

Enforcing the Industrial Emissions Directive in national courts

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Part I – Introduction to the Industrial Emissions Directive and the applicable access to justice framework

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Webinar

25 June 2020



Agenda

1. Overview of IED:

- A. Background to IED

- B. Core IED permitting obligations

- C. Access to justice obligations and obstacles

- D. Building an IED case

2. Case study - litigation concerning Maritsa East 2 TPP



IED - overview



IED – what is it?

- Regulates over 50,000 industrial installations – coal plants to pig farms, launderettes to petrochemicals factories
- Brought together 7 predecessor Directives – IPPC; LCP; Waste Incineration; Solvents Emissions; Titanium Dioxide (x3)
- Fitness Check 2019-20
- New Directive proposed 2020-21



Key features of IED permitting approach

- Integrated approach – take into account whole environmental performance of the plant
- Operation based on Best Available Techniques – and emissions limits set by ‘BAT-AELs’
- Flexibility to set less strict emissions limits – mainly Art 15(4)
- Mandatory environmental inspections
- Aarhus rights (broadly but not entirely) reflected in IED



IED – how ClientEarth + partners use it

- Advocate for an effective IED that (inter alia) reflects Aarhus pillars
- Ensure correct transposition / implementation
- Participate in permit reviews / challenge permits (esp. coal plants)
- Support broader EEB-led advocacy around industrial emissions
- Monitoring / intervening in CJEU cases brought by industry / MS, e.g. Poland / BG / Euracoal challenges



Core IED permitting obligations - demonstrating complexity



General principles

- **Art 11:** General principles for operators' activities:
 - All appropriate preventative measures taken against pollution
 - Best available techniques are applied (note: NOT defined term BATs)
 - No significant pollution is caused
 - Generation of waste prevented in accordance with WFD; apply waste hierarchy
 - Energy is used efficiently
 - Necessary measures taken to prevent accidents
 - Necessary measures taken on closure to avoid pollution / remediate the site
- **Art 12:** detailed information to include in permit applications



The BREF / BATc process

- **Art 13: BAT reference documents (BREF)**

- Paras 1-2: Commission to organise exchange of info between MS, industry, NGOs, concerning performance of installations, best available techniques, and emerging techniques
- Paras 3-4: Commission also convenes IED forum (MS, industry, NGOs) to establish rules for exchange of info, BREF production, and to opine on contents of BREF
- Paras 5-6: BAT conclusions to be adopted under Article 75(2) procedure; BREF published afterwards
- Para 7: Until BATc adopted for particular sector, any BREF from old Directives apply as if BATc – except for purposes of Article 15(3) & (4) (important!)



Example extract from a BATc document

Table 4

BAT-associated emission levels (BAT-AELs) for SO₂ emissions to air from the combustion of coal and/or lignite

Combustion plant total rated thermal input (MW _{th})	BAT-AELs (mg/Nm ³)			
	Yearly average		Daily average	Daily average or average over the sampling period
	New plant	Existing plant ⁽¹⁾	New plant	Existing plant ⁽²⁾
< 100	150–200	150–360	170–220	170–400
100–300	80–150	95–200	135–200	135–220 ⁽³⁾
≥ 300, PC boiler	10–75	10–130 ⁽⁴⁾	25–110	25–165 ⁽⁵⁾
≥ 300, Fluidised bed boiler ⁽⁶⁾	20–75	20–180	25–110	50–220

⁽¹⁾ These BAT-AELs do not apply to plants operated < 1 500 h/yr.

⁽²⁾ For plants operated < 500 h/yr, these levels are indicative.

⁽³⁾ In the case of plants put into operation no later than 7 January 2014, the upper end of the BAT-AEL range is 250 mg/Nm³.

⁽⁴⁾ The lower end of the range can be achieved with the use of low-sulphur fuels in combination with the most advanced wet abatement system designs.

⁽⁵⁾ The higher end of the BAT-AEL range is 220 mg/Nm³ in the case of plants put into operation no later than 7 January 2014 and operated < 1 500 h/yr. For other existing plants put into operation no later than 7 January 2014, the higher end of the BAT-AEL range is 205 mg/Nm³.

⁽⁶⁾ For circulating fluidised bed boilers, the lower end of the range can be achieved by using high-efficiency wet FGD. The higher end of the range can be achieved by using boiler in-bed sorbent injection.



Core permitting obligations

- **Art 14(1):** Permits to include all measures to comply with Arts 11 & 18 – key points:
 - (a) Emissions limits for Annex II substances and all other significant polluting substances
 - (b)/(e) Appropriate measures for protecting soil / groundwater, and waste management
 - (c)-(d) Suitable emissions monitoring requirements & annual reporting for validation
 - (g) Provisions minimising long-distance or transboundary pollution
- **Art 14(3):** BATc are ‘reference point’ for setting permit conditions
- **Art 14(4):** authority may set stricter permit conditions than BATc
- **Art 14(5)/(6):** rules for setting permit conditions w/o relevant BATc
- **Art 16:** Monitoring requirements based on BATc
- **Art 17:** General binding rules based on BATc, must = individual permits



Obligations to comply with BATc

- **Art 15(1):** emissions limit values (ELVs) apply at release point
- Art 15(2): ELVs based on 'best available techniques' w/o prescribing use of any technique or specific technology
- Art 15(3): ELVs to be set to ensure emissions do not exceed 'emissions associated with best available techniques as laid down in BATc' ('BAT-AELs')
- Art 15(4): derogation: authority can set limits less strict than BAT-AELs, where assessment shows BAT-AELs would lead to disproportionately higher costs compared to environmental benefits due to:
 - (a) geographical location / local environment of the installation
 - (b) technical characteristics of the installation
- Art 15(4 cont.): Must still ensure no significant pollution; comply with Art 18 EQS; include reasons for derogation and results of assessment in annex to permit
- **Art 18:** Permits must ensure compliance with 'environmental quality standards'



