

IN THE COURT OF JUSTICE

OF THE EUROPEAN UNION

PRELIMINARY REFERENCE CASE C-404/13

R (on the application of ClientEarth)

Appellant

-v-

The Secretary of State for the Environment, Food and Rural Affairs

Respondent

Written Observations of ClientEarth

ClientEarth is represented by Pierre Kirch, lawyer, and by Dinah Rose QC, Emma Dixon and Ben Jaffey, barristers.

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Introduction

1. Pursuant to the second paragraph of Article 23 of the Protocol on the Statute of the Court of Justice of the European Union, ClientEarth (the appellant in the case before the national court) submits the following observations on the questions referred by the Supreme Court of the United Kingdom ('the Referring Court') for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union ('TFEU').
2. These proceedings arise as a result of the admitted failure of the Government of the United Kingdom ('UK') to ensure compliance with the nitrogen dioxide limits in accordance with Article 13 of Directive 2008/50/EC ('the Directive').
3. For the purposes of assessing and managing air quality, the UK is divided into 43 'zones and agglomerations'. 40 of these zones and agglomerations were in breach of one or more of the limit values for nitrogen dioxide as at the deadline of 1 January 2010. The Directive allowed the deadline for compliance with those limit values to be extended, where certain conditions were satisfied, by a maximum of five years i.e. to 1 January 2015 at the latest. However, the air quality plans established for 16 UK zones and agglomerations show that the limit values are not expected to be achieved until dates between 2015 and 2025.
4. Non-compliance with nitrogen dioxide limit values has a major impact on human health. Excessive levels of nitrogen dioxide contribute to premature death, hospital admissions and respiratory symptoms. Epidemiological studies have shown that symptoms of bronchitis in asthmatic children increase in association with long-term exposure to nitrogen dioxide. Reduced lung function is linked with levels of nitrogen dioxide currently found in cities of Europe and North America.
5. Non-compliance with nitrogen dioxide limit values also has an impact on the natural environment. Emissions of oxides of nitrogen including nitrogen dioxide¹, affect ecosystems through eutrophication and acidification, leading to loss of biodiversity. emissions of nitrogen oxides also cause damage to crops and to physical cultural heritage such as historic buildings.

¹ "Oxides of nitrogen" or "NOx" comprises nitric oxide (NO) and nitrogen dioxide (NO₂). The limit values i.e. relate to atmospheric concentrations of nitrogen dioxide, but emissions are usually expressed in terms of oxides of nitrogen.

6. Poor air quality is a major public health problem for the EU, causing an estimated 420,000 premature deaths in 2010 alone, at an estimated cost of between €330 and €940 billion².
7. On 16 July 2013, the Referring Court granted a declaration that the UK is in breach of its obligation to comply with the nitrogen dioxide limit values provided for in Article 13 of the Directive. At the same time, it referred to this Court a number of questions which it considered needed to be resolved in order for the Referring Court to reach a decision as to what further remedy (if any) should be granted in respect of the UK's admitted breaches of its EU law obligations.

The Facts and the Domestic Proceedings

8. The facts and arguments of the parties are summarised in the Order for Reference (Schedule 2: Annex) and are not repeated in these Observations. One aspect of the domestic proceedings does, however, require further elaboration.
9. In the domestic proceedings, the UK Government has asserted that it is "impossible" to produce air quality plans demonstrating how the limit values for nitrogen dioxide will be attained by 2015 in the 16 zones and agglomerations referred to above. ClientEarth does not accept this. While the question of whether or not it is possible for the UK Government to achieve compliance with the relevant limit values is not one for this Court to determine in giving its ruling on the questions referred, it may be helpful to understand ClientEarth's position on this point.
10. ClientEarth's case is, in summary, as follows³:

- a. In order to comply with the limit values in the Directive, a Member State must identify the gap between existing levels of nitrogen dioxide in a particular zone or agglomeration and the relevant limit value. The Member State must predict the levels of nitrogen dioxide by the relevant Directive deadline; and

² European Commission factsheet "Cleaner Air for All":
<http://ec.europa.eu/environment/pubs/pdf/factsheets/air/en.pdf>

³ ClientEarth's position is set out in full in its Note on Impossibility dated 7 March 2013 (Annex A to these Observations).

must identify the additional measures required in order to close that gap by the relevant deadline⁴.

- b. In 2009, the UK Government carried out analytical work⁵ which identified the gap to be bridged in order to meet the nitrogen dioxide limit values throughout the UK by 2015. That document is admitted by the Secretary of State to set out 'all possible options'⁶ for further national measures in order to meet those values. The paper correctly identified that meeting the Directive limit values would be challenging in some areas (particularly London); that a *range* of new measures would be needed; and that not all of these new measures would be cost-neutral⁷. Thus, as the UK Government then recognised, a straightforward cost-benefit analysis would be inappropriate in identifying the measures necessary to meet the limit values⁸.
- c. Thereafter the Mayor of London identified a total of 14 measures which he considered needed to be implemented by the national Government, in order to meet the nitrogen dioxide limit values in Greater London by 2015. This again made clear that the measures needed would not be cost-free⁹.
- d. The UK Government's approach to implementation then underwent a striking change¹⁰. The analysis supporting the plans that were published in draft in June 2011 and submitted to the Commission in September 2011 shows that the UK failed to select (from the possible measures already identified) a range of measures designed to close the gap between current nitrogen dioxide levels and the limit values. Instead the UK Government (i) carried out an analysis of abatement cost and then excluded any measure having an abatement cost

⁴ Communication from the Commission on notifications of postponements of attainment deadlines and exemptions from the obligation to apply certain limit values pursuant to Article 22 of the Directive, COM(2008) 403 final, Brussels, 26.6.2008, at §25.

⁵ DEFRA, draft UK Approach to its Application for Time Extension for Notification to Nitrogen Dioxide Limit Value deadline (version 1.0, February 2009; version 1.2, August 2009). Version 1.2 is exhibited as **Annex B** to these Observations.

⁶ Secretary of State's response to Appellant's note on impossibility dated 15 March 2013 (**Annex C** to these Observations); ClientEarth's response to this note was dated 20 March 2013 (**Annex D** to these Observations).

⁷ Annex B at §85.

⁸ Ibid, §95.

⁹ Mayor's Air Quality Strategy dated December 2010 (relevant extracts at **Annex E** to these Observations), e.g. at §3.2.4 and §5.3.13.

¹⁰ In its UK Overview Document dated September 2011 (**Annex F** to these Observations).

greater than £80,000 per tonne¹¹ and then (ii) selected just one source of nitrogen dioxide (emissions from heavy goods vehicles ('HGVs') for additional abatement measures; and (iii) in relation to that one source only, selected just one additional measure. That measure required only that the Government should '[investigate] the feasibility of a national network of Low Emission Zones'¹². As ClientEarth explained to the Referring Court¹³:

"28. Some further detail on the approach actually taken is set out in the Regulatory Impact Assessment ("RIA") dated January 2011.¹⁴ This document shows that a range of measures were originally considered, and were reviewed for impact, practicability, and cost (§24), with measures being ranked in terms of 'most cost-effective or most cost-beneficial' (§25). The impact assessment makes clear that on the basis of current or already planned measures, it would not be possible to achieve compliance in some 22 zones (§28) so that it is necessary to consider additional measures for reducing NO2 emissions (§29).

29. The RIA sets out in a table the options considered (Table 4). These options cover not just HGVs but a number of other types of road transport (including buses and coaches; petrol cars; and a range of diesel vehicles) as well as a range of measures which may be taken in relation to domestic buildings, commercial buildings, and power stations. It appears that these were then ranked by abatement cost and emissions reduction (Figure 3).

