
October 2012

What are the barriers to enforcing the right to clean air in the EU?

A survey



Introduction

The Ambient Air Quality Directive¹ sets legally binding limits on levels of ambient (outdoor) air pollution. Where limits are exceeded, the directive requires that member states draw up a plan containing measures to ensure that the limits are achieved.

Failure to comply with the Directive is widespread throughout the EU: limits are frequently breached in many towns and cities, yet air quality plans are often late, inadequate, not properly implemented, or entirely non-existent.

In the *Janecek* case, the ECJ held that where there is a risk that limit values are exceeded, members of the public concerned have the right to demand that a plan is drawn up, if necessary through judicial review. But despite this apparently robust legal framework and useful ECJ precedent, there have still been relatively few cases brought before courts in member states in relation to air quality.

Why is this? Why are individuals and NGOs not flooding the courts with cases demanding that national and municipal authorities take action to tackle air quality? The reasons will differ from country to country, and in most cases will be the result of a number of different factors, such as the costs or delays involved in bringing litigation, unfamiliarity with legal procedures, or restrictive procedural rules which deny NGOs access to the courts.

The purpose of this survey is to better understand the barriers that exist in each member state which deter NGOs from bringing clean air cases. Once we know what the barriers are, we can work out ways of overcoming them.

Many of the solutions can be found in EU law. The supremacy of EU law means that domestic courts are obliged to give effect to it, even if this involves setting aside national laws which are inconsistent with it. Domestic courts must give effect to EU law rights by providing effective remedies. The EU is a party to the Aarhus Convention which guarantees the public the right to access information, participate in the formulation of plans relating to the environment and to access courts to challenge breaches of environmental law.

The survey will also help identify those areas where litigation has the highest prospects of success. This will allow us to focus efforts on facilitating litigation in those countries. For others, where the survey reveals conditions are less favourable, it may be more appropriate to focus on other methods of campaigning for air quality and leave enforcement to the Commission. In these cases it will be highly persuasive in encouraging the Commission to take action if the survey makes clear that domestic litigation is impossible.

Some of the questions will be relatively straightforward to answer, particularly for anyone who has been involved in air pollution issues for some time. However, other questions will require specialist knowledge of national laws and procedures so will need input from lawyers or other legal experts.

¹ Directive 2008/50/EC on ambient air quality and cleaner air for Europe.

While it may be difficult to find such expertise (particularly for free!) it will be essential to have it if we are to progress with legal action, so it is better to start developing these relationships as soon as possible.

The main type of hypothetical case we are considering is a challenge to an act or failure to act by a public authority i.e. a public law action. The typical case would be an action against a national or regional authority for failing to ensure compliance with limits and/or failing to draw up and implement an air quality plan. In the UK the procedure for challenging public authorities is known as "judicial review." The questions are therefore aimed at understanding the equivalent procedures in other EU jurisdictions. For the moment we are not considering private law actions, for example where a group or individual brings a claim for damages against a public or private body for physical harm, damage to property or nuisance caused by air pollution.

The results of the survey will inform a series of workshops which will be held in participating member states. These workshops will allow us to discuss the results of the survey and develop possible legal strategies.

Finally, it may be useful to share the results of the survey with the Commission as part of their 2013 year of air review so that any revision of the directive can try to address some of these problems.

1. Attitudes and awareness

The purpose of this section is to assess general attitudes towards litigation in various member states. Some organisations may be very familiar with bringing legal challenges and have considerable experience of trying to enforce environmental laws in the courts. For others the idea of using litigation may be very unfamiliar.

- 1.1 Has your organisation ever brought or tried to bring legal action before a national court in relation to air quality?
- 1.2 Has your organisation ever brought or tried to bring legal action before a national court in relation to another environmental issue?
- 1.3 How familiar are you with the process for bringing a legal challenge against a public authority (judicial review) in your jurisdiction?
- 1.4 Do you think a legal challenge before a domestic court could be a useful strategy for improving air quality in your jurisdiction?

