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State liability for damage caused to individuals for breach of EU air quality law

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Abstract: The purpose of this paper is to examine the jurisprudence of the Court of Justice of the European Union concerning the compensation of individuals for damages suffered due to the degradation of air quality, for which we will previously analyse its reaction to other rules relating to the environment, both sectoral and procedural. Furthermore, although our analysis will compare different jurisprudential solutions from other regional and universal human rights control bodies, we will also take into account the legislative proposals presented by the institutions of the Union insofar as their normative changes can remove the obstacles presented judicially that would prevent this type of actions from succeeding.

Keywords: Court of Justice of the European Union, air quality, infringement of EU law, compensation for damage to health, limit values

(A) INTRODUCTION.

Air pollution has a huge impact on our health. About 6.7 million premature deaths are associated with it each year. Yet 99% of the world's population continues to live in places with high levels of pollution, exceeding the limits recommended by the World Health Organization[1]. In the European Union, despite the efforts being made, it is estimated that there are around 300,000 early deaths per year[2]. In addition, it causes 10% of cancer cases, apart from other diseases such as asthma or cardiovascular problems[3]. It especially affects vulnerable groups such as children, the elderly and people with pre-existing conditions.

Compliance with the limits laid down in EU law is very low. The Court of Justice has confirmed that a very large group of Member States have failed to comply with the air quality directives insofar as the limit values laid down in these rules had been systematically and continuously exceeded[4]. Among them is Spain, for having infringed

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1 WHO (2022), *Ambient (outdoor) air pollution*, Retrieved from https://www.who.int/health-topics/air-pollution#tab=tab_1

2 EEA (2021), *Air Quality in Europe* 2021.

3 EEA (2022). *Beating cancer — the role of Europe's environment.* Retrieved from https://www.eea.europa.eu/publications/environmental-burden-of-cancer/beatingcancer-the-role-of-europes

4 Judgments of 10 May 2011, *Commission v Sweden* (C-479/10, EU:C:2011:287); of 15 November 2012, *Commission v Portugal* (C-34/11, EU:C:2012:712); of 19 December 2012, *Commission v Italy* (C-68/11, EU:C:2012:815); of 5 April 2017, *Commission v Bulgaria* (C-488/15, EU:C:2017:267); of 22 February 2018, *Commission v Poland*

its obligations for several years in certain areas of Barcelona and Madrid and for failing to adopt appropriate measures to ensure that the period of exceeding the limit values was as short as possible[5]. In addition, there are still other *sub judice* proceedings against a good number of States.

This situation could have led to countless claims for damages before domestic courts on the basis of the principle of State liability for damage caused to individuals as a result of infringements of Union law. However, the Court of Justice has closed this avenue in the *Ministre de la Transition écologique and Premier ministre* case, adopting a restrictive approach to the conditions necessary for such liability to be incurred[6]. This pronouncement comes at a time when the lack of adequate national responses to air pollution and climate change[7] is triggering a wave of claims from civil society through different jurisdictional channels in order to push for stronger domestic actions[8]. Almost all regional courts have had or have to resolve claims of this nature, which allows us to compare arguments and reasoning even though we are dealing with judicial procedures with their own particularities and admissibility requirements. Not surprisingly, all of them are faced with slow and diffuse pollution phenomena, where it is complex to establish the individual or personal nature of the damage and the causal link. Likewise, the United Nations treaty bodies have already taken relevant decisions whose *ratio decidendi* is more favourable to the interests of individuals and where alternatives to the more conservative doctrines or jurisprudence on the subject are proposed.

Although the purpose of our work is to examine the jurisprudence of the Court of Justice regarding the compensation of individuals for damages suffered due to the degradation of air quality, we consider it necessary to first analyse its reaction to other rules relating to the environment, both of a sectoral and procedural nature. Furthermore, although our analysis will confront different jurisprudential solutions, we will take into account the legislative proposals presented by the institutions of the European Union insofar as their normative changes may remove the obstacles presented judicially that would prevent this type of actions from succeeding.

(B) THE DIRECTIVES ON BIODIVERSITY

According to settled case law of the Court of Justice, injured individuals have a right to compensation for the damage suffered provided that three requirements are met: that

(C-336/16, EU:C:2018:94); of 24 October 2019, *Commission v France* (C-636/18, EU:C:2019:900); of 30 April 2020, *Commission v Romania* (C-638/18, EU:C:2020:334); of 10 November 2020, *Commission v Italy* (C-644/18, EU:C:2020:895); of 3 February 2021, *Commission v Hungary* (C-637/18, EU:C:2021:92); of 4 March 2021, *Commission v United Kingdom* (C-664/18, not published, EU:C:2021:171); of 3 June 2021, *Commission v Germany* (C-635/18, EU:C:2021:437); and of 28 April 2022, *Commission v France* (C-286/21, EU:C:2022:319).

5 Judgment of the Court of 22 December 2022, *Commission v Spain (Valeurs limites–NO2)*, (C-125/20, ECLI:EU:C:2022:1025).

6 Judgments of 22 December 2022, *Ministre de la Transition* écologique *and Premier ministre* (C-61/21, EU:C:2022:1015).

7 See P. de Vilchez Moragues, 'Panorama de litigios climáticos en el mundo', 26, *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid* (2022), 349-381.

8 See information on those cases in: http:// climatecasechart.com/climate-change-litigation/non-us-jurisdiction/european-court-of-human-rights

the rule of European Union law infringed is intended to confer rights on individuals, that the infringement of that rule is sufficiently serious and that there is a direct causal link between this infringement and the damage suffered by those individuals[9]. The purpose of the substantiation of claims for compensation is to ensure the full effectiveness of EU rules and the protection of the rights of injured parties[10].

The first condition, then, for a State to be held liable for a breach of EU law and, consequently, for individuals to be able to obtain compensation for the damage suffered, is that the legal rule must be to confer rights to the injured individuals. According to settled case law, EU Law generates rights that become part of the legal assets of individuals[11]. The effectiveness of this principle depends on the domestic courts, but they do not enjoy total freedom, since in many cases they will have to resort, as in the case that we will later examine, to the help of the Court of Justice through preliminary rulings[12].

