

## TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

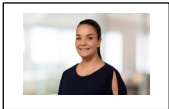
FEBRUARY 2023

### IN THIS ISSUE

*Sylvie Gallage-Alwis and Jordan Leblanc report on the latest sentencing of the French State to unprecedented fines due to lack of sufficient measures taken to reduce air pollution. France is becoming the most sentenced State in the European Union for air pollution, with some major claims starting to be launched. Here is an overview of what is going on and what could become a major toxic tort litigation.*

## Air Pollution in Europe: France, Condemned to be Sentenced?

### ABOUT THE AUTHORS



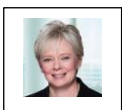
**Sylvie Gallage-Alwis** is one of the founding partners of the Paris office of the EU dispute resolution-focused firm Signature Litigation, also established in London & Gibraltar. Sylvie is specialized in French and EU Product Liability and Toxic Tort, representing manufacturers in civil, criminal, administrative, class actions and mass tort litigation. She is both registered before the Paris Bar (and can try cases in all Courts in France, whether lower level or appellate courts) and as a Solicitor in England & Wales. Sylvie is Vice-Chair for International of the Toxic Tort and Product Liability. She can be reached at [sylvie.gallage-alwis@signaturelitigation.com](mailto:sylvie.gallage-alwis@signaturelitigation.com).



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### ABOUT THE COMMITTEE

Member participation is the focus and objective of the Toxic and Hazardous Substances Litigation Committee, whether through a monthly newsletter, committee Community page, e-mail inquiries and contacts regarding tactics, experts and the business of the committee, semi-annual committee meetings to discuss issues and business, Journal articles and other scholarship, our outreach program to welcome new members and members waiting to get involved, or networking and CLE presentations significant to the experienced trial lawyer defending toxic tort and related cases. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

The right to breathe healthy air, which does not affect health, appeared in French law with the law of 30 December 1996. It is now codified at Article L. 220-1 of the Environmental Code.

According to the French State's statistics, air pollution is said to be responsible for more than 40,000 premature deaths in France each year (approximately 9% of annual deaths in France),<sup>1</sup> and associations for the protection of health and the environment show a pronounced tendency to take legal action against the French State on the ground that the measures taken are not sufficient.

It is in this context that the French Council of State (*Conseil d'Etat*) issued on October 22, 2022, a decision to sentence the French State with two penalties of € 10,000,000 each for failing to meet the obligations of prevention and the objectives of reducing air pollution. It is the third time in two years that the French State is condemned.

### **The Reduction of Air Pollution, a European and Member States' National Issue**

Nitrogen dioxide (NO<sub>2</sub>), particulate matter (PM<sub>10</sub> and PM<sub>2.5</sub>) and ozone (O<sub>3</sub>) are the main pollutants covered by prevention policies implemented by the European Union and the Member States such as France. The European Directive 2008/50/EC

of May 21, 2008, sets specific objectives for Member States. Pursuant to Articles 13 and 23 of the Directive 2008/50/EC, Member States must ensure that the measured values of air pollutants do not exceed the values indicated in the annexes of the Directive. These limits are calculated for a given time period (e.g., average per year; average over eight hours within a limit of 20 days) with the possibility of temporary exceedance, for example during pollution peaks linked to climatic conditions.

Compliance with maximum permissible values for each pollutant, as well as the implementation of air quality plans, is carried out by areas or urban area determined by the French Government. These are used as a geographical reference to measure compliance with the obligations. In France, there are 71 areas of administrative surveillance and measurement of air quality. (Ministerial Order of March 9, 2022).

The limits resulting from the Directive 2008/50/EC are included in national law in Articles R. 221-1 & following of the Environmental Code (Decree no. 2010-1250 of October 21, 2010).

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<sup>1</sup> Information published in 2021 by Santé publique France and available at the following address:  
<https://www.santepubliquefrance.fr/presse/2021/p>

[ollution-de-l-air-ambient-nouvelles-estimations-de-son-impact-sur-la-sante-des-francais](#)

**The French State, Frequently Sentenced for Failing to Meet its Pollution Reduction and Prevention Objectives**

France appears to be one of the worst performers in the European Union when it comes to compliance with the objectives of reducing and preventing atmospheric pollutants. Since 2009, the European Commission has issued six formal notices to comply with the obligations under the Directive, or previous legislation.

In the absence of sufficient action, the European Commission brought a first action for failure to fulfil obligations against France on October 11, 2018, before the Court of Justice of the European Union (hereinafter the "CJEU").

In its decision of October 24, 2019 (no. C636/18), the CJEU recognized the failure of the French State to take adequate measures to reduce air pollution. The CJEU pointed out that the annual limit value for nitrogen dioxide (NO<sub>2</sub>) had been exceeded "*systematically and persistently*" in twelve urban areas, and the hourly limit for these values had been exceeded in two urban areas. In addition, the CJEU fined France for not implementing measures to reduce the period during which the limits were exceeded.

The Court pointed out that these shortcomings had not been corrected since January 1, 2010, date on which the French State should have complied with the limits set out in Directive 2008/50/EC.

