Questionnaire on Air Pollution Law – United Kingdom

I. Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe and Directive 2004/107/EC of the European Parliament and of the Council of 15 December 2004 relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air

1. Have there been problems to fulfil the obligations, set out in these directives, in practice? Are there effective systems in place to ensure detection of possible non-compliance and relevant follow-up, including prosecution and adjudication?

The Air Quality Standards Regulations 2010 (as amended by the Air Quality Standards (Amendment) Regulations 2016 and the Air Quality (Amendment of Domestic Regulations) (EU Exit) Regulations 2019)

As is explained more fully below, Directive 2008/50/EC ("the 2008 Directive") and Directive 2004/107/EC ("the 2004 Directive") have been transposed in the UK by the Air Quality Standards Regulations 2010 (as amended by the Air Quality Standards (Amendment) Regulations 2016 and the Air Quality (Amendment of Domestic Regulations) (EU Exit) Regulations 2019).

The Local Air Quality Management ("LAQM") regime

The LAQM regime requires every local authority regularly to review and assess air quality in its area. The aim of such reviews is to identify whether national objectives in the Air Quality (England) Regulations 2000 have been, or will be, achieved at relevant locations, by an applicable date. Under Part IV of the Environment Act 1995, if national objectives are not met, or are at risk of not being met, the local authority concerned shall "designate as an air quality management area … any part of its area in which it appears that those standards or objectives are not being achieved, or are not likely to be achieved within the relevant period" (section 83(1)) and prepare an air quality action plan (section 84(2)). The air quality action plan should describe the pollution reduction measures that will be put in place and related timings (section 84(3)). It may, from time to time, be revised by the local authority (section 84(4)).

This system relies upon local authorities honestly declaring a failure to meet air quality targets in their area. The LAQM regime does not place an absolute obligation on local authorities to achieve the Government's Air Quality Strategy, but they are required to act "in pursuit of the achievement" of the standards (section 84(2) of the Environment Act). This is because air quality is generally seen as a transboundary issue, and it is recognised that to control emissions originating from other areas is not likely to be possible. Under Part IV of the Environment Act, supervision of the LAQM system in Greater London has been devolved to the Mayor of London, who has powers to intervene and give directions to London boroughs (sections 85 and 86A).

Air Quality Plans

Article 23 of the 2008 Directive and regulation 26 of the UK's Air Quality Standards

Regulations state that where, in given zones or agglomerations, the levels of pollutants in ambient air exceed any limit value or target value, the UK as a Member State must ensure that an air quality plan ("AQP") is established for each of those zones and agglomerations to achieve the related limit value or target value specified in Annexes XI and XIV of the 2008 Directive.

The Government published its first AQP in September 2011 ("Air Quality Plans for the achievement of EU air quality limit values for nitrogen dioxide (NO_2) in the UK: UK Overview Document"). However, this was quashed by the Supreme Court on 29 April 2015 following a challenge brought by the UK environmental law charity, ClientEarth[1]. The Government published a new AQP in December 2015 ("Improving air quality in the UK: Tackling nitrogen dioxide in our towns and cities: UK overview document"). But on 2 November 2016 Garnham J. held that this too was unlawful[2], and on 22 November 2016, he ordered the Government to publish a draft modified AQP by 24 April 2017 and a final AQP by 31 July 2017.

The Government published a new AQP in July 2017 ("UK plan for tackling roadside nitrogen dioxide concentrations: Detailed plan"). ClientEarth launched fresh proceedings on the basis that the 2017 plan failed to meet the Government's legal obligations under the 2008 Directive and the Air Quality Standards Regulations. On 21 February 2018, the High Court (Garnham J. again) held that the 2017 plan was unlawful[3].

On enforcement and adjudication, Garnham J. concluded his judgment by stating:

> "108. I end this judgment where I began, by considering the history and significance of this litigation. It is now eight years since compliance with the 2008 Directive should have been achieved. This is the third, unsuccessful, attempt the Government has made at devising an AQP which complies with the Directive and the domestic Regulations. Each successful challenge has been mounted by a small charity, for which the costs of such litigation constitute a significant challenge. In the meanwhile, UK citizens have been exposed to significant health risks.
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> 109. It seems to me that the time has come for the Court to consider exercising a more flexible supervisory jurisdiction in this case than is commonplace. Such an application was made to me when the November 2016 judgment was handed down. I refused it on that occasion, opting for a more conventional form of order. Given present circumstances, however, I would invite submissions from all parties, both in writing and orally, as to whether it would be appropriate for the Court to grant a continuing liberty to apply, so that the Claimant can bring the matter back before the court, in the present proceedings, if there is evidence that either Defendant is falling short in its compliance with the terms of the order of the Court."

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[1] *R. (on the application of ClientEarth) v Secretary of State for Environment, Food and Rural Affairs* [2015] UKSC 28

[2] *R. (on the application of ClientEarth) (No.2) v Secretary of State for Environment, Food and Rural Affairs* [2016] EWHC 2740 (Admin)

[3] *R. (on the application of ClientEarth) (No.3) v Secretary of State for Environment, Food and Rural Affairs* [2018] EWHC 315 (Admin)

The 2017 plan set out the Government's approach to reducing roadside NO_2 concentrations. A supplement to the plan was published in October 2018 ("Supplement to the UK plan for tackling roadside nitrogen dioxide concentrations").

Table 1 in Annex K of the 2017 plan listed those local authorities in whose areas there were roads with concentrations of NO_2 forecast above legal limits. The plan made clear that the local authorities for the cites of Birmingham, Nottingham, Derby, Leeds and Southampton were expected to deliver Clean Air Zones by the end of 2019 (paragraphs 110 and 112 of the plan), and the Greater London Authority by the end of 2025 (paragraph 139). It directed that the local authorities listed in Table 3 of the plan – projected as having NO_2 limit exceedances beyond the next three to four years – to develop plans to achieve statutory NO_2 limit values within the shortest possible time (paragraphs 93 and 94). The Government has offered support, guidance and funding to these authorities. A further 33 local authorities listed in Table 1 in Annex K were not required to take specific action to improve air quality. Of these 33 authorities, nine were expected to achieve compliance in 2018, two were expected to achieve compliance in 2019, 12 are expected to achieve compliance in 2020, and the remaining 10 are expected to achieve compliance in 2021.

The supplement sets out measures directing what specified local authorities must deliver to help achieve compliance with NO_2 limits on certain roads (paragraph 2). Some local studies, using more detailed local data, have shown that 26 road links identified in the national modelling as exceeding legal limits are in fact already compliant. Others have identified roads with more persistent, long-term exceedances beyond 2021 and the Government has directed the local authorities responsible for these links to develop and implement plans to achieve compliance (paragraph 3).

2. Are those directives properly implemented in your Member State? Have stricter or complementary air quality standards been introduced?

The Air Quality Standards Regulations 2010 (as amended by Air Quality Standards (Amendment) Regulations 2016 and the Air Quality (Amendment of Domestic Regulations) (EU Exit) Regulations 2019)

The Air Quality Standards Regulations designate the Secretary of State as the competent authority for the UK for the purposes of both the Directives (regulation 3). As the competent authority, the Secretary of State is required to divide England into zones and agglomerations (regulation 4) and to classify each zone according to whether or not the upper or lower assessment thresholds specified in section A of Annex II to the 2008 Directive are exceeded for sulphur dioxide, NO_2 and oxides of nitrogen, particulate matter, lead, benzene and carbon monoxide (regulation 5(1)), and those specified in section I of Annex II to the 2004 Directive for arsenic, cadmium, nickel and benzo(a)pyrene (regulation 10(1)). The Secretary of State must review the classification of these zones at least every five years (regulations 5(2) and 10(2)), in accordance with section B of Annex II to the 2008 Directive (regulation 5(3)) and section II of Annex II to the 2004 Directive (regulation 10(3)).

The Secretary of State must ensure that levels of sulphur dioxide, NO_2, benzene, carbon monoxide, lead and particulate matter do not exceed the limit values set out in Schedule 2 (regulation 17), and that concentrations of $PM_{2.5}$, ozone, arsenic, cadmium, nickel and benzo(a)pyrene do not exceed the target values in Schedule 3 (regulation 18(1)). He is also

required to ensure that the critical levels set out in Schedule 6 are not exceeded (regulation 22).

