

The emergence of a right to clean air

Transforming EU law through litigation and
citizen science

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Abstract

Air quality is a matter of rights. A substantive right to clean air for individuals has emerged from European Union legislation, the corollary of duties made ever tighter by the Court of Justice of the European Union (CJEU). In delivering on these developments, reliance on two factors was and remains of crucial importance: litigation and citizen science. The present article focuses on the CJEU's interpretation of European Union law on ambient air quality and on how that interpretation impacts domestic jurisdictions. The article explores the apparent absence of rights talk in such legislation, while showing in parallel how air quality, health and rights constantly intersect and form an undeniable backdrop, or context, that favours – and even requires – a stricter protection of individuals against air quality degradation.

Context

- The air **we all** breathe
- Is **very unequally protected**

- **No global hard law** regime on the quality of ambient air
 - Strange contrast to climate law (while many sources of GHG and 'classical' air pollutants in a fossil-fuel era are just the same – for instance: coal)
 - **Main global reference today: soft governance guidelines (WHO), for a few pollutants only**
- In many countries, requirements (if any) differ according to the **type of area** (industrial/residential)
 - While people and their 'air quality requisites' are supposed to be the same...as humans
- Existing standards do not take vulnerabilities (the **exposure** of children) sufficiently into account
- Air connects with health and life – Same humans, everywhere

European Union law

- **NO GLOBAL CLEAN AIR ACT**

- Regimes on **ambient air quality standards**
 - Directive 2008/50 (= hard law) (SO_2 , NO_2 , PM_{10} , $\text{PM}_{2,5}$, O_3)
 - Directive 2004/107 (= hard law) (arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons)

It articulates:

- limit values
- air quality management plans

- **But what do they mean?**

For years, the answer was:
wellyou know, it's
difficult...very complex...discretion
of public authorities...
the price to pay for a modern
society....



SWITCH

Searching for clarity and substance via

Litigation

Judicial activism

- Strategic
- Public interest litigation
- **NGO's – as main actors of the transformation**

In first line or in the backyard (at the forefront: citizens)

- Issue of locus standi (Aarhus's impact)

Citizen science

Fresh approaches to citizen empowerment

- Issue of trust
- Easier access to (light) technology: knowledge and information from public authorities can easily be challenged
- **Contest institutional knowledge**
- Raises awareness on the (bad) state of air quality

The European Court of Justice

A collection of cases

With questions raised by many national courts

The new « age »/wave started with the Janecek case, 2008

Who can require the adoption of an air management plan?

An individual can require the competent national authorities to draw up an action plan if necessary by bringing an action before the competent courts (!)

A collection of cases building up a new narrative

- **On the power of the judges.** They must take all necessary measures in respect of the competent national authority, such as, if provided for by national law, an order: « you must adopt another plan », « you must install new measurement stations »
- **On the status of obligations on limit values:** obligations of result
- **On the minimal content of plans:** they need to be apt to keep the exceedence of limit values as short as possible (8, 10 years is too long)
- **On how to interpret and collect measurement data:** « it is the responsibility of the competent national authorities to choose the location of sampling points in such a way as to minimise the risk that incidents in which limit values are exceeded may go unnoticed ».
- **The achievement of the objective of protection of human health is not left to the sole discretion of the Member States.** The concept of 'limit value' requires that compliance must be guaranteed within a given period and subsequently maintained
- **On the right to an effective judicial remedy, etc**

Driving force: it's **all about people's health** –
so, be serious

- **the natural or legal persons are** directly concerned by the application of EU legislation
- **because air = health & bad air = a danger to health**
- justiciability: **QUALITY OF AMBIENT AIR = A MATTER FOR THE COURTS + judicial orders**

- Progressively assemble different « pieces »
- to give a **powerful meaning to the directive**
- with important consequences:

multiplication of low emissions zones, re-discussion of measurement policies, diesel bans, etc



Does it mean we have now gained a « right to clean air » in the EU?

- Not formally said, no « language of rights » on environmental issues by the ECJ = quite usual but
- = **Yes**, as **the corollary of ever tighter duties**, as interpreted by the ECJ
- Subjective rights
- **air connects with health and life**
- exceedance of the limit values leads to a large number of premature deaths
- = connects with **fundamental rights**
- = stricter judicial review
- Even if, of course, rights are not 'absolute'

AG Kokott, C-723/17, Craeynest (2019)

Premature deaths?

« The rules on ambient air quality therefore **put in concrete terms the Union's obligations to provide protection following from the fundamental right to life** under Article 2(1) of the **Charter** and the high level of environmental protection required under Article 3(3) TEU, Article 37 of the Charter and Article 191(2) TFEU. **Measures which may impair the effective application of Directive 2008/50 are thus comparable, in their significance, with the serious interference with fundamental rights on the basis of which the Court made rules subject to strict review** ».

The Court refers to that position « in essence »

A right
to clean air is emerging
Because answers
were asked and
obtained

...who is the guardian
of the air?

@misonne2021

There would be no possibility of a convincing protection of ambient air in Europe stemming from Directive 2008/50 without the accompanying case law of the CJEU that has been established, patiently, often strategically, due to the decisions of a limited number of associations and citizens to bring their cases before the domestic courts with good arguments and the conviction that the air people breathe is a matter of rights. In the specific structure built upon Directive 2008/50, after years of procrastination and resignation, strategic litigation made all the difference. It forced the CJEU to flesh out the true meaning of the Directive, including on measurement. A re-humanization of EU ambient air policies is the main dividend in this process.¹³⁸

While air quality plans and measurements were for a long time in the realm of administrative discretion, they have now turned out to be a matter of rights for individuals and for the exposed population. These include silent rights mirroring a fluid dynamic of ever stronger duties under the directive. But they also include fundamental rights, both substantial (the right to life) and procedural (the right to an effective remedy) that subject implementing national measures to another category of limits.

Are there « limits » to a right to clean air?

Is it all about the interpretation of one directive only ?

- Remember: no clean air act in the EU...(don't we need one?)
- Can the main messages (relation to health, restricted discretion of public authorities) apply to other fields, also directly dealing with emissions, air and health, **beyond the scope of Directive 2008/50 ?**
- Why should the approach to emissions and health protection be less strict when sources are concerned?

- What can we learn from ...**other waves of litigation ?**
- on, say, civil liability and duty of care, or fundamental rights at national level, or criminal law
- Going beyond 'legal' standards ?

How to move from a « compliance-solving approach »

To a « problem-solving approach »?

Asking the right questions ...

A logic of accommodation and empathy, that can get disrupted when a few individuals start to ask the right questions and do not get satisfied with easy answers.

The right questions, based on the consideration that air quality is something to genuinely care about. Because it is a matter of the utmost importance for public health. Because, as a consequence, it is a matter of rights for the individuals. Because, in many cases, it is also a matter of unfair competitive advantage.

Taking emissions control truly *au sérieux*. Could this be the refreshed base for a brand new Clean Air Act in Europe, which would also include, somehow, the market surveillance of vehicles?



In the EU
and elsewhere?
**Air connects with health
and life ...everywhere**

Coming soon:

UNEP REPORT,

**The first global assessment
of air pollution legislation**

(by E. Scotford & D. Misonne), 2021

Air quality is not only about numerical
thresholds. Modernized governance schemes
also matter.

Regulating Air Quality

**The first global
assessment of air
pollution legislation**

Thank you

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