

10. An individual right to breathe clean air, at last? The promises and perils of state liability for air pollution

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1. INTRODUCTION¹

One of the main objectives of the Green Deal is to achieve ‘zero pollution’ by 2050. To that end, the European Union enacted Directive 2024/2881 (‘the recast Directive’)² introducing stricter thresholds for air pollutant emissions, as well as provisions designed to address the ‘implementation gap’ relating to Directive 2008/50 (‘the Air Quality Directive’).³ More specifically, the recast Directive aims to improve the legal tools and judicial remedies available to affected individuals who wish to bring legal proceedings regarding the lack of enforcement of the air quality standards in the Directive. For that purpose, it establishes standing for individuals and non-governmental organizations (‘NGOs’) in relation to the judicial enforcement of the Air Quality Directive (Article 27). In addition, it introduces a right to compensation for individuals who suffer health damage caused by breaches of the obligations laid down in the Directive (Article 28).

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² 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 (recast) [2024] OJ L1/70 (‘recast Air Quality Directive’).

³ 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 [2008] OJ L152/1 (‘Air Quality Directive’).

The recast Directive addresses unresolved issues about the rights and remedies available to individuals affected by breaches of EU air quality standards.⁴ In the wake of recent judgments, one might reasonably wonder whether an individual right to clean air has finally emerged. The European Court of Justice ('the Court') even hinted that individuals could rely on EU law to derive an individual claim for financial compensation in the event they suffer damage caused by a breach of EU air quality standards.⁵ The issue is not merely theoretical. Ambient air pollution causes a significant number of premature deaths across Europe each year. Vulnerable populations are particularly prone to being affected by air pollution. As Advocate General Kokott noted, '[t]hose groups often consist of people of low socio-economic status, who are particularly reliant on judicial protection'.⁶

Unfortunately, the Court later ruled out the possibility that individuals could obtain damages as a matter of state liability in environmental matters.⁷ The recast Directive nevertheless reignited hopes that the EU would embrace a more explicit stance on subjective rights in environmental matters. It introduces a right of compensation for individuals who suffer health damage caused by a breach of the rules on air quality. This provision should be viewed in the context of ongoing debates about environmental rights and remedies.⁸ A great deal of uncertainty arises from the conceptual ambiguity underpinning these debates. This ambiguity is manifest first and foremost at the level of semantics, with different conceptions of rights coexisting in academic literature. For example, the distinction between substantive and procedural rights is often

⁴ See most notably Thomas Eilmansberger, 'The Relationship Between Rights and Remedies in EC Law: In Search of the Missing Link' (2004) 41 *Common Market Law Review* 1199; Michael Dougan, 'Who Exactly Benefits from the Treaties? The Murky Interaction Between Union and National Competence over the Capacity to Enforce EU Law' (2010) 12 *Cambridge Yearbook of European Legal Studies* 73.

⁵ Case C-752/18 *Deutsche Umwelthilfe* ECLI:EU:C:2019:1114, para 54.

⁶ Opinion of AG Kokott in Case C-61/21 *Ministre de la Transition écologique et Premier Ministre (Responsabilité de l'Etat pour la pollution de l'air)* ECLI:EU:C:2022:359, para 100.

⁷ Case C-61/21 *Ministre de la Transition écologique et Premier Ministre (Responsabilité de l'Etat pour la pollution de l'air)* ECLI:EU:C:2022:1015.

⁸ See further, eg, Koen Lenaerts and Tim Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 *European Law Review* 287; Michael Dougan, 'When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Primacy' (2007) 44 *Common Market Law Review* 931; Eilmansberger (n 4); Michael Dougan, 'Addressing Issues of Protective Scope within the *Franovich* Right to Reparation' (2017) 13 *European Constitutional Law Review* 124.

employed.⁹ Dougan, in turn, made a distinction between a ‘right of standing to enforce in the general interest’ and a ‘personal individual right’.¹⁰ The co-existence of these various conceptions of environmental rights exacerbates the confusion surrounding the conceptual foundations of such rights.

Dougan’s suggestion that the quality of a right ultimately hinges on the type of remedies available to individuals provides a valuable lens to make sense of the debate about environmental rights and remedies.¹¹ The focus on the type of remedies allows for differentiation between collective and individual rights.

On the one hand, collective rights are intended to enable both natural and legal persons to act for the sake of the environment. In other words, they are geared towards the judicial protection of the collective and diffuse interests underlying sectoral rules on the preservation of the environment. What matters is that secondary law rules on environmental protection are complied with by national authorities. Viewed from this perspective, collective remedies reflect an objective conception of justice revolving around the preservation of the rule of (environmental) law. They are meant to enable concerned individuals to bring national authorities to court for their failure to comply with obligations emanating from EU environmental law. However, this type of remedy falls short of establishing a right for the individuals concerned to claim an individual entitlement from a finding of non-compliance with EU environmental law. Put differently, it does not reflect a subjective conception of environmental justice.

On the other hand, individual rights place a stronger emphasis on ensuring that individuals have access to justice in order to enforce their own rights. They are designed to allow individuals to vindicate their rights before domestic courts. The right to compensation for health damage caused by an infringement of EU environmental law is perhaps the most obvious illustration of such remedies.