Where the levels of sulphur dioxide, NO_2, benzene, carbon monoxide, lead and PM_{10} in ambient air exceed any of the limit values in Schedule 2, or the level of $PM_{2.5}$ exceeds the target value in Schedule 3, the Secretary of State must draw up and implement an AQP stating the measures intended to ensure compliance with any relevant limit value within the shortest possible time (regulation 26(1) and (2)).

The Secretary of State must publish annual reports for all pollutants (regulation 30(1)). The report must contain details of cases where levels of pollutants have exceeded the limit or target values set out in Schedules 2 to 5, and a summary assessment of the effects of those exceedances (regulation 30(2)).

It can therefore be said that "complementary", rather than "stricter", air standards have been introduced in the UK.

Brexit

Until a final Brexit agreement is reached with the EU, the fate of air quality standards and enforcement following Brexit is the subject of speculation. The Government has said that it does not intend to change limit values and targets for air quality following Brexit, and that that, under the European Union (Withdrawal) Act 2018, EU-derived domestic legislation – including air quality legislation – will continue to have effect, and direct EU legislation will form part of domestic law "on and after exit day" (sections 2(1) and 3(1)). All EU environmental laws, principles and relevant enforcement mechanisms will continue to apply to the UK until exit day, when the European Communities Act 1972 is repealed (section 1).

Related statutory instruments have amended the domestic legislation that implements EU air quality legislation to ensure it will remain operable after the withdrawal of the UK from the EU: for example, the Air Quality (Miscellaneous Amendment and Revocation of Retained Direct EU Legislation) (EU Exit) Regulations 2018 and the Air Quality (Amendment of Domestic Regulations) (EU Exit) Regulations.

However, once the UK has left the EU, the UK Government could then amend air quality standards and review any deadlines for meeting them. The role that EU institutions play in monitoring and enforcing these targets will be lost. In the March 2017 White Paper entitled "Legislating for the United Kingdom's withdrawal from the European Union", the Government confirmed that the Court of Justice of the European Union ("CJEU") would cease to have direct jurisdiction over the UK after withdrawal from the EU (paragraph 2.12). However, for continuity and to "maximise certainty" while the EU-derived law remains in effect, "the meaning of EU-derived law" would still be determined in domestic courts by reference to the CJEU's case law as it exists on the day of withdrawal (paragraph 2.14). Following exit from the EU, therefore, it would be UK law, not EU law, that is "supreme" (paragraph 2.3); that "directly-applicable" EU laws will be converted into UK law on exit day (para 2.4); and that UK law made to implement "our EU obligations" would be preserved (para 2.5). There has been considerable debate over the loss of the role of EU institutions in monitoring and enforcing environmental law, including the law on air quality, after the UK's departure from the EU and over the future of EU environmental principles. In response to

concerns raised, the Government held a consultation on environmental principles and governance after exit day, from May to August 2018. It proposed the creation of a new statutory independent environmental "watchdog" to hold it to account on its environmental obligations.

The Environment Bill 2020

In accordance with section 16 of the European Union (Withdrawal) Act, the UK Government published a draft Environment (Principles and Governance) Bill in December 2018. An amended version of the Bill was published in January 2020. Because of the COVID-19 pandemic the sittings of the Parliamentary Committee considering the Bill were suspended. The Committee is now expected to report by 29 September 2020.

Part 1 of the Bill sets out the proposed legal framework for environmental governance, including environmental targets for air quality (clause 1(3)(a)). It requires the Secretary of State to specify a standard to be achieved and a date by which this must be done (clause 1(4)). This includes setting, by regulations, a target for the annual mean level of $PM_{2.5}$ in ambient air (clause 2). In setting these targets the Bill requires the Secretary of State to consult with experts (clause 3(1)). It imposes a duty on the Secretary of State to ensure targets are met (clause 4) and a corresponding duty to report on whether targets have been met, and if they have not been met, why that is so (clause 5). The Secretary of State is also under a duty to ensure targets are reviewed, and thus assess if the "significant improvement" test is met (clause 6).

Clauses 7 to 14 concern the creation, renewal and review of environmental improvement plans. Clause 7 requires the Secretary of State to prepare an "environmental improvement plan" for significantly improving the natural environment within a period of 15 years, setting out the steps to be taken to improve the natural environment. The Secretary of State must then produce an annual report on the progress of the plan (clause 8), and continue to review it and make any amendments necessary (clauses 9 to 14).

Chapter 2 and Schedule 1 of the Environment Bill concerns the creation of the Office for Environmental Protection ("OEP"), an independent body for enforcement required to act objectively and impartially (clauses 21, 22(1) and (2)). The OEP must prepare a strategy for the exercise of its functions, including an enforcement policy explaining how it will determine the severity and action to be taken following failures to comply with environmental law (clause 22(3) to (7)). The OEP's duties include monitoring the progress of environmental improvement plans and targets and the implementation of environmental law. It must produce and publish reports of **its** findings, which are to be laid before Parliament (clauses 25 and 26).

The OEP's enforcement functions are laid out in clauses 28 to 38. A person can make a complaint to the OEP if he believes a public authority has failed to comply with environmental law by unlawfully failing to take proper account of it or by unlawfully exercising, or failing to exercise, any function it has under environmental law (clauses 28 and 29). The OEP may then carry out an investigation following the complaint and prepare a report on its findings (clause 30). It may give an information notice to a public authority if it has reasonable grounds for suspecting the authority has failed to comply with environmental law and considers that the failure, if it occurred, would be serious (clause 32(1)). The public authority must then respond in writing to the notice, outlining its response to the allegation

and what steps it intends to take (clause 32(3) and (5)). If the OEP is satisfied that the authority has seriously failed to comply with environmental law, it may then give a decision notice to the public authority describing the failure and setting out the steps the public authority should take to remedy, mitigate or prevent it occurring again (clause 33(1) and (2)). The public authority must reply in writing within two months stating whether it agrees that the failure occurred, whether it intends to take the steps set out in the notice, and what other steps, if any, it intends to take (clause 33(3) and (4)).

Where the OEP has given a decision notice to a public authority it may apply to the Upper Tribunal for an "environmental review" of the alleged failure (clause 35). On an environmental review the Upper Tribunal must determine whether the authority has failed to comply with environmental law, applying the principles applicable on an application for judicial review (clause 35(5)). If the Upper Tribunal finds that the authority has failed to comply with environmental law, it must make a statement to that effect – a "statement of non-compliance" (clause 35(6)). Where the Upper Tribunal makes a statement of non-compliance, it may grant any remedy that could be granted by the court on judicial review, other than damages, but only if satisfied that granting the remedy would not be likely to cause substantial hardship to, or substantially prejudice the rights of, any person other than the authority, or be detrimental to good administration (clause 35(8) and (9)). If the Upper Tribunal makes a statement of non-compliance, and the statement has not been overturned on appeal, the authority must publish a statement setting out the steps it intends to take in light of the review (clause 35(10)).

The OEP also has a power to apply for judicial review, or a statutory review, of the conduct of a public authority – whether or not it has given an information notice or a decision notice to the authority – if it considers the conduct constitutes a serious failure to comply with environmental law, and it is necessary to make such an application (rather than proceeding under clauses 32 to 35) to prevent or mitigate "serious damage to the natural environment or to human health" (clause 36).

Schedule 1 to the Environment Bill sets out the structure, staffing, delegation, funding and status of the OEP.

The Government's 2019 Clean Air Strategy describes (on p.80) its commitment to establishing a new, independent statutory body to hold it to account on its compliance with environmental legislation – including by legal proceedings if that is necessary – following EU exit, and on the development of a new policy statement on environmental principles.

The draft version of the Environment Bill was subject to pre-legislative scrutiny by both the Environmental Audit Committee and the Environment, Food and Rural Affairs ("EFRA") Committee. In their reports both committees were critical of the draft clauses. In the "Summary" of its report, published on 30 April 2019, entitled "Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill: Fourteenth Report of Session 2017-19", the EFRA Committee expressed concern (on p.3) that the draft Bill's provisions were "not equivalent to the current environmental protections provided by membership of the EU". And in the "Summary" of their report, published on 25 April 2019, entitled "Scrutiny of the Draft Environment (Principles and Governance) Bill: Eighteenth Report of Session 2017-19", the Environment Audit Committee said (on p.4), under the heading "Enforcement":

> "Enforcement by the OEP is limited to administrative compliance and not the failure to attain environmental standards and targets. This is at odds with the Government's claim that the Bill places environmental accountability at the heart of Government and is not equivalent to the procedure of the European Commission."

