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Clean Air for All? An Analysis of EU Air Pollution Legislation and Health Inequality

Bonnie Nolan

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By: Bonnie Nolan¹

Communities around the world face health risks due to air pollution. These health risks can include asthma, cognitive impairment, and even death. But these negative health effects are not equally spread among communities. Studies have established that air pollution affects socially disadvantaged areas more. The correlation between socioeconomic levels and increased risk of environmental harm is referred to as environmental inequality. The World Health Organization has found that environmental health inequality occurs in every European Union (EU) member country. The EU has implemented multiple pieces of legislation to reduce air pollution, including Directive 2008/50/EC, which sets specific air quality that establish concentration limits for air pollutants. If a member country exceeds a value limit for a pollutant, the European Commission can initiate infringement proceedings against that country. The Court of Justice for the European Union then steps in and uses its enforcement power against the country to bring it in line with EU law. The Court has had to use this enforcement power against multiple offenders, including Spain, Germany, and France. Although the Commission has taken multiple member states to court over their exceedance of air quality standards, the Court has not yet imposed financial penalties on the offending country. This paper argues that the current EU air pollution legislation does not effectively reduce the environmental health inequality among the member countries. Moreover, this paper encourages the EU Council and Parliament to pass a new air quality directive based on a recent European Commission proposal that directly addresses environmental health inequality. And the EU should cooperate with other countries to eliminate sources of pollution.

I. Introduction

London has long served as a muse for air pollution depictions in media. The fumes and fog that once existed before proper air quality legislation was in place to serve as a warning to the viewer to not take their much cleaner air for granted. As coal combustion increased during the industrial era, so did the dirty air.² London and Edinburgh were even known as “The Smoke” and “auld Reekie” due to the fumes.³ The pollution was so evident in urban life that Charles Dickens even utilized air pollution as a symbolic device in his novel, *Our Mutual Friend*: “It was a foggy day in London, and the fog was heavy and dark. Animate London, with smarting eyes and irritated lungs, was blinking, wheezing, and choking; inanimate London was a sooty spectre, divided in purpose between being visible and invisible, and so being wholly neither.”⁴

Recently, season one, episode four of the Netflix hit show, *The Crown*, shifted away from its general focus on the life of the late Queen Elizabeth II to highlight a lesser-known catastrophe, The Great Smog of 1952.⁵ Not only was the episode based on a real event, but the Great Smog

¹ J.D. Candidate, SMU Dedman School of Law, 2024; Staff Editor for the International Law Review Association.

² David Fowler et al., *A Chronology of Global Air Quality*, 378 PHIL. TRANSACTIONS ROYAL SOC’Y A MATHEMATICAL, PHYSICAL & ENG’G SCI. 2, 7 (Sept. 28, 2020).

³ *Id.* at 2.

⁴ See CHARLES DICKENS, *OUR MUTUAL FRIEND*, (505) (1865).

⁵ Kate Samuelson, *Everything to Know About the Great Smog of 1952, as Seen on The Crown*, TIME MAG. (Nov. 4, 2016), <https://time.com/4554972/great-smog-london-crown-netflix/> [<https://perma.cc/T9AM-5XXW>].

was also a catalyst that changed the way society thought about and reacted to air pollution.⁶ Recent records suggest that the event caused 12,000 deaths.⁷ For five days, “an anticyclonic inversion trapped the smoke of innumerable coal fires . . . diesel exhaust, and other industrial effluvia over the city.”⁸ Media and literature serve as a timeliness reminder of the dangers of air pollution, and the need for effective government regulation to support human health in urban communities.

A. Brief History of Air Quality Legislation

Air pollution legislation has continued to develop in step with advancements in human civilization. A historic method of government regulation to reduce air pollution in urban areas was to keep the sources of the pollution outside the city.⁹ As the law continued to develop, common law procedures such as the law of nuisance was used by individuals to act against air pollution.¹⁰ The famous English case, commonly referred to as *William Alfred’s case* (1611), is thought of as one of the first instances of citizens utilizing the law to fight personal environmental harms.¹¹ The facts of this case concern “a neighbor dispute over the stench of a pigsty and the obstruction of light.”¹² After the plaintiff won, the defendant appealed the case to the King’s Bench and argued that the plaintiff had not suffered a material injury because “One ought not to have so delicate a nose, that he cannot bear the smell of hogs,” and having hogs was essential for his livelihood.¹³ In affirming the plaintiff’s victory, the Court of Appeals highlighted two aspects of nuisance law: (1) if a defendant interferes with a plaintiff’s full enjoyment of his property, such as creating an unhealthy air, then the plaintiff can bring a nuisance claim due to that injury, and (2) “since the plaintiff had shown actionable damages to elements of necessity for his use and enjoyment of his real property, the court could not undertake the balancing of social utilities.”¹⁴ Another famous nuisance case, *St. Helen’s Smelting Co. v. Tipping*, occurred about 200 years later where a plaintiff claimed “noxious vapors” from the factory affected his property by damaging vegetation and offending employees and residents.¹⁵ The defendant’s argument, that the plaintiff assented to the vapors since the factory existed before the plaintiff bought his property failed, and relied on the nuisance test laid out in *Alfred’s case*.¹⁶

The legal field in England then shifted from the common law to statutes and legislation to reduce environmental harms at a broader scale instead of just relying on the judiciary and individualized action. Early English legislation includes the 1853 Smoke Nuisance Abatement Act, the Alkali Act in 1863, and the creation of the Royal Commission on Noxious Vapours in 1876 to reduce air

⁶ Michelle L. Bell, Devra L. Davis & Tony Fletcher, *A Retrospective Assessment of Mortality from the London Smog Episode of 1952: The Role of Influenza and Pollution*, 112 ENV’T HEALTH PERSP. 6, 6-8 (2004).

⁷ Matthew Wills, *Old Smoke: London’s Famous Fog*, JSTOR DAILY (Aug. 24, 2015), <https://daily.jstor.org/old-smoke-londons-famous-fog/> [<https://perma.cc/LM2K-7MFQ>].

⁸ *Id.*

⁹ Fowler, *supra* note 1, at 6.

¹⁰ Noga Morag-Levine, *The Case of Proclamations (1610), Alfred’s Case (1610), and the Origins of the Sic Utere/Salus Populi Antithesis*, 40 L. & HIST. REV. 383, 407 (2022).

¹¹ *Id.* at 383.

¹² *Id.* at 384.

¹³ George P. Smith, II, *Nuisance Law: The Morphogenesis of an Historical Revisionist Theory of Contemporary Economic Jurisprudence*, 74 NEB. L. REV. 658, 683-84 (1996).

¹⁴ *Id.* at 685.

¹⁵ *Id.* at 686.

¹⁶ *Id.* at 687.

pollution in urban areas.¹⁷ As discussed above, the Great Smog of 1952 had devastating effects and led to broader legislation, starting with the Clean Air Act of 1956 and 1968, that had a greater focus on protecting human health.¹⁸ These acts were later consolidated into the Clean Air Act of 1993, which prohibited the emission of dark smoke from chimneys, required certain new furnaces to be smokeless, regulated the height of chimneys, and allowed local authorities to create smoke control areas.¹⁹

But air pollution and environmental issues are not confined to one country, nor are their effects. Thus, a coordinated effort between countries was needed to produce actual results in terms of improving human health. The European Environmental Agency (EEA), an agency of the European Union, began working in 1994 to “help the community and member and cooperating countries make informed decisions about improving the environment, integrating environmental considerations into economic policies, and moving towards sustainability.”²⁰ Shortly after the foundation of the EEA, the European Union (EU) began passing a series of Directives to limit air pollution and to improve human health in member countries.²¹ The EU utilized a legislative tool called a ‘Directive,’ which allows each member state to pass their own laws to accomplish a specific EU goal from the EU Directive.²² The EU first passed the Air Quality Framework Directive in 1996 to combat air pollution.²³ The Air Quality Framework Directive in 1996, Directive 96/62/EC, followed which focused on diminishing the negative effects on human health and the environment, using a singular method to analyze the ambient air quality in the member states, sharing information on ambient air quality with the public, and overall improving ambient air quality.²⁴ But directive 96/62/EC was criticized for not specifying emission levels for certain chemicals and the EU had to issue “daughter directives” for specific chemicals.²⁵ The first “daughter directive” addressed allowed levels of “SO₂, NO₂, NO, dust and lead” to improve human health.²⁶ Shortly after, the EU implemented a new Directive regulate air quality, Directive 2008/50/EC.²⁷ This Directive is still in force and will be discussed more thoroughly later in the paper.²⁸

B. Why Does Effective Air Pollution Legislation Matter

As Daniel Gilbert, Harvard Psychology Professor, has noted, humans “don’t respond to long-term threats [climate change] with nearly as much vigor and venom as we do to clear and present

¹⁷ Fowler, *supra* note 1, at 7.