2. Implementation of the Directive

A common problem is that member states often fail to properly transpose EU directives into national law. This makes it difficult for citizens to clearly establish their rights under national law. Another problem is working out where responsibilities lie under the Directive: for example in some member states national government is responsible for meeting air quality limits and preparing air quality plans, whereas in others this is delegated down to the city or regional level authorities. It is important to understand this in order to identify who or what would be the target of any legal challenge, and also what the appropriate court and legal process would be for bringing such a challenge.

2.1 Has legislation been passed to transpose the Directive into national legislation?

2.2 Does the legislation transpose the Directive accurately?

2.3 Was this done by 11 June 2011?

2.4 Who or what individual/body/authority is responsible for meeting the following obligations under the Directive:

2.4.1 Monitoring air quality;

2.4.2 Ensuring compliance with limit values;

2.4.3 Communicating information on air quality to the public;

2.4.4 Preparing air quality plans; and

2.4.5 Implementing air quality plans?

3. The Commission

The Commission has an important role in overseeing compliance with the Directive by Member States. The Commission can, at its discretion, bring infraction proceedings² against Member States for failing to comply with the Directive. It is also responsible for approving time extensions notified by Member States under Article 22 of the Directive. It is important that individuals and NGOs in member states draw issues of non-compliance to the Commission's attention and keep the Commission up to date with developments where infraction proceedings are ongoing. However, this should not be a substitute for domestic level litigation: the two processes should be viewed as being complimentary and should be pursued in tandem.

3.1 Has the Commission brought infraction proceedings against your member state?

3.2 If so on what basis has the Commission taken action:

3.2.1 Failure to transpose the directive;

3.2.2 Failure to achieve limits;

3.2.3 Failure to adopt plans; or

3.2.4 Another reason (please specify)?

3.3 Did the Commission take action following a complaint by your organisation?

3.4 At what stage is the Commission infraction action:

3.4.1 Letter of formal notice;

3.4.2 Reasoned opinion;

3.4.3 Member state referred to ECJ;

3.4.4 Case heard by ECJ, awaiting judgment; or

3.4.5 Case heard by ECJ, judgment delivered (please give reference)?

² Article 258 of the Treaty on the Functioning of the European Union.

3.5 Have time extension notifications been submitted for (please give details of when the extension expires for each zone or agglomeration that has obtained a time extension):

3.5.1 NO₂;

3.5.2 PM₁₀;

3.5.3 Benzene?

3.6 What is the status of these time extension notifications:

3.6.1 approved;

3.6.2 conditionally approved;

3.6.3 objections raised?

4. Access to information on air quality

The Directive requires member states to provide the public³ and the European Commission⁴ with information relating to air quality. These rights to access information are enshrined in international law, through the Aarhus Convention, and in EU law, through the Environmental Information Directive.⁵ This information can be used as the basis for proving non-compliance with the Directive, or if access to the information is denied, this could itself form the basis of a legal challenge.

4.1 Have there been breaches of air quality limit values for:

4.1.1 PM₁₀;

4.1.2 NO₂;

4.1.3 SO₂;

4.1.4 Lead;

4.1.5 Carbon monoxide;

4.1.6 Benzene?

4.2 Have there been breaches of any limit value plus margin of tolerance for:

4.2.1 PM₁₀;

4.2.2 NO₂;

4.2.3 Benzene?

NB Please give details such as levels and number of exceedances in each calendar year (for hourly or daily limit values). We are most interested in recent data i.e. in the last two years.

³ Article 26.

⁴ Article 27.

⁵ Directive 2003/4/EC on public access to environmental information and repealing Council Directive 90/313/EEC.

4.3 Are the breaches identified in the above question:

4.3.1 based on official data reported by the Member State to the Commission;

4.3.2 based on official data reported by the Member State to the public; or

4.3.3 based on any other sources of information (for example monitoring data collected by the public, NGOs or scientific institutions)?