The Court has used this concept in a broad sense, covering legal interests from which individuals can benefit as a result of compliance with Community provisions[13]. But it has also recognised that such rights may be created not only when EU law attributes them explicitly, but also implicitly by virtue of obligations (positive and negative) that are imposed in a well-defined manner on both individuals and on the States and the institutions of the Union, so that failure to comply with them alters the legal situation of individuals[14].

In the case of environmental directives, individuals obtain advantages or benefits arising from the obligation to achieve certain objectives or outcomes in order to improve the environment[15]. They are not limited to obligations of a substantive or material nature but also procedural, whose rights, in the latter case, are more clearly outlined[16]. Likewise, although European jurisprudence does not expressly contemplate it, it would be necessary to differentiate those that develop transversal and horizontal aspects, applicable to all environmental sectors, from the material normative instruments that regulate specific problems.

Thus, certain directives aim to promote the maintenance of biodiversity in the European Union through the conservation of natural habitats and wild species of fauna and flora[17]. In principle, these rules are intended to protect a general interest, so that

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9 Judgments of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79), paragraph 51; of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513), paragraph 51; and of 10 December 2020, *Euromin Holdings* (Cyprus) (C-735/19, EU:C:2020:1014), paragraph 79.

10 Judgments of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530), paragraph 56.

11 Judgments of 19 november 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428), paragraph 40; of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 51.

12 E. Cobreros Mendazona, *Responsabilidad patrimonial del estado por incumplimiento del derecho de la Unión Europea* (Iustel, Madrid, 2015), at 126.

13 C. Plaza Martín, *Derecho ambiental de la Unión Europea* (Tirant lo Blanch, Valencia, 2005) at 888.

14 Judgments of 20 September 2001, *Courage and Crehan* (C-453/99, EU:C:2001:465), paragraph 19; of 6 June 2013, *Donau Chemie and Others* (C-536/11, EU:C:2013:366), paragraph 20.

15 C. Plaza Martín, *supra* n. 13, at 889.

16 *Ibid.*, at 1236.

17 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992.

it will not be easy to find in them an attribution of rights. The opinions of Advocate General Fenelly in the *Commission v. France* case seem to support this position. The issue here was whether the State had failed to comply with its obligations under Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and wild fauna and flora, by not having adopted all the necessary provisions, and where the Court of Justice held that the current French legislation in force was not in accordance with it by excluding the assessment of the effects of certain projects on account of their small size or because they were specific areas[18]. While initially acknowledging that directives aimed at environmental conservation are very important for the protection of individual rights, the Advocate General stated that it would be very difficult to argue that the directive was intended to create rights for individuals. Rather, what it creates are obligations. In any event, he concluded, this does not mean "that the transposition requirements are necessarily less stringent than in the case of directives which create individual rights; on the contrary, the effectiveness of directives which create obligations for the Member States not matched by rights under Community law for individuals demands even more urgently a complete regulatory framework"[19].

In this sense, Advocate General Kokott in the *Ministre de la Transition écologique and Premier ministre* case considered that the biodiversity directives only indirectly benefit individuals[20], giving as an example the obligation to comply with the critical levels for the protection of vegetation set out in Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air in Europe. In short, it is difficult to detect the presence of individual or private interests.

(C) ENVIRONMENTAL DIRECTIVES THAT PRIMARILY PROTECT PEOPLE'S HEALTH.

A large majority of the directives aim, in addition to preserving the environment, to avoid significant impacts and risks to human health, through control mechanisms, prohibitions, quality levels or limit values. One of the first pronouncements recognising the rights of individuals was made in relation to Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances, the purpose of which was to prevent the discharge of substances of human origin which endanger human health or damage living resources and the aquatic ecological system[21]. The conclusions of Advocate General Walter Van Gerven, which were not ignored by the Court, stated that the Directive obliged "Member States to introduce a set of rights and duties as between national authorities and those concerned with the substances referred to by the directive, and therefore is designed to create rights for individuals"[22]

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18 Judgments of 6 April 2000, *Commission v France* (C-256/98, EU:C:2000:192), paragraph 39.

19 Opinion of Advocate General Fenelly delivered on 16 september 1999 in case *Commission v France* (C-256/98, ECLI:EU:C:1999:427), paragraph 19.

20 Opinion of Advocate General Kokott delivered on 5 May 2022 in case *Ministre de la Transition écologique and Premier ministre* (C-61/21, ECLI:EU:C:2022:359), paragraph 78.

21 OJ L 20, 26.1.1980.

22 Opinion of Advocate General Van Gerven delivered on 25 September 1990 in case *Comisión/Alemania*, (C-131/88, ECLI:EU:C:1990:332), paragraph 7.

The Court began its argument by recalling that "the transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation; a general legal context may, depending on the content of the directive, be adequate for the purpose provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts"[23]. Consequently, the purpose of this Directive, which contains a set of prohibitions, authorisations and controls to limit the discharge of certain substances, is to create rights and obligations of individuals[24].

Both objectives (ecological and health) also appeared in the directives on the quality of water for fish life (Council Directive 78/659/EEC of 18 July 1978[25]) and shellfish farming (Council Directive 79/923/EEC of 30 October 1979[26]), which led the Court, in examining in one case whether Germany had taken the necessary measures to transpose the Community rules into national law, to declare that where failure to comply with them endangers the health of individuals "persons concerned must be in a position to rely on mandatory rules in order to be able to assert their rights" [27].

In addition to the conservation of water resources, and leaving aside the cases of atmospheric pollution that we will see later, we find similar reasoning in pronouncements relating to other areas of protection. An example of this is Council Directive 82/501/EEC, of 24 June 1982[28], which sought to prevent serious accidents which could result from certain industrial activities, in order to avoid possible harmful consequences for the population and the environment, where the Court reiterates its jurisprudence on the recognition of the rights of individuals[29].