30. Strikingly, a number of measures which had a negative net abatement cost (that is, those assessed as delivering a net benefit) were not adopted. These include, for example, replacing diesel buses with electric buses (Table 5 and §65).

31. The decision-making process as described was as follows: a single source was selected for delivering additional NO2 abatement above and beyond existing measures, namely abatement from HGVs (including buses) (§64). For this source only, two options were then evaluated to deliver abatement, namely LEZs and clean HGV grants (for retrofitting of existing vehicles with NO_x abatement equipment) (§66). The LEZ option was then assessed as being more cost-effective (§85) and it was this option only which was then put forward for inclusion in the draft plans put before the public and the UK's submission to the Commission in relation to the Directive (see above).

32. This is despite the fact that the retrofitting programme was shown to be more effective in reducing levels of NO2 than the LEZ (§86) ...

33. Thus, the Secretary of State's own documents demonstrate that a range of possible measures considered by him to be practical and (in very many cases) cost-effective, were not proposed for implementation. The Secretary of State has assessed likely NO2 emissions on the basis of only one measure and found that there will not be compliance by 2015.

¹¹ Annex F, §5.9.

¹² Annex F, §§5.15-5.17.

¹³ Annex A, §§28-35: these paragraphs are not understood to be in dispute; see Annex C and §5 of Annex D.

¹⁴ Annex G to these Observations.

34. The Secretary of State has never considered the questions: (1) what measures would be necessary in order to achieve compliance by 2015? (2) is it impossible (or even unfeasible or not cost-effective) to implement any of those measures?
35. The exercise of assessing projected NO₂ emissions in a situation where not just one, but *all*, possible measures are implemented has never been undertaken. The Secretary of State thus cannot say that compliance would be impossible. He simply does not know the answer one way or the other.”
- e. Thus, upon return of the reference to the Referring Court, ClientEarth will contend that the UK Government has never identified the measures which would be necessary to achieve the limit values by 2015, and has never assessed whether or not it would be possible to implement these measures by 2015. Rather, it assessed the impact on nitrogen dioxide emissions of taking only one measure out of a range of identified possible measures, failed to even make a firm commitment to implementing this measure and still has made no meaningful progress towards implementing it. This has forced the Mayor of London to abandon plans to implement a LEZ for nitrogen dioxide by 2015 in London.¹⁵ The UK has similarly failed to implement most of the 14 national measures referred to by the Mayor of London in his 2010 strategy, early implementation of which were deemed essential to achieve compliance by 2015. At present, the effect on UK nitrogen dioxide values of taking all possible measures to reduce nitrogen dioxide in the relevant zones or agglomerations is unknown. Accordingly, it cannot be said that meeting the limit values is impossible.

The First Question Referred

11. ClientEarth submits, for the reasons set out below, that the answer to the first question referred is that where, in a given zone or agglomeration, conformity with the limit values for nitrogen dioxide was not achieved by the deadline of 1 January 2010, a Member State is obliged to seek postponement of the deadline in accordance with Article 22 of the Directive:

- a. Article 4(3) of the Treaty on European Union (‘TEU’) requires Member States to “take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the

¹⁵ Letter from Elliot Treharne, the Greater London Authority to Alan Andrews, ClientEarth dated 3 September 2013 (Annex H to these Observations).
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institutions of the Union.” This is an aspect of the “principle of sincere co-operation” under which “the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the treaties” (Article 4(3)(a)). Article 4(3) requires, “within the sphere of its competence ... every organ of the Member State concerned [...] nullify the unlawful consequences of a breach of Community law.”¹⁶ It follows that any Member State which remained in breach of the relevant limit value as at 1 January 2010 was required to apply for a time extension under Article 22 of the Directive because that was the only means by which that Member State can promptly cure its breach of Article 13. The only lawful alternative to an application under Article 22 is immediate compliance with the limit values. To regard Article 22 as a discretionary procedure in these circumstances would be to allow a Member State wilfully to breach EU law, contrary to Article 4(3) TEU and the duty of sincere cooperation.

- b. This interpretation is further supported by a proper reading of the Directive, Article 22 is a mandatory procedure which applied to any Member State which remained in breach of the relevant limit value as at 1 January 2010.

12. That Article 22 is a mandatory procedure where limit values are not achieved by the deadline is clear from the following:

- a. the *travaux préparatoires* and related materials;
- b. the structure of the Directive; and
- c. the case-law of the Court.

13. The *travaux préparatoires*:

- a. As set out in more detail in the judgment of the Referring Court¹⁷ preceding the Order for Reference, the legislation preceding Directive 2008/50/EC contained no equivalent provision to Article 22. Rather, the earlier legislation (Directive 96/62/EC on ambient air quality assessment and management¹⁸ and

¹⁶ Case C-201/02 *Wells v Secretary of State for Transport, Local Government and the Regions* [2004] ECR I-723 at [64].

¹⁷ http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2012_0179_Judgment.pdf, especially at [13]-[16].

¹⁸ “The Framework Directive”.

Directive 1999/30/EC relating to limit values for (inter alia) nitrogen dioxide¹⁹) set out a requirement to comply with the relevant limit values by 1 January 2010, without any possibility of an extension of that time limit.

- b. In a Communication dated 21 September 2005 preceding the draft of what would become Directive 2008/50/EC, the Commission set out its proposal for a limited derogation from the 2010 time limit if strict criteria were fulfilled²⁰:

“Strengthening implementation

Under the Framework Directive and daughter directives, air quality limit values apply throughout the territory of the Member States. Experience has shown that there are zones suffering from acute and exceptional problems. Therefore, as part of the new proposal and where Member States can demonstrate that they have taken all reasonable measures to implement this legislation, it is proposed to allow them to request an extension to the deadline for compliance in affected zones if strict criteria are met and plans are in place to move towards compliance.” (Emphasis added).

- c. The draft Directive²¹ provided (by recital 15) that existing air quality limit values should remain unchanged, although ‘it should be possible to postpone the deadline for compliance’ in cases where there were ‘acute compliance problems’; and provided by Article 20²² that a Member State “may postpone [the] deadlines by a maximum of five years ... subject to” a number of conditions.
- d. Indeed, the UK Government itself appeared to recognise in its Regulatory Impact Assessment of the proposed Directive that a *maximum* of a further five years for compliance would be provided. The Government also noted the disadvantages to human health of taking more time to comply:

“A new provision is introduced (Article 20) that allows Member States up to five years further to comply with existing limit values. The requirement is to demonstrate that the limit value will be achieved by the end of the derogation period. ... The flexibility introduced by this provision addresses specific implementation problems in the current legislation. However, it also potentially

¹⁹ “The Daughter Directive”.

²⁰ Communication from the Commission to the Council and the European Parliament (Thematic Strategy on air pollution), Brussels, 21.9.2005, COM(2005) 446 final, at p7.

²¹ 2005/0183 (COD) accompanying the proposal for a Directive dated 21 September 2005 COM(2005) 447 final.

²² The precursor to Article 22 in the final Directive.

weakens the public health protection offered by the existing air quality standards, because longer would be allowed to meet them.”²³

14. The structure of the Directive:

- a. The legal basis for the Directive was Article 175 EC (now Article 192 TFEU). By what is now Article 192(4), if a measure under that Article involves costs deemed disproportionate for the public authorities of a Member State, provision is made for the measure to lay down appropriate provisions in the form of (*inter alia*) temporary derogations.
- b. In setting the limit values now found in the Directive, the EU legislator was explicitly required to take account of factors including “economic and technical feasibility”: Framework Directive, Article 4(1) and Annex II. The limit values and compliance date (then 2010 without the possibility of extension) were set in the Daughter Directive.
- c. The limit values so set were introduced gradually over a ten year period, in order to allow Member States sufficient time to comply: see the margins of tolerance set out in Part 1 of Annex II to the Daughter Directive in accordance with Article 4 of that Directive (and Article 8 of the Framework Directive).
- d. Upon consolidation, specific provision was made for a limited temporary derogation, subject to strict conditions. Recital 16 to the Directive set out that it “should be possible [for Member States] to postpone the deadline for compliance” for zones & agglomerations where conditions are particularly difficult, and refers to the Article 22 conditions.
- e. Article 2(5) and 2(9) of the Directive defines “limit value” and “target value”. The former is a level “to be attained within a given period and not to be exceeded once attained”; by contrast, the latter is a value “to be attained where possible over a given period”. It is thus made clear that the substantive obligation to meet a limit value is absolute; this is not a duty to be met only “where possible”.