¹⁸ Clean Air Act 1993, c. 11 (UK), <https://www.legislation.gov.uk/ukpga/1993/11> [<https://perma.cc/325G-T5Q2>].

¹⁹ *Id.* at Part I- Part III.

²⁰ WHO WE ARE, EUR. ENV’T AGENCY (last modified Oct. 3, 2022), <https://www.eea.europa.eu/about-us/who> [<https://perma.cc/T3W4-K3AZ>].

²¹ *See* 1996 O.J. (L 296); 2001 O.J. (L 309).

²² *Types of Legislation*, EUR. UNION, https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en [<https://perma.cc/B2UC-SLGK>](last visited Jan. 23, 2023).

²³ *See* 1996 O.J. (L 296).

²⁴ *Id.* at Article one.

²⁵ Karolina Kuklinska et al, *Air quality policy in the U.S. and the EU – a review*, 6 ATMOSPHERIC POLLUTION RSCH. 129, 133 (2015).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Infra* at section III.

dangers [speeding baseball].”²⁹ Although also an environmental problem, air pollution is not treated with the same skepticism as climate change.³⁰ This is likely due to the clear health risks associated with polluted air, that have led society to categorize it as a present danger, like a speeding baseball. Air pollution is more than aesthetically unappealing, it also can lead to fatalities.³¹ According to the World Health Organization, “nine out of ten people now breathe polluted air, which kills 7 million people every year.”³² Additionally, “air pollution is also linked to childhood cancers.³³ Exposure to air pollution can affect fetal brain growth if a pregnant woman is exposed to air pollution.³⁴ Air pollution is also linked to cognitive impairment in both children and adults.”³⁵ The main pollutant resulting in this high rate of mortality and negative health effects is referred to as particulate matter, which is “a mix of solid and liquid droplets arising mainly from fuel combustion and road traffic.”³⁶ Thus, improving air pollution is closely intertwined with addressing climate change and reducing greenhouse gas emissions, especially in the transportation sector.³⁷ Society must view climate change as they do air pollution, as a speeding baseball to tackle air pollution and its negative health effects fully.³⁸

As discussed above, air pollution legislation has come a long way, especially in the European Union, which vows total climate neutrality by 2050.³⁹ WHO’s data on air pollution’s effect on human health further shows the importance of improving air quality as fast as possible.⁴⁰ But studies have shown that air pollution’s effect on human health is not distributed equally among population groups.⁴¹ Thus, it is vital that the EU recognizes the existence of environmental inequality and takes the proper steps to rectify this inequity in its legislation.

This paper will introduce the concept of environmental inequality and follow with studies that further analyze the relationship between health inequality and air pollution. Next, this paper will review the EU’s current air quality legislation and the Court of Justice’s role in enforcing the EU’s air quality limits. This will be followed by a discussion of the European Commission’s (the Commission) proposal for new air quality legislation. Lastly, this paper will conclude that EU should replace the current EU air quality legislation with the Commission’s proposal; that proposal

²⁹ Neal Conan, *Humans Wired to Respond to Short-Term Problems*, NPR (July 3, 2006), <https://www.npr.org/templates/story/story.php?storyId=5530483> [<https://perma.cc/TVR2-Q3DX>].

³⁰ Anita Engels et al, *Public climate-change skepticism, energy preferences and political participation*, 23 GLOBAL ENV’T CHANGE 1018, 1019 (2013).

³¹ *Factsheet on the Revision of EU Ambient Air Quality Legislation*, EUR. COMM’N (Oct. 26, 2022), https://ec.europa.eu/commission/presscorner/detail/en/fs_22_6283 [<https://perma.cc/Y6H6-8W4X>].

³² *How Air Pollution is Destroying Our Health*, WORLD HEALTH ORG., <https://www.who.int/news-room/spotlight/how-air-pollution-is-destroying-our-health> [<https://perma.cc/DTW6-KH3Z>] (last visited Jan. 20, 2023).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Conan, *supra* note 28.

³⁹ *Communication From the Commission: The European Green Deal*, at 2.1.1, COM (2019) 640 final (Dec. 12, 2019).

⁴⁰ See *How Air Pollution is Destroying Our Health*, *supra* note 31.

⁴¹ Evangelia Samoli et al., *Spatial variability in air pollution exposure in relation to socioeconomic indicators in nine European metropolitan areas: A study on environmental inequality*, 249 ENV’T POLLUTION 345, 350 (2019).

is an effective first step to addressing the harms caused by environmental inequality; but there is still more the EU and member states need to do to address environmental health disparities.

II. Environmental Health Inequality in the EU

Environmentalism is a very broad field and had a general focus on preserving the natural world.⁴² Since it is such an extensive field, the environmental movement has various branches, all focusing on different ways to study the interaction between humans and the natural world.⁴³ Environmental inequality is one of the branches of the environmental movement that gained popularity in the 1980s and 1990s and is defined as “the unequal exposure of socially or economically deprived individuals . . . to pollution and its associated effects on their health or their environment, as well as the disproportionate environmental protection provided through laws, regulations, and enforcement.”⁴⁴ Essentially, researchers in this field seek to establish that certain groups of people are disproportionately burdened by environmental problems.⁴⁵ This inequality is known as the “triple bind” of subordinate social groups: “not only do they benefit the least from capitalist social relations, they are also the most burdened by capitalism’s toxic externalities and are the least able to protect their health once they are so burdened.”⁴⁶ Scholars have established that “income and property [are] consistently associated with hazard presence in the expected direction: as environmental hazard presence increases, income decrease and poverty rates increase.”⁴⁷

Environmental health inequity occurs in every EU member country, and “environmental inequalities are therefore a direct contributor to health inequalities.”⁴⁸ WHO concluded that air pollution does in fact affect socially disadvantaged areas more than others due to an increased exposure level.⁴⁹ For example, “people living in low-and middle-income countries disproportionately experience the burden of outdoor air pollution with 89% (of the 4.2 million premature deaths) occurring in these areas.”⁵⁰ Lower income individuals often live in less desirable locations, such as next to busy roads, which leads to increased exposure to transportation pollution.⁵¹ According to WHO, the three main drivers of air pollution inequalities for lower income individuals are (1) residing in neighborhoods with increased traffic and industrial levels, (2) living closer to city centers and industrial areas for work, (3) working outdoors in areas affected by air pollution.⁵² Furthermore, other factors that affect health conditions, such as economic,

⁴² Lorraine Elliott, *Environmentalism*, BRITANNICA ACAD. (Jan. 13, 2022), academic-eb-com.proxy.libraries.smu.edu/levels/collegiate/article/environmentalism/32737#article-contributors [https://perma.cc/ZL24-49LH].

⁴³ *Id.*

⁴⁴ Liam Downey, *Assessing Environmental Inequality: How the Conclusions We Draw Vary According to the Definitions We Employ*, 25 SOCIO. SPECTRUM: THE OFFICIAL J. OF THE MID-SOUTH SOCIO. ASS’N 349 (2005); Martin Branis & Martina Linhartova, *Association between unemployment, income, education level, population size and air pollution in Czech cities: Evidence for environmental inequality? A pilot national scale analysis*, 18 HEALTH & PLACE 1110, 1112 (2012).

⁴⁵ Downey, *supra* note 43.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Environmental Health Inequalities In Europe: Second Assessment Report*, WORLD HEALTH ORG. 2 (2019), <https://apps.who.int/iris/bitstream/handle/10665/325176/9789289054157-eng.pdf> [https://perma.cc/YZ8Y-JVEE].

⁴⁹ *Id.* at 57.

⁵⁰ *Ambient (outdoor) air pollution*, WORLD HEALTH ORGANIZATION (Dec. 19, 2022), [https://www.who.int/news-room/fact-sheets/detail/ambient-\(outdoor\)-air-quality-and-health](https://www.who.int/news-room/fact-sheets/detail/ambient-(outdoor)-air-quality-and-health) [https://perma.cc/RDW9-6DYY].

⁵¹ *Environmental Health Inequalities In Europe: Second Assessment Report*, *supra* note 47, at 57.