Against this background, this chapter reflects on the difficulty of translating collective, diffuse environmental interests into individual rights deserving of judicial protection. It demonstrates that the case law reflects the Court’s reluctance to create environmental remedies focused on the protection of individual rights. The Court’s approach has been to carve out remedies tailored to the collective interests underpinning environmental law. This chapter goes on

⁹ See eg. Jasper Krommendijk and Dirk Sanderink, ‘The Role of Fundamental Rights in the Environmental Case Law of the CJEU’ (2023) 2 *European Law Open* 616, especially 618ff; Patrick Thieffry, ‘La Montée en Puissance (en Trompe l’Œil?) de la Charte des Droits Fondamentaux en Matière Environnementale’ (2020) *Revue Trimestrielle de Droit Européen* 455.

¹⁰ Dougan 2010 (n 4) 95.

¹¹ *Ibid* 73.

to explain that the proposal for a recast Air Quality Directive reflects a more explicit emphasis on the protection of individual rights. To that end, the recast Directive introduces a right to seek compensation for individual harm caused by violations of EU air quality standards.

2. THE DEVELOPMENT OF COLLECTIVE ENVIRONMENTAL RIGHTS

This section explains that the Court has gradually developed collective environmental rights, focused on ensuring access to justice for both individuals and NGOs affected by breaches of EU environmental law. In the early case law, the Court concluded that individuals directly concerned by breaches of EU environmental law must be able to invoke EU environmental provisions in national judicial proceedings. In subsequent judgments, it established a genuine right to institute judicial proceedings for natural or legal persons that are directly concerned by an infringement of environmental provisions. By doing so, the Court essentially empowered individuals and legal persons to bring national authorities to court for their failure to comply with EU environmental law.

2.1 The Right to Rely on Environmental Provisions in National Judicial Proceedings

In the early judgments, the Court of Justice was asked to determine whether EU environmental provisions could be invoked before national courts. Consider, by way of illustration, the German saga that unfolded in the early 1990s.¹² This concerned the transposition of three environmental directives into the German legal order (namely Directive 80/779,¹³ Directive 82/884¹⁴ and Directive 75/440,¹⁵ referred to collectively as ‘the Directives’). The German authorities decided to implement these directives through administrative circulars.

¹² Case C-361/88 *Commission v Germany* ECLI:EU:C:1991:224; Case C-59/89 *Commission v Germany* ECLI:EU:C:1991:225; Case C-58/89 *Commission v Germany* ECLI:EU:C:1991:391. See also Case C-72/95 *Kraaijeveld and Others* ECLI:EU:C:1996:404, para 56.

¹³ Council Directive 80/779/EEC of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates [1980] OJ L229/30.

¹⁴ Council Directive 82/884/EEC of 3 December 1982 on a limit value for lead in the air [1982] OJ L378/15.

¹⁵ Council Directive 75/440/EEC of 16 June 1975 concerning the quality required of surface water intended for the abstraction of drinking water in the Member States [1975] OJ L194/26.

However, the Commission was adamant that the adoption of these administrative circulars did not suffice to bring national law into line with the Directives. The reason for this was simple: at the time, administrative circulars were not endowed with 'unquestionable binding force' in the German legal order.¹⁶ There was, in particular, some uncertainty in German academic literature and case law about whether technical circulars (such as the ones used to implement the environmental Directives at stake) were binding in the context of national judicial proceedings. In that context, the Court was keen to emphasise 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 upon them before the national courts.¹⁷

Speaking specifically about the Directive on ambient air quality, the Court further stated 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.¹⁸

However, because the limit values were set out in a technical administrative circular, it could not be established with certainty that they had binding effects. The consequences were readily apparent: individuals were not in a position to rely upon the obligations established by the relevant environmental Directive, where appropriate, before national courts. The Court concluded that Germany had not transposed this Directive adequately.

Ultimately, the bottom line seemed to be the following: individuals concerned by the infringement of a rule belonging to EU environmental law had to be able to rely on such provisions in national judicial review proceedings. At the same time, the Court left unresolved the questions about the appropriate remedies that should be available to those concerned individuals in the event of non-compliance with these directives. It was also not immediately clear whether the Court intended to define which individuals should have standing to enforce EU environmental law.

¹⁶ Case C-361/88 *Commission v Germany* (n 12) para 21.

¹⁷ *Ibid* para 15.

¹⁸ *Ibid* para 16.

2.2 The Right to Initiate Judicial Proceedings for the General Interest

In subsequent judgments, the Court progressively developed more advanced remedies beyond the right to invoke EU environmental provisions before national courts. It established, in particular, a right to bring judicial proceedings for the enforcement of EU environmental provisions. The following questions, in particular, emerged: Who should be entitled to initiate legal proceedings regarding the enforcement of such provision? Should that entitlement extend to ‘any individual’ who seeks to challenge ‘the legality of any decision or other national measure relative to the application to him [or her] of’ that EU provision?¹⁹ Or, in contrast, should it be limited to a clearly identifiable individual or group of individuals?²⁰ And if so, how should these individuals be identified among the general public?