It can be inferred from these decisions that the mere fact that a directive pursues general interests does not preclude the recognition of individual interests[30]. After all, they all seek to address the concerns of a broad group of people. The distinction ceases to be a matter of degree[31].

(D) THE TRANSVERSAL DIRECTIVES THAT INCLUDE PROCEDURAL RIGHTS.

As mentioned above, there are other types of directives that contemplate different horizontal techniques for environmental protection, among others, access to information

[23] Judgments of 28 February 1991, *Commission v Germany*, (C-131/88, ECLI:EU:C:1991:87), paragraph 6.
[24] Para. 7.
[25] OJ L 222, 14.8.1978.
[26] OJ L 281, 10.11.1979.
[27] Judgment of 12 December 1996, *Commission* v *Germany*, (C298/95, ECLI:EU:C:1996:501), paragraph 16.
[28] OJ L 230, 5.8.1982.
[29] Judgment of 20 May 1992, *Commission v Netherlands* (C-190/90, ECLI:EU:C:1992:225), paragraph 17.
[30] In this regard see J. D. Janer Torrens, *La responsabilidad patrimonial de los poderes públicos nacionales por infracción del derecho comunitario* (Tirant lo Blanch, Valencia, 2002) at. 151.
[31] See S. Prechal, *Directives in european Community Law. A study of directives and their enforcement in National Courts* (Clarendon Press, Oxford, 1995), at 136-139.

and participation in environmental decision-making processes. These are not substantive or material rights, but of an instrumental or procedural nature.

Most decisions have examined whether this was the case with respect to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment[32] (repealed by Directive 2011/92/EU of the European Parliament and of the Council, of December 13, 2011[33]) which aimed to identify, describe and assess the direct and indirect effects of a project, among other factors, on humans, fauna, flora or material assets[34].

In the *Wells* case concerning a preliminary ruling on the interpretation of this directive, which concerned the granting of a mining license without a prior environmental impact assessment, liability for non-compliance was raised for the first time. It stated that it was incumbent on the State to make good any damage caused by the failure to carry out an environmental impact assessment[35], although it was for the national court to determine "whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project in question to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered" [36].

In more detail, but following the same line of jurisprudence, it ruled in the *Leth* case, which dealt with another reference for a preliminary ruling in the context of a domestic dispute in which the claimant sought compensation for the financial loss she claimed she had suffered due to the decrease in value of her home following the expansion of the Vienna-Schwechat airport (Austria). While stating that the assessment did not include the impact on the value of material assets[37], it considered that this did not mean that the absence of an assessment of the factors identified in the directive did not confer on individuals a right to compensation for the decrease in value[38]. And this could occur because exposure to noise from the new project could affect the habitability of the dwelling, in addition to entailing a deterioration in the quality of life and health of those affected[39], and therefore concludes that the prevention of damage to property as a consequence of the direct economic repercussions of a project is an objective protected by the Community legislation examined[40].

In any case, when analysing the three requirements necessary in order to declare the responsibility of the State, it warns that failure to comply with the evaluation does not in itself confer a right to compensation for the decrease in the value of the house derived

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32 OJ L 175, 5.7.1985.
33 OJ L 26, 28.1.2012.
34 Apart from those analysed below, see Judgments of 17 November 2016, *Stadt Wiener Neustadt* (C348/15, EU:C:2016:882), paragraph 45; of 26 July 2017, *Comune di Corridonia and Others* (C196/16 and C197/16, EU:C:2017:589), paragraph 36.
35 Judgment of 7 January 2004, *Wells* (C201/02, EU:C:2004:12), paragraph 66.
36 Para. 69.
37 Judgment of 14 March 2013, *Leth* (C420/11, EU:C:2013:166), paragraph 30.
38 Para 31.
39 Para 35.
40 Para 36.

from the environmental repercussions, although it leaves it in the hands of domestic judges to determine the requirements for compensation to be granted, pointing out, specifically, the finding of a direct causal relationship between the infringement and the damages suffered[41].

In this respect, the doctrine tells us that in these cases we are dealing with subjective public rights[42], with a more clearly delimited content, but whose infringement does not always result in material damages, which will make it difficult to declare compensation in economic terms[43].

(E) THE CASE OF AIR QUALITY DIRECTIVES

Air quality directives are just one of the pillars of the regulatory framework to substantially reduce air pollution throughout the EU. Alongside these, there are those that seek to reduce anthropogenic emissions of compounds and substances that are very harmful to health (sulphur dioxide (SO2), nitrogen oxides (NOx), non-methane volatile organic compounds (NMVOC), ammonia (NH3) and fine particulate matter), known as the National Emissions Ceilings Directive (NEC) [44], and another set of directives that regulate certain highly polluting sectors, such as industrial activities[45], road transport[46] or mobile machinery[47].

The current Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe[48], the provisions of which are the subject of interpretation in the *Ministre de la Transition écologique and Premier ministre* case, has undertaken a task of simplification and systematisation by bringing together five legislative acts (Council Directive 96/62/EC, of September 27, 1996, on ambient air quality assessment and management[49], Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides, particulate matter and lead in ambient air[50], Directive 2000/69/ EC of the European

41 Para 47.
42 C. Plaza Martín, *supra* n. 13, at 892.
43 *Ibid*. at 1236.
44 Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants, amending Directive 2003/35/EC and repealing Directive 2001/81/EC, OJ L 344, 17.12.201.
45 Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), OJ L 334, 17.12.2010; Directive (EU) 2015/2193 of the European Parliament and of the Council of 25 November 2015 on the limitation of emissions of certain pollutants into the air from medium combustion plants, OJ L 313, 28.11.2015.
46 Regulation (EU) 2019/631 of the European Parliament and of the Council of 17 April 2019 setting CO2 emission performance standards for new passenger cars and for new light commercial vehicles, and repealing Regulations (EC) No 443/2009 and (EU) No 510/2011, OJ L 111, 25.4.2019.
47 Regulation (EU) 2016/1628 of the European Parliament and of the Council of 14 September 2016 on requirements relating to gaseous and particulate pollutant emission limits and type-approval for internal combustion engines for non-road mobile machinery, amending Regulations (EU) No 1024/2012 and (EU) No 167/2013, and amending and repealing Directive 97/68/EC, OJ L 252, 16.9.2016.
48 Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ L 152, 11.6.2008.
49 OJ L 296, 21.11.1996
50 OJ L 163, 29.6.1999