⁵² *Id.*

education, and employment status, lead to increased sensitivity to the health issues associated with air pollution.⁵³

WHO relied on various studies to support their conclusion that environmental health inequalities occur in every EU member country.⁵⁴ One of these studies analyzes the levels of nitrogen dioxide “as a surrogate for traffic related air pollution” in nine urban European areas to determine if there is worse air quality in deprived regions.⁵⁵ This study found higher levels of nitrogen dioxide in areas of European Metropolises where there was “higher levels of population density, percentage of population born outside the EU28 countries, crimes per 100,000 inhabitants and unemployment rate.”⁵⁶ The scholars recommended that policy makers take into account the “spatial environmental inequalities” when creating legislation to reduce air pollution levels for improved human health.⁵⁷ Another study found an existing relationship between air pollution exposure and socio-economic status that is associated with factors such as the distance between urban residences and road traffic.⁵⁸ Furthermore, “vulnerable individuals within low SES groups exposed to air and noise pollution can experience increased health impacts.”⁵⁹ Lastly, a study that focused on the exposure of multiple pollutants in thirty nine cities in the Czech Republic found that people living in areas that had a lower education and increased rate of unemployment were more likely to be exposed to pollutants related to domestic heating, and “solid fuel combustion pollutants (PM10 and SO2).”⁶⁰ On the other hand, populations of cities were exposed to pollutants mainly from traffic.⁶¹ The studies conclude that more research in this area is needed.⁶²

As shown above, there is a real issue in European countries regarding disparities between air pollution exposure and socio-economic status, creating environmental injustice in every member state.⁶³ Furthermore, there are not only differences in the disparities between EU countries but also within cities, which makes the research more challenging, especially in certain EU countries where air pollution data is unavailable.⁶⁴ If the EU hopes to meet the United Nations’ No one Left Behind Theme from its 2030 Agenda for Sustainable Development, it must incorporate the conclusions of this research, and provide funding for additional research in its legislation.⁶⁵ The next section will examine the current state of EU ambient air quality legislation and later, this paper will analysis if the current measures offer enough protection for vulnerable groups disproportionately affected by air pollution.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Samoli, *supra* note 18, at 346.

⁵⁶ *Id.* at 345.

⁵⁷ *Id.* at 352.

⁵⁸ Jo Barnes et al., *Qualitative Assessment of Links Between Exposure to Noise and Air Pollution and Socioeconomic Status*, 230 WIT TRANSACTIONS ECOLOGY & ENV’T 15, 22 (2018).

⁵⁹ *Id.*

⁶⁰ Branis & Linhartova, *supra* note 43, at 1113 (2012).

⁶¹ *Id.*

⁶² *See id.*; Barnes, *supra* note 57, at 22-23.

⁶³ *See Environmental Health Inequalities In Europe: Second Assessment Report*, *supra* note 47, at 57.

⁶⁴ *Id.*

⁶⁵ *See Leave No One Behind*, UN Sustainable Development Group, <https://unsdg.un.org/2030-agenda/universal-values/leave-no-one-behind#:~:text=It%20represents%20the%20unequivocal%20commitment,of%20humanity%20as%20a%20whole.> [https://perma.cc/UF4B-CQ5W] (last visited March 9, 2023).

III. Enforcement of the Current EU Air Quality Directive

The European Union has dramatically improved air quality over the last decade using its current legislative tools.⁶⁶ For example, “between 2000 and 2020 emissions of the main air pollutants have decreased by between 13% and 84%” and the mortality rate due to air pollution has decreased by 70% since 1990.⁶⁷ This legislation toolkit includes two Directives, Directive 2004/107/EC and 2008/50/EC that set out EU air quality standards that establish concentration limits for the air pollutants most harmful to human health and cannot be surpassed in the EU.⁶⁸ In partner with these directives, the European Commission published the EU Clean Air Policy Package in 2013 to reduce the negative effects poor air quality has on human health by establishing new EU national emission ceilings for specific air pollutants for 2030.⁶⁹ Lastly, the EU has passed legislation for specific industries such as the Industrial Emissions Directive.⁷⁰ This paper will focus on Directive 2008/50/EC and follow the Commission’s initiation of infringement proceedings against member states who fail to follow the value limits for the pollutants laid out in 2008/50/EC.

As mentioned earlier, Directive 2008/50/EC (the Directive) was enacted in 2008 to reduce air pollution levels to improve human health amongst its member states.⁷¹ To enact this objective, the Directive establishes steps that member states should take to assess ambient air quality, including dividing up their country into zones and utilizing standardized measurements across the member states so the data can be exchanged between the commission and member states.⁷² This Directive requires member states to maintain levels of certain pollutants, including nitrogen dioxide and particulate matter, in ambient air that are below the limit values laid out in the Directive.⁷³ In Article twenty two, the Directive allows member states to postpone their conformity with the limit values for nitrogen dioxide or benzene for a maximum of five years as long as the member state creates an air quality plan and allows members to be exempt from conforming with the PM10 limit values until 2011.⁷⁴ If a member state exceeds the value limits for a specific pollutant in ambient air quality, Article twenty three requires member states to create a plan that will limit the period of exceedance so it is as short as possible, and the plan may also address how it plans on protecting “sensitive population groups.”⁷⁵ The plan must be reported to the Commission “no later than two years after the end of the year the first exceedance was observed”.⁷⁶

If a member state fails to comply with the objectives laid out in Directive 2008/50/EC, the Commission will commence its infringement proceedings.⁷⁷ This process begins with a letter for information sent to the concerned member state and which the member state must respond to in a

⁶⁶ *Factsheet on the Revision of EU Ambient Air Quality Legislation*, *supra* note 30.

⁶⁷ *Id.*

⁶⁸ *Questions and Answers on the EU Clean Air Policy Package*, EUR. COMM’N (Dec. 18, 2013), https://ec.europa.eu/commission/presscorner/detail/en/MEMO_13_1169 <https://perma.cc/8WGY-AWVJ>.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ 2008 O.J. (L 152/1).

⁷² *Id.* at ¶¶ one, seven, twenty.

⁷³ *Id.* at Art. 12.

⁷⁴ *Id.* at Art. 22.

⁷⁵ *Id.* at Art. 23.

⁷⁶ *Id.*

⁷⁷ *Infringements: Frequently Asked Questions*, EUR. COMM’N (Nov. 28, 2022), https://ec.europa.eu/commission/presscorner/detail/en/MEMO_12_12 [<https://perma.cc/YVU5-XUTJ>].

specific period.⁷⁸ Next, the Commission will decide if the member state failed to live up to its obligations under the Directive and will call on the member state to comply with the EU law in a specific timeframe.⁷⁹ If the Commission still finds that the member state has still not complied with the Directive, the Commission can refer the concerned member state to the Court of Justice of the European Union (CJEU).⁸⁰ The CJEU uses its interpretation powers to ensure EU law is utilized the same way throughout Europe and presides over infringement proceedings when a member state does not comply with EU legislation.⁸¹ The CJEU has had to use this enforcement power multiple times against member states who continue to exceed the emission ceilings laid out in EU legislation.

A. Examples: Spain, Germany and France

Although the Commission has taken multiple member states to court over their exceedance of air quality standards, they have not yet imposed financial penalties.⁸² For example, the European Commission alleged that Baix Llobregat, Barcelona, and Madrid, Spain had exceeded the Directive's nitrogen dioxide limit "systematically and continuously" since 2010, and that the Kingdom of Spain had failed to "ensure that the exceedance period can be kept as short as possible."⁸³ According to the Directive, the hourly limit set to protect citizens' health is "200 µg/m³, not to be exceeded more than 18 times a calendar year" or 40 µg/m³ per year.⁸⁴ Specifically, the CJEU held that Spain had failed to meet its obligations to not "systematically and continuously" exceed the nitrogen dioxide limits laid out in 2008/50/EC from 2010 to 2018 in Barcelona and Madrid, and 2010 to 2017 in Baix Llobregat, and further failed to guarantee that the exceedance of nitrogen dioxide levels would be as temporary as possible.⁸⁵ The CJEU then ordered Spain to pay nine-tenths of the costs of the lawsuit and the Commission to pay one-tenths of the cost.⁸⁶ According to EU infringement proceedings, the next step will be for Spain to immediately comply with the CJEU opinion and follow 2008/50/EC, and if it fails to comply, the Commission can refer Spain back to the CJEU and ask the CJEU to inflict a financial sanction, in the form of a lump sum and a daily penalty payment.⁸⁷

In 2021, the CJEU held that Germany had violated Directive 2008/50/EC in twenty-six different zones.⁸⁸ According to the Court, Germany "systematically and persistently" surpassed the annual

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Court of Justice of the European Union (CJEU)*, EU INST., https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/court-justice-european-union-cjeu_en#:~:text=Court%20of%20Justice%20%E2%80%93%20deals%20with,in%20some%20cases%2C%20EU%20governments [https://perma.cc/Y8LT-LA9L] (last visited Jan. 31, 2023).

