



ÖGER Research Paper Series

Nr. 4/2024

„The role of state liability in creating clean air in Europe – Can the violation of the ‘right to clean air’ be remedied by EU state liability“

verfasst von
Konstanze Fiona Pawlik

Wien, 2024

<https://oeger.eu/research-paper-series/>

1. INTRODUCTION	3
2. CASE C-61/21 JP V MINISTRE DE LA TRANSITION ECOLOGIQUE	4
2.1. FACTS OF THE CASE	4
2.2. JUDGMENT AND OPINION	5
2.2.1. <i>Individual right</i>	5
2.2.2. <i>Sufficiently serious breach</i>	7
2.2.3. <i>Causal link</i>	8
2.2.4. <i>Different result if a 'right to clean air' existed?</i>	8
3. 'RIGHT TO CLEAN AIR' AS AN INDIVIDUAL RIGHT	8
3.1. ARTS 13 AND 23 OF THE 'AIR QUALITY DIRECTIVE' AS A 'RIGHT TO CLEAN AIR'	9
3.1.1. <i>Explanation of Arts 13 and 23 AQD</i>	9
3.1.2. <i>Arts 13 and 23 AQD conferring an individual right</i>	10
3.2. 'RIGHT TO CLEAN AIR' AS A FUNDAMENTAL RIGHT	11
3.2.1. <i>EU Charter of Fundamental Rights</i>	11
3.2.1.1. Scope of Application of the CFR	11
3.2.1.2. Possible interpretations of the Articles of the CFR	12
3.2.1.3. Effectiveness of fundamental rights in the EU	14
3.2.2. <i>European Convention on Human Rights</i>	15
3.2.2.1. Scope of Application of the ECHR	15
3.2.2.2. A 'right to clean air' coming from the ECtHR Case Law	15
3.2.2.3. The Strasbourg Principles	17
3.3. FUNDAMENTAL RIGHTS AS 'INDIVIDUAL RIGHTS' WITHIN THE MEANING OF FRANCOVICH	18
3.3.1. <i>Definition of an 'individual right' under Francovich</i>	18
3.3.2. <i>Fundamental rights as individual rights</i>	19
4. FUNDAMENTAL RIGHTS BREACHES AS A 'SUFFICIENTLY SERIOUS BREACH'	22
4.1. DEFINITION OF A 'SUFFICIENTLY SERIOUS BREACH' UNDER FRANCOVICH	22
4.2. FUNDAMENTAL RIGHTS VIOLATION AS A BREACH UNDER FRANCOVICH	22
5. CAUSAL LINK BETWEEN HEALTH PROBLEMS AND EXCESSIVE AIR POLLUTION	25
5.1. DEFINITION OF A 'CAUSAL LINK' UNDER FRANCOVICH	25
5.2. PROBLEMS TO PROOF A CAUSAL LINK BETWEEN HEALTH DAMAGES AND EXCESSIVE AIR POLLUTION	26
6. CONCLUSION	27
7. BIBLIOGRAPHY	28
7.1. PRIMARY SOURCES	28
7.1.1. <i>EU Primary Law</i>	28
7.1.2. <i>International Agreements</i>	28

Pawlik, Right to Clean Air

7.1.3.	<i>EU Secondary Law</i>	28
7.1.4.	<i>CJEU Case Law</i>	28
7.1.5.	<i>Opinion of Advocate General</i>	29
7.1.6.	<i>ECtHR Case Law</i>	29
7.2.	SECONDARY SOURCES	30
7.2.1.	<i>Books</i>	30
7.2.2.	<i>Contributions to edited books</i>	30
7.2.3.	<i>Articles</i>	30
7.2.4.	<i>Working Papers</i>	31
7.2.5.	<i>European Commission Documents</i>	31
7.2.6.	<i>European Court of Human Rights Documents</i>	31
7.2.7.	<i>Websites</i>	32

1. INTRODUCTION

In 2019, ambient air pollution is estimated to have caused 4.2 million premature deaths worldwide.¹ According to the European Commission (EC), in Europe alone 300,000 premature deaths have been counted.² This figure shows how dangerous and life-threatening pollution is. This not only reinforces the fact that clean air can improve the quality of life, but also emphasises the importance of European legislation and legal instruments to ensure minimum air quality standards. The EC has therefore proposed a revised ‘Air Quality Directive’³ as part of the ‘European Green Deal’, which sets out standards that align closer with the recommendations of the World Health Organization.⁴ The Commission has set itself the target to achieve zero pollution for air by 2050.⁵ This legislative initiative shows how the European Union (EU) tries to react to health problems brought on by excessive air pollution.

But clean air quality does not stem from legislation alone, but above all from the effective enforcement of these provisions. For this reason, this seminar paper analyses the topic of clean air in Europe by shining a light on the most recent case decided by the European Court of Justice (ECJ): *JP v Ministre de la transition écologique and Premier ministre*.⁶ In this judgment, the Court decided whether Directive 2008/50⁷, which is also known as the ‘Air Quality Directive’ (AQD), confers an individual right to clean air under the *Francovich* doctrine. Even though the ECJ denied that the AQD confers an individual right to clean air, this seminar paper aims to take this question a step further: *To what extent can the ‘right to clean air’ be regarded as a fundamental right and can this fundamental right give access to State liability under Francovich?*

¹ WHO, ‘Ambient (outdoor) air pollution’ (19 December 2022) <[https://www.who.int/news-room/fact-sheets/detail/ambient-\(outdoor\)-air-quality-and-health#:~:text=In%202019%2C%2099%25%20of%20the.6.7%20million%20premature%20deaths%20annually](https://www.who.int/news-room/fact-sheets/detail/ambient-(outdoor)-air-quality-and-health#:~:text=In%202019%2C%2099%25%20of%20the.6.7%20million%20premature%20deaths%20annually)> accessed 2 December 2023.

² European Commission, ‘European Green Deal: Commission proposes rules for cleaner air and water’ (26 October 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6278#:~:text=The%20proposed%20revision%20of%20the,synergy%20with%20climate-neutrality%20efforts> accessed 2 December 2023.

³ Commission, ‘Proposal for a revision of the Ambient Air Quality Directives’ COM/2022/542 final.

⁴ WHO, ‘WHO global air quality guidelines: particulate matter (PM2.5 and PM10), ozone, nitrogen dioxide, sulfur dioxide and carbon monoxide’ <<https://iris.who.int/handle/10665/345329>> accessed 2 December 2023.

⁵ European Commission, ‘Questions and Answers on New Air Quality Rules’ (26 October 2022) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_6348> accessed 2 December 2023.

⁶ Case C-61/21 *JP v Ministre de la Transition écologique, Premier ministre* [2022] ECLI:EU:C:2022:1015.

⁷ 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 L 152/1 (hereinafter Directive 2008/50).

This paper will try to answer this question by first giving an account of the judgment of the Court and its interpretation of the *Francovich* doctrine. This is followed by a change of perspective: The interpretation of the three conditions of the *Francovich* doctrine (individual right, sufficiently serious breach and causal link) will show whether the violation of fundamental rights can also be compensated by State liability. In this regard, the question arises whether and, if so, from which legal source a ‘right to clean air’ could arise. The Articles of the AQD that were discussed in the most recent decision are interpreted in more detail. Then, the investigation extends to the Articles of the Charter of Fundamental Rights (CFR) and the decisions of the European Court of Human Rights (ECtHR), which can serve as an aid to interpretation.

After having analysed whether a fundamental right could be viewed as an ‘individual right’ within the meaning of *Francovich*, this paper will shed light on the remaining two criteria: the seriously qualified breach of EU law and the causal link. In the conclusion, it will be argued that, based on the outlined analysis and points, a ‘right to clean air’ does exist as a fundamental right and why this right could trigger EU State liability.

2. CASE C-61/21 JP V MINISTRE DE LA TRANSITION ECOLOGIQUE

2.1. Facts of the Case

In the case C-61/12 *JP v Ministre de la Transition écologique, Premier ministre*, the applicant, a French resident, claimed to have suffered serious health damages due to the deterioration of ambient air in his living space in Paris.⁸ JP, the applicant, applied to the Tribunal Administrative de Cergy-Pontoise firstly, to annul the implied decision refusing to take the necessary measures to remedy his health problems caused by air pollution since 2003, and secondly, for compensation from the French state for his damages, estimated at 21 million euros. The applicant claimed that the deterioration in air quality was due to the French authorities' failure to fulfil their obligation under Directive 2008/50 (‘Air Quality Directive’, AQD). In its judgment in 2017, the Tribunal Administrative de Cergy-Pontoise dismissed JP's claims in their entirety, basing its decision on the fact that Art 13 and Art 23 AQD do not grant individuals the right to compensation for the damage caused by the deterioration of air quality. JP brought an

⁸ Karmen Lutman, Lucija Strojjan, *State liability for health damage caused by excessive air pollution: Constitutional and Private Law aspects*, 35.

appeal against this decision before the Court Administrative d'Appel de Versailles. The French Court then decided to stay proceedings and to refer two preliminary questions to the ECJ.⁹

The key question in this case was whether individuals suffering from health problems resulting from excessive air pollution could successfully invoke the *Francovich* jurisprudence.¹⁰ To claim compensation in the sense of *Francovich*, three conditions need to be met: Firstly, an individual right, conferred by the rule, had to have been breached, secondly, the breach must be sufficiently serious and thirdly a direct causal link between the infringement and the damage must be proven.¹¹

2.2. Judgment and Opinion

While the ECJ and Advocate General *Kokott* agreed that the provisions of the AQD were sufficiently clear and conferred an obligation on the state, the Court held that the objective of the directive does not intend to confer an individual right, but rather seeks the protection of public health *as a whole* and thus, did not accept AG *Kokott's* argument. *Kokott*, however, regarding the first criterion of the *Francovich* doctrine as met examined whether the infringement was sufficiently serious and whether a causal link can be proven.¹² Given the discrepancy in opinion, the following sections of this paper evaluate and compare the ECJ's ruling and reasoning with *Kokott's* Opinion.