²³ Second Initial Regulatory Impact Assessment for the proposals for a Directive of the European Parliament and of the Council on ambient air quality and cleaner air for Europe (relevant extract at **Annex I** to these Observations). See similarly the Department for Environment, Food and Rural Affairs (‘Defra’) consultation on transposition of the Directive dated November 2009 (**Annex J** to these Observations) at §§3.18 and 3.21.

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- f. Article 13(1) sets out the substantive obligation to meet the limit values: Member States are required to *ensure* that the values are not exceeded from the specified date (1 January 2010). By contrast, the obligation to meet target values is set out in Article 17(1): Member States are required to take (only) such measures as do not entail disproportionate cost to ensure that target values are attained. It is clear that the obligation to meet limit values is *not* limited to the taking of measures which are considered by the Member State to be cost-neutral, cost-beneficial or cost-effective.
- g. Articles 20 and 21 make specific provision for (respectively) exceedances attributable to contributions from natural sources and (in relation to PM₁₀ only) to winter-sanding or salting of roads. Thus, here, specific and explicit provision is made for circumstances of certain events which are unforeseen and/or outside the control of Member States.
- h. Article 22 then makes provision for extension of the deadlines for compliance with Directive limit values in certain defined circumstances, namely²⁴ (i) where conformity with limit values cannot be achieved by the 2010 deadline; on condition that (ii) an air quality plan is established in accordance with Article 23 and is supplemented by the information in Section B of Annex XV; (iii) that plan demonstrates how conformity will be achieved with the limit values before the new deadline; (iv) the Commission is notified that Article 22(1) is (in the Member State's view) applicable and is provided with all relevant information in order to assess whether the conditions are satisfied; (v) the Commission raises no objections within nine months of receipt of that notification. Where a time extension is approved, Article 22(3) requires that the Member State must, at the very least, "ensure that the limit value for each pollutant is not exceeded by more than the maximum margin of tolerance specified in Annex XI for each of the pollutants concerned". This provision ensures that during any time extension, the limit value is not exceeded by more than 50% (the maximum margin of tolerance).

²⁴ In summary.
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- i. Article 22 is thus the *lex specialis* where compliance with limit values under the Directive cannot be achieved by the 2010 deadline. Article 23 does not provide an alternative procedure.
- j. Article 22(1) provides that a Member State ‘may’ postpone the Directive deadline for compliance with nitrogen dioxide limit values. The UK Government has argued that the use of the term ‘may’ (‘peut’ in the French version) leads to the conclusion that, in cases of non-compliance under Article 13, the use of Article 22 is voluntary. ClientEarth submits that this is a misunderstanding of the provisions of the Directive. A Member State is not required to seek a derogation; it may choose instead to comply from 2010. A Member State is permitted to seek a time extension if it takes the view that compliance by 2010 cannot be achieved (Article 22(1); 22(4)). The only lawful alternative to compliance from 2010 is an application for a time extension under Article 22 and to this extent, Article 22 is a mandatory procedure.
- k. Article 22 requires a comprehensive plan that complies with Annex XV(B). Further, where Article 22 applies, Member States are required to ensure that levels of nitrogen dioxide do not exceed the limit value by more than the maximum margin of tolerance during the extension period. No equivalent provision exists under Article 23.
- l. Further, by failing to notify an air quality plan under Article 22 in a case of non-compliance with Article 13, a Member State can avoid the exercise by the Commission of its power under Article 22(4) (final paragraph) to require Member States to adjust or provide new air quality plans showing compliance by the final deadline of 2015 (or earlier). There is no equivalent power under Article 23. It would appear on the evidence before the Referring Court that the UK is unique among EU member states in purporting to submit air quality plans under Article 23 rather than Article 22.
- m. So if a Member State decides, as the UK has done, not to submit a time extension under article 22, and instead rely on article 23, this leads to the absurd result that the worse the breach of the limit values, the less scrutiny by the Commission of that plan and the lower the protection for human health in

the time that the limit values are exceeded (the maximum margins of tolerance).

- n. That position is supported by the Commission letter to ClientEarth of 29 June 2012²⁵:

“The Commission would have some considerable concerns if Article 23 of the Directive were seen to be a way of allowing Member States to circumvent the requirements of Article 22 of the Directive. Article 22 .. was introduced in order to afford Member States additional time for compliance for up to a maximum of 5 years, on condition that an air quality plan is established in accordance with Article 23 and communicated to the Commission for assessment. It is only under these conditions that Member States can be afforded additional time for compliance and Article 23 itself cannot be relied upon to further extend this clearly prescribed and limited time extension clause.” (Emphasis added.)

- o. See further the Communication from the Commission on notifications of postponements under Article 22²⁶ (emphasis added):

“As regards nitrogen dioxide and benzene, the limit values may not be exceeded from 1 January 2010 at the latest. Where the conditions are met, the deadline for achieving compliance may be postponed until such time as is necessary for achieving compliance with the limit values, but at maximum until 2015. The aim must be to keep the postponement period as short as possible. If an exceedance of the limit values for nitrogen dioxide or benzene occurs for the first time only in 2011 or later, postponing the deadline is no longer possible. In those cases, the second subparagraph of Article 23(1) of the new Directive will apply.”

- 15. The Court’s case-law: it is clear from the Court’s case-law that a Member State wishing to benefit from a longer period for compliance with the requirements of an environmental directive must bring itself strictly within the derogations set out in that Directive. The Member State may not rely on more general administrative, financial or practical difficulties said to inhibit compliance. See in particular the following cases:

- a. Case C-42/89, *Commission v Belgium* [1990] ECR I-02821: this case concerned a derogation in similar terms to Article 22 of the current Directive, which was set out in Article 20 of Directive 80/778/EEC (on drinking water).

²⁵ See Annex K to these Observations.

²⁶ COM(2008) 403 final, at §9.

The Belgian Government contended that owing to the cost and complexity of works for a water treatment station, it would not be possible to comply with the Directive's requirements on time. The Court rejected the Belgian Government's case, holding that the only derogations permitted were those obtained strictly in accordance with the requirements of the Directive:

"[23] It should be determined in that connection that a request for a longer period for complying with Annex 1 must, in accordance with Article 20 of the directive, be made within the period laid down in Article 18 for the transposition of the directive into national law. After the expiry of that period derogations are permissible only in the case of serious accidents and under the conditions laid down in Article 10 of the directive. The request by the Belgian Government was made more than four years after expiry of the abovementioned period."

[24] As regards, finally, the difficulties, pleaded by the Belgian Government, in ensuring that the water supplied to the town of Verviers is in conformity with the directive, it should be borne in mind that, according to the case law of the court, a member-State may not plead practical or administrative difficulties in order to justify non-compliance with the obligations and time-limits laid down in Community directives. The same holds true of financial difficulties, which it is for the member-States to overcome by adopting appropriate measures."

