

# THE CLEAN AIR HANDBOOK

A practical guide to EU air quality law

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**“Air is essential for our lives. We all have the right to breathe fresh air.”**

Janez Potocnik, European Commissioner for Environment<sup>1</sup>

Clean air is essential to good health and a basic human need. EU law has recognised this need and given legal protection to it through directives and court judgments.

A series of EU directives have imposed progressively more stringent limits on levels of harmful air pollution in ambient (outdoor) air. These limits are known as “limit values”, and the European Court of Justice has long held that limit values have particular legal consequences: where limit values are breached, concerned individuals and groups have the right to go before national courts to demand that action is taken. In this sense EU citizens have a legal right to clean air.

However, for most people in the EU this right exists only on the pages of legal textbooks. Air pollution has a major impact on human health.

It is associated with a range of deadly diseases including cancer, heart disease, strokes and asthma, and is the number one environmental cause of death in the EU, responsible for over 400,000 early deaths in 2010 alone.

Up to one-third of the EU urban population are exposed to air pollution which exceeds EU limit values.<sup>2</sup> As of 2012, 17 EU Member States remained in breach of limits for PM<sub>10</sub>, while 22 remained in breach of limits for NO<sub>2</sub>. In theory, citizens in all those countries could go to court to demand that action is taken. In reality, national rules and procedures often make it very difficult for them to do so.

**Up to one-third of the EU urban population are exposed to air pollution which exceeds EU limit values.**

<sup>1</sup> Speech to the closing conference on the European year of air (Council of Europe), Strasbourg, 9 December 2013: [http://europa.eu/rapid/press-release\\_SPEECH-13-1049\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-1049_en.htm)

<sup>2</sup> European Environment Agency, ‘Air Quality in Europe – 2013’ (Report) (15 October 2013), at page 8: <http://www.eea.europa.eu/publications/air-quality-in-europe-2013>

Fortunately, EU law provides citizens with some possible solutions to these difficulties, by guaranteeing them rights to certain procedures. Domestic courts are obliged to give effect to EU law, even if this involves setting aside incompatible national laws. Domestic courts must give effect to EU law rights by providing effective remedies.

The EU is also a party to an international treaty - the "Aarhus Convention" - which guarantees the public the right to access information, participate in the formulation of plans relating to the environment and access courts to challenge breaches of environmental law. This provides campaigners and lawyers with a "toolkit" of procedures that can be used to access their right to clean air.

The purpose of this handbook is to provide individuals, groups and lawyers with a straightforward, easy to use guide to EU air quality law. Whether you are a concerned citizen trying to find out what levels of pollution are like in your neighbourhood, an experienced non-governmental organisation (NGO) campaigner trying to influence an air quality plan for a heavily polluted city, or a lawyer trying to bring a case concerning air quality, this guide will give an overview of the relevant aspects of EU law, together with some practical tips on how they can be used effectively.

Domestic courts are obliged to give effect to EU law, even if this involves setting aside incompatible national laws.

EU law is constantly evolving, so the intention is that the handbook will be updated periodically to reflect major new developments in the field. If you are aware of any such developments, such as a legal action before your national courts, then please get in touch.



The handbook only covers EU law aspects of air quality law. Unfortunately national air pollution laws are beyond its scope. However, before taking legal action you will need to take the advice of a lawyer who is an expert in the relevant national laws and legal procedures. Usually the earlier you can obtain such advice the better.

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## The right to clean air – the theory

*“Every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.”<sup>3</sup>*

### The Air Quality Directive

Air pollution was one of the first environmental problems to be addressed by the EU. Since the early 1980s, EU directives have set limits on emissions and ambient concentrations of air pollutants which harm human health and contribute to other environmental problems such as acidification and eutrophication.

The most recent directive relating to air quality is the Air Quality Directive (the “Directive”), which was adopted in 2008.<sup>4</sup> The Directive consolidated a number of earlier directives and sets objectives for several pollutants which are harmful to human health. It requires Member States to:

- Monitor and assess air quality to ensure that it meets these objectives;
- Report to the Commission and the public on the results of this monitoring and assessment;
- Prepare and implement air quality plans containing measures to achieve the objectives.

EU directives must be transposed into national legislation, which will designate which authority or body is responsible for each of these various tasks.<sup>5</sup> Some Member States take a very centralised

approach, whereby responsibility stays with national government. Others take a more decentralised approach, passing responsibility for complying with limits and preparing air quality plans down to regional or local authorities. It is sometimes difficult to determine exactly who is responsible for what.<sup>6</sup>

Regardless of how national legislation allocates responsibility, it is the national government which bears ultimate responsibility for ensuring compliance with EU directives. The Commission can only bring infringement action against Member States, not individual regions or cities (see further at Chapter 7).<sup>7</sup> Nevertheless, all public bodies, including regional and local authorities, are under a duty to apply EU directives.<sup>8</sup>

### Limit values

The strictest type of air quality objectives contained in the Directive are known as “limit values.” Limit values are set for:

- Particulate Matter (PM<sub>10</sub> and PM<sub>2.5</sub>)
- Sulphur Dioxide (SO<sub>2</sub>)
- Nitrogen Dioxide (NO<sub>2</sub>)
- Lead
- Benzene
- Carbon Monoxide

Limit values are informed by guidelines set by the World Health Organisation (WHO). However, in the case of PM<sub>10</sub> and PM<sub>2.5</sub>, the limits are considerably higher (i.e. less stringent) than the WHO recommendations.<sup>9</sup>

3 The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 1998 (preamble): <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>

4 Directive 2008/50/EC on ambient air quality and cleaner air for Europe OJ 2008 L152/1. In December 2013 the European Commission proposed a package of proposals relating to air pollution, which included a revised National Emission Ceilings Directive (COM (2013) 920). However, it will likely take several years for this proposal to be adopted. In any event, this is less relevant to the right to clean air as it relates to total emissions of air pollution, rather than concentrations of pollution in ambient air: [http://ec.europa.eu/environment/air/clean\\_air\\_policy.htm](http://ec.europa.eu/environment/air/clean_air_policy.htm)

5 Air Quality Directive, Article 3.

6 For example in the UK, the Air Quality Standards Regulations 2010 officially transpose the Air Quality Directive, designating the Secretary of State, i.e. national government, as the competent authority for all obligations under Article 3. However, separate legislation imposes duties on local authorities and the Mayor of London to work towards air quality objectives.

7 See Treaty on European Union (TEU), Article 4(3): “Member State shall take any appropriate measures, 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. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.”

8 Case C-103/88 *Fratelli Costanzo SpA de Milano* [1989] ECR 1839 at paragraph 32.

9 For a summary of these pollutants and an explanation of the harm they cause to human health and the environment, see the EEA Report, note 2 above and the following WHO factsheet: <http://www.who.int/mediacentre/factsheets/fs313/en/>

Pollutant	Obligation	Time period	Compliance deadline	Permitted annual exceedences
<b>Nitrogen dioxide (NO<sub>2</sub>)</b>	Hourly limit value of 200 µg/m <sup>3</sup>	1 hour	01/01/2010 (possible extension to latest 1/1/2015)	No more than 18
	Annual mean limit value of 40 µg/m <sup>3</sup>	Calendar year	01/01/2010 (possible extension to latest 1/1/2015)	n/a
<b>Coarse particulate matter (PM<sub>10</sub>)</b>	Daily limit value of 50 µg/m <sup>3</sup>	24 hours	01/01/2005 (possible extension to 11/6/2011)	No more than 35
	Annual mean limit value of 40 µg/m <sup>3</sup>	Calendar year	01/01/2005 (possible extension to 11/6/2011)	n/a

The most commonly breached limit values and the relevant deadlines by which they should have been complied with are shown in the table above.

Limit values are expressed by reference to a certain period of time. Typically there are both annual average limits and shorter term limits - for example daily or hourly limits. Annual mean limits are designed to protect us from long-term (chronic) exposure to air pollution while hourly and daily limits are aimed at protecting us from short-term (acute) exposure to episodes of high pollution that last only hours or days. So to take the example of PM<sub>10</sub>, there is an "annual" mean limit value of 40 µg/m<sup>3</sup> and a "daily" limit value, which sets a limit of 35 days each calendar year in which 24-hour mean levels of PM<sub>10</sub> can exceed 50 µg/m<sup>3</sup>.

Limit values are the strictest type of objective because they impose an absolute, unqualified duty on the Member State to achieve them by a given deadline, regardless of the cost (see contrast with target values below).

"Zones and agglomerations" are areas designated by Member States for the purposes of monitoring and assessing air quality. The Directive gives Member States a great deal of discretion as to how they divide their territory into zones and agglomerations. Member States must ensure that "throughout their zones and agglomerations" levels of these pollutants do

not exceed the limit values by the relevant deadlines.<sup>10</sup>

It is important to note that the limit values apply "throughout" each zone and agglomeration. This means that limit values apply **everywhere** within a zone or agglomeration, other than:<sup>11</sup>

- Workplaces (which are governed by EU health and safety legislation);
- The carriageways of roads and central reservations (unless there is regular pedestrian access to such reservations);
- Locations where members of the public do not have access **and** there is no fixed habitation.

This is a commonly misunderstood or misapplied part of the Directive, but it is fundamentally important.

Limit values do not only apply where air quality is monitored. Nor is it permissible to calculate average levels of air quality across the zone or agglomeration. The effect of this provision is that even if air pollution is below the limit in 99% of a zone or agglomeration, if the limit value

<sup>10</sup> Air Quality Directive, Article 13.

<sup>11</sup> Air Quality Directive, definition of "Ambient Air" Article 2 and Annex III, Section A.

is exceeded at just one location, for example next to a busy main road, the whole zone or agglomeration is considered to have breached the limit.

But this does not mean that Member States have to monitor air quality everywhere. This would of course be impossible, or at least very expensive. In fact, the Directive only requires Member States to use a small number of monitoring stations. However, those monitoring stations must be placed at a location within the zone or agglomeration which is representative of the **highest** levels of pollution within that zone or agglomeration.<sup>12</sup>

More detail on monitoring and assessment of air quality is provided in Chapter 4.

### Target values<sup>13</sup>

There are also less strict legal obligations known as “target values.” They apply to:

- Ozone
- PM<sub>2.5</sub>
- Benzoapyrene<sup>14</sup>

Unlike limit values, target values need only be achieved “*where possible*”<sup>15</sup> and without incurring “*disproportionate cost*.”<sup>16</sup> In reality, this wording makes target values very difficult to enforce and so they really only act as non-binding guidelines. For this reason, this handbook will focus mainly on limit values.

However, these provisions are not entirely meaningless. Member States must take cost-effective measures and must adopt air quality plans where target values are not met. So in extreme cases, for example where despite the ozone target value being breached (as is the case for large parts of the EU) no air quality plan has been adopted or where no cost-effective measures have been taken to reduce emissions of ozone precursor gases, enforcement may be possible and indeed, worthwhile.

### Air quality plans

The Directive recognises that some Member States will sometimes fail to meet air quality objectives, so contains a mechanism for ensuring that air quality is improved in order to minimise the impact on human health. The Directive requires that where, in any zone or agglomeration, a limit value or target value is exceeded, the Member State must prepare an air quality plan in order to achieve the limit value or target value.<sup>17</sup>

Where the breach occurs after the relevant deadline has expired, the air quality plans must “set out appropriate measures, so that the exceedance period can be kept **as short as possible**.”<sup>18</sup>

Unhelpfully, the Directive does not give much indication of how long “as short as possible” might be (this is one of the questions being considered by the European Court of Justice (ECJ)<sup>19</sup> in the *ClientEarth case* - see below).

The Directive is also quite prescriptive as to what information must be included in an air quality plan. Air quality plans must include the following information:<sup>20</sup>

- A description of measures;
- The estimated impact of each measure; and
- A timetable for implementation of each measure.

### Time extensions<sup>21</sup>

Perhaps the worst aspect of the Directive is that it introduced the possibility of Member States obtaining a time extension to the deadlines for achieving limit values. The original deadline for achieving the PM<sub>10</sub> limits was 2005 and the deadline for achieving the NO<sub>2</sub> limits was 2010. However, because many Member States had failed to meet the PM<sub>10</sub> limits and were also projected to fail to meet the NO<sub>2</sub> limits by 2010,

12 Air Quality Directive, Annex III, Section B.1 (a).

13 Air Quality Directive, Articles 16 and 17.

14 Obligations in relation to benzoapyrene are not laid down in the Air Quality Directive but in Directive 2004/107/EC relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air OJ 2004 L23/3.

15 Air Quality Directive, Recital 9.

16 Air Quality Directive, Article 17.

17 Air Quality Directive, Article 23.

18 Air Quality Directive, Article 23.

19 References to the ECJ refer to the upper chamber of the Court of Justice of the European Union which hears cases brought under Articles 285 and 267 of the Treaty on the Functioning of the European Union (TFEU).

20 Air Quality Directive, Annex X, Section A.

21 Air Quality Directive, Article 22 and Annex XV.

they successfully lobbied for this provision to be included in the Directive.

In the case of PM<sub>10</sub>, Member States were able to obtain a time extension until 2011 at the latest. All PM<sub>10</sub> time extensions have therefore now expired and the limit values apply as normal.

For NO<sub>2</sub> and benzene, the Directive allows Member States to obtain a time extension postponing the deadline for compliance by a maximum of five years from the original deadline i.e. until 1 January 2015. In order to obtain a time extension for a zone or agglomeration, Member States must obtain the approval of the Commission. The time extension notification had to demonstrate two things:

First, that it had not been possible to comply with the limit value by the original deadline of 1 January 2010 (although unfortunately the Commission has largely ignored this requirement when assessing time extensions).

Second, that the Member State had adopted a comprehensive air quality plan which showed that the limit value would be achieved by 1 January 2015 at the latest in each non-compliant zone and agglomeration.