The Government's response was published on 23 October 2019 as the "Appendix" to the Environmental Audit Committee's report entitled "Scrutiny of the Draft Environment (Principles and Governance) Bill: Government Response to the Committee's Eighteenth Report of Session 2017-19".

The Clean Air Strategy 2019

The UK Government's most recent Clean Air Strategy was published in 2019. This contends that the only area in which the UK is not currently meeting the limits set by the 2008 Directive is roadside NO_2 concentrations (paragraph 1.3). It asserts that by implementing the policies in the strategy, $PM_{2.5}$ concentrations everywhere in the UK will be reduced so that the number of people living in locations above the WHO guideline level of 10 $\mu g/m^3$ is reduced by 50% from the 2016 baseline by 2025 (paragraph 2.4).

The strategy includes a promise to review and report on progress in 2022 (paragraph 2.5). It also says that the Government will introduce new legislation to introduce a strengthened, up-to-date legislative framework for tackling air pollution. This will enable the Secretary of State for Transport to compel manufacturers to recall vehicles and non-road mobile machinery for any failures in their emissions control system, and to take effective action against tampering with vehicle emissions control systems (paragraph 9.2.2).

The strategy indicates the action that will be taken to reduce emissions from transport, farming, industry and at home. And (in paragraph 10.1) it sets out the UK's 2005 baseline emissions of five damaging air pollutants (fine particulate matter ($PM_{2.5}$); ammonia (NH_3); nitrogen oxides (NOx); sulphur dioxide (SO_2); and non-methane volatile organic compounds (NMVOCs)), and the Government's commitments to reductions by 2020 and 2030.

	2005 baseline (kt)	Reduction required by 2020	Reduction required by 2030	2020 ceiling (kt)	2030 ceiling (kt)
NO_X	1,714	55%	73%	771	463
SO_2	773	59%	88%	317	93
NMVOCs	1,042	32%	39%	709	636
$PM_{2.5}$	127	30%	46%	89	69
NH_3	288	8%	16%	265	242

3. Have EU infringement proceedings in relation to these directives been brought against your Member State?

In September 2011, the UK submitted a notification to the European Commission of a postponement – under article 22(1) of the 2008 Directive – of the 2010 deadline for attaining the annual limit value and hourly limit value for NO_2 in a number of air quality zones. The

Commission accepted the notification for some of the zones – but not all of them, because the UK had not demonstrated that compliance with the limit value could be achieved by 1 January 2015 or earlier.

In February 2014 the Commission began infraction proceedings against the UK for its failure to meet the 2008 Directive targets for NO_2 in 16 of its air quality zones. This action was followed in February 2017 by final warnings to Germany, France, Spain, Italy and the UK for failing to address repeated breaches of NO_2 limits.

On 30 January 2018, an Air Quality Ministerial Summit was convened by Commissioner Vella, as a final effort to find solutions for the serious problem of air pollution in these countries. The Commission concluded that the Member States in question "did not present credible, effective and timely measures to reduce pollution, within the agreed limits and as soon as possible, as required under EU law". The Commission therefore decided to proceed with legal action.

On 17 May 2018, the Commission referred the UK, France and Germany to the CJEU for a "failure to respect limit values for nitrogen dioxide (NO_2), and for failing to take appropriate measures to keep exceedance periods as short as possible". It also referred Hungary, Italy and Romania for "persistently high levels of particulate matter PM_{10}".

As well as the Commission proceedings, claims for judicial review have also been brought against the UK Government by ClientEarth, stemming from the admitted and continuing failure of the UK, since 2010, to comply with the limits for NO_2 levels. These proceedings have resulted in the Government being required to produce a number of different AQPs aimed at reducing NO_2 levels.

4. Is there national case law in which these directives are relied upon and what are the most relevant subject areas (e.g. concerning adoption and content of air quality plans, access to relevant environmental information and public participation, etc.)?

In 2010, 40 of the 43 zones in the UK exceeded the limit values for NO_2 under the 2008 Directive. The UK applied for time extensions under article 22 for 24 zones and submitted air quality plans showing how the limit values would be met by 1 January 2015. In the remaining 16 zones, the UK did not apply under article 22, but instead submitted air quality plans under article 23, projecting compliance between 2015 and 2025.

In July 2011, ClientEarth brought a judicial review claim seeking:

(1) a mandatory order requiring the Secretary of State to submit an AQP to show "compliance, or at least likely compliance" with the NO_2 limit values by 1 January 2015 at the latest; and
(2) a declaration that the UK is in breach of its obligation to comply with the NO_2 limit values provided for in article 13 of the 2008 Directive.

In the High Court[4] Mitting J. concluded that article 22 was discretionary, based on the word "may" in the first sentence of article 22(1), as well as the word "peut" in the French version of

[4] *R. (on the application of ClientEarth) v Secretary of State for Environment, Food and Rural Affairs* [2011] EWHC 3623 (Admin)

the text, and therefore there was no basis for issuing a mandatory order requiring the Secretary of State to apply for a postponement of the 2010 deadline (paragraphs 12 and 14 of the judgment). He also found that it was not necessary to make a declaration that the United Kingdom was in breach of its obligations under article 13, as it was "common ground" that this was so, and a declaration would "serve no purpose other than to make clear that which is already conceded" (paragraph 16).

The Court of Appeal[5] also found article 22 to be discretionary (paragraph 15 of the judgment), although Laws L.J. found the mandatory order point to be "moot" (paragraph 23).

However, Lord Carnwath, giving the judgment of the Supreme Court[6], noted that the 2008 Directive limits on NO_2 had been regularly exceeded in 16 zones across the UK. The air quality improvement action plans had estimated that in London compliance with the Directive's standards would only be achieved by 2025, and by 2020 for the other 15 zones, in contravention of the deadline for compliance under the 2008 Directive (paragraphs 19 to 23 of the judgment).

The Supreme Court dealt with two points:

(1) whether the court should grant a declaration of a breach of article 13 of the 2008 Directive, despite the fact that the Secretary of State had conceded there was such a breach; and
(2) whether to make a reference to the CJEU on the interpretation of article 22 of the 2008 Directive.

On the first point, the Supreme Court disagreed with the High Court and the Court of Appeal, holding that the mere fact that a breach of article 13 was conceded by the Secretary of State did not mean that there were grounds for refusing a declaration, in a situation where there are no other discretionary bars to the grant of relief. The court also held that "[such] an order is appropriate both as a formal statement of the legal position, and also to make clear that … the way is open to immediate enforcement action at national or European level" (paragraph 37).

On the second point, the court found that these questions "raise difficult issues of European law, the determination of which in the view of the court, requires the guidance of the CJEU, and on which accordingly as the final national court we are obliged to make a reference" (paragraph 38).

Accordingly, the following questions were referred to the CJEU (in paragraph 39 of the judgment):

> "i) Where in a given zone or agglomeration conformity with the limit values for nitrogen dioxide cannot be achieved by the deadline of 1 January 2010 specified in annex XI of Directive 2008/50/EC ("the Directive"), is a Member State obliged pursuant to the Directive and/or article 4 TEU [duty of co-operation] to seek postponement of the deadline in accordance with article 22 of the Directive?

[5] *R. (on the application of ClientEarth) v Secretary of State for Environment, Food and Rural Affairs* [2012] EWCA Civ 897
[6] *R. (on the application of ClientEarth) v Secretary of State for Environment, Food and Rural Affairs* [2013] UKSC 25

ii) If so, in what circumstances (if any) may a Member State be relieved of that obligation?
iii) If the answer to (i) is no, to what extent (if at all) are the obligations of a Member State which has failed to comply with article 13, and has not made an application under article 22, affected by article 23 (in particular its second paragraph).?
iv) In the event of non-compliance with article 13, and in the absence of an application under article 22, what (if any) remedies must a national court provide as a matter of European law in order to comply with article 30 of the Directive and/or article 4 or 19 TEU [Member States to give sufficient legal remedies]?"

