

TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

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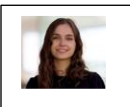
Air pollution regulations and cases are fast developing in the European Union. If the Member States are the main target of claims for now, other toxic tort litigation sagas (such as asbestos and other chemical substances) allow Sylvie Gallage-Alwis and Anélia Naydenova to predict that companies will be the next target. It is therefore important to understand where this issue stands for all companies doing business in the EU.

The European Union is Tackling Its Air Quality

ABOUT THE AUTHORS



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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. To contribute a newsletter article, contact:



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According to the World Health Organization (WHO), air pollution is responsible for an estimated seven million deaths every year. Diseases that could be linked to air pollution would include stroke, chronic obstructive pulmonary disease, trachea, lung cancers, as well as aggravated asthma.

The WHO defines air pollution as the contamination of the indoor or outdoor environment by any chemical, physical or biological agent that modifies the natural characteristics of the atmosphere.

The primary air pollutants that have drawn significant attention from both the WHO and the European Union (EU) include nitrogen dioxide (NO₂), ozone (O₃), coarse particulate matter (PM₁₀), fine particulate matter (PM_{2.5}), and sulphur dioxide (SO₂). WHO data reveals that 99% of the global population breathes air contain these pollutants.

The purpose of this article is to summarize the recent regulatory changes and case law relating to air pollution that we have noticed at EU and French level, and which show that air pollution cases should remain on the rise.

Legal Frameworks Addressing Air Pollution

- **WHO guidelines**

The WHO Global Air Quality Guidelines (AQG) are a set of evidence-based

recommendations of limit values on specific air pollutants, designed to help countries achieve air quality levels that are not harmful to public health.

First released in 1987, at a time when the detrimental effects of air pollution were already evident— through phenomena such as urban smog, acid rain, and deforestation— these guidelines have been updated over the years, with the most current version being that of 2021.

The guidelines serve as a global benchmark for regional, national, and local governments, aimed at encouraging authorities and civil society to monitor and study harmful air pollution in all environments where people live and work.

While not legally binding, they provide WHO Member States with a scientifically grounded framework to inform legislative action and pollution control efforts. As such, they are an essential tool for policymakers, legislators, technical experts, national and local authorities, as well as nongovernmental organizations focused on public health.

According to Air Quality Life Index (AQLI)¹, reducing fine particulate pollution to meet WHO guidelines would increase the global average life expectancy by nearly two years.

¹ The Air Quality Life Index (AQLI), produced by the Energy Policy Institute at the University of Chicago

(EPIC), converts air pollution concentrations into their impact on life expectancy.

This is why EU regulations are striving to align with them.

- **EU regulations**

Since the 1980s, the EU has implemented policies on air quality that have contributed to a significant reduction in most air pollutants over the past decades. However, the EU acknowledges that the challenge of air quality is far from being resolved, with persistent exceedances of the WHO guidelines for several pollutants.

As part of the European Green Deal, the European Commission proposed a revised Ambient Air Quality Directive, amending Directive 2004/107/EC of 15 December 2004 on arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air, and Directive 2008/50/EC of 21 May 2008 on ambient air quality and cleaner air for Europe².

The revised Directive of 23 October 2024³, which entered into force on 10 December 2024, introduces a series of measures and stricter standards, including a significant reduction—by more than 50%—in the annual limit for the key air pollutant, fine particulate matter (PM_{2.5}). It also updates air quality standards for twelve air pollutants, including the five main pollutants, as well as

benzene, lead, carbon monoxide, arsenic, cadmium, nickel, and benzo(a)pyrene. Additionally, it provides for the need for Member States to organize a right for individuals who consider that they have been harmed by air pollution to seek compensation.

Member States must transpose most of the provisions of the revised Directive by 11 December 2026, at which point Directives 2004/107/EC and 2008/50/EC will be repealed, effective 12 December 2026.

- **French law and implementing provisions**

The precursor to France's air pollution regulation is the Law on Air and the Rational Use of Energy (the "LAURE" law), passed on 30 December 1996. This law, now codified under Articles L. 220-1 and following of the French Environment Code (FEC), affirms the right to clean air and establishes a nationwide air quality monitoring system. Managed by the ministry responsible for the environment, the system relies on regional air quality monitoring associations (AASQA) and technical coordination from the Central Air Quality Monitoring Laboratory (LCSQA).

The French Order of 16 April 2021⁴ outlines the implementation of the monitoring

² Directive 2004/107/EC of the European Parliament and of the Council of 15 December 2004 relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air and 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.

³ Directive (EU) 2024/2881 of the European Parliament and of the Council of 23 October 2024 on ambient air quality and cleaner air for Europe.

⁴ Arrêté du 16 avril 2021 relatif au dispositif national de surveillance de la qualité de l'air ambiant.

system in compliance with European directives, particularly Directive 2008/50/EC. The limit values of air pollutants, which are legally binding from the date they enter into force, are specified under Article R. 221-1 of the FEC. However, they are subject to change under the revised Directive of 23 October 2024 as it introduces substantial amendments⁵.

To meet these limit values, the French State enacts policies such as the national plan to reduce atmospheric pollutants (PREPA), regulatory measures for private operators, and financial incentives. Locally, the plans for the protection of the atmosphere (PPA) set specific targets to bring pollutant concentrations below legal limits.

Thus, states and their national agencies are at the forefront of the combat against air pollution. However, the European Commission, nongovernmental organizations and individuals may step in by bringing judicial actions to ensure that states are fulfilling their obligations.