A significant chunk of the relevant case-law to date has revolved around the capacity of environmental NGOs to bring national authorities to court for their failure to comply with EU environmental standards.²¹ In this context, the Aarhus Convention has been relied upon as a source of guidance to develop detailed standing requirements for NGOs. At this point, it is useful to remind that the Convention spells out detailed access to justice requirements for individuals and legal persons affected by breaches of environmental law. It states in peremptory terms, in Articles 2(5) and 9(2)–(3), that environmental NGOs must be granted access to justice, provided that they meet certain requirements. However, the EU has failed to harmonise the right of access to justice guaranteed by the Convention in a comprehensive and cross-cutting manner.²² In the absence of common rules, the discretion retained by the Member States was limited by the right to an effective judicial remedy under Article 47 of the Charter. Based on Article 47 of the Charter, interpreted in the light of Articles

¹⁹ Opinion of AG Wahl in Case C-33/17 *Cepelnik* ECLI:EU:C:2018:311, para 97.

²⁰ Opinion of AG Bobek in Case C-403/16 *El Hassani* ECLI:EU:C:2017:659, para 82; Opinion of AG Kokott in *Ministre de la Transition écologique and Premier Ministre (Responsabilité de l'État pour la pollution de l'air)* (n 6) paras 95ff.

²¹ See eg, Case C-240/09 *Lesoochránárske zoskupenie* ECLI:EU:C:2011:125; Case C-243/15 *Lesoochránárske zoskupenie VLK* ECLI:EU:C:2016:838; Case C-664/15 *Protect* ECLI:EU:C:2017:987; Case C-873/19 *Deutsche Umwelthilfe* ECLI:EU:C:2022:857.

²² See further Charles Poncelet, ‘Access to Justice in Environmental Matters – Does the European Union Comply with Its Obligations?’ (2012) 24 *Journal of Environmental Law* 287.

2(5) and 9(2)–(3) of the Convention, the Court instructed the Member States to grant standing, to the fullest extent possible, to environmental NGOs in the domestic enforcement of EU environmental law.²³

The class of individuals entitled to access to justice in relation to the enforcement of EU environmental provisions was the subject matter of several rulings. In *Janecek*,²⁴ the Court was asked by the referring court to clarify whether individuals could derive an actionable right from the obligation to set up air quality plans in the event the limit values in the Air Quality Directive were exceeded. In the main proceedings, the city of Munich had failed to secure compliance with the limit values for particulate matter (PM10) set out by the Directive. The applicant, Mr Janecek, wished to obtain a judicial order requiring the city of Munich to draw up an air quality action plan to put an end to repeated exceedances of the limit values. The referring court expressed doubts about whether Mr Janecek could derive a personal right to have an action plan drawn up based on the Air Quality Directive. According to the German *Schutznorm* doctrine, it seemed impossible to derive subjective rights that could be enforced in national judicial proceedings based on this provision.²⁵ In this context, the Court ruled that ‘the natural or legal persons directly concerned’ by the exceedance of limit values and alert thresholds for certain pollutants must be able to rely on the obligation to draw up an action plan before the competent national courts.²⁶ To that end, the individuals concerned could, in particular, bring an action before the competent national courts if necessary. A similar formulation was also used in *ClientEarth*.²⁷

That statement was also reiterated in subsequent judgments. It is possible to sum up the position of the Court as follows: any natural or legal person that

²³ See more on these judgments, Maxime Tecqmenne, ‘Turning “Public Interest Litigation” into a Positive Obligation Deriving from Article 47 of the Charter: *Deutsche Umwelthilfe*’ (2023) 60 *Common Market Law Review* 1745; Mariolina Eliantonio, ‘The Relationship between EU Secondary Rules and the Principles of Effectiveness and Effective Judicial Protection in Environmental Matters: Towards a New Dawn for the “Language of Rights”?’ (2019) 12 *Review of European Administrative Law* 95.

²⁴ Case C-237/07 *Janecek* ECLI:EU:C:2008:447.

²⁵ The observations submitted by the Austrian government are instructive. They reveal that, based on the *Schutznorm* doctrine, it was possible to infer a legally enforceable right from the provisions on limit values because the latter essentially aim to protect human health. On the contrary, it was suggested that the obligation to set up an action plan was not intended to establish a personal right for the sake of concerned individuals (*Janecek* (n 24) paras 29–30).

²⁶ *Janecek* (n 24) para 39.

²⁷ Case C-404/13 *ClientEarth* ECLI:EU:C:2014:2382, para 56 (emphasis added).

is 'directly concerned' by the infringement of a rule of EU environmental law must be able to require the competent authority to observe such obligations, where necessary, by bringing judicial proceedings for that purpose.²⁸ In other words, the protective scope of EU environmental provisions is defined by reference to directly concerned legal or natural persons. This raises the question: how should directly concerned individuals be identified?

The judgment in *Wasserleitungsverband Nördliches Burgenland and Others* is enlightening in this respect.²⁹ The applicants in the main proceedings used water with a nitrate level exceeding the limit set by Directive 91/776 ('the Nitrates Directive').³⁰ They requested that the Austrian Ministry modify the 2012 Nitrate Action Programme Regulation to reduce the nitrate level in the groundwater in question. To that end, they invoked the obligations of the Nitrates Directive. However, their request was ruled inadmissible on the grounds that they did not possess 'individual substantive rights' stemming from the national provisions implementing the Directive. This decision was based on the *Schutznorm* doctrine (or a slightly different conception of it prevailing in Austria): the relevant provisions did not show a normative intention to protect the interests of individuals. Similarly, the referring court seemed reluctant to establish standing on the grounds that the situation at issue did not involve a threat to public health.

