarm values or planning values (art. 65(2) EPA). The Confederation thus claims exclusive regulatory competence with regard to the setting of limit values. The further development of the regulatory framework hence mainly lies in the hands of the Confederation. Yet, the cantons quite regularly submit applications to the federal government claiming for further measures in the realm of federal competence. By this means the cantons thus contribute to a certain extent to the development of the legal framework of air quality control.

The **enforcement** of emission regulations constitutes a cantonal task. Cantons and municipalities have e.g. issued thousands of decrees for the rehabilitation of industrial and commercial enterprises as well as of heating systems. In addition, the cantons have developed action plans to reduce excessive air pollution at the local level. These additional, local measures of the cantons include among others public transport promotion programs, parking management, restrictions on polluting wood firing or traffic calming measures.

14. The so-called **action plan** (“Massnahmenplan”) according to art. 44a EPA and art. 31-34 OAPC constitutes a crucial instrument of coordination in the field of air pollution control. It comes into play when there is a threat of excessive immissions despite the imposition of precautionary emission limits, either caused by several pollutant sources or by transportation infrastructure. The plan is drawn up by the competent cantonal authorities. It includes indications on the sources of emission, the measures for reduction, their estimated effects, the applicable legal framework, time limits as well as the authorities responsible for the implementation of the measures. As far as a cantonal action plan contains measures falling within the competence of the Confederation, the plan is to be submitted to the federal government in order to make the relevant application. As far as different cantons are concerned, the plan shall be submitted to the respective cantons. If necessary, the federal government can coordinate the action plans of the cantons. In its *legal nature* the action plan is qualified as an internal administrative regulation binding the authorities, but not containing any rights or obligations for individual citizens. It may also not serve as a legal basis for any measures, but may foresee the enactment of additional legal instruments. The *aim* of the action plan is on the one hand the coordination of measures between different authorities and sources of pollution in complex contexts and on the other hand the transposition of equality concerns in the sense that adequate burden sharing between the different emitters shall be reached. The *measures* under the action plan may include shorter limits for retrofitting or additional or stricter emission limits or, with regard to transport infrastructure, structural, operational, traffic management or traffic restriction measures (art. 32(2) OAPC).

Enforcement of Air Quality Law

15. As for emission limitations for new stationary installations, the enforcement of air pollution regulation usually takes the form of conditions imposed in the permits required for the installations.

With regard to existing stationary installations, the competent cantonal authorities may order retrofitting measures within a certain time limit. If a person fails to comply with the limitations of emissions or with retrofitting orders, the respective conduct may constitute a contravention which can be sanctioned with a fine of up to 20'000 CHF (art. 61(1)(a) and (b) EPA). Enforcement thus mainly rests in the hands of the competent public authorities at the cantonal level.

Due to limited cantonal resources intercantonal cooperation is of crucial importance. To foster this cooperation, cantonal experts and experts from academia formed an association (called "Cerle'Air"), which now exists since 40 years and which has namely the objective of facilitating exchange between experts, of drafting recommendations and of coordinating statements in federal consultation procedures.

16. When it comes to **court cases** in this field in Switzerland, an introductory remark is required: Generally speaking, the attitude towards judicial activism can be described as fairly lukewarm in Switzerland. There are several reasons for this, one pertains to direct democracy another one to a traditionally rather reserved attitude towards the fact that a few judges would be enabled to decide upon important political issues. To some extent this rather critical attitude is taken up by the judiciary itself in the sense that court decisions regularly grant a comparatively large room of discretion to public authorities and avoid to get involved into questions which are deemed to be of eminently political character. As a consequence, the regulatory framework in the field of air pollution control, as many other domains, is not strongly influenced by landmark court rulings. This is of course not to say that the judiciary would have no role in shaping this regulatory landscape, but its role is rather played in a subtle manner by day to day decisions.

"Right to clean air": In a case before the Federal Administrative Court [BVGer A-2723/2007 of January 30, 2008) seven private individuals argued that the fact that ambient limit values for air pollutants were repeatedly exceeded caused them health problems and, in some cases, financial damage. On the one hand, they demanded from the Federal Office for the Environment that the necessary measures be taken at the enforcement level and, if necessary, at the legislative level, to ensure compliance with the ambient limit values for air pollutants for suspended particulates (PM10), ozone and nitrogen oxides (NO_x). On the other, they submitted the demand for a series of concrete measures. The Federal Administrative Court ruled that according to Swiss law, there was **no enforceable right of the individual** to obtain implementing regulations. Art. 74 Const. pertaining to the protection of the environment would not give rise to a subjective claim to the adoption of enforcement measures to comply with the ambient limit values. In addition to this, private individuals who demand such measures by means of judicial instruments are usually not considered to be affected more than the general public and can therefore not claim party status. With regard to a possible violation of the **right to respect for private and family life** (art. 8 ECHR), complainants would have to demonstrate that they have suffered from health impairments, that these impairments are directly attributable to air pollutants and the absence of state protective measures, and that the immissions lead to a considerable impairment of the private and family sphere. As these requirements were not considered to be given in the case, the demand was rejected. An appeal to this decision was rejected by the **Federal Tribunal** due to formal reasons (BGer, 1C_108/2008 decision of March 3, 2009).

A similar **case directed against the cantonal authorities** was rejected by the Federal Tribunal on the same day (BGer, 1C_437/2007) based on the reasoning that the complainant was – from an objective

perspective – not touched more by the high immission levels than any other person and did thus not have a right to party status and to a decision which could be attacked in court. The claim from art. 8 ECHR was rejected with the argumentation that even though it was thinkable that the State was under a duty to protect when it comes to negative environmental impact, these effects would need to show a certain degree of severity, a threshold which was not met in the case before the Court.

17. Some **challenges** to the enforcement are:

- As the cantons ensure the implementation of the regulatory framework in the field of environmental law, both the *resources* and the *know-how within the respective cantonal authorities* are a key factor to the successful enforcement of the law. Particularly in smaller cantons it may thus sometimes be difficult to ensure a systematic and well informed enforcement of the federal legal framework.

- The cantons need to ensure that stationary installations are subject to *continuous controls* in order to ensure that emissions remain at a low level or can be further reduced.

- The cantons need to take steps to *exhaust the available legal instruments* in the framework of their cantonal action plans to reap the entire potential for reduction. Particularly when it comes to the sector of transportation and agriculture, there may still remain some room for manoeuvre.

Regulation of Vehicle Emissions Systems

18. Type approval for motor vehicles falls under the **Agreement on Mutual Recognition in Relation to Conformity Assessment (MRA)** which entered into force between Switzerland and the EU on June 1st, 2002 as part of the “first package of bilateral agreements”. Under the agreement, both Switzerland and the EU recognize the conformity assessments by the other party as far as the legal framework in the respective field is deemed to be equivalent. In order to achieve equivalency with regard to type approval rules, Switzerland has “transposed” the relevant rules from EU law into national law. Due to the fact that Switzerland is also party to the UN-ECE homogenisation agreement of 1958 and has implemented its over 130 ECE-regulations, which are fairly closely mirrored by EU-law, the implementation of the relevant EU provisions has not been a particularly difficult task. In order to maintain equivalency, Switzerland regularly implements the modifications of EU-law into national law. The modifications resulting from Regulation (EU) 2018/858 were decided upon by the federal government in November 2018 and entered into force on February 1st resp. May 1st, 2019 in the form of amendments to Ordinance on Technical Requirements for Road Vehicles.

19. After it became known that the Volkswagen Group had manipulated the engine control systems for certain vehicles in September 2015, the Federal Office of Roads issued a **ban on new approvals** for the affected model variants of the VW Group (claiming that they were the only approval authority in Europe to have taken this step). The ban was relaxed for certain types of vehicles in the following months. For individual vehicles the ban is lifted if the vehicle is retrofitted.

As a reaction to the manipulation the NGO “Consumer Protection Foundation” filed a **declaratory action** with the Zurich Commercial Court against Volkswagen and the vehicle-importer in the name of about 6,000 injured parties. The aim of the case was to determine whether Volkswagen or the vehicle-importer had misled car buyers by manipulating exhaust emissions and thus violated provisions of the Unfair Competition Act (UCA). Both the Commercial Court as well as the Federal Tribunal on appeal held that the Volkswagen Group's exhaust gas manipulation had been known for

a long time and that there was therefore no longer any deception in the legal sense. The courts thus denied the necessary interest of the complainants in any declaration action. An action in performance, namely a claim for damages, remains however possible.

Case Study

Under the **current case law** (cf. question 16) it is at least doubtful if Martha could successfully base a legal action or claim on an individual right to clean air and could by this means oblige the competent authorities to take action against excessive emissions. The same conclusion applies with regard to action plans, which are not directly binding and it will thus normally not be possible for Martha to derive subjective entitlements from the plan (if it at all exists). If she wants to try nevertheless, she would have to *demand an order* from the competent authority and – if the authority remains inactive in such a case – to lodge a *complaint for denial of justice*.

From a **procedural perspective**, Martha would have to argue that she is more affected by the emissions at stake than the general public. As her complaint is not directed against the emission of pollutants from one or more specific sources, but against air pollution in general, this may be a tricky task. If she cannot show a direct and special relationship to the emissions, which is necessary for obtaining party rights, her claim will be qualified as an unacceptable popular complaint. It may thus be more promising for Martha to act against new permits for stationary installations such as plants or traffic infrastructure in her neighbourhood.

With regard to **road-side regulatory interventions**, the municipality or the canton would have the option of restricting traffic or imposing a ban on motorized traffic based on a provision in the federal Road Traffic Act (SVG). This would constitute a so-called functional traffic restriction which can be imposed for the protection of residents from noise and air pollution, where local circumstances require such restrictions (art. 3(4) SVG). In its case law the Federal Tribunal takes a deferent stance when it comes to decisions on traffic measures by local authorities and concedes considerable room of manoeuvre to the competent bodies. As a rule the judge only intervenes when the decision is based upon untenable factual assumptions, pursues objectives violating federal law, differentiates in an inadmissible manner or contains a balancing of interest that violates fundamental rights. If this margin of discretion is granted in the assessment of positive measures, it may even be wider when it comes to the question whether authorities should become active at all. It may therefore be fairly difficult to demand traffic restrictions by judicial means.