R. (on the application of ClientEarth) v Secretary of State for Environment, Food and Rural Affairs[7]

The CJEU answered questions i) and ii) (in paragraph 35 of its judgment):

> "35. … [Article] 22(1) of Directive 2008/50 must be interpreted as meaning that, in order to be able to postpone by a maximum of five years the deadline specified by the Directive for achieving conformity with the limit values for nitrogen dioxide specified in Annex XI thereto, a Member State is required to make an application for postponement and to establish an air quality plan when it is objectively apparent, having regard to existing data, and notwithstanding the implementation by that Member State of appropriate pollution abatement measures, that conformity with those values cannot be achieved in a given zone or agglomeration by the specified deadline Directive 2008/50 does not contain any exception to the obligation flowing from [article] 22(1)."

It gave this answer to the third question (in paragraph 49):

> "49. … [Where] it is apparent that conformity with the limit values for nitrogen dioxide established in Annex XI to Directive 2008/50 cannot be achieved in a given zone or agglomeration of a Member State by 1 January 2010, the date specified in that annex, and that Member State has not applied for postponement of that deadline under [article] 22(1) of Directive 2008/50 the fact that an air quality plan which complies with the second subparagraph of [article] 23(1) of the Directive has been drawn up does not, in itself, permit the view to be taken that that Member State has nevertheless met its obligations under [article] 13 of the Directive."

And it answered the fourth question in this way (in paragraph 58):

> "58. … [Where] a Member State has failed to comply with the requirements of the second subparagraph of [article] 13(1) of Directive 2008/50 and has not applied for a postponement of the deadline as provided for by [article] 22 of the Directive, it is for the national court having jurisdiction, should a case be brought before it, to take, with regard to the national authority, any necessary measure, such as an order in the appropriate terms, so that the authority establishes the plan required by the Directive in accordance with the conditions laid down by the latter."

[7] Case C-404/13; [2015] 1 C.M.L.R. 55

R. (on the application of Client Earth) v Secretary of State for Environment, Food and Rural Affairs[8]

Having received the response from the CJEU, on 29 April 2015 the Supreme Court unanimously ordered that the Government must submit new AQPs to the European Commission no later than 31 December 2015 (paragraph 35 of Lord Carnwath's judgment).

The Supreme Court held that ultimately it became unnecessary to decide if the article 22 postponement procedure was mandatory or not, because the longstop postponement date of 1 January 2015 had by then passed (paragraphs 22 and 27). However, Lord Carnwath observed that article 22 is not a mandatory provision but a failure to apply for a postponement reinforces the obligation to act urgently under article 23 "in order to remedy a real and continuing danger to public health as soon as possible" (paragraph 27). He concluded that Mitting J.'s approach to remedy was "clearly untenable in the light of the CJEU's answer to the fourth question", which, he said, "makes clear that, regardless of any action taken by the Commission, enforcement is the responsibility of the national courts" (paragraph 28). He added that the CJEU's judgment left "no doubt as to the seriousness of the breach ... nor as to the responsibility of the national court for securing compliance" (paragraph 29).

R. (on the application of Client Earth) (No.2) v Secretary of State for Environment, Food and Rural Affairs[9]

The Government published a new AQP on 17 December 2015. The plan's projections of emissions were modelled at five-yearly intervals with a compliance date of 2020 for regional zones and 2025 for London.

ClientEarth once again challenged the plan, arguing that the Secretary of State had erred in his approach to the requirement of article 23(1) that periods of exceedance should be "as short as possible".

On 2 November 2016, in the High Court, Garnham J. (in paragraphs 45 and 46 of his judgment) held that article 23 gave Member States some discretion to select the necessary measures for compliance, but that discretion was "narrow and greatly constrained" (see *Janecek v Freistaat Bayern*[10]). Ultimately, any measures selected by a Member State had to be effective in achieving the objective of meeting the limits in the shortest possible time (paragraph 47). Cost could only be considered when choosing between equally effective measures, but not when fixing a target date for compliance or in determining the route by which compliance could be achieved, where one route produced results quicker than another (paragraph 50).

Garnham J. held that the Government had erred in law in that:

(1) there was no evidence to suggest that five-yearly emission forecast cycles were sufficient when a Member State was faced with the urgent task of bringing its pollutant levels within the limits of the 2008 Directive (paragraph 60);

[8] [2015] UKSC 28
[9] [2016] EWHC 2740 (Admin)
[10] Case C-237/07 [2008] E.C.R. I-6221

(2) the projected compliance date of 2020 was fixed for administrative convenience and the Government had deprived itself of the opportunity to discover what was necessary to ensure compliance sooner (paragraph 73); and
(3) the AQP had not identified measures to ensure exceedance would be as short as possible. Instead, it identified measures that might achieve compliance if very optimistic forecasts happed to be proved right and emerging data happened to be wrong (paragraph 86).

In the light of those three conclusions, the Air Quality Plan 2015 was declared unlawful and an order was made quashing the plan (paragraph 95).

On 22 November 2016, Garnham J. ordered that a draft modified AQP should be published by 24 April 2017, and the final plan by 31 July 2017. Following the announcement of the June 2017 General Election, the Government applied to the court to postpone the publication of the draft AQP to 30 June 2017 and the final AQP to 15 September 2017. This application failed and the Government was ordered to publish the draft modified AQP by 9 May 2017 and to keep to the 31 July 2017 publication date for the final AQP[11].

R. (on the application of ClientEarth) v Secretary of State for Environment, Food and Rural Affairs[12]

The Government published a revised draft AQP for tackling NO_2 in May 2017. It was criticised for a lack of detail in the plan and for delegating action to local authorities. ClientEarth issued another claim for judicial review. In his judgment of 5 July 2017, Garnham J. held that the plan was not unlawful as it was only in draft form (paragraphs 23 and 24 of the judgment).

R. (on the application of Client Earth) (No.3) v Secretary of State for Environment, Food and Rural Affairs[13]

The Government published a new AQP on 26 July 2017. ClientEarth once again launched proceedings on the basis that the plan failed to meet the Government's legal obligations under the 2008 Directive and the Air Quality Standards Regulations.

On 21 February 2018 the High Court (Garnham J.) held that the 2017 plan:

(1) was "seriously flawed" in its approach to 45 local authority areas, for which compliance with the relevant limit values is expected by 2021, because it did not contain measures sufficient to ensure substantive compliance with the 2008 Directive and the Air Quality Standards Regulations (paragraphs 71 and 80);
(2) did not include the information required for those same local authority areas by Annex XV to the 2008 Directive and Schedule 8 to the Air Quality Standards Regulations (paragraph 86); and
(3) contained no compliant AQP for Wales (paragraphs 102 and 103).

[11] See *ClientEarth v Secretary of State for Environment, Food and Rural Affairs* [2017] EWHC 1618 (Admin)
[12] [2017] EWHC 1966 (Admin)
[13] [2018] EWHC 315 (Admin)

The court rejected ClientEarth's challenge to the modelling underpinning the 2017 plan (paragraph 94).

The relief granted by Garnham J. included:

(1) a declaration that the 2017 plan was unlawful;
(2) a mandatory order requiring the urgent production of a supplement to the 2017 plan containing measures sufficient to rectify its deficiencies; and
(3) an order that the 2017 plan was to remain in force while the supplement was produced, to avoid any delay in its implementation.

On 5 October 2018 the Government published a supplement to the 2017 plan ("Supplement to the UK plan for tackling roadside nitrogen dioxide concentrations").

R. (on the application of Shirley) v Secretary of State for Communities and Local Government[14]

This case concerned a challenge to the Secretary of State's decision not to call in for his own determination, under section 77 of the Town and Country Planning Act 1990, a planning application for an urban extension to the south-east of Canterbury, comprising some 4,000 dwellings. The claimants argued that, given the role of the Secretary of State under the Air Quality Standards Regulations, he had a duty to call in the application. They also argued that the duty to meet limit values was an overriding consideration in circumstances where either the thresholds were exceeded or the development might frustrate the requirement to reduce exceedances in a period that has to be kept as short as possible. An AQMA had been designated for the centre of the city, and it was accepted that development would have a moderate adverse impact on air quality in one location – though the local planning authority concluded that the threshold value for NO_2 would not be exceeded. The claimants maintained that Canterbury was already in exceedance and that the proposed development would lead to a breach of the 40µg/m^3 level. As "competent authority" under the 2008 Directive, the Secretary of State was obliged to take all measures within his power to ensure compliance with the Directive, including the measures required to meet the obligation to comply with air quality limit values under article 13.

