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Individual right to clean and healthy air in the EU

An analysis of the existing system of legal protection and possible options to strengthen the legal framework

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Executive Summary

- Across Europe, there is a growing trend of people resorting to courts to translate the vast body of medical and scientific knowledge on the harmful effects of air pollution into legal rights and obligations. As a result of one of these actions, preliminary questions are currently in front of the Court of Justice of the European Union (the '**CJEU**') regarding the scope of individuals' right to claim compensation in response to Member State breaches of Directive 2008/50/EC (the '**Air Quality Directive**' or '**AAQD**').
- This comes at a time when the European Commission is in the process of reviewing this key piece of legislation – providing a momentous opportunity to ensure that our laws are clearer and more effective in driving the action necessary to protect people from what is still recognised to be the largest environmental threat to public health in Europe.
- Against this backdrop, this note explains that, according to a correct interpretation of the existing legal order, **EU citizens already enjoy a right to air quality with levels of pollutants not exceeding the limit values set under the AAQD**. This interpretation is bolstered by wider trends globally and across Europe. EU Member States' national legal frameworks widely recognise the right to a healthy environment. The European Court of Human Rights has also acknowledged that the European Convention on Human Rights ('**ECHR**' or the '**Convention**') embraces people's right to a safe and healthy environment in certain circumstances, and that an individual's Convention rights may be violated by exposure to air pollution in particular.

> **Recommendation 1**
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> Despite the clear basis for this interpretation of the law as its stands, **ClientEarth believes that EU citizens could further benefit from a direct and explicit expression of this individual right to air quality within legal limit values** – both from the CJEU, as part of the upcoming ruling in Case C-61/21, as well as in the letter of EU legislation, as part of the revised AAQD.

- **This individual right to clean and healthy air has legal consequences**. As a matter of EU law, individuals benefit from the right to obtain effective remedies from domestic courts in the event that their rights are infringed. Two complementary forms of remedy are necessary in this context: (1) securing Member State compliance with limit values in order to prevent harm; and (2) holding Member States liable to compensate individuals in instances where harm has already been sustained (the principle of State liability).
- With respect to remedies to prevent harm from breaches of this individual right, **CJEU case law already provides a clear basis for individuals to pursue cases before national courts to demand full and correct implementation of the AAQD**. However, access to justice problems persist in many jurisdictions and continue to block the availability of effective remedies in practice. Furthermore, even where individuals have access to domestic courts, remedies and/or the mechanisms to enforce judgments vary widely between jurisdictions with respect to their effectiveness in preventing harm.

Recommendation 2

In ClientEarth's view, **in order to ensure that remedies are effective at protecting people from harm across the EU, explicit access to justice provisions should be introduced in the revised AAQD** to codify existing case law, **alongside provisions that ensure the remedies made available by domestic courts in response to continued failures of public authorities to comply are sufficiently coercive**.

- With respect to remedies to compensate for harm that has already occurred as a result of breaches of this individual right, **the Francovich doctrine of State liability provides a route whereby individuals should be capable of seeking compensation**. Whilst this route of redress remains untested in practice, there is a strong argument that *any* breach of a Member State's Article 13 or Article 23 duties should be considered sufficiently serious in order to give rise to liability in this way, given the clarity and lack of discretion afforded by those provisions as well as Member States' awareness of the serious public health risks posed by failures to comply.
- For individuals to establish State liability for such breaches of the AAQD, there needs to be a proven causal link between the breach in question and the damage for which compensation is being sought. Whilst Member States are well aware of the harm that pollution is having of the health of their populations, in general people lack access to information on pollution levels and/or evidence of the damage that it is doing to them. **This risks the tests for causation applied in domestic courts being excessively difficult to overcome in instances where strict rules apply, with information asymmetries blocking individuals' access to effective remedies**.

Recommendation 3

In ClientEarth's view, the preliminary reference in Case C-61/21 and the ongoing review of the AAQD should be used as an opportunity to **clarify explicitly the right of individuals affected by air pollution to receive compensation for breaches of the AAQD** and to harmonise rules on causation across the EU, by **alleviating the burden of proof on individual claimants**.

1 Background

Clean air is a basic human need that is essential to good health. However, three out of four city dwellers in Europe are still exposed to levels of fine particulate matter ($PM_{2.5}$) exceeding the guidelines of the World Health Organization (the '**WHO**').[1] Air pollution is the main environmental risk to human health in Europe[2] and across the world.[3] A growing body of scientific research provides extensive and consistent evidence of the serious adverse impacts of air pollution on people's life, health and wellbeing. It is already associated with a range of deadly diseases, including cancer, cardiovascular disease and asthma.

EU law has recognised people's need to breathe clean air and conferred legal protection through directives and court judgments. A series of EU directives have imposed progressively more stringent limits on levels of harmful air pollution in ambient (outdoor) air, known as "*limit values*". The Court of Justice of the European Union (the '**CJEU**') has long held that limit values have particular legal consequences: where they are exceeded, concerned individuals and groups have the right to go before national courts to demand that action is taken. A wave of legal actions before national jurisdictions across the EU has resulted in courts ordering public authorities to adopt improved air quality plans to achieve compliance with the limit values set under Directive 2008/50/EC (the '**Air Quality Directive**' or '**AAQD**') in the shortest time possible.

However, enforcement of the AAQD is not the only legal tool available to citizens to demand improved air quality. The fundamental rights framework provides individuals with additional protections. Air pollution harms the enjoyment of fundamental human rights such as the right to private and family life, the right to health and the right to life[4]. In addition, the right to breathe clean and healthy air is one of the essential elements of the new and emerging substantive right to a healthy and sustainable environment, as the UN Special Rapporteur on human rights and the environment has highlighted.[5]

Within Europe, we are observing a growing number of individuals resorting to courts to translate the vast body of medical and scientific knowledge on the harmful effects of air pollution into legal rights and obligations.

In the United Kingdom, as a result of the second inquest into the death of Ella Kissi-Debrah, a London coroner concluded that exposure to excessive levels of air pollution had materially contributed to the 9-year-old girl's death and issued a report setting out recommendations as to how public bodies could

[1] European Environment Agency, '*Air Quality in Europe – 2020 Report*', 98 <https://www.eea.europa.eu/publications/air-quality-in-europe-2020-report>.
[2] European Environment Agency, '*Air Quality in Europe – 2020 Report*', 9 <https://www.eea.europa.eu/publications/air-quality-in-europe-2020-report>.
[3] *Lancet* Commission on pollution and health, Volume 391, ISSUE 10119, P462-512, 3 February 2018, <https://doi.org/10.1016/S0140-6736(17)32345-0>.
[4] Guerra and Others v. Italy*,* 14967/89, [GC], (ECHR, 19 February 1998), "*environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely*".
[5] Report of the Special Rapporteur on human rights and the environment to the UN General Assembly, *Right to breathe clean* air, A/HRC/40/55, 8 January 2019. https://undocs.org/A/HRC/40/55 <access 7 June 2021>.

prevent further avoidable deaths.[6] The emphasis was put on State bodies needing to act to reduce levels of air pollution and better inform people of the risks.