The Commission had nine months in which to raise objections to the time extension notification. The Commission then issued decisions which either rejected, approved or approved subject to certain conditions being met (for example that the air quality plan be improved or that compliance be achieved earlier than 2015).

Where time extensions have been approved by the Commission, there is a further condition that must be met. During the period of postponement (for example between 1 January 2010 and 1 January 2015), the Member State must ensure that air quality remains within the "maximum margin of tolerance."<sup>22</sup> The maximum margin of tolerance is 150% of the limit value. So for example, where the Commission has approved a time extension for the NO<sub>2</sub> annual mean limit value for a given zone until January 2015, the relevant limit value during that period is 60 µg/m<sup>3</sup> (40 µg/m<sup>3</sup> x 1.5).

The Commission has considered all NO<sub>2</sub> time extension notifications, rejecting approximately 50%. Where time extensions have been rejected, Member States may resubmit a time



extension notification along with improved plans. In some cases the Commission has required resubmission of an improved plan as a condition of the time extension being approved.

All Commission time extension decisions can be found here: [http://ec.europa.eu/environment/air/quality/legislation/time\\_extensions.htm](http://ec.europa.eu/environment/air/quality/legislation/time_extensions.htm)

### Short-term action plans<sup>23</sup>

In addition to air quality plans, the Directive gives Member States the option of producing "short-term action plans" to address pollution episodes which last days or weeks. This is another way in which the Directive weakened existing legal protections: under an earlier directive,<sup>24</sup> the preparation and implementation of short-term action plans had been compulsory. However, they were unpopular with Member States which claimed that they were ineffective, so the legal duty was weakened so that it is now purely discretionary (unless an alert threshold is reached - see further below).

<sup>23</sup> Air Quality Directive, Article 24.

<sup>24</sup> Directive 96/62/EC on ambient air quality assessment and management OJ 1996 L296/1 ("the Air Framework Directive").

<sup>22</sup> Air Quality Directive, Article 22(3).

## Alert and information thresholds<sup>25</sup>

For short periods of high pollution, the best way of reducing the harm caused is by reducing people's exposure to it, particularly among vulnerable groups such as children, older people or those with health conditions which are exacerbated by air pollution. For this reason the Directive contains provisions requiring the authorities to warn the public when pollution is particularly bad. Strangely, despite the well-documented short-term health effects (including death and hospital admissions) of elevated levels of particulate matter (PM<sub>10</sub> and PM<sub>2.5</sub>), these provisions apply only to ozone, NO<sub>2</sub> and SO<sub>2</sub>.

When levels of ozone reach a certain level (known as the "information threshold"), Member States are required to inform the public by means of radio, television, newspapers or the internet.

Where levels of ozone, nitrogen dioxide or sulphur dioxide reach dangerously high levels, known as "alert thresholds" over a period of three consecutive hours, Member States are required to draw up a short-term action plan.<sup>26</sup>

## The right to clean air in the European Court of Justice

The European Court of Justice (ECJ) has made a number of important rulings on the legal meaning and effect of limit values. These rulings have given rise to the principle that we have a right to clean air in EU law. The Court has repeatedly held that limit values confer certain rights on EU citizens, which are enforceable before national courts.

## Commission v Germany<sup>27</sup>

The right to clean air has its origins in this 1991 case, which concerned Germany's failure to comply with one of the first EU air quality directives, which laid down limit values for levels of lead in ambient air. The ECJ held that because the limit values were imposed specifically to protect human health, it meant that whenever they are exceeded, "*persons concerned must be in a position to rely on mandatory rules in order to be able to assert their rights*". This implied

that people could go to court to enforce their right to clean air.

## The Janecek case<sup>28</sup>

This idea lay largely dormant for 15 years until the *Janecek* case in 2007. Dieter Janecek was the resident of a highly polluted street in Munich who took legal action in relation to breaches of the limit values for PM<sub>10</sub>. The case was eventually referred to the ECJ, which held that:

*"... natural or legal persons directly concerned by a risk that the limit values or alert thresholds may be exceeded must be in a position to require the competent authorities to draw up an action plan where such a risk exists, if necessary by bringing an action before the competent courts."*

This was a landmark ruling and one of the most important environmental cases in recent years. It established not only that citizens had the right to go to court to enforce limit values (the right of standing), but also a right to a plan (the right to a legal remedy) and the right to demand judicial scrutiny of that plan (the right to substantive review).

Unfortunately, the court held that such plans only had to ensure a gradual return to compliance with limit values. However, the *Janecek* case was a ruling on obligations laid down by an earlier version of the Directive.<sup>29</sup> The plans under discussion in that case were "short-term action plans". Although the Directive weakened the provisions regarding short-term action plans by making them optional rather than compulsory,<sup>30</sup> it introduced the new concept of an "air quality plan"<sup>31</sup> which was much more demanding than the equivalent requirements for "plans or programmes" under the earlier Air Framework Directive.<sup>32</sup> In particular, it required air quality plans to keep the exceedance period "as short as possible." The inclusion of this wording in the Directive was a direct response by the Commission to the judgment in *Janecek*. The significance of this wording will be fully considered in later chapters but for now it suffices to say that it means more than the gradual return required by the ruling in *Janecek*.

25 Air Quality Directive, Article 19 and Annex XII.

26 But in the case of ozone, only where a short-term action plan would be effective – see Air Quality Directive second paragraph of Article 24(1).

27 Case C-59/89 *Commission v Germany* [1991] ECR-I 2626, at paragraph 22.

28 Case C-237/07 *Janecek v Freistaat Bayern* [2008] ECR I-6221 at paragraph 39.

29 The Air Framework Directive, note 23 above.

30 Air Quality Directive, Article 24.

31 Air Quality Directive, Article 23.

32 Air Framework Directive, Article 8(3)

The ECJ has repeatedly ruled that limit values impose an absolute duty on Member States to comply with limits by the relevant deadline. So it is no excuse if a limit values is breached because of technical, financial or administrative difficulties. This principle was most recently restated in the specific context of air quality in the case of *Commission v Italy*.<sup>33</sup> Italy had argued that it could not possibly have achieved the PM<sub>10</sub> limit values because of various technical difficulties, including unfavourable weather conditions and the fact that EU policies had failed to deliver the expected reductions in PM<sub>10</sub> precursors. These excuses were not accepted by the ECJ, which stated that “it is irrelevant whether the failure to fulfil obligations is the result of intention or negligence on the part of the Member State responsible, or of technical difficulties encountered by it.”<sup>34</sup>

There is currently no case in which the ECJ has considered the Directive. The *Janecek* case and the four judgments in cases<sup>35</sup> brought by the Commission against Member States all concerned obligations under the previous directive.<sup>36</sup>

This will change in 2014, when the ECJ will hear the *ClientEarth* case.<sup>37</sup> This case was originally brought by ClientEarth against the UK Government for failure to comply with limit values for NO<sub>2</sub> in 16 zones and agglomerations. The UK’s air quality plans showed that these limits would not be achieved until 2020, or in the case of London, 2025. ClientEarth brought



*The Royal Courts of Justice, London*

a legal challenge before the national courts, on the grounds that the Directive requires that plans must demonstrate compliance no later than 2015.<sup>38</sup>

The UK’s response was that it was not possible to achieve compliance by 2015, due to a number of factors beyond its control, and so it could not apply for a time extension.<sup>39</sup> Instead, the plans had been prepared in order to comply with the Directive’s requirement that air quality plans must contain measures to ensure the limits are achieved in “the shortest time possible”.<sup>40</sup> 2020/2025 was therefore the “shortest time possible” for these purposes.

ClientEarth’s case was dismissed at first instance by the High Court and again by the Court of Appeal. An appeal was then made to the UK Supreme Court - the highest court in the UK. The Supreme Court allowed part of the appeal, making a declaration that the UK was in breach of its EU obligations by failing to ensure that limit values were achieved throughout all zones and agglomerations.

It then referred a number of questions of interpretation of EU law to the ECJ using the “preliminary reference procedure”. This procedure allows national courts to suspend proceedings while the ECJ makes a preliminary

33 Case C-68/11 *Commission v Italy* (not yet published), at paragraphs 58-66. See also Case C-337/89 *Commission v UK* [1992] ECR-I 6103 (drinking water), Case C-56/90 *Commission v UK* [1993] ECR-I 4109 (bathing water).

34 *Ibid* at paragraph 63

35 In addition to *Commission v Italy*, note 32 above, the ECJ has given judgment in Case C-479/10 *Commission v Sweden* [2011] ECR-I 70, Case C-34/11 *Commission v Portugal* (not yet published) and C- 365/10 *Commission v Slovenia* [2011] ECR-I 40.

36 Directive 1999/30/EC relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air OJ 1999 L163/1.

37 Case C-404/13 *R (on the application of ClientEarth) v Secretary of State for Environment, Food and Rural Affairs*.

38 Either in accordance with Article 22, where a time extension is sought, or in accordance with Article 23 i.e. “in the shortest time possible” cannot logically be later than 2015.

39 In accordance with the Air Quality Directive, Article 22.

40 In accordance with the Air Quality Directive, Article 23.

ruling on the relevant questions of EU law.<sup>41</sup> It is intended to ensure that national courts in different Member States are applying EU law consistently. Once the ECJ has made its ruling, it is binding not only on the referring court but also on the domestic courts in the other 28 Member States.

The questions referred can be summarised as follows:

1. Where a Member State fails to comply with a limit value by the original deadline, is it required to apply for a time extension?
2. In what circumstances can it be exempted from this requirement?
3. What does the Directive mean when it states that air quality plans must contain measures to achieve limit values “in the shortest time possible”?
4. What remedies should national courts provide where a Member State has failed to comply with the Directive (for example by failing to meet limit values)?

The third of these questions is probably the most important. Many Member States, like the UK, have adopted plans (for both NO<sub>2</sub> and PM<sub>10</sub>) which will not achieve compliance until several years after the maximum extended deadline. The ECJ’s answer will determine the extent to which these plans are lawful. A strong ruling on the meaning of “as short as possible” will force these Member States to produce new plans to achieve compliance much more rapidly than currently proposed.

Until the ECJ gives judgment in this case, we will not know for sure the extent of the legal effect of this provision. However, the attitude of the ECJ in previous cases, mainly infringement cases brought by the Commission against Member States (such as *Commission v Italy*) gives us a good indication as to how they will approach this question.

<sup>41</sup> The preliminary reference procedure is laid down in the Treaty on the Functioning of the European Union (TFEU), Article 267. Where the national court is the highest court in the land i.e. a court to which there is no recourse to appeal, it must make use of this procedure unless the provision in question is “acte clair” i.e. so obvious as to leave no room for doubt (see Case C-283/81 *CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR-I 3415 ). This principle is often misused by national courts to avoid making preliminary references.

## The right to clean air - a summary

We will have to wait for the ECJ’s ruling in the *ClientEarth* case to know exactly to what extent the Directive has strengthened the right to clean air first established in *Janecek*.<sup>42</sup> For the time-being, by interpreting the Directive in light of existing ECJ case-law, we can definitely say the following:

- We have a right to breathe air that meets EU limit values.
- Where air does not meet these limits, we have a right to demand that the relevant authorities prepare an air quality plan to ensure they are achieved, if necessary by taking legal action before national courts.
- That plan must contain measures to achieve the limits in the shortest time possible, not merely a “gradual return” to compliance.
- The national court must review the content of the plan to ensure that the measures included are sufficient.
- Practical, financial, technical or other difficulties in achieving limit values are not relevant.

This is all very well in theory, but the reality for millions of people throughout Europe is that their right to clean air is violated, often on a daily basis, and yet no action is taken. There is an old legal maxim “there is no right without a remedy” and this applies equally to the right to clean air: we can talk all we like about the right to clean air, but if there is no remedy available to guarantee it, it is of little interest to anyone other than law students and academics.

In the next chapter we will explore some of the reasons why it is so difficult to access our right to clean air, before going on to look at some possible solutions provided by EU and international law.

<sup>42</sup> The timing of the ECJ’s ruling in the *ClientEarth* case is uncertain. However, it takes, on average, 16 months for the ECJ to give judgment in these types of cases. The *ClientEarth* case was referred to the ECJ in July 2013, so we can expect judgment in late 2014/early 2015.

## The right to clean air – the reality



This chapter will explore some of the typical problems faced by EU citizens when trying to uphold their right to clean air. This draws on two main sources. First, a study conducted by Professor Jan Darpö, Uppsala University, Sweden, on the implementation of the Aarhus Convention in 17 EU Member States.<sup>43</sup> Second, a questionnaire conducted specifically for this project and responded to by NGOs in ten EU Member States specifically on questions of air quality.

Although the specific details vary from country to country, some common problems emerge. These can be broadly categorised under the following headings:

- Inadequate information
- Inadequate air quality plans
- Lack of access to justice

### Lack of information

Any notion of a right to clean air depends on the availability of accurate air quality data. However, in many Member States, such information is not freely available. Some common problems include:

- Inadequate air quality monitoring, for example insufficient numbers of, inappropriately located or old and unreliable monitoring stations.
- Inconsistency between “official” air quality data and other “unofficial” data. For example in the UK, the official data which the government uses to report to the Commission show that London complies with the PM<sub>10</sub> limits, whereas data from other monitoring stations show that they are being breached.
- Lack of up-to-date information, with data published a long time after breaches of limit values have occurred. Statistics on breaches of limit values are often not made publicly available until they are reported to the Commission, for which the Directive allows nine months after the end of the calendar year.<sup>44</sup>
- Information presented in highly technical formats such as spreadsheets containing “raw” data.
- Information and alert warnings not being given. For example, during the London Olympic Games the UK Government failed to issue smog warnings, despite levels of ozone exceeding the information threshold on several occasions.<sup>45</sup>
- Lack of information about the effects of proposed developments on local air quality.