2.2.1. Individual right

As a first condition of the State liability rule, the infringed provision must be intended to confer rights on individuals.¹³ The Court reaffirmed that these rights do not need to be expressly granted to qualify as an individual right. To qualify as an individual right, the provision must be intended to impose a “positive or negative obligation” in a clearly defined manner on individuals, MS or EU institutions.¹⁴ Direct effect of the provision is “neither necessary, nor sufficient in itself” to comply with the criteria of an individual right under *Francovich*.¹⁵

⁹ *Ministre de la Transition écologique* (no 6) paras 28-33.

¹⁰ *Lutman, Strojjan* (no 8) 36.

¹¹ *Ministre de la transition écologique* (no 6) para 44.

¹² Opinion of Advocate General *Kokott* in Case C-61/21 *JP v Ministre de la Transition écologique, Premier ministre* [2022] ECLI:EU:C:2022:359, para 2.

¹³ *Ministre de la transition écologique* (no 6) paras 44, 45.

¹⁴ *Ibid* para 46.

¹⁵ *Ibid* para 47.

In its judgment, the Court examined whether Arts 13 and 23 AQD are “fairly clear and precise”.¹⁶ Art 13 of the AQD sets out the exact measures to prevent the MS from overstepping them. Although MS are given a margin of discretion in deciding on the measures to be taken under Art 23, they are obliged to reduce the risk of exceeding the limit values as well as minimising the duration of such an incident. Since Arts 13 and 23 of the AQD are analogous to provisions of other directives, the Court has classified Arts 13 and 23 of the AQD as “fairly clear and precise obligations”.¹⁷

With this judgement, the ECJ followed the Opinion of *Kokott*, who also found that Art 13 AQD is “sufficiently precise” and underlined this inter alia with the fact that the Court has repeatedly ruled over MS, which have infringed this provision.¹⁸ In her opinion, the obligation to improve air quality, as set out in Art 23 AQD, qualifies as a “clear independent obligation to establish air quality plans, which is triggered by the infringement of limit values”.¹⁹ Some MS²⁰, have, however, argued that Art 23 AQD is not sufficiently precisely laid down because the provision does not set a fixed deadline for bringing an end to the exceedance, only the obligation to keep the period of non-compliance as short as possible, and that the creation of the measures needs balancing between different legal interests. *Kokott* counters that the margin of discretion is only relevant when examining the second and third criterion of the State liability doctrine, namely whether the breach can be qualified as a sufficiently serious breach and whether a causal link exists.²¹

Furthermore, *Kokott* pointed out that the question of whether a rule of EU law is intended to confer rights on individuals depends “above all on the objectives of that legislation”.²² As Art 1 AQD and recital 2 of the directive point out, the aim of the directive, is “to avoid, prevent or reduce harmful effects on human health”.²³ The provisions of the directive therefore set out in concrete terms the obligation to comply with environmental protection and the protection of public health. This obligation of protection arises inter alia from Arts 2, 3 and 37 of the CFR. The Court has previously established that individuals “must be in a position to rely on the mandatory rules of those directives as rights” and their judicial protection.²⁴ In *Kokott’s* opinion,

¹⁶ Ibid para 54.

¹⁷ Ibid paras 49-54.

¹⁸ Opinion *Kokott* (no 12) paras 56-59.

¹⁹ Ibid para 69; See also ibid paras 60-67.

²⁰ Respectively the Republic of Poland, French Republic and Ireland.

²¹ Opinion *Kokott* (no 12) paras 70, 71.

²² Ibid para 72.

²³ Ibid para 73.

²⁴ Ibid para 76; For example: C-361/88 *Commission v Germany* [1991] ECLI:EU:C:1991:224, para 16.

the aim of the directive to protect human health indicates that Arts 13 and 23 of the AQD confer rights on individuals. The interest in health is highly individual and personal to the extent that the objective of the directive cannot be considered as solely aiming at the protection of the general public but at *individual* health as well.²⁵ Following on from this, *Kokott* also stated that ambient air quality problems arise only in specific places and affect specific, identifiable groups of people, which also indicates the importance of protecting *individual* health.²⁶

The Court, on the other hand, did not follow this interpretation of the objective of the directive in relation to the purpose of the provisions. It stated that the general objective of the AQD is to protect human health and the environment *as a whole* and that therefore the provisions do not (implicitly) grant a right to individuals or groups of individuals.²⁷

To conclude, the ECJ did not find that Arts 13 and 23 AQD are intended to confer rights on individuals²⁸ whereas *Kokott* stated that these provisions can be considered individual rights under *Francovich*.²⁹

2.2.2. Sufficiently serious breach

While the Court did not examine the two following criteria of the State liability doctrine, *Kokott* proceeded to consider whether the exceedance of limit values set out in Art 13 AQD and the quality of the plans stated in Art 23 AQD can be identified as a sufficiently serious infringement in case of violation by MS.

She argued that if MS exceeded the limit values without establishing a corresponding plan to remedy the exceedance, this would constitute a serious breach of EU law which may give rise to claims for compensation. The obligation of the MS to comply with these limit values leaves no discretion to the MS, which underlines the seriousness of the breach in its nature.³⁰

Kokott also stressed that the mere existence of an air quality plan is not sufficient to exclude the possibility of a serious breach under State liability. For a breach of EU law that can be considered as sufficient, even a formally correct plan can “not meet the substantive requirements because the competent bodies have breached the limits of their discretion”.³¹

²⁵ *Ibid* paras 72-77.

²⁶ *Ibid* para 101.

²⁷ *Ministre de la transition écologique* (no 6) paras 55, 56.

²⁸ *Ibid* para 57.

²⁹ Opinion *Kokott* (no 12) para 103.

³⁰ *Ibid* paras 108-112.

³¹ *Ibid* paras 115, 113-116.

Kokott therefore concludes that the infringement of Arts 13 and 23 AQD are likely to be qualified as a sufficiently serious breach of EU law.³²

2.2.3. Causal link

In her Opinion, *Kokott* referred to the difficulties of proving a causal link in cases such as the present one. However, she pointed out that in the present case it is not appropriate for the Court to rule on questions arising from these difficulties, as neither party has raised them.³³

2.2.4. Different result if a ‘right to clean air’ existed?

In spite of the ECJ negating the intention of Arts 13 and 23 of the AQD to confer rights on individuals, the question of whether the Court could have come to a different conclusion if a right to clean air existed arises. Would this fundamental right be protected by the remedy of State liability?

To interpret the State liability doctrine under *Francovich*, it is first necessary to determine if the scope of application of State liability and European fundamental rights is fulfilled. Secondly, it must be evaluated whether the EU confers a ‘right to clean air’ at all. If so, it must be asked whether the fundamental rights can be understood as individual rights in the sense of *Francovich*. Thirdly, the question arises whether violations of fundamental rights can be regarded as ‘sufficiently serious breaches’ in the sense of *Francovich*. Fourthly, the paper will delve deeper into the definition of a ‘causal link’ under the *Francovich* doctrine and examine the problems that arise in trying to prove a causal link between health problems and excessive air pollution.

The following analysis is based on the facts of Case C-61/21. Therefore, when discussing the application of State liability, reference is always made to the circumstances explained above.

3. ‘RIGHT TO CLEAN AIR’ AS AN INDIVIDUAL RIGHT

The policy of the European Union (EU) on clean air is very wide ranged. The question of whether the EU provides for a ‘right to clean air’ is not entirely clear yet. To find out whether the EU allows for a ‘right to clean air’, it is necessary to examine the wording of EU legal

³² Ibid para 125.

³³ Ibid para 139; The difficulties in proofing a causal link between health damages and excessive air pollution will be examined in Chapter 5. *Causal link between health damages and excessive air pollution*.

sources as well as case law and the legal foundations of the European Convention on Human Rights (ECHR) in order to understand the EU policy initiatives for clean air.³⁴

3.1. Arts 13 and 23 of the ‘Air Quality Directive’ as a ‘right to clean air’

The EU did not establish a ‘Clean Air Act’ or anything similar, that would target all issues relating to impacts on the atmosphere.³⁵ However, there is Directive 2008/50, also known as the ‘Air Quality Directive’ (AQD), which aims to “protect human health and the environment as a whole”³⁶ and therefore defines measures for avoidance, prevention or reduction and sets corresponding targets for ambient air quality.³⁷ It defines the required air quality for ambient air by prescribing limit values for the concentration of a limited range of pollutants. The AQD prescribes how and by whom air quality is to be “measured, communicated, maintained and, where necessary, improved”.³⁸

3.1.1. Explanation of Arts 13 and 23 AQD

The directive does not directly mention a ‘right to clean air’ or uses a similar expression, but the recital reaffirms respect for fundamental rights and the objective of protecting human health and the environment as a whole.³⁹ However, the recent case mentioned above dealt with the question of whether Arts 13 and 23 AQD could confer rights on an individual.⁴⁰

The compliance with the limit values set in Art 13 AQD shall be assessed in accordance with Annex III of the AQD. Art 23 AQD stipulates the obligation for MS to create an air quality plan, in case of exceedance of limit values or target values plus any relevant margin of tolerance. The directive established plans, namely ‘Air Quality Plans’ under Art 23 AQD and ‘Short-Term Action Plans’ under Art 24 AQD, which can be seen as the “key instrument for improvement”.⁴¹

³⁴ Winfried Huck, Jennifer Maaß, Saparya Sood, Tahar Benmaghnia, Alexander Schulte, Sarah Maylin Heß, Marc-Anthony Walter, *The Right to Breathe Clean Air and Access to Justice Legal State of Play in International, European and National Law* (SSRN 2021) 15.