The most promising avenue of action would therefore be of **political nature**. Martha would have to participate in local initiatives asking for traffic restrictions in her municipality. Local regulations regularly foresee mechanisms for local participation in order to change local transport regimes. However, these instruments are often rather geared towards safety and noise objectives, but may at the same time have the consequence of reducing traffic altogether and thus of bringing down total emissions.

THE NETHERLANDS

AVOSETTA QUESTIONNAIRE: AIR QUALITY LAW
London meeting 2019

Report on the Netherlands by Kars de Graaf and Thomas Senff

Air Quality: National Context

1. What are the main sources of unlawful levels of air pollution in your Member State?

The EU air quality standards for NO₂ and PM₁₀ are being exceeded in the Netherlands; improvement of the situation is ongoing.¹ The main sources of unlawful levels of NO₂ in the Netherlands are busy roads in highly populated city centers. The main source of exceeding the prescribed level of PM₁₀ is intensive livestock farming, particularly poultry farming. The ports of Amsterdam and Rotterdam also contribute to local PM₁₀ pollution.²

2. How extensive is reported non-compliance with AQD air quality standards in your Member State?

The latest report regarding Dutch non-compliance with the AQD was submitted to the Commission on 7 December 2018. The average limit value for PM_{2,5} in one calendar year value was not exceeded nor was the target value. The average limit value for PM₁₀ in one calendar year was not exceeded near 'sensitive destinations' such as houses but the average limit value for PM₁₀ within one day (24 hours) was exceeded, but not more than 35 times in one calendar year, which means that it is compliant with the AQD. The average limit value for NO₂ in one calendar year was not exceeded, however, the average limit value for NO₂ per hour was exceeded more than 19 times. The nitrogen dioxide concentrations that exceed the limit value are located at a number of busy inner-city areas. The target value for ozone was not exceeded. However, the long-term objective of 120 microgram/m³ without excess was not met.

3. Have EU infringement proceedings been brought against your Member State for failure to comply with the AQD?

The deadline to achieve the limit value for NO₂ was postponed from 2010 to 2015 under article 22 of the AQD in order to avoid infringement procedures. The deadline for conformity with the limit value for PM₁₀ was also postponed from 2005 to 2011. At certain locations the limits for NO₂ and PM₁₀ have been exceeded since (respectively) 2015 and 2011. Despite this non-compliance, there have been no recent EU infringement proceedings against the Netherlands for failure to comply with the AQD.

¹ Information can be found on the website of the EEA (www.eea.europa.eu/themes/air/country-fact-sheet/netherlands); also see a recent Joint report on air quality (January 2019) prepared by the Netherlands Court of Audit and the Supreme Audit Office of Poland, <https://www.rekenkamer.nl/publicaties/rapporten/2019/01/30/joint-report-on-air-quality> (see p. 93).

² Report of the Netherlands for the EU on Air Quality in 2017, submitted on 7 December 2018. See: http://cdr.eionet.europa.eu/nl/eu/aqd/g/envxa4wcg/EU_rapportage_2018_over_2017_-_7_december_2018.pdf/manage document.

However, there have been national court procedures (civil law court) against the Dutch State by Friends of the Earth Netherlands (an NGO called *Milieudefensie*) and the association/foundation *Stichting Adem* that claimed failure of the Netherlands to fully comply with the air quality standards of AQD (and the WHO) and demanded further actions of government to improve air quality. The Court of Appeal judged on 22 May 2018 that the Netherlands does not have to implement extra measures to comply with the AGQ, although the Netherlands has to make sure that the limit values are not exceeded again. For more information, see also question 10b.

Air Quality Standards

4. Was there pre-existing national law relating to air quality standards (similar to the AQD), or did the AQD introduce something new in your country?

The regulation of air quality standards in Dutch national law was not introduced by implementing the AQD. The Environmental Management Act (*Wet milieubeheer*) came into force in 1993 and acted as a procedural and instrumental legal framework for environmental policy.³ The EMA made it possible to introduce normative standards for the quality of compartments of the environment (air, water, soil etc.) in general binding rules laid down in delegated acts (Order in Council). This instrument was used to implement Directive 1999/30/EC.

The 1999/30/EC Directive set specific limit values for air pollution in ambient air and the 96/62/EG Directive defined a common strategy to assess and manage ambient air quality. Both directives were implemented by the Governmental Decree on Air Quality 2001 (Besluit luchtkwaliteit 2001). This delegated act (general binding rules) provides substantive standards for air quality. Introduction of the Besluit luchtkwaliteit 2001 had severe consequences for economic development at the local level; it created a 'national lockdown' as many decision-making procedures (concerned with land use such as zoning schemes) were frustrated by the air quality standards. The air quality standards had to be taken into account by administrative authorities when preparing every single administrative decision that influenced (even remotely) air quality. A significant amount of administrative decisions, for example zoning plans for new economic development, were annulled by administrative law courts as these decisions would either lead to exceedance of a limit values for air quality or the court ruled that the air quality was not sufficiently taken into account. This was reason to replace the 2001 regulation by a new Governmental Decree on Air Quality in November 2005. This new Besluit luchtkwaliteit 2005 implemented the 2000/69/EG Directive relating to limit values for benzene and carbon monoxide in ambient air into Dutch law. It also introduced the important concept of offsetting. Projects that lead to local deterioration of air quality can be compensated for by a set of measures if the air quality, *on balance* (criteria include: in the vicinity; same element of pollution), improves. The best example of this would be a new ring road around a city centre in order to alleviate the air quality in the city centre). The introduction of offsetting made spatial planning easier for administrative authorities, as they could now compensate for exceeding limit values.

³ Dutch legislation can be found at www.wetten.nl. Dutch case law can be found at <https://uitspraken.rechtspraak.nl>.

Limit values for air quality in a parliamentary act were not introduced until 2007 in the Air Quality Act (Wet luchtkwaliteit). The Besluit luchtkwaliteit 2005 was revoked with the introduction of this Act. The Wet luchtkwaliteit introduced an amendment to the EMA and set specific target values and limit values in an Annex to the EMA, e.g. for particulate matter and nitrogen dioxide, until the Wet luchtkwaliteit (or: the EMA) was amended yet again in 2009 to implement the Air Quality Directive.

The amendment of the Wet luchtkwaliteit in 2008 introduced the possibility of postponement of / exemption from the obligation to achieve certain limit values into the EMA. It also introduced a target value for PM_{2,5}. Previously there was only a target value for PM₁₀. The amendment also introduced the concept of 'contributions from natural sources' (Article 2 subsection 15 and article 20 AQD) into the EMA. The amended EMA came into force on 1 August 2009.⁴ Article 5.16(1) EMA indicates when an (air polluting) project is permissible. The competent administrative authority must make a reasonable case that the project meets one or a combination of the following conditions: a) no limit value is actually (or threatened to be) exceeded *on balance*, b) a project shall not lead to a deterioration of the air quality, c) a project shall not make a significant contribution (Not making a significant impact, *niet in betekende mate*, NIBM) to air pollution or d) a project has been included in, or fits in, the National Air Quality Cooperation Programme (NSL); a cooperation programme between national and local governments that includes yearly monitoring reports of air quality. This NSL introduces both concrete and generic measures to improve air quality and stipulates which projects that will most likely be detrimental to air quality could be approved in order to – on balance – achieve the limit values and targets stipulated in the EMA in the future. The NSL has proven to be a relevant (programmatic) instrument to avoid infringement procedures. The NSL acts as substantiation for the request for derogation of the limit values for air quality.

5. How are AQD air quality standards implemented in law in your Member State?

The AQD air quality standards are implemented in section 5.2 of the EMA (Wet milieubeheer). The first article in this section refers to an Annex to the EMA in which the substantive air quality standards are mentioned explicitly. At the request of Parliament, the air quality standards are (since 2007) no longer stipulated in a delegated act but are now (important enough) to be implemented at the level of a Parliamentary Act: the EMA.

6. Does any law in your Member State provide for air quality standards that go beyond those set out in the AQD, imposing any more stringent standards, for example, in relation to PM_{2,5}?

No. The Netherlands states that it aims to improve air quality beyond EU norms - towards the World Health Organization (WHO) advisory values for air quality - without introducing more stringent legally binding limit values. The WHO advisory values are included in the so-called *Agreement for Clean Air (Schone Lucht Akkoord)*, which is a non-binding agreement between the state, provinces, municipalities, the business sector (industry) and civil society organisations. This means that national Dutch air quality standards are not more stringent than the air quality standards in the AQD.⁵ There is no over-regulation of the AQD and thus, no gold-plating (or green plating). However, a case has been brought to civil court by NGOs against

⁴ Also see <https://rwsenvironment.eu/subjects/air/air-quality/>

⁵ See the Evidence-based questionnaire Fitness Check of Ambient Air Quality Directives by the Dutch Government: www.eerstekamer.nl/overig/20181112/evidence_based_questionnaire/document3/f=/vktfqu7pv2zm_opgemaakt.pdf.

the Netherlands and they claim that the Netherlands is negligent (at fault) and acts unlawful by not conforming to (the AQD and) the WHO advisory values regarding PM10. For more information, see question 16.

Air Quality Monitoring and Modelling

7. How are air quality monitoring networks set up in your Member State (briefly)? Do these go beyond the monitoring requirements set out in Chapter II AQD (eg in terms of the number and location of monitoring stations)?