Parliament and of the Council of 16 November 2000 on limit values for benzene and carbon monoxide in ambient air[51], Directive 2002/3/EC of the European Parliament and of the Council of 12 February of 2002 relating to ozone in ambient air[52] and Council Decision 97/101/EC of 27 January 1997 establishing a reciprocal exchange of information and data from networks and individual stations measuring ambient air pollution within the Member States[53]). In order to reduce the harmful effects on human health and the environment, the aim is to reduce the most polluting emissions, for which, in addition to other requirements relating to the assessment and reporting of air quality, two essential obligations are established. On the one hand, States must ensure that limit values for a set of pollutants are not exceeded in all their zones and agglomerations (Article 13, paragraph 1). On the other hand, in cases where these thresholds are exceeded, as well as the margin of tolerance, they must draw up air quality plans (article 23).

When the Commission carried out the evaluation of said regulation through the "fitness check", it determined that this had only been partially effective, as not all the objectives had been met, although it recognised that it had contributed to a downward trend in air pollution[54]. As a result of these conclusions, it has proposed a review of the current regulations that would merge the current directives (Directives 2004/107/EC and 2008/50/EC) [55]. Its clear purpose is to adapt to the recommendations of the World Health Organization, not fully but only by carrying out closer harmonisation, with the ambitious goal of achieving an environment free of toxic substances no later than 2050[56]. The proposal includes improvements to the monitoring system, modelling techniques and assessment, which will allow for periodic monitoring of the evolution of air quality as well as access to information for citizens. As for the two key elements mentioned above, in addition to revising the limit values to bring them into line with the WHO and strengthening the obligations regarding air quality plans ensure compliance as soon as possible, the provisions regulating them are modified in a more precise manner, leaving less room for discretion. Instead, a new precept is added that seeks to establish an effective right to compensation for damage to human health, which reinforces class actions and simplifies the proof of causal link.

These changes must be analysed in light of the case law of the Court of Justice, where, as in other areas, such as those examined above, it has recognised that the principle of State liability for damage caused to individuals is one of the ways to ensure the effective protection of the rights conferred on them by EU law[57]. However, it was not until recently, in the case of *JP v. Ministre de la Transition écologique*, that it examined in depth the requirements for the corresponding compensation to arise, adopting a very

51 OJ L 313, 13.12.2000
52 OJ L 67, 9.3.2002
53 OJ L 35, 5.2.1997
54 Fitness Check of the Ambient Air Quality Directives Directive 2004/107/EC relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air and Directive 2008/50/EC on ambient air quality and cleaner air for Europe, SWD(2019) 427 final, 28 November 2019.
55 Proposal for a Directive of the European Parliament and of the Council on ambient air quality and cleaner air for Europe, COM/2022/542 final, 26.10.2022.
56 Article 1.
57 Judgment of 19 December 2019, *Deutsche Umwelthilfe* (C752/18, EU:C:2019:1114), paragraphs 54 .

restrictive approach that hinders, for various reasons that we will now examine, access to this compensatory remedy.

(1) Individual rights are not conferred by the possibility of initiating internal actions

The judicial decisions prior to this ruling seemed to mark a tendency to recognise certain rights in the case of infringement of the obligations contained in the directives on this area, although their analysis was limited to examining those relating to air quality plans. Before the entry into force of the current directive, the Court indicated in the *Janecek* case that "where there is a risk that the limit values or alert thresholds may be exceeded, persons directly concerned must be in a position to require the competent national authorities to draw up an action plan, even though, under national law, those persons may have other courses of action available to them for requiring those authorities to take measures to combat atmospheric pollution"[58]. These conclusions were already confirmed by the new regulation (*ClientEarth*) [59], which stipulated that when the limit values and the margin of tolerance were exceeded, the States should draw up quality plans with the aim of complying with the levels set. Furthermore, such a plan should provide for appropriate measures so that the period during which the limit values are exceeded is as short as possible[60].

Advocate General Kokott, in her conclusions in *JP v. Ministre de la Transition écologique*, considered, following this line of jurisprudence, that we were dealing with an *autonomous* obligation, the purpose of which was to confer rights on individuals[61]. For its part, the Court of Justice also stated that these were clear and precise obligations as to the result to be guaranteed[62]. And, in principle, most relevantly, it also stated that these requirements were met with respect to the obligations arising from Article 13, that is, those obligations imposed on States to ensure that certain limit values are not exceeded.

Despite this statement, the Court seems to take up again, as the doctrine has pointed out, an unfinished jurisprudence that separated the possibility of invoking Community rules at a national level from the granting of rights capable of triggering the corresponding compensation[63]. In particular, the decision in the *Berlington* case, in which the Court said that although Directive 98/34/EC laid down a procedure for the provision of information in the field of technical standards and regulations[64] "is intended to ensure the free movement of goods by organising a preventive control the effectiveness of which requires the disapplication, in the context of a dispute between