The claim was dismissed by Dove J. for three main reasons:

(1) his designation as "competent authority" does not give the Secretary of State responsibilities beyond those set out in article 3(a) to (f) of the 2008 Directive (paragraphs 44 to 46);
(2) the 2008 Directive contains its own remedy for breaches of article 13, namely the requirement under article 23 to establish and implement an AQP that is effective and reduces any periods of exceedance (see the judgment of the CJEU – [2015] 1 C.M.L.R. 55 – in *ClientEarth*, at paragraphs 40 to 42) (paragraphs 49 to 50); and
(3) there was no basis for reading into the legislation a duty to take particular action in dealing with applications for development consent (paragraph 50).

[14] [2017] EWHC 2306 (Admin)

The claimant appealed to the Court of Appeal, which dismissed the appeal and upheld the reasoning of Dove J. The Court of Appeal[15] held that the Secretary of State's discretion under section 77 is wide, and that the wording of the Air Quality Standards Regulations did not require a call-in. It said (in paragraph 40):

> 40. "… [It] is not possible to construe the provisions of the [2008 Directive] and the [Air Quality Standards Regulations] as constraining the Secretary of State's very wide discretion either to call in or not to call in an application for planning permission when the limit values under article 13 have not been complied with, or when and air quality plan under article 23 has not yet been put in place or has proved to be deficient or ineffective. The air quality legislation does not do that. it does not have the effect of narrowing the Secretary of State's call-in discretion in such circumstances, let alone of transforming that discretion into a duty … ."

It declined to make a reference to the CJEU (paragraph 63).

Gladman Developments Ltd. v Secretary of State for Communities and Local Government[16]

This was a challenge to two proposed developments. The first of 330 dwellings, and the second of 140 dwellings and 60 extra care units, on grounds including the impact on air quality. In deciding the two appeals against the refusal of planning permission, the inspector appointed by the Secretary of State, took into account the quashing of the Government's AQP by Garnham J. (in *ClientEarth (No.2)*), and concluded that it would be unsafe to rely on emission levels falling in the period between 2015 and 2020 to the extent assumed in the developer's models (paragraph 19 of the judgment). He found that despite proposed mitigation measures, the proposals were likely to have an adverse effect on air quality (paragraph 21).

The High Court challenge to the inspector's decision failed. Supperstone J. held that the duty to produce and implement an AQP did not mean that local planning authorities had to presume that the UK would become compliant with the 2008 Directive in the near future (paragraph 30). In the absence of a new draft national AQP, the inspector could not reach view as to whether compliance would be secured on any particular date (paragraph 31).

The Court of Appeal[17] dismissed the appeal. It considered the question whether the inspector had failed to deal lawfully with the likely effects of the proposed development on air quality (paragraph 1). On the specific issue of whether the inspector had grasped the significance of Garnham J.'s judgments in the ClientEarth proceedings, the Court of Appeal found it was clear from his decision letter that the inspector recognised that "compliance with the limit values for air pollutants in [the 2008 Directive] and the [Air Quality Standards Regulations], though ultimately the responsibility of the Government, lay in the hands of local authorities" (paragraph 36 of the judgment). As the inspector had acknowledged that added emphasis had been given to the "urgency of meeting limit values for air pollutants" by the ClientEarth decision, it was clear that he had understood Garnham J.'s reasoning, "and the practical

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[15] *R. (on the application of Shirley) v Secretary of State for Housing, Communities and Local Government* [2019] EWCA Civ 22

[16] [2017] EWHC 2768 (Admin)

[17] *Gladman Developments Ltd. v Secretary of State for Communities and Local Government* [2019] EWCA Civ 1543

consequences of his decision", and that the ClientEarth decision was "intended to require the Government to act to achieve compliance with limit values by the earliest possible date" (ibid.).

a) Are there specific difficulties to enforce judgements in these cases? If yes, please explain in more detail.

As the case law shows, judgments in judicial review proceedings in the context of the legislative regime for air quality in the UK have been successfully enforced. This is perhaps best demonstrated by the Government's repeated re-drafting of AQPs following court judgments in the ClientEarth proceedings declaring them to be unlawful.

However, as Garnham J. remarked in his 2018 judgment – [2018] EWHC 315 (Admin) – the proceedings also show that the Government failed three times to devise an AQP compliant with the 2008 Directive and the Air Quality Standards Regulations, and on each occasion a small charitable body, for which the costs of such litigation constituted a "significant challenge", had been left to mount the challenge (paragraph 108 of Garnham J.'s judgment). Garnham J. contemplated (in paragraph 109) granting liberty to apply to the charity so that it could bring the matter back before the court if there was evidence that the Government was falling short in its compliance with the court's order. This is an unusual approach to enforcement, but in view of the long history of the ClientEarth proceedings, perhaps not surprising.

b) Who are the claimants in the different categories of cases (e.g. local authorities, non-governmental organisations, private persons)?

The main area of case law concerns challenges to the Government's AQPs, which have been brought by the charity, ClientEarth. The claim in *Shirley* was brought by individual local residents, and in *Gladman* by a developer dissatisfied with the decision to refuse planning permission.

c) Is there case law, in which claimants demand the withdrawal of measures aimed at improving the air quality (e.g. annulment of ban of certain cars)?

No.

d) With a view to the penalty clauses of Article 30 Directive 2008/50/EC and Article 9 of Directive 2004/107/EC:

– What type of penalties are applicable in your country to breaches of obligations deriving from these two directives? More specifically:

i) Are the sanctions specifically stipulated in the transposing national legislation or are there sanctions of a general kind established in other legislation and applicable more widely?

ii) Are the sanctions directed explicitly or implicitly against competent authorities? Are the sanctions addressed to private natural and legal persons and/or economic operators?

iii) Are the sanctions of administrative or criminal nature or both? What is their range?

iv) Are the sanctions established as a function of obligations stemming from sources legislation? If so, how is that articulated in national law?

There is no equivalent penalty provision in the Air Quality Standards Regulations to article 30 of the 2008 Directive or article 9 of the 2004 Directive. In effect, it could be said, a "penalty" lies in the relief available to the court to enforce obligations arising under the legislation when a claimant succeeds in proceedings for judicial review.

Local authorities have powers to impose sanctions on companies who commit an "emissions offence" – such as by failing to comply with regulation 61 of the Road Vehicles (Construction and Use) Regulations 1986 to ensure that every vehicle is constructed so as not to emit any avoidable smoke or avoidable visible vapour.

The Government has a discretionary power in section 48 of the Localism Act 2011 to require local authorities responsible for increases in NO_2, in breach of the limit values under the 2008 Directive, to pay all or part of any infraction fine which may be imposed by the European Commission.

Where an AQMA has been declared, local authorities in England may, under the Road Traffic (Vehicle Emissions) (Fixed Penalty) (England) Regulations 2002, authorise "any officer of the authority" to carry out a test in accordance with regulation 9 (regulation 6). Regulation 9 states that the "authorised person" may require a vehicle "which is about to pass through, or which has passed through" an AQMA to be "the subject of a test for the purpose of determining whether an emissions offence is being or has been committed". The test may be done: on the spot (regulation 9(2)); or be deferred for up to 14 days (regulation 9(3)(a)), or the vehicle may be required to be presented for examination under section 45 of the Road Traffic Act 1988 (regulation 9(3)(b)). If, after testing, an offence is found to have been committed, a fixed penalty notice of £60 can be issued (regulation 8). Under Part 6, fixed penalty notices of £20 can also be issued to a motorist who leaves his stationary vehicle's engine running unnecessarily – for example, when waiting outside a school or station.

The Clean Air Act 1993 provides that it is an offence, punishable upon conviction with a fine, for industries or trades to emit dark smoke from their premises (section 2). Clause 70 and

Schedule 12 of the Environment Bill contain amendments to the Clean Air Act, which include a financial penalty for emissions of smoke in a smoke controlled area in England of £175 to £300.

– Are there any case law statistics available? Or statistics on the application of penalties outside of court proceedings?

No other reliable statistics are available.

II. Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants

1. Is this directive properly implemented in your Member State? Have stricter emission reduction commitments been introduced? Has national legislation been adapted to meet the emission reduction commitments?

The obligations under the National Emissions Ceilings Directive 2016/2284/EU have been transposed into UK law through the National Emissions Ceilings Regulations 2018 ("the NEC Regulations"). In view of the UK's impending departure from the EU, these are to be amended by regulation 6 of the Air Quality (Amendment of Domestic Regulations) (EU Exit) Regulations.