⁸² *How much did EU cities and states pay in air pollution fines in recent years?*, BREEZE TECH. (June 25, 2021), <https://www.breeze-technologies.de/blog/how-much-did-eu-cities-states-pay-in-air-pollution-fines/> [https://perma.cc/L4UE-WGYG].

⁸³ *Top EU Court rules against Spain for air pollution in Madrid and Barcelona*, REUTERS (Dec. 22, 2022), <https://www.reuters.com/business/environment/top-eu-court-rules-against-spain-air-pollution-madrid-barcelona-2022-12-22/> [https://www.reuters.com/business/environment/top-eu-court-rules-against-spain-air-pollution-madrid-barcelona-2022-12-22/]; Case C-125/20, *Comm'n v. Spain*, ECLI:EU:C:2022:1025, ¶190 (Dec. 22, 2022).

⁸⁴ 2008 O.J. (L 152/1) at annex XI.

⁸⁵ Case C-125/20, *supra* note 82, at ¶190.

⁸⁶ *Id.* at ¶192.

⁸⁷ *Infringements: Frequently Asked Questions*, *supra* note 76.

⁸⁸ Case C-635/18, *Commission v. Germany*, ECLI:EU:C:2021:437, (June 3, 2021).

allowed value of nitrogen dioxide in zones such as Berlin, and “systematically and persistently” surpassed the hourly limit for nitrogen dioxide in Stuttgart and Rhine-Main.⁸⁹ Furthermore, Germany failed to satisfy its obligations under the Directive because it did not assume a method of compliance “from June 2010” or act to ensure that the exceedance period was as brief as possible.⁹⁰ Similar to Spain, the CJEU ordered Germany to pay its legal costs and the Commissions. After the CJEU released its judgment, the Court ordered Germany to comply with the Directive without delay.⁹¹ The Commission has not brought an action for financial penalties. Similar to both Spain and Germany, the Commission also brought infringement proceedings against France for failing to follow the nitrogen dioxide limits in 2008/50/EC.⁹² In 2019, the CJEU found that France exceeded the Directive’s nitrogen dioxide limit “systematic[all]y and persistent[ly]” for seven years in twenty-four zones and failed to “implement appropriate and effective measures to ensure that the exceedance period of nitrogen dioxide limit values would be kept as short as possible.”⁹³ One year after the CJEU ruling, the Commission decided to again refer France to the CJEU for violating the particulate matter limits.⁹⁴ So far, the court has not charged France with any financial penalties for either pollutant.⁹⁵

B. Other methods of enforcement: France

Environmental organizations, looking to see the member states face financial penalties for failing to follow EU air quality standards, have begun to sue governments in their country’s court system successfully.⁹⁶ In 2017, the Conseil d’État in France ordered the government to comply with Directive 2008/50/EC to reduce the nitrogen dioxide and particulate matter, and after three years of inaction, the Conseil d’État threatened a ten million euros fine if they could not explain their delay adequately.⁹⁷ On October 17, 2022, the Conseil d’État ordered France to pay two fines of ten million euros for their failure to limit their pollutants.⁹⁸ The Conseil d’État will automatically review the State’s actions for the second half of 2022 to determine if another fine is necessary sometime this year.⁹⁹

In another attempt to hold member states, specifically France, accountable, a Parisian resident decided to bring an individual suit against the state of France for its violations of EU’s air quality

⁸⁹ *Id.*

⁹⁰ Court of Justice of the European Union Press Release No. 94/21, Between 2010 and 2016, Germany systematically and persistently exceeded the limit values for nitrogen dioxide (NO₂) (June 3, 2021).

⁹¹ Case C-635/18, *supra* note 87.

⁹² *The Right to Breathe Clean Air: The European Judge Is Called Upon to Give a Decisive Ruling*, GIBSON DUNN (June 23, 2021), <https://www.gibsondunn.com/the-right-to-breathe-clean-air-the-european-judge-is-called-upon-to-give-a-decisive-ruling/> [https://perma.cc/8D6E-Z5PF].

⁹³ Court of Justice of the European Union Press Release No. 132/19, France has Systematically and Persistently Exceed the Annual Limit Value for Nitrogen Dioxide Since 1 January 2010 (Oct. 24, 2019).

⁹⁴ *October infringements package: key decisions*, EUR. COMM’N (Oct. 30, 2020), https://ec.europa.eu/commission/presscorner/detail/en/inf_20_1687 [https://perma.cc/Q8QK-FZX5].

⁹⁵ *See The Right to Breathe Clean Air: The European Judge Is Called Upon to Give a Decisive Ruling*, *supra* note 91.

⁹⁶ *Air pollution: the Conseil d’État orders the French State to pay two fines of €10 million*, CONSEIL D’ÉTAT (Oct. 17, 2022), <https://www.conseil-etat.fr/site/Pages-internationales/english/news/air-pollution-the-conseil-d-etat-orders-the-french-state-to-pay-two-fines-of-10-million> [https://perma.cc/4T24-WN65].

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

law.¹⁰⁰ Specifically, the Parisian sought damages for France's failure to "ensure that nitrogen dioxide levels (NO₂) and microparticles (PM₁₀) in the ambient air do not exceed the uniformly applicable limit values throughout the European Union."¹⁰¹ He seeks twenty one million euros in damages for Paris' poor ambient air quality since 2003 that resulted in him having negative health effects.¹⁰²

In order to resolve this claim, the Administrative Court of Appeal of Versailles has requested the CJEU to issue a preliminary ruling on the issue at hand: can individuals "seek compensation for health damage resulting from exceeding the concentration limit values for NO₂ and PM₁₀ set by standards of Union law, and in what conditions."¹⁰³ The Court held that the "obligations resulting from the directives in question are not intended to confer individual rights on individuals likely to entitle them to compensation against a member state."¹⁰⁴ To support this decision, the court considered what elements a law must include for compensation to be due to an individual when a member state fails to meet its obligations under an EU law:

- (1) the rule of law infringed must be intended to confer rights on individuals; (2) the breach must be sufficiently serious, it being specified that this is the case if the breach has persisted despite a judgment by the CJEU finding the infringement in question to be established; (3) there must be a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties.¹⁰⁵

The Directive at issue cannot meet the first element because the obligations described in Articles thirteen and twenty three of the Directive relating to the member states' responsibilities to protect the environment and human health, and does not confer rights onto individuals.¹⁰⁶ Furthermore, "it cannot be inferred from the obligations laid down in those [Articles] . . . that individuals . . . are . . . implicitly granted . . . rights the breach of which would be capable of giving rise to a member state's liability for loss and damage caused to individuals."¹⁰⁷ Thus, Directive 2008/50/EC does not allow an individual to receive damages for a countries breach of EU law.¹⁰⁸

But the CJEU does note that worried citizens still have alternative actions they can perform if they are frustrated with a member state's failure to meet the EU ambient air emission laws.¹⁰⁹ The CJEU

¹⁰⁰ Nicholas Camut, *Citizens Cannot Sue States for Health Damages Due to Air Pollution, EU Top Court Rules*, POLITICO (Dec. 22, 2022), <https://www.politico.eu/article/air-pollution-health-damages-european-union-court-rules/> <https://perma.cc/4Q8G-8EVH>].

¹⁰¹ Court of Justice of the European Union Press Release no. 211/22, Les directives européennes fixant des normes pour la qualité de l'air ambiant n'ont pas, comme telles, pour objet de conférer des droits aux particuliers dont la violation serait susceptible de leur ouvrir un droit à réparation (Dec. 22, 2022) [hereinafter Press Release No. 211/22].

¹⁰² *Id.*

¹⁰³ *Id.* 1

¹⁰⁴ Case C-61/21, JP v. Ministre de la Transition écologique and Premier ministre, ECLI:EU:C:2022:1015, (Dec. 22, 2022).

¹⁰⁵ *The Right to Breathe Clean Air: The European Judge Is Called Upon to Give a Decisive Ruling*, *supra* note 91.

¹⁰⁶ See Case C-61/21, *supra* note 103 at ¶¶ 54-55.

¹⁰⁷ *Id.* at ¶56.

¹⁰⁸ *Id.* at ¶57.