There are approximately 40 monitoring stations set up nationwide (for NO₂ and PM10). They are part of the so-called National Air Quality Monitoring Network (Landelijk Meetnet Luchtkwaliteit). These monitoring stations are supervised by the Netherlands National Institute for Public Health and the Environment (RIVM), an independent agency of the Dutch Ministry of Health, Welfare and Sport. The RIVM states that these monitoring stations meet the requirements set out in the AQD.⁶ The number and location of monitoring stations do not seem to go beyond AQD requirements and the RIVM states the number is sufficient for monitoring (when used in combination with calculating air quality). Additionally, data from local agencies concerning the air quality in the municipality of Amsterdam and the area surrounding the Rhine river mouth (the Rijnmond area) are used to monitor air quality. Furthermore, on approximately 300.000 locations the air quality is calculated (on the basis of modelling techniques regulated in specific regulations). The RIVM is also evaluating several new (cheaper) ways to monitor air quality, also with the help of citizen sensing, although those methods do not comply with the AQD (see www.samenmetenaanluchtkwaliteit.nl).

8. What problems are encountered in monitoring of air quality in your Member State?

1) The national air quality monitoring network does not provide enough information regarding the air quality of the densely populated Rijnmond area. However, the DCMR network (a regional cooperation for permitting and enforcement in the field of environmental law in the Rotterdam area) provides additional information.⁷

2) The RIVM relies on local governments for (recent) data on e.g. traffic and livestock farming. The quality of this data varies, although the quality of the data is very important for the reliability of the reports on/calculation of the air quality.⁸

9. As far as you can determine, are there limitations or problems with the modelling techniques used in your Member State to assess air quality (where modelling is permitted as a method for assessment under Chapter II AQD)?

The modelling techniques are only useful in addition to the monitoring stations, as modelling only seems to be useful if the models are based on monitoring data. In the past new modelling techniques or new data to base the calculations on have proven to lead to different and sometimes even surprising outcomes.

⁶ See the Factsheet *Meten en Rekenen* <https://zoek.officielebekendmakingen.nl/blg-29032.pdf> (in Dutch).

⁷ <https://www.dcmr.nl/projecten/luchtmeetnet-dcmr.html>

⁸ Report on monitoring NSL 2018, page 3, <https://www.rivm.nl/bibliotheek/rapporten/2018-0135.pdf> (in Dutch).

National Air Quality Plans and Governance

10. Does your Member State have a national Air Quality Plan under Article 23?

The NSL is the national Air Quality Plan in the sense of the AQD. The NSL was approved by the European Commission on 7 April 2009. It originally had a duration of 5 years, from 1 August 2009 to 1 August 2014. However, the duration of the NSL was extended in 2013 to 1 January 2017. It was again extended on 7 December 2016 until the exact date that the new Omgevingswet (Environment and Planning Act) is expected to come into force. seeks to modernise, harmonise and simplify current rules on land use planning, environmental protection, nature conservation, construction of buildings, protection of cultural heritage, water management, urban and rural redevelopment, development of major public and private works and mining and earth removal and integrate these rules into one legal framework.

The Omgevingswet is expected to come into force on 1 January 2021. It creates the possibility for local governments (usually the municipalities) to manage measures to prevent exceedances of the AQD air quality standards in a single program per area. The program(matic approach) is then included in an environment plan (a zoning plan with broader scope to include all aspects of the physical living environment). The programmatic approach in the environment plan is a new instrument for decentral governments and focuses on the balance between measures to prevent exceedances of legal standards for environmental quality on one hand, and allowed activities in the area on the other hand. The NSL is also based on this programmatic approach. The programmatic approach has a delinking effect: concrete situations are not assessed against AQD limit values but assessed against the NSL.

a. If so, to which pollutants does the plan relate (eg NO₂ or PM₁₀) and what key measures does the plan outline to keep exceedances ‘as short as possible’? Please also indicate if you think there are any weaknesses in the plan.

The plan specifically relates to NO₂ and PM₁₀ and has been successful in the sense that the air quality has been improving over the years (e.g. in 2009 the exceedances next to roads was relevant for almost 1100 km of road; in 2016 this issue was reduced to 7,2 km). The goal of the NSL is to keep exceedances as short as possible. The most recent version of the NSL outlines specific measures to target exceedances in certain inner cities such as Rotterdam, Eindhoven, Amsterdam and Utrecht (and prevent traffic there). The plan also outlines an amendment to the Crisis- en herstelwet (Crisis and Recovery Act), which act that is focused on the acceleration of infrastructural projects, which makes it possible to intervene in permits for livestock and poultry farming if PM₁₀ limits are exceeded by the farm.⁹

b. If your Member State has such a plan, how is the legal requirement of keeping exceedances ‘as short as possible’ satisfied? Please outline any challenges (legal or otherwise) in meeting this requirement in your Member State.

The relevant period of NSL (to achieve the EU air quality standards) has been extended twice and will now be in force until the new Omgevingswet comes into force (1-1-2021). In short, The Netherlands is working towards the end goal and extends the period as long as there remain exceedances. The Hague district court has ordered in a preliminary relief procedure in a case brought by the *Milieudefensie* (Friends of the Earth Netherlands) and *Stichting Adem*

⁹ See Annex 1 to the Amendment to the NSL 2018, <https://www.rijksoverheid.nl/ministeries/ministerie-van-infrastructuur-en-waterstaat/documenten/rapporten/2018/06/25/bijlage-1-addendum-aanpassing-nsl-2018> (in Dutch).

that the NSL does not satisfy the legal requirement of keeping exceedances 'as short as possible', as the limit values for respectively NO₂ and PM10 have been exceeded for at least 2.5 to 6.5 years.¹⁰

Although exceedances have been going down in number over the past years and more government action was initiated after the court ruling, it is not sure all national exceedances of air quality standards will be resolved before 2020, which is the date mentioned in the NSL. However, the district court's preliminary ruling was not confirmed in substantive proceedings nor in a preliminary appeal procedure. Basically the court ruled that the State has a discretionary power to come up with a plan/programme to keep exceedances as short as possible and the plan was not (sufficiently) unreasonable. The case was also lost in the substantive appeal proceedings on May 7th 2019.¹¹ The Hague Court of Appeals ruled that the State had added new elements to the NSL and by doing so had done its best to quickly improve the situation for any remaining exceedances. Therefore, a court order was no longer legally required. There is only a test of reasonableness by the court, not a substantive check of the plan.

11. Whether or not your Member State has an Air Quality Plan, please outline the key national regulatory measures that contribute towards compliance with EU air quality standards in your Member State.

Industry: The main contributors to exceedances of the air quality standards from industry are livestock farms, mostly located in the southern provinces of Noord-Brabant and Limburg.¹² Local farms were approached by municipalities about implementing methods to reduce the emissions of particulate matter from their farm. Compliance with air quality standards was mainly achieved by local cooperation programs, but not by taking administrative measures against livestock farms. For large installations regulation is relying on the (implemented) IED.

Transport: Lots of different regulatory measures have been taken to prevent emissions from transport, mainly measures to prevent traffic in inner city areas. Environmental zones for freight traffic and older cars have been introduced in certain large cities such as Amsterdam and Arnhem. Local buses for public transport have also been replaced in most large cities with cleaner buses or electric buses to avoid emissions from transport in inner city areas.¹³

Households: The NSL does not introduce any regulatory measures relevant to households in order to contribute towards compliance with EU air quality standards, as households are not a main source of emission of NO₂ or PM10 in the Netherlands.

12. Has your Member State ever issued a Short-term Action Plan under Article 24? If so, please outline any notable features of the plan or aspects of its implementation (briefly).

¹⁰ Court The Hague 7 September 2017, ECLI:NL:RBDHA:2017:10171.

¹¹ Court of Appeal The Hague 7 May 2019, ECLI:NL:GHDHA:2019:915.

¹² Annex 3 to the Amendments to the NSL 2018, see *Parliamentary Papers II 2017/18*, 30175, nr. 299 (reduction number of bottlenecks for air quality near livestock farms).

¹³ Annex 5 to the Amendments to the NSL 2018, see *Parliamentary Papers II 2017/18*, 30175, nr. 299 (report by TNO of the measures proposed to reduce exceedances in inner city areas).

The Smog Regulation 2010 came into force on 31 May 2010 and can be considered a Short-term Action Plan under article 24 of the AQD (based on article 5.18 EMA, in which the AQD was implemented) or at least provides the basis for such a plan. The measures implemented by the Smog Regulation 2010 are mainly relevant for the Netherlands National Institute for Public Health and the Environment (RIVM), an independent agency of the Dutch Ministry of Health, Welfare and Sport. It forces the RIVM to analyse (and predict) the presence of smog and provide all kinds of information in the sense of the AQD about smog to the Dutch population, the Dutch media and relevant Dutch public bodies when there is smog or smog is expected. The amount and depth of the information that the RIVM has to provide depends on the severity of the risk of smog. No other Short-term Action Plans are known to us.

13. Which public bodies have legal responsibilities for meeting air quality standards in your Member State?

In line with European case law – see case 237/07 (Janecek) – the Dutch state in general has legal responsibilities for meeting air quality standards. All Dutch public bodies therefore are responsible for meeting air quality standards. The Minister of Infrastructure and Water Management is responsible under article 5.12 and 5.12a EMA – that implements the AQD in Dutch law – for establishing a program and taking direct action to reach the AQD limit values. Measures in the NSL are established and taken by way of cooperation of all relevant local and central governmental bodies.

14. Are there any legal requirements for different public bodies who have control over different air pollution sources to coordinate their efforts in any way to work towards air quality standards? (For example, different regulators may control highways, airports, local urban planning decisions, large industrial installations, and so on.)

Local plans for air quality are all based on the NSL and are coordinated by/in the NSL. Approval for some of the projects should be granted by local governmental bodies. Dependent on the sort of measure/project, different (local) governmental bodies can be responsible for the realization of certain projects to improve air quality (at a specific location).