43 J Darpö 'Effective Justice? Synthesis report of the study on the implementation of Articles 9.3 and 9.4 of the Aarhus Convention in Seventeen of the Member States of the European Union' (Report) (11 October 2013): <http://ec.europa.eu/environment/aarhus/pdf/synthesis%20report%20on%20access%20to%20justice.pdf>

44 Air Quality Directive, Article 27(2).

45 <http://cleanairinlondon.org/olympics/government-is-systematically-hiding-smog-episodes-60-years-after-the-great-smog/>

## Air quality plans

In most zones and agglomerations where there is a problem with air quality there is already an air quality plan in place. However, the problem is usually that the plan is inadequate or has not been implemented. Common problems with air quality plans include:

- Measures are inadequate to improve air quality within a reasonable time-frame.
- Measures are not implemented, or are delayed.
- Measures are not supported by adequate information, so any assessment of whether they will be effective is impossible.
- Plans are several years old and have not been updated despite continuing air quality problems.
- Citizens and NGOs are not given adequate opportunities to participate in the formulation of air quality plans - either no consultation takes place, or consultation is merely a token gesture - with views not taken into consideration.

## Access to justice

In theory, wherever air quality laws are broken, citizens and NGOs have the right to go to court. However, in practice, national rules and procedures often make it difficult for citizens to access the courts to uphold their right to clean air. Most commonly:

- Restrictive standing rules - individuals and, more frequently, NGOs are denied the right to access the courts.
- The high cost of bringing legal action - the cost of legal fees, including in some cases the risk of paying for the defendant's legal fees if the challenge is unsuccessful, is a major deterrent to taking legal action.
- Delays in legal proceedings - legal actions can take several years to reach a conclusion.
- The unavailability of effective judicial remedies - some national courts are reluctant or unable to force authorities to take action, relying instead on non-binding declarations or merely requiring the relevant authority to reconsider the disputed decision.

- The unavailability of "substantive review" - some national courts look only at whether the public authorities have followed the correct rules and procedures. For example, the court will check that the authorities have properly adopted a plan, but will not review the substance of the plan in order to check that the measures it contains are adequate.
- The need for there to be an "administrative decision" to challenge - making it difficult or impossible to challenge omissions i.e. failures by the authorities to take positive action to improve air quality.

## Solutions in EU law

However, there have now been several cases where NGOs and citizens have overcome these problems and gone to court to successfully defend their right to clean air.<sup>46</sup>



*European Parliament, Strasbourg*

<sup>46</sup> Summaries and relevant documents for some of these cases can be found at: <http://legal.cleanair-europe.org/legal/>

**UK**

ClientEarth’s case against the UK Government for failing to meet NO<sub>2</sub> limits in 16 zones resulted in the Supreme Court declaring that the UK was in breach of the Directive and referring the case to the ECJ.



**Stockholm, Sweden**

In 2008 the Swedish Society for Nature Conservation (SSNC) brought a case against the City of Stockholm for failing to take measures included in its air quality plan. Despite a 2012 court ruling in SSNC’s favour, the lack of any effective remedy has allowed the city to continue to delay taking action.

**Germany**

It started in 2005 with the Janecek case (chapter 2). Since then there have been a series of 9 cases<sup>1</sup> brought by German citizens and NGOs (the Darmstadt case, chapter 6), many of which have resulted in the adoption of new measures such as low emission zones.



**Milan, Italy**

Genitori Antismog have brought a series of cases relating to pollution in Milan, most recently a 2012 case against the government of Lombardy for failing to tackle NO<sub>2</sub> in Milan. The court ordered it to produce an air quality plan within 60 days.



**Salzburg, Austria**

In April 2014 five NGOs<sup>2</sup> brought a legal action against the Region of Salzburg for failure to comply with the limit values for NO<sub>2</sub>.<sup>3</sup>

- 1 Relating to pollution in Munich (2 cases), Wiesbaden, Darmstadt, Main, Reutlingen, Dresden, Offenbach, Stuttgart.
- 2 ÖKOBÜRO, Greenpeace, GLOBAL 2000, VCÖ, ÄrztInnen für eine gesunde Umwelt.
- 3 For more information on Austrian cases see <http://legal.cleanair-europe.org/en/legal/austria/lawsuits-and-decisions/>

All these cases relied on EU law before national courts. The “supremacy” of EU law means that domestic courts are obliged to give effect to it, even if this involves setting aside incompatible national laws. In addition, domestic courts must give effect to EU law rights, such as the right to clean air, by providing effective remedies.

The EU and each Member State are party to an international treaty known as the Aarhus Convention.<sup>47</sup> The “Aarhus Convention” is based on the principle that we have a right to a healthy environment, and a duty as citizens to protect the environment, which is obviously not capable of defending itself in court. It therefore gives us “procedural rights” which help us to assert our rights to a healthy environment:

*“To be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights.”*

So the Aarhus Convention guarantees three basic procedural rights which are deemed essential to accessing our right to a healthy environment:

- The right to access information;
- The right to participate in the formulation of plans relating to the environment; and
- The right to go to court to challenge breaches of environmental law.

This provides campaigners and lawyers with a “toolkit” of procedures that can be used to help overcome some of the common obstacles which stand in the way of our right to clean air (see figure 1). The following chapters will show how each of these three Aarhus “pillars” can help in upholding the right to clean air.

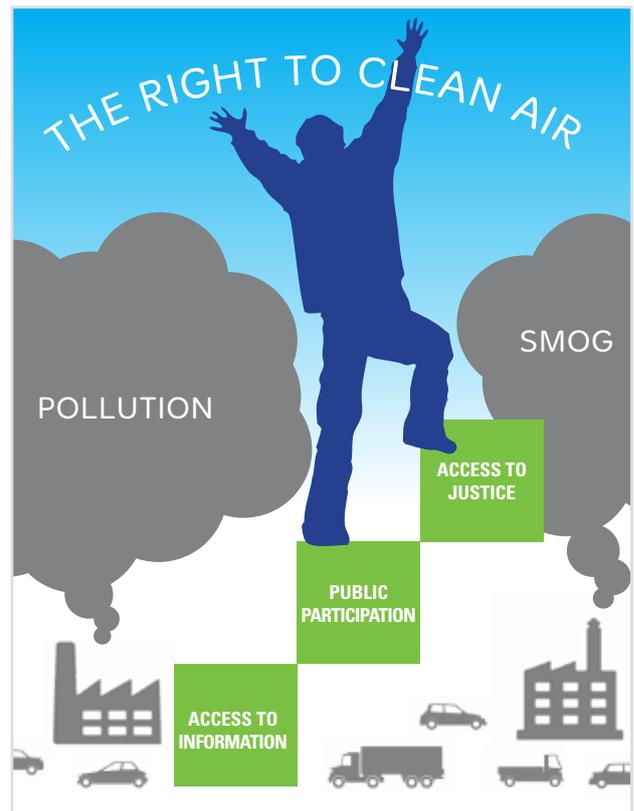


Figure 1

There have been several cases where NGOs and citizens have gone to court to successfully defend their right to clean air

<sup>47</sup> See note 3 above.

## The right to access information on air quality



The right to access information about air quality is a precondition to the right to clean air: unless people know that there is an air quality problem, understand the risk it poses to their health and are informed about what measures are being taken to improve it, they are powerless to take action.

The Directive requires Member States to provide the public with some information about air quality. However, as we will see in the first part of this chapter, these provisions are quite weak and, as we discussed in chapter 3, many Member States even fail to comply with these minimal requirements. The second part of this chapter will therefore show how EU law based on the Aarhus Convention can be used to access information about air quality, together with some practical tips on how this can be used to support campaigns and put pressure on the responsible authorities to improve air quality.

### The Air Quality Directive

#### General

The Directive lays down rules on how information is provided to the public.<sup>48</sup> It requires that the public, including environmental organisations, consumer organisations and organisations representing the interests of sensitive populations are informed **adequately** and **in good time** of:

- Levels of ambient air quality;
- Whether any time extensions have been granted; and
- Air quality plans.

Further, the information must be provided:

- Free of charge; and
- By means of any easily accessible media (which could include the internet, although this is not specifically required).

In addition, Member States must publish an annual report summarising, for all pollutants:

- Breaches of limit values and other objectives such as target values; and
- The effects of these breaches, for example on human health.

So the Directive requires Member States to provide some very basic information about air quality to the public. However, Member States are given very wide discretion as to what information to provide and when and how to provide it. The result is usually that too little information is provided, and/or is provided too late to be useful.

The Directive also lays down rules on how information is provided to the Commission.<sup>49</sup> In particular, Member States must provide the Commission with information on which zones and agglomerations have breached objectives, no later than **nine months** after the end of each year. This information is of critical importance as it is the information on which the Commission bases its infringement cases against Member States (see Chapter 7). It is also the easiest data with which to base any national proceedings, as its accuracy cannot be disputed by the authorities, given that it is their own data.

<sup>48</sup> Air Quality Directive, Article 26.

<sup>49</sup> Air Quality Directive, Article 27.

## Monitoring and assessment<sup>50</sup>

The Directive lays down rules on:

- The minimum number of monitoring stations; and
- Where they must be located.

These rules on monitoring and assessment, while very complex, are insufficient to ensure full and accurate assessment of air quality.

As explained in chapter 2, monitoring stations are to be sited at locations which are representative of the highest levels of pollution in a zone or agglomeration. However, in practice, this provision is often ignored or abused by Member States. Monitoring stations are frequently sited in areas which do not have the highest levels of pollution. In an extreme example of this, the Mayor of Madrid was found to have intentionally moved monitoring equipment away from busy roads and into parks in order to falsely claim that air quality had improved.<sup>51</sup> More commonly Member States fail to publish or report data from unofficial monitoring sites that are not part of their official network. Often this will be justified on the basis that the unofficial data does not meet the very detailed siting requirements of the Directive, for example because the monitoring station is too close to a road junction.

These problems arise in part because the Directive does not require sufficient monitoring stations, allowing Member States to use modelling techniques to supplement monitoring data. While modelling provides useful supplemental information and reduces the need for expensive monitoring stations, it is not always accurate and is open to manipulation by Member States. Models are only as accurate as the data that you put in them (a phenomenon known by the acronym "RIRO" - rubbish in, rubbish out). Consequently, if you underestimate the number and type of vehicles on the road, how far they travel and the amount of pollution they emit, then the model will show that air quality is better than it really is.

These problems are compounded by the fact that the Commission has no powers of inspection, so is completely reliant on Member

States to provide it with information about breaches of limit values. While the Commission will take into account information provided by citizens and NGOs which contradicts the official data and may ask the Member State to explain these discrepancies, it would never bring infringement cases based solely on unofficial data. This is rather like the police only being able to prosecute a criminal where they have made a signed confession, even where there are several eye-witnesses to the crime!

## What can you do?

### Inform the Commission

If you think that there are insufficient numbers of monitoring stations, that they are inappropriately placed (for example they are not representative of the worst levels of air quality) or that data is not being properly reported (for example where data collected from other reliable sources contradicts the official data), then you should notify the Commission (see further at chapter 7 for guidance on how to do this). While the Commission has limited resources and cannot investigate every complaint, it will usually take a keen interest if there are signs that a Member State is not being completely honest with it. While ultimately it has to rely on the data provided by the Member State, it will usually ask officials to explain any discrepancies, particularly where it has already opened infringement proceedings against it.

Breaches of any of the information provisions of the Directive could also form the basis of legal action before national courts (see chapter 6).

### Make an information request

The Aarhus Convention offers another solution to the problem of inadequate information. The Convention guarantees rights of access to environmental information which go further than the relatively weak provisions found in the Directive. You can make use of these provisions to request any missing information which can be useful in raising awareness, informing the Commission or even bringing legal action before national courts.

The Aarhus Convention recognises that access to information is an essential prerequisite to the right to live in a healthy environment. Further, it acknowledges that public authorities hold environmental information on behalf of the public - so really it is "our" information, not "theirs".

<sup>50</sup> Air Quality Directive, Articles 5-11.

<sup>51</sup> Financial Times "Madrid mayor red faced over green campaign" 4 February 2011.

The Convention also stresses the importance of widespread public awareness of environmental issues. It therefore imposes an obligation on public authorities to actively disseminate “environmental information” and also to make such information available to the public where it is requested.<sup>52</sup>

These provisions are implemented in the EU through the Environmental Information Directive.<sup>53</sup> This means that each EU Member State must have passed new national laws, or adapted existing laws, to ensure they comply with this Directive. If the national laws are not consistent with the directive, national judges are required by EU law to ignore them.

*Key provisions:*

Where a request for environmental information is made, the information shall be provided as soon as possible and no later than **one month** after being received.<sup>54</sup> Where the volume and complexity of the information requested is such that it is not possible to provide it within one month, the applicant must be notified and the information must be provided no later than **two months** after receipt of the request.

“Environmental Information” is defined very broadly,<sup>55</sup> and includes any information, whether in written, visual, aural, electronic or any other material form, relating to:

- The state of elements of the environment (including the air and the atmosphere)
- Factors, such as substances, energy, noise and radiation affecting those elements and emissions, discharges and other releases into the environment;
- Activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect those elements of the environment above;
- Reports on the implementation of environmental legislation;

- Cost-benefit and other economic analyses and assumptions used in environmental decision-making; and
- The state of human health and safety, conditions of human life, cultural sites and built structures which might be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures.

So almost any information you can think of relating to air quality would be covered by this definition, such as data on pollution levels, numbers of premature deaths and hospital admissions caused by air pollution, cost-benefit analysis of air pollution measures and technical analysis of air quality plans.