Access to justice - obligations and obstacles



Aarhus rights – Articles 24-26

- **Art 24:** Access to information & public participation
 - (1) MS must ensure public participation for granting / updating permits for (a) new installations; (b) substantial changes; (c) Article 15(4) derogations; (d) significant pollution → important to note what this does *not* cover (BATc updates especially)
 - (2) Detailed list of info to be provided to public following decision granting / updating permit
 - Annex IV procedure applies
- **Art 25:** Access to justice for decisions, acts or omissions that are subject to Art 24 – similar to Aarhus → but some major flaws
- **Art 26:** Transboundary effects – if significant negative effects on environment of another MS, must notify that MS



Access to justice - Article 25

1. Member States shall ensure that, in accordance with the relevant 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 decisions, acts or omissions subject to Article 24 when one of the following conditions is met:

- (a) they have a sufficient interest;
- (b) they maintain the impairment of a right, where administrative procedural law of a Member State requires this as a precondition.

2. Member States shall determine at what stage the decisions, acts or omissions may be challenged.

3. What constitutes a sufficient interest and impairment of a right shall be determined by Member States, consistently with the objective of giving the public concerned wide access to justice.

To this end, the interest of any non-governmental organisation promoting environmental protection and meeting any requirements under national law shall be deemed sufficient for the purpose of paragraph 1(a).

Such organisations shall also be deemed to have rights capable of being impaired for the purpose of paragraph 1(b).

4. Paragraphs 1, 2 and 3 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall 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.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

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

Article 25 - access to justice obstacles

- **Standing:** non-national NGOs struggle to secure standing
- **Scope:** 'decisions, acts or omissions subject to Article 24'
 - Omissions regarding monitoring, enforcement, penalties - not covered by Article 24, but often are key decisions of authorities
 - Article 79 penalties clause ('effective, proportionate, dissuasive') - enforceability?
- **'Fair, equitable, timely and not prohibitively expensive'**
 - Technical expertise - highly technical proceedings; hard for NGOs to secure; can be very expensive
 - Judges (and even lawyers) struggle with complex technical issues; highly deferential
 - Timing: short windows for challenge (e.g. 2 weeks in BG) - hard to review complex permits in available time
 - Weaknesses in public participation and access to information undermine ability to secure access to justice (e.g. ACCC/C/2014/121)
 - Very few relevant CJEU judgments and national court precedents



Building an IED case



IED - building a case

- **Access to info:** Get a copy of permit or other decision
- **Public participation:** Best to participate in permitting procedure - may reduce need for challenge, increases understanding, may help persuade national courts of interest / expertise
- **Legal team:** lawyers required who understand technicalities of IED
- **Technical team:**
 - Experts in relevant industrial installation and pollution abatement required
 - Experts in environmental / human health impacts
 - Experts in dispersion modelling
- **Campaign team:** cases normally aiming to influence decisions to build or operate major industrial installations - effective communications campaign required to maximise impacts of legal work



Thank you and sorry



Part II- Case study: Litigation concerning the Maritsa East 2 coal-fired power plant in Bulgaria.