¹⁰⁹ *Id.* at ¶58.

relies on a prior case where it held that a concerned citizen could bring a suit to their state to comply with Article twenty three regarding the air quality plan.¹¹⁰ Thus, in this instance, the Parisian individual can bring a suit to a Court in France requesting the State follow Article twenty three of the Directive, but he cannot request a monetary damage for his alleged injury.¹¹¹ In addition, the CJEU approved the Conseil d'État's issuance of injunctions and penalties for the State's failure to comply with the Directive.¹¹² But this case may not be the end for this parisian plaintiff, as the European Commission's proposed revision of the Directive creates an individual claim for damages when a Member State fails to comply with 2008/50/EC.¹¹³

IV. Analysis: Evaluate effectiveness of current EU Air quality Legislation

As WHO established, air pollution levels are not equal between citizens of member states, or within member states, with disadvantaged socio-economic groups facing the brunt of the air pollution disproportionately.¹¹⁴ Since air pollution causes 300,000 premature deaths in Europe every year, reducing air pollution should be at the top of the EU and member state's list.¹¹⁵ This section will analyze the previously mentioned legal landscape of current air pollution EU law and conclude that it is not effective in addressing and reducing the negative health impacts from air pollution inequality.

A. Problems with Enforcement

As seen above, although EU Directives are binding law on member states, many countries have chosen not to comply with the pollution limit values laid out in the Directive, to the detriment of their citizens.¹¹⁶ This suggest that the Directive is, in reality, more of a suggestion. Furthermore, it demonstrates that the enforcement measures under the current legislation amount to no more than a slap on the wrist for member states.

Over twelve countries have exceeded the EU's limit values on pollution in ambient air since the enactment of the Directive in 2008, and some countries, such as France, have even exceeded the limits multiple times.¹¹⁷ As evidenced by the caselaw, besides having to defend itself at the CJEU, there has yet to be much punishment for these member states in terms of fines or penalties.¹¹⁸ One factor contributing to the lack of fines is likely the sparse penalty section in the current Directive which only describes penalties member states can impose on their own state, without mention of the severity of the penalties that the EU can impose.¹¹⁹ Furthermore, the Commission has the ability in its infringement proceedings to ask the CJEU to impose a penalty on countries who continually fail to implement EU law, but they have yet to use it on a member state who has violated the air quality legislation.¹²⁰

¹¹⁰ *Id.* at ¶ 60; Case C-404/13, *The Queen on the application of: Client Earth v. The Sec. of State for the Env't, Food and Rural Aff.*, ECLI:EU:C:2014:2382, (Nov. 19, 2014).

¹¹¹ *See* Case C-61/21, *supra* note 103 at ¶ 62.

¹¹² *Id.* at ¶ 64

¹¹³ Camut, *supra* note 100.

¹¹⁴ *Environmental Health Inequalities In Europe: Second Assessment Report*, *supra* note 47, at 1.

¹¹⁵ *Factsheet on the Revision of EU Ambient Air Quality Legislation*, *supra* note 30.

¹¹⁶ *How much did EU cities and states pay in air pollution fines in recent years?*, *supra* note 81.

¹¹⁷ *Id.*

¹¹⁸ *See* Case C-125/20, *supra* note 82; Case C-635/18, *supra* note 87; C-61/21, *supra* note 103.

¹¹⁹ 2008 O.J. (L 152/1) at Article thirty.

¹²⁰ *Infringements: Frequently Asked Questions*, *supra* note 76.

But the Commission has imposed fines in other environmental situations, demonstrating that they are willing to utilize this tool depending on the breach.¹²¹ For example, after Greece ignored the first CJEU judgment for noncompliance and continued to allow toxic waste to be dumped in the river Kouroupitos in violation of EU law, the Commission brought Greece back to the CJEU, and in the second judgment, the CJEU set a daily fine of \$20,000 euros for noncompliance.¹²² This case suggests that penalties are a useful tool to encourage compliance and the Commission should be utilizing this tool more in order to persuade member states to stop dragging their feet and prioritize environmental concerns.¹²³ Thus, it is surprising the Commission has not used this powerful tool yet in response to member states' continued breach of EU limit values on pollution in ambient air.¹²⁴ Air pollution is the most serious environmental threat to human health in the EU and it is vital that the Commission uses every tool in its arsenal to get member states to comply. But there is still hope that penalties can be enforced against these member states. The recent CJEU case involving France demonstrates that non-governmental organizations and other environmental and health organizations can step in and bring their own suit against their country for failing to follow EU law.¹²⁵ This penalty system is aggressive, allowing the court to keep hitting the state with additional monetary penalties every year there is another delay implementing the Directive.¹²⁶ This money is also given to these environmental NGO's, such as Greenpeace France, who often works directly with groups that are the most vulnerable to pollution and its negative health effects.¹²⁷ Thus, this system is likely more helpful in promoting environmental health equality than the current Directive. But this system alone, without the Commission utilizing penalties, may not be enough to speed up member state's compliance and prevent member states's repeat violations of EU law.¹²⁸

B. Air Pollution Inequality and the Current Legislation

The Current Directive does not mention methods to address air pollution inequality and its corresponding disparate health impacts.¹²⁹ As the recent CJEU decision makes clear, the current Directive does not allow individuals affected by member states to receive compensation for their health damages.¹³⁰ Under the current legislation, the EU leaves vulnerable socio-economic groups facing the brunt of air pollution without recourse.

¹²¹ Gerda Falkner, *Fines against member states: An effective new tool in EU infringement proceedings?*, 14 COMPAR. EUR. POL. 36, 44 (March 9, 2015).

¹²² *Id.*

¹²³ *Id.* at 47.

¹²⁴ See *Top EU Court rules against Spain for air pollution in Madrid and Barcelona*, *supra* note 82; Case C-635/18, *supra* note 87.

¹²⁵ See Case C-61/21, *supra* note 103 at ¶ 64.

¹²⁶ See *Air pollution: the Conseil d'État orders the French State to pay two fines of €10 million*, *supra* note 95.

¹²⁷ *Greenhouse gas emissions: The Government must justify within 3 months that the reduction path to 2030 can be achieved*, CONSEIL D'ÉTAT (Nov. 19, 2020), <https://www.conseil-etat.fr/en/news/greenhouse-gas-emissions-the-government-must-justify-within-3-months-that-the-reduction-path-to-2030-can-be-achieved> [<https://perma.cc/2UAL-LTSW>].

¹²⁸ See *October infringements package: key decisions*, *supra* note 93.

¹²⁹ See *Generally* 2008 O.J. (L 152/1).

¹³⁰ See *Camut*, *supra* note 99.

Under Articles twenty three and twenty four, the Directive permits member states to include “specific measures aiming at the protection of sensitive population groups, including children.”¹³¹ Although not mandated, under the Directive, member states “may” create targeted legislation aimed at protecting vulnerable groups in their action plans when they have already exceeded the EU limit values on pollution.¹³² Since the exceedance has already happened, vulnerable communities are likely already feeling the negative health effects associated with pollution exceedances. Instead of being proactive, the Directive takes a permissive and reactive approach, thus prolonging the suffering of these groups without providing a remedy to cure the disparate health impacts levied on the most vulnerable communities.

The current EU air pollution legislation fails to adequately protect disadvantaged socio-economic groups from the negative health impacts caused by air pollution. The morbidity rate resulting from air pollution is too high for inadequate legislation.¹³³ The European Commission’s proposal for a new air pollution Directive attempts to reform some of these inadequacies.

V. The Commission’s Proposal

Fifteen years after the enactment of Directive 2008/50/EC, the European Commission has begun campaigning that the EU Council and Parliament should pass a new Directive for ambient air quality.¹³⁴ The European Commission is the legislative branch of the EU and proposes new EU laws.¹³⁵ In support of the revision, the Commission references the severity of air pollution on human health, and air pollution’s disproportionate impacts on vulnerable groups and “socioeconomically disadvantaged groups.”¹³⁶ In 2019, the Commission performed a fitness check on the current ambient air quality legislation, and the result demonstrated that the current Directives are only “partially effective in improving air quality and achieving air quality standards, but that not all their objectives have been met to date.”¹³⁷ The Commission plans to merge the current ambient air quality Directives 2008/50/EC and 2004/104/EC and revise the language of 2008/50/EC to implement certain policy changes and resolve shortcomings of the current Directive.¹³⁸

A. First Shortcoming the Proposal Seeks to Address

The first shortcoming of Directive 2008/50/EC, that the revision hopes to remedy, is to fill the gap between WHO standards on air quality and the limit values laid out in the Directive.¹³⁹ The WHO recently released new air quality guidelines in 2012, and the purpose of releasing these guidelines is to provide countries with a tool to “guide legislation and policies, in order to reduce levels of air

¹³¹ *Id.* at Art 23-24.

¹³² *Id.*

¹³³ *How Air Pollution is Destroying Our Health*, *supra* note 31.

¹³⁴ *Proposal for a Directive of the European Parliament and of the Council on Ambient Air Quality and Cleaner Air for Europe*, at 1. Context of the Proposal, COM (2022) 542 final (Oct. 26, 2022).