In France, several citizens have issued legal proceedings seeking compensation for the health and moral damage they have suffered as a result of exposure to illegal and harmful levels of air pollution.[7] One of these actions has recently resulted in two preliminary questions being referred by the Administrative Court of Appeal of Versailles to the CJEU about the scope of individuals' right to claim compensation for damage to their health caused by Member State breaches of the AAQD.[8]

The answer to these preliminary questions could have wide-reaching impacts – not only for the other cases pending in France, but also more widely across the EU. For instance, a number of Polish citizens are claiming that illegal air pollution is violating their personal rights.[9] Similar actions have also been lodged in the Czech Republic.[10]

In another case in France, the Administrative Court of Bordeaux quashed an expulsion order against a Bangladeshi citizen because severe air pollution in Bangladesh would aggravate his asthma and significantly increase his risk of death.[11] The French immigration court emphasised the devastating effect of $PM_{2.5}$ pollution,[12] linked air pollution to mortality from asthma and recognised an individual right that was directly linked to air quality.

Meanwhile one of the objectives of the Zero Pollution Action Plan is to ensure stricter implementation and enforcement.[13] In the roadmap on the inception impact assessment for the revision of the AAQD, the EU Commission stated its intention to consider policy options to improve the legal framework, taking into account the "*entitlement of citizens to bring claims for damages, within the conditions set by the CJEU case law on State Liability.*"[14]

[6] https://www.judiciary.uk/wp-content/uploads/2021/04/Ella-Kissi-Debrah-2021-0113-1.pdf
[7] See Cases (1) *Farida T.* , (Tribunal Administratif de Montreuil 2019), N° 1802202 <http://montreuil.tribunal-administratif.fr/Actualites/Actualites-Communiques/Communique-de-presse-du-25-juin-2019>, (2) *N.*, (Tribunal de Paris, 2019), N°1709333/4-3, (3) *M. G.*, (Tribunal de Paris, 2019), N°1814405/4-3 <http://paris.tribunal-administratif.fr/Actualites-du-Tribunal/Communiques-de-presse/POLLUTION-DE-L-AIR>, (4) *D.E.*, (Tribunal Administratif de Grenoble, 2020), N° 1800067 <http://grenoble.tribunal-administratif.fr/content/download/177246/1745929/version/2/file/1800067.pdf>
[8] Case C-61/21 *JP v Ministre de la Transition écologique, Premier ministre*; Request for a preliminary ruling from the Cour administrative d'appel de Versailles (France) lodged on 2 February 2021.
[9] For example Cases: (1) *Z. K. against Polish Ministry of Environment*, (the Court of Appeal in Katowice, 2014), V ACa 649/13 <http://orzeczenia.katowice.sa.gov.pl/content/$N/151500000002503_V_ACa_000649_2013_Uz_2014-01-23_001> now pending before the ECtHR, (2) *G.S. against Polish Ministry of Environment*, (the District Court in Warsaw, 2019), VI C 1043/18 <https://www.saos.org.pl/judgments/371572>, (3) *T.S, M.S. and J.S. against Polish Ministry of Environment*, (the District Court in Warsaw, 2019), II C 661/19 <https://www.saos.org.pl/judgments/406721>, (4) *O.P. against Polish Ministry of Environment*, (Polish Supreme Court), III CZP 27/20, a preliminary question from the Regional Court in Gliwice (III Ca 1548/18) <http://www.sn.pl/sprawy/SitePages/e-Sprawa.aspx?ItemSID=2521-bf64e294-b9ca-4518-b9cd-2b8c7295f4de&ListName=esprawa2020&Search=III%20CZP%2027/20> .
[10] http://en.frankbold.org/news/inhabitant-ostrava-suffering-lung-cancer-sues-ministry-environment-air-pollution
[11] *M.A. v. Le préfet de la Haute-Garonne* (the Administrative Court of Appeal in Bordeaux), [18 December 2020], <https://www.dalloz.fr/documentation/Document?id=CAA_BORDEAUX_2020-12-18_20BX02193_dup#texte-integral> accessed January 2021
[12] In Bangladesh, there is one of the highest concentrations of particulate matter pollution in the world.
[13] EU Action Plan 'Towards Zero Pollution for Air, Water and Soil' COM/2021/400 final
[14] EU Commission, Roadmap Inception impact assessment - Ares(2020)7689281.

Against this background, it is a good time to pause and take stock of the existing legal framework and relevant case law and to reflect upon the question of whether EU citizens have an individual right to clean and healthy air – including what this right entails.

In the following sections we consider, first, the question of whether citizens do enjoy an individual right to clean and healthy air under EU law. In considering the issue, we also provide an overview of developments at the national, European and global levels relating to the emergence of a fundamental right to clean and healthy air (Section 2).

We then consider what the existence of an individual right to clean and healthy air means in practice. In particular, we discuss the right of individuals to obtain effective judicial protection, including the ability to demand compliance to prevent harm and, where harm has been sustained, to obtain compensation (Section 3).

We conclude with three recommendations on steps that should be taken to facilitate the enjoyment and exercise of the individual right to clean and healthy air under EU law (Section 4).

2 Do EU citizens have an individual right to clean and healthy air?

It is commonly stated that citizens in the EU have a right to clean and healthy air. However, there is no explicit reference to such right in the AAQD or other pieces of EU legislation. It is therefore important to consider whether and how EU citizens have an individual right to clean and healthy air.

In doing so, it is useful to first broaden the picture. EU law does not exist in a legal vacuum. The European Convention on Human Rights ('**ECHR**' or the '**Convention**') serves as point of reference when interpreting the rights protected by the EU Charter of Fundamental Rights. Moreover, rights and obligations in global human rights frameworks, as well national constitutions, play a role in the interpretation of EU law.

We then zoom in on EU law to discuss how, in our view, the current EU *acquis* already recognises an individual right to clean and healthy air.

2.1 Recognition of the right to clean and healthy air as a fundamental right – national, European and global perspectives

The purpose of this section is to provide a short overview of an emerging trend of the recognition of the right to a healthy environment and, more particularly, to one element of such right – the right to clean and healthy air. The intention is not to provide a complete overview of that trend, but rather to set the scene by outlining constitutional frameworks in EU Member States, relevant provisions and case law under the ECHR and trends at a global level.

2.1.1 Developments at national level

A recent study by the UN Special Rapporteur on human rights and the environment on national practices in recognising the right to a healthy environment shows that *all* EU Member States have recognised this

right directly or indirectly.[15] Nineteen EU Member States have recognised the right to a healthy environment directly in their constitutions or by Supreme Court/Constitutional Court jurisprudence.[16] Eight remaining EU Member States recognised the right to healthy environment by ratification of international treaties, mainly the Aarhus Convention.[17] This points to there being consensus within the European Union Member States towards legal recognition of the right to a healthy environment. It is worth highlighting for the purpose of this note that the Rapporteur has clarified that "*the right to breathe clean air […] is one of the vital elements of the right to a healthy and sustainable environment*".[18]

2.1.2 European Convention of Human Rights

The ECHR does not codify *expressis verbis* the right to health and never mentions the word "environment." The European Court of Human Rights ('**ECtHR**') has stated several times that "[n]*either Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such*"[19] and there is no "*explicit right to a clean and quiet environment*".[20] However, health and environment have a prominent place in the ECtHR case law[21] and there are solid reasons to conclude that the ECtHR has already recognised *de facto* a right to a safe and healthy environment.[22]