Enforcement of Air Quality Law

15. What is the primary mode for enforcing of air quality law in your Member State?

Dutch administrative law explicitly does not provide direct judicial review by an administrative court against (the absence of effective) air quality plans. Single case decision-making related to projects (zoning schemes and/or permits) that are potentially detrimental to air quality are only approved/granted when the regulatory requirements are met (see question 4). Enforcement of these requirements is a matter of general administrative law either by way of administrative enforcement or judicial review (including the possibility of an indirect plea of illegality of the plan: 'exceptieve toetsing'). This possibility of 'exceptieve toetsing' allows (in judicial review proceedings against a single-case decision) the court the competence to check compatibility of a plan/program with higher legal provisions and (international) norms. In general, there is no reason (or possibility) for action at a civil law court when there is a possibility of 'exceptieve toetsing' by an administrative law court. However, it is possible to initiate proceedings against the government (Dutch state) to claim a civil law unlawful act

(negligence) in cases where the administrative courts cannot provide the same remedies as the civil law courts (also see question 16).

16. Have there been court cases concerning the enforcement of air quality law in your Member State? Please outline major cases or themes in key cases only.

A major case regarding the enforcement of air quality is the case of Friends of the Earth Netherlands (*Milieudefensie*) and *Stichting Adem*, two NGOs. See ECLI:NL:RBDHA:2017:10171, ECLI:NL:RBDHA:2017:15380 and ECLI:NL:GHDHA:2018:1128. The organizations introduced civil legal proceedings against the Dutch state about the lack of enforcement of air quality regulations and stated that the Netherlands violates its obligation under the AQD (and the WHO advisory values).

The court in preliminary relief proceedings found that the AQD forces all member states, including the Dutch state, to include 'appropriate and efficient measures' in an air quality plan to keep the exceedance period for the level of pollutants in ambient air as short as possible. The court determined that the Dutch air quality plan did not keep the exceedance period as short as possible and ordered the Dutch state to draw up a new, improved air quality plan (and to refrain from implementing any project that would be detrimental to the air quality!). The Dutch state also had to refrain from taking measures that would lead to a continued or a new violation of the limit values for NO₂ and PM₁₀. The court in substantive proceedings found that *Milieudefensie* did not provide enough information to ascertain that the state violated its obligation under the AQD.

The mere fact that the limit values are exceeded is insufficient to conclude that the AQD is being violated by the state, because the Dutch state - according to the court in substantive proceedings - is constantly trying to improve and deal with the exceedance of limit values in the Netherlands. The claims of *Milieudefensie* and *Stichting Adem* are therefore rejected by the court. Finally, the court of appeals in the case against the preliminary relief proceedings reverses the judgement in preliminary relief proceedings, as the prevention of all measures that lead to a continued or a new violation of the limit values for NO₂ and PM₁₀ would lead to over-regulation/gold-plating.

Another example of a court case regarding enforcement of air quality law in the Netherlands is the case of residents of Amsterdam against the State Secretary for Infrastructure and Water Management for failure to uphold limit values for air quality in the streets of Amsterdam. (See ECLI:NL:RVS:2018:3324). The Administrative Jurisdiction Division of the Council of State, the highest administrative court in the Netherlands, orders that there is no legal competence for the State Secretary to impose an order subject to a penalty when limit values for air quality are exceeded. The appeal is therefore dismissed as the residents of Amsterdam have the possibility to start a procedure based on a civil unlawful act if air quality standards are not enforced by the government. There is also no legal competence for the State Secretary to take local measures to prevent exceedance of national air quality standards.

17. Please outline any other major challenges faced in your Member State for enforcing the AQD, or any other applicable air quality law.

Main issue probably is the question whether the NSL provides for a sufficiently expeditious pathway to achieve air quality standards everywhere in the Netherlands. In 2018 an extra

10.5 million euro from central government was set aside for (NSL) projects to reduce the bottlenecks of exceedances in inner city areas which will – according to government – keep exceedances as short as possible. New measures targeting livestock farming will – according to government – allow for conformity with the air quality standards as soon as possible but in any case before 2023. Forcing government to do more by way of legal procedures has proven difficult (both in administrative law and civil law procedures (see above)).

A Controversial Source of Air Pollution: Regulation of Vehicle Emissions Systems

Many Member States are currently subject to infringement proceedings by the Commission in relation to vehicle type approval rules. This is currently prescribed under Framework Directive 2007/46/EC establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles [2007] OJ L263/1 and Regulation (EC) No 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 [2007] OJ L171/1.

Amongst other things, this legislation requires Member States to have ‘effective, proportionate and dissuasive’ penalty systems in place to deter car manufacturers from illegal practices, such as installing defeat devices. This legislation was overhauled in 2018 by Regulation (EU) 2018/858 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC [2018] OJ L151/1, which will apply from 1 September 2020.

18. How has your Member State implemented these EU vehicle type approval rules? Have there been any controversies in transposing these rules?

Directive 2007/46 was implemented by amending the *Wegenverkeerswet 1994* (general Act on Road and Traffic 1994) and allowing for a Ministerial Decree that includes dynamic references to the directive. I’m sorry to say that I’m not aware of any controversies in transposing these rules.

19. What legal measures have been taken in your Member State (if any) against car manufacturers which have failed to comply with vehicle type approval rules? *These legal measures might include court cases, including between car buyers and manufacturers.*

I’m sorry to say that at this moment I don’t know.

Case Study

Martha is living in an urban area in your Member State, and her children have developed asthmatic symptoms (i.e. a diagnosed respiratory illness). She becomes aware that the local

air quality exceeds standards laid down in the AQD. Her house is next to a main road, which is a heavily used bus route on which bus operators use diesel vehicles. The town also has a number of industrial plants, a coal fired power station, and a number of intensive farms. It is unclear to her precisely which pollution source is causing the breaches of air quality standards, or what their respective contributions might be to the local air quality problem.

What sort of legal action could Martha take in your Member State? And against whom? What remedies do the courts possess? What are the financial implications of bringing such a case? Might there be other regulatory avenues available to Martha instead?

Martha could start civil proceedings against the Dutch state based on a civil unlawful act, on the grounds that the State is in violation of air quality standards (set by AQD) and is not doing enough (or: is implementing a policy/plan that is insufficient) to keep exceedances as short as possible. It is possible for the court to order the Dutch state to do more with AQD limit values (such legal action can be compared to the Urgenda-case). See question 16 for an example: Milieudefensie/Stichting Adem against the Dutch state. If the civil law court will allow the proceedings (because the administrative law court cannot provide the same remedies), it will allow government with a large discretion to assess what its policy should entail and possibly what should be considered 'as short as possible'.

Martha could also request an administrative body that has powers to take concrete measures to improve air quality in her town (or to request that administrative enforcement measures against any permitted facility that is possibly not operating in conformity with its permit). Formally speaking such a request could qualify as an application by an interested party to the administrative body to take an administrative decision. It is however not very likely that the response by the administrative body is an administrative law decision against which judicial review by an administrative law court is allowed (for instance: asking for a better air quality plan or indeed a plan as such). If it is however (for instance if she were to ask for administrative enforcement measures against a coal-fired power plant), the administrative law court could demand action by the administrative body when the conditions of the permit are not complied with. If a new zoning plan is adopted or a new permit is granted, there is the possibility of judicial review, including the possibility of 'exceptieve toetsing' (a plea of illegality concerning the NSL). However, the government is to be allowed discretion regarding the decision to choose between fitting measures within the NSL and administrative courts can only check the administrative decision for higher law or (un)reasonableness.

TURKEY

Avosetta Meeting on Air Quality Law-London 24-25 May 2019
Air Quality Law in Turkey with reference to the EU Regulations
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Air Quality: National Context

- *The main sources of unlawful levels of air pollution*

Unlawful levels of air pollution are related to almost all pollutants and varies to the towns in the provinces. However, PM10, SO2 and NO2 are respectively considered as the main sources. The main sources for air pollution are respectively industry (particularly coal power plants), transport, residential heating, and fertilizer production.

- *Extensive of reporting non-compliance with AQD air quality standards*

Reporting of non-compliance has been carried out annually in parallel to reporting the information on air quality standards to comply with requirements under the Convention on Long Range Transboundary Pollution. Daily data regarding non-compliance is provided for all interested people in the specific websites¹ of the Ministry of Environment and Urbanization. Additionally, public can reach the relevant data through the web sites of the provincial directorates.

For PM2.5 the relevant data table takes into account the limit values both determined by the World Health Organization (WHO), and national regulations. In this context, considerable exceedance days are determined nearly in all measurement stations. Data for NO2, SO2, NOx, CO2 and O3 are also provided according to the limit values of the WHO and national legislation, and there are significant hours of exceedance although the degrees varies according to the stations and so towns. The EU limit values are only taken into account to determine the exceedance for PM10. Exceedance days for this parameter are stated comparatively according to the EU and national limit values in the relevant table that includes about 300 stations. There are significant number of exceedance days in an extent that for certain towns there are above 200 days. It is reported that approximately 60 million people out of 82 million have been living in the areas where the annual average limit values for PM10 are exceeded².

- *Infringement proceedings for failure to comply with the AQD?*

Not applicable for Turkey.

Air Quality Standards

- *Re-existing national law relating to air quality standards*

The first By-Law on the Protection of Air Quality published on 2 November 1986 according to the relevant provisions of the Law on Environment 1983 was including limit values for various pollutants before the EU directive on the issue is released.

- *Implementation of AQD air quality standards*

¹ www.havaizleme.gov.tr, <http://mobil.havaizleme.gov.tr>. The comprehensive data covering information until 2016 can be find in the Informative Inventory Report submitted under the Convention on Long Range Transboundary Air Pollution. http://cdr.eionet.europa.eu/tr/un/clrtap/iir/envwqpzq/IIR_Turkey_2018.pdf

² See. *Hava Kirliliği Raporu 2018*, Çevre Mühendisleri Odası, 2019 (2018 Report on Air Pollution, Chamber of Environmental Engineers), p.7. This report has been prepared in the light of the official data published online in www.havaizleme.gov.tr, <http://mobil.havaizleme.gov.tr>

Transposition and implementation measures have been carried out with several by-laws regarding air pollution. The main one is the By-law on Ambient Air Quality Management and Assessment (HKDY) repealed the previous one (RG-official gazette-06.06.2008)³.