Seized of this matter, the Court provided much-needed clarity on the requirement of direct concern. The judgment revealed that when deciding if individuals are directly concerned by a violation of an EU environmental directive, the Court must consider the

purpose and the relevant provisions of that directive, the proper application of which is asserted before the referring court.³¹

Based on this assessment, the Court was able to identify the protective scope of the Nitrates Directive. The objective of the Directive was to reduce and prevent

²⁸ See also Case C-723/17 *Craeynest and Others* ECLI:EU:C:2019:533, para 32; Case C-197/18 *Wasserleitungsverband Nördliches Burgenland and Others* ECLI:EU:C:2019:824, para 32.

²⁹ A similar story unfolded in *Land Nordrhein-Westfalen*, only this time the question put to the Court concerned Directive 2000/60 (see Case C-535/18 *Land Nordrhein-Westfalen* ECLI:EU:C:2020:391).

³⁰ Council Directive 91/676/EEC of 12 December 1991 concerning the protection against pollution caused by nitrates from agricultural sources [1991] OJ L375/1.

³¹ *Wasserleitungsverband Nördliches Burgenland and Others* (n 28) para 35.

water pollution caused by nitrates from agricultural sources. According to Article 2(j), the term ‘pollution’ encompasses the

discharge, directly or indirectly, of nitrogen compounds from agricultural sources into the aquatic environment, the results of which are such as to cause [...] interference with other legitimate uses of water.

The Court inferred from this definition that the Directive is meant to address activities involving the discharge of nitrogen compounds likely to ‘interfere with the legitimate use of the water’.³² Undue interference with the legitimate use of water could only arise if the nitrate levels in groundwater exceeded the limit of 50 mg/l established by the Directive. This explains why any individual using that groundwater is directly concerned by an exceedance of that limit. According to the Court, it followed that:

a natural or legal person having the option of drawing and using groundwater is directly concerned by that threshold being exceeded or the risk of it being exceeded, which is capable of limiting that person’s option by interfering with the legitimate use of that water.³³

The referring court was therefore instructed to grant standing to the applicants.³⁴ The Nitrates Directive therefore seems to give rise to an individual entitlement to use water in a legitimate manner, that is to say, free of pollution. Any infringement of the provisions of this Directive interferes with the exercise of that right. In circumstances involving a breach of these provisions, the individuals, or group of individuals, entitled to use the groundwater concerned are entitled to institute judicial proceedings to ensure respect for their entitlement to use non-polluted water.³⁵

In the light of the foregoing considerations, it should be clear that the case law has primarily revolved around the creation of a right to access to justice for individuals ‘directly concerned’ by a breach of EU environmental law. The standards of access to justice set out by the Aarhus Convention served as a relevant source of inspiration to allow individuals affected by breaches of EU environmental law to obtain access to justice. The approach adopted by the Court does not fundamentally depart from the ‘generous approach’ described by Dougan. According to him, the Court’s approach has been to ‘harness’ the services of concerned individuals to secure the enforcement of environmental

³² Ibid para 39.

³³ Ibid para 40.

³⁴ Ibid para 43.

³⁵ See similarly AG Kokott in *Wasserleitungsverband Nördliches Burgenland and Others* (n 28) para 50.

rules.³⁶ By offering ‘concerned’ individuals the right to initiate proceedings in relation to the enforcement of environmental provisions, the Court appears primarily concerned with empowering these individuals to act on behalf, or for the sake of, the environment. After all, the applicants involved in the cases analysed above essentially sought to bring national authorities to court for their failure to comply with EU environmental law. Beyond the right to initiate judicial proceedings in the general interest, the Court also equipped national courts with additional procedural tools, including the ability to issue an order or impose financial penalties, in order to guarantee that EU environmental provisions are respected.³⁷ These tools are essentially meant to empower national judges to secure the judicial enforcement of obligations contained in the relevant secondary provisions in the area of environmental protection.

At the same time, the judgments analysed above suggest the emergence of remedies revolving more prominently around the judicial protection of individual rights or interests. It has been suggested that these judgments reflect a tendency in case law to recognise that at least those provisions adopted to protect human health – such as, for example, those which relate to air quality³⁸ and drinking water³⁹ – could give rise to individual rights for those ‘concerned’ by an infringement of these provisions.⁴⁰ The Court itself seemed to endorse this view. In many instances, it stated that it was precisely because the directives at stake ‘intended to create rights for individuals’ that the ‘persons concerned’ had to be able to rely upon them in national judicial proceedings, if needed by bringing legal proceedings. In the judgment delivered in *Wasserleitungsverband Nördliches Borgenland and Others*, the Court seemingly identified individual interests protected by the Nitrates Directive. One could therefore ponder the prospect of developing a genuine individual right to clean air, or water, deserving of financial compensation for individuals affected by breaches of these provisions.

³⁶ Dougan (n 4) 94.

³⁷ *Deutsche Umwelthilfe* (n 5) para 30; *ClientEarth* (n 27) para 58.

³⁸ Air Quality Directive (n 3).

³⁹ Directive (EU) 2020/2184 of the European Parliament and of the Council of 16 December 2020 on the quality of water intended for human consumption (recast) [2020] OJ L435/1 (‘Drinking Water Directive’).

⁴⁰ Saša Beljin, ‘Rights in EU Law’ in Sacha Prechal and Bert van Roermond (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (OUP 2008) 114.