The key provisions for these developments are Article 8 of the ECHR (protection of the right to private and family life) and Article 2 of the ECHR (protection of the right to life). On numerous occasions, the ECtHR has confirmed that there is a right to protection against environmental hazards. It has found violations of Article 8 of the ECHR in the context of asbestos pollution,[23] industrial pollution[24] and waste pollution.[25] Under Article 2 of the ECHR, the ECtHR has confirmed that activities creating environmental

[15] UN Special rapporteur on human rights and the environment, *Recognition of the Right to a Healthy Environment in Constitutions, Legislation and Treaties*, (Annual thematic report, 30 December 2019), A/HRC/43/53, page 8, at https://undocs.org/A/HRC/43/53.
[16] The latter is the case, for example, in Italy and Ireland.
[17] See for details Annex VI Eastern Europe and Annex VIII Western Europe to the UN Special Rapporteur report A/HRC/43/53 that summarise the recognition of the right to healthy environment at the national level in the 27 EU Member States.
[18] Report of the UN Special Rapporteur on human rights and the environment to the UN General Assembly, *Right to breathe clean* air A/HRC/40/55, 8 January 2019, paragraph 17, p.4, available at https://undocs.org/A/HRC/40/55.
[19] *Kyrtatos v. Greece*, 41666/98, (ECtHR, 22 May 2003), [52].
[20] *Hatton and Others v. the United Kingdom* [GC], 36022/97, (ECtHR, 8 July 2003), [96] (emphasis added).
[21] The European Court of Human Rights, Factsheet on *Environment and the ECHR*, <https://www.echr.coe.int/Documents/FS_Environment_ENG.pdf> and Thematic report of the Jurisconsult's Department of the European Court of Human Rights, *Health-related issues in the case-law of the European Court of Human Rights*, *Health and the Environment,* Council of Europe/European Court of Human Rights, June 2015, p. 22 <https://www.echr.coe.int/Documents/Research_report_health.pdf>
[22] See for example dissenting opinion of Judges Costa, Ress, Turmen, Zapancic and Steiner in case *Hatton and Others v. the United Kingdom* [GC].
[23] *Brincat and Others v. Malta*, 60908/11 (ECtHR, 24 July 2014).
[24] *Băcilă v. Romanie*, 19234/04 (ECtHR, 30 March 2010) lead and zinc producer that released large quantities of sulphur dioxide and dust containing heavy metals, mainly lead and cadmium, into the atmosphere, *Fadeyeva v. Russia,* 55723/00, (ECtHR, 9 June 2005), steel-producing centre.
[25] *López Ostra v. Spain*, 16798/90 (ECtHR, 9 December 1994).

hazards, such as the operation of waste collection sites, can pose a risk to the right to life.[26] Significantly, the ECtHR has also, on several occasions, referred explicitly to the right to a healthy environment.[27]

In the context of air pollution, the ECtHR found a violation of the right to private and family life protected by Article 8 of the ECHR in a case in which the applicant was exposed for significant periods of time to air pollution that seriously exceeded national legal values.[28] In the context of pollution generated by traffic emissions, the ECtHR has found that "*soot and respirable dust particles can have a serious detrimental effect on health, in particular in densely populated areas with heavy traffic*", concluding that the right to respect for private and family life was engaged.[29]

2.1.3 Trends at a global level

Alongside such recognition by Member States and the ECtHR in Europe, there are also some remarkable developments in a number of decisions issued by UN Human Rights Treaty Monitoring Bodies that continue to underline the connection between the violation of human rights and environmental pollution.[30] Regarding air pollution in particular, the UN Committee of the Rights of Child repeatedly raised concerns about high levels of air pollution and the detrimental impacts on children's right to health in their Concluding Observations on the United Kingdom (2016),[31] Spain (2018)[32] and Austria (2020).[33]

2.2 The EU legal framework and individual rights under the Ambient Air Quality Directive

EU law does not expressly recognise an individual right to clean and healthy air. However, we believe that a correct interpretation of the AAQD, by reference to the general scheme and the purpose of the rules of which it forms part, leads to the conclusion that EU law grants to individuals a right to air quality

[26] *Öneryıldız v. Turkey [GC]*, 48939/99 (ECtHR, 30 November 2004), [71] and [89].
[27] See for example *Tătar v. Romania*, 67021/01, (ECtHR, 27 January 2009), [107], [109], [112] and *Di Sarno and Others v. Italy*, 30765/08 (ECtHR, 10 January 2012), [110].
[28] See *Fadeyeva v. Russia*, 55723/00, at [87-88].
[29] See *Greenpeace E.V. and others v. Germany* (dec.), 18215/06, (ECtHR, 12 May 2009).
[30] See, e.g., *Norma Portillo Caceres v. Paraguay*, CCPR/C/126/D/2751/2016, (the Human Rights Committee Communication, 25 July 2019), concerning environmental pollution coming from pesticides in which the Human Rights Committee found the violation of the right to life <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d/PPRiCAqhKb7yhsjvfIjqiI84ZFd1DNP1S9EJbt9fNOFAeKim6Xa3i/rdihcAq5mehv/TQWGvWXGl9qxCMDHlPL/255BdzTObanB0KePC5lUhW9PcaGTS236CEGC/xZYkxw6uCobQzU8IvPw%3D%3D >.
[31] Committee on the Rights of the Child, Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, no CRC/C/GBR/CO/5 <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d/PPRiCAqhKb7yhskHOj6VpDS//Jqg2Jxb9gncnUyUgbnuttBweOlylfyYPkBbwffitW2JurgBRuMMxZqnGgerUdpjxij3uZ0bjQBOLNTNvQ9fUIEOvA5LtW0GL>
[32] Committee on the Rights of the Child, Concluding observations on the combined fifth and sixth periodic reports of Spain, no CRC/C/ESP/CO/5-6 <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d/PPRiCAqhKb7yhsvTvWdCiXbcdHJgod/48UvVLFjvw69pQaqdk3icKuqRzUXTOu9Jkdgy7484z0GiSTkXAAbmzZQRDft4dHK6kwj%2B88PsBa5U52YlaA437rBzH>
[33] Committee on the Rights of the Child, Concluding observations on the combined fifth and sixth periodic reports of Austria, no CRC/C/AUT/CO/5-6 <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d/PPRiCAqhKb7yhsvkrHee8tArE5cEO48WRQ1gVMWjPAohzJdodkn0%2BhzkT3o0ypXMuZuHcJ2JrCvBAfWT2gxG4CnKP3OYI7GQNgUlNTid242NuiqJ%2BogBOlISF>

with levels of pollutants not exceeding the limit values set under Article 13 and Annex XI of the AAQD for the protection of human health.

There is extensive and consistent case law from the CJEU making it manifestly clear that the provisions of the AAQD – and, more specifically, Articles 13 and 23 – confer on individuals rights on which they are entitled to rely directly before national courts. The existence of these individual rights is further bolstered by an understanding of the provisions of the AAQD as the direct expression of the fundamental rights that EU citizens enjoy under EU law.

Key elements of CJEU case law and characteristics of the relevant AAQD provisions that support this position are explained in further detail below.