³⁵ Delphine Misonne, *The emergence of a right to clean air: Transforming European Union law through litigation and citizen science* (2020) 34.

³⁶ Directive 2008/50/EC (no 7) Recital 2.

³⁷ Ibid Recital.

³⁸ Misonne (no 35) 35.

³⁹ Ibid 37; Directive 2008/50 (no 7) Recital; also: *Ministre de la Transition écologique* (no 6) para 55.

⁴⁰ For the interpretation of Arts 13, 23 AQD by the ECJ, see Chapter 2.2. *Judgment and Opinion*.

⁴¹ Misonne (no 35) 35.

3.1.2. Arts 13 and 23 AQD conferring an individual right

In its case law, the Court of Justice of the European Union (CJEU) reaffirmed that the AQD aims to protect human health.⁴² In *Janecek*,⁴³ the Court found that mandatory rules in directives, such as taking the necessary measures to ensure compliance with limit values,⁴⁴ which are designed to protect public health, confer rights on individuals.⁴⁵ These (procedural) rights are designed for individuals to be “in a position to rely on mandatory rules in order to be able to assert their rights”.⁴⁶

Although the Court found in the above-mentioned judgment that the broad aim of the directive⁴⁷ indicates *inter alia*, that the provisions are not intended to confer rights on individuals,⁴⁸ the ECJ has already ruled to the contrary in previous cases involving consumer protection provisions: In *Dillenkofer*, for example, it held that “while the directive intended to ensure broadly defined objectives such as the freedom to provide services, this did not preclude its provisions from also protecting consumers”.⁴⁹ In addition, the General Court found in *Staelen v Ombudsman*, that rules designed to protect general interests can also be intended to confer rights if they have characteristics that protect the individual.⁵⁰ This concludes that provisions of directives can be intended to confer rights even in absence of a clear indication.

Following this case law, I agree with *Kokott*, when she stated in her Opinion that Arts 13 and 23 AQD confer concrete rights on individuals,⁵¹ because both Articles “include a sufficiently delineated claim”.⁵² In case of Art 13 AQD, the limit values are concretely determined in Annex XI, its compliance is set out in Annex III and even the margin of tolerance is laid down in Annex III. Art 23 AQD also specifically mentions the prerequisites to draw up an air quality plan.

⁴² Case C-723/17 *Craeynest and Others* [2019] ECLI:EU:C:2019:533, para 67; See also this paper by an NGO: ClientEarth, *Individual Right to Clean and Healthy Air in EU* (2021) 9.

⁴³ Case C-237/07 *Dieter Janecek v Freistaat Bayern* [2008] ECLI:EU:C:2008:447, para 39.

⁴⁴ Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management [1996] OJ L 296, Article 7; This Directive was replaced by Directive 2008/50; See also: *Ministre de la Transition écologique* (no 6) para 37.

⁴⁵ ClientEarth (no 42) 9.

⁴⁶ Case C-59/89 *Commission v Germany* [1991] ECLI:EU:C:1991:225 para 19.

⁴⁷ Directive 2008/50 (no 7), Recital 2: „In order to protect human health and the environment as a whole, [...]”

⁴⁸ *Ministre de la Transition écologique* (no 6) para 56; See also for a summary and explanation of the judgement Chapter 2. *Case C-61/21 JP v Minstre de la transition écologique*.

⁴⁹ Joined Cases C-178/94, C-179/94, C-188 to C-190/94 *Dillenkofer and Others v Bundesrepublik Deutschland* [1996] EU:C:1996:375 para 39; Herwig C.H. Hofmann, Catherine Warin, *Identifying Individual Rights in EU Law* (2017) 6-7.

⁵⁰ Hofmann, Warin (no 49) 8; T-217/11 *Staelen v European Ombudsman* [2018] EU:T:2015:238, para 73.

⁵¹ Opinion *Kokott* (no 12) para 103; See also Chapter 2.2. *Judgement and Opinion*.

⁵² Thomas Jaeger, *Introduction to European Union Law* (2021) 165.

These provisions are designed to protect public health and as explained above therefore confer rights on individuals.

To ensure *effet utile* of EU law and the protection of rights through directives, individuals must be able to obtain redress. To establish State liability, it is irrelevant if “the provisions in question have direct effect, since direct effect is neither necessary⁵³, nor sufficient in itself⁵⁴” to meet the criterion of “conferring rights on individuals” under *Francovich*.⁵⁵

In conclusion, this means that, in my opinion, given the Opinion of Advocate General *Kokott* and previous case law of the Court itself, Arts 13 and 23 AQD are indeed intended to confer an individual right. The Court takes another lead, which is why the provisions of Art 13 and Art 23 AQD do not entitle individuals to claim compensation from the MS concerning damage to their health.⁵⁶ This seminar paper will therefore further analyse, whether a ‘right to clean air’ could arise from fundamental rights sources.

3.2. ‘Right to clean air’ as a fundamental right

3.2.1. EU Charter of Fundamental Rights

Before the CFR came into force in 2009, the ECJ had already “declared that the EU was bound to observe fundamental rights as general principles of law, as derived from the common constitutional traditions of the MS and from the standards of protection guaranteed by international instruments for the protection of fundamental rights, not least the ECHR”.⁵⁷ After the ECJ rulings in *Wachauf*⁵⁸ and *ERT*⁵⁹, it was clear, that MS were bound by fundamental rights, when implementing EU law. When the Charter was introduced in 2009, some believed it was a “confirmation of past practice”, but in reality, it has significantly changed EU law.⁶⁰

3.2.1.1. Scope of Application of the CFR

The CFR is not an international human rights agreement which sovereign states have agreed on. According to Art 6 of the Treaty on European Union (TEU),⁶¹ the Charter has “the same

⁵³ Case C-46/93 *Brasserie du pêcheur v Bundesrepublik Deutschland and the Queen* [1996] ECLI:EU:C:1996:79, para 18.

⁵⁴ Case C-98/14 *Berlington Hungary and Others* [2015] ECLI:EU:C:2015:386, para 110.

⁵⁵ *Ministre de la Transition écologique* (no 6) para 47.

⁵⁶ *Ibid* para 56.

⁵⁷ Daniel Sarmiento, *Who's afraid of the Charter? The Court of Justice, National Courts and the new framework of fundamental rights protection in Europe* (2013) 1268.

⁵⁸ Case C-5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECLI:EU:C:1989:179.

⁵⁹ Case C-260/89 *ERT v DEP* [1991] ECLI:EU:C:1991:254.

⁶⁰ Sarmiento (no 57) 1270.

⁶¹ Consolidated Version of the Treaty on European Union [2012] OJ C 326/13 (hereinafter TEU).

legal value as the Treaties”. The CFR can therefore be understood as a “layer of legal principles that glides through the existing polity, and which binds the institutions of the EU and the MS when they are implementing EU law”.⁶² The visibility of fundamental rights within the EU limited the margin of action of the MS and familiarized individuals with the standards to which MS are bound by implementing EU law.⁶³

The scope of application of the Charter is defined in Art 51 et seqq. CFR. The personal scope, as defined in Art 51 CFR stipulates that EU institutions, offices, bodies, agencies and MS are addressees of the Charter. As to the material scope of the Charter, the provision states that, regarding the MS, the Charter is only applicable, when they are implementing EU law. This definition shows that the scope of application differs between the EU institutions and MS.⁶⁴ As pointed out by the ECJ, Art 51 of the Charter does not extend its field of application beyond the powers of the EU and the CJEU is only appointed to interpret EU law in the light of the Charter, not national law. This also applies in case of a European legal act, which includes a reference to national law. The Charter does not “establish any new power or task [...] or modify powers and tasks as defined in the Treaties”, which means that the interpretation of a legal act by the Court must be within the limits of powers conferred on the EU.⁶⁵

3.2.1.2. Possible interpretations of the Articles of the CFR

The CFR does not mention a ‘right to clean air’, however, Art 37 of the CFR is dedicated to environmental protection. This provision does state a principle that must be integrated into the policies of the EU.⁶⁶ It lays down the obligations for public authorities while enforcing EU law to ensure the environmental integration into their policymaking but does not recognize an autonomous right to a clean or healthy environment.⁶⁷ What is especially interesting about this principle is its interrelationship with other provisions of the Charter. Some of the rights of the Charter “*shall* and others *may* be interpreted as including environmental rights”.⁶⁸ This is why this Chapter focuses on different Articles, that established an indirect link to Art 37 CFR.

Firstly, a right to clean air can be subsumed by the right to life under Art 2 CFR. The scope of application of the right to life under Art 2 CFR extends not only to criminal justice, but also to

⁶² Angela Ward, *Damages under the EU Charter of Fundamental Rights* (2011) 591, 592.

⁶³ Sarmiento (no 57) 1270, 1271.

⁶⁴ Ibid 1272, 1273.

⁶⁵ Case C-400/10 *PPU J McB v LE* [2010] ECLI:EU:C:2010:544, paras 51, 52.

⁶⁶ Misonne (no 35) 37.

⁶⁷ Elisa Morgera, Gracia Marín Durán, ‘Article 37’ in Peers/Hervey/Kenner/Ward (eds), *The EU Charter of Fundamental Rights – A Commentary* (2nd edn, Nomos Verlagsgesellschaft mbH & Co. KG 2022), 1041.