58 Judgment of 25 July 2008, *Janecek* (C237/07, EU:C:2008:447) paragraph 42.
59 Judgments of 19 November 2014, *ClientEarth* (C404/13, EU:C:2014:2382, paragraph 55-56.
60 Article 23(1) of Directive 2008/50.
61 Opinion of Advocate General Kokott delivered on 5 May 2022 in case *Ministre de la Transition écologique and Premier ministre* (C-61/21, ECLI:EU:C:2022:359), paragraphs 69-103.
62 Para 54.
63 M. Fisicaro, 'Norme intese a conferire diritti ai singoli e tutela risarcitoria di interessi diffusi: una riflessione a margine della sentenza JP c Ministre de la Transition écologique', 8 *Europen Papers* (2023), at 141 [doi: 10.15166/2499-8249/643].
64 OJ L 204, 21.7.1998

individuals, of a national measure adopted in breach of Articles 8 and 9 thereof, that directive does not in any way define the substantive scope of the legal rule on the basis of which the national court must decide the case before it. Thus, that directive creates neither rights nor obligations for individuals"[65]. In that regard, Advocate General Kokott, contrary to the opinion of certain States, which in their observations argued that the obligations of Directive 2008/50 allowed a certain margin of appreciation by permitting a balancing of competing interests, argued that those considerations were not decisive in conferring rights on individuals because it was sufficient for them to be able to invoke respect of the limits before the national courts[66]. This argument was not accepted by the Court, however, insofar as it stated that the possibility of initiating administrative or jurisdictional procedures relating to their particular situation did not imply that the obligations under consideration (compliance with limit values and air quality plans) were intended to confer individual rights or that failure to comply with them could change the legal situation of the injured parties[67].

Having ruled out the recognition of this responsibility, the Court sets out other possible ways of ensuring that compliance with the obligations deriving from the EU clean air directive, basically administrative sanction mechanisms, with coercive fines[68]. Such suggestions would be in line with what the EU authorities put forward in their new proposal for a Directive, which adds new provisions to improve access to justice, in line with Article 9 of the Aarhus Convention on access to justice, information, public participation in decision-making and access to justice in environmental matters[69], the content of which was implemented in the EU by directive 2003/35/EC[70]. But certainly, as with Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment[71], whose content is very similar[72], the proposal limits its application to controlling the legality of the actions of the Administration relating to air quality plans[73], a possibility that is already included in some domestic legal systems

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65 Judgment of 11 June 2015, *Berlington Hungary and Others* (C98/14, EU:C:2015:386), paragraph 108.

66 Para 71.

67 Para 62.

68 Para 64.

69 OJ L 124, 17.5.2005

70 Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L 156, 25.6.2003.

71 OJ L 26, 28.1.2012.

72 Article 11.

73 Article 27 (*Access to justice*):
"1. Member States shall ensure that, in accordance with their national legal system, members of the public concerned have access to a review procedure before a court of law, or another independent and impartial body established by law, to challenge the substantive or procedural legality of all decisions, acts or omissions concerning air quality plans referred to in Article 19, and short term action plans referred to in Article 20, of the Member State, provided that any of the following conditions is met:
(a) the members of the public understood as one or more natural or legal persons and, in accordance with national law or practice, their associations, organisations or groups, have a sufficient interest;
(b) where the applicable law of the Member State requires this as a precondition, the members of the public maintain the impairment of a right.
Member States shall determine what constitutes a sufficient interest and impairment of a right consistently with the objective of giving the public concerned wide access to justice.

such as ours, which allow actions and omissions of public authorities to be challenged in many environmental areas (such as air pollution) [74].

(2) The prevalence of teleological interpretation: the protection of general interests

The fundamental reason why the Court denied, despite the clarity and precision of the obligations, that the provisions of the Directive did not confer rights on individuals was that they pursued a general objective of protecting human health and the environment in general[75]. On this point, their opinion also contradicts that of the Advocate General who, as established by jurisprudence[76], determined that the recognition of rights should be done through the examination of the purpose of the Community rules[77]. For her, health protection is deduced from the provisions of the Directive and its recitals, in harmony with what has been said by the States and the Court of Justice itself. However, it considers that the interest in guaranteeing people's health "is highly personal and thus individual in nature"[78], unlike what happens with other environmental legislation (such as those related to nature conservation) with an indirect benefit to individuals[79]. And as an example of the opposite, the *Paul* case was brought up, one of the few cases where it was said that a right could not be recognised for individuals seeking compensation for the loss of their deposits. For the Court, the main or essential objective of the

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The interest of any non-governmental organisation which is a member of the public concerned shall be deemed sufficient for the purposes of the first paragraph, point (a). Such organisations shall also be deemed to have rights capable of being impaired for the purposes of the first paragraph, point (b).

2. To have standing to participate in the review procedure shall not be conditional on the role that the member of the public concerned played during a participatory phase of the decision-making procedures related to Article 19 or 20.

3. The review procedure shall be fair, equitable, timely and not prohibitively expensive, and shall provide adequate and effective redress mechanisms, including injunctive relief as appropriate.

4. This Article does not prevent Member States from requiring a preliminary review procedure before an administrative authority and does not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

5. Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures referred to in this Article".

74 Law 27/2006, of 18 July, which regulates the rights of access to information, public participation in decision-making and access to justice in environmental areas (BOE no. 171, of 19 July 2006). Although in this case it is a question of challenging acts that contravene the rights that this Law recognises in terms of information and public participation (art. 3.3) or any acts relating to the environment, but by diffuse legitimisation of environmental organisations (arts. 21-22). On the other hand, it should not be forgotten that, in matters of environmental liability, Law 26/2007, on liability (BOE no. 255, of 24 October 2007), exempts damages suffered by the resource "atmosphere". In general, all final administrative acts and provisions can be challenged, provided that they affect the rights or interests of the claimant, unless there is a public action (Coastal Law, Biodiversity Law, Land Law) or a "popular" action (environmental organisations can challenge any action in environmental areas if they meet the requirements of the Law).

75 Para. 55.

76 Judgments of 8 October 1996, *Dillenkofer and Others* (C178/94, C179/94, C188/94 and C190/94, EU:C:1996:375), paragraph 39.