2.2.1 The direct effect of Article 13 and Article 23

The CJEU has clarified, in express terms, that the aim of the AAQD is to protect human health.[34] According to the well-established case law of the Court, mandatory rules in directives designed to protect public health confer rights on individuals.[35]

Article 13 of the AAQD sets out the obligation on Member States to ensure that the levels of identified air pollutants do not exceed limit values prescribed in Annex XI. Such provision contains a clear, precise and unconditional obligation that can be invoked by individuals against the State.

A number of important elements support this interpretation.

A. The combined wording of Article 13 of the AAQD is extremely clear, precise and unconditional

Article 13 provides that:

> *"Member States shall ensure that, throughout their zones and agglomerations, levels of sulphur dioxide, PM_{10}, lead, and carbon monoxide in ambient air do not exceed the limit values laid down in Annex XI.*
>
> *In respect of nitrogen dioxide and benzene, the limit values specified in Annex XI may not be exceeded from the dates specified therein."*

Article 2, point 5, of the AAQD defines limit values as follows:

> *"'limit value' shall mean a level fixed on the basis of scientific knowledge, with the aim of avoiding, preventing or reducing harmful effects on human health and/or the environment as a whole, to be attained within a given period and not to be exceeded once attained."*

In turn, Annex XI sets clear, precise and unconditional levels for the different limit values and specifies the "*Date by which limit value is to be met*."

[34] See Case C-723/17 *Craeynest* at §67
[35] See among others Case C-361/88 *Commission v Germany* at §16; Case C-59/89 *Commission v. Germany* at §19; Case C-58/89 *Commission v Germany* at §14; Case C-237/07 *Janecek v Freistaat* Bayern at § 39; Case C-404/13 *ClientEarth*, at §§55-56

The provisions lack ambiguity or qualification and leave nothing to the discretion of Member States. This has been reflected in the CJEU's judgments, which have repeatedly confirmed that Article 13 imposes an absolute obligation of result on Member States to achieve compliance with limit values.[36]

B. From the case law of the CJEU, it is clear that the obligation of Member States to comply with air quality limit values confers rights to individuals.

This principle was first established by the CJEU in Case C-59/89 *Commission v Germany* (emphasis added):

> *"18. [A]ccording to the case-law of the Court (see, in particular, the judgment in Case 131/88 Commission v Germany [1991] ECR I-825), 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.*
>
> *19. In that respect, it should be pointed out that* ***the obligation imposed on the Member States to prescribe a limit value*** *which must not be exceeded in specified circumstances, […] is imposed […] "specifically in order to help protect human beings against the effects of lead in the environment". […* T*]he obligation* ***implies, therefore, that whenever the exceeding of the limit values could endanger human health the persons concerned must be in a position to rely on mandatory rules in order to be able to assert their rights****."*

The CJEU went on to consistently repeat the same principle in Case C-237/07 *Janecek v Freistaat Bayern*, at §39, and Case C-404/13 *ClientEarth*, at §55-56, as regards the AAQD.

Similarly, existing case law of the CJEU leaves there no doubt that Article 23 AAQD has direct effect and confers rights on individuals:

- In Case C-237/07 *Janecek*, the CJEU was asked to determine whether an individual could require the competent authorities to draw up an action plan under Article 7(3) of Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management (the precursor to Article 23 of the AAQD). At §§35-42, the CJEU concluded that the answer was "yes".
- In Case C-404/13 *ClientEarth* at §§53-56, the CJEU, referring to *Janecek*, made clear that individuals were entitled to bring proceedings to secure compliance with Article 23 of the AAQD.

2.2.2 The direct expression of fundamental rights

As outlined in section 2.1 above, there is a growing tendency at the national, European and global levels towards the recognition of a right to healthy environment and, in particular, a right to clean and healthy air. This trend is particularly relevant to the EU, given the link between the individual rights conferred by

[36] See, for example, Case C-644/18 *Commission v Italy*, §§79-80, and Case C-404/13 *ClientEarth* §30.

Article 13 and 23 of the AAQD and the fundamental rights that EU citizens enjoy under the EU Charter of Fundamental Rights ('**EU Charter**').

The CJEU, in Case C-723/17 *Craeynest*, has expressly recognised that the provisions of the AAQD are a direct expression of the fundamental obligations of the Union under the Treaties:

> *"As the Advocate General pointed out, in essence, in point 53 of her Opinion,* ***the rules laid down in Directive 2008/50 on ambient air quality put into concrete terms the EU's obligations concerning environmental protection and the protection of public health, which stem, inter alia, from Article 3(3) TEU and Article 191(1) and (2) TFEU****, according to which Union policy on the environment is to aim at a high level of protection, taking into account the diversity of situations in the various regions of the European Union, and is to be based, inter alia, on the precautionary principle and on the principle that preventive action should be taken […]."*[37]

It is worth quoting in full the paragraph of the Opinion of Advocate General Kokott, referenced by the CJEU, as it provides further clarification on this point:

> *"53. [N]ote should be taken of the* ***considerable importance of the rules on ambient air quality*** *highlighted by the Commission. Directive 2008/50 is based on the assumption that exceedance of the limit values leads to a large number of premature deaths.* ***The rules on ambient air quality therefore put in concrete terms the Union's obligations to provide protection following from the fundamental right to life under Article 2(1) of the Charter*** *and the high level of environmental protection required under Article 3(3) TEU, Article 37 of the Charter and Article 191(2) TFEU. Measures which may impair the effective application of Directive 2008/50 are thus comparable, in their significance, with the* ***serious interference with fundamental rights*** *on the basis of which the Court made the rules on the retention of call data subject to strict review."*[38]

Furthermore, Recital 30 of the AAQD states expressly that "*This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union*."

It is arguable that EU law grants to individuals a right to air quality with pollution levels not exceeding the limit values set under Article 13 and Annex XI of the AAQD for the protection of human health. This right should be read in conjunction with the fundamental rights conferred to EU citizens by the Treaties and the EU Charter – namely, the right to life (Article 2 EU Charter), the right to private life (Article 7 EU Charter) and the right to healthcare (Article 35 EU Charter).

Such understanding of this right is in line with the interpretation of the protection of private and family life under Article 8 of the ECHR in the context of air pollution, as set out in section 2.1.2. The body of case law summarised in that section points to the conclusion that the ECtHR has recognised the right to clean and healthy air. The case law of the ECtHR is relevant to considering the position under EU law, as stated in Article 52(3) of the EU Charter: "[i]*n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention*".

[37] Case C-723/17 *Craeynest* at §33.
[38] See Opinion of Advocate General Kokott in Case C-723/17 *Craeynest*, §53, emphasis added

3 What do individual rights to clean and healthy air under EU law mean in practice?

Where individuals benefit from rights under EU law, they also benefit from the right to obtain effective remedies from the courts in the event that those rights are infringed.[39] This fundamental right imposes an obligation on national courts to interpret national procedural provisions in a manner that facilitates effective protection of rights derived from EU law.[40]

In Case C-752/18 *Deustche Umwelthilfe*, the CJEU has clarified that:

> *"when the Member States implement EU law, they are required to ensure compliance with the right to an effective remedy enshrined in the first paragraph of Article 47 of the Charter (judgment of 29 July 2019, Torubarov, C-556/17, EU:C:2019:626, paragraph 69), a provision which constitutes a reaffirmation of the principle of effective judicial protection".*[41]

Crucially, the CJEU went on to stress that:

> *"The right to an effective remedy is all the more important because, in the field covered by Directive 2008/50, failure to adopt the measures required by that directive would endanger human health (see, by analogy, judgment of 25 July 2008, Janecek, C-237/07, EU:C:2008:447, paragraph 38)."*[42]

For national courts to effectively protect the rights of individuals in this way, two complementary tools are necessary: (1) allowing individuals to rely on the directly effective provisions of the Treaties in order to secure Member State compliance and prevent harm; and (2) holding Member States liable to compensate individuals in instances where harm has already been sustained (the principle of State liability).