Regina Stoilova, Attorney-at-Law, Bulgaria

Dominique Doyle, Lawyer, ClientEarth Energy Programme



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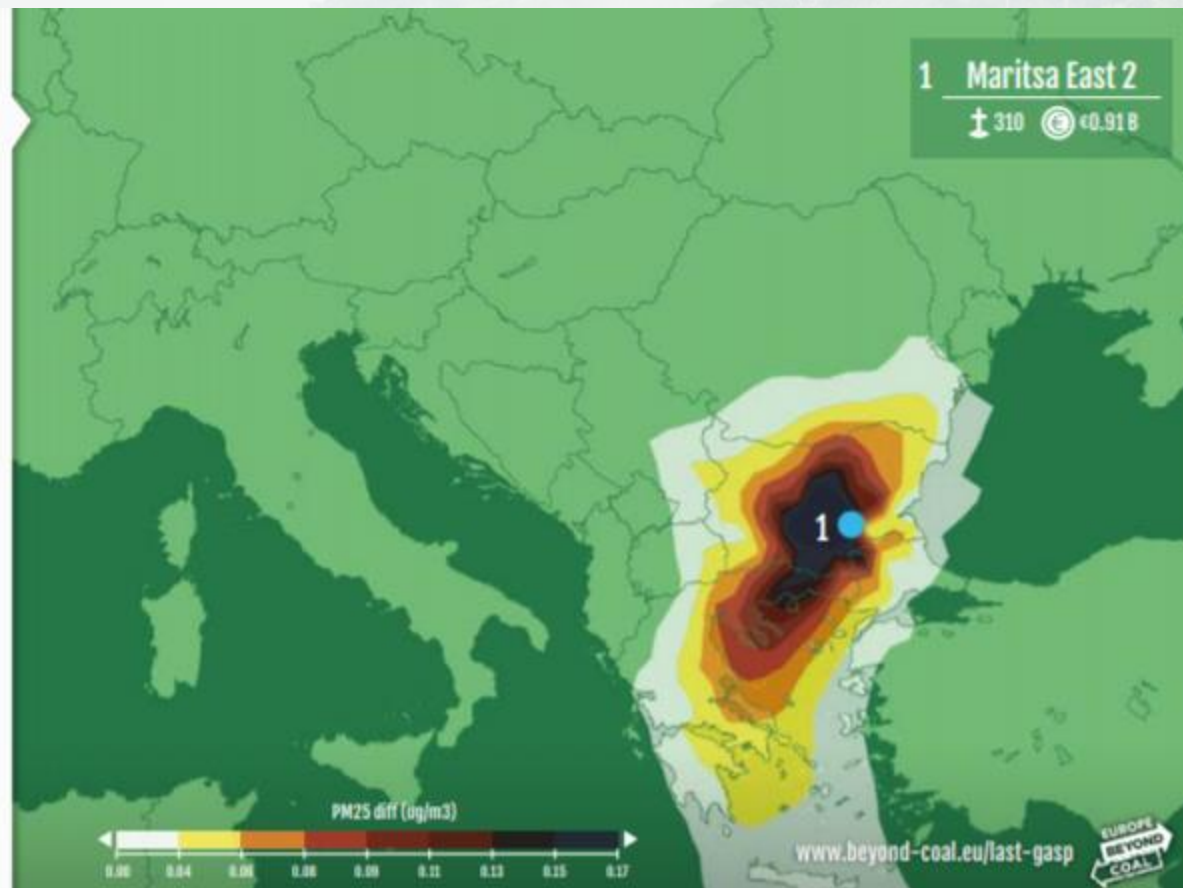
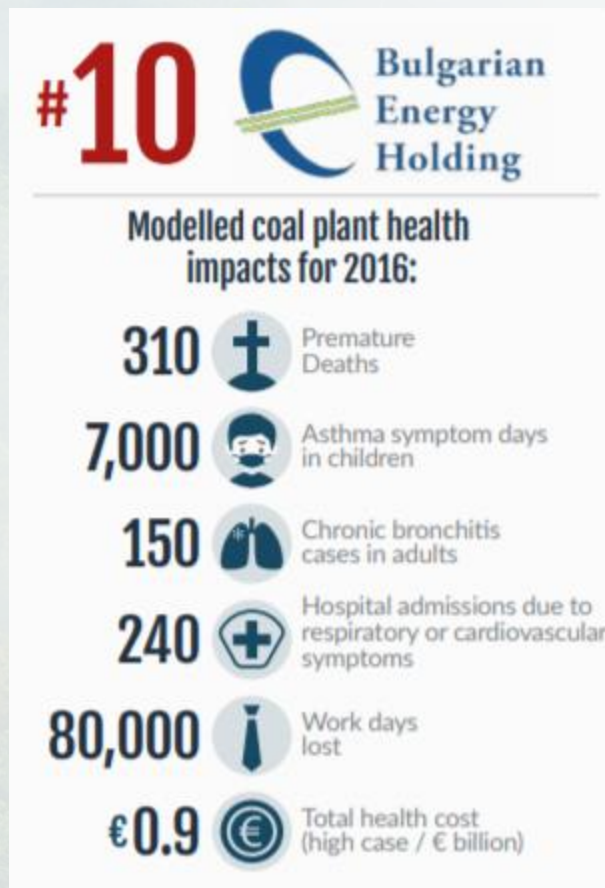


Maritsa East 2 EAD (ME2)

- The biggest thermal power plant in the Balkans (1620 MW)
- Began construction in 1962-1964
- Uses local lignite coal with high Sulphur content
- Owned by the State of Bulgaria (Bulgarian Energy Holdings BEH)
- Coal from Maritsa East Mines: the mine expansion will lead to the expropriation of three more villages in the next years



BEH is 10th most polluting company in EU (from ME2 alone)



Legal framework

The Industrial Emissions Directive 2010/75/EU (IED)

- Article 21 (3): By 17 August 2021, all permits of large combustion plants must be updated to comply with the best available techniques (BAT) conclusions for large combustion plants (LCP BAT Conclusions) (strict emissions limits)
- **Derogation:**
- Article 15 (4) “...the competent authority may, in specific cases, set **less strict emission limit values**...only where an **assessment** shows that the achievement of emission levels associated with the best available techniques as described in BAT conclusions would lead to **disproportionately higher costs compared to the environmental benefits** due to:
 - (a) the geographical location or the local environmental conditions of the installation concerned; or
 - (b) the technical characteristics of the installation concerned.”