4.4 Have there been any breaches of the alert threshold?⁶

4.5 If so, were the public adequately informed?

4.6 Have there been any breaches of the information threshold?⁷

4.7 If so, were the public adequately informed?

4.8 Are there sufficient numbers of monitoring stations?

4.9 Do you have any concerns that monitoring stations are not properly located? Please give details, if possible by reference to the macro and micro-scale siting requirements laid down in Annex III to the Directive.

⁶ See Article 19 and Annex XII.

⁷ See Article 19 and Annex XII.

5. Air quality plans

Air quality plans are a key feature of the Directive. When limits are breached, member states must draw up and implement plans to achieve compliance. If these plans are prepared to support a time extension notification, they must contain measures which will achieve compliance with the limits by the extended deadline, in accordance with Article 22 of the Directive. Otherwise, plans must show compliance “in the shortest time possible.”

The Directive is quite prescriptive as to what plans must contain; they must contain details of the proposed measures, a timetable for their implementation and an estimate of the improvement in air quality they will achieve.⁸

Unfortunately, the Directive fails to implement the requirements of the Aarhus Convention in relation to public participation in the formulation of plans affecting the environment. However, these rights are secured by the application of the public participation directive.⁹ Member states must therefore give the public the opportunity to participate in the formulation of air quality plans, giving adequate information, reasonable timeframes and taking the views of the public into consideration. These provisions also apply where existing air quality plans are amended.

5.1 Have air quality plans been prepared for each zone and agglomeration in which limit values are exceeded?

5.2 When were the air quality plans prepared?

5.3 Have there been breaches of limit values since the plans were put in place?

5.4 Have the plans been amended at any time, for example where further breaches of limit values have shown that the plan does not work?

5.5 When do the plans project compliance with the limit values?

5.6 Do plans contain:

5.6.1 a list and description of measures;

⁸ Section A of Annex XV.

⁹ Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

5.6.2 a timetable for implementation of those measures; and

5.6.3 an estimate of the improvement of air quality planned?

5.7 Have all measures been implemented according to that timetable or have they been delayed, withdrawn etc?

5.8 Were the public given an opportunity to participate in the formulation of this plan?

5.9 If so were the public given:

5.9.1 the opportunity to comment when all options were open;

5.9.2 reasonable timeframes in which to respond;

5.9.3 adequate information?

5.10 Were the views of the public taken into account in the adoption of the final plan?

6. Access to justice: standing

A common barrier to litigating in EU member states is that the courts apply overly restrictive rules on who can bring cases. Most legal systems require that a claimant has a sufficient interest or concern in the act or decision being challenged. This is known as “standing” and is sometimes referred to by the Latin term *locus standi*. In some member states, the rules are very restrictive, and only allow an individual or group who is directly affected by the decision to challenge it. In other jurisdictions, the courts take a relaxed view, for example assuming that an environmental NGO automatically has standing in a case involving environmental law or policy. The Aarhus Convention requires that the public be given access to a court of law or other independent and impartial body to challenge breaches of environmental laws by public and private bodies, and recent ECJ case law has held that national courts must interpret national rules on standing to ensure compliance with the Aarhus Convention.¹⁰

6.1 Is there a legal or administrative procedure by which the public can challenge acts, omissions (failures to act) or decisions of public bodies? Please give a brief outline of the relevant procedure, for example whether it is a court, a tribunal, whether the court/tribunal sits at the national/regional/city level. (NB we are particularly interested in those public bodies identified in section 2 as having responsibilities under the air quality directive).

6.2 Please provide an explanation of the rules on standing that apply in this procedure. For example, are the rules relaxed or restrictive? Does a claimant have to prove direct and individual concern in the matter being challenged or similar?

6.3 Have you/your organisation ever been denied standing in a legal challenge involving environmental law? If so, what reasons were given?

6.4 Are you aware of other groups or individuals who have been denied standing in such cases?

¹⁰ (Case C-240/09) Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky.

7. Access to justice: prohibitive expense

Another common barrier to bringing litigation is cost. Court fees and lawyers' fees can mean litigation is an expensive option for most individuals or NGOs. However, the Aarhus Convention requires that the public be given access to the courts and that this must not be "prohibitively expensive."