The CJEU has clarified that the second of those tools is the corollary of the first, explaining that the right to rely on the directly effective provisions of the Treaty is only a minimum guarantee. It is not sufficient in itself to ensure full and effective protection of individual rights, as there may still be cases in which they sustain damage.[43]

This interpretation is consistent with the system of protection under the ECHR. In particular, according to well-established case law of the ECtHR, the nature of the right at stake has implications for the type of remedy the State party is required to provide to citizens. In the context of the right to life, protected by Article 2 of the ECHR, compensation for pecuniary and non-pecuniary damage should be made available as one form of redress.[44]

With that in mind, the sections below expand on both types of remedy in the context of the individual rights inferred by the AAQD.

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[39] Article 47 of the EU Charter.
[40] See Case C-432/05 *Unibet*, in particular §37 and §44.
[41] Case C-752/18 *Deustche Umwelthilfe* at §34.
[42] *Ibid.* §38.
[43] See Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland* and *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, (hereinafter, '***Brasserie du Pêcheur***'), at §§18-22.
[44] See *Budayeva and Others v. Russia*, 15339/02, [191] and *Öneryıldız v. Turkey [GC]*, 48939/99, [147].

3.1 Remedies aimed at securing compliance and the prevention of future harm

The CJEU has repeatedly stressed that it is open to individuals and NGOs to enforce against the failure of Member States to comply with their obligations under Articles 13 and 23, and to seek effective remedies in the domestic courts in response to responsible authorities' failures to achieve limit values or to adopt adequate air quality plans.

In this context, case law of the CJEU has clarified that individuals (and NGOs) have a right to clean and healthy air, which includes the following six aspects:

1. EU citizens have a right to breathe air that meets EU limit values.[45] Member States are under an obligation of result to achieve compliance with the limit values. Practical, financial, technical or other difficulties in achieving limit values are not relevant.[46]

2. EU citizens have a right to obtain information on air quality and to demand the installation of monitoring stations to ensure the collection of accurate and reliable information.[47]

3. Where air does not meet limit values, EU citizens have a right to demand the adoption of air quality plans complying with certain legal requirements. In particular, plans must contain all the measures necessary to secure compliance in the shortest time possible, not merely a "gradual return" to compliance.[48]

4. EU citizens have the right of standing – that is, the right to go to court to demand the adoption of adequate air quality plans that ensure compliance.[49]

5. EU citizens have the right to substantive review of the plans. Given the fundamental nature of the interests protected by the AAQD, the discretion of Member States is significantly reduced. National courts must review administrative decisions in depth, which may involve complex scientific assessments as to the design of air quality monitoring networks and the content of air quality plans.[50]

6. EU citizens have the right to obtain effective remedies from the national court, including an order in the appropriate terms that the relevant authority establish the air quality plan required by the AAQD[51] as well as "*effective coercive measures in order to ensure that the public authorities comply with a judgment*."[52]

This right to redress for breaches of the AAQD does not necessarily rely on the individual or organisation concerned having suffered harm. Rather the remedies are aimed at forcing compliance by the

[45] See, among others, Case C-59/89 *Commission v Germany*, §§18-19.
[46] See, among others, Case C-644/18 *Commission v Italy*, §87.
[47] See Case C-723/17 *Craeynest*, §§42-43.
[48] See, among others, Case C-404/13 *ClientEarth* §57. See also Case C-644/18 *Commission v Italy*, §§78-80.
[49] See, among others, Case C-404/13 *ClientEarth* §56.
[50] See, among others, Case C-723/17 *Craeynest*, §46. See also Case C-404/13 *ClientEarth*, §57, and Case C-644/18 *Commission v. Italy*, §§148-150.
[51] See Case C-404/13 *ClientEarth*, §58.
[52] See Case C-752/18 *Deustche Umwelthilfe* at §40.

responsible authorities. When it comes to the *prevention* of harm, this is (and must continue to be) the most effective route to seeking remedy for violation of the individual rights conferred by the AAQD.

While the CJEU case law provides a clear and solid basis for pursuing cases before national courts, access to justice problems persist in certain jurisdictions – particularly in Central and Eastern Europe, where national courts routinely ignore the case law of the CJEU, denying individuals and NGOs standing to challenge air quality plans. In particular, ClientEarth has already identified and faced serious access to justice barriers in Bulgaria and Poland (causing the Commission to start infringement proceedings in May 2020). In January 2021, a Hungarian NGO was also refused access to justice by the Hungarian Supreme Court in a case concerning the review of the Budapest air quality plan.[53]

Furthermore, large discrepancies have emerged in the remedies and/or the mechanisms to enforce judgments applied by domestic courts. In some domestic contexts, remedies have been ineffective at enforcing compliance and preventing harm. For example:

- In the Czech Republic, there are no effective remedies. In 2018, national courts quashed the air quality plans in Prague, Brno, Ostrava and Ustecky region, but the courts did not have the power to issue an order to the government to adopt a new plan by a set deadline. More than two years later, the government has not yet adopted new plans.
- In Germany, authorities that refuse to comply with their obligations under the AAQD face the threat of financial penalties of such a low amount that they do not have a sufficiently dissuasive effect. The ineffectiveness of such penalties was clearly demonstrated by the ruling of the CJEU in case *Deutsche Umwelthilfe* (C-752/18).

In particular, in *Deutsche Umwelthilfe*, the CJEU stated that national legal systems must provide for "*effective coercive measures in order to ensure that the public authorities comply with a judgment that has become final, such as, in particular, high financial penalties that are repeated after a short time and the payment of which does not ultimately benefit the budget from which they are funded*."[54]

It is clear that judicial protection available to individuals to prevent Member States' breaches of the AAQD is not consistently effective and is not sufficiently coercive to secure compliance, as the CJEU has stressed is necessary. In many Member States, ambient air pollution persists at dangerous levels which are well above those legal limits set under the AAQD to protect human health.[55]

3.2 Compensation for harm suffered and the Francovich doctrine of State liability

Alongside the right of individuals to rely on the directly effective provisions of EU law before national courts, the principle of State liability allows for individuals to seek compensation in a domestic setting for harm suffered as a result of Member State non-compliance. The application of this principle of State liability to breaches of Member States' obligations under the AAQD is the subject of a preliminary reference currently before the CJEU in Case C-61/21 *Ministre de la Transition écologique and Premier ministre*.

[53] Judgment of the Hungarian Supreme Court of 19 January 2021, no. Kfv.IV.37.700/2020/5.
[54] See Case C-752/18 *Deustche Umwelthilfe* at §40.
[55] In 2019, 23 Member States reported exceedances of at least one air quality standard.