Air quality standards are not fully in line with the AQD. Indeed, the HKDY sets out a smooth and gradual implementation calendar for 13 different pollutants defined in the AQD. The limit values will be met by decreasing the values of margin of tolerance gradually. The final date which differs according to 13 parameters extends to 2024 except PM2.5. Indeed, currently there is not national limit value for this pollutant. Additionally, there is not yet a mandatory CO2 standard for new vehicles except a mandatory labelling requirement regarding CO2 emission level of the vehicle (see the table in the annex).

- *More stringent standards*

The relevant by-laws do not include more stringent standards.

Air Quality Monitoring and Modelling

- *Air quality monitoring networks*

National air quality monitoring network is established under the projects funded by the EU, and five out of eight planned regional networks have been set up. However, the related requirements do not go beyond the requirements set out in AQD. The implementation is not entirely in conformity with the AQD. Currently there are 313 stations located mostly in the urban areas according to the level of air pollution, and the numbers of them are planned to be decreased year by year regarding the levels of the EU. The data obtained from these stations has been directly published and sheered online, and can be monitored in the websites www.havaizleme.gov.tr, <http://mobil.havaizleme.gov.tr>

- *Problems regarding monitoring of air quality*

In a latest report assessing the data regarding the year 2018 the following problems have been raised⁴: Measurements have not been done in certain key areas of İstanbul. Reliable data regarding PM10, SO2, NO2, NOx, CO, O3 parameters could not be obtained from several stations. Only some pollutant parameters can be measured in various stations. For instance, PM'2.5 which is considered among the most dangerous pollutants can be measured in only limited number of stations. The required percentage of data could not be obtained from various stations. Unqualified equipment and lack of equipment are among the other mentioned problems.

- *Limitations or problems with the modelling techniques*

There is no available information.

National Air Quality Plans and Governance

- *National Air Quality Plan according to Article 23 of AQD*

³ Other by-laws are following: By-law on the Control of Air Pollution from Industrial Facilities (RG 03.07.2009), By-law on the Control of Air Pollution from Heating (RG.13.01.2005), By-law on the Control of Emissions from Vehicles (11.03.2017, repealed the previous one dated 30.11.2013), By-law on the Decrease of Sulphur Dioxin in Certain Fuel Oils (RG.06.10.2009).

⁴ See. The report supra note 2.

There is not a “national air quality plan” except the “clean air plan” prepared for the period 2010-2013 for the seven geographical region of the country. This plan has not been revised or replaced by another. Instead, there are 65 clean air plans prepared for 65 provinces which have the highest air pollution potential (Article 10 of HKDY). They are expected to be renewed each five years within the second monitoring period (2019-2025). Pollutants and key measures regarding to keep exceedances “as short as possible” differs to the specific conditions of every province.

- *Key national regulatory measures regarding the compliance with EU air quality standards*

In general, renewable energy and natural gas are promoted. For households: The use of natural gas for residential heating is required in the areas where the relevant infrastructure is established. The new buildings will be constructed according to the energy identity certificate while the old ones are required to solve the insulation problem within the required time. For transport: Exhaust gas emission limits are regulated, and owners are obliged to comply them by both to receive the related license as well as the certificate for approval of vehicle control that would be obtained from the competent stations in every one, two and mostly three years according to the production date of the vehicle. Fuel, diesel and gasoline content is regulated. Used car importation is restricted. All vehicles have been using lead free gasoline since 2006. The construction of bicycle roads, particularly in the major cities is promoted and co-financed by the MEP. Extraction of old vehicles is regulated. Electric vehicles are promoted by the reduction of tax. For industry: Several requirements regarding the permanent or temporary restrictions of total emissions, the termination of activities, not permitting the new facilities, and establishment of protected air zones are among the major measures set out in the By-law on the Control of Air Pollutions from Industry because the industrial emissions directive has not been transposed yet.

- *Short-term Action Plan under Article 24 of AQD*

There is not any separate short term action plan issued. The possible reason is that the relevant provision (Article 11 of HKDY) requires that these plans can be a part of the clean air plans. Therefore, the measures to be taken against the risks of exceeding the required limits are underlined in the above mentioned clean air plans prepared for 65 provinces. The suspension of activities of industrial facilities, restrictions for traffic and for residential heating times and degree are among the emergency short term measures to be taken under the relevant by-law in case of exceedance.

- *Responsible public bodies with regard to meeting air quality standards*

The Directorate of Air Management within the Ministry of Environment and Urbanization (MEU) as well as the provincial directorates of the MEU are the main responsible bodies in terms of main issues as to granting permissions, determining the main and sub regions, preparing the related plans, and control and enforcement. In terms of monitoring and enforcement the directorates or units of other ministries in the provinces as well as municipalities have also responsibility for all or some pollution sources.

- *Coordination for different public bodies*

Although there is not any specific legal requirement for the coordination, the wording of the relevant regulations regarding the competent authorities implies that the duty to coordinate is carried by the provincial directorates of the MEU.

Enforcement of Air Quality Law

- *The primary mode for enforcing of air quality law*

There are requirements regarding all actions as prohibited activities (discharging air emissions into the air without the necessary permit), monitoring and inspection mechanisms and penalties. Majority of penalties provided under the Law on Environment are of administrative nature. These are as fines, cancellation of incentives or state grants, suspension or invalidation of certificates and/or licenses, shutting down of illegal facilities, suspension (temporarily or permanently) of polluted activities wholly or partially until the violation is stopped, compensation for clean-up and damages, and payment of costs for measures taken by competent authorities. Criminal penalties as imprisonment and fines are imposed for illegal emissions into the air that will intentionally or negligently cause damage to environment under the Criminal Code.

- *Court cases concerning the enforcement of air quality law.*

Council of State (Danıştay) judgement about upholding the decision of the relevant public authority on the obligatory use of natural gas for heating. The relevant by-law⁵ includes a provision indicating that “the use of natural gas for heating purpose shall be encouraged”. In spite of this non-obligatory wording, the competent authority has taken a decision that requires the use of natural gas in a settlement zone in a province where the infrastructure studies have been completed. The first degree court has annulled this decision on the ground that it is against to the mentioned provision. However, *Danıştay* reversed this decision on the ground of the nature of “discretion” and the legal motif of administrative decision. It judged that the administration indeed has not any choice to do otherwise because he is within a “bound discretion” in terms of forcing the use of natural gas in the areas where the high level air pollution is occurred. By reaching this conclusion, the court referred to the right to environment in Article 56 of the Constitution as well as to the Convention on the Long Range Transboundary Air Pollution to which Turkey is a party⁶.

- *Major challenges faced for enforcing the AQD, or any other applicable air quality law.*

Lack of technical capacity, lack of control, the reluctance of the competent authorities to apply sanctions for various reasons, lack of expertise, lack of objectivity and impartiality.

A Controversial Source of Air Pollution: Regulation of Vehicle Emissions Systems

- *Implementation of the EU vehicle type approval rules and controversies in transposing.*

The majority of vehicle type approval rules have been transposed into domestic law through so many by-laws and the subsequent amendments since 1999, and are implemented. Indeed, the lists of these regulations has been set out on the website of the Ministry of Industry and Trade in a table by citing the names of the related EU directives or regulations⁷. This table, apart from title of the EU legislation, includes all information regarding date of publication including the dates of amendments, effective date, implementation level and technical services. No available information regarding controversy for transposition.

Implementation: Establishment of a market surveillance system, designation of competent units and sub units (for instance establishing technical committee as well as several technical

⁵ Article 20 of the By-law on the Control of Air Pollution from Heating (RG. 13.01.2005).

⁶ Danıştay 14. Daire. E.20111/13784. K.2013/1306. T. 27.2.2013.

⁷ <https://sanayi.gov.tr/Handlers/MevzuatHandler.ashx?mevzuatId=edf0afdb-8f8d-498f-ae4a-ea0ec5f746b7>

subcommittees on motor vehicles formed by the representatives from public and private sectors), of coordination commission, of laboratories for testing and calibration, and of units for accreditation, certification and conformity assessment; allocation of necessary budget for market surveillance activities are among the major implementation measures.

- *Legal measures for non-compliance against car manufacturers.*

Under the market-surveillance program carried out by the relevant unit of the said Ministry, several measures have been taken as withdrawal from the market and disposal of the product, withdrawal of the type approval certificate, informing public of unsafe or non-conforming products as well as of their companies on the official website periodically and through the media, granting additional time limit to the related firms for correction of non-compliance, application of administrative fines, and suspension of import. There is not available court case against car manufacturers regarding type approval rules on the ground of environmental protection.

(There is a recent pending case concerning a technical defective regarding the engine of a Rower Vogue. A Turkish businessman brought a series of civil law action in the Turkish Courts in Istanbul against the British manufacturer –Land Rower Company Ltd. - to receive his money back. He proved that the defective is derived from the production process and made the car useless. The first instance court judged on behalf of the car buyer- 19 February 2019. Following this decision the car owner applied to the competent authorities of the EU to provide the removal of the same series of the alleged car from both the EU and Turkish market).

Case Study

Martha is living in an urban area in your Member State, and her children have developed asthmatic symptoms (i.e. a diagnosed respiratory illness). She becomes aware that the local air quality exceeds standards laid down in the AQD. Her house is next to a main road, which is a heavily used bus route on which bus operators use diesel vehicles. The town also has a number of industrial plants, a coal fired power station, and a number of intensive farms. It is unclear to her precisely which pollution source is causing the breaches of air quality standards, or what their respective contributions might be to the local air quality problem.

What sort of legal action could Martha take in your Member State? And against whom? What remedies do the courts possess? What are the financial implications of bringing such a case? Might there be other regulatory avenues available to Martha instead?

The choices of Martha, and the related remedies

1. Administrative application: Martha can apply directly to competent authorities to stop the polluted activities that cause exceedance. She has not any obligation to show that she personally suffered because Article 30 of Law on Environment allows this right to any person who has knowledge of such a pollution apart from persons that are personally infringed.