Judicial Actions and Court Rulings

- **The Court of Justice of the European Union**

The Court of Justice of the European Union (CJEU) delivered a landmark decision in *ClientEarth* on 19 November 2014⁶, clarifying the obligations set out in Directive 2008/50/EC. In this case, the environmental organization ClientEarth challenged the UK's failure to meet EU air quality limits for nitrogen dioxide (NO₂) in urban areas.

The CJEU ruled that Directive 2008/50/EC imposes an obligation of result, not just an obligation of means. Hence, simply preparing an air quality plan is not enough for a Member State to be considered in compliance with the required pollutant limits. The Court further ruled that national courts must take appropriate actions, such as issuing injunctions, to ensure compliance with the Directive.

By framing air pollution obligations as result-based, the Court emphasized that Member States cannot avoid liability for failing to meet air quality standards. This ruling has set a precedent that continues to hold Member States accountable for air pollution violations.

⁵ Recital (1) of Directive (EU) 2024/2881 of the European Parliament and of the Council of 23 October 2024 on ambient air quality and cleaner air for Europe: "*Directives 2004/107/EC (4) and 2008/50/EC (5) of the European Parliament and of the Council have been substantially amended. Since*

further amendments are to be made, those Directives should be recast in the interest of clarity".

⁶ Court of Justice of the European Union, 19 November 2014, C-404/13, *ClientEarth v The Secretary of State for the Environment, Food and Rural Affairs*.

For instance, France has been condemned by the CJEU for failing to comply with EU air quality standards, particularly regarding NO₂ and PM₁₀ levels in cities such as Marseille, Paris, and Toulouse⁷. Currently, France is under scrutiny by the European Commission having issued a new letter of formal notice on 7 February 2024 for failing to meet NO₂ pollution limits, potentially resulting in a significant fine.

Other EU Member States have faced similar condemnation. Italy, Bulgaria and Poland have been found in violation of air quality standards in several regions for having systematically and persistently exceeded the limit values for concentrations of PM₁₀ and continuing to exceed them⁸. These cases highlight the ongoing challenge of ensuring compliance with air quality regulations across the EU.

- **National Courts**

As above-mentioned, national courts are responsible for taking appropriate measures against their Member States when they fail to meet air pollution limits.

In France, the French Council of State (*Conseil d'État*) has fined the government for not meeting EU thresholds for PM₁₀ and NO₂ in several cities. In 2021 and 2022, the State

faced three €10 million fines for each six-month delay. On 27 November 2023, the Conseil d'État noted improvements, with PM₁₀ levels now meeting the thresholds nationwide and NO₂ within limits in Toulouse and Aix-Marseille. However, pollution remains above limits in Paris and Lyon and, as a result, two €5 million fines were imposed for the 2022-2023 period due the ongoing violation.

In a similar case, on 23 July 2024, the Higher Regional Administrative Court of Berlin-Brandenburg compelled the German government to revise its National Air Pollution Control Program (NAPCP), as it failed to sufficiently implement Directive (EU) 2016/2284 on the reduction of national emissions of certain atmospheric pollutants⁹. This ruling followed a lawsuit filed by Environmental Action Germany (DUH) and ClientEarth.

More recently, ClientEarth has initiated legal proceedings against Poland on behalf of two citizens with asthma, who claim that the country's failure to address smog has exacerbated their health conditions. The plaintiffs are seeking financial compensation for health damages and medical expenses, as well as protection for their fundamental right to live in a healthy environment with air free from pollutants.

⁷ Court of Justice of the European Union, 24 October 2019, C-636/18 and 28 April 2022, C-286/21, European Commission v Republic of France.

⁸ Court of Justice of the European Union, 10 November 2020, C-644/18, European Commission v Republic of Italy, 5 April 2017, C-488/15, European Commission v Republic of Bulgaria, and 22 February

2018, C-336/16, European Commission v Republic of Poland.

⁹ Directive (EU) 2016/2284 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.

- **The European Court of Human Rights**

On 9 April 2024, the European Court of Human Rights (ECtHR) delivered a historical decision recognising the obligation of states to implement regulatory and preventive measures against rising greenhouse gas concentrations and global temperature increases that could have irreversible negative effects on human rights¹⁰.

In this case, the plaintiffs invoked mainly Articles 2 (right to life) and 8 (right to private and family life) of the European Convention on Human Rights (ECHR). The Court dismissed the claim under Article 2, ruling that climate risk was not an imminent threat to life. However, the case succeeded under Article 8, as the Court acknowledged that severe environmental harm could affect an individual's well-being, disrupt the enjoyment of their home, and infringe on their private and family life.

This decision sets a significant precedent and may pave the way for similar legal actions related to air pollution, particularly based on Article 2 of the ECHR, as such pollution contributes to serious diseases such as stroke, lung cancers and aggravated asthma.

Future Developments and Expectations

The evolving legal landscape around air pollution is poised to create significant

changes, particularly with the revised Directive of 23 October 2024 as it grants individuals the right to seek compensation for health damage¹¹. This development signals the growing importance of legal recourse for individuals affected by air pollution, and we can expect more legal actions targeting states and even private operators in the near future.

Legal actions under the ECHR, specifically Articles 2 and 8, are also likely to gain traction. With air pollution being a major public health concern, these mechanisms will empower citizens to hold governments accountable for failing to take timely and effective action.

Private operators, including manufacturers, will certainly face greater scrutiny and liability as many of the pollutants responsible for air quality violations come from human activities. The growing intersection of legal, regulatory, and financial pressures will likely force companies to adopt more sustainable practices.

¹⁰ European Court of Human Rights, 9 April 2024, *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, no. 53600/20.

¹¹ Article 28 of Directive (EU) 2024/2881.

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