It is worth noting first that, while the preliminary reference from the French court in Case C-61/21 raises novel issues yet to be tested by the CJEU in relation to the AAQD, the CJEU has already expressly acknowledged the principle that breaches of the AAQD can give rise to a claim for State liability under EU law, in Case C-752/18 *Deutsche Umwelthilfe*:

> *"Furthermore, it should be remembered that* ***the full effectiveness of EU law and effective protection of the rights which individuals derive from it may, where appropriate, be ensured by the principle of State liability for loss or damage caused to individuals as a result of breaches of EU law for which the State can be held responsible, as that principle is inherent in the system of the treaties on which the European Union is based*** *(see, to that effect, judgments of 5 March 1996, Brasserie du pêcheur and Factortame, C 46/93 and C 48/93, EU:C:1996:79, paragraphs 20, 39 and 52, and of 28 July 2016, Tomášová, C 168/15, EU:C:2016:602, paragraph 18 and the case-law cited).*"[56]

This section explains why and how ClientEarth considers this doctrine to apply in the context of breaches of Member States' obligations (and individuals' corresponding rights) under the AAQD.

The principle of State liability for non-compliance with EU law was established by the CJEU in Joined Cases C-6/90 and C-9/90 *Francovich*. The CJEU held that, as a matter of principle, full effectiveness of EU law requires that a State could be liable to compensate an individual for damage caused by an infringement of EU law for which that State was responsible.[57]

The conditions which must be satisfied before liability in damages may arise were reformulated as a three-limbed test in *Brasserie du Pêcheur*:

> *"the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious, and there must be a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties."*[58]

Our understanding of the factors relevant to each of those three limbs are summarised in high-level in the following sections – by reference to relevant CJEU case law in general terms, and then to the relevant provisions of the AAQD specifically.

3.2.1 Conferring rights on individuals

The first condition of the *Brasserie du Pêcheur* test is satisfied where the provisions of a Directive confer on individuals rights on which they are entitled to rely directly before national courts.

As explained in section 2.2 above, it is manifestly clear that both Article 13 and Article 23 of the AAQD confer rights to individuals and therefore satisfy the first limb of the *Brasserie du Pêcheur* test. This is due to the clear and unqualified nature of the provisions as well as the well-established case law of the CJEU on the principle of direct effect.

In this regard, it is important to stress that the fact that individuals are in the position to ask authorities to adopt air quality plans pursuant to Article 23 in order to achieve urgent compliance with the limit values

[56] Case C-752/18 *Deutsche Umwelthilfe*, §54 (emphasis added)
[57] Joined Cases C-6/90 and C-9/90 *Francovich*, §§33-37.
[58] *Brasserie du Pêcheur* at §51.

set under Article 13 does not mean that individuals should be prevented from also obtaining compensation in instances when they have already suffered damage. As clarified by the CJEU, the possibility to directly invoke rights granted by EU law in national courts "*is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty*."[59]

3.2.2 Sufficiently serious breach

The decisive benchmark for finding that a breach of EU law is 'sufficiently serious', for the purpose of the *Brasserie du Pêcheur* test, is whether the Member State manifestly and gravely disregarded the limits on its discretion.[60]

The CJEU has identified a number of factors that may be taken into account by a national court in deciding whether a breach is sufficiently serious. These include: (1) the clarity and precision of the rule of EU law that has been breached; (2) the extent of the discretion left to Member States; (3) whether the damage caused was intentional or voluntary; (4) whether any error of law was excusable; and (5) whether the position adopted by one of the EU institutions contributed to the adoption or retention of the national measures that violated EU law.[61]

The CJEU has also added that a breach of EU law will clearly be sufficiently serious if it has persisted following a judgment that the infringement in question has been established, or following a preliminary ruling or case law of the Court from which it is clear that the conduct in question constituted an infringement.[62]

Below we provide our understanding of how any breaches of Article 13 and 23 of the AAQD constitute a sufficiently serious breach by direct reference to the six relevant factors outlined by the Court in *Brasserie du Pêcheur*.

(1) The clarity and precision of the rule of EU law that has been breached

Article 13 could not be more precise. As explained in section 2.2.1, it sets an absolute obligation of result to ensure that the concentration of identified pollutants in ambient air remains within prescribed numerical limits. Annex XI describes very clearly the levels of pollution corresponding to the various limit values and the relevant compliance dates.

Article 23 is also very clear and specific in terms of what it requires from Member States. Air quality plans must "*set out appropriate measures, so that the exceedance period can be kept as short as possible*." The AAQD sets out detailed content requirements on what information those plans must contain (Annex XV).

[59] *Brasserie du Pêcheur* at §20.
[60] *Ibid.* at §55.
[61] *Ibid.* at §56.
[62] *Ibid.* at §57.

(2) The extent of the discretion left to Member States

The CJEU has clarified that where the margin of discretion left to a Member State is considerably reduced, or inexistent, the mere infringement of EU law is sufficient to establish the existence of a sufficiently serious breach.[63]

It is undisputable that EU law leaves no margin of discretion to Member States in relation to their Article 13 obligation to comply with limit values.

The CJEU has consistently held that Article 13 sets an obligation of result. It imposes an absolute obligation to achieve compliance with limit values.[64] Once the deadline to achieve this particular air quality result is expired, there is no discretion left for Member States.[65]

Moreover, case law of the CJEU has consistently clarified that the margin of discretion left to Member States under Article 23 is significantly reduced by the obligation to keep the exceedance period as short as possible.[66]

It must also be stressed that the EU and Member States have already weighed and balanced all relevant considerations – not only scientific evidence, but also technical, socio-economic and political factors – when deciding on limit values and setting deadlines for compliance. Once a deadline has expired, there is no discretion left to Member States to account for these (or any other) considerations.

Given the importance of the protected interest (human health) and the non-existent or very limited margin of discretion left to Member States under Articles 13 and 23, it is arguable that *any* breach of these provisions by a Member State should be deemed 'sufficiently serious' for the purposes of the *Brasserie du Pêcheur* test. For completeness, the additional factors set out in *Brasserie* are considered below.

(3) Whether the damage caused was intentional or voluntary

The CJEU has repeatedly clarified that, once it has been established that a limit value has been exceeded:

> *"in the absence of proof […] of the existence of exceptional circumstances whose consequences could not have been avoided despite all the steps taken,* ***it is irrelevant whether the failure to fulfil obligations is the result of intention or negligence*** *on the part of the Member State responsible, or of technical or structural difficulties encountered by it".*[67]

Moreover, it is noteworthy that the provisions of the AAQD are extremely clear about the importance of reducing air pollution in order to protect human health. By failing to comply with limit values, Member State authorities are acting in the knowledge that this will be causing harmful health impacts to befall their citizens. As recognised consistently by the CJEU in its case law, "*in the field covered by Directive*

[63] See Case 352/98 P *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission* at §44.
[64] Case C-404/13 *ClientEarth* at §30.
[65] See the consistent case law of the CJEU on this point, as reflected in the recent ruling of the Grand Chamber in Case C-644/18 *Commission v Italy* at §§85-87.
[66] See, for instance, Case C-644/18 *Commission v Italy* at §150 and Case C-404/13 *ClientEarth*, at §57.
[67] See Case C-644/18 *Commission v Italy* at §87, emphasis added.

2008/50, failure to adopt the measures required by that directive would endanger human health."[68] Harm to human health cannot be couched as an unforeseen or accidental consequence of Member State failures to comply with Article 13 and/or Article 23.

