

# A subjective right to breathe clean air, at last?

The promises and perils of state liability for  
health-related damages caused by air  
pollution

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# Overview

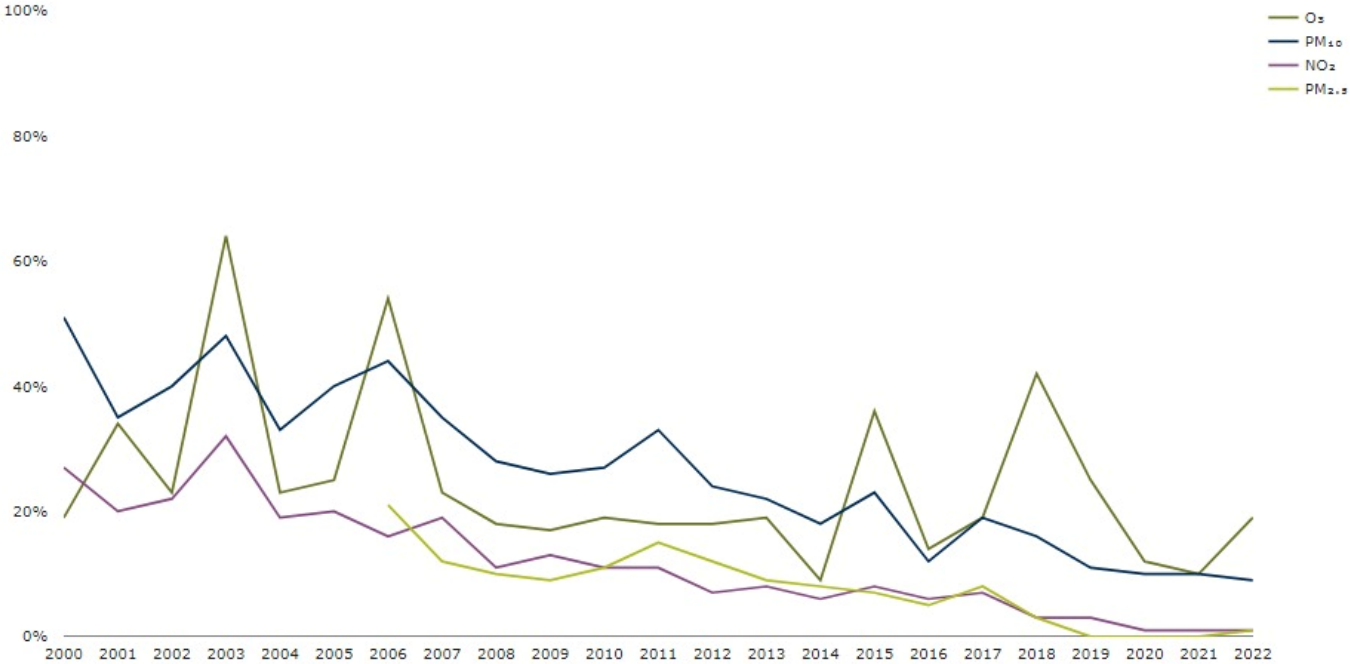


- ▶ What type of remedies are available to individuals affected by infringements of EU environmental law?
- ▶ Primary emphasis on collective remedies.
- ▶ Reluctance to embrace individual remedies.
- ▶ More explicit emphasis on individual remedies in the proposal for a recast directive on ambient air quality.

# Air pollution affects us all



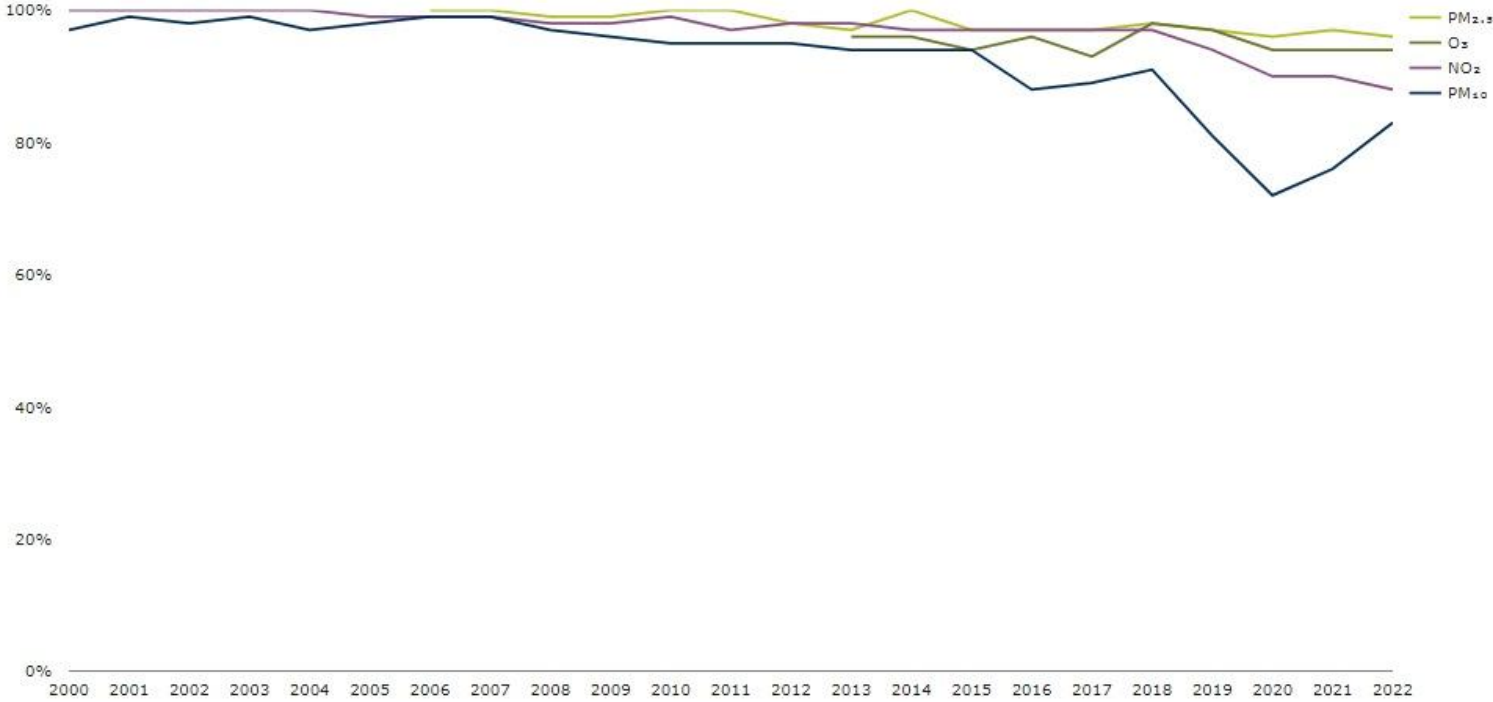
Figure 1. Urban population exposed to air pollutant concentrations above selected EU air quality standards, EU-27