*Exemptions - there are some limited circumstances in which the information can be withheld:*

- Where the request is submitted to the wrong public authority (but if this is the case the recipient must either transfer the request to the correct authority or inform the applicant of the correct public authority).
- Where the request is “manifestly unreasonable”;
- Where the request is formulated in too general a manner;
- Where the request concerns material in the course of completion (in which case they must tell you who is completing it and when it will be completed by);
- Where the request concerns internal communications;
- Where disclosure would adversely affect confidentiality of the proceedings of public authorities, international relations, the confidentiality of commercial or industrial information, intellectual property rights, the confidentiality of personal data.<sup>56</sup>

There is a huge body of case law concerning how these exemptions can be used. A detailed discussion of this is beyond the scope of this handbook. However, there are two broad principles that can be extracted:

<sup>52</sup> The Aarhus Convention, Article 7.

<sup>53</sup> Directive 2003/4/EC on public access to environmental information and repealing Council Directive 90/313/EEC OJ 2003 L41/26.

<sup>54</sup> Environmental Information Directive, Article 3.

<sup>55</sup> Environmental Information Directive, Article 2(1).

<sup>56</sup> These are just some of the more common examples which are often used to refuse disclosure of information. See Article 4(2) of the Environmental Information Directive for the full list.

- Exemptions must be interpreted restrictively i.e. in such a way as to favour access to information.
- Some of the exemptions are not available where the request relates to information on emissions into the environment. This is particularly important in the context of air quality, where many requests could be characterised in this way.

These rights of access to information are supported by quite strong provisions which guarantee a right to administrative and judicial review.<sup>57</sup> So if your request for information is ignored, wrongfully refused (either in full or in part), or inadequately answered you have a right to access a quick and inexpensive procedure in which the authority is required to reconsider its decision.

In addition to this procedure, you must also have access to a review procedure before a court of law or another independent and impartial body established by law (such as a tribunal), in which the decision can be reviewed. So ultimately, if you are refused information, you could go to court to demand that it is disclosed. See further at Chapter 6.

### Practical tips on using environmental information requests

Environmental information requests can be an enormously useful weapon in the air quality campaigner's armoury and crucially, they are free or very low cost. The information can be very useful in supporting campaigns, informing the public, the media and politicians. Journalists in particular are always looking for a "scoop" (an exclusive story) - so if you can get hold of previously secret information, then this can often result in media coverage (see case study: Clean Air in London)

*Air pollution makes headlines in Daily Mail, The Sunday Times and The Independent*

### CASE STUDY

The campaign "Clean Air in London" (CAL) has been very successful at using environmental information requests to generate media coverage and raise the profile of air quality issues. For example, in 2013, Clean Air in London submitted requests for details of emissions of diesel exhaust for every road in London carrying an average of 10,000 vehicles per day. The Mayor declined these requests at first, but CAL sought an "internal review" of the refusal. The Mayor eventually released the information, which was used by CAL to identify the top five most polluted roads in London. This generated a great deal of media coverage and was taken up by local politicians: <http://cleanairinlondon.org/sources/carcinogenic-diesel-exhaust-disclosed-for-every-significant-road-in-london/#sthash.yk4pBGff.dpuf>

In 2014 a request was made by the Sunday Times for a list of the 50 locations in the UK with the highest levels of NO<sub>2</sub>, following the previous week's announcement that the Commission was taking infringement action against the UK for breaching NO<sub>2</sub> limits. The results showed that the worst location was just next to Buckingham Palace. This story was subsequently taken up by almost every other news outlet, resulting in some of the widest coverage of air quality issues in the UK in recent years.



57 Environmental Information Directive, Article 6.

**The following is a list of information that you should check, and if it is not publically available, formally request it from the relevant authorities under the Environmental Information Directive:**

- ✓ The annual compliance report<sup>58</sup>
- ✓ Details of breaches of limit values and other objectives (target values, long-term objective for ozone).
- ✓ Has a time extension been approved?
- ✓ If so, until when and for what zones?
- ✓ If so, has air quality been kept within the “maximum margin of tolerance” during the extension period?
- ✓ Is an air quality plan in place for all zones in which limit values have not been achieved?
- ✓ By what date does the air quality plan achieve compliance?
- ✓ Health impacts - how many premature deaths, hospital admissions, years of life lost are attributable to the levels of air pollution in your country, region, town or city?

This is only a very basic list, most of which is either explicitly or implicitly required by the Air Quality Directive. An environmental information request need not be limited to this information - as the case studies above demonstrate. Be creative. Try to think what information would be particularly useful, interesting or likely to put maximum pressure on the relevant authorities to take action.

If the public body does not want to give you the information, it may try to refuse your request, or at least delay responding until the information is no longer useful. To minimise the risk of this, the following tips may be helpful:

- Make sure you are sending the request to the public body which actually holds the information - this can save delays;
- Try to be as specific as possible so that your request isn't deemed to be “formulated in too general a manner”;
- Make sure the information requested isn't covered by one of the exemptions. If you don't think it is, say so and explain why;
- Inform the media - an environmental information request can be an extremely powerful campaigning tool, particularly if it results in media coverage.

An example of an environmental information request letter is included at Annex II.

**Environmental information requests can be an enormously useful weapon in the air quality campaigner's armoury and crucially, they are free or very low cost**

<sup>58</sup> As required by Articles 26 and 27 of the Air Quality Directive.

## The right to participate in decisions affecting air quality



As well as the right to access information about air quality, the Aarhus Convention also gives you the right to participate in decisions affecting the environment. In the context of air quality this arises in the right to participate in the formulation of air quality plans. However, it is also relevant to decisions on whether to approve certain projects or industrial activities which are likely to have a negative impact on air quality.

These rights have been implemented by the EU through the Public Participation Directive<sup>59</sup> which requires Member States to provide for public participation in:

- Plans and programmes affecting the environment;
- Projects which are subject to Environmental Impact Assessments; and
- Industrial permits.

### Participating in plans and programmes

As discussed in Chapter 2, we have a right to an air quality plan. But we also have a right to participate in the formulation of that plan. Unfortunately, due to an oversight by the EU legislators, this right does not appear anywhere in the Directive. This has no doubt contributed to

59 Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC OJ 2003 L156/17.

the failure of the competent authorities in many Member States to provide for public participation in the formulation of air quality plans. However, it is clear from the following analysis that such a right exists.

The Public Participation Directive requires Member States to ensure that the “public” is given early and effective opportunities to participate in the preparation and modification or review of the plans or programmes required to be drawn up under a list of EU environmental directives.<sup>60</sup> One of the listed directives is the Air Framework Directive - one of the predecessors to the Air Quality Directive. The Air Framework Directive required Member States to draw up “plans or programmes” for zones and agglomerations where air quality exceeded limit values.<sup>61</sup> The intention was that for all environmental directives proposed after the Public Participation Directive came into force, the Commission would automatically include provisions requiring public participation in plans and programmes.<sup>62</sup>

Air quality plans under the Air Quality Directive are the successors to the plans and programmes required by the Air Framework Directive. It was therefore clearly the EU legislator’s intention that they be subject to the provisions of the Public Participation Directive. In addition, in the absence of EU legislation, Member States are required to interpret national laws and procedures in such a way as to give effect to the Aarhus Convention, and therefore give individuals and environmental NGOs a right to participate in the formulation of air quality plans.<sup>63</sup>

60 Public Participation Directive Article 2 and Annex I.

61 Air Framework Directive, Article 8(3).

62 See recital 10 to the Public Participation Directive: “Other relevant community legislation already provides for public participation in the preparation of plans and programmes and, for the future, public participation requirements in line with the Aarhus Convention will be incorporated into the relevant legislation from the outset.”

63 See for example C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR I-1255 (the “Slovakian Bears” case).

So on this basis, individuals and NGOs have the right to participate in the formulation of air quality plans. What does this mean? The Public Participation Directive leaves it up to Member States to decide on the detailed arrangements for public participation, but does lay down the following basic requirements:

### Who is entitled to participate?

The Public Participation Directive leaves considerable discretion to Member States to decide who “the public” is for participating in plans and programmes:

“The public shall mean one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups.”<sup>64</sup>

“Member States shall identify the public entitled to participate... including relevant non-governmental organisations meeting any requirements imposed under national law, such as those promoting environmental protection.”<sup>65</sup>

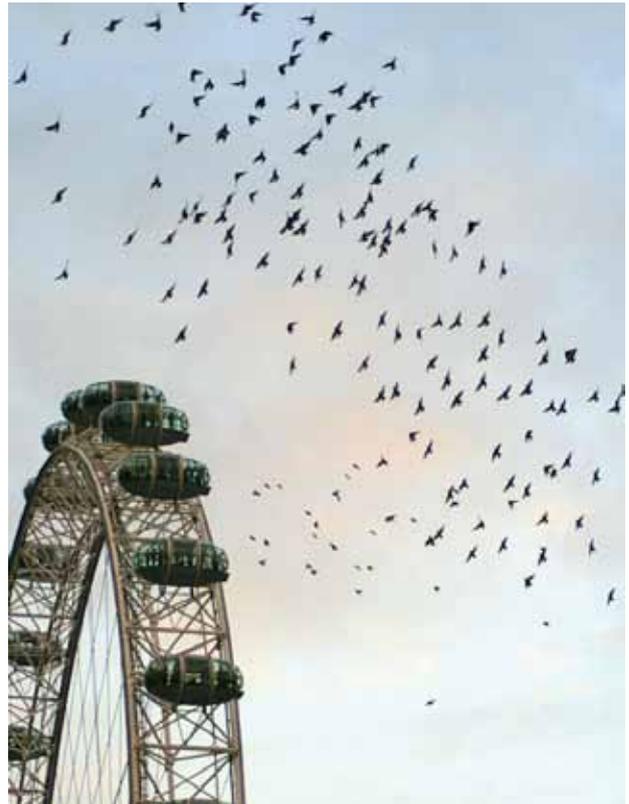
So the right of the individual to participate is clear. However, the rights of groups such as associations and NGOs are more complicated, as this depends on national laws. Unfortunately this means that Member States can (and often do) decide to exclude groups on the basis of certain criteria such as the numbers of members they have or the length of time they have existed. However, there are limits to how far they can go in this respect. The ECJ has made a number of rulings that such provisions are illegal where they do not ensure that the provisions of EU law are made effective.

### Early and effective participation

Public participation must take place early, when all options are open and before any final decision is made on the content of the air quality plan or before a plan is submitted to the legislative bodies for adoption. In the case of a local authority, this means that participation must take place before the plan is submitted to the municipal council.

Participation must also be genuine and effective. This is much more than the right to merely be told that an air quality plan is being prepared and being asked for your views on it: there must be

the possibility that your participation can actually influence the content of the plan. The relevant authorities must consider all the comments and opinions they receive before adopting the finalised air quality plan. Once they have made their final decision, they must make reasonable efforts to inform the public about it, giving the reasons and considerations upon which it was based.<sup>66</sup> However, the authorities do not have to agree with the views expressed by the public - you have a voice in the decision, but not a vote.



### Relevant information

The public must be informed of proposals for air quality plans and relevant information about such proposals must be made available, including information about the right to participate and the authority to which to submit comments and questions. In the context of air quality plans, relevant information would, as a minimum, include all the information required by the Directive, including:

- A detailed description of each measure;
- A detailed timetable for implementation of each measure; and

<sup>64</sup> Public Participation Directive, Article 2(1).

<sup>65</sup> Public Participation Directive, Article 2(3).

<sup>66</sup> Public Participation Directive, Article 2(2).

- Estimates of the expected improvements in air quality that will result (including the date by which compliance with limit values is expected to be achieved).<sup>67</sup>

Other relevant information could include:

- Information about the health and environmental impacts resulting from the air quality plan, for example how many premature deaths, hospital admissions etc. would be avoided as a result of the measures in the air quality plan;
- Economic analysis of the measures in the plan, including cost-benefit and cost-effectiveness analysis;
- The underlying data such as emission factors, traffic statistics and any scientific or technical reports which have been used in the preparation of the plan;
- Alternatives which might exist, such as additional measures which have to be explored.

If insufficient information has been provided, you can make a request for such information under the Environmental Information Directive (see chapter 4). However, you will need to act quickly, as otherwise the information may not arrive until after the participation procedure has closed.

### Reasonable timeframes

Unfortunately, the Public Participation Directive does not lay down specific timeframes, but states that “reasonable time-frames shall be provided allowing sufficient time for each of the different stages of public participation...”<sup>68</sup> So what is “reasonable” is left up to the Member State to decide.

Given the complex and technical nature of air quality plans, considerable time is necessary to allow meaningful participation. However a common problem is that an unreasonably short period of time, for example one month, is given in which to provide comments. It is important that you insist in being allowed to participate “as early as possible” and when all options are still open, rather than only being allowed to participate at the very last moment. If you do not think that you have been given sufficient time

to read the plan and all supporting information and provide detailed comments, it is a good idea to write to the competent authority as soon as possible and request more time, referring to the above provisions of the Public Participation Directive.

### Modification or review

The obligation to prepare air quality plans has existed for several years, so in most cases an air quality plan will already be in place. The opportunity for public participation will therefore usually arise in the context of modifying or updating an existing plan rather than preparing a plan for the first time. Crucially, the Public Participation Directive requires public participation not only in the preparation of air quality plans, but also where they are modified or reviewed.<sup>69</sup> Although the Air Quality Directive does not explicitly state that air quality plans must be regularly modified or reviewed, it is at least implicit that this is the case.

The Public Participation Directive requires public participation where air quality plans are modified or reviewed

The time extension process will often result in the opportunity to participate in the modification of air quality plans. Member States who applied for time extensions were required to prepare air quality plans for each zone/agglomeration containing measures to achieve compliance by the extended deadline. The Commission either approved time extensions, rejected them, or “conditionally approved” them. Where time extensions were conditionally approved, a common condition was a requirement to modify the air quality plan to ensure that it achieved limit values sooner, or to include additional measures where it was uncertain whether compliance would be achieved by the extended deadline.