¹³⁵ *Planning and Proposing Law*, EUR. COMM’N, https://commission.europa.eu/law/law-making-process/planning-and-proposing-law_en [https://perma.cc/A99L-VCY4] (last visited Feb. 9, 2023).

¹³⁶ *Proposal for New Directive on Ambient Air Quality*, *supra* note 133.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Commission Staff Working Document, Impact Assessment Report, Proposal for a Directive of the European Parliament and of the Council on Ambient Air Quality and Cleaner Air for Europe*, 1. Introduction: Political and Legal Context, COM (2022) 542 final (Oct. 26, 2022). [hereinafter Commission Staff Working Document].

pollutants and decrease the burden of disease that results from exposure to air pollution.”¹⁴⁰ The current pollutant value limits are set out in Directives 2004/107/EC and 2008/50/EC, and almost every pollutant has a larger concentration limit than what is recommended by WHO.¹⁴¹ For example, as discussed above, 2008/50/EC sets the limit value for annual nitrogen dioxide at 40 µg/m³ while WHO sets it at 10 µg/m³.¹⁴² Additionally, the EU sets their annual limit value for PM10 at 40 µg/m³, while WHO air quality guidelines put it at 15 µg/m³.¹⁴³ The Commission’s revision works to bridge this gap.

In order to align the Directive more closely with WHO guidelines on Air Quality, the Commission has listed three different policy options that correlate with a different degree of alignment and will require the European Council and Parliament to make a political decision.¹⁴⁴ The options are “full alignment (I-1), closer alignment (I-2) and partial alignment (I-3), with a limited number of temporary exceptions where these are clearly warranted.”¹⁴⁵ The Commission concluded that the “highest benefit-to-cost ration” is policy option I-3 meaning that with minimal increases in effort, majority of the air quality sampling points can meet the air standards under I-3 and the net benefits should amount to more 29 billion euros.¹⁴⁶ I-2 follows closely behind I-3 with a slightly smaller benefit-to-cost ratio, but with net benefits that amount to 25% more than option I-3 of more than 36 billion euros.¹⁴⁷ On the other hand, policy option I-1 has the lowest benefit-to-cost ratio but with net benefits of more than 38 billion euros.¹⁴⁸ But under I-1, 71% of the air quality sampling points cannot be expected to “meet the corresponding air quality standards without additional effort at the local levels (and in many of these instances would not be able to meet these standards at all with technical feasible reductions only).”¹⁴⁹ Once the revised limit values are chosen, based on the above policy options, the pollution limit and target values will be in force through 2030 as interim EU air quality standards.¹⁵⁰

The choice of which alignment option to implement lies with the EU parliament and Council. According to a feedback form, 73% of shareholders demonstrated a desire to align with WHO guidelines.¹⁵¹ Regardless of the chosen alignment option, the Commission encourages the Council and Parliament to implement a multi-step approach when aligning with WHO air quality

¹⁴⁰ *New WHO Global Air Quality Guidelines aim to save millions of lives from air pollution*, World Health Org., WORLD HEALTH ORG. [WHO] (Sept. 22, 2021), <https://www.who.int/news/item/22-09-2021-new-who-global-air-quality-guidelines-aim-to-save-millions-of-lives-from-air-pollution> [https://perma.cc/N4JT-7CP9].

¹⁴¹ *Air Quality Standards*, EUR. ENV’T AGENCY (Dec. 3, 2021), <https://www.eea.europa.eu/themes/air/air-quality-concentrations/air-quality-standards> [https://perma.cc/ZGU7-KYSF].

¹⁴² 2008 O.J. (L 152/1) at annex XI; *Air Quality Standards*, *supra* note 140.

¹⁴³ *Air Quality Standards*, *supra* note 140.

¹⁴⁴ *Executive Summary of the Impact Assessment Report*. COM (2022) 542 final (Oct. 26, 2022) [hereinafter *Executive Summary of the Impact Assessment Report*.]

¹⁴⁵ *Id.*

¹⁴⁶ *See Proposal for New Directive on Ambient Air Quality*, *supra* note 133, at 2.4 Impact Board Assessment and Opinion of the Regulatory Scrutiny Board.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at and 5. Detailed Explanation of the Specific Provisions of the Proposal.

¹⁵¹ *Executive Summary Accompanying Proposal for a New Directive*, *supra* note 143.

guidelines.¹⁵² After 2030, the Commission desires the creation of a long-term plan to align with “future WHO guidelines to achieve the zero-pollution vision by the year 2050.”¹⁵³

B. The Second Shortcoming the Proposal Seeks to Address

The second shortcoming that the Commission hopes to remedy with its proposal is governance and enforcement.¹⁵⁴ The proposed Directive importantly adds a new “Access to Justice, Compensation and Penalties Section” in Articles twenty seven through twenty nine.¹⁵⁵ As seen above, the CJEU has already found that member state courts can impose penalties on the state for failing to follow the current Directive.¹⁵⁶ In addition, the Commission proposes to add to the Directive’s current provision on penalties by requiring member states to establish “proportionate and dissuasive penalties for those who violate the measures adopted in the Member State to implement this Directive, including dissuasive financial penalties.”¹⁵⁷ Furthermore, Article twenty seven creates a path for concerned individuals who want to challenge a member states’ execution of this Directive, “such as when air quality plans has not been established despite exceedances of relevant air quality standards.”¹⁵⁸ The revised Directive lists requirements that must be met for a citizen to bring suit to their member states’ courts, such as standing conditions.¹⁵⁹ One of the most significant changes in the revised Directive, is the new method for individuals to receive compensation for health injuries caused by air pollution if the injury is due to a member state’s violation of EU law under Article twenty eight.¹⁶⁰ Furthermore, injured individuals may have a non-governmental organization, that works to protect the environment or human health, represent them in a collective suit.¹⁶¹ The Commission limits an individual to just one claim and also declares that if the evidence that supports a violation of certain Articles under the Directive “is the most plausible explanation for the occurrence of damage . . . the causal link between the violation and the occurrence of the damage shall be presumed.”¹⁶² The burden then shifts to the state to rebut the presumption.¹⁶³ It’s important to note that this provision, if passed, is a direct contradiction of the CJEU’s recent ruling discussed above.¹⁶⁴

C. Third Shortcoming the Proposal Seeks to Address

The third shortcoming this revision hopes to improve is increasing assistance to local authorities in attaining cleaner air quality through better “air quality monitoring, modelling and plans.”¹⁶⁵ The Commission hopes the revised Directive will increase harmonization of air quality information

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ See Proposal for New Directive on Ambient Air Quality, *supra* note 133, at 2.4 Impact Board Assessment and Opinion of the Regulatory Scrutiny Board.

¹⁵⁵ See Proposal for New Directive on Ambient Air Quality, *supra* note 133, at Article twenty seven- twenty nine.

¹⁵⁶ See Case C-61/21, *supra* note 103, at ¶64.

¹⁵⁷ See *Proposal for New Directive on Ambient Air Quality*, *supra* note 133, at 5. Detailed Explanation of the Specific Provisions of the Proposal.

¹⁵⁸ See *id.*

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ See *id.* at Article twenty eight.

¹⁶² See *id.*

¹⁶³ See *Proposal for New Directive on Ambient Air Quality*, *supra* note 133, at Article twenty eight.

¹⁶⁴ Case C-61/21, *supra* note 103.

¹⁶⁵ See *Proposal for New Directive on Ambient Air Quality*, *supra* note 133, at 2.4 Impact Board Assessment and Opinion of the Regulatory Scrutiny Board.

amongst member states to allow easier information sharing and comparing.¹⁶⁶ Important changes realized in the revised Directive include a requirement for member states to discuss methods for acquiring more funds to improve the rate of compliance and to inform their citizens about the dangers of postponement in regards to the environment and human health.¹⁶⁷ Air quality plans are “plans that set out measures in order to attain the limit values or target values” and are required, under Article twenty three, when limit values of pollutants in ambient air are exceeded by a member state.¹⁶⁸ Furthermore, the proposed revision includes an update requirement for member states if, after implementing an air quality plan, the exceedance continues for three more years.¹⁶⁹ Additionally, under the proposed revision, member states will have to assess the risk of “exceeding alert threshold” in preparing their air quality plans.¹⁷⁰ The Commission also amended an important section from Article nineteen of the current Directive and added “vulnerable groups,” so the Article now reads as “member states shall consider measures referred to in Article 20(2) and specific measures aiming to the protection of sensitive population and *vulnerable groups*, including children in their air quality plans.”¹⁷¹ Importantly, improved modelling and monitoring will be used to follow member state’s compliance with limit values more accurately in order to stop and handle breaches more competently.¹⁷²

These are just a few of the many revisions the Commission has made in its proposal to combine and revise the current air quality Directives. The above revisions all relate to the Commission’s main goals of reducing air pollutant levels in order to reduce and prevent injuries to human health, especially in areas with sensitive and vulnerable socio-economic groups, where air pollution also tends to be higher.¹⁷³ This proposal was submitted to the Council and the European Parliament.¹⁷⁴ Next, the European Parliament adopt the proposal or add amendments, and then the Council can make a decision to accept the parliament position or amend it, which then can result in parliament’s second reading.¹⁷⁵ After the second reading, the Council can either approve and adopt parliament’s amendments or refuse to adopt it.¹⁷⁶ If the Parliament and Council do not agree after the second reading, a conciliation committee, composed of the same number of members of each branch, is created and it either agree on an acceptable text or the act is not accepted.¹⁷⁷ There is then a third reading of the joint text from the conciliation committee that goes through both branches, and if both approve the text, the legislative act is adopted.¹⁷⁸

¹⁶⁶ *Executive Summary Accompanying Proposal for a New Directive*, *supra* note 143.