- b. Similarly, in Case C-337/89, *Commission v UK* (drinking water) [1992] ECR I-06103, the UK sought to argue that it had taken all practicable steps to comply with the relevant Directive's requirements for maximum concentrations of nitrates and lead in drinking water. The Court held²⁷ (i) that the Directive required Member States to ensure that a particular (environmentally protective) result was achieved, and that they could not rely on special circumstances to justify failure to achieve it; (ii) that the only derogations available were those set out explicitly in the Directive and that, consequently, an argument that the UK had taken 'all practicable steps' to comply could not afford a further ground for derogating.
- c. Again, in Case C-56/90, *Commission v UK* (bathing water) [1993] ECR I-04109, the United Kingdom sought to argue that it had taken all practicable steps to avoid deviations from limit values set out in the relevant Directive (76/160/EEC). Here again, the Court held²⁸ that the only derogations available were those explicitly set out in the Directive. An argument that 'all practicable steps' had been taken failed.

²⁷ Judgment at [23]-[25].

²⁸ Judgment at [43]-[47].

d. It is clear that these general principles apply to Community legislation on air pollution in general and, in particular, to Article 22 of the Directive: see the recent judgment of the Court in Case C-68/11 *Commission v Italy*²⁹. In that case, instead of relying on Article 22 to postpone the time limit for complying with limit values for PM₁₀, the Italian Republic sought to rely upon general reasons relating to the difficulty on complying with limit values for PM₁₀. Those reasons included the Italian Republic's claim that it would need to adopt 'drastic economic and social measures' infringing 'fundamental rights and freedoms such as the free movement of goods and persons, private economic initiative and the right of citizens to public utility services'³⁰. In response to that argument, the Commission noted that no Member State had brought an action for annulment of the Directive³¹. The Court rejected the Italian Republic's case³². It noted that the Italian Republic had not submitted a request for an Article 22 exemption following objections raised by the Commission to an initial application under that Article³³, and had not sought to rely on Article 5(4) of the Directive in relation to exceedances due to natural events³⁴; and held that unless a directive had been amended by the EU legislature for the purpose of extending the time-limits prescribed for implementation, the Member States were required to comply with the time limits originally laid down³⁵.

16. For all these reasons, it is clear that a Member State may only comply with the Directive by either (i) complying with the mandatory limit values by 1 January 2010 or (ii) successfully seeking an extension of time to 2015 (at the latest) by complying with the requirements of the Article 22. The Directive lays down an obligation to achieve a result (compliance with mandatory limit values by a particular date), not merely an obligation to take all reasonably practicable steps towards that result.

The Second Question Referred

17. ClientEarth submits that the answer to the second question referred is that:

²⁹ Judgment of 19 December 2012.

³⁰ Judgment at [40], recording the argument of the Italian Republic.

³¹ Judgment at [46].

³² Judgment at [39-43]; [58-66].

³³ Judgment at [43].

³⁴ Judgment at [61].

³⁵ Judgment at [60].

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- a. If conformity with the nitrogen dioxide limit values cannot be achieved by 1 January 2010, a Member State is always required to seek postponement of that deadline under Article 22 of the Directive and there are no circumstances in which it may be relieved of that obligation.
- b. Alternatively, a Member State may be relieved of that obligation only in circumstances of *force majeure*, that is, in circumstances which—
 - i. are exceptional and unforeseeable;
 - ii. cause a substantial increase in nitrogen dioxide levels in the relevant zone or agglomeration;
 - iii. are outside the control of the Member State; and
 - iv. could not have been avoided by the taking of any possible (legislative or other) steps by the Member State and its authorities.

18. Impossibility and *force majeure* generally: the following general principles may be discerned from the case-law of the Court and from relevant EU legislative and other materials:

- a. It is unclear whether *force majeure* is a general principle of EU law³⁶. The view taken by the Commission is that it is not³⁷, and accordingly, the Commission's approach is to include a *force majeure* clause in proposals for secondary legislation where appropriate.
- b. Where a *force majeure* exception applies (either explicitly or by necessary implication), it is to be restrictively interpreted³⁸ as an exception to the legal rules otherwise applicable.
- c. The concept of *force majeure* does not have the same scope in all the spheres of application of Community law and, accordingly, its meaning must always be determined by reference to the legal context in which it is said to operate³⁹.

³⁶ See Commission notice C(88)1696 concerning *force majeure* in European agricultural law (88/C 259/07) section II (applicability of the *force majeure* clause) at §1(a).

³⁷ Ibid at §1(d).

³⁸ Ibid, introductory paragraphs, 3rd unnumbered paragraph.

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- d. In general, even if a *force majeure* exception is available, such an exception presupposes (i) an external cause, that is, one outside the control of the regulated party⁴⁰; (ii) having consequences which are inexorable and inevitable; which (iii) make it objectively impossible for the regulated party to comply with its obligations⁴¹.
- e. Even if a *force majeure* exception does apply, it will not be unlimited in time. The exception will only excuse a State from compliance with its obligations only for the period necessary in order to resolve any temporary insuperable difficulties preventing compliance⁴².
- f. Further, it is clear that the following do not constitute *force majeure*:
 - (1) the complexity of EU legislation which a Member State has taken part in drafting⁴³;
 - (2) the lack of financial resources available for implementation: this cannot, by definition, amount to *force majeure* in relation to a Member State's obligations under EU law since budgetary restrictions are within the control of the Member State itself⁴⁴;
 - (3) domestic difficulties with implementation, including public opposition to the implementation of a Directive (for example, on the ground of its impact on the local population), even where that opposition is so extreme as to lead to social unrest⁴⁵.

19. Impossibility and *force majeure* in EU environmental law: in applying the general principles set out above to a Member State's obligations under EU environmental law, the following additional considerations emerge:

³⁹ See e.g. Case C-263/97, *The Queen v Intervention Board for Agricultural Produce ex p First City Trading Ltd* [1998] ECR I-05537 at [41].

⁴⁰ Here, the Member State.

⁴¹ E.g. Case C-12/92, *Huygen & Others* [1993] ECR I-6381.

⁴² E.g. Case 101/84, *Re Transport Statistics: EC Commission v Italy* [1985] ECR 02629; Case C-68/11 *Commission v Italian Republic* (above) at [64].

⁴³ Case 145/85 *Denkavit België NV v Belgium* [1987] ECR 00565 at [13].

⁴⁴ *Ibid* at [16].

⁴⁵ Case C-45/91, *RE The Kouroupitos Rubbish Tip: EC Commission v Greece* [1992] ECR I-02509 at [20-21]; Case C-121/07, *Commission v French Republic* [2008] ECR I-9159 at [72].

- a. In general, the Court's approach to environmental Directives is to require strict compliance with the terms of express derogations set out in them, rather than to excuse compliance on more general grounds such as impracticability or cost⁴⁶.
- b. Where the EU legislature wishes to provide for a *force majeure* derogation to apply in the environmental field, it can and does make express provision for it. See for example (i) Directive 2000/60/EC (water policy framework), Article 4(6) (temporary derogation as a result of natural causes or *force majeure* subject to strict conditions); (ii) Directive 2003/87/EC (greenhouse gas emission allowance trading), Article 29 (which sets out a *force majeure* exception and provides for Commission guidance to describe the circumstances in which *force majeure* is demonstrated).
- c. In other cases, no general *force majeure* exception is provided in the legislation, but the legislator instead provides for derogations in certain circumstances such as those involving unfavourable weather conditions or other natural causes beyond the control of member states⁴⁷.
- d. Guidance as to what might constitute *force majeure* (if applicable) in a case involving emissions limits has been given by the Commission in the context of greenhouse gas emissions⁴⁸. In that context, the Commission's view is that in order to fall within a *force majeure* derogation, there must be (i) exceptional and unforeseeable circumstances (ii) causing a substantial increase in annual emissions (iii) which could not have been avoided by the regulated party; and (iv) which are beyond the control of that party. Examples given by the Commission of circumstances constituting *force majeure* in that context include "natural disasters, war, threats of war, terrorist acts, revolution, riot, sabotage or acts of vandalism"⁴⁹.
- e. Even if absolute impossibility of compliance may theoretically be available as a defence in particular environmental cases in certain circumstances⁵⁰, the

⁴⁶ See above at §15.