7.1 Does your organisation have sufficient resources to fund litigation, assuming that there were reasonably good prospects for success?

7.2 What fees (fees payable to court for bringing cases, filing documents, court hearings etc) are typically payable when bringing a legal challenge in your jurisdiction?

7.3 What legal fees (lawyers' fees) are payable?

7.4 Is it possible to obtain free or cheap legal advice, for example through:

7.4.1 government legal aid schemes;

7.4.2 lawyers acting pro bono (for free); or

7.4.3 lawyers agreeing to work on a "no win, no fee" basis?

7.5 Do you risk having to pay the defendant's costs if you lose your case?

7.6 If so, please give some indication of the average and maximum amounts that a claimant might have to pay?

8. Delay

Another common problem with litigation is that it takes too long, hence the saying: “justice delayed is justice denied.” The Aarhus Convention requires that the public be given access to judicial procedures which are “timely.”

8.1 Does the length of time that it takes to bring legal proceedings put you off taking legal action?

8.2 What are the typical timescales (in months) for bringing a legal challenge and obtaining judgment in the procedure identified in Section 7?

8.3 Is there a process for expedition/fast-tracking? (please give details).

9. Remedies

Obviously there is little point in bringing litigation if it does not result in the court awarding an effective remedy which forces action to be taken to improve air quality or prevents something happen which would worsen air quality. The Aarhus Convention and EU law both require that courts in member states must provide effective remedies to ensure compliance with environmental laws.

9.1 Does the absence of effective judicial remedies put you off bringing litigation?

9.2 Do judges have discretion as to whether to give a remedy and what remedy to give, once they have found a public authority to be in breach of environmental law?

9.3 Are court orders commonly ignored?

9.4 What consequences could follow if a court order was ignored?

9.5 Which of the following remedies are available to judges where there has been a breach of law by a public body such as a government department or minister:

9.5.1 fines (please give details of minimum, maximum and average level of fines);

9.5.2 declarations;

9.5.3 injunctions (a court order preventing action from being taken);

9.5.4 mandatory orders (a court order requiring that certain action be taken);

9.5.5 any other type of sanction?

10. Procedural and substantive review

A common problem is that in some jurisdictions it is only possible to challenge a decision or action by a public authority in very narrow circumstances. In some jurisdictions judicial review is only available where there has been an abuse of process, an error in law, or where the decision is completely irrational. It is not available where a public authority follows the correct laws and procedures but misapplies the facts or arrives at a bad decision which is harmful to the environment.

This is in breach of the Aarhus Convention, which requires that members of the public have access to a procedure by which the substantive and procedural legality of a decision, act or omission can be reviewed.

- 10.1 Do the procedures identified in section 6 allow the substance or merits of decisions, acts or omissions to be reviewed in theory?
- 10.2 Do these procedures allow the substance or merits of decisions, acts or omissions to be reviewed in practice?

11. Experts and evidence

A common problem is that in judicial review procedures, the courts are reluctant to consider detailed expert evidence, or do not allow for the cross-examination of expert witnesses. This is particularly problematic in air quality cases, as it can allow public authorities to give evidence which misleadingly shows compliance with limit values, or rely on inadequate air quality plans which make unrealistic claims that they will achieve compliance by a certain deadline.

11.1 Do the procedures identified in section 6 typically allow the submission of expert evidence?

11.2 Is evidence given:

11.2.1.1 orally; and/or

11.2.1.2 using written statements?

11.3 Do the courts allow cross-examination of experts?

12. Environmental impact assessment and planning

Our primary aim is to bring cases which will force governments to take positive action to improve air quality. However, it is also important to oppose new development projects, such as the construction of new roads, airports or shopping centres which might lead to increases in volumes of road traffic and therefore worsen air quality or slow progress in achieving air quality limits. Proposals for developments which are likely to have a significant effect on the environment are required to undergo environmental impact assessment (EIA) before consent is granted.

The Aarhus Convention and EU law require that the public be given an early and effective opportunity to participate in the decision making procedure before consent for the new development is granted or refused.