3. TOWARDS THE CREATION OF REMEDIES FOR THE SAKE OF INDIVIDUAL RIGHTS PROTECTION?

This section reflects on the prospect of developing remedies more explicitly geared towards the judicial protection of individual rights in the field of environmental law. It explains that the Court seems reluctant to expand the requirements of effective judicial protection beyond the current emphasis on collective environmental rights. More specifically, the case law falls short of recognising an individual right to breathe clean air that could give rise to financial compensation. This section then demonstrates that the recast Air Quality Directive places a more explicit emphasis on the protection of individual rights, introducing a right to compensation for individuals affected by breaches of EU air quality standards.

3.1 The ECJ's Refusal to Recognise EU State Liability in Environmental Matters

The analysis above clarified that the Court developed a right to initiate judicial proceedings in the general interest based on environmental provisions. This section addresses the following questions: does the infringement of environmental provision give rise to further remedies (beyond the recognition of a right to initiate proceedings)? And, in particular, can individuals affected by a breach of environmental law bring state liability claims for financial compensation before domestic courts on the basis of EU law?

As a matter of EU law, state liability rests on three conditions: the applicant must demonstrate that the rule infringed was 'intended to confer rights on individuals', the breach must be sufficiently serious, and there must be a causal link between the damage and the breach of that provision.⁴¹ The 'intention to confer rights' criterion is based on the German *Schutznorm* doctrine. This entails an appraisal to determine whether the legal norm under consideration is meant to protect individual interests and 'not merely the general (or public) interest'.⁴² This requirement reflects the purpose of state liability under EU law, which is primarily concerned with securing judicial protection of individual rights.⁴³ Most environmental provisions are primarily geared towards the

⁴¹ See eg, Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* ECLI:EU:C:1991:428, paras 40ff; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* ECLI:EU:C:1996:79, para 51.

⁴² Sacha Prechal, 'Member State Liability and Direct Effect: What's the Difference After All?' (2006) 17 *European Business Law Review* 299, 310.

⁴³ Dougan (n 8) 124–5.

general interest intrinsic to the protection of the environment (rather than individual interests). They are not meant to confer rights on individuals. However, the Court has alluded to the possibility that some environmental provisions may give rise to a claim for monetary compensation.⁴⁴ This raises unresolved issues about the type of rights and remedies available to individuals in relation to the judicial enforcement of environmental provisions.⁴⁵

Based on the judgments analysed above, it could be inferred that the provisions inspired by human health concerns gave rise to a subjective right to claim reparation for losses resulting from a breach of these provisions. The crux of the matter could be summarised as follows: in these judgments, the Court appeared to develop subjective rights available to directly concerned individuals. The protective scope of the relevant provisions was deemed to protect individual interests (specifically, human health and the right to use water free of pollution). These judgments prompted legal scholars to suggest that environmental provisions explicitly intended to ‘protect human health’ reflect a normative intention to protect individual health-related interests.⁴⁶ This was deemed to follow from the Court’s insistence that the objective underlying the adoption of such legislative provisions is to protect human health. The Court’s reasoning in these judgments was based on the premise that the relevant provisions were ‘intended’ or ‘designed’ to protect human interests and, in particular, ‘public health’,⁴⁷ ‘human health’,⁴⁸ or even ‘human beings against the effects of lead in the environment’.⁴⁹ Viewed from this perspective, the Air Quality Directive seems to confer a subjective ‘right to breathe clean air’ on ‘directly concerned’ individuals.⁵⁰ Misonne observed that the Ambient Air

⁴⁴ Case C-420/11 *Leth* EU:C:2013:166, especially paras 33ff. Admittedly, the Court concluded that the relevant provision was intended to confer rights upon individuals. It should be stressed, however, that the conception of rights prevailing in that judgment was rather ‘expansive’, or even ‘superficial’. See further, Dougan (n 8) 154. Stagstrup also observed that the Court generally strives to identify economic rights for the purposes of *Francovich*. According to him, this approach might ‘greatly imperil individuals’ ability to hold Member States responsible for their environmental law breaches based on the Member State liability doctrine’: Johan P Stagstrup, ‘State Liability in EU Environmental Law: *Francovich* is Dead, Long Live Compensation?’ (2024) 36 *Journal of Environmental Law* 343, 350.

⁴⁵ Dougan (n 4) 96–7.

⁴⁶ Beljin (n 40) 114.

⁴⁷ Case C-58/89 *Commission v Germany* (n 12) para 14; *Janecek* (n 24) para 38.

⁴⁸ Case C-361/88 *Commission v Germany* (n 12) para 16.

⁴⁹ Case C-59/89 *Commission v Germany* (n 12) para 19.

⁵⁰ Ugo Taddei, ‘Case C-723/17 *Craeynest*: New Developments for the Right to Clean Air in the EU’ (2020) 32 *Journal of Environmental Law* 151; Delphine Misonne, ‘The Emergence of a Right to Clean Air: Transforming European Union

Directive reflects a ‘context of fundamental rights’ in the field of air quality law owing to its intrinsic connection with the protection of human health.⁵¹ Advocate General Kokott seemed to concur with that argument when she stated that the rules on ambient air quality gave concrete expression to the fundamental right to life enshrined in Article 2 of the Charter.⁵²