More recently, in a decision of April 28, 2022 (no. C-286/21), the CJEU once again fined France for having systematically and persistently exceeded "*the daily limit value applicable to concentrations of particulate matter (PM<sub>10</sub>) from January 1, 2005 up to and including 2019*" in one urban area (Paris), and in a second (Fort-de-France) until 2016. The CJEU criticized France for not having put in place measures to reduce as much as possible the period during which the limits were exceeded.

With these various sentences, France joins Poland and Bulgaria in the list of Member States sentenced for failure to meet their obligations to prevent atmospheric pollution.

One might have expected to see many appeals from non-profit associations and non-governmental organizations. However, this litigation only prospers before national courts. In its decision of December 22, 2022, the CJEU stated that the European regulations relating to limit values for certain substances and the preservation of air quality (Directive No. 2008/50/EC) "*are not intended to confer rights on individuals capable of entitling them to compensation from a Member State under the principle of State liability for loss and damage caused to individuals as a result of breaches of EU law attributable to that Member State*" (no. C-61/21). It is for this reason that the litigation carried out by the organizations for the protection of health and the environment is located before the French jurisdictions.

The recent decision to condemn the French State issued by the French Council of State on October 17, 2022, has its genesis in a decision of the Council of State rendered a few years earlier, on July 12, 2017 (no. 394254).

According to this decision, the NGO "*Les Amis de la Terre France*" obtained that the French State be required to implement action plans to reduce the concentrations of nitrogen dioxide (O<sub>3</sub>) and particulate matter (PM<sub>10</sub>) to the limits set by Directive 2008/50/EC, transposed in Article R. 221-1 of the Environmental Code. The French Council of State also enjoined the French State to take all measures to reduce the levels of nitrogen dioxide (NO<sub>2</sub>) and particulate matter (PM<sub>10</sub>) in the shortest possible timeframe.

In a decision dated July 10, 2020 (no. 428409), the French Council of State added to the previous injunctions a penalty of €10,000,000 per half-year of delay if the necessary measures are not implemented within six months of the present decision.

If the penalty imposed is significant, it is not so far from the condemnation against France by the CJEU in 2019 which will be at least €11,000,000. The specificity of the decision of July 10, 2020, is that it creates a scope for the future by providing that the penalty could be ordered for each half-year period, until France complies with the measures ordered in the decision of July 12, 2017

(action plans and measures to reduce pollution in the shortest possible period).

Without actions considered sufficient and observing that the limits of nitrogen dioxide and particulate matter were exceeded, the Council of State pronounced a first sentence of the French State to a financial penalty of €10,000,000 for exceeding the limits on the first half-year period of 2021 (no. 428409).

The latest decision of October 17, 2022 (no. 428409) continues the trend of sentencing France in application of the measures prescribed in the decision of July 12, 2017. After observing that the atmospheric pollutant limits were once again exceeded, without the implementation of the required curative actions, the French Council of State pronounces two sentences for the second period of 2021 and the first period of 2022, i.e., a total sentence of €20,000,000.

More than five years after the first condemnation of France by the Council of State to comply, the objectives of reducing atmospheric pollution are still not achieved according to said Court.

### **Future Evolutions and Transfer of Responsibilities to the Private Operators?**

On September 22, 2021, the World Health Organization adopted new guidelines<sup>2</sup> to set new limits for exposure to air pollutants (including nitrogen dioxide, particulate matter and ozone).

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<sup>2</sup> Available at the following link:

<https://www.who.int/news-room/questions-and-answers/item/who-global-air-quality-guidelines>

These new limits could be applied to the obligations of the Member States. Indeed, a draft revision of Directive 2008/50/EC is currently being elaborated at the European legislative level. It appears from the preparatory work that the European legislator intends to align the limits on exposure to atmospheric pollutants with the recommendations made by the World Health Organization in its guidelines. To illustrate, the transposition of these new limits would lead to the following limits: 10 µg/m<sup>3</sup> as an annual average compared to 40 µg/m<sup>3</sup> for nitrogen dioxide (NO<sub>2</sub>), 5 µg/m<sup>3</sup> as an annual average compared to 20 µg/m<sup>3</sup> for certain fine particles (PM<sub>2.5</sub>), or 100 µg/m<sup>3</sup> as an eight-hour average compared to 120 µg/m<sup>3</sup> for ozone (O<sub>3</sub>).

Facing these new objectives that are coming up in 2030, France seems to be committed to paying the semi-annual penalty payments of €10,000,000. Faced with this trend of litigation, to which other claimants could be joined, a risk can be identified: the transfer of responsibility to economic operators.

The French legislative framework would allow such a transfer to take place. For example, the "polluter pays" principle (Article L. 110-1 of the Environmental Code) imposes an obligation on operators who cause pollution to repair the costs associated with it, and to take any corrective action as part of their environmental responsibility. We can also mention Article L. 220-1 of the Environmental Code, which makes public and private operators responsible for the preservation of healthy atmosphere.

If we already know that associations and NGO's regularly take action against economic operators to obtain compensation for possible environmental damage, it is now possible to envisage a variety of compensation claims that would be set up by the French State in order to make up for its shortcomings in the fulfilment of its obligations.

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