2. Legal action- Public law action: Martha can bring a legal action against the competent authorities (mostly the Ministry of Environment and Urbanization) before administrative court directly or if the relevant body remains salience about her above mentioned application. The court can issue an injunctive order for prevention of exceedance

through the enforcement of relevant legislation, and can order compensation for moral and material damages if Martha proves that she has suffered such damages. In this case she can base on the requirements as the polluter pays principle, “duty” of the public bodies regarding to protect the environment as well as to provide efficient public service underlined in the constitution, the Law on Environment, and Administrative Judicial Law. (In a case, the Council of State -*Danıştay*- held the Ministry of Environment responsible for damages to the products of local farmers that are caused by pollution in a river because of illegal activities of private companies, and ordered to pay damages of the plaintiffs⁸. The legal reasoning of this judgment is the Ministry has not properly carried out his duty to provide efficient public service to prevent the pollution of alleged river).

Martha cannot bring a civil law action to claim for prevention of interference and for payment the relevant damages. Although the Law on Environment requires “strict liability”, and also refers to the applicability of the general rules allowing “joint and several liability” under tort law, she still has to prove both damage and causality. The similar situation is valid for application to prosecutor to criminalize the polluters because polluters are not identified. (Emissions to the air against the standards set out under the by laws regarding air pollution have been subjected to criminal penalties -imprisonment and judicial fines depending on the knowingly or negligently act- under the Criminal Code).

Financial aspect for bringing legal cases.

Martha has to bear all expenses for bringing legal cases herself unless she wins the case because there is not any contrary provision under the related legislation.

Annex

Air quality limit values (www.havaizleme.gov.tr, <http://mobil.havaizleme.gov.tr>)

English of the first line: Parameters-Measurement period-limit values (Turkey-EU) - transposition time.

English of the second line: Measurement period: hour, day, critical level, exceedance per hour, exceedance per day, annual ecosystem.

⁸ 6. Daire, E. 1999/2949. K.2000/5145. T.17.10.2010 and 6. Daire, E.200276748. k.200471834. T.31.3.2004.

Tablo.1 İnsan Sağlığı ve Ekosistemin Korunması İçin Hava Kalitesi Sınır Değerleri

Kirlenici Parametreler	Ölçüm Periyodu	Sınır Değerler		Uyum Takvimi
		Ülkemizde Uygulanan (2018)	AB Ülkelerinde Uygulanan	
Kükürtdioksit SO ₂ (µg/m ³)	Saatlik	380	350	1.1.2019
	Günlük	150	125	
	Uyarı Eşiği (3 ardışık saat)	500	500	
	Saatlik Aşım Sayısı	-	24	
	Günlük Aşım Sayısı	-	3	
	Yıllık Ekosistem	20	20	1.1.2014
Partikül Madde PM ₁₀ (µg/m ³)	Günlük	60	50	1.1.2019
	Yıllık	44	40	
	Günlük Aşım Sayısı		35	
Azotdioksit NO ₂ (µg/m ³)	Saatlik	260	200	1.1.2024
	Yıllık	44	40	
	Uyarı Eşiği (3 ardışık saat)		400	
	Saatlik Aşım Sayısı		18	
Azotoksitler NO _x (µg/m ³)	Yıllık (Ekosistem)	30	30	1.1.2014
Karbonmonoksit CO (mg/m ³)	8 Saatlik Ortalama	10.000	10	1.1.2017
Ozon O ₃ (µg/m ³)	8 Saatlik Ortalama	120	120	1.1.2022
	Bilgi Eşiği (saatlik)		180	
	Uyarı Eşiği (saatlik)	240	240	
Benzen C ₆ H ₆ (µg/m ³)	Yıllık	8	5	1.1.2021
Kurşun Pb (µg/m ³)	Yıllık	0,6	0,5	1.1.2019
Arsenik (ng/m ³) As (ng/m ³)	Yıllık	-	6	1.1.2020
Kadmiyum Cd (ng/m ³)	Yıllık	-	5	1.1.2020
Nikel Ni (ng/m ³)	Yıllık	-	20	1.1.2020
Benzoapiren B(a)p (ng/m ³)	Yıllık	-	1	1.1.2020

UK

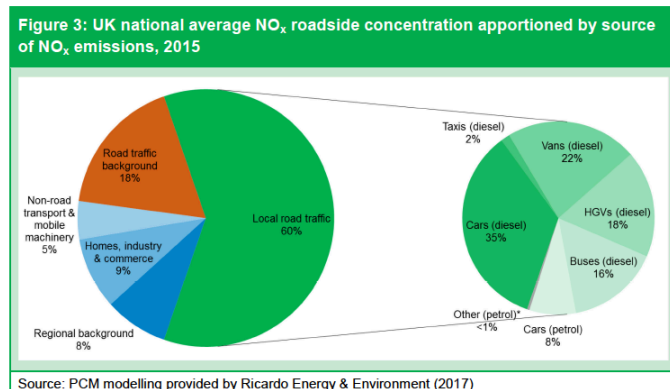
Avosetta Questionnaire: Air Quality Law
London 24-25 May 2019
UK Report: Eloise Scotford, UCL Faculty of Laws

Air Quality: National Context

1. What are the main sources of unlawful levels of air pollution in your Member State?

On latest available data (for 2017), the UK was in breach of EU air quality standards in relation to three pollutants – NO₂, O₃ and benzo[a]pyrene (see Q2) – with infringements being most serious in relation to NO₂. There is a range of fuel combustion sources for NO_x, including power generation, industrial combustion and road transport. According to the [UK National Air Emissions Inventory](#), the largest source of unlawful levels of NO₂ air pollution is road traffic, accounting for almost one-third of emissions.

Note that the UK government presents this source apportionment information in a particular way in its plan for tackling NO₂ exceedances, framing the problem as one of ‘roadside emissions’ (ie focusing on the dominant 1/3 of road traffic sources) and apportions the sources of NO₂ emissions as follows (this is taken from the UK NO₂ air quality plan 2017, discussed below):



In relation to road traffic emissions, the UK government reports that:

The main reasons why roadside NO₂ concentrations have not decreased as expected is believed to be the failure of Euro vehicle emission standards for diesel vehicles to deliver the anticipated reductions in NO_x emissions in real world driving conditions.

For ozone (O₃), the inverse relationship with NO_x pollution is important to appreciate. NO_x emitted in cities reduces local O₃ concentrations as NO reacts with O₃ to form NO₂. Thus levels of O₃ are often higher in rural areas than urban areas. The implication is also that cleaning up NO_x pollution in cities may lead to higher O₃ pollution there too. O₃ pollution is generated by a complex and unpredictable set of sources, both locally and from a distance. This is because ground-level ozone is produced when NO_x and VOCs (volatile organic compounds) from vehicles interacts with sunlight and, once produced, can travel long distances and accumulate to reach high concentrations far from original sources.

The main sources of polycyclic aromatic hydrocarbons (including benzo[a]pyrene) in the UK are domestic coal and wood burning, fires (e.g. accidental fires, bonfires, forest fires, etc.), and industrial processes such as coke production.

2. How extensive is reported non-compliance with AQD air quality standards in your Member State?

There are 43 zones in the UK.

NO₂: Limit Values for Annual and Hourly Means

On latest available data (for 2017), six zones were compliant with the limit value for the NO₂ annual mean. The remaining 37 zones exceeded this limit value. This is currently the biggest air pollution policy challenge for the UK. For the NO₂ hourly mean, there was also non-compliance (ie breach on more than 18 occasions) in two zones in 2017: Greater London and South Wales. Greater London's NO₂ levels are not foreseen to meet limit values before 2026 (taking into account measures to be adopted in our Article 23 Air Quality Plan).

Benzo[a]pyrene: Target Value

In 2017, three zones exceeded the target value for benzo[a]pyrene. This is a polycyclic aromatic hydrocarbon (PAH) and is used as a 'marker' pollutant for this group of polluting compounds. Exceedances are identified as being due to specific local sources.

Ozone: Long-term Objective

In 2017, nine zones were compliant with the long-term objective for ozone, based on the maximum daily eight-hour mean. The other 34 zones exceeded this long-term objective. So again this is a major air pollution challenge for the UK, but currently receives less attention since it is not a binding limit value but rather subject to a less onerous obligation in Article 17(1) (Member States 'shall take all necessary measures not entailing disproportionate costs' to ensure that long term objectives are attained).

PM₁₀ and PM_{2.5}

While there is no reported UK non-compliance with EU limit values for PM, these standards are heavily criticized (particularly PM_{2.5} where the WHO guidelines are more stringent: 10 µg/m³). In light of this, the UK's reported PM levels are also problematic. Annual mean urban PM_{2.5} concentrations in the UK are typically in the low teens of µg/m³ but exceed 20 µg/m³ at a few urban roadside locations. Annual mean PM₁₀ concentrations for urban AURN monitoring sites have been typically in the range 10-30 µg/m³ in recent years. There is no threshold that has been identified for PM₁₀ below which no adverse health effects occur.

- a. If data on compliance with air quality standards is incomplete, please indicate the extent of the non-compliance with requirements of Article 26 AQD (public information requirements).

N/A

Note there are two main UK databases for air quality information:

- [NAEI](#): for reporting emissions (GHG and air pollutants) as required under various air pollution regimes
- [UK-Air](#): for reporting measurements of pollution levels through monitoring

3. Have EU infringement proceedings been brought against your Member State for failure to comply with the AQD?

Yes. The Commission brought proceedings against the UK government in May 2018, when it issued a spate of formal infringement proceedings against seven Member States (including the UK) in a renewed push to enforce NO₂ and PM₁₀ limits, as well as rules on type approval for cars.

- a. If so, what was the outcome of this enforcement action and its impact on air quality law and policy in your Member State? (If enforcement action is ongoing, answer this question as best you can in terms of the effects of this action on your Member State's approach to air quality law and policy.)