In the same vein, the analysis above shows that the Court derived a right to use non-polluted water from the directives establishing thresholds for the pollution of groundwater and surface waters (that is, the Water Framework Directive and the Nitrates Directive). Therefore, the normative intention, or purpose, of these provisions was to protect individual interests.⁵³ Viewed from that perspective, the Court appears to have gradually developed procedural guarantees to secure the judicial protection of individual rights stemming from such provisions. These procedural guarantees included not only a right to initiate judicial proceedings, but also the obligation to take any necessary measures, including issuing orders, to secure compliance with EU environmental law.⁵⁴

The Commission seemingly concurred with that approach when it stated that the reasoning outlined in *Janecek* was justified by reference to the objectives of the Air Quality Directive. The Commission suggested that this approach could therefore be reiterated in relation to other EU secondary legislation aimed at protecting human health.⁵⁵ It even stated that individuals could derive a right to have their health protected from such provisions.⁵⁶ A similar line of reasoning was formulated by Advocate General Kokott in *Craeynest and Others*. Advocate General Kokott suggested that the provisions on air quality are intrinsically linked to the fundamental right to life set out in Article 2 of the Charter.⁵⁷ In *Deutsche Umwelthilfe*, the Court even suggested that the principle of state liability could apply in relation to breaches of the air pollution standards set out in the Air Quality Directive.⁵⁸ In the absence of a conclusive stance of the Court on that matter, it remained unclear, however, whether such

Law through Litigation and Citizen Science’ (2021) 30 *Review of European, Comparative and International Environmental Law* 34.

⁵¹ Misonne (n 50) 37; Taddei (n 50).

⁵² Opinion of AG Kokott in Case C-723/17 *Craeynest and Others* ECLI:EU:C:2019:168, para 53.

⁵³ Beljin (n 40) 114.

⁵⁴ *ClientEarth* (n 27) para 58.

⁵⁵ European Commission, ‘Commission Notice on Access to Justice in Environmental Matters’ [2017] OJ C275, 16.

⁵⁶ *Ibid.*

⁵⁷ Krommendijk and Sanderink (n 9) 620.

⁵⁸ *Deutsche Umwelthilfe* (n 5) para 54.

provisions could effectively give rise to a subjective right to claim reparation for damages.

This question was referred to the Grand Chamber of the Court in the *Ministre de la Transition écologique* case.⁵⁹ The stakes were high. The applicant in the main proceedings alleged serious health problems caused by the deterioration of air quality in the municipality of Paris. He claimed that the deterioration in air quality resulted from the French authorities' failure to comply with the air pollution standards established by Articles 13 and 23 of the Air Quality Directive. His claim for damages, however, was rejected on the grounds that the relevant provisions of the Air Quality Directive did not create a right for individuals to obtain compensation for damages suffered as a result of an infringement of these provisions. Much of the debate thus revolved around whether the relevant provisions were 'intended to confer rights on individuals capable of entitling them to compensation from a Member State'.⁶⁰

The Grand Chamber concluded that Articles 13 and 23 of the Air Quality Directive were not intended to confer rights on individuals. In support of this conclusion, it held that these provisions were primarily geared towards the general interests intrinsic to the protection of human health and the environment as a whole, rather than the interests of clearly defined individuals.⁶¹ The Court stated that it could not consider that

individuals or categories of individuals are [...] 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.⁶²

This judgment was portrayed as a significant 'step back' for the judicial protection of individuals.⁶³ Mario Pagano opined that this judgment was difficult to reconcile with the Court's longstanding approach, which is to confer directly enforceable rights upon individuals to encourage them to engage in 'altruistic litigation' for the sake of environmental protection (or, more generally, the

⁵⁹ *Ministre de la Transition écologique et Premier Ministre (Responsabilité de l'Etat pour la pollution de l'air)* (n 7). See further, on that judgment, Bernhard W Wegener, 'No Francovich in Environmental Law: the ECJ's Decision in *J.P. v Ministre de la Transition Ecologique*' (2023) 60 *Common Market Law Review* 1773.

⁶⁰ *Ministre de la Transition écologique et Premier Ministre (Responsabilité de l'Etat pour la pollution de l'air)* (n 7) para 42.

⁶¹ *Ibid* para 55.

⁶² *Ibid* para 56.

⁶³ Krommendijk and Sanderink (n 9).

proper application of EU law).⁶⁴ By failing to recognise a right to claim reparation for violations of air quality standards, the Court suppressed the incentive for individuals to contribute to the implementation of these standards at national level. Jasper Krommendijk and Dirk Sanderink similarly advocated in favour of a human rights-based approach to environmental protection before the Court.⁶⁵ According to them, such an approach would go a long way towards securing respect for the environmental standards set out by EU secondary law.⁶⁶

The *Ministre de la Transition écologique* judgment illustrates the difficulty in translating collective, diffuse environmental interests into directly enforceable subjective rights. This judgment ultimately reflects the Court's reticence to expand the requirements of judicial protection of environmental law beyond the current emphasis on remedies primarily concerned with the general interests intrinsic to the defence of the environment.⁶⁷ As a remedy primarily focused on the judicial protection of individuals, state liability does not align well with the Court's current emphasis on general interest remedies. At the end of the day, the Court seems primarily concerned with developing specific remedies that foster the judicial protection of the collective interests underpinning most of the legislative provisions adopted in the field of environmental protection.