⁶⁸ Ibid no 37.05.

health protection.⁶⁹ Similarly, the AQD aims to protect public health.⁷⁰ As *Kokott* stated before in her Opinion on *Craeynest*, the provisions laid down in the AQD “put in concrete terms the Union’s obligation to provide protection following from the fundamental right to life under Art 2 (1) of the Charter [...]”.⁷¹ The Court then did not follow *Kokott*’s opinion on Art 2 CFR, but clarified that the AQD sets out “the EU’s obligations concerning environmental protection and the protection of public health”.⁷² This shows that the provisions of the AQD serve, among other things, to protect public health, which is covered by the scope of Art 2 CFR.

Secondly, following from this, the rules on ambient air quality also arise from the right to the integrity of the person under Art 3 CFR. Art 3 (1) CFR “guarantees physical and mental integrity without relating the concept of integrity to particular areas of life.”⁷³ In conjunction with this fundamental right to integrity, Art 9 of the Treaty on the Functioning of the European Union (TFEU) also stipulates that the EU shall require a high level of protection of human health by defining and implementing its policies and activities.⁷⁴ Art 3 CFR confirmed its importance in the judgment *Netherlands v European Parliament and Council*,⁷⁵ in which the ECJ stressed its competence to review acts of EU institutions against general principles of EU law to ensure their compatibility with the fundamental right to human integrity.⁷⁶ The EU must therefore not only protect human integrity while implementing new policies and activities,⁷⁷ but it is also subject of the review of the ECJ on the question of whether these acts are compatible with Art 3 CFR.

Regarding a ‘right to clean air’, the scope of application (“physical and mental integrity”) of Art 3 CFR is met. As described by *Kokott*, the failure of a MS to comply with the limit values set out in the AQD infringes a legal interest, namely Art 3 CFR, which “is ranked in first position in relation to other legal interests”.⁷⁸ It follows that, if the failure of a MS to comply with the provisions of the AQD is therefore liable to prejudice the legitimate interest of Art 3 CFR, the right to the integrity of the person includes the protection of human health harmed by excessive

⁶⁹ Elizabeth Wicks, ‘Article 2’ in Peers/Hervey/Kenner/Ward (eds), *The EU Charter of Fundamental Rights – A Commentary* (2nd edn, Nomos Verlagsgesellschaft mbH & Co. KG 2022), no 02.02.

⁷⁰ Directive 2008/50 (no 7), Article 1, Recital 2.

⁷¹ Opinion of Advocate General *Kokott* in Case C-723/17 *Craeynest and Others* [2019] ECLI:EU:C:2019:168, para 53.

⁷² *Craeynest* (no 42), para 33.

⁷³ Sabine Michalowski, Steve Peers, ‘Article 3’ in Peers/Hervey/Kenner/Ward (eds), *The EU Charter of Fundamental Rights – A Commentary* (2nd edn, Nomos Verlagsgesellschaft mbH & Co. KG 2022), no 03.01.

⁷⁴ *Ibid* 03.01., 03.02.

⁷⁵ Case C-377/98 *Netherlands v European Parliament and Council* [2001] ECLI:EU:C:2001:523.

⁷⁶ Michalowski, Peers (no 73) 03.06; *Netherlands* (no 73) para 70.

⁷⁷ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, Article 9.

⁷⁸ Opinion *Kokott* (no 12) para 91.

air pollution. In my view, this is an indication that Art 3 CFR includes health damage caused by air pollution and therefore includes an indirect ‘right to clean air’.

Art 7 CFR enshrines the right to respect for private and family life, which also corresponds to environmental protection. This right is best explained in conjunction with the interpretation of Art 8 ECHR. Based on the instructions in Art 52 (3) CFR, which state: “In so far as this Charter contains rights which correspond to rights guaranteed by the Convention [...], the meaning and scope of those rights shall be the same as those laid down by the said Convention”, the right to respect for private and family life will therefore be analysed in the next Chapter.⁷⁹

3.2.1.3. Effectiveness of fundamental rights in the EU

The EU treaties only explicitly set out one mechanism of public enforcement, namely infringement proceedings according to Arts 258 – 260 TFEU.⁸⁰ The case law of the ECJ has developed various types of legal remedies to ensure the effectiveness of EU law. These remedies, e.g. actions for damages, interim measures, access to justice and procedural safeguards with preliminary ruling proceedings, are in the hands of national judges. The CJEU has also developed the principle of effectiveness and equivalence. A further principle for ensuring the effectiveness of EU law can be found in Art 4 TEU, the principle of sincere cooperation, and in Article 19 TEU, which obliges the MS to provide sufficient legal remedies to ensure effective legal protection in areas of EU law.⁸¹

These remedies and principles concern national procedural law, as the MS are responsible for the implementation and enforcement of EU law. The fact that the MS are subject to the legal remedies of the EU is of great importance for the Charter, as fundamental rights are usually guaranteed before the national courts.⁸²

In contrast to the ECHR, which empowers the ECtHR with Art 41 ECHR to “afford just satisfaction to the injured party”⁸³, if national law only provides for partial reparation, the CFR itself does not set out any remedies in the event of its breach.⁸⁴ This absence of compensation for breaches of the CFR stems from the “sui generis nature of the EU legal system”.⁸⁵

⁷⁹ See Chapter 3.2.2. *European Convention on Human Rights*.

⁸⁰ Tobias Lock, *Is private enforcement of EU law through state liability a myth? An assessment 20 years after Francovich* (2012) 1675.

⁸¹ Sarmiento (no 57) 1283.

⁸² Ibid 1283.

⁸³ Convention for the Protection of Human Rights and Fundamental Freedoms [1950], Article 41.

⁸⁴ Ward (no 62) 590.

⁸⁵ Ibid 591.

It is therefore very important to delve into the possibility of State liability as a compensation for damages due to fundamental rights breaches.

3.2.2. *European Convention on Human Rights*⁸⁶

3.2.2.1. Scope of Application of the ECHR

Although the EU has formulated accession to the ECHR as a political objective in Art 6 (2) TEU, accession has not (yet) been realised due to two rejections by the CJEU.⁸⁷ That is why the relationship between the two systems remains largely informal. One of the formal elements of this relationship is stipulated in Art 6 (3) TEU, which assigns the ECHR the role of a source of inspiration and identifies the Articles of the ECHR as general principles of EU law. In addition, Art 52 (3) of the Charter states that the ECHR is the minimum standard for the protection of human rights in the EU insofar as the rights of the CFR correspond to the rights of the ECHR. The relationship between the two systems is also characterised by the dialogue between the judges of the two Courts and the reference of each Court to the case law of the other. The case law of the ECtHR on the liability of MS for violations of the ECHR in the context of their membership of the EU also characterises the interrelationship between the two.⁸⁸

3.2.2.2. A 'right to clean air' coming from the ECtHR Case Law

First of all, it needs to be recognized, that the ECHR does not provide “an explicit right to a clean and quiet environment”⁸⁹ or a “right to nature preservation”.⁹⁰ In order to infer the right to a clean environment or more specifically the right to clean air under one of the Articles, one needs to analyse the ECtHR case law.

Even if a human right to clean air or a clean environment cannot be directly derived from the Convention,⁹¹ the ECtHR does recognise “de facto” an environmental human right.⁹² This is not only based on the fact that it is not unusual for the ECtHR to embrace a right that is not

⁸⁶ As the relationship between the ECHR and the CFR is very close, this chapter focuses on the case law of the ECtHR and how it influences the understanding of the right to clean air. The comments on the individual articles of the CFR in chapter 3.2.1. *EU Charter of Fundamental Rights* therefore apply mutatis mutandis.

⁸⁷ Jaeger (no 52) 135.

⁸⁸ Tobias Lock, ‘Part III – Commentary on the Treaty of EU Accession to the European Convention on Human Rights’ in Peers/Hervey/Kenner/Ward (eds), *The EU Charter of Fundamental Rights – A Commentary* (1st edn, Nomos Verlagsgesellschaft mbH & Co. KG 2014), no 63.05.

⁸⁹ *Hatton and Others v the United Kingdom* no 36022/97 (ECtHR, 8 July 2003) para 96.

⁹⁰ *Fadeyeva v Russia* no 55723/00 (ECtHR, 9 June 2005) para 68; Irmina Kotiuk, Adam Weiss, Ugo Taddei, *Does the European Convention on Human Rights guarantee a human right to clean and healthy air? Litigating at the nexus between human rights and the environment – the practitioners’ perspective* (2022) 131.

⁹¹ *Hatton* (no 89) para 96.

⁹² Kotiuk, Weiss, Taddei (no 90) 131.

explicitly mentioned in the Convention,⁹³ but also by the recognition of the “link between the state of the environment and the protection of human health, life and well-being”.⁹⁴ The Court confirmed that “where an individual is directly and seriously affected by an environmental hazard, an issue may arise under Articles 2, 3 or 8 of the Convention”.⁹⁵

For this reason, the right to clean air derives from multiple Articles of the Convention comparable to Articles of the CFR.⁹⁶ As the ECtHR has discussed the issue of the right to a clean environment or clean air mainly in the context of Art 8 of the Convention, this paper also focuses on the interpretation of Art 8 ECHR.

