

# LIFE-ENPE Working Group 3

## Air Pollution

### Prosecuting air pollution crimes

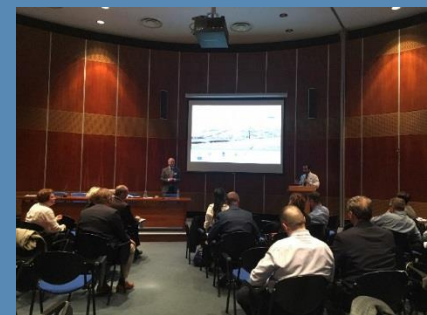


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# Working Group 3 – Air pollution

- focussed on prosecuting air pollution crimes
- 8 Members representing 7 countries
- training workshop - Nicosia, Cyprus March 2019 - applicable EU Directives
- summary presentation translated into 20 European languages



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# WG3 Questionnaire survey to establish focus

## **Sent to Environmental prosecutors in Europe in 2017 to identify training needs:**

### **Opening questions**

- How many prosecutions are brought on an average annual basis which relate solely or partially to air pollution?
- How many of the average annual prosecutions relate solely to odour prosecutions?
- How many of these relate to Emission Limit Values?
- How many of the total number of air pollution cases are prosecuted in courts of first instance?
- How many are prosecuted in higher courts?

### **Evidence gathering**

- How is evidence of air pollution gathered at investigation stage?
- Are the following methodologies used?
  - site Inspection reports
  - odour logs
  - odour surveys from Inspectors
  - photos
  - environmental consultant reports (external to national agency)
  - Other?
- Is the methodology of air emission monitoring ever challenged in pre-trial inter party correspondence?
- How are Indictments or charging documents drafted in relation to dates for odour prosecutions? Is it divided by specific incidences or is it framed as one long continuous breach?
- For example, in Ireland in a recently contested trial before a jury, charges were initially framed on the basis of a continuing breach rather than breaches on specific dates referred to in the various odour assessments. How do other Member States draft air pollution offences?

**The results from the survey concluded that *prosecuting air pollution, including evidence gathering* needed to be the focus of the group**

# Applicable EU Directives when prosecuting air pollution crimes



- Industrial Emissions Directive (IED): DIRECTIVE 2010/75/EU
- Air Quality Directive: DIRECTIVE 2008/50/EC
- Environmental Crime Directive: DIRECTIVE 2008/99/EC
- In all cases, use of **Scientific evidence** is key – this can be a major problem when non specialised prosecutors are dealing with the cases.



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# Industrial Emissions Directive (IED)



- DIRECTIVE 2010/75/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 24 November 2010 on industrial emissions (integrated pollution prevention and control)
- This Directive establishes rules:
  - to prevent (or, where that is not practicable), to reduce emissions into air, water and land and
  - to prevent the generation of waste, in order to achieve a high level of protection of the environment taken as a whole.
  - to requires factories to have a permit or licence to operate. That permit sets out what the factory is allowed to emit. The limit of the emissions is a key issue in any permit for an air pollution case.



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# Article 79: Penalties



- Member States shall determine penalties applicable to infringements of the national provisions adopted pursuant to this Directive.
- The penalties provided for shall be effective, proportionate and dissuasive.
- There appears to be a widespread issue with imposing dissuasive fines in most MS.



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# Air Quality Directive



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

This Directive lays down measures aimed at the  
following:

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



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# Article 30: Penalties



- Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented.
- The penalties provided for must be effective, proportionate and dissuasive.



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# Environmental Crime Directive



DIRECTIVE 2003/100/EC OF THE EUROPEAN PARLIAMENT  
AND OF THE COUNCIL of 19 November 2003 on the  
protection of the environment through criminal law

This Directive obliges Member States to provide for criminal penalties in their national legislation in respect of serious infringements of provisions of Community law on the protection of the environment.

This Directive creates no obligations regarding the application of such penalties, or any other available system of law enforcement, in individual cases.



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# Offences



The Directive sets out the following as criminal offences:

Any act which causes or is likely to cause death or serious injury to any person or

substantial damage to the quality of air, or  
the quality of soil or  
the quality of water, or  
to animals or plants.

The *mens rea* of the offence(s) is that the act be committed intentionally or with at least serious negligence.



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# Prosecuting under IED – what basic things do you need to know as a criminal prosecutor?



The IED aims to ensure a reduction in harmful industrial emissions across Europe thereby resulting in significant benefits to both the environment and human health.

Specific bodies enforce emissions purposes of the IED, e.g. in Ireland it is the Environmental Protection Agency. Local municipal authorities also have a role in inspections.

The following pollutants are examples of those covered by the IED:

- Sulphur dioxide –  $\text{SO}_2$  - Nasty sharp bitter smell, burned match smell, preservative for foods, wine, it is a solvent and a refrigerant – respiratory diseases.
- Nitrogen oxide -  $\text{NO}_x$  - exhaust fumes, burning of fossil fuels, primarily power plants – contributes to 'acid rain', hazy air.
- Carbon monoxide – odourless, toxic colourless gas, results from incomplete/faulty burning of fossil fuels, exhaust fumes.
- Dust including Particulate matter – also written as P.M. 2.5 or P.M. 10
- VOCs – volatile organic compounds
- Metals
- Chlorine
- Arsenic
- Cyanides and others.