Where time extensions were rejected, Member States will have to modify their air quality plans or risk infringement action by the Commission, or legal action by individuals or NGOs in national courts.

<sup>67</sup> Air Quality Directive, Articles 22 and 23 and Annex XV.

<sup>68</sup> Public Participation Directive, Article 2(3).

<sup>69</sup> Public Participation Directive, Article 2(2).

## CASE STUDY

**ClientEarth v Secretary of State for Environment, Food and Rural Affairs**

The UK applied for a time extension for PM<sub>10</sub> for Greater London.

The Commission raised no objections to the time extension notification on condition that the air quality plan for London was “adjusted” to include measures to be taken in the short-term to ensure that the limits were in fact met.

The UK adjusted the plan to include a number of measures, including the use of “dust suppression.” However, it did not consult the public on this adjusted plan.

ClientEarth’s argument was that either it was an adjustment of the plan, which was equivalent to “modification” and so public participation was required, or it wasn’t an adjustment, in which case the UK had failed to comply with the conditions of the time extension and so that was invalid, and the UK was in breach of the Directive since 2005 (the original deadline for achieving PM<sub>10</sub> limit values).

This formed one of the two grounds in ClientEarth’s case (the other being the failure of plans to achieve NO<sub>2</sub> limits until after 2015). However, a month before the case was due to be heard, the government agreed to settle on this part of the claim and offered to hold a public consultation on the adjusted plan.



*Spraying dust suppressant, London*

**Participating in decisions on projects and permits**

In addition to requiring public participation in plans and programmes such as air quality plans, the Public Participation Directive also amended two EU environmental directives to ensure they comply with the Aarhus Convention:

- The Environmental Impact Assessment (EIA) Directive;<sup>70</sup> and
- The Integrated Pollution Prevention and Control Directive (IPPC) Directive, (which has now been replaced by the Industrial Emissions Directive (IED)<sup>71</sup>).

Both are potentially highly significant for air pollution. While a full discussion of these directives (which are highly technical and the subject of a large body of case law) is beyond the scope of this manual, it is worth highlighting some key considerations that are particularly relevant in the air quality context.<sup>72</sup>

A key point to note is that the Public Participation Directive not only requires public participation in decisions subject to the EIA or IED, but it also guarantees rights of access to justice so that members of the public concerned can challenge those decisions. However, it does not require access to justice when it comes to plans and programmes.

Although the right of access to justice for air quality plans is provided for by the *Janecek* case, this does not fulfil the requirements of the Aarhus Convention that procedures be fair, equitable, timely and not prohibitively expensive.<sup>73</sup> For this reason it may be easier to bring national legal action in relation to an EIA or IED decision which will worsen air quality than to challenge an air quality plan.

70 Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment OJ 1985 L175/40. This Directive has now been replaced - though not changed in its content - by Directive 2011/92/EU OJ 2012 L 26/11. Furthermore, the Commission proposed in 2013 to review this Directive. That proposal is likely to be adopted in 2014.

71 Directive 96/61/EC concerning integrated pollution prevention and control OJ 1996 L257/26. This Directive was repealed and replaced by Directive 2010/75/EU on industrial emissions OJ 2010, L 334/17. The participation rights were not changed in substance.

72 See further at <http://ec.europa.eu/environment/eia/eia-legalcontext.htm>.

73 Aarhus Convention, Article 9(4).

## EIA and air quality

The public also has a right to participate in decisions which are subject to an Environmental Impact Assessment (EIA). The EIA Directive requires that projects likely to have a “significant effect” on the environment be subject to an EIA, which assess the full environmental impact of a project and considers how to mitigate those impacts.

EIAs are mandatory for certain types of projects (listed in Annex I) which are assumed to have a significant impact on the environment. Such projects include airports, motorways and long-distance railway lines.

EIAs are discretionary for those projects listed in Annex II. The relevant authorities decide whether an EIA is needed through a “screening procedure”, which determines whether a project is likely to have a significant effects on the environment. Annex II projects which are of particular relevance to air quality are urban development projects (which includes the construction of supermarkets and car parks),<sup>74</sup> road construction<sup>75</sup> and shale gas extraction (fracking).<sup>76</sup>

Member States can decide whether or not to require an EIA for an Annex II project on a case by case basis and/or by setting certain thresholds. However, when an Annex II project is likely to have significant effects on the environment, Member States are obliged to require an EIA.<sup>77</sup> Also, when they fix thresholds, they may only exempt certain Annex II projects from the requirement of an EIA altogether, when **all** the projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment.<sup>78</sup>

74 EIA Directive, Annex II, 10(b).

75 EIA Directive, Annex II, 10(e).

76 EIA Directive, Annex II, 2(e).

77 See case C-72/95 *Kraaijeveld and others v Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403, paragraph 39: “the purpose of the Directive would be undermined, if some projects could escape an environmental impact assessment, though they were likely to have significant effects on the environment”.

78 Case C-392/96 *Commission v. Ireland* [1999] ECR I-5901, paragraph 75.

In any event they must take into account the criteria set out in Annex III. Some of these criteria are highly relevant to air quality, for example:

- Cumulative effects
- Densely populated areas
- Areas in which environmental quality standards (such as air quality limit values) **have already been** exceeded
- Trans-boundary effects

So any Annex II project which would significantly increase emissions of air pollution in a densely populated area such as a town or city, where limit values are exceeded should, through the screening procedure, be identified as likely to have a significant impact on air quality. An EIA would then be required.

The second stage of the EIA process is “scoping”. Scoping is carried out for all projects that require an EIA, whether they fall under Annex I or Annex II, and it is the process by which the content and extent of the developer’s Environmental Impact Statement are determined. This process can be carried out by the developer, or the developer may ask the relevant authority for a “scoping opinion”.<sup>79</sup> In this case the relevant authority must give its opinion as to the relevant information to be included.

A typical problem is that projects are not subject to EIA, because the screening procedure assesses that the impact on air quality will not be “significant” or that air quality is excluded at the scoping stage for the same reason. Public participation is not required by EU law at either the screening or the scoping stage, so it is often difficult to challenge these conclusions. However, it is important that you try. In some Member States, national procedures provide some more limited forms of public consultation. In any event, you should try and do everything possible to highlight any air quality impacts. Because all documents will not normally be publically available at the screening or scoping assessment stage, you may need to submit a formal environmental information request (see chapter 4) in order to see relevant documents such as the air quality assessment and traffic projections.

79 EIA Directive, Article 5(2).

If the responsible authority decides not to make an environmental impact assessment, it is obliged, on request from citizens or NGOs, to give reasons justifying this decision.<sup>80</sup>

Where a full EIA is carried out, the developer must produce a detailed report containing certain information including the following which are especially relevant to air quality:

- An estimate of type and quantity of expected emissions to air resulting from the operation of the project;
- An estimate of aspects of the environment likely to be significantly affected, including population, air, climatic factors and architectural and archaeological heritage;
- An outline of main alternatives to the project;
- A description of the forecasting methods used to assess the impacts;
- A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment.

Typically this document will be very large and technical, however the Directive also requires the developer to produce a non technical summary.

Where a full EIA is carried out, the “public concerned” has the right to participate in the decision whether or not to grant consent to the project. These provisions mirror those for rights of participation in plans and programmes, so there must be early and effective opportunities to participate, relevant information must be provided and reasonable timeframes must be given.

The public concerned is defined as the public affected or likely to be affected by, or having an interest in, the decision. NGOs promoting environmental protection and meeting any requirements under national law are deemed to have such an interest. So, as with plans and programmes, the rights of NGOs to participate are subject to national rules.

One of the reasons that it is so important to push for an EIA to be carried out is that it requires the relevant authority to give reasons for whatever decision it takes in relation to the development.<sup>81</sup> This will not necessarily be the case where an EIA is not required. Where reasons are given for a decision it is much easier to determine whether a legal challenge is appropriate and the likelihood of success.

Note that the EIA Directive is currently being revised. A Commission proposal was adopted in 2012, with adoption by co-decision expected in the 2014.<sup>82</sup>

### Industrial pollution and air quality

The IPPC Directive subjects industrial emissions, including emissions into the air, to a permitting process. The IPPC Directive has been “recast” as the Industrial Emissions Directive, which replaced the IPPC Directive from January 2014.<sup>83</sup>

Permits should only be granted where “Best Available Techniques” (BAT) are used, and “Emission Limit Values” (ELVs) are met.

The Public Participation Directive requires public participation in the decision to grant the permit. These provisions largely mirror the provisions for public participation in projects subject to EIA. The public concerned must similarly be given early and effective opportunities to participate in the procedure for:

- Issuing a permit for a new installation;
- Issuing a permit for any substantial change in the operation of an installation; and
- Updating a permit or permit conditions.

**So if there is a permit being issued or updated for an industrial process that may have an impact on local air quality, this is an opportunity for you to get involved.**

<sup>80</sup> Case C-75/08 *R (on the application of Mellor) v Secretary of State for Communities and Local Government* [2009] ECR I-3799.

<sup>81</sup> EIA Directive, Article 9.

<sup>82</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52012PC0628>

<sup>83</sup> See note 71 above.

## Enforcing the right to participate

The EIA Directive does not require that consent for projects which will have a negative impact on the environment must be refused. Even where the EIA shows significant environmental impacts, the project can normally still go ahead, provided that “consideration” is given to mitigate impacts.

However, it is arguable that where the EIA shows that a project will worsen air quality such that a limit value will be breached or an existing breach exacerbated, any subsequent decision would be unlawful on the basis that it was inconsistent with the public authorities’ duties flowing from the Air Quality Directive. This would make an interesting test case (see Annex II).

What is clear is that if a project or permit is approved without a proper EIA having been undertaken, then that decision can be legally challenged. There is extensive ECJ case law arising out of the EIA Directive.<sup>84</sup> While most of the case law applies to failures to properly conduct EIAs, this applies equally to failure to properly consult on air quality plans.

It is vitally important that you exercise your right to participate, either in the formulation of an air quality plan, or in any decision subject to an EIA or IPPC/IED which affects air quality, as in some Member States this is a precondition for challenging the ultimate decision. So if you don’t exercise your right to participate, you have no right to challenge the decision in court (see Chapter 6).<sup>85</sup>

It can be vitally important that you participate in the formulation of air quality plans, as in some Member States this is a precondition for challenging the ultimate decision

## Projects and permits checklist:

- ✓ Is a project being proposed, such as a new road, supermarket or fracking site which could adversely affect air quality?
- ✓ Has an assessment been made of the likely impact of the project on air quality?
- ✓ If not demand one.
- ✓ If it has been assessed, submit an access to information request for the assessment and all supporting information.
- ✓ Is the project likely to worsen air quality where it is already exceeded, or will it cause an exceedance of air quality limits?
- ✓ Have the relevant authorities required a full EIA to be carried out?
- ✓ If so, has the public been given an opportunity to participate before the decision has been made?
- ✓ Have the public been given adequate information, including the report?
- ✓ Have reasonable timeframes been given?

<sup>84</sup> See [http://ec.europa.eu/environment/eia/pdf/eia\\_case\\_law.pdf](http://ec.europa.eu/environment/eia/pdf/eia_case_law.pdf)

<sup>85</sup> See Darpö “Effective Justice?”, note 42 above at 14.

## Access to Justice I – the right to access national courts



*“Union citizens will have effective access to justice in environmental matters and effective legal protection in line with the Aarhus Convention and developments brought about by the entry into force of the Lisbon Treaty and case law of the Court of Justice of the European Union.”<sup>86</sup>*

As we have seen in the two previous chapters, our right to clean air is supported by a number of other rights, namely the rights to environmental information and public participation. But ultimately these rights are worthless unless they are supported by a third right: the right to be able to enforce the laws by going to court. This is arguably the most important of all the rights contained in the Aarhus Convention, as without it there is no right to clean air.

However, as we saw in chapter 3, the right of access to justice is also usually the most difficult to exercise. National rules and practical realities put numerous obstacles in the way of the would-be litigant. National rules on access to the courts (“standing”) place restrictions on who can bring cases. Legal procedures are usually complex, expensive, and can take years to reach a conclusion. Even then the decision of the court can fail to provide a satisfactory remedy.

EU law and the Aarhus Convention provide some partial solutions to these problems. The so called “third pillar” of the Aarhus Convention establishes the right of access to justice where environmental laws are broken. This applies both to the access to information and public participation provisions of the Convention and more generally to national environmental laws.

First, it requires that citizens must have access to a “review procedure” where an access to information request is ignored, refused, or otherwise inadequately responded to.<sup>87</sup>

Second, it requires access to “a procedure” to challenge any decision, act or omission which is subject to the public participation rights conferred by the Convention.<sup>88</sup>

Third, it requires that members of the public have access to justice to challenge breaches of national environmental laws by private persons and public authorities.<sup>89</sup>

In addition, these procedures must:

- Provide adequate and effective remedies;
- Be fair, equitable and timely; and
- Not be prohibitively expensive.<sup>90</sup>

The Aarhus Convention does not necessarily require access to a judicial procedure, what we would call “judicial review”. Administrative procedures such as an appeal to a tribunal are sufficient provided that they are impartial and independent and their decisions have binding legal effect. For simplicity this chapter uses the term “court” as shorthand for whatever procedure or body is used, whether judicial or administrative.

### **Enforcing the rights to access information and public participation**

The access to justice provisions relating to the access to information and public participation “pillars” have been implemented by the EU through the Environmental Information Directive (see Chapter 4) and the Public Participation Directive (see Chapter 5).