The NEC Regulations provide these requirements:

(1) UK emissions of NOx, NMVOCs, SO_2, NH_3 and $PM_{2.5}$ do not exceed the percentage of base year (2005) emissions specified for that pollutant in Schedule 3 (regulation 6). These national commitments are to be met in two phases: from 2020 to 2029 (regulation 6(2)); and from 2030 onwards (regulation 6(3)).
(2) An annual inventory of relevant UK emissions is to be produced (regulation 3(1)(a)).
(3) The Secretary of State was required to publish a National Air Pollution Control Programme ("NAPCP") by 1 April 2019, setting out the measures that will be taken to meet the respective national emission reduction commitments in 2020 and 2030 (regulation 9).
(4) The impacts of air pollution on certain types of eco-systems and habitats are to be monitored (regulation 11).

Part 2 of the NEC Regulations concerns national emissions inventories and projections. Regulation 3(1)(a) requires the Secretary of State to prepare (by 15 February each year) an inventory of emissions occurring within the UK of the pollutants specified in Schedule 1 to the regulations for the calendar year before the previous calendar year. Regulation 3(1)(b) states that by 15 March 2019 and every two years after that, the Secretary of State must prepare and update a projection of emissions of the specified pollutants in specified years. Regulation 4 provides for circumstances in which the inventory may be adjusted.

Part 3 obliges the Secretary of State to ensure that, in each calendar year, the total anthropogenic emissions of relevant pollutants do not exceed the amount set out in Schedule

3. Regulation 7 provides that the Secretary of State must ensure that, in 2025, the total anthropogenic emissions of each of the relevant pollutants do not exceed the "linear reduction trajectory", unless he determines that it is necessary not to follow that linear trajectory because it is economically or technically more efficient not to do so. However, even if that trajectory is not followed, emissions must still reduce year on year. Regulation 8 provides a list of derogations if a relevant pollutant was shown to be above the national emissions reduction commitment for that pollutant in a particular year.

Part 4 obliges the Secretary of State to prepare and implement a NAPCP to limit anthropogenic emissions in accordance with the national emission reduction commitments outlined in regulation 6(2) and (3) by 1 April 2019 (regulation 9(1) and (2)). This may be revised from time to time, but must be reviewed within 18 months of any inventory of emissions or projection of emissions that shows total anthropogenic emissions of a relevant pollutant exceeding the national emission reduction commitment (regulation 9(4) and (5)). Public authorities must have regard to the NAPCP when exercising any functions that significantly affect the level of emissions of a relevant pollutant within the UK (regulation 9(6)). Under regulation 10, the public must be consulted in the preparation of any plan.

Part 5 places an obligation on the Secretary of State – taking a cost-effective and risk-based approach – to monitor the negative impacts of air pollution at sites representing freshwater, natural and semi-natural, and forest habitats and eco-systems.

Part 6 places further obligations on the Secretary of State to create spatially disaggregated and large point source inventories of pollutants specified in Table 1 of Schedule 4 to the regulations, and an annual "informative inventory report" of those pollutants (regulation 12(1)). The inventory and report must be made available to the public (regulation 12(3)).

In January 2019, the Air Quality (Amendment of Domestic Regulations) (EU Exit) Regulations were made. The regulations will come into force at the end of the transition period, on 31 December 2020. They ensure that key UK and EU legislation relating to the regulation of air quality, including that relating to national emissions ceilings, can continue to operate after the UK's departure from the EU.

On 15 October 2019, the Environment (Legislative Functions from Directives) (EU Exit) Regulations 2019 were made. They will come into force on exit day. The regulations create legislative powers for the Secretary of State – or where matters are devolved, the appropriate authority – to make minor and technical changes to the relevant environmental regimes. These powers replace the functions currently conferred upon the European Commission by various environmental directives (for example, updating annexes to Directives – usually as a result of scientific and technical progress or specifying various technical rules and standards). This will enable the functions to be exercisable at a national level, so that domestic legislation implementing the directives can continue to operate in a similar way after the UK has left the EU. Chapter 6 in Part 2 of the regulations concerns functions derived from the NEC Directive.

NAPCPs enable Member States to monitor the effect of the measures they put in place to meet the emission reduction commitments under the NEC Directive. The first NAPCPs had to be drawn up and submitted to the European Commission by 1 April 2019 (article 10(1)). Member States must update their NAPCPs at least every four years (article 6(3)). Part 1 of Annex III to the NEC Directive contains the minimum requirements for NAPCPs. Annex III provides that NAPCPs must cover:

(1) the national air quality and pollution policy framework, which form the context for developing the NAPCP. Specifically, the NAPCP should address:
   - policy priorities and how it co-ordinates with climate change, agriculture, industry and transport policies;
   - how responsibilities have been allocated among national, regional and local authorities; and
   - the progress achieved by current policies and measures to reduce emissions and improve air quality, and the degree to which national and EU obligations have been complied with;

(2) policy options that would comply with the emission reduction commitments for 2020 to 2029 and 2030 onwards;

(3) the policies and measures (known as PaMs) to meet the emission reduction commitments that will be put in place, including a timetable for adopting, implementing and reviewing them;

(4) the reasons why the Member State cannot meet the emission levels for 2025 without entailing disproportionate costs, and, if it intends to use the flexibility provisions, any environmental consequences that might arise from that use; and

(5) an assessment of how the PaMs to be implemented will ensure coherence with plans and programmes in other relevant policy areas.

On 1 April 2019, the Department for Environment, Food and Rural Affairs published the UK's NAPCP, entitled "Air Quality: National Air Pollution Control Programme", which explains how the UK can meet legally-binding emission reduction commitments for NOx, NH_3, NMVOCs, fine particulate matter and SO_2, by 2020 and 2030. It assesses the emission reduction or abatement potential of a range of measures to be deployed across the UK.

2. Have EU infringement proceedings in relation to this directive been brought against your Member State?

On 31 March 2017, the European Commission issued the United Kingdom with a formal notice under article 258 TFEU in respect of its compliance with the NEC Directive (Infringement No. 20170243). This was a formal request for information to allow the Commission to investigate the case. On 4 October 2017, the case was closed and no further action has been taken.

3. Is there national case law in which this directive is relied upon?

No.

III. Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles and Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information

1. How has your Member State implemented these EU vehicle type approval rules?

On 19 February 2009, the Department for Transport issued a publication entitled "Impact Assessment of Vehicle Type Approval and implementation of Directive 2007/46/EC in UK". This explained the policy objectives and intended effects of the Directive and proposed several options for implementation of these objectives in national legislation in the UK.

On 29 April 2009, regulations came into force in the UK implementing Directive 2007/46/EC: the Road Vehicles (Approval) Regulations 2009, the Road Vehicles (Individual Approval) (Fees) Regulations 2009 and the Motor Vehicles (Type Approval and Approval Marks) (Fees) (Amendment) Regulations 2009.

The Road Vehicles (Approval) Regulations indicate conditions for licensing or entry into service of vehicles (motor vehicles and trailers) (Part 2), EC type approval granted by the Secretary of State (Part 3) and national small series type approval and individual approval (Part 4). The regulations also provide systems for enforcement, review and appeals (Part 6). The Road Vehicles (Individual Approval) (Fees) Regulations sets out the framework of fees for applications and appeals, which the Motor Vehicles (Type Approval and Approval Marks) (Fees) (Amendment) Regulations amends.

2. Treatment of diesel vehicles when using illegal shutdown devices:

a) Are there national regulations or jurisprudence according to which an issued EC type approval (Directive 2007/46/EC) loses its legal effect if an (impermissible) shutdown (defeat) device is discovered, which was already installed, when approval was granted? (A shutdown device - usually a cheat software - manipulates gas measurements.)

Regulation 19 of the Road Vehicles (Approval) Regulations provides for the withdrawal or suspension of EC type approval, in accordance with article 30(2) of the 2007/46/EC Directive. It states:

> "19. …
>
> (2) The approval authority may withdraw or suspend an EC vehicle type approval by notice to the holder of that approval where, following examination of vehicles associated with a single EC vehicle type approval granted by the authority, the authority is satisfied that two or more of those vehicles –
>
> (a) are accompanied by certificates of conformity issued in respect of that approval, and
>
> (b) fail to conform to the approved type.