In *Kyrtatos v Greece*, the ECtHR held that “neither Art 8 ECHR nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such”.⁹⁷ The Court explicitly said that even if severe environmental pollution may affect individuals’ well-being, the scope of application of Art 8 ECHR is not generally met. The scope of application of Art 8 ECHR only extends to environmental pollution in circumstances where the “environmental pollution has adversely affected one of the rights safeguarded by Art 8 (1) ECHR in the existence of a harmful effect on a person’s private or family sphere and not simply the general deterioration of the environment”.⁹⁸

The ECtHR also does not recognise an explicit “right to clean and quiet environment” deriving from Art 8 ECHR.⁹⁹ Art 8 ECHR is relevant when individuals are directly affected by environmental pollution such as toxic emissions,¹⁰⁰ noise,¹⁰¹ asbestos pollution¹⁰² or pollution emanating from gold mines.¹⁰³ This concludes that the ECtHR does allow the application of Art 8 ECHR for cases, where individuals suffer from environmental pollution. The link between the state of the environment and the enjoyment of the full right to respect for private and family life is therefore always determined by the serious impact on individuals if the environment is

⁹³ See for example the ‘right to asylum’.

⁹⁴ Kotiuk, Weiss, Taddei (no 90) 131.

⁹⁵ Council of Europe/ECtHR, *Health-Related Issues in the Case-Law of the European Court of Human Rights* (2015) 22.

⁹⁶ See Chapter 2.2.1. *EU Charter of Fundamental Rights*.

⁹⁷ *Kyrtatos v Greece* no 41666/98 (ECtHR, 22 August 2003) para 52.

⁹⁸ *Ibid* para 52.

⁹⁹ *Hatton* (no 89) para 96.

¹⁰⁰ *Guerra and Others v Italy* no 116/1996/735/932 (ECtHR, 19 February 1998) para 57.

¹⁰¹ *Powell and Rayner v the United Kingdom* no 9310/81 (ECtHR, 21 February 1990) para 40.

¹⁰² *Brincat and Others v Malta* no 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11 (ECtHR, 24 October 2014).

¹⁰³ *Tatar c Roumanie* no 67021/01 (ECtHR, 06 July 2009); Kotiuk, Weiss, Taddei (no 90) 131, 132.

polluted. The ECtHR also addresses the causal link between the environmental pollution and the deterioration of an individual's health.¹⁰⁴

In some of its case law, the ECtHR even explicitly referred to a right to a healthy environment. For example, in *Tatar v Romania*, the Court held that the authorities are obliged to adopt reasonable and adequate measures capable of protecting the rights of the person, firstly, the right to respect for private and family life, and secondly, the enjoyment of a healthy and protected environment.¹⁰⁵ The ECtHR also held in *Băcilă v Romania*¹⁰⁶ that it recognises the right to enjoy a “balanced environment” that respects the applicant's health.¹⁰⁷

3.2.2.3. *The Strasbourg Principles*

The ‘Strasbourg Principles of International Environmental Human Rights Law’ are a further aid to the interpretation of the Articles of the ECHR. They were drafted in 2020 at a conference, where the ECtHR brought together renowned experts in the field of international human rights law in the context of the environment. These Principles are intended to be used by legal professionals and judges engaged in international litigation of environmental matters but are not legally binding.¹⁰⁸

The Strasbourg Principles describe a “safe, clean, healthy and sustainable environment” as a “precondition for the full enjoyment of the whole range of civil, political, social, economic, cultural and solidarity rights”.¹⁰⁹ This definition shows that all the other rights laid down in the ECHR can only be fully enjoyed if the environment is protected. The ‘right to a clean environment’, as mentioned in the Principles, operates either as an explicit right stated in a legal act or as an implicit right deriving from different human rights of the ECHR. Namely, these are inter alia the “right to life; right to dignified life; prohibition of degrading and inhuman treatment; right to personal integrity; right to respect for private and family life and for home; right to property; prohibition of discrimination; peoples’ right to self-determination; right to health; right to food; right to water; and right to progressive development”.¹¹⁰ The right to a clean environment consists of two components: the substantive and procedural elements. The substantive element is not limited to those listed in the Principles, but the authors expressly

¹⁰⁴ *Băcilă c Roumanie* no 19234/04 (ECtHR, 04 October 2010) paras 63, 64.

¹⁰⁵ Translated from the French version: *Tatar* (no 103) paras 107, 112.; *Di Sarno and Others v Italy* no 30765/08 (ECtHR, 10 April 2012) para 110.

¹⁰⁶ Translated from the French version: *Băcilă* (no 104) para 71.

¹⁰⁷ *Kotiuk, Weiss, Taddei* (no 90) 131, 132.

¹⁰⁸ *The Strasbourg Principles of International Environmental Human Rights Law* (2022) 195.

¹⁰⁹ *Ibid* pt. 6, page 196.

¹¹⁰ *Ibid* pt. 8, page 196.

mention a ‘right to clean air’ as a part of the “right to a safe, clean, healthy and sustainable environment”.¹¹¹ This definition of a right to a clean environment clearly shows that even if the ECHR does not mention directly a right to clean air, it is a precondition for the full enjoyment of the protected human rights and, hence, derives from the human rights stipulated in the Convention.

3.3. Fundamental rights as ‘individual rights’ within the meaning of Francovich

3.3.1. Definition of an ‘individual right’ under Francovich

The definition of an ‘individual right’ was first established in the case *van Gend en Loos*, in which the Court stated that the EU legal order has a *sui generis* nature and that “Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage”. In this judgment, the Court also held that these rights can arise from clearly defined obligations on MS imposed by the Treaties, even when these are not expressly granted.¹¹² This definition of an ‘individual right’ was established in the context of direct effect and later recast in the context of State liability.¹¹³ The importance of a provision to be “sufficiently clear, precise and unconditional for an individual to rely on them” was also confirmed in State liability cases such as *Stockholm Lindöpark*.¹¹⁴

In its landmark judgment on State liability, *Francovich*, the ECJ described the first condition to claim for State liability, that it “should entail the grant of rights to individuals”.¹¹⁵ However, the Court went even further in its following judgment in *Brasserie du pêcheur*, in which it stated that only rights that are “intended to confer rights on individuals” can lead to State liability.¹¹⁶ This ruling invokes the connotation of the *Schutznormtheorie*, a concept known to the German speaking legal systems. If this approach applies to EU State liability cases, it would result in the fact, that the violation of a clearly and precisely defined obligation would not be sufficient in itself, but the ‘intent’ - the ‘telos’- of the provision must aim at protecting individuals. In view of the case law of the CJEU, it is clear that the Court has a much broader understanding of ‘intent’ than national courts which generally apply the *Schutznormtheorie*.¹¹⁷

¹¹¹ Ibid 196-197.

¹¹² Case C-26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] ECLI:EU:C:1963:1, para 3; Ward (no 62) 593, 594.

¹¹³ Ward (no 62) 594.

¹¹⁴ Hofmann, Warin (no 49) 5; Case C-150/99 *Stockholm Lindöpark* [2001] ECLI:EU:C:2001:34, para 35.

¹¹⁵ Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECLI:EU:C:1991:428, para 40; Hofmann, Warin (no 49) 6.

¹¹⁶ Hofmann, Warin (no 49) 6.

¹¹⁷ Ibid 6.

To summarise, an individual right under *Francovich* can be identified primarily by the precise and unambiguous wording of the provision. In addition, the intention of the European legislator, and thus, the objective of a provision is important for the identification of individual rights.

3.3.2. Fundamental rights as individual rights

According to Art 51 CFR, the scope of the Charter is met when MS implement EU law. The Charter does not establish or modify new or existing tasks and powers of the Union. Applying this to the facts of the case described above, the Charter is applicable, because France was in violation of EU law when it was exceeding the limit values set out in the AQD.

Which Article of the Charter could qualify as an ‘individual right’ within the meaning of *Francovich*? According to Art 37 CFR, the MS and the EU are obliged to ensure a “high level of environmental protection and the improvement of the quality of the environment”. This Article clearly does not define an individual ‘right’, but simply refers to policymaking and leaves it to the EU and national legislators to achieve these objectives.¹¹⁸ The provision, therefore, does not confer any right on individuals.

As *Ward* points out, “it is sufficient to note that damage liability can conceivably attach to fundamental rights that are not reflected in the Charter”.¹¹⁹ For the above described case, it is important to keep this in mind when assessing the Charter or other human rights legal sources with regards to a ‘right to clean air’, because this right is not expressly granted in these legal sources.

The ‘right to clean air’ could, however, fall within the scope of Art 2 CFR (‘right to life’)¹²⁰, which is why this section will now try to interpret whether the ‘right to clean air’ could be identified as an individual right, when subsumed under Art 2 of the Charter.

As set out in Art 52 (3) CFR, the meaning and scope of the provisions of the Convention, and therefore the case law of the ECtHR, apply equally to each provision of the Charter. The ECtHR interprets the right to life broadly, imposing both positive and negative obligations on MS. Art 2 CFR aligns with this interpretation, requiring not only the prevention of intentional loss of life but also the protection of lives through reasonable measures.¹²¹

¹¹⁸ *Ward* (no 62) 598.

¹¹⁹ *Ibid* 597-598.

¹²⁰ See Chapter 3.2.1.2. *Possible interpretations of the Articles of the CFR*.

¹²¹ *Wicks* (no 69) no 02.12.