# Air pollution affects us all



Figure 2. Urban population exposed to air pollutant concentrations above 2021 WHO air quality guidelines, EU-27



# Air pollution mostly affects vulnerable individuals



- ▶ Exposure to air pollution leads to health diseases (e.g., asthma, heart diseases, lung cancer, stroke etc.), and a great number of premature deaths each year.
- ▶ The « burden of disease » affects primarily, or « disproportionately » vulnerable groups of individuals such as children, pregnant women, older generations and lower socio-economic groups (WHO, 2021).
- ▶ Vulnerable individuals are « particularly reliant on judicial protection » (AG Kokott in Case C-61/21, para 100).

# The absence of rights narrative in EU secondary law



- ▶ Dir. 2008/50, Art. 1: Objective is to reduce harmful effects of pollution on 'human health'.
- ▶ Art. 13: Limit values and alert thresholds.
- ▶ Art. 23: Obligation to set up air quality plans.
- ▶ Most environmental provisions are meant to safeguard collective or diffuse interests, rather than individual rights.

# Giving a voice to the environment



- ▶ Jurisprudential development of procedures and remedies conducive to the judicial protection of collective environmental interests.
- ▶ Right to rely upon environmental provisions in national judicial proceedings available to « directly concerned » individuals (C-237/07, *Janecek*).
- ▶ Right to initiate judicial proceedings for the sake of the environment available to « directly concerned » legal and natural persons (C-243/15, *LZ II*; C-197/18).
- ▶ Possibility to seek appropriate measures, including orders or injunctions (C-404/13, *ClientEarth*; C-723/17, *Craeynest*; C-752/18, *Deutsche Umwelthilfe*).

# Towards state liability for health damages caused by breaches of Dir. 2008/50?



- ▶ Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur*, para 51.

« Community law confers a right to reparation where three conditions are met: 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 ».

- ▶ Is Directive 2008/50 intended to confer rights upon individuals?



# Towards state liability for health damages caused by breaches of Dir. 2008/50?



- ▶ C-61/21, *JP v Ministre de la transition écologique and Premier ministre (Responsabilité de l'Etat pour la pollution de l'air)*.
- ▶ General interests vs. Individual rights (C-61/21, paras 55-56).

« those obligations pursue... a general objective of protecting human health and the environment as a whole».

« it cannot be inferred from the obligations laid down in those provisions, with the general objective referred to above, that individuals or categories of individuals are, in the present case, implicitly granted, by reason of those obligations, rights the breach of which would be capable of giving rise to a Member State's liability for loss and damage caused to individuals ».

# The promises and perils of state liability for air pollution



- ▶ Proposal for a recast ambient air directive, Art. 28.

« Member States shall ensure that persons who suffer damage to human health caused by a violation of Articles 19(1) to 19(4), 20(1) and 20(2), 21(1) second sub-paragraph and 21(3) of this Directive by the competent authorities are entitled to compensation ».

- ▶ Right of compensation triggered by a violation of the obligation to set up air quality plans, not air quality standards as such!
- ▶ Difficulty to establish causal link.

# The promises and perils of state liability for air pollution



- ▶ Multi-factorial diseases (asthma, respiratory diseases, etc.): what about other contributing factors such as predisposition, personal behaviour and environmental factors?
- ▶ Non-inclusion of pollutants with demonstrated negative effects on human health (ultrafine particles and black carbon) complicates task of demonstrating causal link.
- ▶ Rebuttable presumption in case of prolonged stay in area where air quality standards were infringed? (AG Kokott in C-61/21, para 138).

# That's all folks!

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