¹⁶⁷ *See Proposal for New Directive on Ambient Air Quality*, *supra* note 133, at 5. Detailed Explanation of the Specific Provisions of the Proposal.

¹⁶⁸ *Id.* at Article four, Article nineteen.

¹⁶⁹ *See id.* at Article nineteen.

¹⁷⁰ *See id.* at 5. Detailed Explanation of the Specific Provisions of the Proposal.

¹⁷¹ *See id.* at Article nineteen (emphasis added).

¹⁷² *See id.* at 5. Detailed Explanation of the Specific Provisions of the Proposal.

¹⁷³ *Questions and Answers on New Air Quality Rules*, EUR. COMM’N (Oct. 26, 2022), https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_6348 [https://perma.cc/VPS7-EBT6].

¹⁷⁴ *The ordinary legislative procedure*, EUR. COUNCIL (April 7, 2022), <https://www.consilium.europa.eu/en/council-eu/decision-making/ordinary-legislative-procedure/#:~:text=The%20European%20Commission%20submits%20a,a%20conciliation%20committee%20is%20convened> [https://perma.cc/U44L-EUQZ].

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

VI. Analysis of the proposed revision of the Directive.

The next section will analyze the Commission's revised Directive through an environmental justice lens and conclude that the Council and European Parliament should pass the revision. In addition, there are amendments the parliament and council can recommend that can improve the Directive to aid vulnerable groups and reduce the disproportionate health impacts. Lastly, this paper will determine if an alternative form of legislation is necessary to tackle air pollution.

A. The EU Council and Parliament Should Choose Alignment I-3

The EU parliament and council should choose alignment option I-3, partial alignment with WHO air quality guidelines. As mentioned above, option I-3 matches the least of the three policy options to WHO air quality guidelines and has a PM_{2.5} limit value of 15 µg/m³ compared to the current Directive, which has an annual PM_{2.5} limit value of 25 µg/m³.¹⁷⁹ But under I-3, there is still a decrease in pollution in ambient air which provides a health benefit to the citizens of the EU member states.¹⁸⁰

Although alignment I-3 is less ambitious than I-2 and I-1, it provides the most realistic limit values for member states to meet.¹⁸¹ According to the Commission, "most air quality sampling points in the EU might be expected to meet the corresponding air quality standards with little additional effort."¹⁸² As discussed previously, many member states have failed to meet the current, more generous, pollution limit values under the current Directive 2008/50/EC.¹⁸³ Since some reduction in air pollution is better than none, choosing viable interim limit values for 2030 can encourage member states to start complying now, so they can prepare for another reduction in 2030. Furthermore, setting up certain areas of member states to fail since it is not technologically possible for them to meet I-2 and I-1 limit values will likely lead to ineffectual infringement proceedings and frustrated citizens.¹⁸⁴ These citizens may resort to lawsuits, which can deplete a country's resources and further prevent it from gaining the technology necessary to reduce their pollution to align with WHO standards. For the EU to successfully implement a staggered approach to aligning with WHO air pollution guidelines, the member states must first be able to accomplish step one.¹⁸⁵

B. Enforcement under the proposed revised directive

The "Access to Justice, Compensation and Penalties Section" in the revised Directive adds more bite to the EU's air quality legislation to reduce member state's non-compliance.¹⁸⁶ Importantly, the revised Directive creates new enforcement opportunities for individuals and non-governmental organizations to pressure member states' into complying with EU law.

¹⁷⁹ *Air Quality Standards*, *supra* note 140.

¹⁸⁰ *Commission Staff Working Document*, *supra* note 138, at 6.1 Impact of Policy Options I-1 to I-6 (and related sub-options).

¹⁸¹ *See Proposal for New Directive on Ambient Air Quality*, *supra* note 133, at 2.4 Impact Assessment and Opinion of the Regulatory Scrutiny Board.

¹⁸² *Id.*

¹⁸³ *See How much did EU cities and states pay in air pollution fines in recent years?*, *supra* note 81.

¹⁸⁴ *See Proposal for New Directive on Ambient Air Quality*, *supra* note 133, at 2.4 Impact Board Assessment and Opinion of the Regulatory Scrutiny Board.

¹⁸⁵ *See Executive Summary Accompanying Proposal for a New Directive*, *supra* note 143.

¹⁸⁶ *See Proposal for New Directive on Ambient Air Quality*, *supra* note 133, at Article twenty seven.

One of the principal changes to the current Directive under the proposal is creating a right for individuals to sue their country's government for damages due to the negative health impacts from their countries' failure to comply with EU air pollution law.¹⁸⁷ Individuals, such as the Parisian citizen from the recent CJEU case, would not only be able to collect well-deserved damages from their government, but can also utilize these lawsuits to pressure their country into compliance. If even one individual can win under this provision, there will likely be lots of media coverage and possibly a flood of litigation. This threat of mass litigation would pressure governments to turn their attention to complying with EU law rather than face many lawsuits. Furthermore, once an individual has proven an injury and won his case in court, he can also use the damage award to seek medical help or increase his socio-economic standing to move to a less polluted area, which hopefully will have the long-term effect of reducing the morbidity rate associated with air pollution.

Furthermore, the proposal considers that the same lower socio-economic group disproportionately impacted by air pollution also might struggle to acquire legal representation.¹⁸⁸ The Commission correctly recognizes this right would have little impact without providing a means for lower-income individuals to utilize this new right. As mentioned above, Article twenty eight allows non-government organizations that work to advance human and environmental health to bring suits for members of the public and also class actions.¹⁸⁹

In addition to claims for compensation, any individual or non-governmental organization in the EU can utilize lawsuits to demonstrate their dissatisfaction with their government's air quality plan.¹⁹⁰ Non-governmental organizations working to promote health equity should take advantage of this new provision, and follow Greenpeace France's lead and utilize litigation to pressure government leaders to commit to their air quality plan as quickly as possible to avoid court-imposed fines.¹⁹¹ Furthermore, individuals who may not have a cognizable claim for an injury under Article twenty eight can instead utilize this cause of action to compel their state to follow EU law and actively reduce air pollution.

Although the Commission's encouragement of individual action in the revised Directive is promising, the Commission should not sit back and have private actors act as the main enforcers of EU law. Under the new Directive, if passed, the Commission must remain the primary watchdog of member states to ensure they comply with the new pollution limits or their air quality plans if they have already exceeded the limit values.

Recently, there has been a discussion of where responsibility falls regarding leading the charge on environmental issues. According to studies, while individual action, such as recycling and carpooling, is important to reduce air pollution and other environmental threats, equating individual consumer choices with a solution to a global issue, such as air pollution and climate

¹⁸⁷ See *id.* at Article twenty eight.

¹⁸⁸ Fatos Selita, *Improving Access to Justice: Community-based Solutions*, 6 ASIAN J. OF LEGAL EDUC. 83, 83 (2019).

¹⁸⁹ See *Proposal for New Directive on Ambient Air Quality*, *supra* note 133, at Article twenty eight.

¹⁹⁰ See *id.* at Article twenty seven.