86 7th EU European Environmental Action Programme ‘Living well, within the limits of our planet’ OJ 2013 L354/171, Article 62: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013D1386&from=EN>

87 Aarhus Convention, Article 9(1).

88 Aarhus Convention, Article 9(2).

89 Aarhus Convention, Article 9(3).

90 Aarhus Convention, Article 9(4).

For example, if you make a request for information about how many early deaths are caused by exposure to air pollution in your country, and this request is refused, you should have the right to go before a national court or tribunal to challenge that decision (assuming the authority holds that information).

Or, if a local authority gave consent to a large new supermarket which resulted in significant impacts on air quality without providing for public participation, you should have the right to go to court to challenge that decision. In theory, the failure to allow public participation could render the decision to approve the project invalid.

Equally, if there was a public participation process, which you engaged with in order to object to the project because it would increase emissions of air pollution, but the authorities decided to grant permission anyway, you should still have the right to challenge that decision.

In all these cases, the procedure must:

- Provide an effective remedy;
- Be fair and equitable;
- Not take too long; and
- Not be so expensive that you are deterred from bringing the challenge.

### Enforcing national environmental laws

Unfortunately, the more general access to justice provisions relating to breaches of national environmental laws have not been implemented by the EU. An access to justice directive was proposed in 2003 but was blocked by Member States and so was never adopted and has now been withdrawn. The Commission is currently considering whether to propose a new access to justice directive or some kind of other non-legislative proposal aimed at improving access to justice in environmental cases.<sup>91</sup>

So for the time-being, apart from where access to environmental information, environmental impact assessment or industrial permits are concerned, it is for Member States to decide how to implement the access to justice provisions of the Aarhus Convention. The result is that national access to justice rules vary widely between different EU Member States. Probably

the only thing that is consistent is that in nearly all Member States, the would-be environmental litigant must overcome numerous practical and procedural obstacles.

However, in recent years the ECJ has made progress where the EU legislators have failed. In several landmark judgments it has strengthened the rights of EU citizens and environmental NGOs to access national courts to enforce EU environmental law. So together EU law and the Aarhus Convention have started to overcome the various obstacles that national laws have placed in the way of their citizens.

In several recent landmark judgments, the European Court of Justice it has strengthened the rights of EU citizens and NGOs to enforce EU environmental law

### The first obstacle: Standing

Standing (sometimes referred to by the latin term "*locus standi*") is the ability of a party to participate in a case before the court. Restrictive national standing rules are therefore the most fundamental obstacle: if you have no right to go to court in the first place, then you have no chance to defend your right to clean air.

National rules on standing vary greatly across the EU. Some countries have quite relaxed rules on standing in environmental cases. However, in many Member States, national rules make it virtually impossible for groups such as associations and NGOs to enforce environmental laws. In many Member States, environmental NGOs have been prevented from accessing the courts because of restrictive national standing rules which require a claimant to be able to show that they have some kind of direct or individual interest in the matter which is in some way uniquely relevant to them.

For example in the *Janecek* case, the claimant, Dieter Janecek, was forced to continue living next to one of the most polluted roads in Germany (at considerable risk to his health and that of his family) because if he moved home he would no longer have a direct interest in the case and so would not have standing.

<sup>91</sup> See 7th EAP note 86 above, Annex no. 62 and 65.

It is almost impossible for an environmental NGO to satisfy a "direct interest" test because breaches of environmental laws, by their very nature, tend to affect many people. Air quality is the perfect example of this. However, the ECJ has ruled that such provisions are illegal in EU law and that both individuals **and** groups must be able to access the courts. The following four cases show how the ECJ has improved rights of standing in environmental cases.

#### *Janecek*<sup>92</sup>

The *Janecek* case was not only significant in that it granted the right to clean air - it has significance well beyond the sphere of air quality. This is because it recognised that EU citizens had a right to access national courts to uphold EU laws which were in place to protect human health had been. Interestingly this right did not derive from the Aarhus Convention, but from broader principles of EU law: namely that national courts must give effect to EU law rights by providing effective remedies.



#### *The Slovakian Bears case*<sup>93</sup>

However, the *Janecek* case only guaranteed rights of standing to "individuals directly concerned". It said nothing of the right of environmental NGOs or other groups to access the courts. This is highly significant, as such groups are often best placed to bring legal challenges as they tend to have greater expertise, time and financial resources than ordinary members of the public.

In the Slovakian Bears case, an environmental NGO was refused permission to become a party to administrative proceedings in which various hunting groups were applying to a government ministry for permits to hunt brown bears. The NGO in question appealed against this decision, and the case was eventually referred to the ECJ.

In a landmark ruling, the ECJ held that national courts were required, in order to ensure the effectiveness of EU environmental law, to interpret national laws (in this case, national rules on standing) to the fullest extent possible in a manner consistent with the Aarhus Convention.

This would enable an environmental NGO to challenge before a national court a decision taken which was alleged to be in contravention of EU environmental law. While the EU environmental law in this case was the EU Habitats Directive,<sup>94</sup> this rationale would apply equally to any other EU environmental directive, including the Air Quality Directive. Further, while this case related to the standing requirements of the Aarhus Convention, the same logic would apply to its other requirements, such as the need for procedures to provide effective remedies, be fair, equitable and timely and not be prohibitively expensive.<sup>95</sup>

#### *Darmstadt*<sup>96</sup>

So taken together, the *Janecek* and *Slovakian Bears* case mean that both individuals (assuming they are sufficiently "concerned") and environmental NGOs have the right to go to court to challenge a public authority where there has been a breach of the Air Quality Directive.

This was recently put to the test in another German case. A German environmental NGO - Deutsche Umwelthilfe (DUH) brought a case against the regional authorities in Hess relating to breaches of limit values in the city of Darmstadt. In light of the ruling in the Slovakian Bears case, the German court granted DUH standing in the case, contrary to normal German procedural requirements that require a claimant to show that they have "direct and individual concern".

<sup>92</sup> *Janecek v Freistaat Bayern* note 27 above

<sup>93</sup> *Lesoochránárske zoskupenie VLK* note 63 above

<sup>94</sup> Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora OJ 1992 L206/7.

<sup>95</sup> Aarhus Convention, Article 9 (4).

<sup>96</sup> *Deutsche Umwelthilfe e.V. v Land Hessen* in the Administrative Court of Wiesbaden (2012) Judgment available here: <http://legal.cleanair-europe.org/legal/germany/lawsuits-and-decisions/>

Hopefully NGOs in other Member States will now make use of the *Slovakian Bears* case to overturn national rules which illegally deny them access to the courts.

### *Djurgarden*<sup>97</sup>

Other national procedural requirements can restrict standing in more subtle ways, for example by requiring that an Environmental NGO has a certain number of members, or has been active for a certain number of years. In Sweden, NGOs were only granted standing in EIA cases where they had a minimum of 2,000 members. Sweden acknowledged that only two NGOs in the entire country met this requirement. The case was referred to the ECJ, which held that such a provision was illegal. While EU directives leave it for national rules to determine the precise standing rules for NGOs, such rules must ensure wide access to justice and the effectiveness of the directive. The Court held that the Swedish provision in question would make it almost impossible for local citizens' groups to take legal action and was therefore illegal.

Another common way of restricting access for NGOs is by requiring them to have existed for a certain period of time. Such rules would likely contravene the ECJ's ruling in *Djurgarden* if the minimum term was so long that it seriously restricted access to the courts for environmental NGOs and associations.

### The second obstacle: prohibitive expense

Even where an individual or an environmental NGO has the right to go to court, this does not help if the costs involved mean that they cannot afford to. Legal action usually involves instructing lawyers, who tend to be expensive. Expert witnesses can also charge considerable sums for their services. Further, there are usually additional costs such as court fees and the costs associated with preparing and copying legal documents. In some Member States, notably the UK, things are even worse, as the unsuccessful claimant can be ordered to pay some or even all of the defendant's costs if they lose. This is known as "the loser pays principle." So taking legal action against the government can involve taking on the risk of having to pay

tens of thousands of Euros for even a fairly straightforward case.

### *Edwards*<sup>98</sup>

This was a reference from the UK Supreme Court in an infamous case in which an individual was ordered to pay £88,000 (c. £97,000) in legal costs after losing a case against the UK Environment Agency relating to air pollution from a local cement factory. The UK court asked the ECJ a number of questions relating to what the Aarhus Convention meant when it required that access to justice must not be "prohibitively expensive."

The ECJ ruled that in determining what was prohibitive:

- The costs **must** not exceed the financial resources of the person concerned nor be "objectively" unreasonable i.e. unreasonable for the "average" person;
- The court **must** look at the actual resources of the claimant - so it can not simply base its assessment of what is "prohibitive" based on an objective estimate of the resources of the average applicant;
- The court **may** also take into account a range of other factors including the claimant's chance of success, the case's importance (for both the claimant and protection of the environment) and complexity and the existence of any national legal aid or costs protection schemes.

Unfortunately, the *Edwards* ruling gives only some very vague guidance to national courts on how they should apply the "not prohibitively expensive" rule, so is of limited use. This is shown by the final decision of the UK Supreme Court which decided that it was not unreasonable on either an objective or subjective basis for the claimant to pay a lower sum of £25,000 (c.£30,000)<sup>99</sup> To put this figure in context, it is roughly equal to the average national **annual** earnings.

<sup>97</sup> C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* [2009] ECR I-9967.

<sup>98</sup> Case C-260/11 *R (on the application of Edwards and Pallikaropoulos) v Environment Agency and others* (not yet published).

<sup>99</sup> Eventually the defendants agreed not to seek their full costs of £88,000, instead accepting the lower figure of £25,000 which the claimant had already paid as security for costs.

Due to the delay in hearing the *Edwards* case, the ECJ's ruling was overtaken by events. Under the combined pressure of the *Edwards* case, the Commission's parallel infringement case against the UK<sup>100</sup> and an earlier ruling by the Aarhus Compliance Committee in a complaint brought by ClientEarth,<sup>101</sup> the UK introduced major reforms to the allocation of costs in environmental cases in April 2013. As a result, claimants in cases covered by the Aarhus Convention automatically benefit from a maximum cap of £5,000 (for individuals) or £10,000 (for groups and NGOs).<sup>102</sup> The Aarhus Convention has therefore played a crucial role in improving access to environmental justice in the UK.

The costs of litigation are likely to remain a serious challenge for claimants in many Member States, especially those which operate a "loser pays" system.<sup>103</sup> However, there are Member States where there is no "loser pays" system and a case could be brought for less than €5,000.

Such sums should be within the reach of most reasonably well-resourced environmental NGOs. Given the potential strategic benefits of litigation, such groups should give serious consideration to making provision within their budgets or even to raising new funding to pay for litigation.

Both individuals and NGOs have the right to go to court to challenge a public authority where there has been a breach of the Air Quality Directive

### Tips for funding legal action

Even in those countries where there is a more equitable allocation of legal costs, merely finding the resources to pay for your own legal costs is a real challenge. The following possibilities should be explored:

- ✓ Is there a legal aid scheme? (although note that these schemes are usually only available to individuals, not NGOs)
- ✓ Can you get a lawyer to work for free, on reduced rates, or on a "no-win, no fee" basis?
- ✓ You may need to be creative in looking at ways of funding litigation, for example through the use of "crowd-funding".
- ✓ Please contact the author (see contact details on p. 44) who would be happy to help with any queries and/or try to put you in contact with lawyers working in your country.

### The third obstacle: the scope of review

A common problem is that national rules mean that it is only possible to challenge the procedure, not the substance of the decision itself. So it would be possible to challenge the procedure by which an air quality plan was adopted (for example where there was no public consultation). However, it would not be possible to challenge the content of the air quality plan, even where it was obviously inadequate, (for example where it does not include sufficient measures and won't achieve compliance for several years).

This is clearly incompatible with EU law and the Aarhus Convention.

The *Janecek* decision did more than merely give a right of standing, it also required substantive review of the action plan by national courts of the adequacy of the measures included in

100 Case C-530/11 *Commission v UK* (not yet published).

101 ACCC/C/33/2008: [http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/ece\\_mp\\_pp\\_c.1\\_2010\\_6\\_add.3\\_eng.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/ece_mp_pp_c.1_2010_6_add.3_eng.pdf)

102 The new fixed costs regime sets a maximum limit of £5,000 for individuals and £10,000 for groups.

103 For a comprehensive assessment of the costs of environmental procedures see Darpö "Effective Justice?", note 42 above at 2.4

it.<sup>104</sup> This is crucial where, as in many Member States, air quality plans have been adopted, but do not contain adequate measures to ensure compliance with limit values in a reasonable timeframe. National courts must actually look at the adequacy of the measures in the plans by reference to the need to achieve limit values in the shortest time possible. The approach taken by the German court in the *Darmstadt* case points to the correct approach to be taken in this regard. Hopefully, the ECJ will provide further clarity on this issue in the *ClientEarth* case.

A common related problem is that national rules do not allow administrative omissions (failures by a public authority to act or make a decision) to be challenged. In some Member States, for example Hungary and the Czech Republic, it is only possible to challenge administrative acts.<sup>105</sup> This is a major problem when air quality is concerned, because often it is the very lack of action that is the problem i.e. the failure by the relevant authorities to adopt or update an air quality plan or take measures to reduce pollution. This is clearly in contravention of the Aarhus Convention, which expressly provides for review of the acts **and** omissions of public authorities.<sup>106</sup> This is not limited to administrative acts.<sup>107</sup>

#### The fourth obstacle - delay

A major problem with national legal action is that it can take several years to come to a conclusion. While this is undoubtedly a major problem (and one which ultimately needs EU legislation to resolve), it needs to be viewed in context of two factors: First, the Commission infringement procedure takes even longer, typically four years just to reach first judgment (see further at chapter 5). Second, several Member States project limit values to be breached until as late as 2020 or even later.