- 12.1 Are there any major development proposals (such as a new road, airport, shopping centre etc) which might cause air quality to deteriorate?
- 12.2 Has an environmental impact assessment been carried out which properly assesses the impact the development will have on local air quality?
- 12.3 If so were the public given:
 - 12.3.1 the opportunity to comment on when all options were open;
 - 12.3.2 reasonable timeframes in which to respond; and
 - 12.3.3 adequate information about the project and its predicted impact on air quality?
- 12.4 What was the predicted impact on air quality e.g:
 - 12.4.1 would it cause a breach of a limit value or margin of tolerance?
 - 12.4.2 would it lead to further deterioration where limit values already breached?
- 12.5 Were the conclusions reached regarding the projected impact on air quality reasonable in light of all the evidence?

13. Industrial pollution

While road traffic is usually the main cause of air quality in many towns and cities, pollution from industry can also be significant. EU industrial emissions law requires that operators of highly polluting industrial facilities obtain permits for their activities. These permits impose conditions on the operator such as emission limit values, and the approval or refusal of a permit must take into full account of the objectives of the Air Quality Directive.¹¹

The public have a right to participate in applications for pollution permits. Opposing the granting of permits for such industrial facilities, or opposing their construction in the first place (see section 12) is therefore another way of enforcing the right to clean air.

- 13.1 Is pollution from a large industrial installation (such as a power station, oil refinery or factory) a major cause of poor air quality?
- 13.2 Is the permit application publicly available?
- 13.3 Does the permit contain a non-technical summary?
- 13.4 Were the public been given an opportunity to participate in the permit application?
- 13.5 When is the current permit due to expire?
- 13.6 Has there been any major change in the operation of the facility (e.g. a change in the type of fuel used, an increase in scale or frequency of operation) or is any such change proposed?
- 13.7 Does the air quality plan make any reference to the granting of permits for the installation?

¹¹ Directive 2008/50/EC, Recital 18.

14. Next steps

Please fill out the survey and email to me at aandrews@clientearth.org. You will need the help of a lawyer or other legal expert, ideally one who has experience of environmental cases and who would ultimately be willing and able to bring the case to court.

You can either insert your answers into this document and return it to me, or produce a separate document with the answers. In either case, please ensure that you use the question numbers from the survey so that it is clear which answer relates to which question.

Once I have reviewed your responses I will contact you to arrange a time for a meeting or telephone call to go through your answers. This will allow us to identify any areas that did not make sense or where further information and research is required. At this stage it may be appropriate to take some pre-litigation steps such as making formal requests for information on exceedances of limit values, air quality plans etc.

We will then discuss the findings in greater detail at the Brussels workshop in January. By this point we should know which member states have the best prospects for successful litigation. We will initially focus on initiating legal action in those member states. For other less favourable jurisdictions, we will work on alternative enforcement strategies, such as engaging with the Commission and utilising access to information rights to support awareness raising initiatives.

Indicative project timeline for the next three months:

October-November 2012	Complete survey, enlisting help of lawyers.
November 2012	Meetings and telephone calls to go through survey responses.
December 2012	AA to analyse survey results.
January 2013	Brussels workshop - AA to present survey results and identify priority targets for litigation . Meetings/calls with relevant NGOs and lawyers in target jurisdictions. Take first litigation steps in priority targets.

ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

As legal experts working in the public interest, we act to strengthen the work of our partner organisations. Our work covers climate change and energy system transformation, protection of oceans, biodiversity and forests, and environmental justice.

ClientEarth is funded by the generous support of philanthropic foundations and engaged individuals and with programmatic support from the UK Department for International Development.

For further information please contact:

Alan Andrews

Lawyer

Health and Environment Programme

t +44 (0)20 7749 5976

aandrews@clientearth.org

ClientEarth offices:

Brussels

4ème Etage

36 Avenue de Tervueren

Bruxelles 1040

Belgium

London

274 Richmond Road

London E8 3QW

UK

Warsaw

Aleje Ujazdowskie 39/4

00-540 Warszawa

Poland