Since 2015 (when the AQD's dates for transposition expired), the UK government has taken seriously the threat of infraction proceedings for non-compliance with EU air quality standards and issued a series of air quality plans under Article 23, which have had a dramatic effect on air quality policy. The impetus for issuing these plans has been the threat of infraction proceedings coupled with strategic public interest litigation brought by ClientEarth, starting with a case brought in 2015, the judgment in which made clear that the government was required to draw up air quality plans when limit values under Article 13 were breached, whether or not it had applied for extensions of time under Article 22.¹ To date, the effect of infraction proceedings has been less about actual improvements in air quality standards and more about drawing up a lawful plan (see further below).

Air Quality Standards

4. Was there pre-existing national law relating to air quality standards (similar to the AQD), or did the AQD introduce something new in your country?

The AQD (or its predecessors setting out limit values for SO₂ and NO₂ dating back to the early 1980s)² was the first to introduce numerical concentration standards as a regulatory tool for UK air quality. Prior to this, the UK Clean Air Act 1956 (consolidated and updated in the Clean Air Act 1993) had introduced limits on the emission of smoke (banning dark smoke, preventing smoke emissions in designated 'smoke control areas', and regulating chimney height for furnaces). The Clean Air Act fundamentally changed the sources of domestic heat and energy (away from fires) in many towns and cities, requiring that smokeless fuels be used, and required power stations to be located farther afield. It remains an important part of UK air quality law and is largely seen as having been successful in improving air quality.

5. How are AQD air quality standards implemented in law in your Member State?

¹ *R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28 (Lord Carnwath).

² See http://ec.europa.eu/environment/air/quality/existing_leg.htm.

AQD air quality standards are transposed by [The Air Quality Standards Regulations 2010 SI 2010/1001](#) (in England, with equivalent transposing legislation in Scotland, Wales and Northern Ireland). To support this transposition, the Environment Act 1995 also introduced a supplementary system of local air quality management (LAQM),³ which gave local authorities a role in identifying local pollution hotspots ('air quality management areas') and taking steps to remedy them (though 'air quality management plans'). These local responsibilities and measures are in addition to the national responsibility for overall pollution standards under the AQS Regulations.

6. Does any law in your Member State provide for air quality standards that go beyond those set out in the AQD, imposing any more stringent standards, for example, in relation to PM_{2.5}?

The LAQM regime (see Q5) uses 'air quality objectives', which are almost identical to EU air quality standards, with some minor differences. In particular, the annual mean for ozone is more stringent, and Scotland (within the LAQM regime) has adopted more stringent air quality objectives for PM as follows:

- PM_{2.5}: annual mean 12µg/m³ (cf 25µg/m³ in the AQD)
- PM₁₀: annual mean 18µg/m³ (cf 40µg/m³ in the AQD), plus annual mean only to be exceeded 7 times per year (cf 35 times)

Air Quality Monitoring and Modelling

7. How are air quality monitoring networks set up in your Member State (briefly)? Do these go beyond the monitoring requirements set out in Chapter II AQD (eg in terms of the number and location of monitoring stations)?

The UK has a history of evolving air quality networks going back to the establishment of the 'National Survey' in 1961 (the world's first co-ordinated national air pollution monitoring network). Currently, we have a national network of fixed measurement monitoring using reference methods under the Directive that is more extensive than that required under the Directive. Beyond this, we have additional and more extensive networks for assessing air quality using a range of monitoring methods, run by local authorities under the LAQM regime (see Q5).

8. What sort of problems are encountered in monitoring of air quality in your Member State?

Through empirical research I have conducted on English air quality governance ('Investigating Compliance with Air Quality Law: Administering Diffuse Implementation', BA/Leverhulme Small Grant SG152891), I have identified two main problems with our fixed measurement monitoring. First, the national and local monitoring networks can produce inconsistent results. This usually reflects that local authorities are monitoring more extensively and identifying hotspots or wider problem areas that are not picked up in the narrower set of EU-mandated national measurement sites (Annexes III and V). In light of EU

³ <http://www.legislation.gov.uk/ukpga/1995/25/contents> (see Part IV).

infraction proceedings, only those infringing areas that are within the AQD network attract resources and support from central government, setting up conflicts with local areas that are often concerned about different or more extensive air pollution issues. Second, there are concerns about the siting of measurement equipment according to the AQD's rules and particularly whether this captures levels of air pollution encountered by the public, and particularly vulnerable people. The requirement to site traffic-oriented sample probes 25m from the edge of major junctions is commonly cited as a problematic requirement in this respect (Annex III).

Beyond fixed measurement requirements in the Directive, increasingly citizen science and other research projects are being used to measure air quality and to empower citizens who are concerned about pollution levels and frustrated about political inaction. These projects are most successful when they use measurement methods that are checked and overseen by scientific researchers (see eg [CHILL](#) research study, partly relying on children wearing backpacks including monitors walking to and from school), although there is a limit as to what can be achieved with currently available technology. There is a risk of more confusion generated by potentially erroneous air quality measurements generated through citizen projects. There are also some sophisticated monitoring research projects being launched to supplement and verify the data obtained from AQD fixed monitors (eg [Breathe London](#)).

9. As far as you can determine, are there limitations or problems with the modelling techniques used in your Member State to assess air quality (where modelling is permitted as a method for assessment under Chapter II AQD)?

Again, there are inconsistencies between the air quality measurements produced at national and local levels due to different modelling approaches being adopted. Local authorities are free to adopt different modelling approaches as they deem appropriate in reviewing local air quality. National models are inevitably larger in scale and scope and rely on [Fairmode](#) guidance.

A particularly difficult area is the modelling of how planned measures will *improve* air quality. Some quantitative estimation of air pollution effects is required by Annex XV, 8(c) in relation to planned improvement measures. For example, in preparing the UK's 2017 Air Quality Plan (see Q10), the government has promoted Clean Air Zones (CAZs) as the main mode for improving NO₂ levels in urban areas on the basis that it is one measure they feel confident of being able to model and to show that CAZs will bring the UK into projected compliance.

National Air Quality Plans and Governance

10. Does your Member State have a national Air Quality Plan under Article 23?

Yes.

- a. If so, to which pollutants does the plan relate (eg NO₂ or PM₁₀) and what **key** measures does the plan outline to keep exceedances 'as short as possible'?

It is a plan focused only on NO₂ roadside emissions (the '[Air quality plan for nitrogen dioxide \(NO₂\) in UK \(2017\)](#)'), as this is seen to be the air pollution problem that is strictly infringing the Directive. The main device of the plan is to make local authorities responsible for coming up with plans to achieve compliance with NO₂ limit values in their area in the shortest possible time. The plan is driven by a premise that '[g]iven the local nature of the problem, local action is needed to achieve improvements in air quality'. Local authorities are encouraged to consider the adoption of Clean Air Zones (which can be constructed in many different ways, but generally involve some kind of charging framework for specified vehicles),⁴ and other measures for improving local traffic pollution. The government then makes funding pots available for local authorities to bid for measures they want to implement, and has allocated over £3bn to date to local authorities for measures such as improving infrastructure for ultra-low emission vehicles, upgrading bus fleets, developing walking and cycling strategies.

Increasingly, to make the plan work, central government has been directing local authorities (through statutory Directions) to come up with 'business cases' for the measures that will achieve compliance with EU limit values in the shortest possible time, and also directing local authorities to undertake very specific measures (such as introducing traffic calming, traffic 'signal optimisation' and bus retrofitting).

At the national level, the plan confirms that the government is 'working with industry' to end the sale of new conventional petrol and diesel cars and vans by 2040. This has since become a government commitment in its [Road to Zero](#) transport strategy, and confirmed in the 2019 [Clean Air Strategy](#) for England. The plan also considers a number of options to consult on with motorists (such as targeted scrappage schemes, subsidized car clubs), without making any firm commitments.

b. *Please also indicate if you think there are any **weaknesses** in the plan.*

The two main weaknesses are its scope and its disproportionate allocation of responsibility on local authorities to deal with air pollution problems. On scope, focusing so narrowly on roadside NO₂ emissions avoids detailed consideration of wider sources of NO₂ pollution and how they might contribute to the problem (at roadsides and elsewhere), not to mention not addressing at all our ozone pollution issues. One of the lessons of air pollution regulation historically is that it has been too targeted on single pollution issues, failing to appreciate and tackle pollution problems holistically.⁵

On allocation of primary responsibility for achieving compliance to local authorities, this overlooks the fact that local authorities do not have control over many sources of pollution in their areas, even just focusing on roadside emissions. A good example of this is the fact that national highways are controlled by Highways England (a national regulator) and local authorities can do nothing about the considerable pollution these main roads cause in their areas. This approach feels very like 'passing the buck' on a difficult political issue to another government level that does not have all the necessary regulatory levers to tackle the

⁴ See the [Clean Air Zone framework](#) (May 2017).

⁵ Gary Fuller, *The Invisible Killer: The Rising Global Threat of Air Pollution and How We Can Fight Back* (Melville House UK, 2018).

problem in a comprehensive and holistic way. Further, the statutory Directions (see Q10a) being imposed on local authorities are producing some perverse effects. In particular, fragmented air quality measures are being adopted across the country (eg different types of charging zones are being adopted), which creates inefficiencies for investing in new technologies and potential resistance to compliance by drivers moving between these different areas. Further, some local air quality measures are politically rejected by local councils voting against them, demonstrating the political risk of passing the buck (and the considerable challenge of promoting social transformation for improving air quality in a short space of time).

- c. If your Member State has such a plan, how is the legal requirement of keeping exceedances 'as short as possible' satisfied? *Please outline any challenges (legal or otherwise) in meeting this requirement in your Member State.*

The 2017 plan is in fact a revised plan, rewritten after the High Court found the initial 2015 plan to be unlawful for failing to ensure that exceedances would be kept as short as possible (based on flaws in the modelling methodology used),⁶ and rewritten again in 2017 after a follow up legal challenge on further grounds relating to the approach adopted in the plan (not requiring any measures to be adopted in areas where compliance was projected to be achieved within 3 years).⁷ In the first judgment in this litigation – *ClientEarth (No 2)* – Mr Justice Garnham set out some requirements for a plan to comply with the legal obligation that plans should ensure that exceedances are kept as short as possible. He held that:

1. Cost cannot be a factor in determining measures that will achieve compliance in the shortest possible time: the 'determining consideration has to be the efficacy of the measure in question and not their cost'.
2. The measures that a Member State may adopt should be 'proportionate', in the sense of being 'no more than is required to meet the target. To do more than is required, especially in the field of environmental protection, may well impact adversely on other, entirely proper and reasonable interests'.
3. The obligation 'to ensure' is an 'obligation to take steps which mean meeting the value limits is not just possible, but likely'.