(3) The approval authority may withdraw or suspend an EC system, component or separate technical unit type approval by notice to the holder of that approval where, following examination of systems, components or separate technical units associated with a single EC system, component or separate technical unit type approval granted by the authority, the authority is satisfied that two or more of those systems, components or separate technical units –

(a) bear an EC type approval mark issued in respect of that approval or, not being required by the relevant regulatory acts to bear a type approval mark, have been supplied for use in a vehicle on a road, and

(b) fail to conform to the approved type.

(4) If, as a result of the approval authority carrying out (with or without the co-operation of another member State) the obligations of the United Kingdom under Article 12(2) of the Framework Directive in respect of an EC type approval which the approval authority has issued, the authority is satisfied that –

(a) the arrangements made by the holder of the approval for ensuring that production vehicles, systems, components or separate technical units conform to the approved type no longer continue to be adequate, or

(b) the holder has otherwise failed to comply with a requirement imposed on the holder of an approval by or under regulations 12 and 14 to 17,

the approval authority may suspend the EC type approval by notice given to the holder.

(5) If the approval authority is considering withdrawing or suspending an EC type approval the authority must give the holder of the approval notice of that.

(6) Where the approval authority gives notice to the holder under paragraph (5) –

(a) the holder may, within the period of 28 days beginning with the day on which the notice is given, make representations concerning the proposed withdrawal or suspension,

(b) the approval authority must not make a decision on the withdrawal or suspension of the approval until that period has expired, and

(c) before deciding whether or not to withdraw or suspend the approval, the approval authority must take into account any representations made by the holder during that period.

(7) If the holder of an EC type approval which has been withdrawn or suspended under this regulation purports by virtue of that approval to –

(a) issue an EC certificate of conformity with respect to a vehicle, or

(b) affix an EC type approval mark to a system, component or separate technical unit,

the certificate or mark is invalid but a suspension does not affect the validity of any certificate of conformity issued before the approval was suspended.

(8) A suspension remains in force until it is revoked by the approval authority.

(9) The approval authority may, by notice under paragraph (5) or by subsequent notice given to the holder, exempt from paragraph (7) EC certificates of conformity or classes of EC certificates of conformity specified in the notice.

(10) If, following a request by the holder, the approval authority refuses to exercise powers under paragraphs (8) or (9) in respect of an EC type approval which has been suspended under this regulation, the authority must give notice of that decision to the holder.

(11) The approval authority must –
(a) inform other member States of measures the authority has taken under this regulation;
(b) comply with the obligations imposed on a member State (or the approval authority of that State) by paragraphs 1, 3, 4 and 5 of Article 30 of the Framework Directive (vehicles, etc, not in conformity with the approved type).

(12) For the purposes of this regulation –
(a) a vehicle is associated with an EC vehicle type approval if an EC certificate of conformity relating to that type approval has been issued in respect of that vehicle, and
(b) a system, component or separate technical unit is associated with an EC system, component or separate technical unit type approval if it bears an EC type approval mark which relates to that type approval."

b) What legal measures have been taken in your Member State (if any) against car manufacturers, which have failed to comply with vehicle type approval rules? These legal measures might include court cases, including between car buyers and manufacturers.

Anthony Joseph Champion Crossley and others v Volkswagen Aktiengesellschaft and others[18]

In this case the court (Waksman J.) was required to determine preliminary issues arising in a group action brought by the owners or lessees of vehicles manufactured by Volkswagen, Audi, Seat and Skoda. The engine in the vehicles had a software function that enabled it to recognise when it was being tested for compliance with vehicle emissions standards and then to produce lower emissions of nitrogen oxide (NO_X). This was held (in paragraph 437(3)) to be a prohibited "defeat device" for the purposes of article 3(10) of Regulation (EU) No. 715/2007.

The claim asserted various causes of action including fraudulent misrepresentation. In normal driving conditions the engine produced impermissible levels of NO_X. However, in test conditions, the software caused it to run in such a way as to comply with the NO_X emissions limit. Vehicles that did not comply with the emissions standards could not obtain "type-approval" from the relevant approval authority (in this case the German authority, known as the KBA) and could not lawfully be sold in the EU. The central issue was whether the software amounted to a "defeat device" within the meaning of article 3(10) of Regulation (EC) No. 715/2007, and was thus prohibited by article 5. Under article 3(10) a "defeat device" was an element of an engine's design that sensed parameters, such as temperature and speed, for the purpose of changing the operation of, and thereby reducing the effectiveness of, any

[18] [2020] EWHC 783 (QB)

part of the engine's emission control system ("ECS"). It was common ground that Volkswagen's software sensed relevant parameters. The claimants contended that its purpose was to change the operation of the engine's exhaust gas re-circulation ("EGR") system and thereby reduce the effectiveness of the ECS. The defendants argued that the software was not a defeat device because (1) EGR did not occur in the exhaust pipe and was therefore not part of the ECS, and it aimed to prevent rather than control NO_X emissions; (2) in determining whether the effectiveness of the ECS was reduced, the true comparison was between the level of emissions in normal road conditions and the level in normal road conditions but with the engine running in "test mode"; and (3) a reduction in the effectiveness of the ECS meant a reduction in the level of overall emissions, not just NO_X emissions.

The preliminary issues were (1) whether a finding by the KBA that the software amounted to a defeat device, expressed in formal letters sent by it to Volkswagen, was binding on the English court; and (2) whether the software amounted to a "defeat device" within the meaning of article 3(10). These preliminary issues were determined in favour of claimants.

Interpreting EU legislation was held to be a more purposive exercise than interpreting UK legislation (paragraph 132). The decision in *R. (on the application of IDT Card Services Ireland Ltd.) v Customs and Excise Commissioners*[19] was followed. Much depended on the facts of any particular case, but recourse could be had to the recitals, travaux preparatoires, other provisions within the same piece of legislation, and other pieces of EU legislation. That said, the recitals could not be used to derogate from the provision, and the travaux preparatoires had to be from an authoritative body, they had truly to form part of the legislative history, and had to clearly demonstrate the meaning contended for. Provisions had to be given full effect and had to be interpreted broadly so as to ensure the smooth functioning of the legislative scheme, and a particular interpretation might be chosen on the basis that the alternative would render another provision in the same legislation redundant or ineffectual (see paragraphs 132, 137 to 141 and 144 to 147 of Waksman J.'s judgment).

On the "defeat device" issue, all of the defendants' arguments failed. The software was held to be a "defeat device" within the meaning of article 3(10). That was a conclusion with which numerous courts and other bodies in various other jurisdictions, as well as the KBA, agreed (paragraphs 268 to 286 of the judgment). The EGR was part of the ECS; it aimed to reduce NO_X emissions, and it was irrelevant that the process did not take place in the exhaust pipe system (paragraphs 154 to 170). The argument that the EGR process did not "control" NO_X emissions because it instead served to prevent them from arising, was specious. It posited a highly technical, linguistic distinction which, given the clear purpose of the legislation, had to be rejected (paragraphs 171 to 175). The software function concerned the difference between the vehicle's performance in a test and its performance under normal road conditions. Thus, for the purpose of determining whether the software brought about a reduction in emissions, the true comparison was between test performance and road performance (paragraphs 178, 181, 184 to 185, 190, 194, 230 and 243 to 245). Finally, the emissions test did not measure emissions on a global basis. Rather, individual emissions were measured against their own particular limits, and it was therefore difficult to see why a device should only be a "defeat device" if it brought about some overall reduction in emissions (paragraphs 248 to 251 and 266).

[19] [2006] EWCA Civ 29

The KBA's finding that the software was a "defeat device" was held to be binding on the English court, and the defendant's challenge to it was an abuse of process. Under the type-approval system, the KBA had exclusive jurisdiction to grant approval for Volkswagen's engines. Although the binding part of its letters (the "tenor" or regulatory content) contained no formal declaration that the software was a "defeat device", no such declaration was necessary under German law. Provided the finding was sufficiently clear – which it was – it would bind the German courts and authorities as a matter of German law. It also bound the courts and authorities of other Member States as a matter of EU law. By virtue of their duty of sincere co-operation, Member States had to give effect to the aim of a harmonised approval regime giving precedence to the authority that granted the type-approval. Thus, for the Volkswagen engines, the KBA's decisions had to be respected by the approval authorities of other Member States. That principle of deference applied also to the courts of other Member States, at least where the addressee of the approval authority's order was asking the courts of another Member State to go behind that order. The House of Lords' decision in *Crehan v Inntrepreneur Pub Co*[20] was considered, and the decisions in *Astellas Pharma GmbH*[21], and *Orion Corporation v Secretary of State for Health and Social Care*[22] applied (paragraphs 294, 316, 319, 322, 342 to 344, 376, 386 to 393, 401 to 407, 418 and 421).