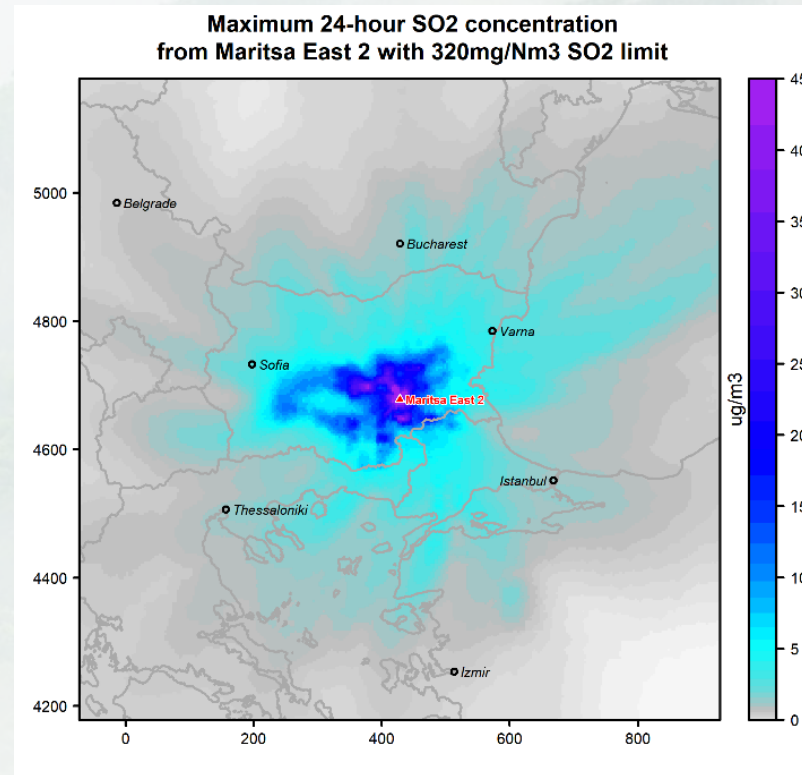
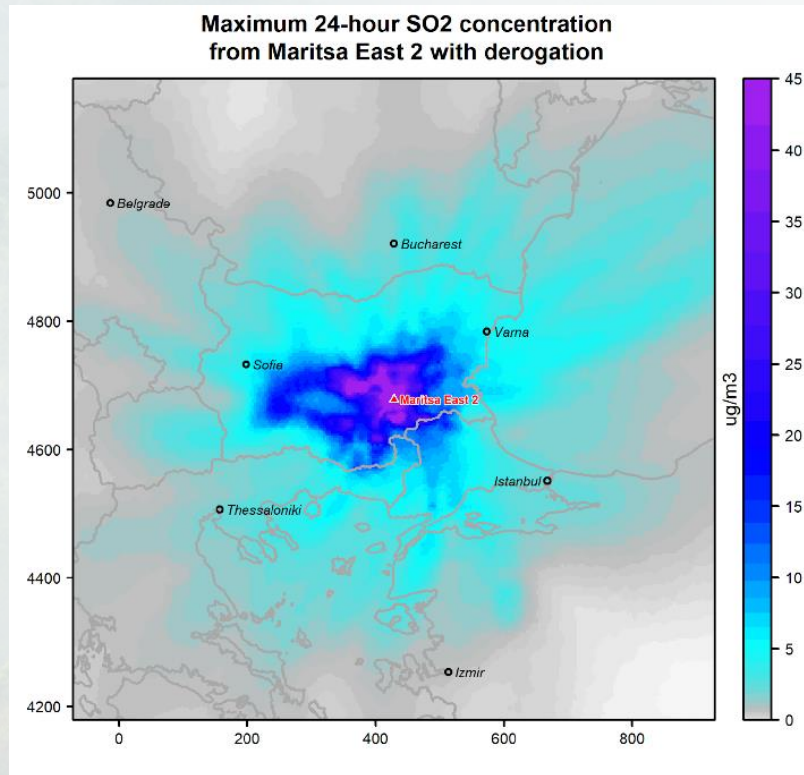
The derogation granted to ME2

Permit update of 21 December 2018 allowed ME2 to derogate **for an indefinite period**

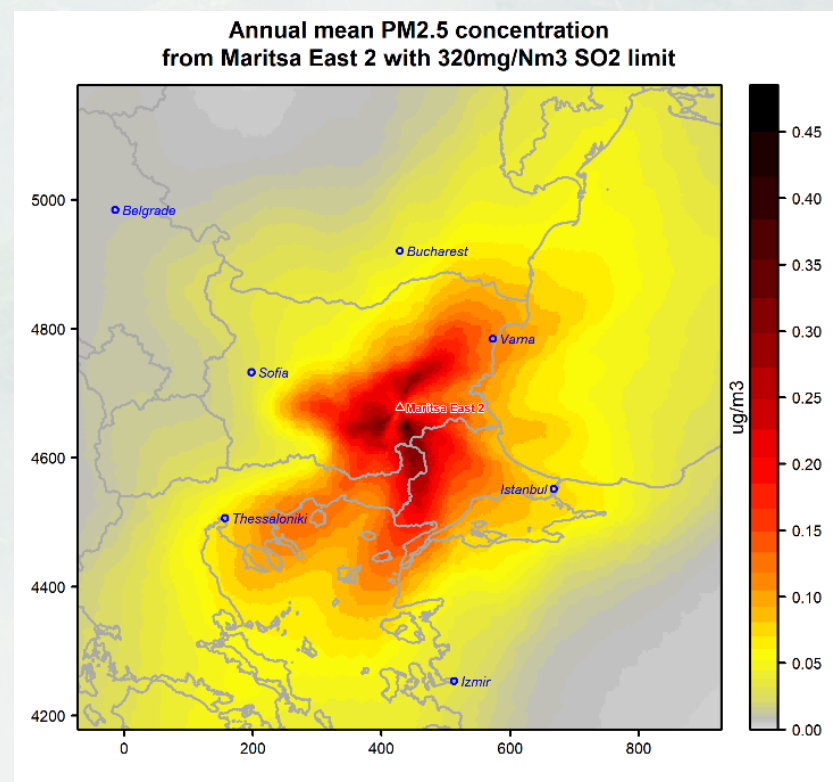
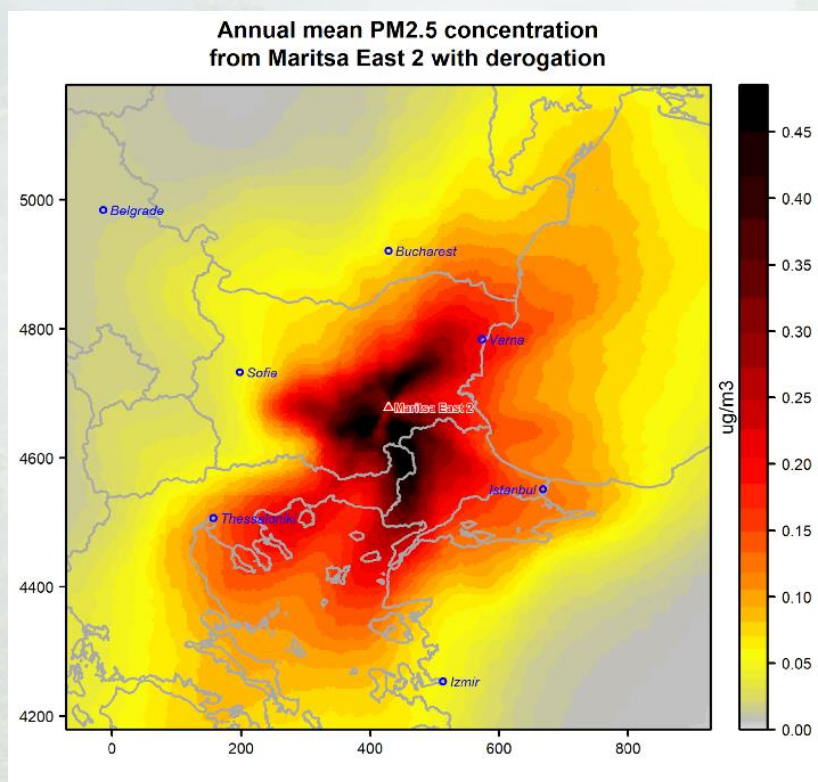
Pollutant	LCP BAT Conclusions (2017)	ME2 derogation
Sulphur Dioxide (SO ₂)	10 - 130 mg/Nm ³ (320 mg/Nm ³ for plants ≥ 300 MW designed to fire indigenous lignite fuels)	570 mg/Nm ³ (97/97,5 % desulphurization rate)
Mercury (Hg)	1-7 µg/Nm ³	30 µg/Nm ³