⁴⁷ See e.g. Articles 20 and 21 of the Directive in the present case.

⁴⁸ COM(2003) 830 final at §§113-114.

⁴⁹ Ibid at §114.

⁵⁰ Compare, for example, Case C-68/11, *Commission v Italy*, above, at [64].

Court has rejected attempts by Member States to establish impossibility in the following cases:

- (1) Where the existing (or projected) non-compliance with limit values is due to the fact that the Member State responsible for compliance started work belatedly on the measures needed to ensure compliance: see Case C-56/90 *Commission v UK* (bathing water) where Advocate General Lenz said this at [49-57]:

“Impossibility of compliance with the duties imposed

49. ... the United Kingdom contends that the Directive cannot demand the impossible. The requisite remedial works could not objectively have been carried out within the periods allowed. Duties entailing physical alterations to the environment cannot be absolute. A Member State can only be obliged to take all practicable steps. Particularly in environmental law legal duties were not to be construed as duties as to the result to be achieved, since a Member State would otherwise be liable for occurrences and for the conduct of third parties over which it had no influence. The Member State could not be liable as the guarantor of a specific outcome.

50. The United Kingdom's submissions compel a view to be taken of the legal nature of the duties enshrined in the Directive. The duty within two years to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive is straightforward. A Member State is always responsible for meeting the requirement to enact requisite legislation and cannot, when the need arises, rely on internal difficulties in the legislative process to escape liability for the punctual fulfilment of its obligations under Community law.

51. It might be otherwise where physical alterations of the environment must be brought about in order to meet specific objectives. Therefore, the question arises whether the values to be set pursuant to Article 3 of the Directive must be absolutely complied with within the 10-year period contained in Article 4(1), failing which the Member State concerned is in breach of the Treaty. The terms in which the duty are couched are unconditional:

“Member States shall take all necessary measures to ensure that, within 10 years following the notification of this Directive, the quality of bathing water conforms to the limit values set in accordance with Article 3.”

52. Allowance is made for the fact that difficulties may be encountered in attaining the objectives set by the fact that the 10-year period for attaining the objectives is unusually long. Moreover, as already stated, an extension of time may be available. Finally, allowance is also made for the possible effect on the parameters to be attained of natural disasters, abnormal weather conditions, exceptional weather or geographical conditions or specific natural features in the context of Article 5(2) and Article 8.

53. The United Kingdom is of the view that the inference to be drawn from the availability of the derogation provision is that the duties in regard to

attainment of the parameters are not absolute. The derogations are provided for in order to ensure the requisite flexibility in the application of the provisions. The United Kingdom considers this machinery to be evidence of the fact that requirements imposed by the Directive must also be applied in a flexible manner. It is not reasonable to demand the impossible.

54. In my view the availability of derogations is to be construed the other way around. Directive 76/160 is structured in the same way as Directive 80/778 relating to the quality of water intended for human consumption ([1980] O.J. L229). With regard to that Directive I expressed the view (see my Opinions of December 14, 1989, in Case C-42/89, E.C. Commission v. Belgium [1989] E.C.R. 2821, at p. 2828 and of January 21, 1992, in Case C-337/89, E.C. Commission v. United Kingdom [1992] E.C.R.), that derogations were to be construed strictly. The Court has followed that interpretation in two judgments (Case C-42/89, E.C. Commission v. Belgium [1990] E.C.R. 2821, and Case C-337/89, E.C. Commission v. United Kingdom [1993] Env. L.R. 299). I am of the view that in Directive 76/160 the Community legislator chose the same structure of legal duties. For that reason the derogations ought to be given a narrow interpretation in this case as well. In the result that means that a duty as to the result to be achieved was imposed on the Member States, from which departures were possible only in the context of the explicitly authorised exceptions.

55. In my opinion there is no reason why a Member State should not be liable as a guarantor vis-à-vis the Community for the attainment of specified aims. As regards liability for the conduct of third parties, the Member State may avail itself of means, such as legislative action, in order to ensure that certain courses of conduct are followed.

56. Moreover, in the cleansing of the bathing waters at issue one is not confronted with a case of objective impossibility. Since the requisite works were only started on expiry of the 10-year period, the timely fulfilment of the duties was no longer possible. However, the belated start made on the requisite works is undoubtedly the responsibility of the Member State. It may remain open whether on account of the extent of the works it would have been possible to carry them out earlier. Certainly, it appears to me questionable for there to be consultation phases lasting over several years before concrete steps are taken. In any event it was open to the Member State to obtain an extension of time under Article 4(3). Certainly, that would have required the competent authorities of the Member State concerned to have reached a decision within six years on whether and, if so, what remedial measures were necessary. However, that is not in my view an impracticable requirement.

57. In the result I am of the view that the United Kingdom's arguments cannot justify the long delay of at least 10 years following expiry of the 10-year period provided for in the attainment of the parameters prescribed by Community law—and then only if the projected works are started immediately. The appreciable delay in fulfilling these duties under Community law also constitutes an infringement of Articles 5 and 189 of the EEC Treaty.” (Emphasis added)

- (2) Where the matters relied upon are unduly vague and general in nature, so that it is not established that it is objectively impossible to comply.

Thus in a recent case under the Directive, Case C-68/11 *Commission v Italy*, the following matters sought to be relied upon by Italy⁵¹ were rejected by the Court⁵² as too vague and general to be able to constitute a case of *force majeure* justifying non-compliance with Directive limit values for PM₁₀:

“(i) the complexity of the process of PM₁₀ formation, (ii) the impact of the weather on concentrations of PM₁₀ in the atmosphere, (iii) insufficient technical knowledge of the process of PM₁₀ formation which led to the imposition of time-limits which were too short for compliance with those limit values, (iv) the fact that the various European Union policies to reduce PM₁₀ precursors did not produce the results expected and (v) the absence of a link between European Union policy concerning air quality and, inter alia, that aiming at reducing greenhouse gas emissions.”

20. Applicability of *force majeure* in the present case: in the light of the principles set out above:

- a. It is first necessary to consider whether it is appropriate to imply any exception for *force majeure* into the requirements of Article 22 of the Directive. No such exception should be implied. Article 22 lays down a procedure for seeking an extension of time in a case where given current and predicted nitrogen dioxide levels, the Member State is of the view that conformity with limit values cannot be met by 2010. There is no express exception in Article 22 for *force majeure*, and it is not necessary to imply any such exception.
- b. If, contrary to that primary submission, there is an exception in Article 22 for *force majeure*, any such exception should be narrowly construed. ClientEarth suggests (by analogy with the Commission’s guidance on greenhouse gas emissions) that a case of *force majeure* could only arise where there were (i) exceptional and unforeseeable circumstances (ii) causing a substantial increase in annual emissions (iii) which could not have been avoided by the Member State; and (iv) which are beyond the control of the Member State.
- c. Thus, any exception for *force majeure* would cover only such exceptional matters outside the Member State’s control as (for example) natural disasters,

⁵¹ In support of an argument of ‘impossibility’ and/or of *force majeure* justifying non-compliance with the Directive limit values.