77 Para. 72.

78 Para. 77.

79 Para. 78.

regulations on banking supervision at the time was to achieve freedom of establishment, freedom to provide services in the sector of credit institutions[80] and mutual recognition of authorisations[81]. In short, they could not be interpreted "as meaning that they confer rights on depositors in the event that their deposits are unavailable as a result of defective supervision on the part of the competent national authorities"[82].

Although we are dealing with different jurisdictional procedures, some recent conclusions from other international bodies, basically those of the United Nations treaty bodies, point in the same direction as the Advocate General. These are also issues related to diffuse interests, specifically, the damage caused to human rights by climate phenomena, whose impacts affect a broad group of individuals. As is well known, human rights protection systems do not in principle admit complaints related to global public interests, such as those we are examining, since it is very difficult to prove that people's health is being affected[83]. It is worth remembering that their competence *ratione personae* is limited to those individuals who prove their status as victims, which involves demonstrating that they are directly and personally harmed by the alleged violation[84]. Nevertheless, some decisions have managed to overcome these obstacles, as is the case of *Chiara Sacchi et al v. Argentina*, brought by a group of minors before the Committee on the Rights of the Child, in which, on the one hand, it was stated that the complainants had justified that the impairment of their rights resulting from the actions or omissions of the State partly in relation to the carbon emissions originating in their territory was reasonably foreseeable, and on the other hand, that they had personally experienced a real and sensitive damage that justifies their status as victims[85].

The Advocate General, on the other hand, was aware both of the high number of breaches of Community air quality standards declared by the Court of Justice and of the procedures still pending at European and national level. If the answer to their proposal were to be successful, that is, that rights are conferred on individuals, it would lead to a large number of awards of compensation and a considerable increase in the workload of domestic courts[86]. Well, this has already happened in Spain, for example, in relation to "floor clauses", where the Court of Justice opened the door to a very high number of domestic claims[87]. In this case, the situation is indeed more serious, since its impact is not only economic, but we are talking about consequences on health, where it has been shown that non-compliance can, in specific cases, cause premature death in certain individuals. In any case, as is rightly pointed out in its conclusions, it would not affect an unlimited group of individuals, but only those who live or reside in very specific places,

80 Judgment of 12 October 2004, *Paul and Others* (C222/02, EU:C:2004:606), paragraph 36.
81 Para. 42.
82 Para. 46.
83 *Sdružení Jihočeské Matky v. the Czech Republic* (dec.), no. 19101/03, 10 July 2006.
84 *Caron et autres c. France* (déc.), no 48629/08, 29 June 2010, para 1; *Rabbae et al. v. Netherlands*, communication no 2124/2011, 14 July 2016, CCPR/C/117/D/2124/2011, para. 9.5.
85 *Chiara Sacchi et al. v. Argentina*, communication no 104/2019, 22 September 2021, CRC/C/88/D/104/2019, para 10.14
86 Paras. 95-98.
87 Judgment of 21 December 2016, *Gutiérrez Naranjo and Others* (C154/15, C307/15 and C308/15, EU:C:2016:980).

which are the most polluted areas, so that specific and identifiable groups of people can be identified[88].

With regard to these comments, it is also worth recalling the jurisprudence of the European Court of Human Rights in relation to cases of air pollution, which in several cases has found violations of certain rights recognised in the European Convention on Human Rights, notably Article 8 on the right to private and family life. In principle, on the basis of the findings of domestic courts and the scientific reports submitted, it has accepted that polluting dust particles can have serious adverse effects on health, especially in densely populated areas with heavy traffic, so that individuals can be considered victims of a possible violation[89]. Many cases have found that prolonged exposure to emissions can deteriorate the health of claimants[90], but only when the geographical proximity (within a few metres) of the pollutant source the claimants' residence was found[91]. This is, certainly, a very ambiguous criterion, which seems to have led the Court in recent rulings to soften its application. Thus, in the case of *Pavlov et al v. Russia*, where the applicants did not live in the immediate vicinity of the contaminating industries, but rather several kilometres away, it considered that this fact was not sufficient reason to exclude the application of Article 8, but that the particular circumstances of the case and the available evidence would have to be verified[92]. Consequently, it had no hesitation in upholding the claimants who live in a city inhabited by more than half a million people, despite the opinion of some judges who also pointed to the high cost of compensation[93].

Continuing with this very restrictive approach, the Court of Justice also held that "obligations laid down in those provisions, with the general objective referred to above, that *individuals or categories of individuals* are, in the present case, implicitly granted, by reason of those obligations, rights the breach of which would be capable of giving rise to a Member State's liability for loss and damage caused to individuals" [94]. With this reasoning, it comes close to the restrictive jurisprudence on the requirement of direct and individual impact required of individuals in order to recognise them as having standing to bring an action for annulment, as was again evident in the case of *Armando Carvalho et al v. European Parliament and Council of the European Union*.

According to the fourth paragraph of article 263 of the TFEU "any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does

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88 Paras 100-101.

89 *Greenpeace E.V. et al v. Germany*, no. 18215/06, inadmissibility decision of 12 May 2009, para 1. The Court dismissed the application, based on the refusal of the German authorities to adopt specific measures to curb emissions from diesel vehicles, relying on the subsidiary role it must play with respect to domestic environmental policies, where States enjoy a wide margin of appreciation, so that it has a certain discretion to choose different means to fulfil its obligations. (See also *Fadeyeva v. Russia*, no 55723/00, § 103, 9 June 2005; *Budayeva and others v. Russia*, n.º 15339/02, 21166/02, 20058/02, 11673/02 y 15343/02, § 146, 20 march 2008).

90 *Ledyayeva and Others v. Russia*, n.º 53157/99, 53247/99, 53695/00 56850/00, § 100, 26 October 2006.

91 *Fadeyeva v. Russia*, n.º 55723/00, § 88-90, 9 june 2005; *Băcilă c. Romania*, nº. 19234/04, § 63, 30 march 2010.

92 *Pavlov and others v. Russia*, nº. 31612/09, § 65, 11 October 2022. See also Çiçek *and Others v. Turkey* (dec.), no 44837/07, § 29, 4 February 2020.