For identifying an individual right, the provision must initially be clearly and precisely defined, as described in the previous chapter, in order to grant rights to individuals. The wording of the right to life differs from other Articles of the Convention, where the ECtHR observed that the notion of a *freedom* (for example Art 10 ECHR ‘*freedom of expression*’) inherently entails some degree of choice in its exercise. However, under Art 2 ECHR this assumption does not appear to apply due to the clear and explicit wording which calls for the protection of human life (‘*right to life*’).¹²²

To examine the *intent* of the ‘right to clean air’, it is necessary to scrutinise not only the negative obligations, such as the arbitrary use of force by the public authorities,¹²³ but the positive obligations recognised by the ECtHR under Art 2 ECHR. This applies in the context of public or private activity in case that lives may be at risk. MS are obliged to protect life, also in situations when the life threat is caused by a natural disaster “and the danger is imminent and clearly identifiable”.¹²⁴ Furthermore, for an interference with Art 2 ECHR it is sufficient that there was an exposure to a risk to life. There is no need for death to have occurred.¹²⁵

In its case law, the ECtHR clarified that the positive obligation entails that State authorities must reasonably endeavour to prevent a ‘serious, real and immediate risk to life’, provided they are aware of or should be aware of it.¹²⁶ Nevertheless, this obligation “does not impose an impossible or disproportionate burden on the authorities”.¹²⁷

Applying this interpretation of the positive obligation under Art 2 ECHR to the facts of the case, the question of whether exposure to poor air quality in agglomerated areas can already be described as a ‘serious, real and immediate risk to life’ arises. The case law of the ECtHR leads to the assumption that the mere existence of poor air quality is not sufficient to fall within the scope of Art 2 ECHR. In general, the ECtHR has accepted a link between air pollution and the right to life. More specifically, the Court found violations of Art 2 ECHR, when the air was

¹²² Christoph Grabenwarter C, ‘Article 2’ in Grabenwarter (ed), *European Convention on Human Rights: commentary* (1st edn, München Oxford Baden-Baden Basel: Verlag C.H. Beck oHG Hart Publishing Nomos Helbing Lichthenhahn Verlag 2014) no 4; The author noted this when answering the question of whether Art 2 ECHR contains a ‘right to end life’. Even if this is not discussed in this paper, I also assume that the wording of Art 2 ECHR is different to other Articles in the Convention and is therefore clearly and precisely defined.

¹²³ Wicks (no 69) no 02.20.

¹²⁴ Council of Europe/ECtHR, *Guide to the case-law of the European Court of Human Rights – Environment* (2022) 7-8.

¹²⁵ Ibid no 4.

¹²⁶ Ibid no 4-5; See also *Brincat* (no 102) para 82; *Fadeyeva* (no 90) and *Ledyeva and Others v Russia* no 53157/99, 53247/99, 53695/00, 56850/00 (ECtHR, 16 September 2004).

¹²⁷ Wicks (no 69) no 02.22.; See also *Osman v The United Kingdom* no 23452/94 (ECtHR, 28 October 1998).

polluted with emissions such as toxic emissions from a fertilizer factory¹²⁸ or asbestos¹²⁹. But the ECtHR has not yet adjudged on the possibility of an interference or even a violation of this fundamental right if the air is only as polluted as is common in agglomerated areas.

However, this could be different if a person is already suffering from serious health problems caused by poor air quality. In *Aparicio Benito v Spain*, the Court dismissed a complaint of a prisoner, who was exposed to the smoke of cigarettes by his fellow-prisoners as ill-founded, because it could not find sufficient evidence for his health issues due to the exposure to cigarette smoke.¹³⁰ This is an indication for the fact that if there is someone who can seriously prove the link between his health issues and poor air quality, Art 2 ECHR is more likely to be applicable. In the case described above, the applicant suffered from health problems linked to air pollution and sought compensation for damage arising from the deterioration of his state of health.¹³¹

Another argument in favour of the ECtHR including ambient air quality, when no specific type of pollution such as cigarette smoke or asbestos is added, is the fact that ambient air pollution in urban areas has already been linked to serious health risks such as lung cancer and diabetes.¹³²

In my opinion, due to the fact, that the AQD aims “to protect human health”¹³³, MS are put in a position, where they are, or at least should have been,¹³⁴ aware of the risks posed by excessive air pollution, which leads to the conclusion, that the scope of Art 2 ECHR is met. By infringing the AQD, MS put individuals in a real and immediate risk of life, which even led to health problems of the applicant. I therefore maintain - even if the Court has not yet ruled on this matter - that in the present case the right to life is intended to protect not only human health but also forbids excessive air pollution if it causes serious health problems. In this context, it can also be briefly emphasised that this was not a natural disaster, because although the air was polluted, this did not lead to other disasters such as mudslides¹³⁵ or earthquakes.¹³⁶

¹²⁸ *Guerra* (no 100).

¹²⁹ *Brincat* (no 102) para 81; Council of Europe/ECtHR (no 124) no 2.

¹³⁰ Translated from the French version: *Aparicio Benito c l’Espagne* no 36150/03 (ECtHR 13 November 2006) para 6; Council of Europe/ECtHR (no 124) no 32.

¹³¹ *Ministre de la Transition écologique* (no 6) paras 28, 29.

¹³² Jaspreet Kaur, Charu Jhamaria, *Urban Air Pollution and Human Health: A Review* (2021).

¹³³ Directive 2008/50 (no 7) Recital 2.

¹³⁴ See also Ibid Recital 21: “It is necessary for the MS [...] to collect, exchange and disseminate air quality information in order to understand better the impacts of air pollution and develop appropriate policies.”; And see also Ibid Art 27 AQD.

¹³⁵ *Boudaïeva and Others v Russia* no 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR, 20 March 2008); Council of Europe/ECtHR (no 124) no 14.

¹³⁶ *M. Özel and Others v Turkey* no 14350/05, 15245/05 and 16051/05 (ECtHR, 17 November 2015); Council of Europe/ECtHR (no 124) no 3.

However, it would be a fallacy to conclude that if a MS does not fulfil its positive obligation to protect human life, it automatically interferes with Art 2 CFR. It is important to note that the obligations to uphold other rights may justify the decision of a MS to not take specific actions to preserve life.¹³⁷ MS hence need to balance different legal interests while preventing health risks. In other words, the positive obligations imposed by the right to life are of “limited nature”.¹³⁸ This is of great importance for the ‘right to clean air’, as the fundamental rights of private parties, such as the ‘right to property’ under Art 1 of Protocol No. 1 of the Convention, who may be responsible for excessive air pollution must also be considered. The question of whether the French State's failure to take the necessary measures constitutes an infringement of the right to life and can therefore be considered a ‘sufficiently serious breach’ will be answered in the next chapter.

4. FUNDAMENTAL RIGHTS AS ‘SUFFICIENTLY SERIOUS BREACHES’

4.1. Definition of a ‘sufficiently serious breach’ under Francovich

In the leading decision *Francovich*, the ECJ declared that the failure to transpose a directive within the prescribed period can be regarded as a ‘breach of Community law’. In the subsequent *Brasserie du pêcheur* case, the ECJ extended this definition of a ‘breach’ beyond the context of directives to any sufficiently qualified infringement of EU law. In *Köbler*, the ECJ went even further and stated that the doctrine of State liability also covers “breaches by the judiciary where the infringement of EU law was manifest”.¹³⁹

4.2. Fundamental rights violation as a breach under Francovich

The line of case law previously described still leaves the question of whether fundamental rights can also be regarded as provisions of EU law, which can be so seriously breached that they justify State liability. As Art 6 (1) TEU states the Charter has the same legal value as the Treaties. In *Brasserie du pêcheur*, the ECJ stated that “the state liability principle is a general principle applicable to all cases where a Member State infringes Community law, irrespective of whether the breach concerns a provision of the EC Treaty, a regulation or the implementation of a directive”.¹⁴⁰ In conclusion, this means that if the CFR has the same legal value as the

¹³⁷ Wicks (no 69) no 02.22.

¹³⁸ Wicks (no 69) no 02.08.

¹³⁹ Lock (no 80) 1675-1676.

¹⁴⁰ Matilda Rotkirch, *The Principle of State Liability – The Creation of a General Principle of Law to Enhance Effective Judicial Protection of Individual EC Rights* (2002) 15.

Treaties and the Court clarified that a breach of a provision of the EC Treaty can lead to State liability, a breach of an Article under the CFR can give rise to State liability as well.

In the light of this definition of an ‘infringement’, this means that the violation of fundamental rights can also lead to State liability. This chapter therefore deals with the second prerequisite of the doctrine of State liability: the seriousness of a breach and the role of MS discretion in this context.

To start with the assessment of a ‘sufficiently serious breach’ it needs first to be examined whether Art 2 CFR was not only interfered with but rather violated. The previous chapter already examined that France interfered with Art 2 CFR because the substantive element of the right to life is present. However, did the state also *violate* this fundamental right? In Art 52 (1) CFR, the Charter stipulates that an interference is justified if it fulfils three criteria: It must be provided for by law, respect the essence of the fundamental right, and be proportionate. In the present case, however, the interference is not based on national or EU law that interferes with a fundamental right, but on the fact that France has not taken the necessary measures to avoid exceeding the limit values laid down in the AQD.¹⁴¹ For this reason, Art 52 (1) CFR is not applicable. Since Article 52 (3) CFR allows the case law of the ECtHR to be used to interpret the provisions of the Charter if they correspond to the rights of the Convention, the ECtHR's method of justification should also be applied in this case when assessing the conformity of an omission with the Convention.

In its case law, the ECtHR found inter alia a violation of Art 2 ECHR, when a domestic law protecting the right to life existed only in theory.¹⁴² In the present case, France failed to fulfil its obligation to prevent the limit values laid down in the AQD from being exceeded. This led not only to an interference, but also to a violation of the right to life by the French state, as the effective safeguarding of limit values to prevent excessive air pollution only existed in theory.¹⁴³

The gravity of a breach was also discussed in *Brasserie du pêcheur*, in which the ECJ established the criteria “for assessing whether the wrongdoer had manifestly and gravely

¹⁴¹ *Ministre de la Transition écologique* (no 6) para 33 (1).

¹⁴² *Ciechońska v Poland* no 19776/04 (ECtHR, 14 June 2011) para 77.