⁵² Judgment at [41]; at [65].

war, threats of war, terrorist acts, revolution, riot, sabotage or acts of vandalism.

d. By contrast, the following cannot justify a failure to comply with Article 22 (or Article 13) of the Directive:

(i) the cost of implementation measures and/or the lack of financial resources available for implementation;

(ii) domestic difficulties with implementation, including the fact that particular measures (e.g. measures restricting the use of private vehicles in built-up areas at particular times) may be unpopular;

(iii) the fact that the Member State in question has failed to take the necessary implementation measures until after 1 January 2010 or later;

(iv) the fact that particular EU policies on reducing nitrogen dioxide emissions (e.g. the 'Euro' standards for diesel engines) did not produce the results expected;

(v) the complexity of the problem of reducing nitrogen dioxide levels and (in particular) the variety of emissions sources and the variety of measures which need to be taken in order to reduce them.

The Third Question Referred

21. ClientEarth submits that the answer to the third question referred is that:

a. The provisions of Article 23 cannot excuse a failure by a Member State to comply with Article 13 or Article 22.

b. In a case where nitrogen dioxide limit values are being exceeded after 1 January 2010 (where no valid Article 22 notification has been made) or after 1 January 2015 (whether or not a valid Article 22 notification has been made):

i. the second subparagraph of Article 23(1) requires a Member State to establish an air quality plan to set out a comprehensive range of additional measures ensuring that the exceedance period is kept as short as possible;

- ii. for these purposes ‘as short as possible’ means ‘as short as is physically possible’;
 - iii. accordingly, a measure may not be omitted from an air quality plan on the ground of financial, practical, administrative, legislative or political difficulties in implementation.
- c. In any event, ‘as short as possible’ cannot be after 1 January 2015, as Article 22 has already provided that ‘a maximum of 5 years’ from 1 January 2010 is an entirely sufficient period from Member States in breach as at 1 January 2010 to achieve compliance. The intention of the EU legislature was to allow up to 5 further years for compliance from 2010, but no more.
- d. The provisions of Article 23 do not remove the need for national courts to provide an effective remedy for breaches of Article 13 or Article 22 (see ClientEarth’s observations on the fourth question referred).
22. The second paragraph of Article 23(1) requires Member States to set out appropriate measures for keeping the exceedance period as short as possible. It is clear from this wording that what is required is more than a gradual return to a level below the limit values, in contrast with the obligations at issue in *C-237/07 Janecek v Freistaat Bayern* [2008] ECR I-06221⁵³, which concerned “short-term action plans” required by article 7(3) of the Framework Directive. On the contrary, ‘as short as possible’ requires the very opposite of a gradual return.
23. In order to keep the exceedance period as short as possible, the air quality plan under Article 23 must include all possible measures. The correct test of what is “possible” or otherwise in the context of the duty to achieve mandatory limit values is well established in the case law of the Court (see for example *Commission v UK*, *Commission v Belgium*, *Commission v Italy* discussed at paragraph 19 above).
24. In order to ensure the overall effectiveness of the obligations in the Directive where, as here, there is an admitted breach of Article 13⁵⁴ and no notification under Article 22, it is essential to ensure that the obligations under the second subparagraph of

⁵³ At [47]; cf [33].

⁵⁴ Respondent’s written case before the Referring Court (**Annex L** to these Observations) at §75. The Appellant’s written case before the Referring Court is at **Annex M** to these Observations.

Article 23(1) are no less onerous than those which would have arisen had the Member State complied with its obligations under Article 22.

25. It is clear from Article 22 Annex XV (B) and Recital 16 to the Directive that time extensions under Article 22 “should be accompanied by a comprehensive plan to be assessed by the Commission to ensure compliance by the revised deadline.” An air quality plan under Article 23 must be no less comprehensive. It must contain measures relating to the whole range of emission sources and must not be restricted only to one emissions source or to one type of pollution reduction measure.

26. In particular (by analogy with Article 22 and Annex XV, Part B), but without limitation, an Article 23 plan must consider:

- (1) reduction of emissions from stationary sources, including by ensuring that polluting small and medium sized stationary combustion sources are fitted with emission control equipment or replaced;
- (2) reduction of emissions from vehicles through retrofitting with emission control equipment;
- (3) procurement by public authorities of road vehicles, fuels and combustion equipment to reduce emissions, including the purchase of new vehicles (including low emission vehicles, cleaner vehicle transport services, low emission stationary combustion sources and low emission fuels for stationary and mobile sources);
- (4) measures to limit transport emissions through traffic planning and management (including congestion pricing, differentiated parking fees or other economic incentives and low emission zones);
- (5) measures to encourage a shift of transport towards less polluting modes;
- (6) ensuring that low emission fuels are used in small, medium and large scale stationary sources and in mobile sources;
- (7) measures to reduce air pollution through the permit system under Directive 2008/1/EC, the national plans under Directive 2001/80/EC, and through the use of economic instruments such as taxes, charges or emission trading; and

- (8) where appropriate, measures to protect the health of children or other sensitive groups.

27. It is clear that a member state may not plead financial, practical, legislative, political or administrative difficulties in order to justify failure to comply with the limit values. It follows that such factors similarly do not justify the exclusion of measures from an air quality plan under Article 23. A member state may only lawfully exclude a measure in the case of physical impossibility. The following would therefore not constitute valid reasons not to include a particular measure in an air quality plan under Article 23 in these circumstances:

- (1) the cost of implementation measures and/or the lack of financial resources available for implementation;
- (2) domestic difficulties with implementation, including the fact that particular measures may be unpopular;
- (3) the fact that the Member State in question has failed to institute the necessary implementation measures until after 1 January 2010 or later;
- (4) the complexity of the problem of reducing nitrogen dioxide emissions and (in particular) the variety of sources of such emissions and the variety of measures which need to be taken in order to reduce them.

28. Measures set out in an Article 23 plan in these circumstances must contain actual commitments rather than being merely aspirational in nature. For example, merely stating that a particular measure 'will be investigated' would be inadequate for Article 23 purposes. The Commission has already rejected time extensions for some of those UK zones and agglomerations submitted for which a time extension was sought on the basis that the Article 22 plans did not contain such a clear commitment⁵⁵:

"Several of the air quality plans list the measure "low emission zone" as an optional measure to be implemented. It should be noted that a plan is considered as an air quality plan for the purposes of a notification pursuant to Article 22 of Directive 2008/50/EC, if it has been formally endorsed by the competent authorities so that it constitutes a formal commitment to take the necessary

⁵⁵ Commission decision of 25.6.2012 on the notification by the United Kingdom of Great Britain and Northern Ireland of a postponement of the deadline for attaining the limit values for NO₂ in 24 air quality zones (Annex N to these Observations at §17).
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abatement action with the view of ensuring compliance with the NO₂ limit values before the new deadline.

Considering that the competent authorities have indicated the measure "low emission zone" to be only optional, the Commission finds that it does not allow the Commission to assess with enough certainty whether this measure will be implemented or not and hence whether compliance by the extended deadline can be achieved in those zones."

This requirement for formal commitments must apply equally to measures included in Article 23 plans.