93 Partly dissenting opinion of Judges Elósegui and Roosma, para 2.

94 Para 56 (Emphasis added).

not entail implementing measures". As the doctrine has pointed out, the requirement of "individual concern" is the real litmus test that individuals have to pass in order for their appeal to succeed[95], as it has been interpreted in a very restrictive manner: this only occurs when the contested act affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed[96]. On the basis of this jurisprudence, the applicants in the aforementioned case (a group of families from various countries of the European Union and the rest of the world together with a Swedish association representing indigenous Sami youth), who sought the annulment of a set of acts constituting the *2030 Climate and Energy Package*[97] because, in short, they were not sufficiently ambitious with respect to the objectives of reducing greenhouse gas emissions, considered that the set of measures adopted by the EU directly affected their legal position since they infringed fundamental rights[98]. The legislative package would contribute to exacerbating the effects of climate change and, consequently, to the infringement of rights in a different and unique way for each individual[99]. The General Court (and later the Court of Justice[100]), while considering that when an act of general application is adopted higher ranking rules of law must be respected, and also recognizing that each individual may suffer from the effects of climate change, held that this is not in itself sufficient to establish the appellants' standing, as otherwise the fourth paragraph of Article 263 of the TFEU would be rendered meaningless by creating a *locus standi* for all individuals[101].

(3) The proof of the direct causal link

The greatest difficulty in obtaining a right to compensation lies, as the Advocate General pointed out in the *Ministre de la Transition écologique* case, in providing a direct causal relationship between the infringement of air quality standards and actual damage to health, which is a matter for the

95 A. Mangas Martín and D. Liñán Nogueras, *Instituciones y Derecho de la Unión Europea* (10th ed., Tecnos, Madrid, 2016) at 485

96 Judgments of 15 july 1963, *Plaumann* v Commission (25/62, EU:C:1963:17), paragraph 223; of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council* (C-583/11 P, EU:C:2013:625), paragraph 72.

97 Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814 (OJ 2018 L 76), in particular Article 1 thereof, Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013 (OJ 2018 L 156), in particular Article 4(2) thereof and Annex I thereto, and Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU (OJ 2018 L 156), in particular Article 4 thereof.

98 The right to life (Article 2), the right to the integrity of the person (Article 3), the rights of the child (Article 24), the right to engage in work and to pursue a freely chosen or accepted occupation (Article 15), the freedom to conduct a business (Article 16), the right to property (Article 17) and the right to equal treatment (Articles 20 and 21).

99 Order of 8 May 201, *Carvalho and Others v Parliament and Council* (T330/18, not published, EU:T:2019:324), paragraph 30.

100 Judgment of 25 March 2021, *Carvalho and Others v Parliament and Council* (C565/19 P, EU:C:2021:252).

101 Para 50.

national courts[102]. The mere fact that the limit values are exceeded is not sufficient proof of the impairments suffered by a given person, since they may have their origin in other causes such as predisposition or personal behaviour[103]. The injured party must therefore prove that, for a sufficiently long period of time, they were in an environment, their home or workplace, where the established threshold values were exceeded, which in principle requires scientific medical data. On this point, there is agreement with the jurisprudence of the ECHR, which recognizes the difficulties in quantifying the effects of air pollution in each individual case, as it depends on different factors such as age or occupation[104]. The existence of harm caused to individuals depends on the circumstances of the case, such as the intensity and duration of the pollution and its physical or psychological effects[105].

Given the difficulties that the individual may face, the conclusions reached propose a simplification by invoking the principle of effectiveness, especially "where the full standard of proof, beyond any reasonable doubt, would make it excessively difficult to obtain compensation". In this sense, it is advocated, firstly, that the injured party should be able to determine the degree of contamination by means of simulations and, secondly, for an *iuris tantum* presumption that typical damage to health has been caused by exceeding the limit values[106]. This position is in line again with the verification of the causal link required by the ECHR, which, while also applying the "beyond all reasonable doubt" standard of proof, argues that it can be inferred from the coexistence of sufficiently consistent, clear and concordant inferences[107]. Indeed, in a case involving serious industrial pollution, it held that damage to health could be established on the basis of a combination of indirect evidence and strong presumptions[108].

The proposal for a Directive on ambient air quality also contains some new developments in this area. First of all, it incorporates a new Article 28 that includes some interesting new features. This provision begins by stating that "Member States shall ensure that natural persons who suffer damage to human health caused by a violation of Articles 19(1) to 19(4), 20(1) and 20(2), 21(1) second sub-paragraph and 21(3) of this Directive by the competent authorities are entitled to compensation in accordance with this article" [109]. This is an interesting but very limited recognition, because it only concerns obligations relating to air quality plans, short-term action plans and transboundary air pollution. In addition, there is a constant reference to national legislation which will leave, as in the previous version, considerable discretion to the States[110]. There is only one clear indication as to the limitation periods for bringing actions for compensation, which should now be no less than five years (such periods shall not begin to run before the infringement has ceased and the person claiming compensation knows or can reasonably be expected to know that they have suffered damages resulting from an

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[102] Para 128.
[103] Para 130.
[104] *Ledyayeva and Others v. Russia,* n.º 53157/99, 53247/99, 53695/00 56850/00, § 90, 26 October 2006.
[105] *Dubetska and Others v. Ukraine,* no. 30499/03, § 107, 10 February 2011.
[106] Para 138.
[107] *Ivan Atanasov v. Bulgaria*, no. 12853/03, § 75, 2 December 2010.
[108] *Fadeyeva v. Russia*, n.º 55723/00, § 79-88, 9 june 2005.
[109] Para 1.
[110] In this regard see D. Misonne, 'The emergence of a right to clean air: Transforming European Union law through litigation and citizen science', 30, *Review of European, Comparative & International Environmental Law* (2021), at 36 [doi.org/10.111/reel.12336].

infringement) [111], which is not in line with what is established, for example, in Spanish law[112]. But it does, however, include some relevant considerations as to the burden of proof, which, as a general principle, should be designed in a way that does not make it impossible or excessively difficult to exercise the right to compensation for damages[113]. Furthermore, relaxing this requirement in our opinion indicates that when a claim is supported by evidence that demonstrates that the violation is "the most plausible explanation for the occurrence of the damage of that person, the causal link between the violation and the occurrence of the damage shall be presumed"[114].