3.2 The Recast Directive: A Legislative Attempt to Embrace Individual Environmental Rights?

The recast Directive suggests that the EU legislature is willing to adopt a more explicit stance on individual rights in environmental matters. The original proposal was presented by the European Commission within the framework of the EU Green Deal. In this context, the Commission pledged to strive for 'zero pollution' by 2050.⁶⁸ To that end, it committed to introducing a proposal to modernise the rules on ambient air quality. The negotiation process began

⁶⁴ Mario Pagano, 'Human Rights and Ineffective Public Duties: The Grand Chamber Judgment in *JP v Ministre de la Transition écologique*' (2023) European Law Blog <www.europeanlawblog.eu/pub/human-rights-and-ineffective-public-duties-the-grand-chamber-judgment-in-jp-v-ministre-de-la-transition-ecologique/release/1> accessed 18 December 2023.

⁶⁵ Krommendijk and Sanderink (n 9) 626ff.

⁶⁶ Ibid.

⁶⁷ See similarly Stagstrup (n 44) 355.

⁶⁸ European Commission, 'Pathway to a healthy planet for all. EU Action Plan: "Towards Zero Pollution for Air Water and Soil"' (Communication) COM (2021) 400 final.

following the publication of recommendations concerning air pollution by the World Health Organization ('WHO'). The WHO called for stricter limits on pollutant emissions, reflecting current scientific knowledge of the health risks associated with air pollution.⁶⁹ These recommendations cast an unforgiving light on the glaring gaps in the previous version of the ambient Air Quality Directive. The European Parliament expressed concern over the outdated air quality standards in this Directive, as well as the Member States' failure to comply with these standards.⁷⁰

To address these shortcomings, the recast Directive introduces stricter thresholds for pollutant emissions. It aims to align EU air quality standards more closely with the recommendations formulated by the WHO.⁷¹ It also aims to address the 'implementation gap' in air quality standards. This is achieved by including provisions that provide additional legal tools and judicial remedies for individuals affected by non-compliance with the air quality standards set forth in the recast Directive. The Directive essentially builds upon the Court's case law concerning environmental collective rights, as discussed above. Article 27 of the proposal, in particular, sets out a right for concerned individuals and NGOs to bring judicial proceedings.

However, the recast Directive goes beyond what is prescribed by the case law. It spells out a right to compensation for individuals whose health is adversely affected by a breach of the Directive. This right to compensation echoes Article 79a of the recast Industrial Emissions Directive⁷² and Article 26 of the proposal for a Directive on Urban Wastewater Treatment.⁷³ This development

⁶⁹ WHO, 'WHO Global Air Quality Guidelines. Particulate Matter (PM_{2.5} and PM₁₀), Ozone, Nitrogen Dioxide, Sulphur Dioxide and Carbon Monoxide' (2021) 4.

⁷⁰ European Parliament resolution of 25 March 2021 on the implementation of the Ambient Air Quality Directives: Directive 2004/107/EC and Directive 2008/50/EC (2020/2091(INI)), P9_TA(2021)0107.

⁷¹ European Commission, 'Proposal for a Directive of the European Parliament and of the Council on ambient air quality and cleaner air for Europe (recast)' COM (2022) 542 final/2, 1. Much of the debate revolved around when and to what extent the standards introduced by the recast Directive should be brought in line with the recommendations formulated by the World Health Organization.

⁷² Directive (EU) 2024/1785 of the European Parliament and of the Council of 24 April 2024 amending Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control) and Council Directive 1999/31/EC on the landfill of waste (Text with EEA relevance) [2024] OJ L1/47.

⁷³ European Commission, 'Proposal for a Directive of the European Parliament and of the Council concerning urban wastewater treatment (recast)' COM (2022) 541 final, art 26.

marks a significant departure from existing secondary rules on environmental protection. It should be clear by now that the EU's regulatory approach in environmental matters has traditionally failed to embrace the language of rights.⁷⁴ To be sure, the adoption of the Aarhus Convention has spurred a renewed legislative focus on procedural participatory rights in secondary environmental law. It must be stressed, however, that secondary law has historically failed to embrace the creation of individual environmental rights.

Viewed from this perspective, the right to compensation in Article 28 of the recast Air Quality Directive represents a shift in the EU institutions' approach, expanding the framework beyond the current emphasis on collective rights and remedies. It also aligns with the suggestion formulated by some legal scholars,⁷⁵ but ultimately rejected by the Court of Justice, that environmental provisions designed to protect human health are meant to create individual rights for those affected by a breach of such provisions. By the same token, Article 28 helps to overcome the Court's reluctance to recognise EU rules on air quality as 'intended to confer rights' upon individuals.⁷⁶

The recast Ambient Air Directive should be viewed as a step forward for the judicial protection of individuals affected by breaches of EU air quality standards. However, several elements may limit its implications. It is important to recall that four conditions must be satisfied to trigger the right to compensation set out in Article 28: first, a 'damage to human health' must be identified; second, there must be a 'violation of the national rules transposing Article 19(1) to (5) and Article 20(1) and (2) of this Directive'; third, that violation must have been 'committed intentionally or negligently by the competent authorities'; and fourth, there must be a causal link between that violation and the damage suffered by the applicant. Demonstrating that these conditions are satisfied may prove challenging, particularly with regard to causation.

⁷⁴ Gráinne de Búrca, 'The Language of Rights and European Integration' in Gillian More and Jo Shaw (eds), *New Legal Dynamics of the European Union* (OUP 1995). In a similar vein, see also Chris Hilson, 'The Visibility of Environmental Rights in the EU Legal Order: Eurolegalism in Action?' (2018) 25 *Journal of European Public Policy* 1589.