¹⁴³ As this paper only deals with the issue of State liability for the violation of fundamental rights, it does not go into detail as to whether and how France has implemented the Directive. This was the subject of the national court proceedings and is irrelevant to the issue of State liability in relation to fundamental rights. The national courts found that, in any event, France had not complied with the provisions of the AQD and was therefore in breach of its obligations. (See *Ministre de la Transition écologique* (no 6) paras 29, 33 (1)).

disregarded the limits on the exercise of their discretion”.¹⁴⁴ Firstly, the Court examined whether the infringed provision was clear and unambiguous and then measured the national or community authorities' margin of discretion. Further criteria are whether the infringement and the resulting damage were intentional or voluntary and whether the legal error was excusable or inexcusable.¹⁴⁵

Having established that the wording was clear and unambiguous under Art 2 CFR (see above in the previous chapter), it is now necessary to turn to the second criterion concerning the margin of discretion the provisions of the Charter leave for the MS. As explained in the previous chapter, Art 2 CFR contains of a positive obligation by MS “to create a legal and administrative framework that ensures an effective defence against threats to human life”.¹⁴⁶ As *Berka* points out, MS have a particularly wide margin of discretion in situations where the protection of human life depends on the “dangers of modern civilization”, such as transport or nuclear energy. Hence, it is only in exceptional circumstances that the obligation to provide protection becomes unmistakably evident in such scenarios. This might occur, for instance, when safeguards against identifiable hazards are entirely neglected or when an established level of protection undergoes significant reduction.¹⁴⁷

As air pollution can be classified as a “danger of modern civilization”¹⁴⁸, MS have a particularly wide margin of discretion. The application of the criteria to the case described above could lead to an exceedance of the margin of discretion if MS completely disregard the risks of excessive air pollution. Thus, if France refused “to take the necessary measures to address the health problems linked to air pollution”, as claimed by the applicant JP,¹⁴⁹ it can be argued that France has neglected the risk of excessive air pollution and has therefore (at least) *exceeded* its discretion.¹⁵⁰

What constitutes an interference in every respect is the intentional killing or life-threatening threat by state authorities. Harm to health is equivalent to killing.¹⁵¹ This aligns with the assessment of a ‘sufficiently serious breach’ under *Francovich* if the impairment of health was

¹⁴⁴ Ward (no 62) 600.

¹⁴⁵ Ibid 600-601.

¹⁴⁶ Translated from German: Walter Berka, *Verfassungsrecht* (2021) no 1343a.

¹⁴⁷ Ibid no 1343b.

¹⁴⁸ Ibid no 1343b.

¹⁴⁹ *Ministre de la transition écologique* (no 6) para 2.

¹⁵⁰ This of course depends on the interpretation of the facts by the national court, which is why this paper does not further analyse the Member States' margin of discretion in this case.

¹⁵¹ *Berka* (no 146) no 1337.

intentional. This would be a further indication of the second criterion, but is not relevant to the present case, as there is no evidence of any intention on the part of France to pollute the air excessively.¹⁵²

In the above-mentioned case, France applied EU law, when it was implementing the AQD. This made it possible to infringe Charter rights, namely the right to life pursuant to Art 2 CFR. As the Charter has the same legal value as the Treaties, its infringement could also be qualified as a ‘breach’ within the meaning of *Francovich*. If the margin of discretion was extended as well¹⁵³, it follows that the infringement met the requirements set out in the State liability case law.

5. CAUSAL LINK BETWEEN HEALTH PROBLEMS AND EXCESSIVE AIR POLLUTION

5.1. Definition of a ‘causal link’ under *Francovich*

The third condition of the *Francovich* doctrine is the “existence of a causal link between the breach of the State’s obligation and the loss and damage suffered by the injured parties”.¹⁵⁴ The question of causation is to be decided by the national courts, whereas the CJEU may “provide the national court with all the guidance it deems necessary”.¹⁵⁵

This was confirmed by the Court in cases like *Norbrook Laboratories*¹⁵⁶, where it explicitly held that the national court is competent to decide on the presence of a direct causal link. Nevertheless, the Court does not seem to hold a consistent line of case law: In *Brinkmann Tabakfabriken*¹⁵⁷ or *Rechberger*¹⁵⁸, on the other hand, the ECJ itself ruled over the existence of a causal link.¹⁵⁹

However, it is a fact that in order to know the definition of a ‘causal link’ in the sense of civil liability law, it is necessary to delve deeper into national jurisprudence.¹⁶⁰

¹⁵² See for example Case C-244/01 *Gerhard Köbler v Republik Österreich* [2003] ECLI:EU:C:2003:513, para 55, where the Court explains the factors which determine whether a breach was seriously qualified and consequently finds that one factor is whether the infringement was committed intentionally.

¹⁵³ *Ministre de la Transition écologique* (no 6) paras 49-53.

¹⁵⁴ *Francovich* (no 115) para 40.

¹⁵⁵ Opinion *Kokott* (no 12) para 128.

¹⁵⁶ Case C-127/95 *Norbrook Laboratories v Ministry of Agriculture, Fisheries and Food* [1998] ECLI:EU:C:1998:151, para 110.

¹⁵⁷ Case C-319/96 *Brinkmann Tabakfabriken v Skatteministeriet* [1998] ECLI:EU:C:1998:429.

¹⁵⁸ Case C-140/97 *Rechberger and Others* [1999] ECLI:EU:C:1999:306, paras 73 et seqq.

¹⁵⁹ Jans J.H., *State Liability: In Search of a Dividing Line between National and European Law* (2007) 290.

¹⁶⁰ For reasons of stringency, this seminar paper does not further analyse the definition of a ‘causal link’ under national case law.

5.2. Problems to proof a causal link between health damages and excessive air pollution

This seminar paper will quickly point out the problems arising from proving a direct causal link between health damages and excessive air pollution in this specific case. In her Opinion, *Kokott* stated that the suffering of certain people due to excessive air pollution can only be an assumption, because health damages could be triggered by different factors, such as smoking.¹⁶¹

She further explained that to prove a causal link, the injured party must firstly prove that he stayed for a period of time in an area, where the limit values had been exceeded to amount to a ‘significant serious breach’ of EU law. The injured party must then show that the limit values were exceeded during the period he stayed in that area.¹⁶²

Secondly, the applicant needs to prove that his health damage can be linked to the bad ambient air quality. Thirdly, the party must also prove the link between his stay at the agglomerated area and the damage.¹⁶³

Evidence would have to be given in form of medical reports. In addition, *Kokott* proposed a rebuttable presumption for typical types of health damages to be attributable to a sufficiently long period of stay in an area where the limit values had been exceeded. She even points at ECtHR case law¹⁶⁴, in which the Strasbourg Court applied a presumption similar to the one she proposed.¹⁶⁵

The third condition of the *Francovich* doctrine would also be fulfilled in the case of a fundamental rights breach, namely the ‘right to clean air’ as part of the right to life, if the applicant can prove a direct causal link.

¹⁶¹ Opinion *Kokott* (no 12) para 130.

¹⁶² *Ibid* paras 131 et seqq.

¹⁶³ *Ibid* paras 135 et seqq.

¹⁶⁴ *Fadeyeva v Russia* (no 90) paras 87, 88.

¹⁶⁵ Opinion *Kokott* (no 12) paras 137 et seqq.

6. CONCLUSION

According to the *Francovich* doctrine, three conditions must be met to trigger State liability: an individual right, a sufficiently serious breach and a causal link. To what extent can the ‘right to clean air’ be regarded as a fundamental right and can this fundamental right give access to State liability under *Francovich*?

In my opinion, the French State interfered in the right to life under Art 2 CFR by exceeding the limit values for air pollution set out in the AQD. This is because the scope of application of Art 2 CFR does include a ‘right to clean air’.

Due to its clear and precise wording and the intent to protect human life, Art 2 CFR can be qualified as an ‘individual right’ according to the *Francovich* doctrine. Since the Charter has the same legal value as the Treaties¹⁶⁶, a violation of the Charter would also be considered a ‘Union law breach’ within the meaning of *Francovich*. In these circumstances, the French state violated the Charter because it did not effectively fulfil its positive obligations to protect human life under Art 2 CFR. Furthermore, a breach is ‘sufficiently serious’ in the sense of *Francovich* if MS exceed their discretion. In the present case, France exceeded its discretion by not taking measures to combat health problems linked to air pollution. Some problems would arise for the applicant in proving the last condition of the doctrine, but once these were overcome, the last prerequisite would also be met.

In summary, despite the Court concluding that Arts 13 and 23 of the AQD were not intended to confer rights on individuals, the ‘right to clean air’ can be considered a fundamental right included in the scope of certain Articles of the Charter in light of the ECtHR case law. If the Court affirms the violation of a Charter right - especially Art 2 CFR - in cases such as the leading judgement of this seminar paper, this could give rise to State liability under *Francovich*.

¹⁶⁶ Article 6 (1) TEU.