So in this context, even where national legal action takes several years, it will make a difference. For example, despite going through three hearings, the *ClientEarth* case will be heard in 2014. By comparison, the Commission has only just taken the first steps in the infringement process against Member States for breaches of nitrogen dioxide limits, so these cases are unlikely to reach the ECJ until 2016 at the earliest.

It is worth noting that cases in Germany and Italy have proceeded relatively swiftly, with judgment delivered in less than a year.

Finally, in many Member States, national procedures allow for cases to be “expedited” or “fast-tracked” in exceptional circumstances, often at the discretion of the courts. Where such procedures exist, it can be argued that the courts must use them in environmental cases such as those relating to air quality, in order to ensure the effectiveness of the Aarhus Convention, which requires that procedures be “fair, equitable and timely”.<sup>108</sup>



<sup>104</sup> See also joined cases C-165/09 *Stichting Natuur en Milieu and Others v College van Gedeputeerde Staten van Groningen* and C-166/09 *College van Gedeputeerde Staten van Zuid-Holland* [2011] ECR I-4599 at 103. In the EIA context, see the *Djurgarden* case note 97 above at 39, which requires access to a review procedure to challenge the decision i.e. not just the procedure leading to the decision.

<sup>105</sup> Concerns about this issue were identified in nearly all Member States surveyed in Darpö “Effective Justice?”, note 42 above at 34.

<sup>106</sup> Aarhus Convention, Article 9(3).

<sup>107</sup> See General Court, case T-338/08 *Natuur en Milieu v. Commission* (not yet published), and case T-396/09 *Milieudefensie v. Commission* (not yet published).

<sup>108</sup> Applying the same logic to Article 9(4) of the Aarhus Convention as was applied to article 9(3) in the “Slovakian Bears” case note 63 above.

### The fifth obstacle - lack of effective remedies

Even where you overcome all these obstacles, there is a risk that ultimately the court fails to award a remedy which makes any real difference. For example, in the *ClientEarth* case, both the first instance and appeal courts decided not to give any remedy, even though the UK Government had accepted it was in breach of its obligations to ensure that limit values were achieved. The Supreme Court eventually gave a non-binding “declaration”, which merely confirmed that the UK was in breach of the limits, without forcing the government to take any positive action.

Another common problem is that national courts may simply set aside the public authority’s decision - the decision then goes back to the public authority, which may then simply take the same bad decision after following the correct procedures.

Even the threat of legal action can put significant pressure on national authorities to take action

The extent to which national courts must provide effective remedies in the context of the Air Quality Directive is the subject of the fourth question referred to the ECJ in the *ClientEarth* case. Until this has been answered, considerable uncertainty will remain. However, the following principles are well established in EU law:

- Remedies must be effective - they must not make it excessively difficult or impossible to access rights conferred by EU law.<sup>109</sup>
- Remedies must also be dissuasive i.e. they must have a genuinely deterrent effect.<sup>110</sup>
- These principles have been given explicit recognition in the Air Quality Directive.<sup>111</sup>

109 Case C-33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989

110 Case C-14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1819

111 The Air Quality Directive, Article 30.

- National courts must interpret national procedural rules to the fullest extent possible to give effect to EU law rights.<sup>112</sup>
- In the specific context of air quality, the *Janecek* case requires that as a minimum, the national court must provide a remedy which has the effect of forcing the relevant authority to prepare or revise an air quality plan.

### Conclusion

Litigation is a major undertaking, especially for an individual or environmental group with limited resources of time and money. However, it can be the only way of forcing a reluctant authority to act. Litigation can also bring indirect benefits such as media coverage, which can result in higher levels of public awareness and significant political pressure on public bodies to take action. Even the threat of legal action can, provided it is genuine, put significant pressure on national authorities to take action.

If you think you may have grounds for a legal challenge, it is important you seek proper legal advice at the earliest opportunity. This handbook provides only a simple overview of some relevant aspects of EU law, which will need to be considered in light of national laws and procedures by an experienced national lawyer or other expert. Please contact the author (contact details on p.44), who would be happy to provide some initial thoughts on the case and try to put you in touch with a national legal expert.



112 The “Slovakian Bears” case note 63 above.

## Access to Justice II – Enforcement by the Commission

The Commission has an important role in upholding our right to clean air. The Commission is known as the “Guardian of the Treaty”. It is responsible for ensuring that Member States comply with EU law, including environmental directives relating to air pollution. It derives its enforcement powers from the Treaty.<sup>113</sup>

The Commission has the power (but crucially, no obligation) to bring legal proceedings against Member States for failing to comply with EU law. These proceedings are usually referred to as “infringement” or “infraction” proceedings. The Commission is also responsible for approving or rejecting time extensions.

It is important that individuals and NGOs in Member States draw issues of non-compliance to the Commission’s attention and keep the Commission up to date with developments where enforcement proceedings are ongoing. However, this should not be seen as a substitute for national litigation which should, where possible, be pursued in tandem with Commission infringement action. The two processes should be viewed as being complementary.

This chapter will: explain how the Commission uses its enforcement powers; explain the problems faced by the Commission when bringing infringement cases, particularly in relation to air quality; and give some practical advice on how to co-operate most effectively with the Commission.

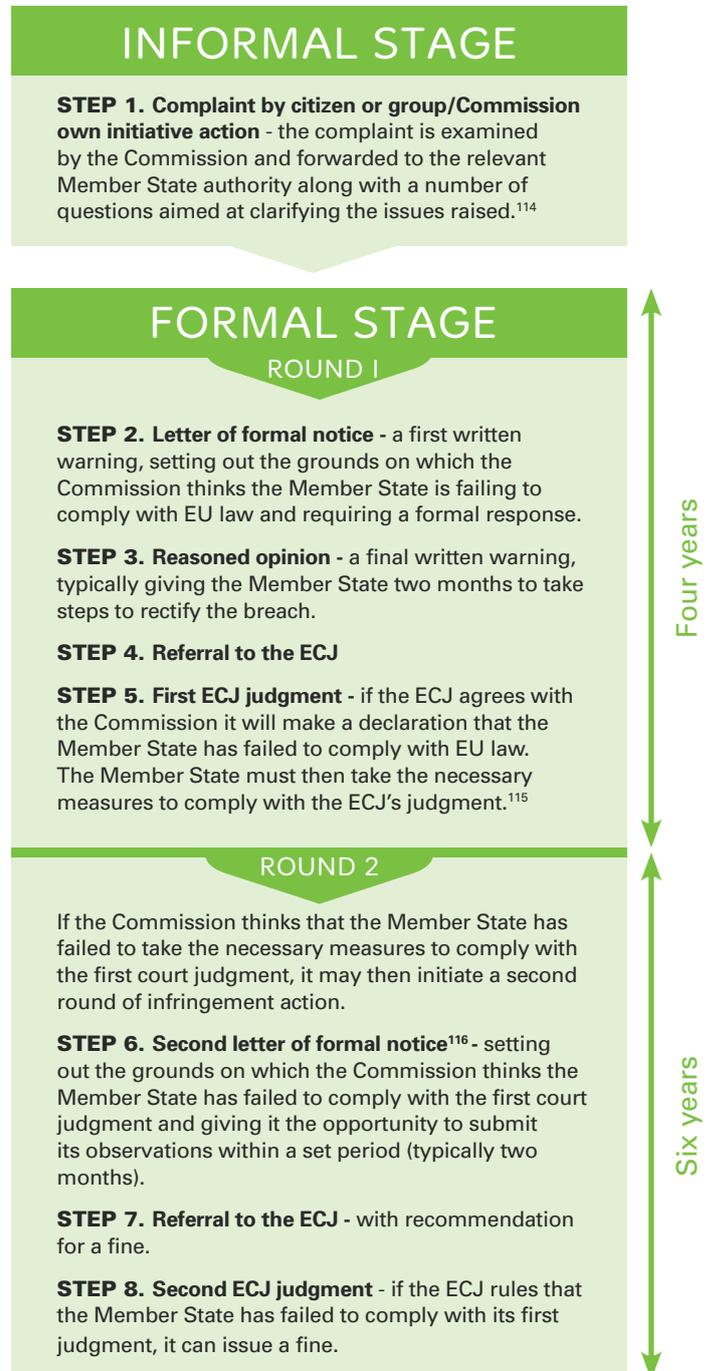
### The infringement procedure

The Commission can bring infringement cases in three situations:

- Where the Member State fails to transpose a directive into national legislation by the relevant deadline and communicate this to the Commission.
- Where the Member State transposes a directive into national legislation, but fails to do so correctly.

- Where the Member State transposes the directive into national legislation, but fails to ensure that the provisions of the directive are actually implemented in practice - for example, failing to ensure that limit values are complied with.

The process is made up of several informal and formal stages:



114 For more information about the EU Pilot scheme see: [http://europa.eu/rapid/press-release\\_IP-11-1434\\_en.htm](http://europa.eu/rapid/press-release_IP-11-1434_en.htm)

115 TFEU, Article 260(1).

116 The requirement for a second reasoned opinion was removed by the Lisbon Treaty.

113 TEU, Article 17, TFEU, Article 258.

## FINES - frequently asked questions<sup>118</sup>

At every stage the Commission has complete discretion as to whether and when to act. Regrettably, the Commission does not make any documents relating to infringement cases publically available. However, it will normally issue a press release whenever it issues a reasoned opinion or refers a Member State to the ECJ to inform the public that action has been taken. In rare cases it will issue a press release where it issues a letter of formal notice, for example the recent action against the UK on NO<sub>2</sub>.<sup>117</sup> The Commission usually announces decisions on infringement cases on the third Wednesday of each month, and will publish a press release on the following website:  
[http://ec.europa.eu/environment/legal/law/press\\_en.htm](http://ec.europa.eu/environment/legal/law/press_en.htm)



European Commissioner for the Environment  
 Janez Potočnik

**When?** Rarely and slowly: Fines are very much a last resort, only issued when a Member State has failed to comply with the first ECJ judgment and the Commission has brought a second case to the ECJ. In environmental cases it takes on average 10-11 years from the first letter of formal notice to a fine being issued.

**What?** The ECJ can apply either or both of two types of fine known as the “daily penalty” and the “lump sum”.<sup>119</sup>

The two types of fine are calculated differently and serve slightly different purposes. The daily penalty is the most commonly used of the two. It is calculated as a penalty which applies to each day from the date of the second court judgment until the Member State complies with the law. It therefore aims to incentivise the Member State to comply with the law as soon as possible: the longer it delays, the more daily penalties will accumulate.

The lump sum acts as a retroactive punishment against Member States for failing to act quickly enough to comply with the ECJ’s first judgment. It applies for each day from the date of the first judgment to the date of the second judgment.

**Who?** The fine is imposed by the ECJ, after considering the Commission’s recommendation. The fine is imposed on the Member State, not city or regional authorities. However, in practice national governments may try to pass all or part of fines down either directly through a formal process, or indirectly, for example by withholding funding.

**How much?** This is a very difficult question to answer with any accuracy. The Commission uses a formula to calculate the size of the fine it recommends to the ECJ based on several factors:

<sup>118</sup> For more detail on the calculation of fines, see the following Commission web-page: [http://ec.europa.eu/eu\\_law/infringements/infringements\\_260\\_en.htm](http://ec.europa.eu/eu_law/infringements/infringements_260_en.htm)

<sup>119</sup> It was confirmed for the first time that both types of fine could apply for the same infringement in Case C-304/02 *Commission v France* [2005] ECR I-6263

<sup>117</sup> [http://europa.eu/rapid/press-release\\_IP-14-154\\_en.htm](http://europa.eu/rapid/press-release_IP-14-154_en.htm)

- Seriousness of the breach - including factors such as serious or irreparable harm to human health or the environment, whether the breach is a repeated or a one-off breach and the size of the population affected by the breach.
- Duration of the breach.
- Ability of the Member State to pay (by reference to GDP and voting rights in the Council)<sup>120</sup>.
- The need for the penalty to have a deterrent effect.

These factors are all quite subjective, and even then are not binding on the ECJ, which can impose a lower fine. In recent years the ECJ has tended to impose lower fines because it has been sensitive to Member States' reduced ability to pay in light of the financial crisis.<sup>121</sup>

However, what we can say is that if a Member State were to be fined for breach of the Air Quality Directive, the fine would be very large indeed, particularly in the larger, richer Member States such as the UK, France, Germany and Italy. The seriousness of the breach would be very high given the clear impacts on human health and that the limit values have been breached frequently and often by very large margins, breaches have been widespread i.e. in many zones and agglomerations and that the breaches affect a large proportion of the urban population. Similarly the duration factor would be high given that the PM<sub>10</sub> limits have been in force since 2005, so by the time these cases got to second court judgment, the Member States would have been in breach for over 10 years.

120 This is known as the "n" factor, for the n factors applied to each Member State from 2012 see the table at pages 4-6: [http://ec.europa.eu/eu\\_law/docs/docs\\_infringements/act\\_part1\\_en.pdf](http://ec.europa.eu/eu_law/docs/docs_infringements/act_part1_en.pdf)

121 See for example Case C-279/11 Commission v Ireland (not yet published) at paragraphs 78-80, where the Commission recommended a lump sum fine of approximately €4.3 million, but the ECJ imposed a lower fine of €1.5 million.

## Advantages and disadvantages of the Commission's infringement procedure

### Advantages

- **Financial penalties** - in the case of air quality, where the breaches are widespread, longstanding, have a major impact on human health and in many cases involve wealthy Member States, these fines could amount to hundreds of millions of Euros. For this reason even the mere possibility of a fine is usually taken very seriously by Member States.
- **Strategic overview** - the Commission has a good overview of the bigger picture i.e. it can compare the compliance situation in different Member States.
- **Resources** - the Commission can draw on the resources of a large body of officials and lawyers.
- **The duty of sincere cooperation** - Member States are obliged by the Treaty to cooperate with the Commission.