¹⁹¹ *Greenhouse gas emissions: The Government must justify within 3 months that the reduction path to 2030 can be achieved*, *supra* note 126.

change, is misguided.¹⁹² Focusing only on the acts of individuals is fallacious because the major polluters are not within individual control to change. These pollutants are mainly “high levels of smoke and sulphur dioxide emitted, following the combustion of sulphur-containing fossil fuels,” and emissions from the transportation sector.¹⁹³ According to studies, “only 100 investors and state-owned fossil fuel companies are responsible for around 70 percent of the world’s historic GHG [greenhouse gas] emissions.”¹⁹⁴ While some consumers can install solar panels or buy electric cars, many lower socio-economic individuals cannot afford those products. Ultimately, legislation and government enforcement are needed to confront these air pollution contributors.¹⁹⁵

Although the Commission’s enactment of individual causes of action in the revised proposal is vital to promoting human health, the Commission’s work is not done. The Commission also needs to use its infringement proceeding power with a heavy hand and compel member states to pass their own legislation to combat fossil fuel and transportation emissions. As seen above, the Commission has a history of not following through with financial penalties for member states that continuously exceed pollution limit values set out in EU law.¹⁹⁶ Air pollution is “the biggest environmental health risk in Europe.”¹⁹⁷ The Commission should be utilizing every tool in its toolkit to encourage compliance and “promote . . . the well-being of its citizens” and “protect and improve the quality of the environment.”¹⁹⁸ The Council and Parliament should add a provision to the revised Directive to encourage the Commission to bring penalties against member states if compliance with the Directive is not immediate after a CJEU ruling in the Commission’s favor.

C. Additional Legislation and International Cooperation

Since air pollution does not comply with territorial lines, it will need a multinational approach to promote health equity within the EU.¹⁹⁹ In addition to revising the air quality Directive, the EU and its member countries need to pass climate change legislation and forge multinational alliances using existing and new treaties to eliminate the sources of air pollution.

¹⁹² See Elliot Hyman, *Who’s Really Responsible for Climate Change?* HARV. POL. REV. (Jan 2, 2020), <https://harvardpolitics.com/climate-change-responsibility/> [<https://perma.cc/Z5VQ-SPGT>].

¹⁹³ *Causes of Air Pollution*, U.K. DEP’T FOR ENV’T FOOD & RURAL AFFAIRS, <https://uk-air.defra.gov.uk/air-pollution/causes> [<https://perma.cc/NT93-WZY8>] (last visited March 1, 2023).

¹⁹⁴ See Hyman, *supra* note 191.

¹⁹⁵ *How Do Governments Combat Climate Change?*, WORLD 101, <https://world101.cfr.org/global-era-issues/climate-change/how-do-governments-combat-climate-change#:~:text=Almost%20all%20experts%20agree%20that,the%20fight%20against%20climate%20change>. [<https://perma.cc/K5NX-UJJU>] (last visited March 1, 2023).

¹⁹⁶ See *Top EU Court rules against Spain for air pollution in Madrid and Barcelona*, *supra* note 82; Case C-635/18, *supra* note 87.

¹⁹⁷ *Air Pollution*, EUR. ENV’T AGENCY, <https://www.eea.europa.eu/themes/air> [<https://perma.cc/Y3TA-VWTM>] (last visited March 1, 2023).

¹⁹⁸ *Aims and Values*, EUR. UNION, https://european-union.europa.eu/principles-countries-history/principles-and-values/aims-and-values_en#:~:text=The%20aims%20of%20the%20European,and%20prevent%20and%20combat%20crime [<https://perma.cc/T7HT-2PMG>] (last visited March 1, 2023).

¹⁹⁹ See *WHO global air quality guidelines. Particulate matter (PM_{2.5} and PM₁₀), ozone, nitrogen dioxide, sulfur dioxide and carbon monoxide*, WORLD HEALTH ORG. 190 (2021), https://www.ncbi.nlm.nih.gov/books/NBK574594/pdf/Bookshelf_NBK574594.pdf [<https://perma.cc/NE5N-QFQJ>].

The European Commission has recently worked to propose and pass climate change legislation. The European Green Deal is an example of aggressive climate change legislation that can greatly reduce air pollution. According to the Commission's Green Deal Proposal, the legislation would work towards making the EU "the first climate-neutral continent."²⁰⁰ One aspect of the Commission's Green Deal is the revised 2008/50/EC proposal.²⁰¹ Critically, the Green Deal also proposes a fifty five percent emission reduction for Greenhouse gases by 2030.²⁰² In addition to short-term goals, the EU has also passed the European Climate Law, which pledges "net zero greenhouse gas emissions for EU countries" by 2050.²⁰³ As discussed above, the reduction of greenhouse gas emissions is essential to reduce air pollution, especially emission reduction in the transportation sector that researchers have found disproportionately affects lower socio-economic groups living near roadways. The EU has the correct approach in creating a larger scheme of legislation that the new proposed Directive can fit within. But creating the 2050 net zero emission target is easy; member states must also do their part and comply with the legislation.

Additionally, in concurrence with EU action, international treaties and agreements are necessary to encourage other nations to work towards reducing pollutants in the air. The 2015 Paris Climate Agreement is an example of such international cooperation. In addition to reducing greenhouse gas emissions, the Paris Climate Agreement also promised to help poorer nations develop the technology necessary to reduce emissions.²⁰⁴ This is one of the most important aspects of the agreement because, as discussed earlier, it is hard to implement ambitious pollution limits when not every member country has the technology to comply.²⁰⁵ But as mentioned above, climate change action moves slow, with vital actors like the United States dragging their feet. As one of the leaders of Climate Change action, the EU and its member states must pressure non-compliant actors such as the United States into staying in the Paris Agreement and passing climate change legislation.

Thus, the European Council and Parliament must pass the Commission's proposal on the revision of Directive 2008/50/EC because it is just one piece of a larger scheme to reduce pollution and promote human and environmental health. Furthermore, promoting health equity through the reduction of pollution in ambient air requires a global approach.

VII. Conclusion

²⁰⁰ *A European Green Deal*, EUR. COMM'N, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en [<https://perma.cc/E6NQ-6TK6>].

²⁰¹ *See id.*

²⁰² *Is Europe reducing its greenhouse gas emissions?*, EUR. ENV'T AGENCY, <https://www.eea.europa.eu/themes/climate/eu-greenhouse-gas-inventory#:~:text=The%20EU%20has%20a%20set,were%2034%20%25%20below%201990%20levels.&text=Emis sions%20have%20decreased%20in%20almost,industry%20and%20the%20residential%20sector> [<https://perma.cc/Q7DN-BUZD>] (Last modified June 20, 2022).

²⁰³ *European Climate Law*, EUR. COMM'N, https://climate.ec.europa.eu/eu-action/european-green-deal/european-climate-law_en [<https://perma.cc/2NU4-MTQ7>].

²⁰⁴ Hayden Watters, *Limiting temperature rise to 2 C, helping poorer nations part of historic pact*, CANADIAN BROADCASTING CORP. (Dec. 12, 2015), <https://www.cbc.ca/news/world/paris-agreement-key-climate-points-1.3362500> [<https://perma.cc/39QY-JB68>].

²⁰⁵ *See Proposal for New Directive on Ambient Air Quality*, *supra* note 133, at 2.4 Impact Board Assessment and Opinion of the Regulatory Scrutiny Board.

Air pollution legislation has come a long way since the common law days of *William Alfred's case*. But it has not come far enough, considering the threat air pollution poses, especially to the most vulnerable communities in our society. If the EU hopes to improve the health of its citizens, the EU must take the next step and pass the revised ambient air quality Directive.

The current version of Directive 2008/50/EC has too many shortcomings to be an effective tool to help the EU accomplish its goal of zero net emissions by 2050 and a fifty five percent reduction. The ineffectiveness of the current Directive is evident by the sheer number of exceedances since its enactment. Furthermore, the Commission gives member states a little more than a slap on the wrist for these violations as the Commission continues to not fine the member states for failing to comply with EU law. Additionally, according to the recent CJEU decision, individuals don't have the power to pressure the government into compliance because they have no individual right to seek damages from their countries for the harm caused by the continued failure to reduce air pollution. The EU cannot accomplish its climate change or air pollution goals under the current Directive or the Commission's current enforcement tactics.

The Commission's proposed revision of Directive 2008/50/EC is a necessary update to prolong the EU's trend of reducing air pollution and its negative health effects. The European Council and Parliament should pass the Commission's revised Directive and choose alignment option I-3. Member states can feasibly meet the I-3 pollution standards. Furthermore, while the member states are reducing their emission levels to meet I-3, the EU can help other member states gain the technology they need to align with I-2 and I-1 in the future. Also, the new individual causes of action in the Directive directly aid lower socio-economic citizens disproportionately bearing the health effects of air pollution.

The European Union is a world leader in air quality and climate change legislation. Although legislation like the European Green Deal and European Climate law is transformative on paper, the EU must use its enforcement powers to confirm that the member states comply with the environmental laws and work towards realizing these ambitious net zero emission goals. Furthermore, although the EU is working at a territory level, it is important that the Commission, Council, and Parliament craft legislation that directly addresses air pollution's unequal effects on socially disadvantaged areas. Everyone deserves to breathe clean air regardless of social or economic status.