7. **BIBLIOGRAPHY**

7.1. **Primary Sources**

7.1.1. ***EU Primary Law***

Consolidated Version of the Treaty on European Union [2012] OJ C 326/13

Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47

Charter of Fundamental Rights of the European Union [2012] OJ C 326/391

7.1.2. ***International Agreements***

Convention for the Protection of Human Rights and Fundamental Freedoms, 4 September 1950, CETS No. 005, ratified by 46 States (Status 15 January 2024), entered into force 03 September 1953

7.1.3. ***EU Secondary Law***

Directive 2008/50 [2008] OJ L 152/1

Directive 96/62 [1996] OJ L 296

7.1.4. ***CJEU Case Law***

Case 61/21 *JP v Ministre de la Transition écologique, Premier ministre* [2021] ECLI:EU:C:2022:1015

Case C-723/17 *Craeynest and Others* [2019] ECLI:EU:C:2019:533

T-217/11 *Staelen v European Ombudsman* [2018] EU:T:2015:238

Case C-98/14 *Berlington Hungary and Others* [2015] ECLI:EU:C:2015:386

Case C-400/10 *PPU J McB v LE* [2010] ECLI:EU:C:2010:544

Case C-237/07 *Dieter Janecek v Freistaat Bayern* [2008] ECLI:EU:C:2008:447

Case C-244/01 *Gerhard Köbler v Republik Österreich* [2003] ECLI:EU:C:2003:513

Case C-377/98 *Netherlands v European Parliament and Council* [2001] ECLI:EU:C:2001:523

Case C-150/99 *Stockholm Lindöpark* [2001] ECLI:EU:C:2001:34

Case C-140/97 *Rechberger and Others* [1999] ECLI:EU:C:1999:306

Case C-127/95 *Norbrook Laboratories v Ministry of Agriculture, Fisheries and Food* [1998] ECLI:EU:C:1998:151

Case C-319/96 *Brinkmann Tabakfabriken v Skatteministeriet* [1998] ECLI:EU:C:1998:429

Joined Cases C-178/94, C-179/94, C-188 to C-190/94 *Dillenkofer and Others v Bundesrepublik Deutschland* [1996] EU:C:1996:375

Case C-46/93 *Brasserie du pêcheur v Bundesrepublik Deutschland and the Queen* [1996] ECLI:EU:C:1996:79

Case 59/89 *Commission v Germany* [1991] ECLI:EU:C:1991:225

Joined Cases C-6/90 and 9/90 *Francovich and Bonifaci v Italy* [1991] ECLI:EU:C:1991:428

Case C-260/89 *ERT v DEP* [1991] ECLI:EU:C:1991:254

Case C-5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECLI:EU:C:1989:179

Case C-26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] ECLI:EU:C:1963:1

7.1.5. Opinion of Advocate General

Opinion of Advocate General *Kokott* in Case C-61/21 *JP v Ministre de la Transition écologique, Premier ministre* [2022] ECLI:EU:C:2022:359

Opinion of Advocate General *Kokott* in Case C-723/17 *Craeynest and Others* [2019] ECLI:EU:C:2019:168

7.1.6. ECtHR Case Law

M. Özel and Others v Turkey no 14350/05, 15245/05 and 16051/05 (ECtHR, 17 November 2015)

Brincat and Others v Malta no 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11 (ECtHR, 24 October 2014)

Di Sarno and Others v Italy no 30765/08 (ECtHR, 10 April 2012)

Ciechońska v Poland no 19776/04 (ECtHR, 14 June 2011)

Băcilă c Roumanie no 19234/04 (ECtHR, 04 October 2010)

Tatar c Roumanie no 67021/01 (ECtHR, 06 July 2009)

Boudaïeva and Others v Russia no 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR 20 March 2008)

Aparicio Benito c l'Espagne no 36150/03 (ECtHR, 13 November 2006)

Fadeyeva v Russia no 55723/00 (ECtHR, 9 June 2005)

Ledyeva and Others v Russia no 53157/99, 53247/99, 53695/00, 56850/00 (ECtHR, 16 September 2004)

Kyrtatos v Greece no 41666/98 (ECtHR, 22 August 2003)

Pawlik, Right to Clean Air

Hatton and Others v the United Kingdom no 36022/97 (ECtHR, 8 July 2003)

Osman v The United Kingdom no 23452/94 (ECtHR, 28 October 1998)

Guerra and Others v Italy no 116/1996/735/932 (ECtHR, 19 February 1998)

Powell and Rayner v the United Kingdom no 9310/81 (ECtHR, 21 February 1990)

7.2. Secondary Sources

7.2.1. Books

Jaeger T, *Introduction to European Union Law* (facultas 2021)

Berka W, *Verfassungsrecht* (Verlag Österreich 2021)

7.2.2. Contributions to edited books

Grabenwarter C, ‘Article 2’ in Grabenwarter (ed), *European Convention on Human Rights: commentary* (1st edn, München Oxford Baden-Baden Basel: Verlag C.H. Beck oHG Hart Publishing Nomos Helbing Lichthenhahn Verlag 2014)

Lock T, ‘Part III – Commentary on the Treaty of EU Accession to the European Convention on Human Rights’ in Peers/Hervey/Kenner/Ward (eds), *The EU Charter of Fundamental Rights – A Commentary* (2nd edn, Nomos Verlagsgesellschaft mbH & Co. KG 2022)

Morgera E, Durán G. M, ‘Article 37’ in Peers/Hervey/Kenner/Ward (eds), *The EU Charter of Fundamental Rights – A Commentary* (2nd edn, Nomos Verlagsgesellschaft mbH & Co. KG 2022)

Peers S, ‘Article 3’ in Peers/Hervey/Kenner/Ward (eds), *The EU Charter of Fundamental Rights – A Commentary* (2nd edn, Nomos Verlagsgesellschaft mbH & Co. KG 2022)

Wicks E, ‘Article 2’ in Peers/Hervey/Kenner/Ward (eds), *The EU Charter of Fundamental Rights – A Commentary* (2nd edn, Nomos Verlagsgesellschaft mbH & Co. KG 2022)

Wollenschläger F, ‘Article 17(1)’ in Peers/Hervey/Kenner/Ward (eds), *The EU Charter of Fundamental Rights – A Commentary* (2nd edn, Nomos Verlagsgesellschaft mbH & Co. KG 2022)

7.2.3. Articles

Jans J. H, ‘State Liability: In Search of a Dividing Line between National and European Law’ [2007] Vol. 7 Europa Law Publishing, 279

Kaur J, Jhamaria C, ‘Urban Air Pollution and Human Health: A Review’ [2021] Vol. 16 Special Issue 1 Current World Environment, 01

Kotiuk I, Weiss A, Taddei U, ‘Does the European Convention on Human Rights guarantee a human right to clean and healthy air? Litigating at the nexus between human rights and the environment – the practitioners’ perspective’ [2022] Vol. 13 Special Issue Journal of Human Rights and the Environment, 122

Lock T, 'Is private enforcement of EU law through state liability a myth? An assessment 20 years after Francovich' [2012] Vol. 49 Common Market Law Review, 1657

Lutman K, Strojan L, 'State liability for health damage caused by excessive air pollution: Constitutional and Private Law aspects' [2023] Vol. 34 Journal of Agricultural and Environmental Law, 31

Misonne D, 'The emergence of a right to clean air: Transforming European Union law through litigation and citizen science' [2020] RECIEL, 34

Sarmiento D, 'Who's afraid of the Charter? The Court of Justice, National Courts and the new framework of fundamental rights protection in Europe' [2013] Vol. 50 Common Market Law Review, 1267

'The Strasbourg Principles of International Environmental Human Rights Law' [2022] Vol. 13 Special Issue Journal of Human Rights and the Environment

Ward A, 'Damages under the EU Charter of Fundamental Rights' [2011] ERA, 589

7.2.4. Working Papers

ClientEarth, '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' (2021)

Hofmann H. C. H, Warin C, 'Identifying Individual Rights in EU Law' (2017) Faculty of Law, Economics and Finance Working Paper Series 2017-004

Huck W, Maaß J, Sood S, Benmagnia T, Schulte A, Maylin S, Walter M-A, 'The Right to Breathe Clean Air and Access to Justice Legal State of Play in International, European and National Law' (2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3808572> accessed 29 November 2023

Rotkirch M, 'The Principle of State Liability – The Creation of a General Principle of Law to Enhance Judicial Protection of Individual EC Rights' (2002) Centre of European Studies at Lund University Working Paper Series

7.2.5. European Commission Documents

European Commission, 'Proposal for a revision of the Ambient Air Quality Directives' COM/2022/542 final

7.2.6. European Court of Human Rights Documents

Council of Europe/ECtHR, 'Health-Related Issues in the Case-Law of the European Court of Human Rights' (2015) <http://www.antonioacasella.eu/salute/ECHR_health_2015.pdf> accessed 13 January 2024

Council of Europe/ECtHR, 'Guide to the case-law of the European Court of Human Rights - Environment' (2022)

<https://www.echr.coe.int/documents/d/echr/Guide_Environment_ENG> accessed 29 March 2024

7.2.7. Websites

WHO, 'Ambient (outdoor) air pollution' (19 December 2022) <[https://www.who.int/news-room/fact-sheets/detail/ambient-\(outdoor\)-air-quality-and-health#:~:text=In%202019%2C%2099%25%20of%20the,6.7%20million%20premature%20deaths%20annually](https://www.who.int/news-room/fact-sheets/detail/ambient-(outdoor)-air-quality-and-health#:~:text=In%202019%2C%2099%25%20of%20the,6.7%20million%20premature%20deaths%20annually)> accessed 2 December 2023

European Commission, 'European Green Deal: Commission proposes rules for cleaner air and water' (26 October 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6278#:~:text=The%20proposed%20revision%20of%20the,synergy%20with%20climate-neutrality%20efforts> accessed 2 December 2023

WHO, 'WHO global air quality guidelines: particulate matter (PM2.5 and PM10), ozone, nitrogen dioxide, sulfur dioxide and carbon monoxide' <<https://iris.who.int/handle/10665/345329>> accessed 2 December 2023

European Commission, 'Questions and Answers on New Air Quality Rules' (26 October 2022) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_6348> accessed 2 December 2023

European Environment Agency, 'How air pollution affects our health' (18 October 2023) <<https://www.eea.europa.eu/en/topics/in-depth/air-pollution/eow-it-affects-our-health>> accessed 02 February 2024