### Disadvantages

- **Limited powers** - the Commission has very limited powers of inspection when it comes to environmental matters (in contrast with competition law, for example, where it is bestowed with draconian powers). It is therefore reliant on information provided to it by Member States. This has two unfortunate consequences:

First, perhaps not surprisingly, Member States are not always as helpful as they might be in providing the Commission with evidence of their own wrongdoing. Further, the Commission adheres to the so called "Golden Principle" (which flows from the Treaty) that it must trust the information provided to it by Member States;<sup>122</sup>

Second, Member States are not required to provide information to the Commission on breaches of air quality limit values until nine months after the end of the calendar year in which it took place.<sup>123</sup>

122 The principle of sincere cooperation, see TFEU, Article 4(3).

123 Air Quality Directive, Article 27(2).

- **Limited resources** - while it has greater resources than any individual or NGO, the Commission does not have sufficient resources to properly fulfil its role as Guardian of the Treaty. For this reason the Commission favours a “decentralised” model of enforcement - where it focuses its limited resources on cases of failure by Member States to properly transpose EU directives and cases of major, systemic breaches of EU law.<sup>124</sup> For other cases, it relies on legal action taken by EU citizens before national courts to ensure compliance.
- **Unlimited discretion** - the Commission has absolute discretion as to if and when to take legal action against Member States, and whether to proceed to each stage in proceedings. While an infringement case is open, there will be an ongoing negotiation between the Commission and the Member State. In this respect the process resembles a political negotiation rather than a legal process.
- **Political pressure** - the Commission faces considerable political pressure from Member States not to pursue legal action, particularly where there is a prospect of a fine in round two proceedings. It is particularly vulnerable to such pressure given its dual roles as both the initiator and enforcer of EU legislation, which often conflict.
- **Delay** - the combined effect of these four problems is that the infringement process is very slow. It typically takes around four years to move from letter of formal notice to the first court judgment.<sup>125</sup> It can then take several more years to reach second court judgment, at which point the court may issue a fine. By contrast, national legal action can proceed relatively quickly. For example, Genitori Antismog were able to bring a successful case in less than a year - see map on p. 14 for more details.

## Problems with the Commission’s air quality infringement cases

These general problems with the Commission infringement process are especially prevalent when it comes to air quality infringement cases. Limit values for PM<sub>10</sub> have been in place since 1 January 2005. The Commission started infringement cases against Member States which were in breach of PM<sub>10</sub> limits after this date, and eventually obtained ECJ judgments against four Member States: Slovenia; Sweden; Portugal and Italy.

These were only “round one” actions, so the ECJ only had the power to make a declaration that the Member State had failed to fulfil its treaty obligations. Member States are then required to take the necessary measures to comply with this judgment. If they fail to do so, the Commission can then bring “round two” proceedings to enforce compliance with the court’s judgment, with a recommendation for a fine.<sup>126</sup>

So in round one cases like these, it is crucial that any declaration made by the ECJ requires the Member State to take action in order to comply with the judgment. However, in *Commission v Slovenia*, the court merely declared that by exceeding the limit values for PM<sub>10</sub> in the years 2005 to 2007, Slovenia was in breach of its obligations under the earlier Directive.

This judgment was practically useless as it did not force the Member State to take any measures to comply with it, and therefore gave no opportunity to the Commission to bring round two proceedings. The ECJ did not even find that Slovenia breached the Air Quality Directive, only that it had breached an earlier directive.<sup>127</sup> The Commission’s only option was therefore to resume round one proceedings on the basis of the latest reports received from Slovenia, i.e. starting the whole slow process from the very beginning.

124 See for example ‘A Europe of Results - Applying Community Law’ (COM (2007) 502): [http://ec.europa.eu/eu\\_law/eulaw/pdf/com\\_2007\\_502\\_en.pdf](http://ec.europa.eu/eu_law/eulaw/pdf/com_2007_502_en.pdf)

125 L Kramer, “Environmental judgments by the Court of Justice and their duration” in 2008 *Journal for European Environmental and Planning Law*, page 263.

126 TFEU, Article 260.

127 Directive 1999/30/EC, note 35 above.

The Commission tried a slightly different tactic in *Commission v Portugal*<sup>128</sup> and *Commission v Italy*,<sup>129</sup> but the result was the same: a practically useless declaration that the Member States had at some point in the past breached the limit values under the 1999 Directive.

It is also worth noting the timescales involved: the letter of formal notice was sent to Portugal in February 2009 - so it took two years for the case to be heard by the ECJ and a further ten months for it to deliver judgment.

The result of these setbacks is that nine years after the PM<sub>10</sub> limits came into force in 2005, not a single fine has been issued, despite the fact that 17 Member States were still in breach as of 2012.

### **The Commission's "Fresh Approach" to infringement**

As a result of these setbacks, the Commission adopted a "fresh approach to infringement cases" which it launched in January 2013 to coincide with the start of the EU's "Year of Air".<sup>130</sup> Under the fresh approach, new letters of formal notice were issued against the 17 Member States still in breach of PM<sub>10</sub> limit values:

Czech Republic, Germany, Greece, Spain, France, Italy, Hungary, Latvia, Portugal, Poland, Romania, Sweden, Slovakia and Slovenia.

The new approach is based on:

- Failure to ensure compliance with limit values<sup>131</sup>; **and**
- Failure to adopt plans containing measures to achieve limits in the "shortest time possible."<sup>132</sup>

The previous unsuccessful cases had been based only on the first of these grounds. By adding the second ground, the new approach seeks to ensure that any ECJ judgment would require the Member State to take action to improve air quality.

It remains to be seen whether this new strategy will be successful. What is certain is that it will place even greater demands on the Commission's already limited resources, because it will now have to conduct detailed analysis of Member States' air quality plans in order to assess whether the measures are adequate. For a large Member State like France or Germany, this can involve hundreds of separate plans for each zone and agglomeration.

What is also certain is that these cases will not progress quickly. It took over a year between the Commission issuing the first letter of formal notice under the fresh approach and the first reasoned opinion being issued against Belgium.<sup>133</sup> Even the letter of formal notice against the UK, which was brought forward because of the UK Supreme Court declaration in the *ClientEarth* case, comes four years after the 2010 deadline for achieving NO<sub>2</sub> limits.

Further delay is likely because the Commission will want to wait for the ECJ to hear the *ClientEarth* case before referring any Member States to the ECJ. This is because one of the questions the ECJ will consider in that case is the requirement that plans must include "appropriate measures to keep the exceedance period as short as possible." The *ClientEarth* case will therefore act as a useful test case for the Commission's fresh approach.

As a result, even those Member States which are at the front of the "queue" (the Commission tends to pick on the worst culprits first) are unlikely to reach the ECJ before 2015. Remember, at this stage fines would not be a possibility, this would require further action to be taken by the Commission, which would likely take several more years. Further, this is just for PM<sub>10</sub> cases: cases concerning breaches of NO<sub>2</sub> limits, will take even longer to get to court.

128 *Commission v Portugal* note 34 above.

129 *Commission v Italy* note 32 above.

130 [http://europa.eu/rapid/press-release\\_IP-13-47\\_en.htm](http://europa.eu/rapid/press-release_IP-13-47_en.htm)

131 In accordance with the Air Quality Directive, Article 13.

132 In accordance with the Air Quality Directive, Article 23.

133 [http://europa.eu/rapid/press-release\\_MEMO-14-116\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-116_en.htm)

## Engaging with the Commission

Despite these problems, for many citizens and NGOs, a complaint to the Commission is the only practical path available due to the problems with accessing national courts discussed in chapter 6.

However, in the case of air quality, the Commission is already aware of most breaches of limit values and has, at least with respect to PM<sub>10</sub>, commenced infringement action. In these cases there is little point in making fresh complaints simply on the basis that limit values are not being met. This will merely waste the time of the Commission lawyers, which would be better spent on making progress on existing cases.

However, where there is an existing infringement case, citizens and NGOs in Member States have a vital role to play in being the Commission's "eyes and ears" on the ground and keeping the Commission informed of developments. The Commission has limited resources and is reliant on information provided to it by Member States, which is not always accurate and in any event is only required to be reported nine months after the end of each calendar year. These limited resources will be stretched even further by the "fresh approach", which requires the Commission to scrutinise the measures included in each air quality plan.

The following information will be particularly useful:

- Up to date data - the Commission won't receive data until nine months after the year end, so this will be useful, even if it can't use this information formally;
- Breaches of conditions of time extensions such as the maximum margin of tolerance;
- Details of any projects which are likely to have a major negative impact on air quality;
- Delays in implementing measures included in air quality plans;
- Evidence of misleading information - for example failure to report data, poorly sited monitoring stations.

It is a good idea to meet with the Commission to discuss ongoing infringement cases. In some Member States, the Commission sometimes holds a "pre-package" meeting with national

NGOs before meeting with national officials to discuss ongoing infringement cases.

If you think that there has been a breach of EU law which the Commission has not adequately addressed by taking infringement action, you should consider making a formal complaint to the Commission.

You can use the Commission's form:

[http://ec.europa.eu/eu\\_law/your\\_rights/your\\_rights\\_forms\\_en.htm](http://ec.europa.eu/eu_law/your_rights/your_rights_forms_en.htm)

Or write a letter or email.

Whichever means you choose, make sure to be clear and concise and only provide information which is directly relevant to the complaint. Make sure that any assertions you make are supported by facts, data and documents.

**Citizens and NGOs in Member States have a vital role to play in being the Commission's "eyes and ears" on the ground**

## Conclusion

The Commission is poorly equipped to uphold our right to clean air. As a result of recent setbacks in infringement cases against Member States, it will take many years before any Member States face effective legal sanctions for failing to comply with air quality limits. It is therefore essential that national legal action is taken in the meantime.

However, the "fresh approach" does at least signal a renewed determination by the Commission to force Member States into action. As these cases progress to reasoned opinions and referrals to the ECJ, this will bring additional pressure to bear on national ministries and regional and city authorities.

Ultimately the right to clean air depends on successful cases being brought before both the ECJ and national courts to force national, regional and local authorities to take the measures needed to comply with limits and protect health.

## Annex I - Test Cases

The *ClientEarth/Darmstadt* case remains the most tried and tested litigation strategy: A legal challenge brought before a national court against the competent authority for ongoing breaches of limit values (or, where a time extension has been approved, breaches of the maximum margins of tolerance) together with a failure to adopt a plan containing all measures to keep the exceedance period as short as possible.

Such cases should be even more likely to succeed once the ECJ has given judgment in the *ClientEarth* case, so now is the ideal time to be preparing the ground for bringing similar legal actions later this year in anticipation of this judgment.

However, there are a number of other possible cases that could be taken in the meantime which would help uphold the right to clean air, while taking the law forward and raising the public profile of air quality as an issue. Some of these may be cheaper and easier, as the evidential burden of proving that measures are inadequate is lower.

If any of these cases were referred to the ECJ under the preliminary reference procedure, this would establish a precedent in EU law which would be legally binding on all 28 Member States.

The following are some ideas for some alternative/additional grounds for bringing national legal action:

### Information

- Inadequate monitoring of air quality e.g. insufficient or improperly located monitoring stations. Such a case would be particularly powerful if it could be shown that there was a serious discrepancy between the official data being reported to the Commission and the public and other unofficial, yet reliable data.
- Failure to adequately inform the public when information or alert thresholds are exceeded. If such a case were successful it could lead to much greater public awareness of the health impacts of air pollution.

- Failure to disclose relevant information on request e.g. number of exceedances of limit values, numbers of premature deaths, locations of pollution “hotspots.”

### Participation

- Failure to allow for proper public participation in formulation/modification of air quality plans.
- Failure to allow for proper public participation in an industrial permit or an environmental assessment.
- A decision to approve development consent/ an industrial permit where this would lead to a breach of a limit value or worsen an existing breach i.e. lengthen the period of exceedance such that it is not “as short as possible” as required by article 23.

### Air quality plans

- Failure/delay to implement a measure contained in a plan.
- Failure to properly assess air quality impacts of a project or industrial activity/failure to adequately mitigate impacts.
- Breach of conditions of time extension e.g. maximum margins of tolerance.

## Annex II – template environmental information request letter

[Address of competent national/regional authority/municipality/region]

Dear Sir/Madam

### **Request for environmental information**

I am writing to request information under [Directive 2003/4/EC (the “Directive”)].<sup>134</sup> To assist you with this request, I am outlining my query as specifically as possible.

Please send me the following information:

1. x
2. y
3. z

As the information requested concerns: [the state of the elements of the environment, such as air and atmosphere];

[emissions into the environment];

[measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect those elements];

[reports on the implementation of environmental legislation];

[cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to above];

[the state of human health and safety];<sup>135</sup>

we consider that the information we request is correctly characterised as ‘Environmental Information’ as defined in Article 2 of the Directive.

In the event that this request is denied in whole or in part, please justify all deletions or refusals by reference to specific exceptions listed in Article 4 of the Directive [the equivalent provision in national legislation].

I look forward to your response as soon as possible and no later than the one month time limit. Please confirm [by email/in writing] that you have received this request. If you require further clarification about this request, please do not hesitate to contact me on [give contact details].

Please send me the information in [specify format e.g. paper or electronic (electronic will usually be cheaper and quicker)].

Yours sincerely

[ Name ]

<sup>134</sup> [If you know the national legislation which implements this directive please refer to that instead].

<sup>135</sup> [Select all that apply. If it is capable of being characterised as emissions into the environment, as most requests concerning air pollution would be, then use this. This is because several commonly used exceptions are not available for these kinds of requests]

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

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