(4) Whether any error of law was excusable

The provisions of Articles 13 and 23 are extremely clear and leave no space for any 'error of law'.

As explained at section 2.2.1, the CJEU has consistently interpreted these provisions as imposing obligations of result that give rights to individuals and leave very little margin of discretion to the relevant authorities. This case law dates back to the early 1990s and has been confirmed in several preliminary rulings and judgments dealing with infringements by the Commission.

It is worth stressing the jurisprudence from the CJEU clarifying that technical, financial or administrative difficulties are not sufficient to excuse Member States from failing to fulfil their obligations under Articles 13 and 23.[69]

(5) Whether the position adopted by one of the EU institutions contributed to the adoption or retention of the national measures that violated EU law

During infringement proceedings against persistent breaches of the AAQD, the French, UK and German governments have tried to evade liability for breaches of Article 13 by arguing that these were caused by the failure of the EU Commission to properly address the discrepancy between laboratory tests and on road NO_x emissions from diesel vehicles. However, the CJEU has expressly and repeatedly rejected this defence.[70] An equivalent defence would almost certainly be met with the same response in a claim for State liability.

(6) Prior case law of the CJEU

The CJEU has already issued judgments against many Member States in the course of infringement proceedings, finding them to be in breach of both their Article 13 and Article 23 obligations.[71] In many of these cases, breaches of the AAQD have also been established in proceedings before national courts – for example, in the UK, Germany and France. However, in all cases, breaches have persisted after CJEU and/or national judgments on the matter.

Notwithstanding the fact that there is a prior judgment of the CJEU finding an infringement by these Member States, which will certainly be determinative of a sufficiently serious breach, the CJEU has made it clear that such a judgment is not essential in order for the sufficiently serious condition to be satisfied.[72] Furthermore, the obligation of the Member State concerned to make reparation cannot be

[68] See Case C-752/18 *Deutsche Umwelthilfe* at §38, and, by analogy, Case C-237/07 *Janecek* at §38. See also Opinion of AG Kokott in Case C-723/17 *Craeynest* at §33: "*Directive 2008/50 is based on the assumption that exceedance of the limit values leads to a large number of premature deaths*".
[69] See, for instance, Case C-68/11 *Commission v Italy* at §§58-66, and Case C-636/18 *Commission v France* at §42 and §85.
[70] See Case C-636/18 *Commission v France* at §48, Case C-664/18 *Commission v United Kingdom* at §60, Case C-635/18 *Commission v Germany*, at §90.
[71] See Cases C-365/10 *Commission v Slovenia*, C-479/10 *Commission v Sweden*, C-34/11 *Commission v Portugal*, C-68/11 *Commission v Italy*, C-488/15 *Commission v Bulgaria*, C-336/16 *Commission v Poland*, C-635/18 *Commission v Germany*, C-636/18 *Commission v France*, C-638/18 *Commission v Romania*, C-644/18 *Commission v Italy*, C-664/18 *Commission v UK*.
[72] *Brasserie du Pêcheur* at §93.

confined only to loss or damage sustained after delivery of a judgment of the CJEU finding the breach in question.[73]

3.2.3 Causal link

Regarding the third condition of the *Brasserie du Pêcheur* test for State liability, the CJEU leaves the determination of the existence of a causal link to the internal legal order of the Member States, pursuant to the principle of procedural autonomy.[74]

The starting point, therefore, is that the State must make reparation for any loss and damage caused in accordance with domestic rules on liability. Nevertheless, these domestic rules must satisfy two conditions: (1) they are no less favourable than those governing similar domestic actions (principle of equivalence); and (2) they do not make it impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness).[75] If national rules on liability do not meet those conditions, the courts must step in.

In Case C-432/05 *Unibet*, the CJEU stated that the principle of effective judicial protection creates an obligation for the national courts to interpret national procedural provisions in a manner that facilitates effective judicial protection of the rights derived from the EU law (see §37 and §44). In *Brasserie du Pêcheur*, at §§68-73, the CJEU set aside provisions of German and UK law that would have made it impossible to obtain reparation.

The preliminary reference questions referred to the CJEU in Case C-61/21 offer an opportunity to clarify the application of the causal link test in air quality matters. In our view, it would be beneficial for the CJEU to consider introducing specific mitigations that are necessary to ensure that domestic rules on causality and burden of proof do not, in practice, make it impossible or excessively difficult to obtain compensation for damage suffered for breaches of the AAQD. There is also the opportunity for such mitigations to be clarified expressly in EU legislation through revisions to the AAQD.

In ClientEarth's view, it is important to look into the case law of the ECtHR not only as a source of inspiration, but also as a legally relevant reference for the correct interpretation of Article 47 of the EU Charter. In particular, the right to effective remedy under the EU Charter has to be interpreted in line with the understanding of the ECtHR in its extensive case law interpreting Article 13 and Article 6 of the ECHR.[76]

The ECtHR is well aware that there is an information asymmetry between the State and individuals. Such awareness has led the ECtHR to mitigate the burden of proof on individual claimants and to clarify that State parties have an obligation to undertake effective investigation into the events and the cause of loss.

(a) Mitigation of the principle *affirmanti, non neganti, incumbit probatio*

The ECtHR has often repeated the need to alleviate the burden of proof of individual claimants in matters involving fundamental rights.[77] Some of this case law is particularly interesting as it relates directly to matters concerning breaches of the right to private life in connection to air pollution. In

[73] *Brasserie du Pêcheur* at §95.
[74] *Brasserie du Pêcheur* at §57.
[75] *Brasserie du Pêcheur* at §67.
[76] See § 37 Case C-752/18 *Deutsche Umwelthilfe* and Article 52.3 of the EU Charter.
[77] See for instance *Neshkov and others v. Bulgaria*, 36925/10, §184 and 190.

Fadeyeva v. Russia, 55723/00, the ECtHR addressed a case concerning the health effects of air pollution, drawing two important conclusions about causality and burden of proof.

First, the application of the general rules, according to which the claimant has the burden to prove the causal link, need to be applied flexibly, taking into consideration the information asymmetry between individuals affected by air pollution and the State:

> *"The Court reiterates at the outset that, in assessing evidence, the general principle has been to apply the standard of proof 'beyond reasonable doubt'. Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. It should also be noted that it has been the Court's practice to allow flexibility in this respect, taking into consideration the nature of the substantive right at stake and any evidentiary difficulties involved. In certain instances, only the respondent Government have access to information capable of corroborating or refuting the applicant's allegations; consequently, a rigorous application of the principle* affirmanti, non neganti, incumbit probatio *is impossible."*[78]

Second, there is a presumption that air pollution exceeding legal limits is harmful to health:

> *"In summary, the Court observes that over a significant period of time the concentration of various toxic elements in the air near the applicant's home seriously exceeded the MPLs.*[79] *The Russian legislation defines MPLs as safe concentrations of toxic elements (see paragraph 49 above). Consequently, where the MPLs are exceeded, the pollution becomes potentially harmful to the health and well-being of those exposed to it". This is a presumption, which may not be true in a particular case".*[80]

The ECtHR relied on a combination of indirect evidence and presumptions in concluding that the applicant's health deteriorated as a result of prolonged exposure to pollution levels exceeding legal limits, inevitably making the applicant more vulnerable to various illnesses and affecting her quality of private life.