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# What key terms do you need to know for an air pollution case?



**Emissions** : the direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into air, water or land.

**Emission Limit Value (ELV)** : the mass concentration and/or level of an emission, which may not be exceeded during one or more periods of time.

This ELV can be expressed in terms of certain specific parameters, such as millilitres, micrograms etc. It is important to understand the limit first, so as to understand the alleged breach in context. Only then can you explain it to a Court.

**Best Available Techniques** : The permit conditions including emission limit values must be based on the **Best Available Techniques (BAT)**. BATs are the most effective techniques for preventing or reducing emissions that are technically feasible and economically viable within the sector.

EU experts decide on these. BAT conclusions are the reference for setting individual Licence conditions.



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# Key scientific terms you need to know in prosecuting air pollution crimes (cont.)



**Volatile Organic Compound (VOC)** : an organic substance which can be vaporised by small changes in temperature or pressure. They evaporate at individual boiling points and result mainly from industrial processes and automobiles.

They are found in all sorts of man made and natural materials such as paints, CFCs, fossil fuels, formaldehyde, benzene *etc*

**TVOC** – total volatile organic compounds

**VVOC** – very volatile organic compounds

**VOCs** are measured using sorption and absorption tubes where the concentration of a VOC in a known volume of air is reported.



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# What type of air pollution prosecutions are common under the Industrial Emissions Directive?

- Air pollution prosecutions can be technical breaches of the IED legislation; i.e. that the factory is emitting an excessive amount of a certain chemical which does not have a significant harmful effect to the environment on its own (*i.e. breaching an ELV*)
- Alternatively, air pollution prosecutions can relate to **odour complaints**; where citizens working or living near a factory have encountered negative effects with an odour coming from the factory. The odour itself may not be environmentally dangerous, but it may stop the people from being able to live or work comfortably in the vicinity of the source.
- There may be instances where these two types of prosecution overlap.



# Which legal derogations could possibly be raised as objections regarding licensing and noncompliance in a case of air pollution ?

- Article 192 par. 5 of the Treaty on the Functioning of the European Union regarding costs deemed as disproportionate for the public authorities of a Member State.
- Article 10c of the ETS, Emissions Trading System (Directive 2003/87/EC) regarding free allocation and temporary derogations.
- Article 28a of the ETS, Emissions Trading System (Directive 2003/87/EC) regarding the issuance of new licenses until 2020.
- Articles 4(1), 15(4, 5), 30 (5), 33, 34, 35, 37(2), 59(2) of the IED, Industrial Emissions Directive (Directive 2010/75/EC) regarding noncompliance to emission limits.
- The above list is indicative and not exclusive. Read more at:  
<https://eurex.europa.eu/search.html?qid=1589526392869&text=Industrial%20Emissions%20Directive&scope=EURLEX&type=quick&lang=en>

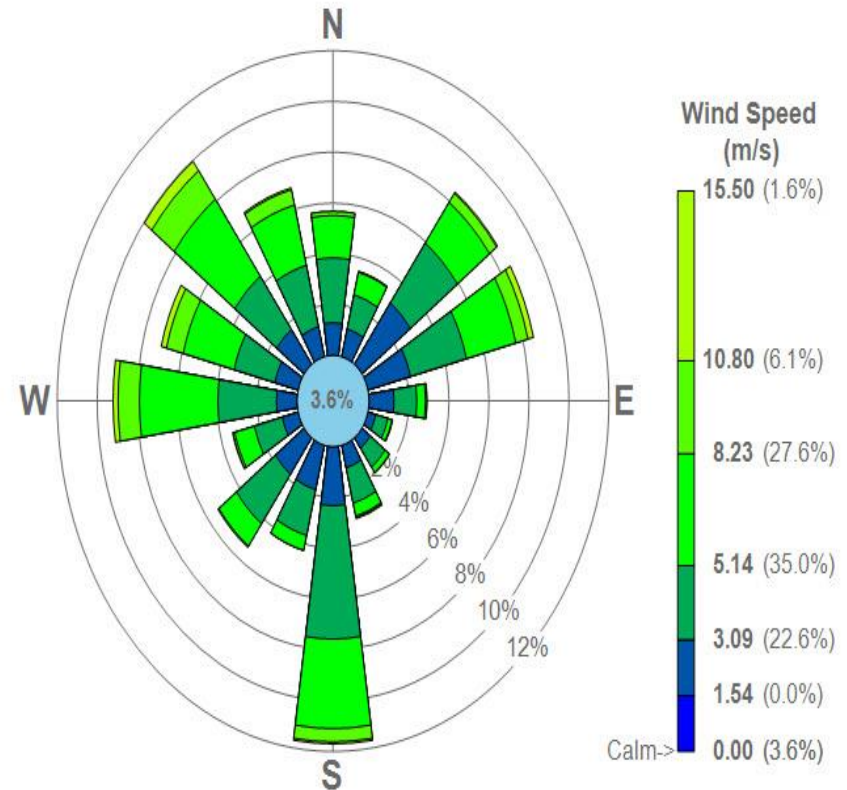
# An example of an air pollution prosecution under the IED in Ireland