The Environment Bill

Part 4 of the Environment Bill includes specific measures for improvement in air quality and the "environmental recall" of motor vehicles. Clause 71 includes a power to make provision for the "recall of relevant products that do not meet relevant environmental standards" (clause 71(1)). A "relevant product" is, or is part of, a mechanically propelled vehicle; an engine that is, or forms part of, machinery that is transportable, including by way of self-propulsion; or part of an engine or machinery that is connected with the operation of the engine (clause 71(2) and (3)). A "relevant environmental standard" is defined as a standard that a relevant product must meet by virtue of any enactment; relevant to environmental impact of the product; and specified in the regulations (clause 71(4)). An "environmental impact" includes any impact on the environment caused by noise, heat or vibrations or any other kind of release of energy or emissions resulting from use of the product (clause 71(6)). Clause 72 gives the Secretary of State power to give a compulsory recall notice to a manufacturer or distributor of a relevant product if he has reasonable grounds for believing that the product does not meet a relevant environmental standard.

c) Which requirements will be imposed on the request to retrofit a vehicle in your Member State?

The Clean Vehicle Retrofit Accreditation Scheme ("CVRAS")

On behalf of the DEFRA/Department for Transport Joint Air Quality Unit, the Low Carbon Vehicle Partnership and the Energy Saving Trust have developed a certification scheme to approve technologies that can be retrofitted to diesel vehicles to reduce NO_X and PM emissions, and achieve Euro 6/VI equivalent standards. The CVRAS scheme covers taxis, vans, buses, refuse collection vehicles and trucks. Technologies already accredited include

[20] [2006] UKHL 38
[21] Case C-557/16 EU:C:2018:181
[22] [2019] EWHC 689 (Admin)

exhaust aftertreatment technology, selective catalytic reduction, and the conversion of diesel engines to a more environmentally friendly mode of power. The CVRAS scheme has been recognised in air quality policies, such as Clean Air Zones (England and Wales), the Ultra-Low Emission Zone (London) and Low Emission Zones (Scotland).

The Driver and Vehicle Standards Agency ("DVSA")

Since 1 September 2019, all new cars sold in the UK have had to meet "real driving emissions" standards that put stringent limits on the amount of nitrogen oxides that can be emitted. The DVSA, which is a branch of the Department for Transport, created the Vehicle Market Surveillance Unit in 2016 after it had been alleged that Volkswagen had manipulated emissions tests.

In its report entitled "Vehicle Market Surveillance Unit: Results of the 2018 Vehicle Emissions Testing programme", published in July 2019, the DVSA set out the results of the tests it had carried out on nine diesel cars. Paragraphs 4.40 to 4.47 of the report deal with the results of the tests on the Nissan Qashqai. The DVSA found that in the World Harmonised Light Vehicle Test Procedure, older models of the Nissan Qashqai were found to be more than 17 times the legislative limit. They said that this "significant exceedance" meant the Qashqai was "not sufficiently well designed to control NO_X in real world conditions" (paragraph 4.41). It asked Nissan to retrofit the vehicles to reduce their emissions – as some other manufacturers have – but Nissan told the DVSA it was not possible to do this. Although the DVSA has prosecution powers under regulation 15 of the General Product Safety Regulations 2005 enabling it to force manufacturers to issue recall notices, it did not resort to them.

d) How does the authority get information about the lack of implementation of any software updates in your Member State?

The Government collates and accesses this information through the Driver and Vehicle Licencing Agency ("DVLA"). The DVLA has a database of all registered vehicles in the UK, their current owners, and service and MOT history.

On 28 December 2017, the DVSA published the "Authorised testing facility (ATF) service bulletin 01-17: update for diesel opacity meters". In section 1, the bulletin said that vehicle emissions testing would change on 20 May 2018, when Directive 2014/45/EC was introduced. And in preparation for this change, all ATFs were to update the software of their diesel opacity meters by that date (section 3).

e) Are there less onerous measures under the law of the Member State than imposing a driving ban on a vehicle? Have such less burdensome measures possibly been developed by case law?

No.

IV. Domestic Law

Please provide information, including case law, on additional domestic air protection law that could be interesting for other Member States.

The 25-Year Environment Plan

The Government's 25-Year Environment Plan, entitled "A Green Future: Our 25 Year Plan to Improve the Environment", published in January 2018, stated (in chapter 4):

> "The UK's determination to improve air quality is reinforced by our commitment to meeting ambitious, legally-binding targets to cut emissions of five pollutants – ammonia, nitrogen oxides, non-methane volatile organic compounds, fine particulate matter and sulphur dioxide – by 2020 initially, and by 2030 for a deeper cut. Our commitment to meeting these legally binding targets is not affected by the UK's departure from the EU."

In May 2019, the "25-Year Environment Plan Progress Report: January 2018 to March 2019", set out (in section 1.3) how further research would inform a new $PM_{2.5}$ target:

> "Recognising the importance of reducing exposure to $PM_{2.5}$ to improve public health, we will publish evidence this year to examine what action would be needed to meet the World Health Organization (WHO) annual mean guideline limit of 10 $\mu g/m^3$. We will also use this to inform a new, ambitious long-term target for $PM_{2.5}$. …"

The Environment Act 1995

Part IV of the Environment Act requires local authorities in the UK to review air quality in their areas and designate AQMAs if improvements are necessary (sections 82 and 83). Where an AQMA is designated, the local authority must prepare an action plan describing the proposed measures to improve air quality (section 84).

In the Environment Bill, clause 69 and Schedule 11 contain amendments to Part 4 of the Environment Act.

R. (on the application of Spurrier) and others v Secretary of State for Transport[23]

This was a claim for judicial review challenging the Secretary of State for Transport's decision to designate the Airports National Policy Statement ("ANPS"), supporting a third runway at Heathrow Airport as the preferred scheme to meet the need for new airport capacity in the south-east of England. The case concerned a multitude of issues, some of which were the subject of a successful appeal in the Court of Appeal[24]. However, the ground concerning air quality was not taken further on appeal.

The claimant argued that the Heathrow scheme would undermine the UK's obligations under the 2008 Directive, which imposed binding commitments on the UK aimed at defining and

[23] [2019] EWHC 1070 (Admin)
[24] *R. (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214

establishing objectives for ambient air quality to avoid, prevent or reduce harmful effects on human health and the environment as a whole. The Divisional Court held (in paragraph 265) that there was no arguable error of law in the Secretary of State's conclusion that the third runway scheme could be implemented without breaching the UK's obligations under the 2008 Directive, and (in paragraph 268) it found no evidence that a compliant scheme was not deliverable.

Wealden District Council v Secretary of State for Communities and Local Government[25]

This was a successful challenge to the decision of two local planning authorities to adopt a joint core strategy covering the Ashdown Forest SAC, designated under Habitats Directive, which extends to large areas of lowland health vulnerable to NO_2 pollution from motor vehicles and is crossed by two major A-roads. Natural England recommended that there would not be significant effects if car increases were below 1,000 cars per day, either in terms of an increase per day, or a percentage increase in traffic. Wealden District Council also complained that there was no in-combination assessment with its own plan. The two local planning authorities accepted Natural England's advice and the Secretary of State's inspector did not challenge it. The Secretary of State argued that Natural England's "expert advice" that on the 1,000-car increase threshold was "sufficiently robust and precautionary to cover any likely scenario of in-combination effects" showed that "in-combination effects" had been properly considered (paragraph 69 of the judgment).

Jay J. upheld the claim, concluding that the advice provided by Natural England during the preparation of the Joint Core Strategy relating to potential effects of planned development on the SAC could not be supported on "logical and empirical grounds" (paragraph 101). On the 1,000-car increase threshold, he observed (in paragraph 93) that "there may be no distinction logically to be made between 1,050 additional traffic flows from one district and 1,050… additional traffic flow from two districts". As he said, "[the] cars are the same and the nitrogen dioxide is the same". He also held (in paragraph 112) that Natural England's advice breached the requirement for cumulative assessment under article 6(3) of the Habitats Directive.

[25] [2017] EWHC 351 (Admin)