29. Measures included in an air quality plan must include a clear timetable for implementation (Directive, Annex XV, Part A §8b). The requirement under Article 23 to ensure that the limit values are achieved in the shortest time possible logically requires that this timetable must commit to implementing measures in the shortest time possible.
30. The measures set out in an Article 23 plan must be such *additional* air pollution abatement measures as are necessary to ensure compliance in the shortest possible time. Accordingly, an Article 23 plan may not merely list existing measures that are already in place that have failed to ensure compliance with the Directive's mandatory limit values.
31. Thus, in order to comply with Article 23, a Member State must:
- a. adopt a comprehensive plan;
 - b. containing formal commitments;
 - c. with implementation by a certain date and as soon as possible; of
 - d. all additional measures necessary to address all relevant sources of pollution.
32. In any event, Article 23 may not be relied upon by a Member State which has not met the nitrogen dioxide limit values at or after 1 January 2010 in order to obtain an extension of time for compliance beyond 1 January 2015. That is because to allow an extension beyond 2015 would be to circumvent the protection set out in Article 22.
33. An air quality plan under Article 23 is required to set out measures to keep the exceedance period "as short as possible" so cannot lawfully set out a date after 2015 for compliance with nitrogen dioxide limit values:

- a. Article 22 is the *lex specialis* in relation to time extensions under the Directive – in other words, it governs the specific subject-matter of time extensions for compliance with the mandatory limit values (at least prior to 2015). Where specific provision is made for a particular situation by one part of a legal instrument, it is presumed that the situation is intended to be dealt with by that specific provision rather than by a general provision which (when read literally) might cover the same situation. Thus, Article 23 cannot provide an alternative process, beyond 2015, in the light of the specific provision in Article 22.
- b. An exceedance cannot be “as short as possible” within the meaning of Article 23(1) if it continues beyond the final cut-off date of 2015 set out in Article 22. The EU legislator did not consider that there would be any Member State that could not, with proper effort, comply by 2015. Otherwise it would have been possible to apply for a lengthier time extension beyond 2015. So in this legislative context, “as short as possible” cannot mean longer than 2015.

The Fourth Question Referred

34. ClientEarth submits that the answer to the fourth question referred is that in the event of non-compliance with Article 13 and/or Article 22, the national court must:

- a. provide an effective and dissuasive remedy, i.e. an order which is not merely declaratory or symbolic in nature but mandatory and legally binding. That mandatory order must require the national authorities to comply with its obligations under Article 23: to draw up and consult the public on a new plan under Article 23(1) containing measures to achieve compliance in the shortest time possible;
- b. review that plan against the requirements of Article 23(1), including the adequacy of the measures included in that plan; and
- c. impose financial sanctions on the competent authority of the Member State commensurate with the seriousness of the breaches of Article 13 (and/or commensurate with the seriousness of the breaches of Article 13 (and/or Article 22) for which they are imposed, in order to ensure a genuinely dissuasive effect. This requirement would be satisfied by, for example, the

imposition by the national court of a financial penalty calculated on a daily basis (where the breach of limit values is continuing) and/or a lump sum payment by reference to this Court's case-law on the imposition of fines under Article 260 TFEU.

Effective legal protection

35. Article 4(3) TEU requires Member States to “take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union”. This principle requires, “within the sphere of its competence [...] every organ of the Member State concerned [...] to nullify the unlawful consequences of a breach of Community law” (Case C-201/02 *Wells v Secretary of State for Transport, Local Government and the Regions*, [2004] ECR I-00723 at paragraph 64).

36. Further, Article 19(1) TEU requires Member States to “provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.” Article 19(1) was introduced by the Lisbon Treaty, and enshrines the general principle of effective legal protection within primary EU legislation, thus giving it constitutional status. Effective legal protection flows from the duty under Article 4(3) to take all appropriate measures to ensure fulfilment of obligations arising out of the Treaties. It is well established that the duty to ensure effective legal protection extends to domestic courts.

37. Effective remedies are also required by Article 9(4) of the Aarhus Convention and Article 47 of the Charter of Fundamental Rights of the EU.

38. The classic requirements for national remedies were set out in Case C-432/05 *Unibet* [2007] ECR I-02271, at paragraph 43:

“[T]he detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)” (emphasis added).

39. Article 30 of the Directive makes the general principle of effective legal protection explicit in the specific context of air quality, requiring Member States to lay down rules on penalties applicable for infringements of the national implementing

provisions. Such penalties must be effective, proportionate and dissuasive. In the present case, the Member State relies on the availability of judicial review remedies for breaches by the competent authority (in this case the national Government) of its obligations under the national transposing regulations in order to implement Article 30 of the Directive⁵⁶.

40. There are two elements to the principle of effective legal protection:

- a. the *existence* of a remedy for breaches of EU law; and
- b. the *effectiveness* of that remedy.

Existence of a remedy

41. The national court must provide a remedy. As a matter of purely domestic law, courts in England and Wales have discretion to refuse to grant relief even where they find that a public body has acted unlawfully (section 31(2) of the Senior Courts Act 1981)⁵⁷. The UK courts have a range of remedies available to them including:

- a. declarations;
- b. mandatory orders;
- c. injunctions;
- d. quashing orders; and
- e. damages

42. While the UK courts typically recognise that the exercise of that discretion is narrowed in a case involving an infringement of EU law⁵⁸, Mitting J in this case at first instance concluded that “[i]f a State would [...] be in breach of its obligations under Article 13 [...] it can, as the United Kingdom Government has done, simply admit its breach and leave it to the Commission to take whatever action the Commission thinks right by way of enforcement under Article 258” TFEU (at paragraph 12) and “the means of enforcing Article 13 lie elsewhere in the hands of the

⁵⁶ Transposition note for the Directive (Annex O to these Observations).

⁵⁷ Senior Courts Act 1981: <http://www.legislation.gov.uk/ukpga/1981/54/section/31>

⁵⁸ For most recent discussion of the scope of discretion in EU cases see *Walton v Scottish Ministers* [2012] UKSC 44 at [138-139] and [156] <http://www.supremecourt.gov.uk/docs/uksc-2012-0098-judgment.pdf>

Commission [...] these remedies are sufficient to deal with the mischief at which the 2008 Directive is aimed” (at paragraph 16). Mitting J thought it was not necessary for the national courts to provide *any* remedy.

43. This finding was wrong. It is incompatible with EU law for a national court to refuse to provide remedies for admitted breaches of EU law on the basis of the possibility of subsequent infraction proceedings by the Commission in relation to those breaches. As the Commission expressed it in a letter to ClientEarth following the dismissal of its appeal⁵⁹:

“The fact that the Commission has powers to bring its own infringement proceedings against Member States under Article 258 TFEU should not mean that individuals cannot plead these obligations before a national court as has been recognised by the Court of Justice as long ago as 1963 (Van Gend en Loos judgment [1963] ECR I). As the Court already recognised in that case, a restriction of the guarantees against an infringement by Member States to the procedures under Article 258 TFEU would remove all direct legal protection of the individual rights of their nationals.”

Effectiveness of the remedy

44. It is not sufficient that the national court provides a remedy for a breach of EU law. That remedy must be effective: it must not make it practically impossible or excessively difficult to access rights conferred by EU law. The Court has held that sanctions must be more than purely symbolic in nature⁶⁰. So for example, the declaration made by the Referring Court that the UK was in breach of Article 13 of the Directive cannot be considered an effective remedy as it was purely symbolic⁶¹. If this was the only type of remedy available, it would make it practically impossible for individuals and NGOs in the UK to access the rights conferred on them by the Directive to compliance with air quality limit values.

45. In addition, the remedy must have a genuinely dissuasive effect: it must provide a sufficient deterrent to ensure that the relevant provisions are fully effective⁶². This is a general principle of EU law and Article 30 of the Directive specifically requires

⁵⁹ Letter from Jean-Francois Brakeland, European Commission, to Alan Andrews, ClientEarth dated 29 June 2012 (Annex K to these Observations).

⁶⁰ In Case C-81/12, *Asociata Accept v Consiliul Național Pentru Combaterea Discriminării*, judgment of 25 April 2013 [2013] 3 CMLR 26

⁶¹ See order of the Supreme Court of the United Kingdom dated 16 July 2013.

⁶² See, among many other authorities, Case C-212/04 *Adelener v ELOG* [2006] ECR I-6057 at [94-95].

penalties for breaches of national provisions which are effective, proportionate and dissuasive.