Derogation for SO₂

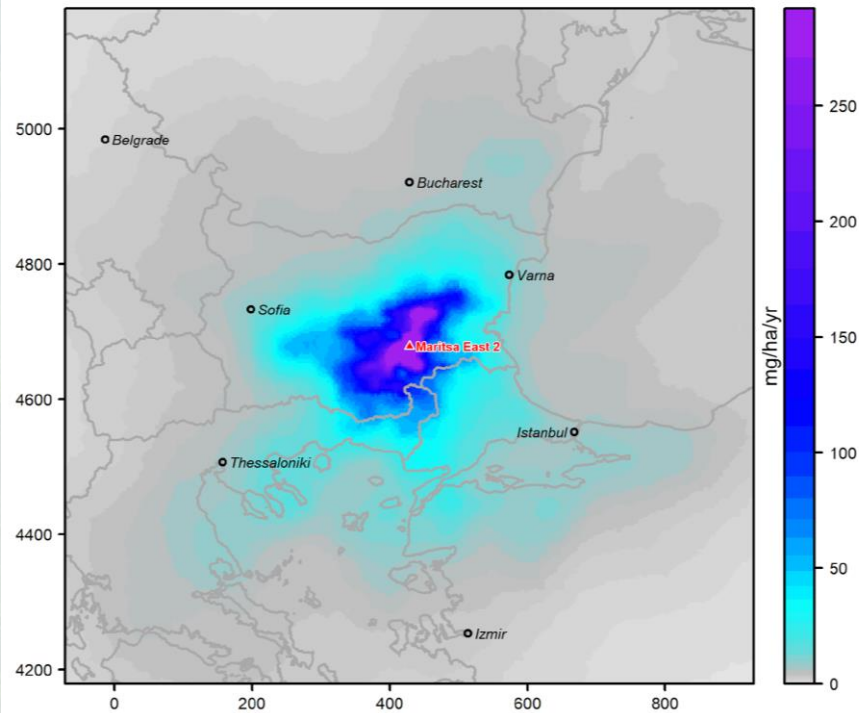


Secondary pollution resulting from SO₂ derogation (PM_{2.5})

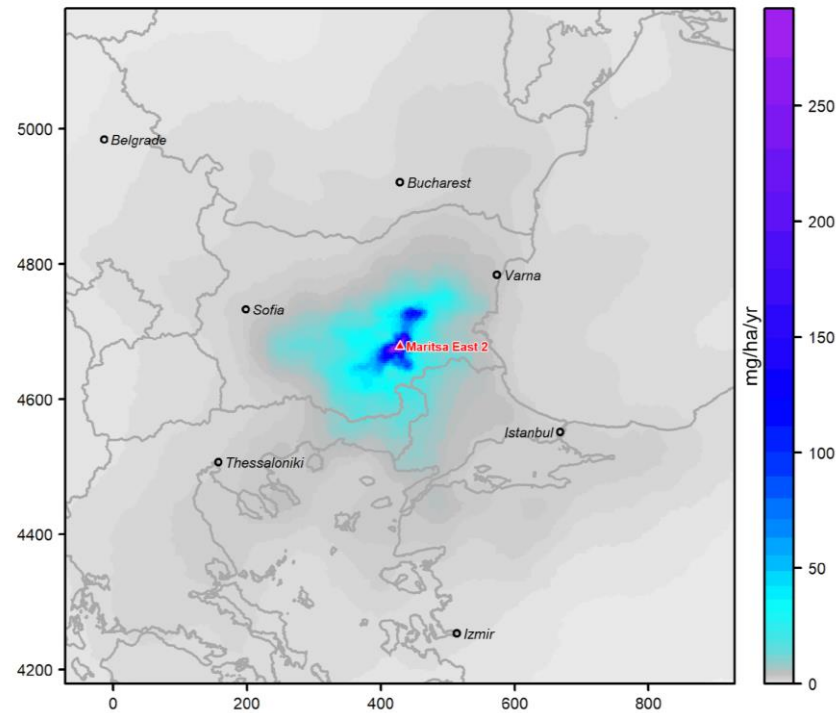


Derogation for Mercury (Hg)

Annual total mercury deposition
from Maritsa East 2 with derogation



Annual total mercury deposition
from Maritsa East 2 with BREF limits



How we challenged the derogation?