To meet these legal requirements, the UK government has been issuing a series of statutory 'Air Quality Directions' to accompany the plan, essentially requiring local authorities to come up with their own plans or to adopt measures that will achieve compliance in as short a time as possible (with the attendant flaws outlined above).⁸

11. Whether or not your Member State has an Air Quality Plan, please outline the **key** national regulatory measures that contribute towards compliance with EU air quality standards in your Member State.

⁶ *R (ClientEarth) (No 2) v Secretary of State for the Environment, Food and Rural Affairs* [2016] EWHC 2740.

⁷ *R (ClientEarth) (No 3) v Secretary of State for the Environment, Food and Rural Affairs, Secretary of State for Transport, and Welsh Ministers* [2018] EWHC 315 (Admin).

⁸ <https://www.gov.uk/government/publications/air-quality-plan-for-nitrogen-dioxide-no2-in-uk-2017-air-quality-directions>.

- *Households* – Whilst we had success after the Clean Air Act 1956 in reducing smoke and pollution from burning solid fuels in the home, the boundaries of ‘smoke control areas’ have failed to keep up with urban expansion and pollution from solid fuel burning in the home has become a major issue again, particularly due to the popularity of wood-fired stoves. Domestic burning is a major cause of PM pollution. The government now has plans to ban the most polluting solid fuels for domestic burning (particularly setting standards for waste-derived fuels), to improve the enforcement of smoke control areas, and is also relying on the new EU ecodesign regulations that will come into force in 2022 to improve the emissions standards of stoves.⁹
- *Planning* - There is ongoing discussion about whether UK planning law can be improved to plan homes and cities better to minimize air pollution. This is contentious (particularly as to whether individual developments can be prevented on air pollution grounds)¹⁰ but the planning system is seen as a critical lever in air pollution prevention and management.
- *Transport* – See the measures discussed under the Air Quality Plan outlined above (Q10a), with a particular emphasis on introducing clean air zones in urban areas. In April this year, London’s Ultra Low Emission Zone (ULEZ) came into force, charging vehicles a daily charge if they enter the ULEZ charging zone (a large area of London, although the ULEZ boundary has been controversial) if they do not meet required Euro standards.¹¹
- *Industry* – the UK mainly relies on the Industrial Emissions Directive and MCP Directive¹² to control air pollution from industry. The UK government is considering whether it might introduce measures for small/medium sources of pollution that are not caught by either the MCP Directive or Ecodesign regulations.

12. Has your Member State ever issued a Short-term Action Plan under Article 24? If so, please outline any notable features of the plan or aspects of its implementation (briefly).

No.

13. Which public bodies have legal responsibilities for meeting air quality standards in your Member State?

Strictly, this responsibility lies squarely with the Secretary of State in the Department for the Environment, Food and Rural Affairs. However, as explained above, local authorities have responsibilities under the LAQM regime (not to achieve air quality standards but to exercise any powers exercisable by the authority ‘in pursuit of the achievement of air quality standards and objectives’ in hotspot areas identified by the local authorities).

⁹ See Clean Air Strategy 2019.

¹⁰ Eg *Gladman v Secretary of State for Communities and Local Government* [2017] EWHC 2768.

¹¹ For ULEZ vehicle standards, see <https://tfl.gov.uk/modes/driving/ultra-low-emission-zone/ways-to-meet-the-standard#on-this-page-1>.

¹² Directive (EU) 2015/2193 on the limitation of emissions of certain pollutants into the air from medium combustion plants [2015] OJ L313/1.

14. Are there any legal requirements for different public bodies who have control over different air pollution sources to coordinate their efforts in any way to work towards air quality standards? (For example, different regulators may control highways, airports, local urban planning decisions, large industrial installations, and so on.)

No. Although there are informal networks of air quality officers from different local authorities who share best practice.

Enforcement of Air Quality Law

15. What is the primary mode for enforcing air quality law in your Member State?

Implementation of air quality law is delivered through the UK air quality plan for NO₂ (outlined in Q10) and through the LAQM regime (Q5), with the latter relying on local authorities to identify local hotspot areas and to have local plans for dealing with these. Enforcement of measures pursued under these plans however has often been difficult. This is for very specific reasons (eg the enforcement regime for penalizing vehicles for idling is not cost-effective for local authorities to police) and for reasons of public acceptance (eg some cities have held local referenda to reject the introduction of a charging zone).¹³ In its 2019 Clean Air Strategy for England, the government is looking to strengthen local government enforcement powers in relation to specific regimes but the overall question of enforcement of air quality plans is a very difficult one. This is particularly because effective delivery of air quality plans requires cooperation and action from many government departments (particularly transport, health, housing, communities and local government, and treasury), which do not see air pollution as their primary responsibility.

16. Have there been court cases concerning the enforcement of air quality law in your Member State? *Please outline major cases or themes in key cases only.*

There have been three major public interest challenges brought by ClientEarth, forcing the government to have an air quality plan as required under the AQD and requiring this plan to be adequate, as outlined in Q10.

17. Please outline any other major challenges faced in your Member State for enforcing the AQD, or any other applicable air quality law.

The main challenges faced by local authorities in achieving good air quality (currently at the frontline of delivering this in the UK's governance structures for air pollution) are: severe budgetary constraints, poor inter-governmental coordination, poor coordination with other public bodies responsible for major sources of pollution, and time. Time is an interesting challenge. The AQD requires compliance with limit values in the shortest possible time, but systemic change to achieve sustainable improvement in air pollution levels, including public acceptance of major changes to urban planning and transport, takes time. Many local authorities see the 'shortest possible time' constraint in the AQD as counter-productive and

¹³ In 2008, Manchester citizens overwhelmingly rejected the introduction of a congestion charging zone: <https://www.theguardian.com/politics/2008/dec/12/congestioncharging-transport>.

impossible to determine in any case (in terms of which bundle of measures adopted will in fact achieve compliance in the shortest possible time).

A Controversial Source of Air Pollution: Regulation of Vehicle Emissions Systems

18. How has your Member State implemented these EU vehicle type approval rules?
Have there been any controversies in transposing these rules?

Yes. New regulations to punish manufacturers to cheat emissions tests came into force just after infraction proceedings were brought against the UK for failing properly to implement type approval rules.¹⁴

19. What legal measures have been taken in your Member State (if any) against car manufacturers which have failed to comply with vehicle type approval rules?

None to date, beyond the application of type approval rules.

Case Study

Martha is living in an urban area in your Member State, and her children have developed asthmatic symptoms (i.e. a diagnosed respiratory illness). She becomes aware that the local air quality exceeds standards laid down in the AQD. Her house is next to a main road, which is a heavily used bus route on which bus operators use diesel vehicles. The town also has a number of industrial plants, a coal fired power station, and a number of intensive farms. It is unclear to her precisely which pollution source is causing the breaches of air quality standards, or what their respective contributions might be to the local air quality problem.

What sort of legal action could Martha take in your Member State? And against whom? What remedies do the courts possess? What are the financial implications of bringing such a case? Might there be other regulatory avenues available to Martha instead?

Martha does not have an easy route to pursue any particular person or authority that is a source of pollution under UK law. Causation and source apportionment are big problems on these facts. However, if it can be shown that the unlawful levels of pollution in Martha's area are indeed causing her children's asthma, her children might be able to bring a private (tort) law claim in negligence against the Secretary of State for failing to take action to prevent foreseeable harm. This would be a claim for compensatory damages. This would be a ground-breaking case but it would be imaginable as a possible claim if causation could be proved. There are reasons to think such a causal link might be shown in some cases. Recently, the Attorney-General has reopened an inquest into the death of Ella Kissi-Debrah, who lived on a busy road in London and walked or drove to school each day along that heavily polluted road. The inquest will examine whether her death was caused by unlawful levels of air pollution, and is attracting considerable [media interest](#). As a private law claim, there would be no costs protection for Martha's children under our Civil Procedure Rules

¹⁴ Road Vehicles (Defeat Device, Fuel Consumption and Type Approval) Regulations 2018 SI 2018/673.

(CPR Part 45 has costs protections provisions for Aarhus claims but extends to public law claims only), which would appear to be a breach of the Aarhus Convention.¹⁵

Otherwise, Martha would need to gather information from any of the regulatory authorities who are responsible for controlling the sources of pollution mentioned in the question to determine if they are indeed fulfilling their regulatory duties. The most obvious authority to ask questions of is the local authority, as they should have an air quality management plan for dealing with the air pollution in her area (with measures relating to sources over which they have control, such as local roads and buses). She could not sue the local authority for failing to achieve air quality standards, but she might be able to challenge any failures to take seriously their duty to have a plan pursuing their achievement. This would be a public law challenge covered by the CPR rules on costs protection, and would not involve any compensatory remedies for Martha or her family.

Finally, there is always the possibility of bringing a public law challenge against the Secretary of State for failing to achieve binding air quality standards. This would relate only to limit values (as these are binding with no qualifications) and would need to be carefully constructed in terms of what is being challenged. A judicial review challenge is most easily based on a specific decision of the Secretary of State, which is why the recent ClientEarth litigation so far has related to the air quality plans issued by the government. Such litigation would again fall within the CPR rules on costs protection, but Martha would be best placed to encourage ClientEarth to continue with their air pollution litigation campaign to bring this next phase of litigation in the UK if air quality levels do not improve.

¹⁵ As suggested by *Austin v Miller Argent (South Wales) Limited* [2015] 1 WLR 62.