⁷⁵ See references cited in footnotes 43 and 47.

⁷⁶ Although that issue falls outside the scope of this chapter, it should be clear that challenging questions remain about the establishment of causation. See further, on that issue, eg, Antoine Le Dyllo, 'Lutte contre la Pollution Atmosphérique: La Carence Fautive de l'Etat Reconnue par des Jugements en Demi-Teinte' (2019) *Revue des droits de l'homme* 1, 4; Maryse Deguerque, 'Pollution de l'Air et Responsabilité de l'Etat' (2018) *Energie – Environnement – Infrastructures: actualité, pratiques et enjeux* 16, 18.

Most diseases associated with air pollution, such as asthma, cancer and lung infection, are multifactorial. This means that they may be caused by several factors, including, but not limited to, exposure to air pollution. To assess whether such health issues may be caused by air pollution, it becomes necessary to consider additional elements, such as predisposition, personal behaviours (such as diet, smoking habits, alcohol intake) and other environmental factors.

The endeavour becomes even more complicated considering that the Directive requires a violation of national rules transposing the obligation to establish air quality plans. It is worth emphasising that the Member States retain significant discretion regarding the type of ‘appropriate measures’ that should feature in these air quality plans.⁷⁷ Admittedly, the recast Directive sets out minimum requirements for the content of these plans.⁷⁸ Ultimately, it falls upon national courts to evaluate, on a case-by-case basis, whether a given plan complies with the Directive. As the Court itself has established, a failure by the Member State to comply with the limit values and alert thresholds set out in the Directive does not, in and of itself, constitute a failure to comply with the obligation to draw up an action plan.⁷⁹

It is also worth highlighting the proposal put forward by the European Parliament during the negotiations of the recast Directive. The amendment would have allowed individuals affected by violations of the air quality standards to claim financial compensation solely based on the breach of those standards. This would have enhanced the prospect of individuals obtaining compensation for damages resulting from air pollution. Based on that proposal, any exceedance of the air quality standards set out in the Directive would have been sufficient on its own or trigger the right to compensation under Article 28 of the recast Directive. Unfortunately, this proposal failed to gather support among the Member States.

It follows from Article 28 that a breach of air pollution standards is not constitutive as such of a violation triggering the right of compensation. The recast Directive even spells out an additional requirement, introduced by the Council, which entails that financial compensation can only be obtained if the violation was ‘committed intentionally or negligently’.⁸⁰ This additional requirement entails that the breach must be qualified. The requirement of intent or negligence suggests, in particular, that the right to compensation may be available only in relation to egregious breaches of the obligation to establish

⁷⁷ *ClientEarth* (n 27) para 57.

⁷⁸ Recast Air Quality Directive (n 2) art 19(6).

⁷⁹ Case C-488/15 *Commission v Bulgaria* ECLI:EU:C:2017:267, para 107.

⁸⁰ Interinstitutional File 2022/0347(COD) art 28.

air quality plans. As a result, the ability of individuals to obtain compensation for harm caused by air pollution may be significantly restricted.

4. CONCLUDING REMARKS

Much ink has been spilled about the rights and remedies available to individuals affected by breaches of EU environmental law. This issue bears strong relevance in the context of long-standing debates regarding the enforcement issues of EU environmental law by national authorities. Historically, the Court has sought to encourage concerned individuals to stand up for the environment. This chapter explained, in particular, that the Court has developed remedies focused on the judicial protection of the collective interests underlying much of EU environmental law. In a nutshell, concerned individuals and environmental NGOs have been empowered to bring national authorities to court for their failure to comply with EU environmental law. The relevant case law, nevertheless, falls short of establishing remedies geared towards the protection of individual rights. The exclusion of state liability in environmental matters illustrates the Court's reluctance to expand the scope of judicial protection beyond the current emphasis on collective interests prevailing in current secondary legislation.

In light of these considerations, it should come as no surprise that many legal commentators voiced concerns about the Court's failure to embrace a more explicit individual rights-based approach in environmental matters. This chapter explained, however, that the approach of the Court was driven by underlying concerns intrinsic to the realm of environmental law. After all, that field has historically been preserved from the narrative of individual rights. One would be hard-pressed to find, within the regulatory universe of EU environmental law, specific legislative provisions explicitly conferring rights upon individuals (beyond the procedural participatory rights inspired by the Aarhus Convention). Most environmental provisions are designed to safeguard collective and diffuse interests, focused on the preservation of the environment as a whole. The EU Charter also evinces a certain reluctance to embrace a regulatory approach framed explicitly around environmental fundamental rights. It spells out a principle encouraging public authorities to strive for a 'high level of environmental protection', rather than a subjective entitlement available to individuals affected by the deterioration of the environment.

Viewed from this perspective, the Court should be commended for attempting to develop procedural rules and remedies tailored to the unique features of environmental law. A reasonable case can, therefore, be made that the responsibility lies with the EU legislature to overcome the emphasis on collective environmental interests prevailing in existing secondary legislation. Recent legislative developments suggest that the legislature is up to the task.

The recast Air Quality Directive shows, in particular, that the EU is willing to adopt a more explicit stance on individual rights in environmental law. Ultimately, though, the conditions established by Article 28 of the Directive present significant challenges for individual claimants seeking compensation for health damage caused by air pollution, thereby limiting the ‘bite’ of the newly introduced provision.