Complainants

- Local ENGO: Za Zemiata and Greenpeace Bulgaria
- Greek individual and a Greek NGO: The Green Tank

Court

- Administrative Court in Stara Zagora (final hearing on 28 July 2020)
- Option for cassation appeal



How we challenged the derogation

Legal grounds:

1. Failures in the public consultation
2. Incorrect application of Article 15 (4) IED
3. Violation of Article 18 IED



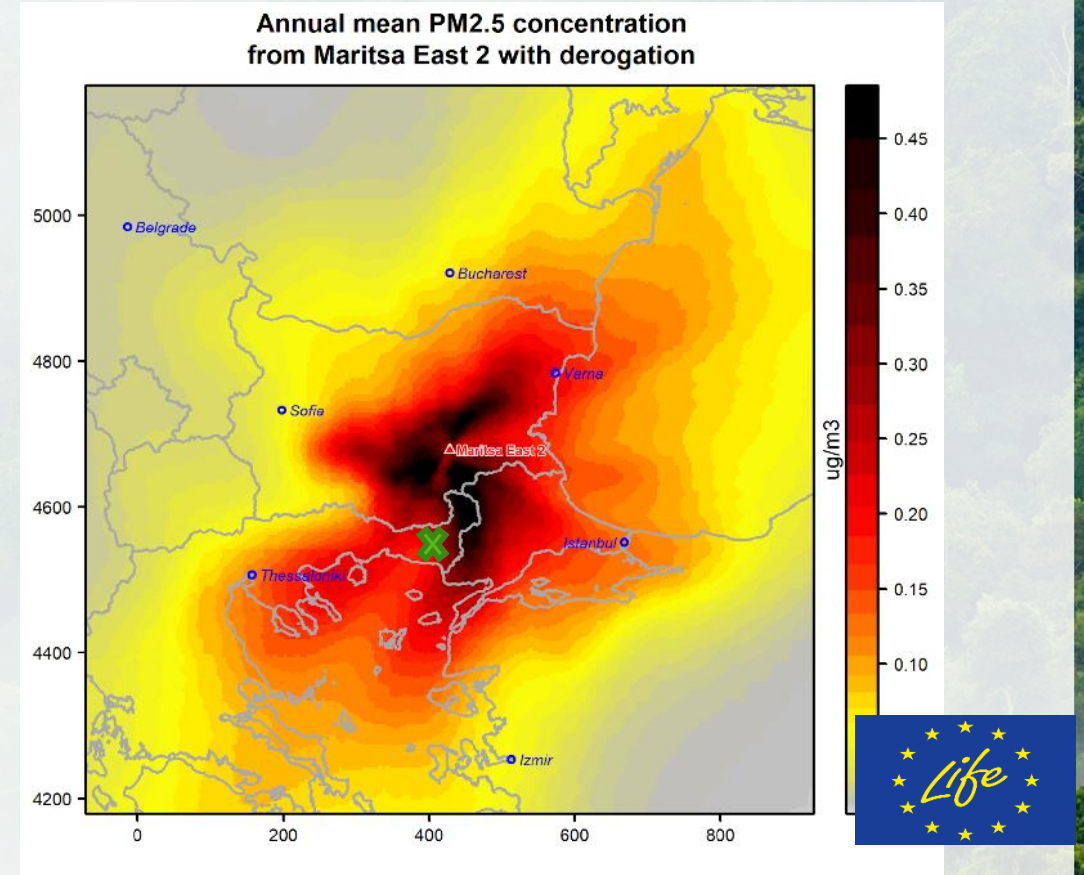
1. Failures in the public consultation

1. The public was not informed “**early in the procedure for the taking of a decision**” (Paras 1 and 4 of Annex IV of the IED)
2. No access to the documents relevant for the decision making: the **Cost Benefit Assessment** (Paras 1 and 2 of Annex IV IED and Article 6 (6) of the Aarhus Convention)
3. The public in **neighboring states (Greece)** were not consulted (Article 3 (17))



1. Failures in the public consultation

1. Transboundary impact in Greece: The public in **Greece** were not consulted
2. IED: 'public concerned' (Article 24, Annex IV)
3. Espoo Convention and Aarhus Convention obligations



2. Incorrect application of Article 15 (4): The cost-benefit analysis

Are the abatement costs **disproportionately higher** than the environmental benefits?

	Abatement Costs (EUR)	Benefits IPA (EUR)	Benefits DCA (EUR)
SO ₂	159.6 mln.	6.2 mln.	724.7 mln.

Methodologies to calculate the environmental benefits:

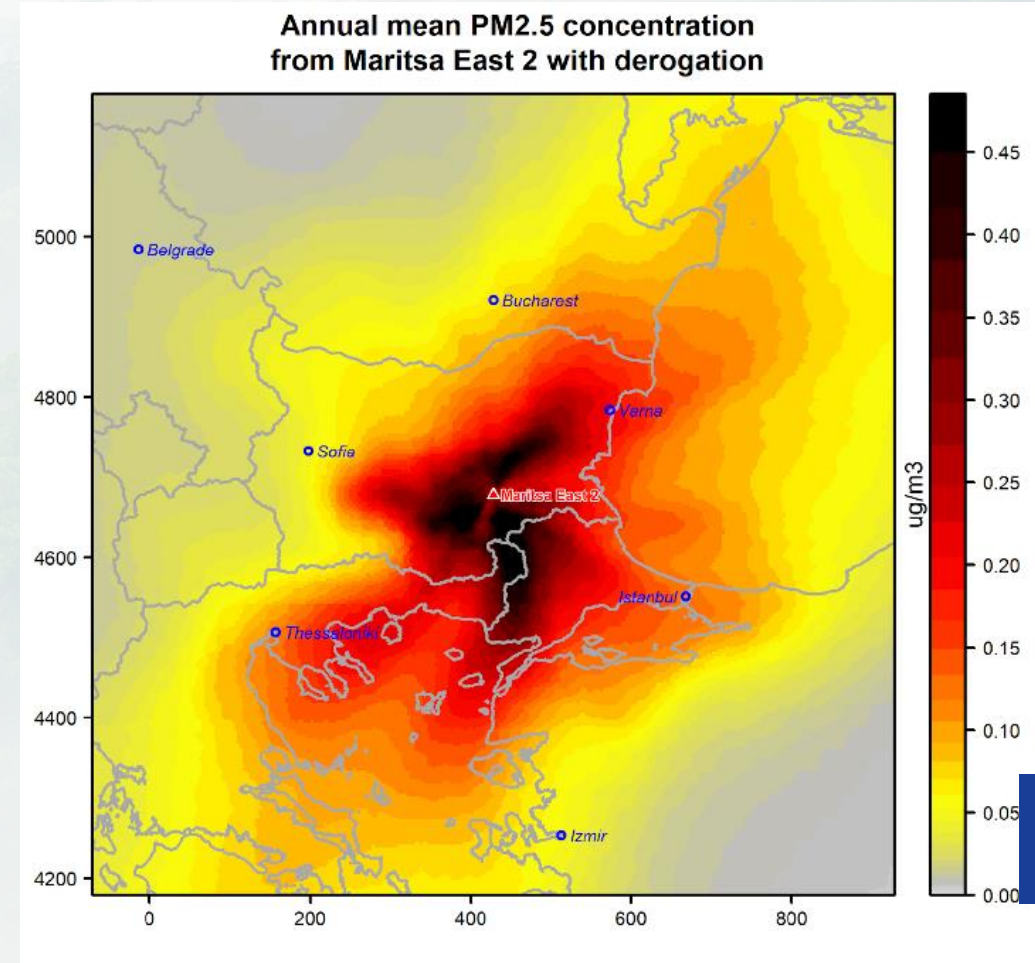
- Damage cost approach (DCA) (EEA 2014)
- Impact pathway approach (IPA)



2. Incorrect application of Article 15 (4): The cost-benefit analysis

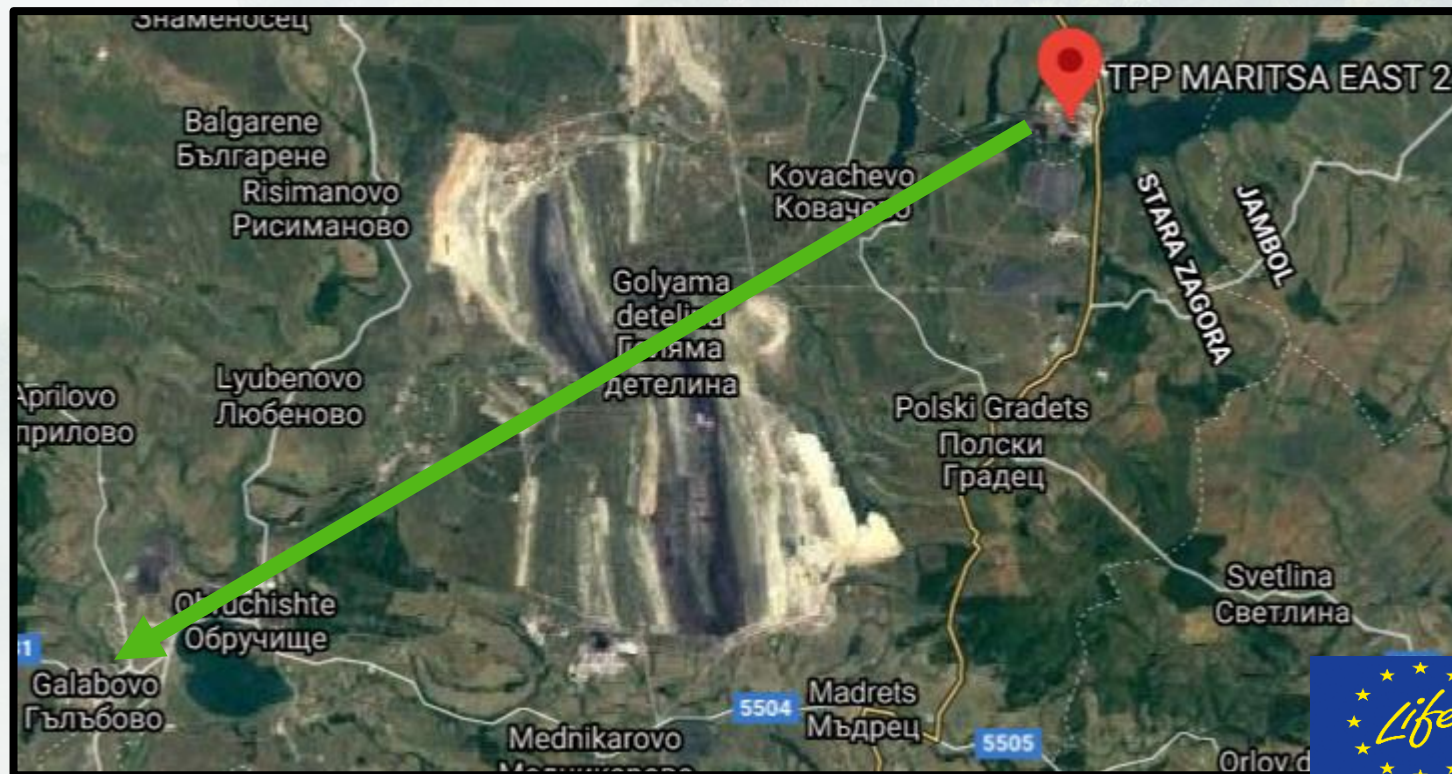
Failures with methodology: The Impact pathway approach did not take into account:

- Secondary pollution: SO₂ mixing with other chemical compounds to create PM_{2.5} (particulate matter)
- Pollution beyond 45 km away from the plant