- A common condition of any Industrial Emissions Directive Licence in Ireland is:
  - *“No emissions, including odours, from the activities carried on at the site shall result in an impairment to the environment beyond the installation boundary or any other legitimate uses of the environment beyond the installation boundary.”*
- This means that once neighbours of any factory or business which is subject to an IED licence regards their use of the environment to be impaired, they can then complain to the enforcing authority who in turn can investigate and decide if the issue is sufficiently serious to prosecute in a court of first instance.

# Scientific evidence for Odour cases: Odour assessments and Wind roses (mapping odour)

- Odour assessments can be carried out by inspectors *or*
- By citizens in the neighbourhood *or*
- By employees of the factory
- By expert sub contractors.
- “FIDOL” :
  - Frequency
  - Intensity
  - Duration
  - Observation
  - Length

## An example of a wind rose



Made with BREEZE MetView - [www.breeze-software.com](http://www.breeze-software.com)

## Air pollution prosecution case study: Using Best Available Technology (BAT) Heraklion, Crete



# Judgment of the ECJ (Second Chamber) of 7 July 2005

## Commission of the European Communities v Hellenic Republic

Failure of a Member State to fulfil its obligations - Directive 84/360/EEC - Atmospheric pollution - Industrial plant - Electricity power station.

### Summary presentation of Case C-364/03

- In Case C-364/03, *Action under Article 226 EC for failure to fulfil obligations, brought on 22 August 2003, Commission of the European Communities versus the Hellenic Republic*, the ECJ declared that the Hellenic Republic has failed to fulfil its obligations under Article 13 of Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants.
- The power plant of the Public Electricity Undertaking, hereinafter the “DEI”, operated on the basis of obsolete and polluting technology, which could not be classified as “the Best Available Technology” (BAT) within the meaning of Directive 84/360. The Greek authorities had not set emission limit values for sulfur dioxide and oxides of nitrogen.

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=8169599349AD5B40A3D3F63900C400C8?text=&docid=59885&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3894954>



- The power plant had 12 diesel generators. However, there was no pollution measuring point belonging to the national air pollution monitoring network. It was situated next to a riverbank, less than 50m distance from the seashore. The factory had been “on site” during the military dictatorship in Greece (1967-1974) when there was no holistic approach taken as to planning for large scale installations.
- The Greek Government argued that the adaptation of the power plant to the best available technology (BAT) would have been too expensive for the DEI. The Commission claimed that the cost was not the only criterion in regard to abiding by Article 13 of Directive 84/360. It also said that such costs must be viewed relative to the years which have elapsed since entry into force of the Directive.



- The Greek Government argued that the level of pollution caused by the plant did not take account of the contribution of emissions from other different pollutants in the atmosphere of the region. The Commission's counter argument was that the average pollution was irrelevant to the adjustment obligation of the plant.
- The Greek Government argued that the quality of the environment in the region, where the power plant was situated, was excellent and posed no danger to the public. In response, the Commission presented a letter of 10 July 2002 in which the Greek Government acknowledged that there is a problem of environmental deterioration owing to the operation of the power plant.
- The Greek Government stated that it had been decided in February 2003 to move the power station in 2006 to another part of Crete. The Commission stated that this intention did not validate the failure to adopt emission limit values (ELVs).

- The measures taken in the meantime according to the judgment were of a general nature and did not specifically relate to the power plant. They also were stated to have brought no improvement as they were not mandatory, or did not constitute measures to adapt to the best available technology, since the Greek authorities had not laid down emission limit values for sulphur dioxide and nitrogen oxide.
- In light of all the foregoing considerations, the Commission concluded that the measures relied on by the Greek Government did not constitute the implementation of a policy or strategy for the adaptation of the power station to the best available technology for the purposes of Article 13 of Directive 84/360.
- The plant is still operating at the same spot, although the deadline of Art. 34 of IED (Directive 2010/75/EU) relevant for exemptions in small isolated systems expired on the 31 December 2019.

# Summary: prosecuting air pollution crimes



- The three main EU Directives used are:
  - 1) Industrial Emissions Directive (IED):  
DIRECTIVE 2010/75/EU
  - 2) Air Quality Directive: DIRECTIVE 2008/50/EC
  - 3) Environmental Crime Directive: DIRECTIVE 2008/99/EC
- In all cases, use of **scientific evidence** is key, in particular under IED



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# Summary: prosecuting air pollution crimes



Industrial Emissions Directive (IED): DIR 2010/75/EU is most commonly used piece of legislation.

Specialist scientific support in provision of evidence is often helpful to explain matters to you and the court.

We encourage sharing examples of all air pollution prosecutions via the ENPE crimes database:

[www.environmentalprosecutors.eu](http://www.environmentalprosecutors.eu)

## END



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# Thank you to our specialist contributors

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