(b) State obligation to undertake effective investigation on the events and the cause of loss

The ECtHR has also clarified that, when it comes to the protection of the right to life (Article 2 of the ECHR), public authorities have a procedural obligation to undertake effective investigation into the events and the loss caused by activities or omissions which fall within the responsibility of the State. This is because the ECtHR recognises that

> *"without such an investigation, the individual concerned may not be in a position to use any remedy available to him for obtaining relief, given that the knowledge necessary to elucidate facts such as those in issue in the instant case is often in the sole hands of State officials or authorities."*[81]

[78] *Fadeyeva v. Russia*, 55723/00 at §79 (emphasis added).
[79] 'MPLs' stands for "Maximum Permissible Levels". As explained at paragraph 49 of the *Fadeyeva* ruling, MPLs are air quality standards established for protecting public health from environmental nuisances, by setting maximum concentration of various toxic substances in the air. MPLs are, therefore, broadly equivalent to the limit values set under the AAQD.
[80] *Fadeyeva v. Russia*, 55723/00 at §87 (emphasis added).
[81] See *Öneryıldız v. Turkey [GC]*, 48939/99, §149.

4 Conclusion and recommendations

Across Europe, there is a growing trend of people resorting to courts to translate the vast body of medical and scientific knowledge on the harmful effects of air pollution into legal rights and obligations.

In ClientEarth's view, the correct interpretation of the existing legal order is that EU citizens already enjoy a right to air quality with levels of pollutants not exceeding the limit values set under the AAQD. This individual right to clean and healthy air has legal consequences. Individuals benefit from the right to obtain effective remedies from domestic courts in the event that their rights are infringed. Two complementary forms of remedy are necessary in this context: (1) securing Member State compliance with limit values in order to prevent harm; and (2) holding Member States liable to compensate individuals in instances where harm has already been sustained (the principle of State liability).

This interpretation of an individual right to clean and healthy air in the EU is supported by a systemic analysis of existing EU legislation and case law. It is also bolstered by trends in Europe and across the world towards the recognition of the fundamental right to a healthy environment, which are significant to the interpretation of the EU Charter.

However, there is no explicit reference to a right to clean and healthy air in the AAQD or any other pieces of EU legislation. ClientEarth's analysis has highlighted how and why this is problematic, given the practical barriers that make it impossible or excessively difficult for individuals to obtain full legal protection against the harmful impacts of air pollution.

In ClientEarth's view, the preliminary questions currently in front of the CJEU in Case C-61/21 and the ongoing revision of the AAQD should be seized as two important opportunities to clarify the existing legal framework, with the aim of facilitating the enjoyment and exercise of the individual right to clean and healthy air under EU law.

4.1 Recognising an individual right to clean and healthy air

It is clear that an individual right to air with pollution levels within prescribed limit values stems from the existing EU legal framework.

However, ClientEarth believes that EU citizens could further benefit from a direct and explicit expression of this individual right to air quality within legal limit values – both from the CJEU, as part of the upcoming ruling in Case C-61/21, as well as in the letter of EU legislation, as part of the revised AAQD. The former does not exclude the need for the latter, which would clearly codify the application of this individual right across all Member States.

4.2 Securing adequate access to justice and effective remedies to prevent harm

As explained above, although extensive CJEU case law provides a clear and solid basis for pursuing cases before national courts against Member State breaches of the AAQD, access to justice problems persist in certain jurisdictions. Even in those jurisdictions where individuals have been granted access to the domestic courts, the remedies made available to them have in many cases proved insufficient to pressure Member States into compliance.

In ClientEarth's view, to ensure adequate and timely access to justice and effective remedies across the EU, explicit provisions should be introduced in the revised AAQD in order to both:

- Codify in legislation the jurisprudence of the CJEU ensuring that individuals and NGOs have access to justice, through the rights to standing, substantive review and effective remedies; and
- Introduce stronger and explicit provisions on the remedies that should be made available by domestic courts in response to persistent non-compliance by public authorities.

With respect to provisions on remedies, ClientEarth's view is that the most effective mechanism to ensure compliance is time-based penalties for further periods of breach. The payment of the penalties could contribute to the establishment of a 'clean air fund' to support the implementation of pollution abatement measures and/or compensate victims of air pollution. The revised AAQD could also include a list of criteria to be taken into account for the imposition of penalties and provide guidance on the level of sanctions. In this regard, the Commission could refer by way of example to the sanction mechanisms that already exist in other fields of EU law. For instance:

- Title VIII Enforcement (Articles 89-93) of Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy;
- Article 13 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market; and
- Articles 83 and 84 of Regulation (EU) 2016/679 (General Data Protection Regulation).

4.3 Recognising a mechanism for State liability for harm suffered

Section 3.2 explains the clear basis in EU law for the right to seek compensation in domestic courts for harm suffered by individuals as a result of Member States' breach of their Article 13 and/or Article 23 obligations, pursuant to the Francovich doctrine of State liability. However, in practice, domestic rules determining the evidential burden that individuals must overcome to prove a causal link between State breaches of the AAQD and the damage they have incurred risk making it impossible or excessively difficult for those individuals to obtain compensation.

The opportunity is currently before the CJEU, in Case C-61/21, to clarify how the Francovich principle must be applied by domestic courts in a way that secures individuals' right to an effective remedy in this context. There is also the chance to codify these rules within the legislation as part of the ongoing review of the AAQD. In particular, in ClientEarth's view, the following steps should be taken to facilitate the enjoyment and exercise of the individual right to compensation:

- Clarify explicitly that any person who has suffered material or non-material damage as a result of an infringement of provisions in the AAQD shall have the right to receive compensation.
- Address the obstacles concerning causation that make it impossible or excessively difficult for individuals to obtain compensation for the damage they have incurred. In particular, given the overwhelming evidence of the harm that exposure to excessive pollution levels is having on people's health, and given the information asymmetry between individuals affected by air pollution and the State, it is necessary to set out two key mitigations:

- First, claimants that have been exposed to harmful levels of air pollution as a result of a Member State's failure to comply with limit values should be able to rely on presumptions that such air pollution inevitably made them more vulnerable to, and increased their risk of, suffering from various illnesses and affected their quality of private and family life – relying on population-scale evidence, rather than direct individual-level evidence. When an individual can provide *prima facie* proof that they suffered health impacts from air pollution (for instance, by making reference to reliable epidemiological studies), there should be a rebuttable presumption that they suffered harm as a result of the infringement of the AAQD. This rebuttable presumption should apply unless the competent authority responsible for the breach can credibly demonstrate to the satisfaction of the court that air pollution had no material contribution to causing the actual harm.
- Second, when establishing where the burden of proof then lies for establishing a causal link between exposure and individual harm, domestic courts should apply the domestic rules on burden of proof with some degree of flexibility and consider requiring State authorities (rather than individual claimants) to carry out an independent and official investigation to refute any such presumptions.

- Establish a clear limitation period so that victims have sufficient time to bring an action, starting only from the moment when they had the possibility to discover that they suffered harm from an infringement.

In this regard, the Commission could refer by way of example to the compensation mechanisms that already exist in other fields of EU law. For instance:

- Directive 2014/104/EU on antitrust damages actions; and
- Article 82 of Regulation (EU) 2016/679 (General Data Protection Regulation).