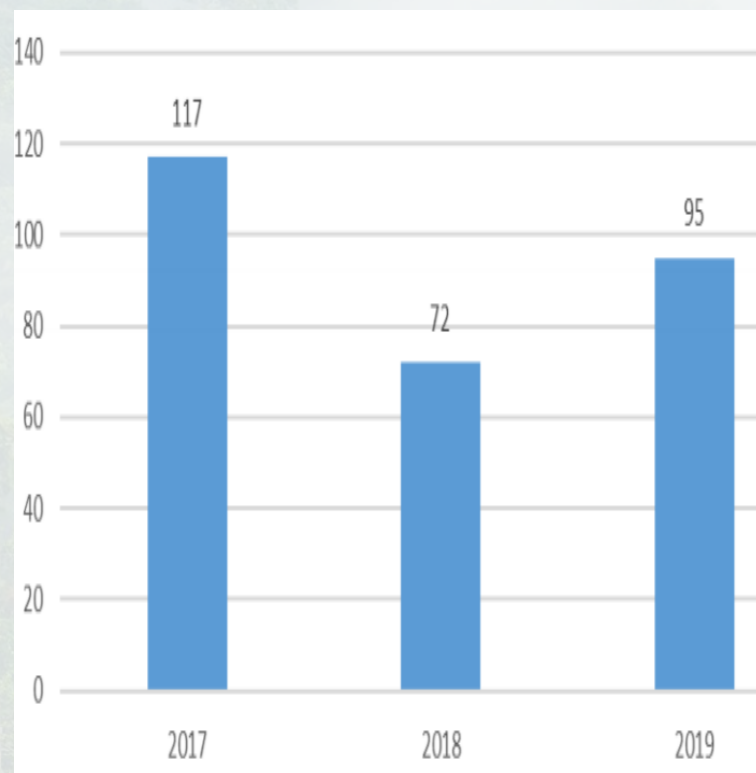
3. Violation of Article 18 IED: Environmental quality standards

- Article 18: If emissions limits in the permit would lead to a violation of an “**environmental quality standard**” then additional measures must be taken.
- Environmental quality standards = air quality standards in Air Quality Directive 2008/50/EC
- Violations of SO₂ air quality standards in nearby town Galabovo
- Galabovo is exposed to the emissions of 4 coal plants and ME2 is the biggest.

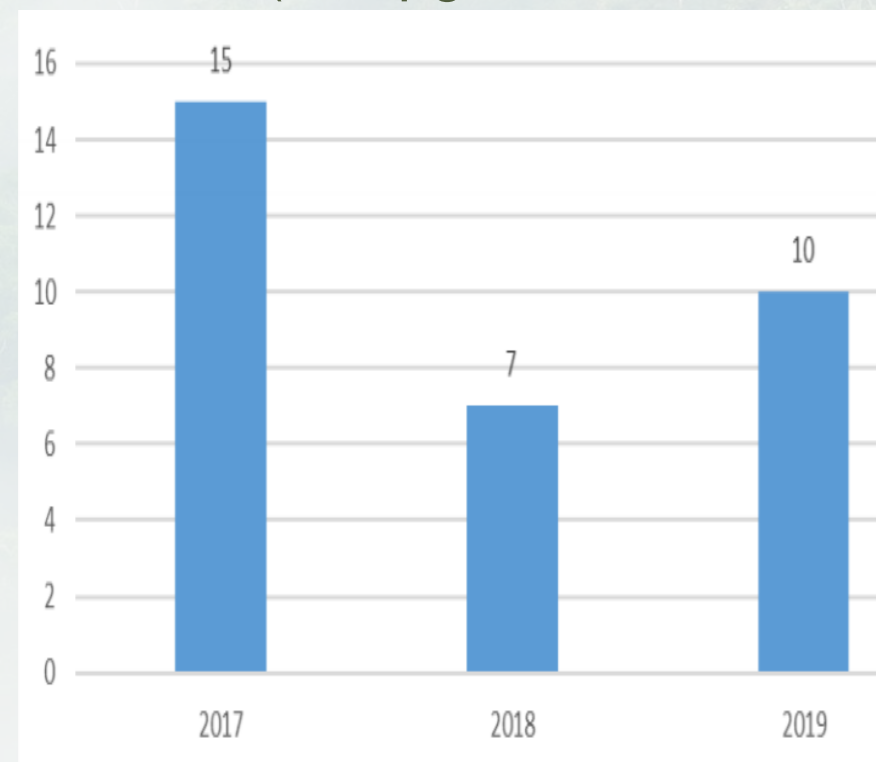


Exceedance of SO2 EQS in Galabovo

Number of exceedances of SO2 hourly standard ($350 \mu\text{g}/\text{m}^3$)



Number of exceedance of daily standard ($125 \mu\text{g}/\text{m}^3$)



How we proved our claim?

- **We had to prove:**
 - Emissions from ME2 go beyond the 45km
 - Emissions from ME2 reach Greece
 - The air quality standards in Galabovo are violated and ME2 contributes to this
- **How we did it**
 - Our own modelling
 - The author of the modelling was heard by the court as a witness
 - Court appointed experts
 - Documents (EMEP reports, WHO reports, Air Quality Plan of Galabovo, etc.)



Reflections and next steps?

Barriers in the Bulgarian courts

- Technical and scientific issues to be proved before court
- Lack of settled practice of the CJEU or official guidance on the application of Article 15 (4) IED
- Technical facts have to be proved by court appointed experts

Next steps

- Last court hearing on 28 July
- Decision is expected in August
- Appeal: Supreme Administrative Court



*Last court hearing of 28 July
*Decision is expected in August
*Appeal: Supreme Administrative Court

Thank you !

To know more about our LIFE project on Access to Justice EARL A2J and our next trainings, visit our website:

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See you soon !