46. The Court has recently considered⁶³ an identical requirement to Article 30 of the Directive⁶⁴ for sanctions to be 'effective, proportionate and dissuasive'. In its judgment, the Court held that while such a provision did not call for the adoption of specific sanctions, it did require Member States to ensure 'real and effective legal protection' of rights under the Directive.⁶⁵ Further, "the severity of the sanctions imposed must be commensurate to the seriousness of the breaches for which they are imposed, in particular by ensuring a genuinely dissuasive effect".⁶⁶

47. Dissuading breaches of EU law is a critical component of the general principle of effectiveness, which flows from article 4(3) TEU. These principles apply *a fortiori* in circumstances where the Member State has relied on the availability of judicial review remedies in order to implement the provisions of a directive relating to penalties with respect to breaches by the national government.⁶⁷

Air quality plans as an effective remedy

48. The need for national courts to provide effective remedies is particularly clear in the context of breaches of limit values laid down by EU air quality directives and other directives relating to atmospheric pollution and human health. In *Janecek* the Court held that the binding effect of such directives required that natural or legal persons must be able to bring legal action before national courts in order to require the competent authorities individuals to draw up an action plan⁶⁸.

49. It is incompatible with EU law for a national court to refuse to provide an effective remedy on the basis of any perceived practical, administrative, political or financial difficulties that would result from its implementation. National courts must interpret

⁶³ Case C-81/12, *Accept*, note 60 above.

⁶⁴ In that case, in Article 17 of Directive 2000/78/EC.

⁶⁵ Judgment at [63].

⁶⁶ *Ibid.*

⁶⁷ See Transposition Note (Annex O to these Observations).

⁶⁸ See also Joined Cases C-165/09 to C-167/09 *Stichting Natuur en Milieu & Others v College van Gedeputeerde Staten van Groningen* [2011] ECR I-04599.

national procedural rules to the fullest extent possible in order to give effect to rights conferred by EU law⁶⁹.

50. While EU law does not require the national court to impose a mandatory order which demands the impossible, the obligations under the Directive are mandatory. They are not intended to be achieved without cost or effort. As under Articles 22 and 23, the following factors would not justify withholding an effective remedy or be relevant considerations in determining the specific terms of the remedy:

- (1) the cost of implementation measures and/or the lack of financial resources available for implementation;
- (2) domestic difficulties with implementation, including the fact that particular measures may be unpopular;
- (3) delay, for example where the competent authority in question had failed to institute the necessary implementation measures until after 1 January 2010 or later; or
- (4) the complexity of the problem.

51. It is also clear from the Court's case law that the national court must conduct a substantive review of the measures set out in an air quality plan. In *Janecek* the Court held that while the Member States had discretion as to which air pollution abatement measures to select, the Directive's provisions imposed limits on that discretion which could be relied upon before the national courts. In particular, the national court was required to review the adequacy of the measures included in the action plan⁷⁰.

52. Accordingly, where there has been a breach of Article 13, the national court is required to insist on the production of an air quality plan in accordance with Article 23, and then to carry out a substantive review of the appropriateness of the body of measures set out in the air quality plan by reference to the requirement that the exceedance period is kept as short as possible. In particular, the national court must determine whether a plan adopted contains all necessary measures to ensure compliance with Directive limit values in the shortest time possible; and must

⁶⁹ See Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* at [51].

⁷⁰ Judgment at [45]. See also *Milieu*, note 68 above at [103].

specifically consider whether there are any feasible measures which have been wrongly excluded by the authorities of the Member State⁷¹. For example, measures may have been wrongly excluded on grounds of their cost, complexity or unpopularity.

53. The provisions of Article 23 do not remove the need for an effective remedy. Where, as in the case of the UK, there is already a plan in place which purports to comply with Article 23, the national court must carry out a substantive review of that plan and if it finds that does not achieve the limit values in the shortest time possible, require that the plan be amended to: include further measures, increase the ambition level of measures, or speed up the timetable for their implementation to achieve compliance with the limit values in the shortest time possible.
54. However, such a remedy would not be dissuasive, as it would merely be requiring the UK to comply with its obligations under Article 13 i.e. to take all necessary measures to achieve the limit values, but years after the original deadline. A mandatory order requiring the UK to prepare, consult on and implement new plans under Article 23 is necessary, but not sufficient. Such an order would have no dissuasive effect. It is therefore necessary, in addition, for financial penalties to be imposed by the national court in a case where there is a violation of Article 13. The penalty imposed for non-compliance must be at least equal to the cost of timely compliance, otherwise the Member State may take the view that it is more advantageous not to comply with the Directive's mandatory requirements.
55. Thus, in the present case, a proper sanction for non-compliance with Article 13 must incentivise present and future compliance by the Member State, so as to satisfy the requirement that the remedy be both effective *and* dissuasive. This requirement would be satisfied by, for example, the imposition by the national court of a financial penalty⁷². While it would be for the national court to determine the specific arrangements, such fines could be paid in to a ring-fenced fund to be used exclusively for air pollution measures and for compensating those who have suffered harm caused by the breach of EU law.

⁷² Such comparable cases in the sphere of EU environmental law would include, for example, the Court's judgments under Article 260 TFEU in the cases of *Commission v Greece* (C-387/97) [2000] ECR I-369 (waste); *Commission v Spain* (C-278/01) [2003] ECR I-14141 (bathing water); *Commission v France* (C-121/07) [2008] ECR I-9159 (Genetically Modified Organisms).
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ClientEarth's Proposed Answers to the Questions Referred

56. For the reasons set out above, ClientEarth submits that the questions referred by the Referring Court should be answered as follows:

- (1) As to the first question referred: where, in a given zone or agglomeration, conformity with the limit values for nitrogen dioxide was not achieved by the deadline of 1 January 2010, a Member State is obliged to seek postponement of the deadline in accordance with Article 22 of the Directive.
- (2) As to the second question referred, if conformity with the nitrogen dioxide limit values cannot be achieved by 1 January 2010, (a) a Member State is always required to seek postponement of that deadline under Article 22 of the Directive and there are no circumstances in which it may be relieved of that obligation; alternatively, (b) a Member State may be relieved of that obligation, at most, only in circumstances of *force majeure*⁷³.
- (3) As to the third question referred, the provisions of Article 23 cannot excuse a failure by a Member State to comply with Article 22 (or Article 13). Further, in a case where Directive limit values are being exceeded in violation of Article 13: (a) the second subparagraph of Article 23(1) requires a Member State to establish an air quality plan to set out a comprehensive range of measures ensuring that the exceedance period is kept as short as possible; (b) for these purposes 'as short as possible' means 'as short as is physically possible'; (c) accordingly, a measure may not be omitted from an air quality plan on the ground of practical, administrative, political or financial difficulties in implementation. In any event, Article 23 may not be relied upon by a Member State in order to obtain an extension of time for compliance beyond 1 January 2015.
- (4) as to the fourth question referred, in the event of non-compliance with Article 13 and/or Article 22, the national court (a) must give a remedy which is mandatory in nature requiring the national authorities to draw up a plan under Article 23(1) demonstrating compliance in the shortest time possible; (b) must review the adequacy of the measures included in that plan by reference to the

⁷³ As defined at §17.b above.
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substantive requirements of Article 23, considering in particular whether or not the plan demonstrates compliance with the Directive limit values in the shortest time possible; and (c) must additionally impose upon the Government of the Member State financial sanctions the severity of which is commensurate with the seriousness of the breaches of Article 13 (and/or Article 22) for which they are imposed, in particular by ensuring a genuinely dissuasive effect.

A handwritten signature in black ink, appearing to read 'Pierre Kirch', with a long horizontal stroke extending to the right.

PIERRE KIRCH

AVOCAT A LA COUR

DINAH ROSE QC

EMMA DIXON

BEN JAFFEY