At the same time, it is envisaged that non-governmental organisations for the protection of health or the environment will be granted standing, going beyond the popular action in environmental matters provided for in the 1998 Aarhus Convention insofar as it states that they may "represent natural persons" [115]. This alternative is not provided for in most domestic legal systems, unlike the ECHR, which has admitted this on more than one occasion. The general rule is that the system does not allow *actio popularis*, in defence of general interests[116]. However, collective claims are allowed, as long as the environmental damage directly affect all members of the group of claimants[117]. But it has also recognised, in exceptional situations, the status of victim of some associations that have appeared before the ECHR as representatives of their members, since, in its understanding, recourse to collective bodies is one of the accessible means in

111 Para 6.

112 See Law 39/2015, of 1 October, on Common Administrative Procedure of the Public Administrations (BOE no 236, of 2 October 2015):
Article 67. Requests for initiation in the procedures for patrimonial liability.
"1. Interested persons may apply for civil liability proceedings to be initiated only if their right to seek compensation has not become time-barred. The right to seek compensation shall be time-barred one year after the event or act giving rise to compensation occurred or after its adverse effect became apparent. In cases of physical or psychological harm caused to individuals, the period shall run from the time of recovery or from the determination of the extent of the sequelae.
In cases where it is appropriate to recognise the right to compensation for annulment on administrative or administrative grounds of a general act or provision, the right to claim shall be prescribed for the year in which it has been notified. the administrative decision or the final judgment.
In the cases of liability referred to in Article 32(4) and (5) of Law [40/2015], the right to seek compensation shall be time-barred one year after publication in the "Boletín Oficial del Estado" or in the "Official Journal of the European Union", as appropriate, of the decision finding the rule to be unconstitutional or declaring it contrary to [EU] law.
2. In addition to the provisions of Article 66, the application made by the persons concerned must specify the injuries produced, the alleged causal link between them and the operation of the public service, the economic assessment of the liability, if possible, and the time when the injury actually occurred, and shall be accompanied by any allegations, documents and information deemed appropriate and the proof of the proposed evidence, giving the means that claim the claimant"

113 Para 5.

114 Para 4.

115 Para 2.

116 See R. Fernández Egea, 'Climate change litigation and human rights: Addressing the rights of future generations', in M. Campins Eritja and R. Bentirou Mathlouthi (eds), *Understanding vulnerability in the context of climate change* (Atelier, Barcelona, 2022) at 93; F. Jiménez García, 'Cambio climático antropogénico, litigación climática y activismo judicial: hacia un consenso emergente de protección de derechos humanos y generaciones futuras respecto a un medio ambiente sano y sostenible', 46 *Revista Electrónica de Estudios Internacionales* (2023) , at 46 [DOI: 10.36151/reei.46].

117 *Di Sarno and Others v. Italy*; no. 30765/08, § 81, 10 January 2012.

modern-day societies, if not the only one, to be able to defend oneself against complex administrative actions[118].

(F) CONCLUDING REMARKS

Civil society legal proceedings, whether brought by individuals or associations, are of great strategic value because, regardless of the outcome, they offer a good opportunity to raise awareness of the environmental problems we face, thereby raising public awareness and pushing for a more demanding regulatory framework. Many of these demands only aim to improve the quality of life or well-being of individuals. However, in the case of air quality standards under discussion, we are faced with serious harmful effects on human health. For this reason, urgent, immediate solutions are required, which do not allow further delays. In the case of Spain, for example, we have been talking about infringements of air quality rules for more than a decade, based on outdated values, in urban centres where a large part of the population lives.

Given this situation, the best way to speed up compliance with air quality standards, in addition to legislative changes, would have been to recognise *a priori* a possible right to obtain compensation for damage to health, as has been done in the case of many environmental directives, leaving it to the national courts to determine whether the required criteria have been met on a case-by-case basis. The restrictive stance adopted by the Court of Justice, however, hinders not only this type of claim, but also any other claim based on environmental directives, in which general interests will always prevail. We do not understand, therefore, why it has been recognised on other occasions and not in this case, where people's lives and therefore individual interests are at stake.

We cannot place much hope in the new legislative proposal of the institutions of the European Union, since the rights to compensation that are included are limited in scope. If there is any element to be praised, it is its attempt to simplify the proof of the causal link between the infringement and the damage, since the scientific evidence traditionally required, with *ad hoc* medical certificates, makes it a true *probatio diabolica*[119].

Thus, in the face of serious episodes of atmospheric pollution, permanent over time, and in certain specific areas, the individual will have to seek other jurisdictional alternatives to safeguard their rights, perhaps finding a suitable route in the regional and universal systems of protection, since, as we have seen, their control bodies offer more generous hermeneutic solutions on this point in the defence of individuals. We are not dealing with one-off events, but, as has been judicially recognised, with a systematic and continuous violation, so that, by virtue of the positive obligations of the State, in situations where the lives of individuals are endangered, effective protection of citizens must be guaranteed, with appropriate measures, so that the passivity or permissiveness of public authorities can be considered a violation of the rights conferred by the respective treaties[120].

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[118] *Gorraiz Lizarraga and others v. Spain*, no. 62543/00, § 36-38, 27 april 2004.

[119] Partly dissenting opinion of Judges Zupančič y Gyulumyan in the case *Tătar v. Rumania*, no. 67021/01, 27 january 2009.

[120] *Bor v. Hungary,* no. 50474/08, § 27, 18 June 2013; *Băcilă v. Romania*, no. 19234/04, § 68, 30 March 2010.